No. _____

IN THE

Supreme Court of the United States

FERNANDO ROMERO-SALGADO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Rehaif v. United States*, this Court identified a new mens rea element of an offense under 18 U.S.C. § 922(g)(1), overturning "what was then the universal and long-established" interpretation that had been adopted "by every single Court of Appeals to address the question." 139 S. Ct. 2191, 2194-98 (2019); *id.* at 2201-02 (Alito, J., dissenting).

On direct appeal, the Ninth Circuit held that a trial court's pre-*Rehaif* failure to instruct the jury on that previously unrecognized element was subject to a harmless-error analysis, even though the element had not been alleged in the indictment, presented to the jury at trial, or reasonably subject to challenge at trial before *Rehaif* overturned the law of every circuit.

Does *Rehaif* error per se affect a defendant's substantial rights under the third prong of plain-error review?

RULE 14.1(b)(iii) STATEMENT

This case arises from the following proceedings in the United States District Court for the District of Arizona and the United States Court of Appeals for the Ninth Circuit:

United States v. *Romero-Salgado*, No. 4:17-cr-00131-RCC-BGM (D. Ariz. Aug. 29, 2018); and

United States v. Romero-Salgado, 796 F. App'x 346 (9th Cir. 2019).

No other proceedings in state or federal trial or appellate courts, or in this Court, are directly related to this case.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Rules

Federal Regulations

Constitutional Provisions

Other

OPINION BELOW

The memorandum disposition of the court of appeals is unpublished. *United States v. Romero-Salgado*, 796 F. App'x 346 (9th Cir. 2019).

JURISDICTION

The court of appeals entered judgment on November 27, 2019 (App. 1a) and it denied a petition for rehearing on January 23, 2020 (App. 7a). This Court has jurisdiction under 28 U.S.C. § 1254(1). This petition is timely.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment provides, "[n]o person shall be held to answer for a . . . crime, unless on a presentment or indictment of a Grand Jury . . . nor be deprived of life, liberty, or property, without due process of law . . . ." U.S. CONST. amend. V.

The Sixth Amendment provides, [i]n all criminal prosecutions, the accused shall enjoy the right to a . . . trial, by an impartial jury . . . and to be informed of the nature and cause of the accusation . . . ." U.S. CONST. amend. VI.

STATEMENT OF THE CASE

A complete recitation of the facts appears in the opening brief filed in the court of appeals. Appellant's Opening Brief ("Op. Br.") 3-14, *United States v. Romero-Salgado*, No. 18-10331 (9th Cir.) (DktEntry: 14-1).

On February 15, 2018, a jury convicted Salgado of Possession of Ammunition by a Convicted Felon, in violation of 18 U.S.C. § 922(g)(1) and § 924(a)(2), and Smuggling of Goods from the United States, in violation of 18 U.S.C. § 554(a). Op. Br. 3, 11. The district court imposed two concurrent terms of 82 months of imprisonment. *Id.* at 14.

While Salgado's case was pending on direct appeal, this Court held in *Rehaif v. United States* that "knowingly" in § 922(g) and § 924(a)(2) "applies both to the defendant's conduct and to [his] status"—including under § 922(g)(1) that he has a conviction "'*punishable* by imprisonment for a term exceeding one year.'" 139 S. Ct. 2191, 2194-98 (2019) (emphasis in original).

On appeal, Salgado argued that the district court's failure to instruct the jury on *Rehaif's* knowledge-of-felon-status element should be per se reversible. Op. Br. 38-40. He argued that unlike in *Neder v. United States*, 527 U.S. 1 (1999), his indictment did not put him on notice to defend against the missing element and the element was not reasonably contestable at trial, because every court of appeals had ruled it did not exist. Op. Br. 39-40. For these reasons, he argued, his trial did not reliably serve its function as a vehicle for determination of his guilt or innocence. Op. Br. 40. He also argued that to affirm his conviction on a theory neither alleged in the indictment nor presented to the jury at trial would offend the most basic notions of due process and the Sixth Amendment. Appellant's Rule 28(j) Letter 1-2, No. 18-10331 (9th Cir.) (DktEntry: 55).

On November 27, 2019, the Ninth Circuit affirmed the conviction, holding that the trial court's failure to instruct the jury that § 922(g)(1) requires knowledge of felon status was "harmless since the record makes clear Defendant was aware of his felon status." App. 4a. *See also United States v. Benamor*, 937 F.3d 1182, 1188-89 (9th Cir. 2019) (holding that *Rehaif* error was harmless on plain-error review).

REASONS FOR GRANTING THE WRIT

I. *Rehaif* error per se affects a defendant's substantial rights.

A. This Court's precedents that apply a harmless-error analysis to the omission of an element in criminal jury instructions are distinguishable.

After *Rehaif*, a felon-in-possession offense under 18 U.S.C. § 922(g)(1) requires knowledge not only of the defendant's conduct but of his status as person who has been convicted of a crime punishable by imprisonment for a term exceeding one year. *Rehaif*, 139 S. Ct. at 2194-98. Although the *Rehaif* Court declined to decide whether the omission of § 922(g)'s mens rea element in the jury instructions was harmless, *id.* at 2200, Justice Alito observed in dissent that defendants "for whom direct review has not ended will likely be entitled to a new trial," *id.* at 2213.

In *Neder*, this Court held that an error in omitting an element of the crime in the jury instructions is subject to a harmless-error analysis and is harmless if "the omitted element was uncontested and supported by overwhelming evidence." *Neder*, 527 U.S. at 9-15, 17. This Court has never held, however, that the omission of an element may be dismissed as harmless where the omitted element (1) was not found by a grand jury, (2) was not noticed in the indictment or elsewhere, (3) was not presented to the jury at trial, *and* (4) was not reasonably available to contest at trial. *Rehaif* error involves each of these four errors.[1]

[1] Although *Neder* involved a harmless error analysis under FED. R. CRIM. P. 52(a), rather than plain error under Rule 52(b), both standards require a showing that the error affected the defendant's substantial rights. *See United States v. Olano*, 507 U.S. 725, 734 (1993) (noting the difference is that, on plain-error review, "[i]t is the defendant rather than the Government who bears the burden of persuasion").

In *Neder*, the "language" of the omitted element was "used in the indictment" and it was the subject of a circuit split resolved after the defendant's trial, both of which gave the defendant notice of the element and an incentive to contest it at trial. 527 U.S. at 6-7. Here, by contrast, the language of Salgado's defective indictment did not adequately put him on notice that he had to defend against the missing element. *See Hamling v. United States*, 418 U.S. 87, 117 (1974) (explaining that "an indictment is sufficient" only if it "contains the elements of the offense charged and fairly informs a defendant of the charge against which he must defend"). Furthermore, before *Rehaif*, every court of appeals, in a unanimous, decades-long practice implicitly sanctioned by this Court, had ruled that the element did not exist. *Rehaif*, 139 S. Ct. at 2201-02 (Alito, J., dissenting) (observing that *Rehaif* overturned "what was then the universal and long-established" interpretation that had been "adopted by every single Court of Appeals to address the question" and "used in thousands of cases for more than 30 years"). Thus, in contrast to *Neder*, Salgado not only had no notice of the omitted element but he had no reasonable prospect of contesting it before *Rehaif*. "A defendant, after all, often has little incentive to contest facts that are not elements of the charged offense." *Descamps v. United States*, 570 U.S. 254, 270 (2013).

Like *Neder*, other opinions of this Court similarly do not hold that the omission of an element in these circumstances may be dismissed as harmless. In *United States v. Cotton*, 535 U.S. 625, 628 (2002), a federal drug indictment omitted the drug quantity, a fact that enhanced the statutory maximum sentence, which this Court held was error after the defendant's trial. The *Cotton* Court held that it "need not

resolve" whether the error was structural for purposes of the third prong of plain-error review because the error did not satisfy the fourth prong where the evidence of involvement in the drug conspiracy was "overwhelming and uncontroverted." *Id.* at 632-34. Unlike Salgado, however, the defendant in *Cotton* had notice of the significance of the missing element from the statute itself, which set forth graduated penalties depending on the drug quantity, and he had a full opportunity and a reason to contest the evidence of the drug quantity at trial.

Similarly, in *Johnson v. United States*, 520 U.S. 461, 463 (1997), the trial court ruled that the element of materiality in a perjury prosecution was a question for the judge to decide rather than the jury, which this Court held was error after the defendant's trial. This Court declined to resolve whether the failure to submit the element to the jury was "structural error," holding instead that the error did not satisfy the fourth plain-error prong because the evidence of materiality was "overwhelming" and "essentially uncontroverted." *Id.* at 468-70. Unlike Salgado, however, the defendant in *Johnson* had notice of the disputed missing materiality element and also a full opportunity and a reason to contest it before the trial judge. *Accord California v. Roy*, 519 U.S. 2, 5 (1996) (per curiam) (holding that the omission in jury instructions of a mens rea element was subject to a harmless-error analysis) (citing *People v. Beeman*, 674 P.2d 1318, 1319 (Cal. 1984) (holding that "[s]ound law, embodied in a long line of California decisions, requires [that mens rea element]")).

Similarly, in *Washington v. Recuenco*, 548 U.S. 212, 214-16 (2006), the judge rather than the jury found a statutory sentencing enhancement that increased the

penalty beyond the prescribed statutory maximum, which intervening authority held was error. This Court held that a harmless-error analysis applied. *Id.* at 220. Unlike Salgado, however, the defendant in *Recuenco* had notice of the sentencing factor from the sentencing statute itself and he also a full opportunity and a reason to contest it before the trial judge.

None of these cases control here.

B. Affirming a criminal conviction where a previously unrecognized element was neither alleged in the indictment, nor presented to the jury at trial, nor reasonably subject to challenge at trial violates the Fifth and Sixth Amendments

The Fifth Amendment guarantees a federal defendant a right to have guilt determined on the basis set forth in the indictment and presented to the jury. *Dunn v. United States*, 442 U.S. 100, 106 (1979); *Stirone v. United States*, 361 U.S. 212, 217 (1960). The Sixth Amendment guarantees a "right to have a jury make the ultimate determination of guilt." *United States v. Gaudin*, 515 U.S. 506, 510 (1995); *accord Apprendi v. New Jersey*, 530 U.S. 466, 477 (2000).

For these reasons, in a related line of cases, this Court has held that "[a]ppellate courts are not permitted to affirm convictions on any theory they please simply because the facts necessary to support the theory were presented to the jury." *McCormick v. United States*, 500 U.S. 257, 270 n.8 (1991). To affirm a conviction on a theory "neither alleged in an indictment nor presented to a jury at trial offends the most basic notions of due process" and the Sixth Amendment. *Dunn*, 442 U.S. at 106. This Court has repeatedly applied this rule.

In *McCormick*, the trial court instructed the jury that a Hobbs Act extortion charge required proof that the political contributions were given with the expectation of influencing official conduct. 500 U.S. at 264-65, 269-70. The court of appeals, however, held that no quid pro quo was required and instead affirmed based on a new rule for distinguishing "legitimate" and illegitimate campaign contributions. *Id.* at 265-70. This Court reversed, holding that the right to a jury trial is not satisfied when an appellate court "retries a case on appeal under different instructions and on a different theory than was ever presented to the jury." *Id.* at 270 n.8.

In *Dunn*, the Court reversed a false-statements conviction obtained based on an indictment and jury instructions that specified an interview in an attorney's office as the qualifying "ancillary" proceeding. 442 U.S. at 106 n.4. The court of appeals, however, affirmed on the basis that a later evidentiary hearing qualified as the "ancillary" proceeding. *Id.* at 106. This Court reversed because "appellate courts are not free to revise the basis on which a defendant is convicted simply because the same result would likely obtain on retrial." *Id.* at 107. "To uphold a conviction on a charge that was neither alleged in an indictment nor presented to a jury at trial offends the most basic notions of due process." *Id.* at 106.

In *Chiarella v. United States*, 445 U.S. 222, 225-26 (1980), the Court reversed a conviction for securities fraud under a regulation that penalized a fraud in connection with the "purchase or sale" of securities. The trial court instructed the jury that it could convict if it found a fraud against the sellers. *Id.* at 236. On appeal, the government advanced the alternative theory that the acts also constituted a fraud

against the buyers. *Id.* at 235-36. This Court refused to consider the alternative theory because the jury had not been instructed on the elements of a duty owed to anyone other than the sellers. *Id.* at 236. "[W]e cannot affirm a criminal conviction on the basis of a theory not presented to the jury." *Id.*

In *Rewis v. United States*, 401 U.S. 808, 810-11 (1971), the Court reversed convictions under the Travel Act obtained under a theory that conducting a gambling operation frequented by out-of-state bettors violated the Act. The Court held that the government's alternative theory on appeal—that active encouragement of "interstate" patronage suffices—"cannot be employed to uphold these convictions" because "it is not the interpretation of [the statute] under which petitioners were convicted." *Id.* at 813-14.

The principle that emerges from these cases applies here: finding an error harmless on a ground not indicted, not noticed, not found by the jury, and not reasonably contestable at trial violates the Fifth and Sixth Amendments. The Ninth Circuit's decision to affirm Salgado's conviction on the basis of *Rehaif*'s new element—not indicted, not noticed, not found by the jury, and not previously recognized by any court as contestable at trial—similarly violates the Fifth and Sixth Amendments.

C. The error is structural and satisfies the third plain-error prong.

An error is structural if it "affect[s] the framework within which the trial proceeds," rather than being "simply an error in the trial process itself." *Weaver v. Massachusetts*, 137 S. Ct. 1899, 1907 (2017) (citations omitted). Structural errors "deprive defendants of 'basic protections' without which 'a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence.'" *Neder*,

527 U.S. at 8-9 (citation omitted). General categories of structural error include: (1) where "the right at issue is not designed to protect the defendant from erroneous conviction but instead protects some other interest," such as a defendant's right to "conduct his own defense"; (2) where "the effects of the error are simply too hard to measure," such as a defendant's right to select his own attorney; and (3) where "the error *always* results in fundamental unfairness," such as a failure to give a reasonable-doubt instruction. *Weaver*, 137 S. Ct. at 1908 (emphasis in original). "These categories are not rigid," however, and "[a]n error can count as structural even if the error does not lead to fundamental unfairness in every case." *Id.*; *see also Olano*, 507 U.S. at 735, 739 (recognizing that some errors "should be presumed prejudicial").

When an unforeseeable mens rea element is neither charged in the indictment, nor submitted to the jury, nor reasonably available to contest at trial, structural error arises. Such an error is structural because it "blocks the defendant's right to make the fundamental choices about his own defense." *See McCoy v. Louisiana*, 138 S. Ct. 1500, 1511 (2018) (holding that a lawyer's admission of a client's guilt over the client's objection constitutes structural error). The error is also structural because the premise for a harmless-error analysis is absent when there has been no jury verdict within the meaning of the Sixth Amendment. *See Sullivan v. Louisiana*, 508 U.S. 275, 280-82 (1993) (holding that a defective reasonable-doubt instruction constitutes structural error). *Rehaif*'s previously unrecognized element was not reasonably subject to challenge before *Rehaif* overturned the law of every circuit; therefore, Salgado was deprived of basic protections without which his trial could not reliably

serve its function as a vehicle for determination of his guilt or innocence. *See United States v. Gary*, — F.3d —, 2020 WL 1443528, at *2, 4-8 (4th Cir. Mar. 25, 2020) (holding in the plea context that "*Rehaif* error . . . per se affects a defendant's substantial rights" on plain-error review); *see also United States v. Resendiz-Ponce*, 549 U.S. 102, 117 (2007) (Scalia, J., dissenting) (arguing that the omission of an element from a federal indictment constitutes structural error and that the "Court will undoubtedly have to speak to the point on another day").

A structural error satisfies the third prong of plain-error review. Although the Court has stated that forfeited structural errors are subject to plain-error review, *Johnson*, 520 U.S. at 466, it has repeatedly reserved the question of whether "'structural' errors . . . automatically satisfy the third prong of the plain-error test." *Puckett v. United States*, 556 U.S. 129, 140 (2009); *accord Olano*, 507 U.S. at 735 ("There may be a special category of forfeited errors that can be corrected regardless of their effect on the outcome, but this issue need not be addressed."); *Cotton*, 535 U.S. at 632-34; *Johnson*, 520 U.S. at 468-70; *see also United States v. Marcus*, 560 U.S. 258, 262-63 (2010) (observing that a plain error must affect the outcome "[i]n the ordinary case"); *Weaver*, 137 S. Ct. at 1910-12 (applying "a different standard for evaluating a structural error depending on whether it is raised on direct review or raised instead in a [collateral] claim alleging ineffective assistance of counsel").

Numerous circuits, however, including the Ninth Circuit, have held that "[t]he third requisite of plain error review is necessarily met where the error at issue is structural." *United States v. Becerra*, 939 F.3d 995, 1005 (9th Cir. 2019); *accord*

United States v. Ramirez-Castillo, 748 F.3d 205, 215 (4th Cir. 2014) ("[I]f the error in the instant case is structural, the third prong of *Olano* is satisfied."); *United States v. McAllister*, 693 F.3d 572, 582 n.5 (6th Cir. 2012) ("When the error in question is structural, the defendant is not required to show that the putative error affected his substantial rights."); *see also United States v. Syme*, 276 F.3d 131, 155 n.10 (3d Cir. 2002) (assuming that structural error "would constitute per se reversible error even under plain error review"). No circuit appears to have held otherwise. Therefore, the Court should rule that *Rehaif* error is not subject to a harmless-error analysis and that it satisfies the third prong of plain-error review.

II. The question presented is important and this case is an ideal vehicle.

Rehaif error occurred in every § 922(g) conviction before this Court decided *Rehaif* on June 21, 2019. In Fiscal Year 2018 alone, for example, 6,719 defendants were convicted under § 922(g), with an average sentence of 64 months. U.S. Sentencing Comm'n, *Quick Facts: Felon in Possession of a Firearm*, *Fiscal Year 2018*, at 1-2, *available at* https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Felon_In_Possession_FY18.pdf (last visited Mar. 30, 2020). The prevalence and the importance of the issue warrants this Court's attention.

This case is an ideal vehicle for consideration of the question presented because Salgado presented the question to the court of appeals and this Court's resolution would affect the outcome of his case.

Although the Ninth Circuit did not reach whether the *Rehaif* error here would also satisfy the fourth plain-error prong, either per se or on the facts of Salgado's case, it has concluded in other cases that "the same reasoning that justifies categorizing

th[e] error as structural" supports the conclusion that the error "seriously affect[ed] the fairness, integrity, or public reputation of judicial proceedings." *Becerra*, 939 F.3d at 1006. When an error "implicates a structural right, the error affects substantial rights, and undermines the fairness of a criminal proceeding as a whole." *United States v. Chavez-Cuevas*, 862 F.3d 729, 734 (9th Cir. 2017) (citations omitted). Thus, if the Ninth Circuit was incorrect in concluding that *Rehaif* error is susceptible to a harmless-error analysis, its precedents strongly suggest that it would conclude that Salgado is entitled to relief on remand.

In addition, if Salgado is acquitted or if he is not retried on the § 922(g) count, he would be resentenced on the remaining count, *see United States v. Bennett*, 363 F.3d 947, 955-56 (9th Cir. 2004), and he would no longer be ineligible for a one-year sentence reduction under the Bureau of Prisons' Residential Drug Abuse Program. *See* 18 U.S.C. § 3621(e)(2)(B); 28 C.F.R. § 550.55(b)(5)(ii); U.S. Dep't of Justice, Bureau of Prisons, Program Statement P5162.05(3)(a)(1) (Mar. 16, 2009), *available at* https://www.bop.gov/policy/progstat/5162_005.pdf (last visited Mar. 30, 2020).

CONCLUSION

The petition for a writ of certiorari should be granted.

RESPECTFULLY SUBMITTED this 7th day of April, 2020.

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s/ *Jeremy Ryan Moore*
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NOT FOR PUBLICATION

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NOV 27 2019

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U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. FERNANDO ROMERO-SALGADO, Defendant-Appellant.	No. 18-10331 D.C. No. 4:17-cr-00131-RCC-BGM-2 MEMORANDUM*

Appeal from the United States District Court
for the District of Arizona
Raner C. Collins, District Judge, Presiding

Argued and Submitted October 23, 2019
San Francisco, California

Before: WALLACE and BRESS, Circuit Judges, and ENGLAND,** District Judge.

Defendant Fernando Romero-Salgado ("Defendant") appeals following his conviction by a jury for one count of smuggling goods from the United States in violation of 18 U.S.C. § 554(a) and one count of possession of ammunition by a

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

** The Honorable Morrison C. England, Jr., United States District Judge for the Eastern District of California, sitting by designation.

convicted felon in violation of 18 U.S.C. § 922(g)(1). Defendant was arrested after he traveled to Phoenix, purchased 7,000 rounds of ammunition, transported those rounds and another 5,000 rounds to a home near the Mexico border, and admitted to agents that his accomplice was planning to take the ammunition into Mexico while Defendant acted as a "spotter" at the port of entry. According to Defendant, his conviction and sentence are fatally flawed because the district court: (1) erroneously instructed the jury on the elements of the charges against him; (2) denied Defendant's motion for judgment of acquittal under Federal Rule of Criminal Procedure 29; (3) allowed the Government to make impermissible assertions in opening statements and closing arguments undermining the ability of the jury to fairly consider the case; (4) imposed a sentence that is both procedurally and substantively unreasonable; and (5) made clerical errors in the Judgment and Statement of Reasons. We have jurisdiction under 28 U.S.C. § 1291, and we affirm in part and vacate and remand in part.

1. Whether a "jury instruction misstated an element of the statutory crime" is reviewed *de novo*. *United States v. Gracidas-Ulibarry*, 231 F.3d 1188, 1191 (9th Cir. 2000). A "district court's failure to instruct the jury on the intent element of the offense was harmless error if we conclude that it is 'clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error.'" *Id.* at 1197 (quoting *Neder v. United States*, 527 U.S. 1, 18 (1999)).

Errors raised for the first time on appeal are reviewed for plain error. *United States v. Keys*, 133 F.3d 1282, 1286 (9th Cir. 1998). Such errors may be corrected "only if (1) an error occurred, (2) the error is plain on appeal, and (3) it affects substantial rights." *Id.* "If these conditions are satisfied, we have the discretionary authority to 'notice' a forfeited error, but only if (4) the error 'seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.'" *Id.* (quoting *Johnson v. United States*, 520 U.S. 461, 467 (1997)). "[T]he burden of establishing entitlement to relief for plain error is on the defendant claiming it." *United States v. Dominguez Benitez*, 542 U.S. 74, 82 (2004).

Any error in omitting an instruction that Defendant must have known the exportation of ammunition was unlawful under the laws of the United States was not plain and was harmless in any event. There is no binding authority indicating that the jury should have been charged specifically with finding Defendant had knowledge that smuggling the ammunition was contrary to the laws of the United States. The answer to the question is thus not "clear" or "obvious." *See United States v. Olano*, 507 U.S. 725, 734 (1993). Moreover, even if any error was plain, Defendant's substantial rights were not affected because the evidence indicating he knew smuggling the ammunition violated the laws of the United States was overwhelming.

Similarly, any error in declining to instruct the jury as to "attempt" or to give a specific unanimity instruction was also harmless given the ample evidence that Defendant took substantial steps toward the unlawful exportation of ammunition, namely, that he actually purchased, concealed, and transported the ammunition to an area near the border, intending for it to be exported into Mexico while he served as a "spotter." Finally, failing to instruct the jury that a conviction under 18 U.S.C. § 922(g)(1) requires proof that Defendant knew he was a felon was also harmless since the record makes clear Defendant was aware of his felon status.

2. The district court permissibly denied Defendant's motion for judgment of acquittal, by which Defendant argued that there was insufficient evidence to support an attempt conviction. This Court "review[s] *de novo* whether sufficient evidence exists to support a guilty verdict." *United States v. Stewart*, 420 F.3d 1007, 1014 (9th Cir. 2005). "First, a reviewing court must consider the evidence presented at trial in the light most favorable to the prosecution." *United States v. Nevils*, 598 F.3d 1158, 1164 (9th Cir. 2010). "Second, after viewing the evidence in the light most favorable to the prosecution, the reviewing court must determine whether this evidence, so viewed, is adequate to allow *any* rational trier of fact [to find] the essential elements of the crime beyond a reasonable doubt." *Id.* (internal quotation marks omitted). As indicated above, the evidence of

Defendant's guilt, including the substantial steps he took in furtherance of the crime, was overwhelming and more than sufficient to sustain a conviction.

3. "[T]he standard of review for [prosecutorial] comments [to] which defendant failed to interpose an objection is 'plain error.'" *United States v. Endicott*, 803 F.2d 506, 513 (9th Cir. 1986). Considered in the context of the entire trial, permitting the prosecutor to make the statements challenged in this case was not error, let alone plain error. In context, none of the Government's statements would have affected the jury's ability to be impartial, and the district court did not err in allowing the Government's comments.

4. The district court did not rely on clearly erroneous facts when imposing Defendant's sentence, and the court's denial of a minor role adjustment, even without extensive discussion, was proper. *United States v. Diaz*, 884 F.3d 911, 914–16 (9th Cir. 2018). Defendant's within-Guidelines sentence was also "sufficient, but not greater than necessary," under 18 U.S.C. § 3553(a). This remains true even though the co-defendant received a lesser sentence because the two parties were not similarly situated.

5. The parties agree that a limited remand is appropriate for the district court to correct certain clerical errors in the Judgment and Statement of Reasons. Defendant's possession conviction was erroneously reflected in the Judgment as arising under 18 U.S.C. § 922(g)(5)(B), which was also the statutory section listed

in the Presentence Report, instead of 18 U.S.C. § 922(g)(1). This error appears to derive from the Government's own initial error in the indictment. In addition, the court's Statement of Reasons also incorrectly failed to account for Defendant's acceptance of responsibility. Given this clerical error, the Total Offense Level was stated as 26 instead of 23. This case is thus remanded to the district court for the limited purpose of correcting these clerical errors.

AFFIRMED in part and VACATED and REMANDED in part.

FILED

JAN 23 2020

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. FERNANDO ROMERO-SALGADO, Defendant-Appellant.	No. 18-10331 D.C. No. 4:17-cr-00131-RCC-BGM-2 District of Arizona, Tucson ORDER

Before: WALLACE and BRESS, Circuit Judges, and ENGLAND,* District Judge.

The panel has unanimously voted to deny the petition for panel rehearing, and that petition (Docket Entry No. 62) is thus DENIED.

* The Honorable Morrison C. England, Jr., United States District Judge for the Eastern District of California, sitting by designation.