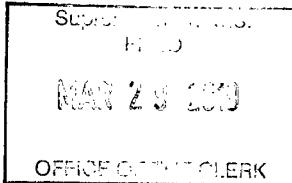


NO. 18-7505

ORIGINAL

IN THE
SUPREME COURT OF THE UNITED STATES



Demian Pina - PETITIONER

vs.

UNITED STATES OF AMERICA - RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO

United States Court of Appeals for the Sixth Circuit

PETITION FOR REHEARING

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FMC Lexington, Federal Medical Center
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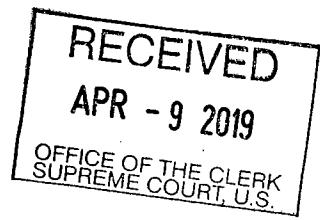
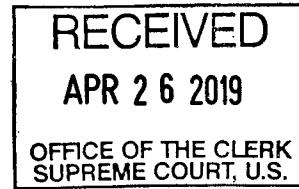


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CONSTITUTIONAL AMENDMENTS

- Amendment IV 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.
- Amendment V No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment of a or indictment of a grand jury, nor be deprived of life liberty or property, without due process of law; nor shall private property be taken for public use without just compensation.
- Amendment VI In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial.
- Amendment IX The enumeration in the Constitution of certain rights shall not be construed to deny or disparge others retained by the people.
- Amendment X The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively. or to the people.
- Amendment XI The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign state.
- Amendment XIV Section 1: All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

QUESTIONS BEFORE THE COURT

- 1) Does the Statute 18 U.S.C.S §2251, or §2252A as written, and as prosecuted, violate the Article I Section 8 Clause 3, this clause is properly known as the "Commerce Clause". (Parts of this clause are also known as the "Interstate Commerce Clause", the "Indian Commerce Clause" and the "Dormant Commerce Clause"), for purposes of establishing basis for Nexus for Interstate Commerce as sufficient to provide Federal Jurisdiction or Venue?
- 2) Does the Jurisdictional Requirement for NEXIS showing Interstate Commerce, get overridden by prosecution's use of extreme examples and infirm cases designed to mislead a reasonable juror (finder of facts) to believe there exists interstate commerce when all interstate commerce has ceased?
- 3) Is it Plain Error (Fed. R. Evid 103(d)) for an Appellate Court Justice to add statements of facts-not-in-evidence into the record, which were: 1) Not within the indictment; 2) Never brought into the District Court Case by either Prosecutor or Defense; 3) Never presented for proper fact-finding to a Jury; all such that were utilized by the Appellate Court to enforce or enhance the Court's finding of Guilt - thus violating the Defendant's Due Process right to confront those supposed "facts" and prepare a defense?

DEFINITION OF COMMERCE

As previously defined by this Honorable Court, the following cases exemplify the true deliniation of Inter and Intra-State Commerce:

1) Carter v. Carter Coal Co., 298 US 238 (1936)

"As used in the Constitution the word 'commerce' is the equivalent of the phrase 'intercourse for the purpose of trade,' and includes transportation, purchase, sale, and exchange of commodities by the citizens of the different states."

2) Edwards v. California, 314 US 160 (1941) Jackson, J.

"But the migrations of a man, of whome it is charged that he possesses nothing that can be sold and has no wherewithal to buy, do not fit easily into my notion as to what is commerce."

"To hold that the measure of his rights is the commerce clause is likely to result eventually either in distorting the commercial law or in denaturing man's rights."

"I suppose none of us doubt that the hope of imparting to American Citizenship some of this [Roman] vitality was the purpose of declaring in the Fourteenth Amendment, 'All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No States shall make or enforce any laws which shall abridge the privileges or immunities of citizens of the United States...'."

3) Adair v. United States, 208 US 161 (1908)

"Let us inquire what is commerce, the power to regulate which is given to Congress?

"This question has been frequently propounded in this court, and the answer has been - and no more specific answer could well have been given -

that commerce among the several states comprehends traffic, intercourse, trade, navigation, communication, the transit of persons, and the transmission of messages by telegraph, - indeed, every species of commercial intercourse among the several states, - but not that commerce 'completely internal, which is carried on between man and man, in a state, or between different parts of the same state, and which does not extend to or affect other states.' (quoting Gibbons v. Ogden, 9 Wheat 1, (1824))"

4) Gibbons v. Ogden, 9 Wheat. 1, (1924)

"[Chief Justice Marshall explained that commerce included both] the interchange of commodities and commercial intercourse."

5) Schechter v. United States, 295 US 495 (1935)

"The precise line between transactions directly affecting interstate commerce which the Federal Government may control and those only indirectly affecting interstate commerce to which the power conferred by the commerce clause of the Federal Constitution does not extend, can be drawn only as individual cases may arise."

EXAMPLES OF FEDERAL COMMERCE LAW OVERREACH

What follows is a short list of cases where CONCERN about Congressional Overreach regarding the applications by District Courts to the breadth of what is being interpreted as jurisdiction under the Art. 1 §8, 3 Commerce Clause.

- 1) United States v. Lopez, 514 US 549 (1994)
Held that possession of a firearm in a local school zone does not substantially affect interstate commerce.
Statute 18 USCS §922(g)(1)(A) exceeds authority of Congress to regulate commerce among states under Commerce clause.
- 2) Cargill v. United States, 516 US 955 (1995)
Army Corp of Engineers assertions of jurisdiction over petitioner's land over the potential presence of migratory birds, found to be outside commerce.
- 3) United States v. Morrison, 529 US 598 (2000)
Congress held to have **no authority** under either the Federal Constitution's Fourteenth Amendment to enact 42 USCS § 1398 providing Federal remedy for victims of gender-motivated violence, where the violence against women based its jurisdiction on the effect of interstate commerce, was found to contain no jurisdictional element, under the Federal Constitution's Commerce clause.
- 4) Solid Waste Agency v. Army Corps En., 531 US 159 (2001)
The Clean Water Act, through Commerce, did not reach the abandoned sand and gravel pit within the intastate limits and jurisdiction of the State of Illinois, even though the ponds that developed could have been used as migratory bird habitat.
- 5) Cutter v. Wilkinson, 544 US 709 (2005), n.2
Quoting Lopez ("the Constitution not only uses the word 'commerce' in a narrower sense than our case law might suggest, it also does not support the proposition that Congress has authority over all activities that 'substantially affect' interstate commerce")
Suggesting that RLUIPA may well exceed the powers of Congress under the Commerce clause.

GROUND FOR REHEARING

The Petitioner's case represents a unique opportunity for this Honorable Court to further delineate the limits of Congressional Statutory mandates as regards the reach or limit thereof, the Article III Commerce Clause as it relates to Federal Jurisdiction encroaching on the rights of people and the protected Jurisdiction of the States. Implications include encroachments on the Fourth, Ninth, Tenth, and Eleventh Amendments.

Petitioner was charged under §2251 and §2252 having to do with the knowing possession of Child Pornography, under these federal statutes, even though none of the investigation was done outside of the State of Ohio, Petitioner's home state, and none of the investigators and analysts performed any of their work outside the State of Ohio.

In performing the investigation into Petitioner's home, and the taking of computers from the domestic residence, no evidence was presented to the Petitioner or to his attorney, that showed how any "Interstate NEXIS" was established, until it was "presented" during the trial. The Prosecutor quoted several OTHER Circuits' cases that supposedly gave NEXIS to the "Labels" affixed to the computers which were all Gun possession cases. Each and every one pre-dated the United States v. Lopez, 514 US 549 (1995) - which struck down the mere possession as being in Interstate Commerce, thus holding

that Congress had exceeded its authority to regulate commerce under Federal Constitution's commerce clause (Art I, §8, cl 3).

The Petitioner, in his appeal was turned down for this being "Harmless error", alluding to the cases listed where actual transmission of the Child Pornography was conducted, thereby triggering the "transportation" equation, yet Petitioner never was shown to have "transmitted" anything to anybody. The private possession of anything, even though what once may have moved in commerce, such as the computers here, are outside of commerce once they reach the end consumer at point of sale. There was no evidence that any of these computers were ever owned by the Petitioner as the prosecution did not make any connection to a sales receipt of any of these devices to this Petitioner, thus not establishing true ownership in any tangible way.

The State of Ohio has its own laws regulating child pornography cases, and this investigation started as one within the state, but was quickly usurped by Federal Officers and Agents because of its "Commerce" nature. Even still with all of the investigations done and all of the Federal Agents being ONLY within the boarders of the State of Ohio, and without any third-party to claim as a "sender or recipient" of said pornography, the Federal Agents and the Federal Prosecutor quickly took over the case.

Petitioner prays this Honorable Court review the Article II, Commerce Clause for limitations. (See Ex Parte Bain, 7 S. Ct. 781, 787 (1887) (It is never to be forgotten that in the construction of the language of the Constitution here relied on... we are to place ourselves as nearly as possible in the condition of the men who framed that instrument.)

No Act of Congress can authorize a violation of the Constitution. United States v. Brignoni-Ponce, 95 S. Ct. 2574, 2578 (1975). The Constitution cannot be interpreted safely except by reference to common law and to British institutions as they were when the instrument was framed and adopted. Ex-Parte Grossman, 267 US 87, 108-109 (1925).

If Congress did have such authority, the Courts were obliged to follow the rules and statutes enacted by that body, failure to do so rendering the court without jurisdiction.

"Let justice be done, though the heavens fall." Lord Mansfield in Rex v. Wilkes, Burrow's Reports 2527, 2562 (1768), from an English maxim popular prior to 1600.

See also United States v. Coggin, 1F. 49 (E.D. Wis. 1880) (It is the duty of the court to administer the law according to its best understanding, regardless of the consequences).

The issues in Petitioner's case involve implications from Kyllo v. United States, 533 US 27 (2001), with an infirm or no warrant, without cause or jurisdiction at the Magistrate's court's hearing. Petitioner "demurred", thus challenging the jurisdiction so as not to make a plea to an infirm indictment. Petitioner was then further prejudiced, being subjected to a Magistrate ordered competency hearing, having petitioner handcuffed and then led back to County Jail, where he was refused any access to his attorney, and forced to undergo the competency tests so ordered by the court. This delay unfairly tolled petitioner's Sixth Amendment Speedy Trial rights, and subjected him to isolation from being able to prepare his defense with his attorney, including his access to any motions, records, and evidence involved in his trial. Petitioner was denied motions filed by his appointed attorney, and unaware of the Kyllo implications of the tools the FBI and State Police used to intrude into his home.

"The constitutional power of Congress...is ultimately a judicial rather than a legislative question, and can be settled finally only by this Court." United States v. Morrison, 529 US 598 (2000)

"For, as this Court has long recognized, '[i]t is obviously correct that no one acquires a vested or protected right in violation of the Constitution by long use, even when that span of time covers our entire national existence." Waltz v. Tax Comm'n of City of New York, 397 US 664 (1970) (As quoted in Eldred v. Ashcroft, 537 US 186 (2003)

Take for instance the Supreme Court Case United States v. Lara,
541 US 193, 158 L Ed 2d 420, 124 S Ct 1628 (2004) Justice Breyer concludes

"I do, however, agree that this case raises important constitutional questions that the Court does not begin to answer. The Court utterly fails to find any provision of the Constitution that gives Congress enumerated power to alter tribal sovereignty. The Court cites the Indian Commerce Clause and the treaty power. Ante, at 200, 158 L Ed 2d, at 428-429. I cannot agree that the Indian Commerce Clause 'provide[s] Congress with plenary power to legislate in the field of Indian affairs.' Ibid. (quoting Cotton Petroleum Corp. v. New Mexico, 490 US 163, 192 104 L Ed 2d 209, 109 S Ct 1698 (1989))."

The Court Opinion by Justice Breyer continues with:

"At one time, the implausibility of this assertion at least troubled the Court, see, e.g., United States v. Kagama, 118 US 375, 378-379, 30 L Ed 228, 6 S Ct 1109 (1886) (considering such a construction of the Indian Commerce Clause to be 'very strained'), and I would be willing to revisit the question. Cf., e.g., United States v. Morrison, 529 US 598, 146 L Ed 2d 658, 120 S Ct 1740 (2000); United States v. Lopez, 514 US 549, 131 L Ed 2d 626, 115 S Ct 1624 (1995); id., at 584-593, 131 L Ed 2d 626, 115 S Ct 1624 (Thomas, J., concurring)." Id at P. 224.

Justice Breyer is commenting on the separation of Sovereign rights, such as the Indian Nations rights, similar to States Rights. and the issues with Congress enacting legislation utilizing the Commerce Clause to infiltrate and usurp the Rights of the State for prosecutions, creating the NEXIS that the Commerce Clause does not specifically delineate.

So too, has Congress passed legislation making "Commerce" where the Commerce Clause does not go. And so has said this Honorable Court.

Lara is not the only case where the Congress has taken advantage of its powers to regulate "Commerce" in over-reaching ways.

In United States v. Morrison, 529 US 598, 146 L Ed 2d 658, 120 S Ct 1740 (2000) this Court held that Congress did not have authority under "either Federal Constitution's commerce clause or §5 of Constitution's Fourteenth Amendment to enact 42 USCS § 13981". Stating that "§13981 contained no jurisdictional element establishing that a federal cause of action was in pursuance of Congress' power to regulate interstate commerce; and [] the Constitution required a distinction between what was truly national and what was truly local."

In Morrison "Thomas, J., concurring, expressed the view that while the decision in United States v. Lopez (1995) 514 US 549, 131 L Ed 2d 626, 115 S Ct 1624, was correctly applied to the case at hand (1) the notion of a 'substantial effects' test under the Commerce Clause was inconsistent with the original understanding of Congress' powers and with the Supreme Court's early Commerce Clause cases; and (2) by continuing to apply this standard, the Supreme Court encouraged the Federal Government to persist in the view that the commerce clause had virtually no limits." Id. Summary (emphasis added). A statement that pushes for limits on "Big Government", and a strong support for limits on Congressional powers.

FACTS NOT IN EVIDENCE - APPELLATE COURT

The third question presented to the court, as well as to sum up the motion,, the Petitioner prays the Honorable Court review these errors as Plain Errors affecting the Prejudice in the Appelate Court review of, and determination in, the Petitioner's Appeal.

The Appellate Court added statements of facts-not-in-evidence into the record which included, but not limited to, one of the Appellate Court Justices stating the government had "proven interstate commerce through two otherways", other than the "stickers". The only cases cited by the Prosecution at trial to support any jurisdictional nexus, are the various gun cases we listed previously. There was no other mention of NEXIS about any of "other ways". Even though the cases were all cited outside of the Sixth Circuit, such that they were all overturned by United States v. Lopez 514 US 549, (1995), ignored by both the Prosecutor and Defense attorneys as if the Lopez case did not exist.

The use of infirm cases to support NEXIS of a state of "Commerce" which Petitionr Prays the Honorable Court further define, given the number of Circuits who are thus defining "Commerce" to mean almost any act by the People, regardless of State Rights, and thus placing the full weight of Plenary Power into the Federal Government to regulate nearly every aspect of a person's interactions for purposes of

extending jurisdiction, and prosecutions.

From the very beginning of this case, Petitioner has Demurred in an effort to require the Court to ascertain Jursidiction and to establish proof of Petitioner being in violation of ANY statute, whether State or Federal. Petitioner continues to declare innocense.

The Appellate Court was attempting to "firm-up" the Prosecution's Case, using claims and propounded statements as if this evidence was already put forth, and debated, within the four corners of the already adjudicated District Case. Petitioner had thus not been allowed his Sixth Amendment right to confront these cases/issues at trial, thus the Appellate Court violated the Petitioner's Sixth Amendment rights.

Throughout the course of the Petitioner's journey, thus far up until he faces this Honorable Court, Petitioner's rights, given and those he had been attempting to actively pursue; declaring his innocense from the point of arrest, pretrial, during trial, and post trial, have all been denied or ignored, causing prejudice which has resulted in his loss of Liberty, Property, and with risk to Life, along with much wealth and freedom. The Indifference of Justice experienced by this Petitioner is manifest and in need of this Court's consideration.

The manifest abuse of justice and the people's rights was forewarned would develop "in the future" if the safeguards of the Constitution were not enforced to stop the Federal Government abuse and overreach into the private and independant lives of the American People of the several states.

As stated in Lopez, at 588, "this Court's understanding of Congressional power under these two clauses, many of Congress' other enumerated powers under Art. 1, §8, are whole superfluous" and "would be superfluous if Congress had been given authority over matters that substantially affect interstate commerce." Yet the Constitution only states:

Art. 1, §8 Cl3: "To regulate commerce with foreign nations, and among the several States, and with the Indian Tribes".

In Lopez, at 565, "We are hard pressed to posit any activity by an individual that Congress is without power to regulate."

Yet our American History speaks of the People constantly fighting government abuses. i.e.: The Declaration of Independence; The Bill Of Rights; The Northwest Ordinance, just to name a few.

These examples show the people have rights and power not given the government, specifically the Federal Government, to protect themselves and their posterity. The Petitioner acted within these rights and never gave up his innocence when threatened with a harsher sentence if he did not plead guilty as if he was never innocent, before a trial to attempt to prove otherwise.

The Federal Government has been stretching the limits of the Fourth Amendment search and seizure protections by using both Kyllo violated technologies that, under testimony, wrenched the suspected child pornography out of the Internet Protocol (IP) address in the investigation, by using tools that do not comport with the "commercially available softwares" that they are claiming is participating in "Commerce" transactions. The Daubert v. Dow Pharmaceuticals standards for admitting scientific evidence, which MUST be allowed to be tested to authenticate its accuracy, as well as being shown the "error rate" and have the ability to cross examine by the Defence's own technical forensics expert - none of which was allowed or done by the Court in Petitioner's case.

The Federal Government has stretched the limits of its own powers, with Congress passing statutes like 2251 and 2252, acknowledging that an element of "traffic" exists in the "commerce" of production and sale, transactions that generate receipts. Congress has enacted a Statute that the Department of Justice has stretched the Commerce clause to inject Federal Agents into State investigations of state citizens, who ultimately then wrench those State cases away from the States into the clutches of Federal Agencies, when no clear acts of "Commerce" are taking place.

For all of this, the Courts are relying on further District Court precedents in "other" like-minded interpretations of the

same over-reach of Commerce onto the background of "Internet Trade" of obscene materials. Here more so when no "Internet Trade" was seen or proven to have taken place.

States Rights to exercise their plenary rights under the enforcement of existing State Laws are being abused by Federal Agency's override States' constitutional delineated plenary powers.

Sixty percent of a person's life is interaction, not necessarily paying for something, but are private interactions. No one person would use the common description of those interactions as being all commerce. We as a people do not have the phrase "in commerce" in our common usage.

i.e.; My wife buys lipstick made in Malaysia, and wears it on her lips. Does her kissing me continue as an act of "Commerce"? Thereby the act of kissing my wife would be regulated by the commerce clause, our government, and subject to the rule of Congress? If, rather, the common usage of the meaning of "commerce" ends once my wife buys the lipstick, then I will not need an "Act of Congress" to get or give her a kiss!!!

Just as our Government is attempting to get its arms around the legalization of Marijuana, the use of tax revenues, regulated growth production, shipping and retail selling all fall within the commerce

clause, and as such the Federal Tax Statutes. To further control the regulated distribution of marijuana, the Supreme Court issued its opinion denying "at home" production. Gonzales v. Raich, 545 US 1 (2005).

"Moreover, interjecting a modern sense of commerce into the Constitution generates significant textural and structural problems. For example, one cannot replace "commerce" with a differnt type of enterprise, such as manufacturing. [] The Port Preference Clause also suggests that the term "commerce" denoted sale and/or transport rather than business generally."
United States v. Alfonso, 514 US 549.

It is time for the Honorable Court to consider this question and to rule "what is Commerce" with regard to private person's use of same and what is not commerce. And do the People and the States retain their rights and liberty thereby as the 9th and 10th Amendments of the Bill of Rights Declare?

CONCLUSION

For reasons just stated, Demian Pina urges that this Petition for Rehearing be granted, and that, on further consideration, the Petition for Certiorari be granted or the judgement of the lower court reversed or as appropriate.

CERTIFICATE OF GOOD FAITH

I, Demian Pina, am a petitioner proceeding in forma pauperis under Rule 39 and am an inmate of a prison filing pro se Certify that this Petition for Rehearing is presented in good faith and not for delay, and that it is restricted to the grounds specified in Supreme Court Rule 44 to the best of my ability in detained conditions and have filed an original of the Petition for Rehearing under Rule 12 of the Rules of this Court, and hereby declare and affirm under penalty and in accordance with 28 U.S.C. 1746 that the foregoing is a true and accurate document to the best of my knowledge and belief.

Executed on: 29 March, 2019

Demian Pina All Rights Reserved
Demian Pina

29 Mar 2019
Date

pro se