No.

IN THE

SUPREME COURT OF THE UNITED STATES

JAIME CALDERON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

---

MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

The Petitioner, Jaime Calderon, asks leave to file the enclosed Petition for Writ of Certiorari without prepayment of costs and to proceed *in forma pauperis* in accordance with Supreme Court Rule 39. The filing of this petition is a continuation of the representation of the Petitioner under a Criminal Justice Act (18 U.S.C. § 3006A) appointment by the United States Court of Appeals for the Ninth Circuit.

WHEREFORE, Petitioner, Jaime Calderon, prays for leave to proceed *in forma pauperis* before this Honorable Court.

Donna Lee Elm

/s/ *Donna Lee Elm*

Donna Lee Elm
Law Practice of Donna Elm
1465 West Wagon Wheel Road
Cottonwood, Arizona 86326
602-299-7022
donnaelm1014@gmail.com
Counsel of Record for Petitioner

No.

IN THE

SUPREME COURT OF THE UNITED STATES

JAIME CALDERON,

Petitioner,

v.

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

Jeffrey T. Green
Northwestern Supreme Court Practicum
375 East Chicago Avenue
Chicago, IL 60611
(202) 736-8291

Donna Lee Elm
Law Practice of Donna Elm
Arizona Bar No. 012127
1465 W. Wagon Wheel Rd.
Cottonwood, Arizona 86326
(602) 299-7022
donnaelm1014@gmail.com
Counsel of Record for Petitioner

QUESTIONS PRESENTED

Whether district courts, serving as *Daubert/Kumho Tire* gatekeepers, have a duty to assess the reliability of law enforcement officers testifying as experience-based experts, rather than rely on their qualifications alone, before allowing them the wide latitude afforded to experts testifying to a jury?

Whether Congress violated the Commerce Clause and the Tenth Amendment when it criminalized purely intrastate drug transactions on the basis that at some historic point, those drugs had crossed state lines?

PARTIES AND CORPORATES DISCLOSURE STATEMENT

All parties appear on the caption of the title page. Petitioner Jaime Calderon was the defendant in the United States District Court for the District of Arizona, and Appellant in the case before the United States Court of Appeal for the Ninth Circuit. The United States was the plaintiff in the District Court, and Appellee in the case before the Ninth Circuit.

No corporate entities have any interest in this case.

STATEMENT OF RELATED PROCEEDINGS

This case arises from these proceedings:

United States v. Jaime Calderon, No. 3:18-cr-08126, District of Arizona (July 14, 2020) (judgement of conviction entered); and

United States v. Jaime Calderon, No. 20-10234, Ninth Circuit (October 29, 2021) (affirming conviction on direct appeal) and (December 3, 2021) (denying petition for review en banc).

No other proceedings in federal or state courts are directly related to this case, per Supreme Court Rule 14.1 (b)(iii).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES **PAGE(S)**

TABLE OF AUTHORITIES – *Cont.*

CASES – cont. **PAGE(S)**

TABLE OF AUTHORITIES – *Cont.*

CASES – cont. **PAGE(S)**

TABLE OF AUTHORITIES – *Cont.*

CASES – cont. **PAGE(S)**

TABLE OF AUTHORITIES – *cont.*

CASES – cont. **PAGE(S)**

CONSTITUTION AND STATUTES

SUPREME COURT RULES

MISCAELLANEOUS RULES

TABLE OF AUTHORITIES – *cont.*

MISCELLANEOUS PUBLICATIONS **PAGE(S)**

TABLE OF AUTHORITIES – *cont.*

MISCAELLANEOUS PUBLICATIONS – cont. **PAGE(S)**

No.

IN THE

SUPREME COURT OF THE UNITED STATES

JAIME CALDERON,

Petitioner,

v.

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

Petitioner Jaime Calderon respectfully petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the Ninth Circuit, *United States v. Jaime Calderon*, No. 20-10234 (9th Cir. 2021).

INTRODUCTION

This case presents an important supervisory question concerning the holdings of numerous federal courts that are contrary to this Court's express holdings in *Daubert* and *Kuhmo Tire*. In *Daubert*, this Court sought to intervene in federal courts' admission of "junk science" by imposing a reliability requirement. *General Elec. Co. v. Joiner*, 522 U.S. 136, 153 (1997). When the Court applied *Daubert* to experience-based experts, it noted that although different factors may apply, that reliability determination must still take place. *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 152 (1999). By continuing to require reliability, the Court meant to bar "junk opinions" from influencing juries. Although some federal courts adapted and evaluate those experts' reliability, many stop short and continue to rely solely on qualifications, trusting that will assure reliable opinions. Such trust is misplaced. This has reinforced a robust line of precedent in criminal prosecutions that routinely admits experts' opinions based just on training and experience. As occurred in the instant case, that free rein to law enforcement experts can produce expert testimony that is not objective and is actually *unreliable*. This gatekeeping failure has confounded consistency of federal practice in all litigation involving experts, resulting in double standards and contradictory law. The instant case provides the Court with an apt opportunity to correct those divisions and ensure that experience-based experts also comply with the reliability prerequisite of *Daubert*/*Kumho Tire*.

Mr. Calderon's prosecution is based upon a statute that Congress enacted in violation of the Commerce Clause and Tenth Amendment. The Founders envisioned

a federal government of limited powers, with plenary powers reserved to states. Their Commerce Clause authorized federal regulation of international and interstate commerce. However since then, it has been applied with extravagant breadth beyond any original intent. Indeed, given globalization of trade and finances, the Commerce Clause today could and has extended federal police powers to virtually any walk of modern life – simply due to some historical travel, purchase, or theoretical impact on financial institutions – and regardless whether the defendant had any connection to those historical transactions. The nexus between that trade and local crime has been stretched beyond any original understanding of the clause as well. Caselaw has consistently upheld Commerce Clause application to the vast federal reach of drug prosecutions, even those occurring wholly within state borders. Nonetheless, a century of precedent presuming a court had jurisdiction over certain crimes can be utterly wrong. *See McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020). This case warrants reevaluation of precedent and demonstrates the need for a far closer nexus with interstate or international commerce before authorizing prosecutions under 21 U.S.C. § 841.

OPINION BELOW

This case was tried in the District Court for the District of Arizona, captioned *United States of America v. Jaime Calderon*, with case number 3:18-cr-8126. Judgment was entered on July 14, 2020, and was not reported. The case was directly appealed to the Ninth Circuit Court of Appeals, captioned as *United States of America v. Jaime Calderon*, with case number 20-10234. The unreported memorandum

decision was rendered on October 29, 2021, is available at 2021 WL 5027792, and is attached as the Appendix to this petition.

JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. § 1254 (1). The judgment of the court of appeals affirming conviction was entered on October 29, 2021, and denial of a petition for rehearing en banc was entered on December 3, 2021. This petition is timely filed within 90 days of the Ninth Circuit's denial of that petition. SUP. CT. R. 13.3.

STATEMENT OF THE CASE

I. Factual Background

A. Circumstances of the Offense

Joe Arredondo, who had long been involved in illegal drug trafficking in the Prescott, Arizona area, cooperated as a "confidential informant" with police in their efforts to interdict in drug crimes there. He had a criminal record, was "working off" two additional pending criminal cases, and was paid $54,000 for his cooperation. He received phone calls seeking to set up three heroin sales, recorded those calls, and gave the recordings to officers managing his cooperation. He identified the caller as his distant relative, third cousin Mr. Calderon.

At the time, Mr. Calderon was in the Cimmaron Unit of the state prison. Cimmaron was a high security unit where guards watched inmates closely. The calls had been placed on various cell phones (not the prison inmate phones that record calls) but investigators could never trace the phones to Mr. Calderon. No cell phone was

found on him or in his cell, and guards did not catch him using any cell phone. Police directing the informant's activities never alerted the Cimmaron Unit that Mr. Calderon was alleged to be placing this multitude of calls, so as to try to catch him in the act, and thereby verify that it was him arranging the drug deals. Prisons have considerable background noise usually heard on calls from inside, but no such noise was heard on the calls the informant recorded. The informant addressed the caller as "Jaime" and "primo" several times over the course of many calls, but he could have been referring to Jesse Jaime, a fellow member of the informant's drug-dealing gang, who was in prison at that time.

The caller arranged three heroin sales to the informant using Nicolas Cowan and John Delgado to deliver the drugs. The sales were surveilled and video-recorded by undercover officers. Both Mr. Cowan and Mr. Delgado were eventually arrested and prosecuted. The government never called them to testify at trial in order to establish who asked them to transport those drugs.

B. Evidence at Trial

Although there is no question that those drug transactions occurred, Mr. Calderon has adamantly disputed that he was the one arranging them and has maintained that the voice on those calls was not his.

At trial, the prosecution called the informant and played recordings of those calls. To establish the link between Mr. Calderon and the voice on those calls, the informant testified that he recognized the voice as his distant cousin, Jaime Calderon

– but he was highly impeached. Mr. Calderon did not testify and had not been asked for a voice exemplar. The case agent reported that he had copies of Mr. Calderon's calls placed on inmate phones (such as to his mother), which could have been admitted to provide examples of his voice heard on a phone. But the government never introduced those. Consequently, the jury had no samples of Mr. Calderon's voice to compare with the voice they heard on the calls to the informant. The jury was thus precluded from making its own voice identification.

Instead, the prosecution relied on witnesses claiming to recognize Mr. Calderon's voice: the informant and case agent Det. Roe. Bolstering the informant's voice recognition claim, Det. Roe testified that he also recognized Mr. Calderon's voice from: (1) speaking to Mr. Calderon during an "unrelated situation in Prescott Valley" in "2014 or '13 maybe" or "2014, or thereabouts,"; and (2) when transporting Mr. Calderon into federal custody in 2018, where Mr. Calderon spoke "maybe 50 words." Det. Roe had not documented the 2013 or 2014 encounter and conceded that the conversation gave him no reason to take special note of Mr. Calderon's voice. Moreover, Mr. Calderon had been continuously incarcerated elsewhere since February 2013.

Although the government had Det. Roe's purported voice identification, it presented no evidence that Mr. Calderon could have had access to contraband cell phones at the time of these calls. Instead, it sought to present expert testimony of a prison crimes investigator. The prosecutor noticed that they would call BOP

Investigator Adrian Garcia concerning:

> specifically the methods of communication [inmates] use to achieve their criminal objectives. … the preparation and methods of concealment to facilitate the introduction of contraband as well as how the contraband is used or moved throughout a prison facility once it is inside. … the use of smuggled cell phones in prison as it relates to criminal activity committed by individuals outside of prison, including drug activity.

The prosecutor described his qualifications but offered no information regarding the reliability of his opinions. Mr. Calderon moved to preclude his testimony, which the district court took as a foundation objection. The prosecutor replied that the investigator was qualified as an expert based on his experience and training, so the *Daubert* reliability requirement was "simply not applicable to this kind of expert testimony." The district court denied the defense motion pending the government "laying the proper foundation" during trial.

In trial, the prosecutor again qualified Mr. Garcia as an "expert" in prison crimes, detailing his training and expertise but, again, did not address reliability. After the defense objections were overruled, Mr. Garcia provided a number of questionably biased opinions. He told jurors that illicit cell phones are used to conduct criminal business on the street, naming assaults, murder, escape, and "serious drug sales and drug movement," but never mentioning that inmates would want to use cell phones to avoid usurious prison phone charges. He opined that, "Inmates have money in their prison [inmate accounts] due to drug sales, gambling, extortion," never mentioning that inmate accounts held their earnings from prison industry and their family's donations. He testified that cell phones get to inmates from visitors

smuggling phones in past metal detectors; those were "magnetic free cell phones" which "you could search them on Amazon" to find.[1] That expert opinion thus was in fact *unreliable*. Finally, he testified that he has seen "tens of thousands of dollars," in some inmate accounts from these crimes, never mentioning what was in Mr. Calderon's account. If his opinion was in fact reliable, the government would have admitted Mr. Calderon's "books" (prison inmate account) to verify that with each drug deal, money went into his prison account; but that test of his reliability never materialized because the government never introduced Mr. Calderon's account records – because it did not reflect deposits coinciding with the three deals. That also demonstrated his opinions' *unreliability*.

He testified that illicit cell phones are "fairly common" in prisons, but without distinguishing higher security units like Mr. Calderon's from lower ones. Making his testimony more prejudicial, that opinion and several others had not been "noticed" per FED. R. CRIM. P. 16 (a)(1)(G).

The jury convicted Mr. Calderon as charged. He was sentenced to 150 months prison.

C. Motion Challenging the Court's Jurisdiction

In early stages of the case, Mr. Calderon moved pro se to dismiss the

[1] Had that opinion been "noticed" to the defense, or had there been a hearing regarding the investigator's reliability before he made that claim, the defense could have accepted Mr. Garcia's invitation to search the Amazon website – and found that there was no such item there. It would not have been found on a Google search either.

indictment. He argued several jurisdictional grounds that: he could not be convicted under 21 U.S.C. § 841 and 18 U.S.C. § 2 because the power to "punish" was not delegated to the federal government by the Constitution; the Commerce and Necessary and Proper Clauses do not allow the federal government to prosecute local drug offenses; federal drug offense statutes encroach on state sovereignty and may only be prosecuted federally if they fall within the "maritime and territorial" federal geographic bounds; alternatively, the Commerce Clause can only supply jurisdiction where the state of Arizona ceded that to the federal government; and the district court lacked subject-matter jurisdiction. After oral argument, the district court promptly denied his motion, stating "it is well-settled" that the federal government had authority to regulate interstate commerce and punish federal crimes; further, it has jurisdiction to prosecute federal crimes in the state of Arizona. However, the district court advised Mr. Calderon that he could raise this on appeal.

II. Direct Appeal

Mr. Calderon appealed five issues. He asserted that the district court abused its discretion in admitting Mr. Garcia's expert testimony when there was no showing it was reliable. He challenged the district court's order that the parties could not research jurors "during or after trial." He complained of material inaccuracies in the testimony of Det. Roe (that he had an encounter in Prescott Valley with Mr. Calderon during a time that Mr. Calderon was incarcerated), and that the prosecutor did not correct that falsehood. He also contended that denying the motion to dismiss

(jurisdiction issues) was an abuse of discretion. Acknowledging that circuit precedent disfavored his position, he nonetheless appealed that issue "to preserve his jurisdiction challenges for review." Finally, he argued that cumulative error warranted reversal. The court of appeals affirmed. It found that the expert testimony "was relevant and reliable," and the jury probably would have reached the same verdict without it; additionally, that testimony "did not concern a central issue at trial." Citing *United States v. Tisor*, 96 F.3d 370, 374-75 (9th Cir. 1996), the Court upheld denying the jurisdictional challenge.

Mr. Calderon petitioned for rehearing en banc, citing several conflicts between this decision and other Ninth Circuit cases. In particular, he pointed to circuit decisions addressing experience-based experts that required a showing of reliability in addition to qualifications. *E.g.*, *United States v. Valencia-Lopez*, 971 F.3d 891, 901 (9th Cir. 2020); *United States v. Ruvalcaba-Garcia*, 923 F.3d 1183, 1190-91 (9th Cir. 2019), *cert. denied,* 140 S. Ct. 1135 (2020); *United States v. Vera*, 770 F.3d 1232, 1243 and 1247 (9th Cir. 2014); *Estate of Barabin*, 740 F.3d 457, 463-65 (9th Cir.) (en banc), *cert. denied*, 574 U.S. 815 (2014); *United States v. Hermanek*, 289 F.3d 1076, 1093-95 (9th Cir. 2002), *cert. denied*, 537 U.S. 1223 (2003); *Elsayed Mukhtar v. Cal. State Univ., Haywood*, 299 F.3d 1053, 1064 (9th Cir. 2002). He also argued that the panel's decision regarding the juror research prohibition was at odds with other circuit case law. The court summarily denied the petition.

REASONS THE COURT SHOULD GRANT THE PETITION

I. DISTRICT COURTS, SERVING AS *DAUBERT/KUMHO TIRE* GATEKEEPERS, HAVE A DUTY TO ASSESS THE RELIABILITY OF LAW ENFORCEMENT OFFICERS TESTIFYING AS EXPERIENCE-BASED EXPERTS, RATHER THAN RELY ON THEIR QUALIFICATIONS ALONE, BEFORE ALLOWING THEM THE WIDE LATITUDE AFFORDED TO EXPERTS TESTIFYING TO A JURY.

A. THE *DAUBERT* REVOLUTION HAS FAILED TO MAKE A SIGNIFICANT IMPACT ON ADMISSION OF LAW ENFORCEMENT EXPERTS' TESTIMONY IN CRIMINAL PROSECUTIONS.

Before the sea change wrought by *Daubert*, district courts applied FED. R. EVID. 702 to routinely admit testimony of law enforcement officers to interpret drug trafficking language and criminal cultures or behaviors ("modus operandi") not commonly known by jurors. *E.g.*, *United States v. Jackson,* 425 F.2d 574, 576-77 (D.C. Cir. 1970) (citing caselaw from other circuits); *United States v. Espinosa*, 827 F2d 604, 611-13 (9th Cir. 1987) (same), *cert. denied,* 485 U.S. 968 (1988); *United States v. [David] Thomas*, 676 F.2d 531, 538 (11th Cir. 1982) (same); *United States v. Pearce*, 912 F.2d 159, 163 (6th Cir. 1990) (same); *United States v. Boykin*, 986 F.2d 270, 275 (8th Cir. 1993), *cert. denied*, 510 U.S. 888. Most commonly, the experts discuss drug or gang culture ("modus operandi") to show that ambiguous conduct was instead criminal in nature.[2]

After this Court settled that expert opinions need to be both relevant and

[2] Such testimony may, of course, impermissibly bolster the credibility of a fact-witness who had testified that such conduct had occurred. *See United States v. Cruz*, 981 F.2d 659, 663 (2nd Cir. 1992).

reliable, *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), and that district courts should not rely on the *ipse dixit* of experts, *General Electric Co. v. Joiner*, 522 U.S. 136, 146 (1997), the Court addressed gatekeeping responsibilities for experience-based experts in *Kumho Tire, Ltd. v. Carmichael*, 526 U.S. 137 (1999). The *Kumho Tire* opinion arose from the Eleventh Circuit's holding that *Daubert*'s science-based factors did not apply to experience-based experts, though the court of appeals continued to require judges to verify that their testimony was "sufficiently reliable." *Carmichael v. Samyang Tire, Inc.,* 131 F.3d 1433, 1436 (11th Cir. 1997). Consequently, the *Kumho Tire* Court was not determining whether a reliability finding was needed for experience-based experts, but whether factors other than *Daubert*'s science-based ones would better fit that assessment. *Kumho Tire*, 526 U.S. at 151. It continued to require the reliability assessment. *See id.* at 151-52, 154-55. The holding endorsed:

> trial-court discretion in choosing the manner of testing expert reliability—[which] is not discretion to abandon the gatekeeping function. . . . it is not discretion to perform the function inadequately. Rather, it is discretion to choose among *reasonable* means of excluding expertise that is *fausse* and science that is junky.

Id. at 158-59 (Scalia, J., concurring).

The *Daubert* revolution was meant to resolve the "sharp divisions among the courts regarding the proper standard for the admission of expert testimony." *Daubert*, 509 U.S. at 585. Since then, courts in civil cases have generally adhered to *Daubert*'s requirements, but they remain divided and confused concerning whether reliability

needs to be established over and above mere qualifications of expertise in criminal cases.

In criminal prosecutions, complying with *Daubert/Kumho Tire* by imposing reliability on law enforcement experts has been the exception rather than the rule.[3] Those opinions typically justify that omission by citing their precedent, *e.g.*, *United States v. Bender*, 265 F.3d 464, 471-72 (6th Cir. 2001), or relying on selective language of *Kumho Tire* (that reliability "may focus upon personal knowledge and experience," *Kumho Tire*, 526 U.S. at 150, the test of reliability is "flexible," *id.* at 141, or judges have "broad latitude" how to determine it, *id.* at 153). *E.g.*, *United States v. Hankey*, 203 F.3d 1160 (9th Cir.), *cert. denied*, 530 U.S. 1268 (2000); *United States v. [Ronnie] Thomas*, 490 Fed. App'x 514, 520-21 (4th Cir. 2012) (unpublished). Indeed in the case

[3] Examples bypassing reliability abound. The reliability of testimony associating narco-saint Jesus Malverde with drug trafficking was assessed only by reviewing the marshal's knowledge and experience. *United States v. Holmes*, 751 F.3d 846, 850-51 (8th Cir. 2014). An agent's "extensive experience and knowledge was more than sufficient to provide a reliable basis for his expert opinions" about alien smuggling. *United State v. Arnold*, 3 Fed. App'x 614, 616 and n.6 (9th Cir.) (unpublished), *cert. denied*, 533 U.S. 937 (2001). A gang expert's testimony about gang practices is reliable as long as the detective had "significant experience with the gang." *United States v. Rios*, 830 F.3d 403, 414 (6th Cir. 2016). The officer's testimony that possession of guns and quantities of drugs among five individuals in a car was indicative of drug trafficking was reliable based on his experience. *United States v. Davis*, 397 F.3d 173, 177-79 (3rd Cir. 2005). The FBI Agent's testimony about the MS-13 gang need have no reliability findings since "experience is the predominant, if not sole, basis for a great deal of reliable expert testimony." *United States v. Sandoval*, 6 F.4th 63, 84 (1st Cir. 2021). Even the Eleventh Circuit (after suffering reversal in *Kumho Tire*) carved out an exception for police testifying as drug trafficking experts. *United States v. Santiago Moreno*, 2007 WL 9735523 at *3 (N.D. Ga. 2007) (unpublished).

at bar, the court both cited precedent holding that qualification alone sufficed (*Hankey*) and quoted *Barabin* (which referred to *Kumho Tire's* "knowledge and experience in the relevant discipline" language) to justify foregoing any reliability analysis. *See* Pet. App. at *1.

Although some astute jurists have properly applied *Kumho Tire*'s reliability requirement to law enforcement experts, there persists a flourishing line of caselaw that continues to admit experience-based law enforcement expert testimony without any concern for its reliability or trustworthiness. However, eschewing a reliability analysis has only occurred in criminal cases. Joëlle Moreno, *What Happens When Dirty Harry Becomes an (Expert) Witness for the Prosecution?*, 79 TULANE L. REV. 1, 17 (Nov. 2004).

> The problem with allowing police officers to testify as experts is that courts rarely require that police meet the standards of relevancy and reliability, standards which are required of experts in other fields. . . . Thus, "when it comes to police, . . . '[the testimony] kind of slips in under the gatekeeper's door.'"

Elizabeth Wells, *Warrantless Traffic Stops: A Suspension of Constitutional Guarantees in Post September l1th America,* 34 U. TOL. L. REV. 899, 911 (2003). Consequently, criminal defendants receive far less of federal courts' protection against wayward and unfounded expert testimony than civil parties.

Allowing law enforcement experts to testify this way has produced a veritable cottage industry of prosecution experts who evade reliability scrutiny. In fact, the most common expert prosecutors use is a law enforcement officer. Jennifer L. Groscup

et al., *The Effects of Daubert on the Admissibility of Expert Testimony in State and Federal Cases*, 8 PSYCHOL., PUB. POL'Y & L. 339, 345 (2002). That these witnesses are invested in prosecution success makes it doubly important that their reliability be established, so far more problematic that their reliability examination is brushed off. *See* Anna Lvovsky, *The Judicial Presumption of Police Expertise*, 103 HARV. L. REV. 1995 (2017). Furthermore, they were most often used in drug prosecutions, where they were called to testify about criminal "modus operandi." Groscup *supra*, at 345. Other studies found that judges routinely admitted testimony of law enforcement experts, with 92% of prosecution experts surviving defense challenges.[4] D. Michael Risinger, *Navigating Expert Reliability: Are Criminal Standards of Certainty Being Left on the Dock?*, 64 ALB. L. REV. 99, 99 (2000); *and see* Christopher Slobogin, *The Structure of Expertise in Criminal Cases*, 34 SETON HALL L. REV. 105 (2003). *Daubert* has had little impact "on the overwhelming inclination of judges" to admit prosecution police experts. Moreno *supra*, at 18. An empirical study revealed that before *Daubert*, judges admitted 90.3% of these experts, but after *Daubert*, they still admitted those experts an alarming 89.9% of the time. Groscup *supra*, at 347 n.6.

This, at a minimum, demonstrates that the *Daubert* revolution, meant to upgrade the quality and consistency of expert evidence, has had little impact in the criminal arena.

[4] Incidentally, judges also routinely denied similar experts for the defense, who survived prosecution challenges only 33% of the time. Risinger *supra*.

B. FEDERAL COURTS ARE SHARPLY DIVIDED WHETHER EXPERIENCE-BASED LAW ENFORCEMENT EXPERTS MUST MEET *DAUBERT'S* RELIABILITY REQUIREMENT IN ADDITION TO EXPERTISE QUALIFICATION.

Having been reversed by *Kumho Tire*, the Eleventh Circuit's civil opinions require experience-based experts to undergo a reliability evaluation. In *Kilpatrick,* the court cited *Kumho Tire*'s "level of intellectual rigor" language, *Kumho Tire*, 526 U.S. at 152, to reject the argument that reliability need not be established. *Kilpatrick v. Breg, Inc.*, 613 F.3d 1329, 1335 (11th Cir. 2010). "Such an approach goes against the law of this Circuit, which has reversed trial courts who abdicate their gatekeeping role and refuse to assess reliability." *Id.* at 1336. Conceding that reliability may be determined primarily from experience and knowledge, the district court must still make a principled inquiry and finding. *Id.* "To hold otherwise," the Eleventh Circuit warned, "would encourage trial courts to simply rubber stamp opinions of expert witnesses once they are determined to be an expert." *Id.*

However, judges are divided in applying that to criminal cases. Two Eleventh Circuit cases require reliability. In *United States v. Masferrer*, 367 F.Supp.2d 1365 (S.D. Fla. 2005), defendants challenged the government's experts' opinions on the validity of banking transactions. The district court noted that, "While an expert's overwhelming qualifications may bear on reliability of his proffered testimony, they are by no means a guarantor of reliability." *Id.* at 1372. After thoughtfully examining reliability, the court excluded the experts. *Id.* at 1373-80. Similarly in *Fra*zier, the district court had found that the rape forensics expert was highly qualified, but that

his opinion lacked reliability. *United States v. Frazier (Frazier I)*, 322 F.3d 1262 (11th Cir. 2003), *reversed*, *United States v. Frazier (Frazier II*), 387 F.3d 1224 (11th Cir. 2004) (en banc). The original panel had held that experience-based expertise alone is admissible. *Frazier I* at 1267. Because the expert's opinion was based on reason and experience, "[r]eliability is established," and the panel reversed the case. However, the court took the matter up en banc to correct the statement of law. Conceding that reliability may be established in a variety of ways, the court nonetheless noted:

> the unremarkable observation that an expert may be qualified by experience does not mean that experience, standing alone, is a sufficient foundation rendering reliable *any* conceivable opinion the expert may express. . . . While an expert's overwhelming qualifications may bear on reliability of his proffered testimony, they are by no means a guarantor of reliability. . . . one may be considered an expert but still offer unreliable testimony.

Frazier II, 387 F.3d at 1261 (emphasis in original). The court added that if reliability could be established simply by the *ipse dixit* of a qualified expert, "the reliability prong would be . . . subsumed by the qualification prong," finding the expert's testimony *unreliable.*[5] *Id.* On the other hand, a number of other opinions uphold police testifying as drug trafficking experts without any reliability showing. *E.g., United States v. Lozano*, 711 Fed. App'x 934, 939 (11th Cir. 2017) (unpublished), *cert. denied*, 138 S. Ct. 938 (2018); *United States v. Garcia*, 447 F.3d 1327, 1334-35 (11th Cir. 2006).

---

[5] Perhaps the aberrations of *Frazier II* and *Masferrer* can best be understood because in *Frazier,* the defense called that expert, and *Masferrer* was charged with white-collar banking fraud, which is closely aligned with civil practice.

The Tenth Circuit has some of the strongest jurisprudence demanding that law enforcement experts establish reliability in criminal prosecutions. In a "blind mule" drug prosecution, the passenger began reciting a prayer to Santa Muerte when police stopped the vehicle. The district court allowed expert testimony of a U.S. Marshall and DEA agent that Mexican drug traffickers pray to that unofficial saint for protection from law enforcement. *United States v. Medina-Copete,* 757 F.3d 1092, 1102 (10th Cir. 2014). The failure to fully examine the expert affected the reliability analysis, since the district court had not based that finding on "sufficient facts or data," or "reliable principles and methods." *Id.* at 1103. Hence the testimony constituted mere *ipse dixit*. *Id.* at 1104; *and see* Mixcoatl Miera-Rosete, *Officers at the Gate: Why United States v. Medina-Copete Should Be the Rule and Not the Exception*, 47 N.M.L. REV. 184 (2017). Similarly, in *United States v. Roach*, 582 F.3d 1192, 1206-08 (10th Cir. 2009), *cert. denied*, 558 U.S. 1156 (2010), the court of appeals found error in admitting a police officer's testimony as a gang expert when the district court had made no reliability finding. In *United States v. Velarde*, 214 F.3d 1204, 1210 (10th Cir. 2000), the district court had admitted testimony of two child sex abuse experts without any reliability finding, creating reversal. One of those experts had also testified in *United States v. Charley*, 189 F.3d 1251, 1266 (10th Cir. 1999), *cert. denied*, 528 U.S. 1098 (2000), where the district court erred by only inquiring about qualifications and not reliability. Nevertheless, a sizeable line of contradictory opinions that largely rely on pre-*Kumho Tire* precedent persists to confuse the

jurisprudence. Hence, testimony concerning a drug organization's behavior was readily admitted based on experience qualifications alone. *E.g., United States v. [Roderick] Walker*, 179 Fed. App'x 503, 507 (10th Cir. 2006) (unpublished) (citing *United States v. Quintana*, 70 F.3d 1167, 1171 (10th Cir. 1995); *United States v. Goxcon-Chagal*, 885 F.Supp.2d 1118 (D. New Mex. 2012) (citing *[Roderick]Walker*), *vacated and remanded by Medina-Copete.*

The Ninth Circuit is particularly confused over the issue. Most recently, a panel held that the district court failed its gatekeeping role by finding that experience and qualifications alone sufficed for the agent to testify about drug trafficking across the border. *Valencia-Lopez*, 971 F.3d at 899. The district court had refused to conduct a *Daubert* hearing. *Id.* at 896. Quoting *Kumho Tire's* language about flexibility, the circuit panel nonetheless stated that "the trial court's broad latitude to make the reliability determination does not include the discretion to abdicate its responsibility to do so." *Id.* at 898 (citing criminal cases requiring reliability: *Elsayed Mukhtar,* 299 F.3d at 1064; *Hermanek*; *Barabin*; *Ruvalcaba-Garcia*). *Valencia-Lopez* granted that *Daubert* may be harder to apply to experience-based experts, but thoughtfully concluded that:

> [W]e see a strong argument that reliability becomes more, not less, important when the "experience-based" expert opinion is perhaps not subject to routine testing, error rate, or peer review type analysis, like science-based expert testimony.

Valencia-Lopez, 971 F.3d at 898. Because the Supreme Court made it abundantly clear that "reliability is the lynchpin – the flexibility afforded to the gatekeeper goes

to *how* to determine reliability, not *whether* to determine reliability." *Id.*

However, the circuit has also issued contrary caselaw, most notably *Hankey*. In *Hankey*, the prosecutor sought to introduce a police officer's gang culture testimony. Citing *Kumho Tire's* "flexibility" in deciding how to evaluate the expert's reliability, the court pointed to extensive voir dire of the witness's background (but significantly, that only addressed his experience, not whether his conclusions were trustworthy). *Hankey*, 203 F.3d at 1168-69. Relying on *Kumho Tire* language that "the relevant reliability concerns may focus upon personal knowledge and experience," the court of appeals concluded that *Daubert* is "simply not applicable to this kind of testimony." *Id.* at 1169. A line of cases promptly followed suit. In *United States v. Alatorre*, 222 F.3d 1098 (9th Cir. 2000), a police officer (admitted on his experience alone) testified about the value of the marijuana and structure of marijuana distribution. The court concluded, "Having found no abuse of discretion in the admission of expert testimony given the foundation established in *Hankey*, we find none here." *Id.*; *and see United States v. Mendoza-Paz*, 286 F.3d 1104, 1112 (9th Cir.) (officer's drug trafficking testimony admissible based on his qualifications, citing *Hankey*), *cert. denied*, 537 U.S. 1038 (2002); *United States v. Brown*, 800 Fed. App'x 455, 462 (9th Cir. 2020) (unpublished) (testimony about pimping and gang activity upheld in accord with *Hankey*), *cert. denied*, 141 S. Ct. 1078 (2021). Furthermore, the panel in the instant case rejected applying *Valencia-Lopez* in reliance instead on *Hankey* to deny relief. Pet. App. *1.

Opinions also vary considerably within the Fourth Circuit. For example, the court demanded a finding of reliability for a DEA agent interpreting drug transaction language. Conceding that the agent was sufficiently knowledgeable in that field, the court precluded his testimony because he had provided "virtually no methodology or guiding principles." *United States v. [Walter] Johnson*, 617 F.3d 286, 294 (4th Cir. 2010). In another case, the defendant offered expert testimony about shell casing ejection patterns to show he had not been in the position to be the shooter. Although the expert had substantial experience in this area, because he failed to establish reliability, he was properly precluded – perhaps because he was a defense expert. *United States v. Fultz*, 591 Fed. App'x 226, 228 (4th Cir.) (unpublished), *cert. denied*, 535 U.S. 1034 (2015). On the other hand, despite the gang expert's testimony being admitted based only on his experience, the court approved his testimony about the history and policies of the Bloods. The judge reasoned that the *Daubert* factors do not apply to non-science experts, whose admissibility "depends heavily on the knowledge and experience of the expert, rather than the methodology or theory behind it." *[Ronnie] Thomas*, 490 Fed. App'x at 520-21 (citing *Hankey*).

The Sixth Circuit contributes to the confusion about whether to require reliability findings for experienced-based law enforcement experts. Its seminal *Kumho Tire* case is *First Tennessee Bank Nat'l Ass'n v. Barreto*, 268 F.3d 319 (6th Cir. 2001), where the bank's expert established just his qualifications as an expert, not reliability of his opinions. Relying on *Kumho Tire* language that "the relevant

reliability concerns may focus upon personal knowledge and experience," and that judges have broad latitude to determine how to evaluate reliability, *id.* at 335 (citing *Kumho Tire*, 526 U.S. at 150, 153), the court concluded that the expert's experience and knowledge alone established reliability. *Id.* This reasoning then carried over to criminal cases. For example, a DEA agent's interpretation of drug transaction language was challenged based on reliability since he "relies on anecdotes rather than methodology." *United States v. Ayala-Vieyra*, 2022 WL 190756 (6th Cir. 2022) (unpublished). Citing *Kumho Tire* for the "considerable leeway" courts have to evaluate experts, the court disposed of the challenge because "A DEA agent's extensive experience is a permissible basis to find expert testimony reliable." *Id.; and see Bender*, 265 F.3d at 471-72; *United States v. [Michael] Johnson*, 488 F.3d 690, 698 (6th Cir. 2007); *United States v. List*, 200 Fed. App'x 535, 545 (6th Cir. 2006) (unpublished).

The Seventh Circuit joins the confusion of its sister circuits by requiring reliability findings in civil cases but allowing qualifications to subsume reliability in criminal cases. Its central opinion addressing experience-based experts, *Naeem v. McKesson Drug Co.,* 444 F.3d 593 (7th Cir. 2006), found that the expert on human resources regulations offered conclusory statements (*ipse dixit*), not explaining how he made his analysis. Because his reliability had not been assessed, the trial judge had abused his discretion in admitting that testimony. *Id.* at 607-08. But in a criminal prosecution, a DEA agent's opinion linking the gun found in the defendant's room

with drug trafficking was admissible based just on the agent's experience, without any requirement to show reliability. *United States v. Allen*, 269 F.3d 842, 846 (7th Cir. 2001). The court noted that the circuit had approved such "modus operandi" testimony in other cases, citing a list of pre-*Kumho Tire* criminal prosecutions. *Id.*; *and see United States v. Conn*, 297 F.3d 548, 556 (7th Cir. 2002), *cert. denied*, 538 U.S. 969 (2003) (same).

C. MR. CALDERON'S CASE IS SUPERBLY SUITED TO EXPLORE THE ARRAY OF DIVERGENT CASELAW WHOSE ROUTINE RECURRENCE MAKES THE QUESTION PRESENTED EXCEPTIONALLY IMPORTANT TO FEDERAL PRACTICE.

Mr. Calderon's case offers the ideal vehicle to settle how courts should decide reliability of experienced-based experts' testimony. The obvious confusion of opinions in the Ninth Circuit was squarely called into play. The prosecution attested that the expert was not subject to *any* reliability evaluation, relying on the Ninth Circuit's *Hankey* opinion. Raising the circuit's opposite opinion in *Valencia-Lopez* on appeal, Mr. Calderon placed the collision of those holdings in stark contrast. Additionally, unlike stricter *Daubert* adherence in civil practice, this was a criminal case where the prosecution was allowed to introduce its law enforcement expert with nonchalant ease and no inquiry whether his testimony was at all reliable. That highlights the much-criticized divisions that have developed between civil and criminal gatekeeping of expert opinions. *E.g.*, Risinger *supra*; Slobogin *supra*; Brian Gallini, *To Serve and Protect: Officers as Expert Witnesses in Federal Drug Prosecutions*, 19:2 GEO. MASON L. REV. 363 (2012).

The instant case provides an important benefit that is usually missing in law enforcement "modus operandi" testimony cases. The expert's testimony here was demonstrably *unreliable*, exaggerated, and biased toward prosecution success – in short, "junk opinions." *E.g.*, the Amazon.com claim. As a result, Mr. Calderon's case can shed light on the inherent likelihood that failing to assess reliability can lead to *unreliable* testimony. This Court cautioned that *ipse dixit* opinions must be avoided. *Joiner*, 522 U.S. at 146. Those unsupported opinions offered in the instant case lend credence to the warning that:

> [R]eliability becomes more, not less, important when the "experience-based" expert opinion is perhaps not subject to routine testing, error rate, or peer review type analysis, like science-based expert testimony.

Valencia-Lopez, 971 F.3d at 898.

Furthermore, the expert's testimony could not be shrugged off as harmless when it filled a conspicuous void in showing that Mr. Calderon made those calls, by educating jurors that inmates "fairly common[ly]" have illegal cell phones in prisons. Supplemental testimony that those phones were used to conduct "serious drug sales and drug movement" presents the compounding problem that partisan experts given free rein may "shape the opinion to fit the facts." Moreno *supra*, at 7.

This Court granted *certiorari* in *Daubert* to resolve "sharp divisions among the courts regarding the proper standard for the admission of expert testimony." *Daubert*, 509 U.S. at 585. It ushered in what was meant to be a sea change of judicial gatekeeping, broadly and equally applied throughout federal practices. Yet 23 years

after *Kumho Tire*, holdings across the country remain sharply divided and frankly confused concerning whether and how to apply any reliability finding to experience-based experts, especially law enforcement officers in criminal prosecutions. *Kumho Tire* needs to be revisited by this Court, to settle (as *Daubert* was meant to do) the breadth of contradictory case law that has developed in its wake.

II. CONGRESS VIOLATED THE COMMERCE CLAUSE AND THE TENTH AMENDMENT WHEN IT CRIMINALIZED PURELY INTRASTATE DRUG TRANSACTIONS ON THE BASIS THAT AT SOME REMOTE POINT, THOSE DRUGS HAD CROSSED STATE LINES.

A. THE COURT'S CURRENT JURISPRUDENCE ON INTRASTATE CRIMES STANDS AT ODDS WITH THE ORIGINAL MEANING OF THE COMMERCE CLAUSE AND THE TENTH AMENDMENT.

Mr. Calderon's prosecution is emblematic of thousands of prosecutions each year that have no foundation, and thus no authority, in the Commerce Clause. It is a bedrock principle of our republic that the federal government is one of limited, enumerated powers. "If no enumerated power authorizes Congress to pass a certain law, that law may not be enacted, even if it would not violate any of the express prohibitions in the Bill of Rights or elsewhere in the Constitution." *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 535 (2012). When the People ratified the Constitution, they did not give the federal government the ability to criminalize purely intrastate activity.

With this in mind, this Court should revisit its holding in *Gonzales v. Raich*, 545 U.S. 1 (2005). Lower courts use this precedent to allow the federal government to both violate the Commerce Clause and infringe on state sovereignty. Though lower

courts have consistently held that drug laws, such as 21 U.S.C. § 841 do not violate the Commerce Clause or the Tenth Amendment,[6] these holdings contradict the original understanding of both constitutional provisions and should no longer apply in the present era of globalized trade and finances where virtually anything can affect commerce.[7] This Court should restore the original meaning of the power to "regulate commerce … among the several states," U.S. Const. Art. I, Sec. 8, cl. 3, and honor the original understanding of the "powers not delegated to the United States by the Constitution" are thus "reserved to the States respectively, or to the people," U.S. Const. amend. X.

1. FEDERAL LAWS CRIMINALIZING PURELY INTRASTATE DRUG OFFENSES CONTRADICT THE ORIGINAL UNDERSTANDING OF THE COMMERCE CLAUSE.

Article I Section 8 of the U.S. Constitution gives Congress the power "[t]o

---

[6] *See Tisor*; *Oregon v. Ashcroft*, 368 F.3d 1118, 1142-43 (9th Cir. 2004), *aff'd sub nom. Gonzales v. Oregon*, 546 U.S. 243 (2006) (Wallace, J., dissenting) ("We have steadfastly upheld the Controlled Substances Act against Commerce Clause challenges, even in cases involving wholly intrastate activity"); *United States v. Sanders*, 909 F.3d 895, 906 (7th Cir. 2018), *cert. denied*, 139 S. C.t 2661 (2019); *United States v. Lerebours*, 87 F.3d 582, 584 (1st Cir. 1996), *cert. denied*, 519 U.S. 1060 (1997); *Smith v. United States*, 2007 WL 160996 at *4 (E.D. Tenn. 2007) (unpublished) (citing *Lerebours* as good law); *United States v. Parkes*, 497 F.3d 220, 228 (2d Cir. 2007), *cert. denied*, 522 U.S. 1220 (2008); *United States v. Hohn*, 293 Fed. App'x 395, 399 n.3 (6th Cir. 2008) (unpublished); *and see generally United States v. [Jerome] Walker*, 2018 WL 10140178 at *1 n.1 (E.D. Pa. 2018) (unpublished) (listing circuits that have rejected Commerce Clause challenges to federal drug laws).

[7] The over-extension of the Commerce Clause prompted Judge Kozinski to remark, "[One] wonder[s] why anyone would make the mistake of calling it the Commerce Clause instead of the 'Hey, you-can-do-whatever-you-feel-like Clause.'" Alex Kozinski, *Introduction to Volume Nineteen*, 19 HARV. J.L. & PUB. POL'Y 1, 5 (1995).

regulate Commerce . . . among the several States." This Court has emphasized that "the grant of authority to Congress under the Commerce Clause, though broad, is not unlimited." *Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Engineers*, 531 U.S. 159, 174 (2001); *see also Raich*, 545 U.S. at 58 (Thomas, J., dissenting) ("If Congress can regulate this under the Commerce Clause, then it can regulate virtually anything—and the Federal Government is no longer one of limited and enumerated powers."). Congress's power does not extend to activity that "never crosses state lines." *Raich*, 545 U.S. at 58 (Thomas, J., dissenting). That *nexus* with interstate commerce was plainly central to this Court's decision in *United States v. Lopez*, 514 U.S. 549, 563–64 (1995).

Here, Mr. Calderon was in no way involved in importing or transporting the drugs in question across state lines. The criminal activity he was charged with consisted of moving drugs from one individual to another all within the state of Arizona. Congress cannot "regulate noneconomic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce." *United States v. Morrison*, 529 U.S. 598, 617 (2000). Despite this clear limitation on Congress's reach, courts have failed to check Congress's commerce power, demonstrating a misunderstanding of *Raich* and the Constitution in need of correction. *See Taylor v. United States*, 579 U.S. 301, 320 (2016) (Thomas, J., dissenting) ("*Raich* held at most that the market for marijuana comprises activities that may substantially affect commerce . . . [but] are not necessarily 'commerce.'").

Furthermore, allowing Congress to criminalize intrastate conduct contradicts the original meaning of the Commerce Clause. A thorough survey of originalist sources[8] reveals that the term "commerce" was understood to refer to "exchange" or "trade." *See* Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. CHI. L. REV. 101, 124 (2001). As James Madison explained, "the word trade was put in the place of commerce, the word foreign made it synonymous with commerce. Trade and commerce are, in fact, used indiscriminately, both in books and in conversation." James Madison, Letter to Professor Davis—not sent (1832), in Galliard Hunt, ed, 4 LETTERS AND OTHER WRITINGS OF JAMES MADISON 232, 233 (J.B. Lippincott 1865).

Relying on the Necessary and Proper Clause to augment the reach of the Commerce Clause is no answer to this challenge. The Necessary and Proper Clause "is not the delegation of a new and independent power." *State of Kan. v. State of Colo.*, 206 U.S. 46, 88 (1907). Otherwise, this short clause transforms a list of limited powers into a national police power. Certainly, regulating the health, safety, and morals of society could be necessary and proper to regulate activity that substantially affects commerce. But this Court has repeatedly rejected the notion of a federal police power.[9] The Necessary and Proper Clause is not a workaround to our system of

---

[8] Sources including the text of the Constitution, contemporary dictionaries, records from the constitutional convention, the Federalist Papers, and the ratifying conventions.

[9] *See, e.g.*, *Lopez*, 514 U.S. at 566 ("The Constitution ... withhold[s] from Congress a plenary police power"); *id.* at 584–85 (Thomas, J., concurring) ("[W]e always have rejected readings of the Commerce Clause and the scope of federal power that would permit Congress to exercise a police power"); *id.* at 596–597 and n.6 (noting that the

limited powers.

Ultimately, the Court rightly placed limits on the Commerce Clause in *Lopez* and *Morrison*, but *Raich* and subsequent lower court rulings (like *Tisor*) have eviscerated those limits. *See* Ilya Somin, Gonzales v. Raich: *Federalism as A Casualty of the War on Drugs*, 15 CORNELL J.L. & PUB. POL'Y 507, 525 (2006). "[F]uture substantive judicial review of congressional Commerce Clause authority is largely dead in the water until *Raich* is either limited or overruled." *Id.* at 526. Therefore, this Court should end these transgressions and restore the original meaning of the Commerce Clause.

2. FEDERAL LAWS CRIMINALIZING PURELY INTRASTATE DRUG OFFENSES INTRUDE ON AN AREA OF SOVEREIGNTY RESERVED TO THE STATES.

Not only does federal law that criminalizes purely intrastate activity violate the Commerce Clause, but it also infringes on state sovereignty as protected by the Tenth Amendment. *See Printz v. United States*, 521 U.S. 898, 919 (1997) ("Residual state sovereignty" is established "in the Constitution's conferral upon Congress of not all governmental powers, but only discrete, enumerated ones, Art. I, § 8," and this was made "express by the Tenth Amendment's assertion that the powers not delegated to the United States by the Constitution, nor prohibited by it to the States,

---

first Congresses did not enact nationwide punishments for criminal conduct under the Commerce Clause); *United States v. Kebodeaux*, 570 U.S. 387, 402 (2013) (Roberts, C.J., concurring) ("[A] federal police power […] could not be material to the result in this case—because it does not exist").

are reserved to the States respectively, or to the people"); *see also Lane County. v. Oregon*, 74 U.S. 71, 76 (1868) (explaining that the Constitution leaves to the states "nearly the whole charge of interior regulation," and "to them and to the people all powers not expressly delegated to the national government are reserved."). This principle is summarized best in Federalist No. 45:

> The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite. The former will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce; with which last the power of taxation will, for the most part, be connected. The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State.

THE FEDERALIST NO. 45, at 289 (C. Rossiter ed. 1961).

The principle of state sovereignty over the policies within its own borders was especially pronounced in the area of criminal law. At the Founding, it was understood that the punishment of intrastate crimes would fall within the province of the state and not the federal government. *See, e.g.*, *Cohens v. Virginia*, 6 Wheat. 264, 426, 428 (1821) (Marshall, C.J.) (stating that Congress "has no general right to punish murder committed within any of the States," and it is "clear" that "congress cannot punish felonies generally"); *Bond v. United States*, 572 U.S. 844, 854 (2014) (quoting *United States v. Fox*, 95 U.S. 670, 672 (1877)) ("A criminal act committed wholly within a State 'cannot be made an offence against the United States, unless it have some relation to the execution of a power of Congress, or to some matter within the

jurisdiction of the United States."); *United States v. Bass*, 404 U.S. 404 U.S. 336, 350 (1971) ("Absent proof of some interstate commerce nexus in each case, [a law] dramatically intrudes upon traditional state criminal jurisdiction."). Thus, drug laws such as the one at issue here intrude on the dominion of states as traditionally contemplated and protected by the Tenth Amendment. *See Morrison*, 529 U.S. at 618 ("[R]egulation and punishment of intrastate violence that is not directed at the instrumentalities, channels, or goods involved in interstate commerce *has always been the province of the States*") (emphasis supplied).

This understanding is foundational to our system of federalism. It establishes important boundaries between state and federal governments. Yet, it is flouted by a federal criminal code that knows no such bounds. Like ignoring the proper metes and bounds of the Commerce Clause, ignoring the Tenth Amendment also leads to erroneously granting Congress a federal police power. *See Bond*, 572 U.S. at 854 (quoting *Cohens*, 6 Wheat. at 428) ("For nearly two centuries it has been 'clear' that, lacking a police power, 'Congress cannot punish felonies generally.'"). This Court underscored that it "can think of no better example of the police power, which the Founders denied the National Government and reposed in the States, than the suppression of violent crime and vindication of its victims." *Id.* But the warnings did not stop there. As Justice Kennedy stated, "Were the Federal Government to take over the regulation of entire areas of traditional state concern, areas having nothing to do with the regulation of commercial activities, the boundaries between the spheres

of federal and state authority would blur and political responsibility would become illusory." *Lopez*, 514 U.S. at 577 (Kennedy, J., concurring).

The trend of trampling on states sovereignty over crimes that occur wholly within their states has worsened at the lower court level. *See* Somin *supra*, at 523 ("Post-*Raich* Court of Appeals decisions confirm the view that congressional power is now virtually limitless. Five circuit courts have now held that *Raich* requires them to uphold a ban on the intrastate possession of internet images of child pornography,[10] reversing a previous trend under which the Eleventh and Ninth Circuits had held that at least some such prosecutions fall outside the scope of congressional Commerce Clause authority."[11]). Such a drift away from bedrock principles of our Constitution should be stopped by this Court.

In sum, the current doctrine on the federal criminalization of intrastate drug activity defies both the original understanding of the Commerce Clause and the Tenth Amendment. Without the judiciary enforcing the proper interpretation and application of both provisions, they will be rendered mere "parchment barriers," feckless against the ever-expanding vortex of federal power.

---

[10] *See United States v. Sullivan*, 451 F.3d 884 (D.C. Cir. 2006); *United States v. Maxwell (Maxwell II)*. 446 F.3d 1210 (11th Cir. 2006); *United States v. Chambers*, 441 F.3d 438 (6th Cir. 2006); *United States v. Grimmette*, 439 F.3d 1263 (10th Cir. 2006); *United States v. Jeronimo-Bautista*, 425 F.3d 1266 (10th Cir. 2005), *cert. denied*, 547 U.S. 1049 (2006); *United States v. Forrest*, 429 F.3d 73 (4th Cir. 2005).

[11] *United States v. Maxwell (Maxwell I)*, 386 F.3d 1042 (11th Cir. 2004), *vacated* 546 U.S. 801(2005), *overruled*, 446 F.3d 1210 (11th Cir. 2006); *United States v. McCoy*, 323 F.3d 1114 (9th Cir. 2003).

B. THE QUESTION PRESENTED IS BOTH IMPORTANT AND RECURRING.

Federal criminal laws have proliferated, continuing a modern trend that predates *Raich*. Put simply, "[o]ver the last several decades, federal criminal law has mushroomed beyond recognition." Rachel E. Barkow, *Federalism and Criminal Law: What the Feds Can Learn from the States*, 109 MICH. L. REV. 519, 523 (2011). As a result, the federal prison population is now "larger than the prison population of any single jurisdiction" *Id.* As one might expect, federal court dockets have not been immune to this rise—federal criminal law accounts for nearly 70,000 cases annually, which is roughly double the number of cases from 25 years earlier. *See* Sara Sun Beale, *Rethinking the Identity and Role of United States Attorneys*, 6 OHIO ST. J. CRIM. L. 369, 400 and n.173 (2009). In particular, federal drug cases have risen "approximately 300% in the stretch from 1980 to 1990 and another 45% from 1990 to 2000." Barkow *supra*, at 524–5; *and see generally*, Kathleen F. Brickey, *Criminal Mischief: The Federalization of American Criminal Law*, 46 HASTINGS L.J. 1135, 1162 n.154 (1995).

As the number of federal criminal statutes continues to tick upward, our federal criminal code should respect the boundaries set forth by the Constitution's promise of both a federal government of enumerated, limited powers and a government that respects individual liberty through the due process of law. As this Court has underscored, "The Constitution requires a distinction between what is truly national and what is truly local." *Morrison*, 529 U.S. at 617-18. As the "faithful

guardians of the Constitution," THE FEDERALIST NO. 78, at 469 (C. Rossiter ed. 1961), this Court should step in and address this important and pressing issue.

The other modern trend affecting this analysis is globalization of trade and finances. The Framers lived in an era when local sale of locally grown/manufactured items could have no appreciable effect on interstate or international trade. Today however, the interrelatedness of trade, finances, and communication have changed the playing field where "impact on commerce" is analyzed, leading to ready application of the Commerce Clause far beyond its originally intended scope. The resultant treatment of "local" commercial activity as affecting national scale trade has resulted in blending local with interstate for Commerce Clause purposes. *See Raich*, 545 U.S. at 49-57, 49 (O'Connor, Rehnquist and Thomas, JJ., dissenting) ("The Court uses a dictionary definition of economics to skirt the real problem of drawing a meaningful line between 'what is national and what is local'"). Nevertheless, this Court has been sensitive to adjust its jurisprudence to accommodate developments in technology and society over time. *E.g.*, *Riley v. California,* 5734 U.S. 373, 385-86 (2014). Consistent with that policy, the Court should reconsider *Raich* and similar Commerce Clause jurisprudence justifying the government's extension of the Commerce Clause based on modern globalized interrelatedness of commerce and finances onto intrastate drug transactions that had not been contemplated by the Framers.

C. THIS IS AN EXCELLENT VEHICLE FOR RESOLVING THIS ISSUE.

Mr. Calderon's case is an excellent vehicle for the Court to consider these important constitutional questions. The issue of Mr. Calderon's narcotics charges turns on whether the federal government has constitutional authority to criminalize purely intrastate drug activity. Thus, there are no alternative grounds for the decision below. And there are no outstanding factual disputes, so the issues of law are dispositive. This case is unencumbered by procedural anomalies and presents a situation that is typical for cases arising under 21 U.S.C. § 841. Furthermore, all issues are properly preserved, as both were raised at the lower court and direct appeal levels.

CONCLUSION

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

Respectfully submitted,

Donna Lee Elm

/s/ Donna Lee Elm
Counsel of Record for Petitioner

No.

IN THE

SUPREME COURT OF THE UNITED STATES

JAIME CALDERON,

Petitioner,

v.

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 APPENDIX

2021 WL 5027792
Only the Westlaw citation is currently available.
United States Court of Appeals, Ninth Circuit.

UNITED STATES of America, Plaintiff-Appellee,
v.
Jaime CALDERON, aka Jaime Arredonde, aka Jaime Rene Calderon, Defendant-Appellant.

No. 20-10234
|
Argued and Submitted October 19, 2021 San Francisco, California
|
FILED October 29, 2021

Appeal from the United States District Court for the District of Arizona, Steven Paul Logan, District Judge, Presiding, D.C. Nos. 3:18-cr-08126-SPL-1, 3:18-cr-08126-SPL

Attorneys and Law Firms

Rachel Cristina Hernandez, Assistant U.S., USPX—Office of the US Attorney, Phoenix, AZ, for Plaintiff-Appellee.

Donna Lee Elm, at, Law Practice of Donna Elm, Cottonwood, AZ, for Defendant-Appellant.

Before: WATFORD and HURWITZ, Circuit Judges, and BAKER,[*] International Trade Judge.

MEMORANDUM[**]

***1** Jaime Calderon challenges his convictions for multiple counts of aiding and abetting possession of heroin with intent to distribute in violation of 21 U.S.C. § 841(a)(1), (b)(1)(C) and 18 U.S.C. § 2. We affirm.

1. Calderon contends that the district court committed reversible error by admitting the expert testimony of Special Investigator Adrian Garcia without making an express reliability finding. A district court "necessarily abuses its discretion" when it makes no reliability finding pursuant to its gatekeeping function under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). *United States v. Valencia-Lopez*, 971 F.3d 891, 898 (9th Cir. 2020). Because the district court failed to make the required reliability finding, we must determine whether this error was harmless.

To establish harmlessness, the government must show either that (1) the record below establishes that the admitted testimony was relevant and reliable under *Daubert*, or (2) it is more probable than not that the jury would have reached the same verdict absent the evidence. *United States v. Ruvalcaba-Garcia*, 923 F.3d 1183, 1190 (9th Cir. 2019). The government has made both showings here.

First, the record establishes that Garcia's testimony had "a reliable basis in the knowledge and experience of the relevant discipline." *Id.* (quoting *Estate of Barabin v. AstenJohnson, Inc.*, 740 F.3d 457, 463 (9th Cir. 2014) (en banc), *overruled on other grounds by United States v. Bacon*, 979 F.3d 766 (9th Cir. 2020) (en banc)). Garcia's testimony explaining the role and usage of cell phones in prison was adequately supported by evidence in the record about his qualifications, knowledge, and experience, which included approximately 30 criminal investigations, hundreds of interviews related to the introduction of contraband into prisons, and thousands of prison cell searches. *See United States v. Hankey*, 203 F.3d 1160, 1169 (9th Cir. 2000). Second, it is more probable than not that the jury would have reached the same verdict absent the evidence. Garcia's brief testimony did not concern the central issue at trial, identification of Calderon's voice on the recorded phone calls. *See Valencia-Lopez*, 971 F.3d at 902. Given the evidence presented on that issue, the jury would likely have convicted Calderon even if Garcia had not testified. We thus conclude that the district court's error was harmless.[1]

2. Calderon next argues that the district court erred by prohibiting all independent research concerning prospective and seated jurors. Because Calderon again did not object below, despite having ample opportunity to do so, we review only for plain error. Although we have concerns about the breadth of the district court's order, we find no plain error because Calderon has not shown that the district court's order affected his substantial rights. *See United States v. Olano*, 507 U.S. 725, 734–35 (1993). The parties submitted joint voir dire questions that the district court asked of prospective jurors, neither party was prohibited from asking follow-up questions about any topic, and no challenges for cause were denied. Nor does Calderon allege that any of the jurors who were ultimately seated were biased or partial. Because any harm

resulting from the district court's order is entirely speculative, Calderon has failed to demonstrate that his substantial rights were affected.

***2 3.** Calderon is not entitled to relief based on alleged prosecutorial misconduct. Calderon contends that the government committed misconduct in relying on allegedly false testimony by Detective Roe. At trial, Roe testified about a prior interaction he had with Calderon in 2013 or 2014. Calderon asserts that this testimony was false because he was incarcerated during part of this period. To prevail on this claim, Calderon must establish that: (1) the testimony was actually false; (2) the government knew or should have known the testimony was false; and (3) the testimony was material. *United States v. Houston*, 648 F.3d 806, 814 (9th Cir. 2011). The testimony at issue fails the first prong of this test, as the date range was offered as an approximation and spanned a period in which the interaction between Calderon and Roe could have occurred. *See United States v. Renzi*, 769 F.3d 731, 752 (9th Cir. 2014).

4. Finally, the district court did not err in denying Calderon's motion to dismiss for lack of jurisdiction. We have previously held that the drug-trafficking laws under which Calderon was convicted represent a valid exercise of Congress's authority under the Commerce Clause. *United States v. Tisor*, 96 F.3d 370, 374–75 (9th Cir. 1996).

AFFIRMED.

All Citations

Not Reported in Fed. Rptr., 2021 WL 5027792

Footnotes

* The Honorable M. Miller Baker, Judge for the United States Court of International Trade, sitting by designation.

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

1 Calderon argues alternatively that he was not provided with the required notice regarding the scope of Garcia's testimony. The testimony to which Calderon objects emerged on re-direct, following cross-examination. There was no objection to this testimony when it emerged below, so we review for plain error. *See United States v. Blueford*, 312 F.3d 962, 974 (9th Cir. 2002). We find no plain error here because Garcia's testimony fell within the scope of the notice provided by the government.