No. 19-_____

IN THE

Supreme Court of the United States

JOSE JOEL HELGUERA DEL RIO,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

Motion for Leave to Proceed *In Forma Pauperis*

The petitioner, Jose Joel Helguera Del Rio, requests leave to file the attached petition for writ of certiorari to the U.S. Court of Appeals for the Ninth Circuit without prepayment of costs and to proceed *in forma pauperis* pursuant to Rule 39.1 of this Court and 18 U.S.C. § 3006A(d)(7). The petitioner was represented by counsel appointed under the Criminal Justice Act in the U.S. District Court for the District of Oregon and on appeal in the U.S. Court of Appeals for the Ninth Circuit.

DATED: November 5, 2019

Respectfully submitted,

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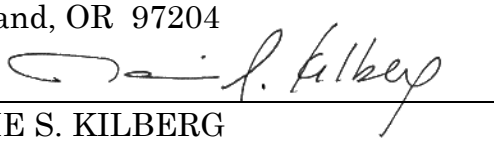
By: 
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On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Petitioner was the passenger in a vehicle stopped for a driving infraction. When Petitioner opened the glove compartment to retrieve the vehicle's registration, the officer observed what he believed to be a firearm. The officer removed the Petitioner and the driver from the vehicle and secured them. Rather than retrieve the object from the glove compartment, he and another officer began slowly circumnavigating the vehicle, peering into windows with cupped hands. Finally arriving at the opened passenger door, the officer turned away from the glove compartment, bent over, and began an examination of the small door-handle pocket. After approximately 20 seconds of observation and verification with the other officer, the officer retrieved what he believed to be evidence of drug possession in the form of white residue on a rolled-up $5 bill located in the pocket behind a lighter and a pack of cigarettes. Based on that probable cause, the officers then conducted a full search of the vehicle and discovered a significant quantity of drugs elsewhere in the vehicle in addition to the purported firearm in the glove compartment.

The first question presented is: Does an officer's seizure of an object only after crouching down, carefully examining it for several seconds, and obtaining another officer's second opinion, meet the requirement that the incriminating nature of an object observed in plain view be "immediately apparent" under the Fourth Amendment's plain-view doctrine?

2. At trial, the government failed to elicit any testimony that the object retrieved from the glove compartment met the statutory definition of a "firearm." Notwithstanding contrary authority from the Seventh Circuit, the Ninth Circuit relied on the fact that the object itself was admitted into evidence and the jury, without further assistance or instruction, could determine on its own whether the object "will or is designed to or may readily be converted to expel a projectile by the action of an explosive." 18 U.S.C. § 921(a)(3)(A).

The second question presented is: Can the government meet its burden to establish beyond a reasonable doubt every essential element of the crime of possession of a firearm in furtherance of a drug trafficking offense by admitting the object itself into evidence and providing no further guidance to the jury through testimony or otherwise on whether the object was capable of or designed to, or could be converted to, expel a projectile using an explosive?

3. During closing arguments, the prosecutor improperly vouched for the only witness (the driver) who offered any evidence that Petitioner possessed the alleged firearm by telling the jury that he (the prosecutor) believed the witness's version. Trial counsel did not object. A divided Ninth Circuit found, notwithstanding contrary authority from this Court, from the Sixth and Eleventh Circuits, and even from the Ninth Circuit, that the improper vouching of the only witness who provided any evidence as to the firearm count did not warrant reversal on plain error review, and in any event was offset by the district court's general instructions to the jury that the arguments of counsel are not evidence.

The third question presented is: Is reversal required on plain error review when a prosecutor improperly vouches for a co-defendant who provides the only evidence to support a count in the indictment, even when the trial court generally instructs the jury that the arguments of counsel are not evidence?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Jose Joel Helguera Del Rio respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINION BELOW

The relevant opinion of the Ninth Circuit was issued on May 31, 2019, as an unpublished decision. *See* Pet. App. 1a – 7a. The court unanimously affirmed Petitioner's drug convictions but was divided as to the firearms count. A similarly divided Ninth Circuit later denied Petitioner's petition for rehearing and suggestion for hearing *en banc*. *See* Pet. App. 8a.

JURISDICTION

The Ninth Circuit issued its memorandum opinion on May 31, 2019, and it denied Petitioner's petition for rehearing on August 8, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The district court had jurisdiction under 18 U.S.C. § 3231. The court of appeals had jurisdiction under 28 U.S.C. § 1291.

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

1. The Fourth Amendment to the U.S. Constitution provides that "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

2. 18 U.S.C. § 924(c)(1)(A) provides for a five-year mandatory minimum and consecutive sentence for "any person who, during and in relation to any crime of violence or drug trafficking crime . . . uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm." Under 18 U.S.C. § 921(a)(3)(A), a "firearm" means "any weapon (including a starter gun) which will or is designed to or may readily be converted to expel a projectile by the action of an explosive."

3. The Fifth Amendment to the U.S. Constitution provides, in relevant part, that "No person shall be . . . deprived of life, liberty, or property, without due process of law."

STATEMENT OF THE CASE

Petitioner went to trial on an indictment alleging four counts: (1) conspiracy to possess with intent to distribute methamphetamine and cocaine, in violation of 21 U.S.C. §§ 841 & 846, (2) possession with intent to distribute methamphetamine, in violation of 21 U.S.C. § 841, (3) possession with intent to distribute cocaine, in violation of 21 U.S.C. § 841, and (4) possession of a firearm in furtherance of a drug trafficking offense, in violation of 18 U.S.C. § 924. The jury convicted on all four counts. The charges stemmed from a traffic stop on February 23, 2016.

A. Traffic Stop: Evidence Allegedly in Plain View Was Seized Only After Repeated Close Visual Inspections

Petitioner was a passenger in a vehicle stopped by an Oregon State Police Trooper for failure to display a front license plate. The Trooper approached the passenger window to conduct the stop. During a conversation between the Trooper

and the driver—co-defendant Martinez—regarding the reason for the stop, Petitioner reached for the vehicle's papers in the glove compartment. When Petitioner opened the glove compartment, there was an object inside that appeared to be a handgun. Upon seeing it, Petitioner immediately closed the glove compartment and did not attempt to retrieve the object. Upon determining that neither occupant had a permit to carry a concealed handgun in a vehicle, the Trooper opened the passenger door, removed Petitioner, and secured him in handcuffs without incident several yards away from the vehicle. The passenger door was left open. The Trooper then secured Martinez in handcuffs in the back of his patrol vehicle without incident. All of that was completed within approximately 5½ minutes of the Trooper initiating the stop. The local sheriff soon arrived, and Petitioner was then moved to the back of the Sheriff's vehicle.

Approximately 19 minutes into the stop, the Trooper told the Sheriff he would retrieve the object in the glove compartment. He did not. Instead, he began walking around the vehicle, peering into all the windows, including the back of the vehicle (a mini-van) and other areas that could not have been reached from the front seat.

After approximately five minutes of this methodical inspection, the Trooper found himself at last in front of the glove compartment. But he still did not retrieve the object in it. Instead, he turned away from the glove compartment and bent over to examine the door-handle pocket on the still-open passenger door. Filling the entire door-handle pocket was a package of cigarettes, a lighter, and a rolled-up

paper. After further examination by crouching down, closely inspecting what he saw, and asking the Sheriff to also look closely, the Trooper concluded there appeared to be white powder residue on the end of the rolled-up paper behind the cigarette lighter and cigarette package. The Trooper testified that he suspected the residue was drugs; it later turned out to be methamphetamine residue on a $5 bill. He thereafter initiated a full search of the entire vehicle after first finally retrieving the object from the glove compartment approximately 28 minutes after first seeing it, 23 minutes after securing both defendants, and 10 minutes after telling the Sheriff that he was going to go get the object.

The vehicle search revealed a substantial amount of methamphetamine in black trash bags in a floor storage compartment designed to store the second row of seats of the vehicle when not in use. The search also revealed a large amount of cocaine inside a closed duffel bag located on the third-row seat of the vehicle. Neither the storage compartment nor the duffel bag was accessible from the passenger seat.

The district court denied Petitioner's motion to suppress the results of the search, finding that the Trooper's seizure of the white residue on the $5 bill in the door-handle pocket was justified under the plain-view doctrine and that discovery of the white residue in turn justified the full search of the vehicle.

B. Trial: The Government Offered No Evidence That the Object in the Glove Compartment Met the Statutory Definition of a "Firearm"

At trial, the government introduced into evidence the dash-cam video showing the Trooper retrieving the object found in the glove compartment. The

government also introduced the object itself into evidence. The government did not offer testimony or evidence that the object was a weapon that was capable of, designed to, or could be converted to expel a projectile by the action of an explosive. For example, neither the Trooper nor any other witness testified that they examined the object and determined that it could expel such a projectile.

Petitioner moved for judgment of acquittal pursuant to Fed. R. Crim. P. 29 on the firearm count, arguing the government failed to offer evidence of an essential element of the charge of possession of a firearm in furtherance of drug trafficking offense. The district court denied the motion. On appeal, the government argued and the Ninth Circuit concluded that, notwithstanding on-point case law from the Seventh Circuit to the contrary, because the object itself was admitted into evidence, it is reasonable to assume the jury could have examined it themselves and determined (somehow, without other evidence to guide them) that the object was designed to or could be converted to expel a projectile by use of an explosive.

C. Trial: The Prosecutor Committed Misconduct and Vouched for the Credibility of the Only Witness to Offer Any Evidence Tying Petitioner to the Alleged Firearm

At trial, the only evidence that Petitioner had any knowledge of or ever possessed the alleged handgun in the glove compartment was the testimony of the co-defendant driver, Martinez. Martinez was a critical witness for the government generally, and his credibility was paramount to the government being able to prove its claim that Petitioner possessed the alleged firearm. Martinez was also an admitted liar with respect to his own involvement in the crimes.

During closing arguments, the prosecutor improperly vouched for Martinez's credibility. In asking the jury to accept Martinez's version of events, the prosecutor zeroed in on Martinez's explanation for his shifting stories about his own involvement. The prosecutor told the jury that Martinez's final explanation—and therefore Martinez's entire testimony—was believable because "it just sounded absolutely so truthful to me as I'm listening to it." On appeal, the government conceded the prosecutor committed improper vouching.

D. Conviction and Appeal

Petitioner was convicted and sentenced to a term of 240-months' imprisonment, which included a mandatory consecutive 60 months on the firearm count. On appeal, the Ninth Circuit affirmed. As relevant here, the court concluded (1) that the Trooper's discovery of the $5 bill did not even constitute a search, letting stand the district court's determination that the seizure of the $5 bill fell within the plain-view doctrine; (2) that notwithstanding contrary precedent from the Seventh Circuit, there was sufficient evidence from which the jury could conclude the object in the glove compartment met the statutory definition of a "firearm" because the object was admitted into evidence for the jurors to examine; and (3) in a split decision, that the prosecutor's confessed misconduct in vouching for the only evidence that Petitioner possessed the alleged firearm did not deprive Petitioner of a fair trial because the trial court generally instructed the jury that the arguments of counsel are not evidence. Pet. App. 1a – 6a.

Judge Watford dissented as to the vouching issue, arguing that vouching is particularly pernicious when it serves to bolster the credibility of the sole witness who can provide any evidence of a defendant's guilt and that, here, the prosecutor vouched for Martinez's version of events, which included the only evidence that Petitioner was even aware of the alleged firearm before he opened the glove compartment during the traffic stop, much less that he possessed it. Pet. App. 7a. The Ninth Circuit denied Petitioner's request for a rehearing and suggestion for *en banc* consideration. Pet. App. 8a.

REASONS FOR GRANTING THE WRIT

A. The Court Should Grant the Writ to Settle the Scope of the "Immediately Apparent" Requirement of the Plain-View Doctrine

The Court should grant the writ of certiorari to both answer an important federal question not yet fully settled by this Court, and to resolve a circuit split created by the Ninth Circuit, regarding the scope of the requirement under the plain-view doctrine that the incriminating nature of the seized object be "immediately apparent."

The Ninth Circuit concluded that because the Trooper had the authority to seize the object in the glove compartment, his conduct does not even amount to a search. Pet. App. 2a. Setting aside whether that assessment is correct, that does not end the inquiry with respect to the seizure of evidence in the passenger door-handle pocket. The constitutionality of a seizure does not depend on whether the officer is engaged in an actual search at the time the evidence is seized. Instead, "seizures of property are subject to Fourth Amendment scrutiny even though no

search within the meaning of the Amendment has taken place." *Soldal v. Cook County*, 506 U.S. 56, 68 (1992); *see also* U.S. Const. amend. IV.

Under the plain-view doctrine, the warrantless seizure of an object lawfully observed in plain view is only justified under the Fourth Amendment if the incriminating nature of the object is "immediately apparent." *Horton v. California*, 496 U.S. 128, 136 (1990); *Coolidge v. New Hampshire*, 403 U.S. 443, 466 (1971). The "immediately apparent" requirement prevents law enforcement from using the plain-view doctrine as a means to extend an otherwise particularized and authorized search into "a general exploratory search from one object to another until something incriminating at last emerges." *Coolidge*, 403 U.S. at 466.

This Court has not given the lower courts further guidance on the scope of the "immediately apparent" requirement, other than to say that observation of the object at issue must give the officer probable cause to believe the object is contraband without conducting a further search of it. *Minnesota v. Dickerson*, 508 U.S. 366, 379 (1993). For example, the Court has not defined what type and duration of examination and observation is permitted, before the incriminating nature of an object is discerned, to still qualify as "immediately apparent." The Ninth Circuit's decision here concludes without analysis that the Trooper's "naked-eye observation" of the rolled-up $5 bill established probable cause. Pet. App. 2a.

The Ninth Circuit's test—implicitly holding that any length or nature of observation meets the "immediately apparent" standard so long as it qualifies as a

"naked-eye observation"—conflicts with decisions from this Court, the Fifth Circuit, and the Sixth Circuit. Granting the writ of certiorari is warranted.

In *Dickerson*, this Court established a corollary to the plain-view doctrine—the plain-feel doctrine—and held that when an officer must do something more than immediately feel an object to determine it was contraband, the "immediately apparent" requirement is not met. That case involved a *Terry* stop. In conducting a proper pat-down of the defendant as part of the *Terry* stop, the officer felt something in the defendant's jacket pocket from the outside. The officer determined it was crack cocaine "only after 'squeezing, sliding and otherwise manipulating the contents of the defendant's pocket.'" *Id.* at 378. Using the plain-view doctrine as an analogy for "plain feel," the Court concluded the officer's conduct failed the "immediately apparent" test. In other words, the officer had to do something *more* than immediately feel the object in the defendant's jacket pocket. *Id.* at 379. Likewise, here, the Trooper (and the Sheriff) had to do something *more* than immediately perceive the door handle pocket. He had to crouch down, notice that a rolled-up paper was behind a lighter and pack of cigarettes, examine the paper closely, and call the Sheriff over for verification. *Dickerson* instructs that when those additional steps beyond immediate perception are necessary, the "immediately apparent" requirement is not met.

In *United States v. Garcia*, 496 F.3d 495 (6th Cir. 2007), the Sixth Circuit likewise concluded that when further examination is required, the "immediately apparent" requirement is not met. There, officers were searching a home for

cocaine pursuant to a search warrant. In conducting their search, they came upon and seized a map displaying a "notorious drug area of the city circled in red" as evidence of the defendant's drug activities. *Id.* at 511. However, the officers only recognized the significance of the map once they actually read the street names on the map. *Id.* at 512. That is, the incriminating nature of the map was not the result of the officers' "instantaneous sensory perception," but rather was based upon the officers taking the extra step to read the map—presumably an extra step that did not take significant time. *Id.* at 511. Similarly, after observing the door handle pocket here, the Trooper took several extra steps before concluding what he saw was evidence of contraband. The incriminating nature was not immediately apparent upon the Trooper's "instantaneous sensory perception."

The Fifth Circuit has also held that when an officer must verify his suspicions with another person, the "immediately apparent" requirement is not met. In *United States v. Wilson*, 36 F.3d 1298 (5th Cir. 1994), *overruled on other grounds by United States v. Gould*, 364 F.3d 578, 586 (5th Cir. 2004), officers were investigating possession of stolen U.S. mail. *Id.* at 1301. Officers were invited into a hotel room where the defendant had been staying. During a protective sweep of the hotel room, an officer noticed an opaque-covered check book in the trash. The officer seized it; the checks turned out to be stolen. However, the incriminating nature of checks seized by the officer was only established after the officer made a telephone call to verify the checks were stolen. *Id.* at 1306. Thus, the Fifth Circuit concluded that the incriminating nature of the checks was not immediately

apparent when the officer first perceived them. While the Trooper here did not have to call anyone on the telephone to verify what he believed he saw in the door-handle pocket, he did motion the Sheriff to crouch down and observe what he was perceiving to verify his beliefs. Like in *Wilson*, the extra steps needed to verify the Trooper's suspicions fail the "immediately apparent" requirement.

This case presents a good vehicle for the Court to establish, and to resolve the circuit split regarding, the boundaries of its "immediately apparent" requirement under the plain-view doctrine. The writ of certiorari should be granted.

B. The Court Should Grant the Writ to Resolve a Circuit Split Regarding the Evidence Necessary to Meet the Essential Element of a Firearms Charge That the Object is a "Firearm"

The Court also should grant the writ of certiorari to resolve a circuit split created by the Ninth Circuit regarding how the government can meet its burden to prove each essential element of a firearms-related offense. Firearms offenses, including violations of 18 U.S.C. § 924(c) for possession of a firearm in furtherance of a drug trafficking offense, are common. According to the U.S. Sentencing Commission, in fiscal year 2018, there were more than 2,500 such convictions. *See* U.S.S.C., "Quick Facts—18 U.S.C. § 924(c) Firearms Offenses," located at https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Section_924c_FY18.pdf (last visited Oct. 29, 2019). In each of those cases, the government was required to prove (or the defendant was required to admit to) the use, carrying, possession, brandishing, or discharge of a "firearm." The Courts of

Appeals are divided on what kind of evidence is sufficient for the government to meet its burden to prove that the object in question is a "firearm" under federal law.

To obtain a conviction for possession of a firearm in furtherance of a drug trafficking offense, the government must prove beyond a reasonable doubt all essential elements of the charge—including whether the object at issue is, in fact, a "firearm." *Castillo v. United States*, 530 U.S. 120, 131 (2000) ("Congress intended the firearm type-related words it used in § 924(c)(1) to refer to an element of a separate, aggravated crime."); *United States v. O'Brien*, 560 U.S. 218, 231-35 (2010) (same). As relevant here, a "firearm" is statutorily defined as "any weapon . . . which will or is designed to or may readily be converted to expel a projectile by the action of an explosive." 18 U.S.C. § 921(a)(3)(A).

1. Here, the government offered no specific evidence to meet the statutory requirement that the object at issue "will or is designed to or may readily be converted to expel a projectile by the action of an explosive." For example, neither the Trooper nor any other witness testified that they examined the object and determined that it could or was designed to expel a projectile. The Ninth Circuit nevertheless affirmed the district court's denial of Petitioner's Rule 29 motion, holding that "the gun was admitted into evidence, so the jury could have examined it." Pet. App. 6a.

The Ninth Circuit's conclusion that the jury could be presumed to have examined the object and, without further assistance from the evidence, conclude that it is a "firearm" as defined under the statute, is in direct conflict with the

Seventh Circuit. In *United States v. Meadows*, 91 F.3d 851 (7th Cir. 1996), the defendant was convicted of illegally owning a "firearm." In that case, the relevant definition of "firearm" included "a rifle having a barrel or barrels of less than 16 inches in length." 26 U.S.C. § 5845(a)(3). "Rifle," in turn, was defined to mean "a weapon designed or redesigned, made or remade, and intended to be fired from the shoulder and designed or redesigned and made or remade to use the energy of the explosive in a fixed cartridge to fire only a single projectile *through a rifled bore* for each single pull of the trigger." *Id.* § 5845(c) (emphasis added); *see Meadows*, 91 F.3d at 856. In short, like Section 924(c) here, the relevant definition of "firearm" in *Meadows* had characteristic-based requirements specific to each alleged firearm that were essential to proving the alleged violation.

The Seventh Circuit reversed the defendant's conviction because the government failed to offer any evidence, and thus "failed to prove," that "the weapon fired a single projectile through 'a rifled bore.'" *Meadows*, 91 F.3d at 856. The court noted that there was a "complete gap in the evidence," and that the government "simply overlooked" the critical element of establishing a "rifled bore." *Id.* at 857. The court specifically rejected the government's argument "that the members of the jury could have looked down the barrel and seen that it was grooved or rifled." *Id.* at 857.

Here, the Ninth Circuit concluded exactly what the Seventh Circuit rejected: "the gun was admitted into evidence, so the jury could have examined it." Pet. App. 6a. The court did not explain how the jury, absent further guidance from the

evidence, could examine the object and conclude that it "will or is designed to or may readily be converted to expel a projectile by the action of an explosive." The Seventh Circuit in *Meadows* concluded that the jury should not be presumed to have the capacity to make that visual determination on its own absent other evidence. *Cf. United States v. Mullins*, 446 F.3d 750, 755-56 (8th Cir. 2006) (finding "firearm" element met because government relied on visual determination *of an expert witness* who testified that the starter's gun could readily be converted to expel a projectile); *United States v. Liles*, 432 F.2d 18, 20 (9th Cir. 1970) (finding "firearm" element met based, in part, on testimony of store manager who inspected weapon because "[s]o close an inspection offered ample opportunity *for someone as familiar with firearms as was he* to determine the nature of the object he was observing") (emphasis added). This Court should resolve that split.

2. The Ninth Circuit also concluded that the "firearm" element was satisfied because the jury "heard testimony that the object was a .45 caliber gun." Pet. App. 6a. Indeed, the jury heard from the Trooper that when Petitioner opened the glove compartment, the Trooper saw "a .45 handgun, in plain view." SER 404. The jury also heard from co-defendant Martinez that government's Exhibit 4 (the actual object seized) was "a .45 weapon." SER 405, 629.

That is not sufficient, however, and it is in direct conflict with the Seventh Circuit once again. In *Meadows*, the court observed that there was frequent use of the term "rifle" during the testimony, and even a suggestion that the defendant's "weapon will 'expel with every pull of the trigger a single projectile through the rifle

bore.'" *Meadows*, 91 F.3d at 857. The court deemed that testimony insufficient because "[t]here was no indication in the testimony that the bore was *rifled*," which was the statutory standard and is different than simply describing the "rifle bore." *Id.* (emphasis added).

In short, the Seventh Circuit concluded that vague, unexplained descriptive references will not suffice absent an actual attempt by the government to provide the testimony necessary to aid the jury in its deliberation of an essential element of the offense. The Ninth Circuit here disagreed and concluded that isolated descriptors like "a .45 handgun" and "a .45 weapon" are alone sufficient to prove beyond a reasonable doubt that the object at issue could or was designed to or could be readily converted to expel a projectile by the action of an explosive. This Court should resolve that split.[1]

3. Given the sheer quantity of firearms offenses that are prosecuted in federal court—each of which requires the government to prove or the defendant to admit that the evidence meets the statutory definition of a "firearm"—this case presents an opportunity for the Court to clarify for the first time how the government can meet its burden in those thousands of cases—and to make clear

[1] The Ninth Circuit also concluded that the "video of the traffic stop showed the officer emptying bullets from the gun. Pet. App. 6a. But the relevant portion of the dash-cam video was not played for the jury, *id.* n. 2, and there is no evidence in the record the jury examined the video during its deliberations. Moreover, the video does *not* show the Trooper "emptying bullets from the gun." It shows him removing what *could* be a magazine and one loose round from the object. The Trooper immediately put those items and the object itself into an evidence bag without further examination. There was no testimony from the Trooper or other evidence that what he removed from the object was, in fact, "bullets."

that the jury cannot be presumed to have the capacity to make specialized determinations absent guidance from the evidence. *Cf. United States v. Diíaz-Arias*, 717 F.3d 1 (1st Cir. 2013) (no evidence jury possessed mastery of Spanish language sufficient to consider whether Spanish recordings were of defendant's voice, absent additional explanatory testimony from government witness—a native speaker familiar with particular accents). The writ of certiorari should be granted.

C. The Court Should Grant the Writ to Resolve a Circuit Split Regarding When Vouching for the Lone Government Witness to Offer Evidence Against a Defendant Violates Due Process

Finally, the Court should grant the writ of certiorari to (1) bring the Ninth Circuit in line with other circuits and make clear that, even on plain-error review, Due Process requires reversal when the government vouches for the credibility of the key witness who provides the only evidence of the defendant's guilt, and (2) clarify that a district court's general instruction, that arguments of counsel are not evidence, cannot cure such vouching.

1. The Fifth Amendment to the U.S. Constitution provides that "No person shall be . . . deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V. This includes a criminal defendant's right to a fair trial. *United States v. Agurs*, 427 U.S. 97, 107 (1976). That right to due process is threatened, however, when a prosecutor vouches for the credibility of a government witness. As this Court has held:

> The prosecutor's vouching for the credibility of witnesses . . . pose[s] two dangers: such comments can convey the impression that evidence not presented to the jury, but known to the prosecutor, supports the charges against the defendant and can

> thus jeopardize the defendant's right to be tried solely on the basis of the evidence presented to the jury; and the prosecutor's opinion carries with it the imprimatur of the Government and may induce the jury to trust the Government's judgment rather than its own view of the evidence.

United States v. Young, 470 U.S. 1, 18-19 (1985); *Berger v. United States*, 295 U.S. 78, 88 (1935) (holding that "improper suggestions, insinuations and, especially, assertions of personal knowledge are apt to carry much weight against the accused when they should properly carry none").

The impact a prosecutor's vouching has on the defendant's right to a fair trial depends on "the probable effect the prosecutor's [vouching] would have on the jury's ability to judge the evidence fairly." *Young*, 470 U.S. at 12. The threat vouching poses, therefore, is perhaps at its most acute where the only evidence implicating the defendant is the testimony of an improperly vouched-for co-defendant. *Berger*, 295 U.S. at 89 (holding that prejudice "highly probable" when case against defendant was weak, "depending, as it did, upon the testimony of . . . an accomplice with a long criminal record"). The Sixth and Eleventh Circuits are in agreement that vouching is particularly pernicious when it serves to bolster the credibility of a key witness who provides the only evidence against the defendant. *See United States v. Carroll*, 26 F.3d 1380, 1390 (6th Cir. 1994) (reversing for improper vouching where "there was no physical evidence linking Appellant to cocaine distribution or to the conspiracy" and "the only evidence against Appellant was the testimony of the [vouched-for witnesses]"); *United States v. Eyster*, 948 F.2d 1196, 1205, 1207 (11th Cir. 1991) (reversing for improper vouching where government vouched for cooperating witness who was the "most critical witness to testify

against" defendant because defendant was acquitted on all counts except count for which cooperating witness was principal witness).

Even the Ninth Circuit has agreed, notwithstanding the divided panel's decision here. *See United States v. Kerr*, 981 F.2d 1050, 1054 (9th Cir. 1992) (reversing for improper vouching on plain-error review where government vouched for co-conspirators whose testimony "was crucial to the government's case," and who provided only direct evidence connecting defendant to conspiracy); *see also United States v. Alcantara-Castillo*, 788 F.3d 1186, 1196 (9th Cir. 2015) (noting under plain-error review that court has "repeatedly reversed convictions . . . in cases in which 'witness credibility was paramount' and the prosecutor sought to bolster critical testimony through improper conduct") (quoting *United States v. Combs*, 379 F.3d 564, 573 (9th Cir. 2004)).

Here, the evidence against Petitioner for possession of a firearm in furtherance of a drug trafficking offense was weak. Indeed, the *only* evidence that Petitioner knew of, much less ever possessed, the alleged firearm in the glove compartment was the testimony of the co-defendant driver, Martinez. Pet. App. 7a. Even the government conceded that Martinez was a critical witness. SER 759. Knowing this, and knowing that Petitioner's conviction would turn on the credibility of Martinez's version of events, the prosecutor in closing arguments told the jury that it should believe Martinez's version—*because that is the version government counsel personally believed*:

> So when you're thinking to yourself, well, I'm going to be really skeptical about Mr. Martinez. I don't know. You know, he was

> in jail blues and he was—he looked shifty. He had tattoos. *The best part is when he says—and it just sounded absolutely so truthful to me as I'm listening to it.*

SER 760 (emphasis added).

The majority of the Ninth Circuit panel here concluded Petitioner's substantial rights were not affected by the admitted misconduct. Pet. App. 5a. That conclusion is contrary to this Court's determination in *Berger* that the risk of prejudice from improper vouching is particularly strong when the evidence against a defendant is weak and highly dependent on the testimony of a co-conspirator. It is also contrary to the similar decisions of the Sixth, Ninth, and Eleventh Circuits that reversal for improper vouching is warranted when the vouching seeks to bolster the credibility of a witness who provides the only direct evidence against the defendant. The panel majority's decision was wrong and created a circuit conflict. The writ of certiorari should be granted.

2. Nor did the district court's general instructions to the jury cure the misconduct. The Ninth Circuit panel majority held that (1) the misconduct was (preemptively) cured because the trial judge had instructed the jury in advance of closing arguments that the arguments of counsel are not evidence, and (2) juries are presumed to follow the district court's instruction. Pet. App. 3a. Those rationales do not justify the result below.

It is true that the jury here was instructed that "what the lawyers say in their opening statements, closing arguments, and at other times is intended to help you interpret the evidence, but it is not the evidence." SER 728. It is also true that, generally, juries are presumed to follow the district court's instruction. *Jones v.*

United States, 527 U.S. 373, 394 (1999). But juries are given that general instruction in *every criminal case*. Indeed, the instruction is Ninth Circuit Model Criminal Jury Instruction 1.4.[2] Moreover, the presumption that juries "follow their instructions is a pragmatic one." *Richardson v. Marsh*, 481 U.S. 200, 211 (1987). It is not rooted "in the absolute certitude that the presumption is true." *Id.* Rather, it merely "represents a reasonable practical accommodation of the interests of the state and the defendant." *Id.* That "pragmatic" presumption should give way when the facts do not support its usefulness.

If it were the case that the general instruction (untethered to later misconduct) that the arguments of counsel are not evidence, along with the presumption that instructions are always followed, were enough to cure later improper argument, there would be no reversals for misconduct in closing arguments. That is not the law, and it is not even the law in the Ninth Circuit.

In *United States v. Weatherspoon*, 410 F.3d 1142 (9th Cir. 2005), the prosecutor repeatedly vouched for the government's key witnesses in closing argument by stating that government agents would be risking their jobs if they did not tell the truth. *Id.* at 1146. On plain-error review, the Ninth Circuit held that the misconduct "cannot be salvaged by the later generalized jury instruction reminding jurors that a lawyer's statements during closing argument do not

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[2] *See Manual of Model Criminal Jury Instructions for the District Courts of the Ninth Circuit* (2010 ed.), "1.4 What is Not Evidence" ("The following things are not evidence, and you must not consider them as evidence in deciding the facts of this case: (1) statements and arguments of the attorneys . . . .").

constitute evidence." *Id.* at 1151. The court specifically found that, in the context of improper vouching, such general instructions "did not neutralize the harm of the improper statements because 'they did not mention the specific statements of the prosecutor and were not given immediately after the damage was done.'" *Id.* at 1151 (citation omitted); *see also Kerr*, 981 F.2d at 1053 (holding that general instructions not sufficient to cure vouching misconduct in closing argument because instructions were "general rather than specific" and merely "reminded the jurors that they 'are the sole judges of the credibility of the witnesses,' along with providing other routine directions for evaluating testimony").

The trial court's general instruction here could not have preemptively cured the later vouching misconduct. The writ of certiorari should be granted.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

DATED: November 5, 2019

Respectfully submitted,

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No. 19-_____

IN THE

Supreme Court of the United States

JOSE JOEL HELGUERA DEL RIO,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

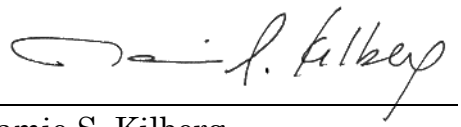
Certificate of Service

I declare that on this date, I have served the Motion for Leave to Proceed *In Forma Pauperis*, Petition for Writ of Certiorari, and Petitioner's Appendix on each party to the above proceeding, by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first-class postage prepaid. The names and addresses of those served are as follows:

Solicitor General of the United States
Room 5616
United States Department of Justice
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530-0001

I declare under penalty of perjury that the foregoing is true and correct.

Executed on November 5, 2019



Jamie S. Kilberg

Petitioner's Appendix

Unpublished Panel Memorandum of the Ninth Circuit

(May 31, 2019)

NOT FOR PUBLICATION

FILED

MAY 31 2019

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. JOSE JOEL HELGUERA-DEL RIO, Defendant-Appellant.	No. 17-30175 D.C. No. 3:16-cr-00110-BR-2 MEMORANDUM*

Appeal from the United States District Court
for the District of Oregon
Anna J. Brown, District Judge, Presiding

Argued and Submitted May 17, 2019
Portland, Oregon

Before: N.R. SMITH and WATFORD, Circuit Judges, and SELNA,** District Judge.

Jose Helguera-Del Rio ("Helguera") challenges his convictions for conspiracy to possess and distribute methamphetamine and cocaine, possession with intent to distribute methamphetamine and cocaine, and possession of a

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The Honorable James V. Selna, United States District Judge for the Central District of California, sitting by designation.

firearm in furtherance of a drug trafficking crime. We affirm.

1. The district court properly denied Helguera's motion to suppress the drugs found in the minivan. Helguera was in the passenger seat while his wife's cousin, Alberto Martinez ("Martinez"), drove. A police officer lawfully stopped them and, after observing a firearm in the glove box, took the reasonable step of removing them both from the minivan, leaving the passenger door open. Because the passenger door was open and the officer was "in a place where he ha[d] a right to be," the officer's naked-eye observation of a white substance believed to be drug residue on a dollar bill in the passenger door pocket was not a search. *See United States v. Head*, 783 F.2d 1422, 1426 (9th Cir. 1986). That observation in turn gave the officer probable cause to search the rest of the vehicle for drugs. *See Wyoming v. Houghton*, 526 U.S. 295, 307 (1999).

2. Helguera raises three instances of alleged prosecutorial misconduct during closing argument. Because he did not object at trial, we review for plain error. "We may reverse if: (1) there was error; (2) it was plain; (3) it affected the defendant's substantial rights; and (4) viewed in the context of the entire trial, the impropriety seriously affected the fairness, integrity, or public reputation of judicial proceedings." *United States v. Alcantara-Castillo*, 788 F.3d 1186, 1190–91 (9th Cir. 2015) (internal quotation marks omitted).

The government concedes that the prosecutor committed misconduct by

vouching for the credibility of Martinez's testimony, telling the jury that "it just sounded absolutely so truthful to me." The government further concedes that the prosecutor improperly argued propensity evidence by telling the jury that Helguera had the "lifestyle" of a drug trafficker. Finally, Helguera contends that the prosecutor also violated a stipulation not to "argue to the jury that they should infer . . . a link" between the drug residue in the passenger door compartment and the drugs found in the back of the van. We do not think any of these instances of misconduct rises to the level of plain error because, even considered collectively, they did not affect Helguera's substantial rights.

First, the prosecutor ameliorated the vouching error himself, telling the jury that "[e]ven though I say that Mr. Martinez sounded believable to me, that doesn't matter a lick either." Second, the trial court instructed the jurors that the lawyers' closing arguments are not evidence and that they "should examine the testimony of Mr. Martinez with greater caution than that of other witnesses." Even in cases of prosecutorial misconduct, "an instruction carries more weight than an argument." *United States v. Begay*, 673 F.3d 1038, 1046 (9th Cir. 2011) (en banc); *see also Fields v. Brown*, 503 F.3d 755, 782 (9th Cir. 2007) (en banc) ("We presume that jurors follow the instructions.").

Second, the jury heard plenty of evidence apart from Mr. Martinez's testimony to suggest that Helguera was a knowing participant in a drug trafficking

operation rather than an unwitting bystander. Evidence showed that Helguera and Martinez drove for about 32 hours with little rest, an itinerary consistent with drug trafficking. When he arrived in Southern California, Helguera texted the words "California Budget Motel" to an unknown person, suggesting a clandestine meeting. When the police questioned him about the drugs found in the car, Helguera told them repeatedly that the drugs were not his and that he had not seen them, but he conspicuously avoided answering whether he had been paid to deliver the drugs and whether he knew the drugs were there. He was also carrying over $3,000 in cash. This evidence, independent of the effect of any misconduct, strongly suggested that Helguera was a knowing participant in a drug trafficking conspiracy.

We acknowledge that, as the dissent points out, the prosecution produced less evidence (aside from Martinez's testimony) that tends to directly show that Helguera knowingly possessed the firearm, as alleged in Count 4. However, as noted above, even without Martinez's testimony, the trial evidence established that the firearm was found in the glovebox, mere inches from where Helguera was sitting when stopped by law enforcement. Even without Martinez's testimony, the trial evidence also demonstrated that Helguera provided the vehicle, purchased and possessed the white cell phone used to arrange the transaction, and carried the cash. With or without Martinez's testimony the jury could have inferred from this

circumstantial evidence that Helguera was aware of the firearm. Lastly, because the jury was properly instructed and because the prosecutor's remarks were isolated, and the vouching remarks were corrected by the prosecutor himself, we do not find that Helguera's substantial rights were affected with regards to Count 4.[1]

3. The district court correctly denied Helguera's motion for a judgment of acquittal with respect to Count 4, possession of a firearm in furtherance of a drug trafficking crime. 18 U.S.C. § 924(c)(1)(A). Helguera raised this argument in his motion for judgment of acquittal, which was made following the close of the government's case, and he did not renew that motion after the close of evidence. We "may review an unrenewed motion for judgment of acquittal, but only to prevent a manifest miscarriage of justice, or for plain error." *United States v. Alvarez-Valenzuela*, 231 F.3d 1198, 1201 (9th Cir. 2000). We will "not reverse in the absence of a clear showing of insufficiency," *id*., and Helguera cannot show clear insufficiency here. A rational trier of fact could have found beyond a reasonable doubt, *see Jackson v. Virginia*, 443 U.S. 307, 319 (1979), that the object in the glove compartment was a "firearm," that is, a "weapon . . . which will

[1] Moreover, even if these errors did affect Helguera's substantial rights regarding Count 4, we do not find that these errors are the kind of error that should be noticed under the final, discretionary prong of the plain error test. *See United States v. Perez*, 116 F.3d 840, 846 (9th Cir. 1997) (en banc).

or is designed to . . . expel a projectile by the action of an explosive." 18 U.S.C. § 921(a)(3); *cf. United States v. Westerdahl*, 945 F.2d 1083, 1088 (9th Cir. 1991) ("Possession of a toy or replica gun cannot sustain a conviction under § 924(c)."). In this case, the gun was admitted into evidence, so the jury could have examined it. The video of the traffic stop also showed the officer emptying bullets from the gun.[2] The jury also heard testimony that the object was a .45 caliber gun. That evidence was sufficient for a rational jury to conclude that the "object" was a firearm designed to expel a projectile.

4. Finally, the district court did not abuse its discretion by denying Helguera a "minor participant" adjustment. U.S.S.G. § 3B1.2(b). The district court reasoned that the "extraordinary quantity" of drugs that Helguera possessed showed "that he was in a position of trust within the conspiracy." Our circuit has already approved of that reasoning. *See United States v. Rodriguez-Castro*, 641 F.3d 1189, 1193 (9th Cir. 2011).

AFFIRMED.

[2] It isn't clear from the record that this particular portion of the video was played for the jury during trial. However, the full video was entered into evidence and was available for the jury's review during its deliberations.

Unpublished Panel Dissent

(May 31, 2019)

FILED

MAY 31 2019

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

United States v. Helguera-Del Rio, No. 17-30175

WATFORD, Circuit Judge, dissenting in part:

I would reverse Helguera's conviction for possession of a firearm in furtherance of a drug trafficking crime. As the government has conceded, the prosecutor improperly vouched for Martinez's credibility when he assured the jury that Martinez's testimony "just sounded absolutely so truthful to me."

Our disposition recounts the corroborating evidence that suffices to sustain Helguera's convictions for conspiracy and drug possession on plain error review. As to the firearm charge, however, there is no evidence corroborating Martinez's testimony that Helguera knew about the gun. Indeed, if anything, the fact that Helguera opened the glove box in front of a police officer, thereby revealing the contraband gun, casts doubt on Martinez's testimony that Helguera had placed the gun there just minutes before.

With the evidence on this point shaky at best, everything turned on Martinez's credibility. "We have repeatedly reversed convictions for plain error in cases in which witness credibility was paramount and the prosecutor sought to bolster critical testimony through improper conduct." *United States v. Alcantara-Castillo*, 788 F.3d 1186, 1196 (9th Cir. 2015). I would do so here.

Order of the Ninth Circuit Denying Petition for Rehearing and Suggestion for Rehearing *En Banc*

(August 8, 2019)

FILED

AUG 8 2019

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. JOSE JOEL HELGUERA-DEL RIO, Defendant-Appellant.	No. 17-30175 D.C. No. 3:16-cr-00110-BR-2 District of Oregon, Portland ORDER

Before: N.R. SMITH and WATFORD, Circuit Judges, and SELNA,* District Judge.

Judges N.R. Smith and Selna vote to deny the petition for panel rehearing; Judge Watford would grant the petition for panel rehearing. Judge Watford votes to deny the petition for rehearing en banc, and Judges N.R. Smith and Selna so recommend.

The full court has been advised of the petition for rehearing en banc, and no judge requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35. The petition for panel rehearing and rehearing en banc, filed July 15, 2019, is DENIED.

* The Honorable James V. Selna, United States District Judge for the Central District of California, sitting by designation.