FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff - Appellee*, v. JAIME TOVAR-DURAN, *Defendant - Appellant*.	No. 24-2328 D.C. No. 3:19-mj-24405- BLM-GPC-1 OPINION

Appeal from the United States District Court
for the Southern District of California
Gonzalo P. Curiel, District Judge, Presiding

Argued and Submitted March 6, 2026
Pasadena, California

Filed September 14, 2026

Before: Kim McLane Wardlaw, Roopali H. Desai, and Ana de Alba, Circuit Judges.

Opinion by Judge de Alba

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SUMMARY*

Criminal Law

The panel reversed a district judge's order affirming Jaime Tovar-Duran's conviction, following a bench trial before a magistrate judge, for improper entry into the United States as a non-citizen; conditionally vacated the conviction; and remanded for further proceedings.

Tovar-Duran argued that the magistrate judge improperly determined that the government met its obligations under *Brady v. Maryland*, 373 U.S. 83 (1963), and Federal Rule of Criminal Procedure 16, in connection with Tovar-Duran's request for additional evidence of witnesses' membership and activity in a Facebook group in which United States Border Patrol agents shared patently offensive material, including jokes about migrant deaths and racist and sexist slurs. The panel held that the magistrate judge abused her discretion in denying the request. The government was obligated to disclose the evidence under *Brady* and Rule 16. When a defendant shows that the government may be in possession of undisclosed *Brady* and Rule 16 evidence and requests further discovery, courts must require the government to review evidence in its possession and disclose the *Brady* and Rule 16 material. Because the government failed to disclose this evidence, the panel could not determine whether its failure to disclose it prejudiced Tovar-Duran. The panel thus conditionally vacated the conviction and remanded for further proceedings on whether

* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

the government's documents in fact contain, or would have led to, information that might have altered the verdict.

Tovar-Duran also argued that the magistrate judge abused her discretion by admitting prior warrants of removal and written warnings to prove Tovar-Duran's citizenship status under the public records exception to hearsay. The panel agreed. The government relied on these documents, which contain multiple layers of hearsay, to prove alienage without providing any exception under which they are admissible. The magistrate judge did not examine the admissibility of the specific statements pertaining to Tovar-Duran's citizenship status and instead generally concluded that the warrants of removal and written warrants were admissible. This was an abuse of discretion, and the error was not harmless.

COUNSEL

Peter S. Horn (argued) and Andrew Sherwood, Assistant United States Attorneys; Daniel E. Zipp, Chief, Appellate Section; Criminal Division; Adam Gordon, United States Attorney; Civil Division, Office of the United States Attorney, United States Department of Justice, San Diego, California; for Plaintiff-Appellee.

Jessica Agatstein (argued), Federal Defenders of San Diego Inc., San Diego, California, for Defendant-Appellant.

OPINION

DE ALBA, Circuit Judge:

Jaime Tovar-Duran was convicted of improper attempted entry into the United States as a non-citizen under 8 U.S.C. § 1325(a)(1), and sentenced to time served, following a bench trial before a magistrate judge.[1] Mr. Tovar-Duran appealed his conviction to a district court judge pursuant to Federal Rule of Criminal Procedure 58(g)(2)(B). The district court judge affirmed. Mr. Tovar-Duran now appeals his conviction to our court. We have jurisdiction under 28 U.S.C. § 1291.

Mr. Tovar-Duran argues that the magistrate judge improperly determined that the government met its obligations under *Brady v. Maryland*, 373 U.S. 83 (1963), and Federal Rule of Criminal Procedure 16. He also argues that the magistrate judge improperly admitted hearsay statements included in warrants of removal and written warnings to prove Mr. Tovar-Duran's non-citizenship. We agree.

We hold that when a defendant shows that the government may be in possession of undisclosed *Brady* and Rule 16 evidence and requests further discovery, courts must require the government to review evidence in its possession and disclose the *Brady* and Rule 16 material. We also clarify that all removal documents are not per se admissible as

[1] Section 1325(a) provides, in relevant part, "Any alien who (1) enters or attempts to enter the United States at any time or place other than as designated by immigrations officers . . . shall, for the first commission of any such offense, be fined under Title 18 or imprisoned not more than 6 months, or both." 8 U.S.C. § 1325(a).

public records. Because, like here, some removal documents contain multiple levels of hearsay, courts must examine whether the specific statements within the documents are admissible.

Therefore, we reverse, conditionally vacate Mr. Tovar-Duran's conviction, and remand for further proceedings consistent with this opinion.

I

A

In 2019, Agent Copenhaver, a United States Border Patrol agent, encountered Mr. Tovar-Duran on a mountainside within a mile from the U.S.-Mexico border. Agent Copenhaver followed footprints in the mountainside before encountering Mr. Tovar-Duran. Agent Copenhaver handcuffed Mr. Tovar-Duran and asked his "country of citizenship" and "if [he] had any documents . . . to enter the country legally." According to Agent Copenhaver, Mr. Tovar-Duran responded that he was from Mexico, did not have papers to enter the country legally, and "had crossed illegally." The agent transported Mr. Tovar-Duran to a nearby Border Patrol station, and the next day, the government charged Mr. Tovar-Duran with one count of misdemeanor attempted illegal entry. *See* 8 U.S.C. § 1325(a). Mr. Tovar-Duran proceeded to trial before a magistrate judge.

Before trial, Mr. Tovar-Duran requested that the government provide him exculpatory evidence and impeachment material pursuant to its obligations under *Brady*; *Giglio v. United States*, 405 U.S. 150 (1972); and *United States v. Henthorn*, 931 F.2d 29 (9th Cir. 1991). Mr. Tovar-Duran specifically requested information regarding

the government's witnesses' membership and activity in the "I'm 10-15" Facebook group, in which United States Border Patrol agents shared patently offensive material, including jokes about migrant deaths and racist and sexist slurs.

The government initially represented that none of its likely witnesses were members of the Facebook group. At a hearing before trial, Mr. Tovar-Duran renewed his request, asking the magistrate judge to "order the Government to make specific inquiries as to whether any of the agents involved in this case were part of that group." The government stated that, after speaking to both "likely witnesses" in the case, it was its "understanding [that] neither of them were a part of those groups." The judge responded, "There we go."

Yet on the eve of trial, the government notified Mr. Tovar-Duran that two of its now three witnesses, all of whom were Border Patrol agents, were, in fact, members of the Facebook group. But the government did not specify which of its three witnesses were members of the group. According to the government, the two witnesses who were members of the Facebook group reported that they did not "post" or "like" anything in the group. Based on these representations, Mr. Tovar-Duran "renew[ed] [his] request for more complete discovery on this issue." The magistrate judge denied the request, and the trial proceeded.

Over Mr. Tovar-Duran's hearsay objection, the magistrate judge admitted four immigration documents into evidence. First, the judge admitted two warrants of removal, which stated that Mr. Tovar-Duran was subject to removal or deportation from the United States based upon a final order by a designated official. Second, the judge admitted two documents entitled "Warning to Alien Ordered

Removed or Deported," which notified Mr. Tovar-Duran that he was prohibited from reentering the United States for a period of 20 years from the date of his departure from the United States because he had "been found . . . to have reentered the United States illegally."

The first witness, Agent Copenhaver, testified about his encounter with Mr. Tovar-Duran and Mr. Tovar-Duran's statements to him. The second witness, Agent Artiles, interviewed Mr. Tovar-Duran at the Border Patrol station. He testified that Mr. Tovar-Duran told him he entered the United States through the mountains, that he was a citizen of Mexico, and that he "didn't have any papers." And the third witness, Agent Hernandez, testified that he reviewed immigration databases and the databases did not have any records of Mr. Tovar-Duran applying for permission to enter the United States.

The magistrate judge convicted Mr. Tovar-Duran of violating Section 1325(a)(1) and sentenced Mr. Tovar-Duran to time served.

B

Mr. Tovar-Duran appealed his conviction to the district court, arguing that the magistrate judge erred by (1) denying repeated requests for *Brady* and Rule 16 material, and (2) admitting the prior warrants of removal and written warnings because they contained inadmissible hearsay. In its briefing, the government represented for the first time that Agent Artiles and Agent Hernandez were the two witnesses who were members of the Facebook group but that its third and only other witness, Agent Copenhaver, was not a member of the group. The district court affirmed Mr. Tovar-Duran's conviction, concluding that the magistrate judge abused her discretion by denying Mr. Tovar-Duran's request

for material about the witnesses' involvement in the Facebook group, but that the error was harmless. The district court determined that, even if it discounted the testimony of Agent Artiles and Agent Hernandez, Agent Copenhaver's testimony—together with the prior warrants of removal—sufficiently proved each element of the offense. The district court also held that the warrants were admissible under the public records exception to hearsay.[2] Mr. Tovar-Duran now appeals his conviction to this court.

II

On appeal from a district court order affirming a conviction, we conduct the same appellate review as the district court and do not defer to the district court's conclusions. *See United States v. Stanton*, 501 F.3d 1093, 1099 (9th Cir. 2007); Fed. R. Crim. P. 58(g). We review a district court's ruling on a prosecutor's duty to produce evidence under *Brady* de novo, *United States v. Liew*, 856 F.3d 585, 596 (9th Cir. 2017), Rule 16 discovery rulings for abuse of discretion, *United States v. Gonzalez-Rincon*, 36 F.3d 859, 865 (9th Cir. 1994), and the decision to admit evidence under an exception to the hearsay rule for abuse of discretion. *United States v. Johnson*, 875 F.3d 1265, 1278 (9th Cir. 2017).

III

A

The magistrate judge abused her discretion by denying Mr. Tovar-Duran's request for additional evidence of the witnesses' membership and activity in the Facebook group

[2] The district court judge focused on the warrants, rather than on the warnings, in addressing Mr. Tovar-Duran's arguments regarding the admissibility of the warrants and warnings.

because the government was obligated to disclose the evidence under *Brady* and Rule 16.[3] And because the government failed to disclose this evidence, we cannot yet determine whether its failure to disclose it prejudiced Mr. Tovar-Duran. We thus must vacate his conviction and remand for further proceedings on "whether the government's documents in fact contain, or would have led to, information that might have altered the verdict." *United States v. Doe*, 705 F.3d 1134, 1152 (9th Cir. 2013) (citation modified).

Under *Brady* and its progeny, the government must "disclose exculpatory evidence to a defendant if it is 'material' to guilt or punishment." *United States v. Doe*, 705 F.3d 1134, 1152 (9th Cir. 2013). This rule applies equally to impeachment evidence. *Milke v. Ryan*, 711 F.3d 998, 1005 (9th Cir. 2013) (citing *Giglio*, 405 U.S. at 154–55). To succeed on a *Brady* claim, a defendant must show that "(1) the evidence at issue was favorable to him, either because it was exculpatory or impeaching; (2) the evidence was suppressed by the State, either willfully or inadvertently; and (3) that he was prejudiced." *United States v. Bruce*, 984 F.3d 884, 894–95 (9th Cir. 2021). Under *Brady*, prejudice exists if "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Doe*, 705 F.3d at 1152 (citation modified).

Rule 16 "grants defendants a broad right to discovery." *Doe*, 705 F.3d at 1150. Under Rule 16, the government

[3] The parties dispute whether we review for abuse of discretion or de novo. We review discovery rulings for an abuse of discretion, but *Brady* violations de novo. *See United States v. Doe*, 705 F.3d 1134, 1149–50 (9th Cir. 2013).

must, upon a defendant's request, "permit the defendant to inspect and to copy . . . documents [and] data . . . if the item is within the government's possession, custody, or control and . . . the item is material to preparing the defense." Fed. R. Crim. P 16(a)(1)(E). Even if the government violates Rule 16, "reversal is only appropriate if the defendant shows a likelihood that the verdict would have been different had the government complied with the discovery rules." *Doe*, 705 F.3d at 1152 (citation modified).

Mr. Tovar-Duran argues that *Brady* and Rule 16 required the government to disclose which witnesses were involved in the "I'm 10-15" group before trial and to provide documentation of their membership and activity in the group. We agree.

To start, evidence of the witnesses' involvement in the Facebook group is *Brady* material because Mr. Tovar-Duran could have used it to impeach the witnesses' credibility. In light of the derogatory material posted in the group, the witnesses' activity on the page could be strong evidence of bias against noncitizens. Similarly, the evidence falls under Rule 16(a)(1)(E)(i), which requires the government to turn over documents "material to preparing the defense." Materiality is a low threshold, and any document that "would have helped" the defendant prepare his defense satisfies the standard. *United States v. Hernandez-Meza*, 720 F.3d 760, 768 (9th Cir. 2013). Here, at a minimum, evidence of the witnesses' involvement in the Facebook group would have helped Mr. Tovar-Duran "impeach the . . . agent at trial." *Doe*, 705 F.3d at 1151.

Brady and Rule 16 only require disclosure of evidence in the government's possession. *United States v. Cano*, 934 F.3d 1002, 1023 (9th Cir. 2019) ("Under both *Brady* and

Rule 16, the government has no obligation to produce information which it does not possess or of which it is unaware.") (citation modified). The government argues that the magistrate judge did not abuse her discretion by denying the discovery request because the "prosecution team was not aware of and had no additional information about the agents' '10-15' activity in its possession." But Mr. Tovar-Duran pointed to "facts which would tend to show that the Government is in possession of information helpful to the defense." *See Doe*, 705 F.3d at 1150 (citation modified). For example, the government originally represented that none of its witnesses were in the group and—for an unexplained reason—later confirmed that two witnesses *were* in the group. The government's contradictory disclosures alone suggest that it is in possession of evidence about the witnesses' involvement in the Facebook page and, thus, "helpful to the defense." *See id.* (citation modified). Moreover, Mr. Tovar-Duran notes that when he requested the evidence, it was widely reported that the Facebook group prompted Congressional and internal investigations. In a similar case decided by our court, we observed that the government conducted many investigations relating to the group. *See United States v. Bernal-Sanchez*, No. 21-50276, 2023 WL 7179469, at *1 (9th Cir. Nov. 1, 2023) (unpublished). Because Mr. Tovar-Duran shows that the government is in possession of *some* evidence of the witnesses' involvement in the Facebook group, the magistrate judge should have ordered the government to review and disclose any *Brady* or Rule 16 evidence relating to the witnesses' membership and activity in the Facebook group.

Next, we turn to prejudice. Both *Brady* and Rule 16 violations require the defendant to show prejudice. *Doe*, 705

F.3d at 1152–53 (explaining that prejudice under *Brady* means "there is a reasonable probability of a different result," and prejudice under Rule 16 means a "likelihood that the verdict would have been different" (citation modified)). But we have held that when the government has never disclosed *Brady* or Rule 16 evidence, remand is required for disclosure because a prejudice analysis is "impossible." *Doe*, 705 F.3d at 1151; *see also United States v. Alvarez*, 358 F.3d 1194, 1209 (9th Cir. 2004) ("Because neither we nor the trial court know what it is we are attempting to review . . . [t]he appropriate step is to vacate the defendant's conviction and remand to the district court for an evidentiary hearing." (citation modified)). Indeed, in *Doe*, we remanded after finding *Brady* and Rule 16 violations without analyzing prejudice because "the documents [had] yet to be turned over, if they even exist at all." *Doe*, 705 F.3d at 1151; *see also United States v. Bernal-Obeso*, 989 F.2d 331, 333 (9th Cir. 1993) ("[R]esolution of this matter is best served by the light of a hearing, not the darkness of an assumption on appeal.").

We must take the same approach here. Without knowing whether and to what extent additional evidence of the witnesses' involvement in the Facebook group exists, we cannot determine whether such evidence would have undermined the witnesses' credibility and impeached their testimony. We thus have no way to determine whether the evidence "might have altered the verdict." *Doe*, 705 F.3d at 1152 (quoting *United States v. Stever*, 603 F.3d 747, 754 (9th Cir. 2010)).

The government argues that we can analyze prejudice because even if we completely discount the testimony of the two witnesses that it says were members of the group, it presented sufficient evidence to convict Mr. Tovar-Duran

through Agent Copenhaver's testimony and other documents. We reject this argument for two reasons. First, because the government has yet to search for and disclose additional evidence relating to the witnesses' membership and activity in the group, we cannot know whether Agent Copenhaver's testimony, too, might have been tainted by membership or activity in the group. And second, we conclude below that the additional removal documents the government relied on to prove Mr. Tovar-Duran's alienage were not admissible for that purpose. We thus cannot rely on Agent Copenhaver's testimony or the removal documents to conclude that Mr. Tovar-Duran was not prejudiced.

The government also suggests that remand is unnecessary because in *Bernal-Sanchez*, after we remanded to the district court to review any of a witness's "I'm 10-15 materials in the government's possession," the "United States confirmed there was no material for the court to review." But, here, the government did not, for example, file a declaration by an appropriate government official confirming that the official reviewed all relevant material in the government's possession and that none of the material demonstrated that the witnesses were involved in the Facebook group. Indeed, the remand in *Bernal-Sanchez* highlights that the government has the means to further evaluate the agents' involvement in the Facebook group and failed to do so here.[4]

[4] We also reject the government's argument that Mr. Tovar-Duran cannot show prejudice because he had the opportunity to cross-examine the witnesses on their involvement in the group. At trial, Mr. Tovar-Duran did not know which witnesses were members of the group. If the witnesses denied their involvement in the group on cross-examination, Mr. Tovar-Duran would have no way to impeach them.

At bottom, the magistrate judge "committed a clear error of judgment" by proceeding to trial before ordering the government to review the evidence in its "possession, custody, or control," and produce any additional Rule 16 evidence. *Doe*, 705 F.3d at 1150 (citation modified). This was an abuse of discretion. And the government's failure to produce the evidence likewise constituted a *Brady* violation. We thus reverse the district court, conditionally vacate Mr. Tovar-Duran's conviction, and remand for further proceedings.

B

We are now left with Mr. Tovar-Duran's hearsay claims. Mr. Tovar-Duran argues that the magistrate judge abused her discretion by admitting the prior warrants of removal and written warnings to prove Mr. Tovar-Duran's citizenship status under the public records exception to hearsay.[5]

"'Hearsay' means a statement that: (1) the declarant does not make while testifying at the current trial or hearing; and (2) a party offers in evidence to prove the truth of the matter asserted in the statement." Fed. R. Evid. 801(c). Federal Rule of Evidence 803(8) sets out a public records exception to the rule against hearsay. In relevant part, Rule 803(8) excepts from the rule against hearsay a "record or statement

[5] To the extent the government suggests that the warrants of removal and written warnings fall under the business records exception to the rule against hearsay, the government has forfeited any such argument. *See Martinez-Serrano v. I.N.S.*, 94 F.3d 1256, 1259 (9th Cir. 1996) (concluding that issues "raised in a brief that are not supported by argument are deemed abandoned"). In any case, the business records exception "does not apply to records of government agencies." *United States v. Morales*, 720 F.3d 1194, 1201 (9th Cir. 2013).

of a public office if . . . it sets out . . . a matter observed while under a legal duty to report."[6]

When a public record contains additional layers of hearsay statements, each statement must fall under a hearsay exception to be admissible. Fed. R. Evid. 805. We have explained that the "mere fact that a document qualifies as a public record . . . does not ipso facto overcome the hearsay objection unless the document relates to an event to which the author could himself testify." *United States v. Chu Kong Yin*, 935 F.2d 990, 999 (9th Cir. 1991) (citation modified). This is because "the public documents exception to the hearsay rule is only the substitute for the appearance of the public official who made the record." *Id.* (citation modified). For example, we have concluded that the public records exception does not apply to a "rap sheet" or conviction report because it contains inadmissible hearsay when the government offers no evidence that "the person who signed the conviction report . . . had first-hand knowledge of the convictions." *United States v. Perlmuter*, 693 F.2d 1290, 1293–94 (9th Cir. 1982).

Under a straightforward application of these rules, the removal documents contain inadmissible hearsay statements. The government introduced two types of removal documents at trial. The first is a "Warrant of

[6] While, in a criminal case, Rule 803(8) excludes from the public records exception to hearsay "a matter observed by law-enforcement personnel," Fed. R. Evid. 803(8)(A)(ii), whether the statements at issue in this case fall under this exception to the exception is not at issue. Notably, even if law-enforcement personnel made the statements, statements in removal documents do not typically trigger the law-enforcement exception as they are normally "ministerial, objective observations." *See United States v. Loyola-Dominguez*, 125 F.3d 1315, 1317–18 (9th Cir. 1997) (citation modified).

Removal/Deportation" or "I-205." These forms say that Mr. Tovar-Duran, "who entered the United States . . . on March 13, 2016[, and November 9, 2019,] . . . is subject to removal/deportation from the United States, based upon a final order by: . . . a designated official." The warrants are signed by an immigration officer but say nothing about the official who issued the orders of removal. The second type of document is a "Warning to Alien Ordered Removed or Deported" or "I-294." These forms had boxes checked indicating that Mr. Tovar-Duran "ha[d] been found . . . to have reentered the United States illegally." The warning forms were signed by the "officer serving [the] warning."

To prove a violation of 8 U.S.C. § 1325(a), the government must prove that the defendant is not a citizen or national of the United States. *See* 8 U.S.C. § 1101(a)(3). Here, the government relied on these documents, which contain multiple layers of hearsay, to make that showing. Each document references a prior removal order issued by "a designated official" or a finding that Mr. Tovar-Duran "reentered the United States illegally." And the magistrate judge relied on the truth of the statements—that Mr. Tovar-Duran was subject to a final order of removal by a designated official or had been found to have reentered the United States illegally—to conclude that Mr. Tovar-Duran is not a United States citizen. But the government failed to show that any of the forms were prepared by someone with firsthand knowledge of the removal order or finding of illegal reentry. *Cf.* Fed. R. Evid. 805. The government thus relied on hearsay statements to prove alienage without providing any exception under which they are admissible. *Cf. Chu Kong Yin*, 935 F.2d at 999 (holding that a criminal record sheet contained inadmissible hearsay statements because "the government offered no evidence [that] . . . [the document

was] prepared or signed by persons with first-hand knowledge of [the defendant's] . . . convictions"); *United States v. Morales*, 720 F.3d 1194, 1202 (9th Cir. 2013) (holding that witness statements within Border Patrol field encounter forms were inadmissible double hearsay where the government failed to identify a "hearsay exception under which the statements might be admitted").

The government's arguments to the contrary are unavailing. First, the government relies on the broad principle that "deportation documents are admissible to prove alienage under the public records exception to the hearsay rule." *See United States v. Hernandez-Herrera*, 273 F.3d 1213, 1217–18 (9th Cir. 2001). We agree. But that general principle does not replace the Rules of Evidence, which require an exception for each hearsay statement—and hearsay within hearsay—to be admissible. Fed. R. Evid. 802; Fed. R. Evid. 805.

Second, the government argues that the documents were properly authenticated. Authentication, a separate requirement under the Rules of Evidence, requires that the "proponent . . . produce evidence sufficient to support a finding that the item is what the proponent claims it is." Fed. R. Evid. 901(a). Whether a document satisfies the authentication requirement has no bearing on whether it contains inadmissible hearsay. As we have explained, "a document may be authentic, but still contain inadmissible hearsay." *Chu Kong Yin*, 935 F.2d at 1000.

And third, the government argues in its supplemental brief that the statements were not offered for the truth of the matter asserted. This argument is belied by the record. The magistrate judge expressly concluded that the removal documents "support [Mr. Tovar-Duran's] statement that he

is not a citizen of the United States and does not have a legal right to enter the United States." And at trial, the government relied on the removal documents to argue "the defendant was an [a]lien at the time of the defendant's attempted entry into the United States."

In sum, the magistrate judge did not examine the admissibility of the specific statements pertaining to Mr. Tovar-Duran's citizenship status and instead generally concluded that the warrants of removal and written warnings were admissible. This was an abuse of discretion.[7] *See United States v. Hinkson*, 585 F.3d 1247, 1259 (9th Cir. 2009) ("A district court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law." (citation modified)).

This error was not harmless. "A non-constitutional error requires reversal unless there is a fair assurance of harmlessness, or stated another way, unless it is more probable than not that the error did not materially affect the verdict." *United States v. Lopez*, 913 F.3d 807, 825 (9th Cir. 2019) (citation modified). It is more probable than not that admitting the removal documents materially affected the verdict. Had these statements been excluded as hearsay, the

[7] Our holding is not novel nor a departure from precedent. The government suggests that our court has never required that a declarant have first-hand knowledge of statements within a removal document to show that a document is admissible under Rule 803(8). But whether a document or statement is hearsay depends entirely on what the statement is offered to prove. The cases the government cites are illegal *reentry* cases, in which the government is required to prove that a noncitizen was previously deported. 8 U.S.C. § 1326. In those cases, the government relies on the firsthand knowledge of the agent who filled out the form attesting that he witnessed the defendant's deportation. *See, e.g.*, *United States v. Hernandez-Rojas*, 617 F.2d 533, 535 (9th Cir. 1980).

record would have contained minimal evidence of Mr. Tovar-Duran's citizenship status, given that at least two of the witnesses' testimony may be tainted by *Brady* and Rule 16 violations.

IV

For the reasons discussed above, we reverse the district court, conditionally vacate Mr. Tovar-Duran's conviction, and remand for further proceedings (either an evidentiary hearing or *in camera* review) to determine whether records on the government's witnesses' membership and activity in the Facebook group "in fact contain, or would have led to, information that might have altered the verdict." *See Doe*, 705 F.3d at 1139, 1151–52.[8]

REVERSED, CONVICTION CONDITIONALLY VACATED, AND REMANDED for further proceedings consistent with this opinion.

[8] In a footnote in his reply brief, Mr. Tovar-Duran moved for judicial notice of the contents of a declaration filed in another case. Assuming the motion for judicial notice was properly made—*cf. Estate of Saunders v. C.I.R.*, 745 F.3d 953, 962 n.8 (9th Cir. 2014) ("Arguments raised only in footnotes . . . are generally deemed waived."); *compare* Fed. R. App. P. 27 (providing rule related to motions) *with* Fed. R. App. P. 28 (providing rule related to briefs)—we **DENY** it. The contents of a declaration "are not a matter of which the court can take judicial notice." *See Hornish v. King County*, 899 F.3d 680, 702–03 (9th Cir. 2018) ("[W]e can take judicial notice only of the *filing* of the documents, and not of the truth of the documents' contents.").