

DEC 19 2012

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U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

ISAAC REYES MARTINEZ,

Defendant - Appellant.

No. 11-50093

D.C. No. 8:10-CR-00033-AG-2

MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
Andrew J. Guilford, District Judge, Presiding

Argued and Submitted November 8, 2012
Pasadena, California

Before: REINHARDT and THOMAS, Circuit Judges, and NAVARRO,**
District Judge.

Appellant Isaac Reyes Martinez appeals his conviction after jury trial for conspiracy to possess with intent to distribute methamphetamine, 21 U.S.C. §§ 841(a)(1) and 846, and possession of firearms in furtherance of a drug trafficking crime, 18 U.S.C. § 924(c)(1)(A)(i).

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

** The Honorable Gloria M. Navarro, United States District Judge for the District of Nevada, sitting by designation.

We hold that the government violated Appellant's Fifth Amendment right to be convicted solely on the evidence adduced at trial, under *United States v. Schuler*, 813 F.2d 978, 981–82 (9th Cir. 1987), by commenting in its closing argument on Appellant's demeanor in the courtroom during witness Acosta-Ruiz's testimony and identification of Appellant. Analyzing the record for harmless error pursuant to *Chapman v. California*, 386 U.S. 18, 24 (1967), we cannot conclude that this error was harmless beyond a reasonable doubt. *See United States v. Weatherspoon*, 410 F.3d 1142, 1151 (9th Cir. 2005). Therefore we reverse Appellant's conviction and remand the case to the district court for a new trial.

REVERSED and REMANDED.