No. _____

_____

IN THE

SUPREME COURT OF THE UNITED STATES

_____

RAFAEL VILLANUEVA – PETIITIONER

v.

UNITED STATES OF AMERICA – RESPONDENT

_____

PETITION FOR WRIT OF CERTIORARI

_____

FROM THE UNITED STATES COURT
OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

1. Because the trial court and the Fifth Circuit erred by finding Mr. Villanueva competent to stand trial, it violated his due process rights.

2. Because it is not one of the federal crimes enumerated by the constitution and further is beyond the scope of the Commerce Clause and further that it is unconstitutionally vague, the trial court and the Fifth Circuit erred by failing to declare unconstitutional the statute under which Mr. Villanueva was prosecuted.

LIST OF PARTIES

All parties do not appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

1. Rafael Villanueva, Defendant-Appellant.

2. United States of America, Plaintiff-Appellee.

3. Counsel for Plaintiff-Appellee:
   Assistant United States Attorneys Karen Betancourt and Paul Marian (in district court), and Carmen Castillo Mitchell and John A. Reed (on appeal).

4. Counsel for Defendant-Appellant:
   Ed Stapleton and Nathaniel Perez (in district court), and Ed Stapleton (on appeal).

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari be issued to review the judgment below.

OPINIONS BELOW

The opinion of the United States Court of Appeals appears at Appendix A to this petition and is unpublished.

The opinion of the United States District Court appears at Appendix B to this petition and is unpublished.

JUISDICTION

The date on which the United States Court of Appeals decided Mr. Villanuva's case was June 7, 2022.

A petition for rehearing was not urged.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves issues pursuant to 6th Amendment and 21 U.S.C. Sections 841 and 846, 18 USC § 1956, 31 USC § 5332

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STATEMENT OF THE CASE

A. The offenses and plea.

Mr. Villanueva, a citizen of Mexico, was charged by indictment on July 25, 2017, in Brownsville, Texas. Mr. Villanueva was charged with the following:

> COUNT 1: Conspiracy to possess with intent to distribute more than 5 kilograms of cocaine 21 USC §§ 846, 841(a)(1), and 841(b)(1)(A)(1).
>
> COUNT 2: Possession with intent to distribute more than 5 kilograms of cocaine; that is approximately 11.96 kilograms of cocaine 21 USC §§ 841(a)(1) and 841(b)(1)(A) and 18 USC 2.
>
> COUNT 3: Possession with intent to distribute more than 5 kilograms of cocaine; that is approximately 27.5 kilograms of cocaine 21 USC §§ 841(a)(1) and 841(b)(1)(A) and 18 USC 2.
>
> COUNT 4: Conspiracy to laundering of monetary instruments 18 USC § 1956(h).
>
> COUNT 5: Bulk Cash Smuggling 31 USC §§ 5332(a)(1) and (b) and 18 USC § 2.
>
> COUNT 6: International Money Laundering 18 USC §§ 1956(a)(2)(B)(i) and 2.

On July 2, 2019, Mr. Villanueva entered his plea of not guilty. On June 19, 2019, a competency trial before the judge was held. On January 21, 2020, Mr. Villanueva proceeded to jury trial before United Stated District Judge Fernando Rodriguez Jr. On January 28, 2020, the jury found Mr. Villanueva guilty of all Counts 1-6. On April 29, 2021, a sentencing hearing before the judge was held.

B. Statement of Facts

On February 16, 2018, a hearing was held by the Magistrate Judge arriving at a conclusion that Mr. Villanueva was not competent to proceed to trial at that time. On September 26, 2018, the Federal Medical Center requested an extension of evaluation and treatment, and this motion was granted. On June 19, 2019, a competency hearing was held with witnesses and exhibits filed. On June 24, 2019, an order of competency was entered as to Mr. Villanueva.

The memorandum opinion of the trial court described the nature Mr. Villanueva's brain injury and permanent neurological sequelae, adopting findings by the Government's expert, Dr. Wadsworth:

> *In August 2016, about a year before his arrest, Villanueva was found "unresponsive after falling secondary to alcohol and drug use resulting in respiratory failure." (Wadsworth Rpt., Doc. 281, 3) He remained comatose for some time and was diagnosed with a "sever[e] bihemisphere brain injury" that would result in "permanent neurological sequelae". (Id.) Villanueva's medical state slowly improved and in October 2016, he was released to a rehabilitation center. (Id.) He later returned to his home. Some symptoms from the stroke persist, such as slurred speech and difficulty walking. (Id. at 8–9) And he has reported significant memory loss, including of the stroke itself and of the facts underlying the charges in this case.* (Id. at 3–4, 8–15).

The trial court reviewed images taken from a cell phone that contained several saved videos showing Mr. Villanueva engaging in life activities. The trial judge states, "The footage demonstrated that Villanueva had observable difficulty talking and walking." The trial court also noted jail calls describing loss of memory.

C. Sentencing

On April 29, 2021, Mr. Villanueva was sentenced to LIFE for counts 1, 2, 3, 240 months on count 4, 60 months on count 5 and 240 months on count 6.

D. Appeal

Mr. Villanueva timely filed his appeal to the United States Court of Appeals for the Fifth Circuit and affirmed the District Courts judgment.

REASONS FOR GRANTING THE PETITION

1. Because the trial court erred by finding Mr. Villanueva competent to stand trial, it violated his due process rights.

The legal standards being applied by the trial court are internally inconsistent as applied. We begin with the premise: "[T]he criminal trial of an incompetent defendant violates due process." *Cooper v. Okla.*, 517 U.S. 348, 354 (1996). From there, the two standards being applied will result in different findings. On the one hand: "A defendant is competent where he has 'the present ability to consult with his lawyer with a reasonable degree of rational understanding and [has] a rational as well as factual understanding of the proceeding against him.'" *United States v. Porter*, 907 F.3d 374, 380 (5th Cir. 2018) (quoting United States v. Simpson, 645 F.3d 300, 306 (5th Cir. 2011)); see also 18 U.S.C. § 4241(a)–(d) (establishing the applicable standard). On the other hand: *Drope v. Missouri,* 420 U.S. 162, 171 (1975) ("[A] person whose mental condition is such that he lacks the capacity . . . to assist in preparing his defense may not be subjected to a trial.").

If Mr. Villanueva was unable to remember the events for which he was charged as crime, he would not meet the second standard of being able to assist in preparing his defense. Even if he had a rational understanding of the proceedings, if he cannot aid his lawyer in responding to accusations of codefendants regarding who did what

and when, he is not able to assist in preparing the defense. This limitation was especially harmful in Mr. Villanueva's case. After his stroke and extended time in coma, the evidence gives an inference that he became everybody's scapegoat. And why not, since he was in position to defend himself. Mr. Villanueva faced the additional problem that his voice and speech had changed after the stroke and since the wiretap tapes were purportedly made of him. Defense counsel argued that he was especially denied his right to testify, because not only had he suffered amnesia, but the judge prohibited evidence of the stroke and its impact on his memory and speech: "I mean, I know we see these differently, but I see them as a man who's post-stroke. I think maybe some of the jurors will, too. He's impaired in -- in many ways and it will explain. Part of the problem that I've got is, if he's going to testify and he cannot remember things, it will be held against him that -- that he claims not to remember without an understanding as to why he cannot remember."

The trial court in his memorandum discusses the issue of memory loss. It is undisputed that Mr. Villanueva suffered brain injury and memory loss. However, the trial court finds that Mr. Villanueva purposely exaggerated memory deficits. The trial judge in his memorandum then goes from the finding of exaggeration of memory deficits to a finding that Mr. Villanueva had adequate memory to assist his attorney in his own defense.

However, no expert or fact witness and no piece of evidence in the record ever supports a finding that he remembers the facts surrounding the accusations against him. The key to being able to reply to these accusations is remembering the facts.

As noted by the trial judge, the prosecution has the burden of establishing this fact: The Government bears the burden of proving that the defendant is competent. *United States v. Pervis*, 937 F.3d 548, 554 (5th Cir. 2019).

The due process violation cited in *Cooper*, is supported by the requirement that the accused be able to present a defense under the 6th Amendment. For example, the 5th Circuit recognizes this right and reverses a conviction in which the client was not allowed to talk to his lawyer, during a thirteen-hour overnight recess, in *United States v. Torres*, 997 F.3d 624 (5th Cir. 2021):

> "The Sixth Amendment guarantees a criminal defendant the right to the assistance of counsel for his defense. U.S. Const. Amend. VI. In *Geders v. United States*, 425 U.S. 80, 91 (1976), the Supreme Court held that an order preventing a testifying defendant from consulting with his counsel "about anything" during a 17-hour overnight recess between his direct and cross examination violated his Sixth Amendment right to the assistance of counsel. But the Supreme Court narrowed the *Geders* rule in *Perry v. Leeke,* 488 U.S. 272, 284–85 (1989), holding that an order barring consultation with counsel during a short recess between a defendant's direct and cross-examination that only lasted "a few minutes" did not violate the Sixth Amendment."

United States v. Torres, 997 F.3d 624, 627 (5th Cir. 2021).

Mr. Villanueva's memory loss deprived him counsel, not 17 hours, but throughout the years of representation before trial.

The Supreme Court has recognized that a primary interest secured by the Sixth Amendment's Confrontation Clause is the right of cross-examination. *Davis v. Alaska*, 415 U.S. 308, 315 (1974). The defense's theory was that the government witness made a hasty and faulty identification of the defendant in order to shift the suspicion away from himself or because he feared that his probationary status would

be jeopardized if he did not satisfactorily assist the government in obtaining a conviction. *Id*. at 311. The district court refused to allow the defendant to question the government witness about his current probation. *Davis*, at 311. The Supreme Court held that the district court's limitation on cross-examination was an abuse of its discretion and reversed the conviction. *Id*. at 319, 94 S.Ct. at 1112. The Fifth Circuit has also reversed because of limitations on cross examination. *United States v. Jones,* 930 F.3d 366 (5th Cir. 2019).

Mr. Villarreal's case is different from the amnesia case of *United States v. Doke*, 171 F.3d 240, 248 (5th Cir. 1999) upon which the trial court relied for its decision. First, Mr. Villanueva's physical injury, his brain damage, was not demonstrated by *Doke*. Mr. Villanueva had a medically documented stroke and *Doke* did not. Both were hospitalized and unconscious, but Mr. Villanueva's was for a greater duration. Next, *Doke* could remember the events surrounding his charges if he was shown old documents relating to it, but there is no evidence that Mr. Villanueva had this ability. The government expert who evaluated *Doke* said *Doke's* memory function is still adequate…." *Id*. at 248. We have no such showing about Mr. Villanueva. The only conclusion given were that he had lost memory but was exaggerating. These findings do not quantify is ability to assist trial counsel. *Doke* had a "considerable intelligence" before his diminution of abilities, such that he was then "not much worse off than many average defendants." *Id*. The government has given no such showing about Mr. Villanueva. Factors considered as part of the "circumstances of each individual case" are different between *Doke* and Mr. Villanueva. *Doke* was not precluded from

taking the stand on matters within his memory by "some other pathological or psychological condition." *Id*. Mr. Villanueva's stroke left him hard to understand when he spoke and limited in his ability to walk. Also, the *Doke's* court believed it was "possible" that restoration of Doke's memory would not "materially aid his defense." *Id*. Mr. Villanueva's defense could not be known because of his memory loss, the difference being that Doke was convicted with a paper trail and Mr. Villanueva was convicted based on the snitch testimony of six codefendants and federal agents who relied on their testimony. The experts in *Doke* were contrary to each other. On the contrary, government and defense experts largely agreed to these facts: Mr. Villanueva had brain damages from a stroke resulting in memory loss and later exaggerated the extent of his memory loss. The government evidence provided no basis for finding the factors provided in *Dokes*.

Mr. Villanueva's loss of memory deprived him of the ability to exercise his constitutional right to testify. Criminal defendants have a right to testify in their own behalf under the Due Process Clause of the Fourteenth Amendment, the Compulsory Process Clause of the Sixth Amendment, and the Fifth Amendment's privilege against self-incrimination. *Rock v. Arkansas,* 483 U.S. 44, 49-53 (1987).

The government brought six conspirators in a drug business to point at Mr. Villanueva and say he was the boss. All had incentive to point their finger at the harmless, stroked out, Mr. Villanueva, rather than each other or anyone more dangerous or powerful. The remaining twelve witnesses were government witnesses who based their testimony largely on the conspirators' testimony. A review of this

testimony demonstrates the unfairness of having Mr. Villanueva face trial when he lacked a memory of the events and the harm done by his inability to respond:

1. Roberto Ruiz. Roberto Ruiz was brought from jail to testify that he was hired to transport narcotics belonging to Mr. Villanueva. Maybe that was true, but then again if Mr. Villanueva had not suffered memory loss, maybe he could have shown it was not true. Perhaps the owner of the drugs was Mr. Medina, who featured prominently in the testimony. We cannot know because Mr. Villanueva cannot remember. The conspiracy continued after Mr. Villanueva was in a coma, so he was not required for the enterprise. Someone else (Medina) dropped them off. Ruiz claimed he received a phone number for the delivery in Houston, from Mr. Villanueva, but Mr. Villanueva was unable to either dispute this point or provide a good faith basis for cross-examination to dispute this statement. Ruiz admitted he neither met with Mr. Villanueva nor was paid by him when he returned, but rather Medina. Then, Mr. Ruiz started working for Julian Muraira, not Mr. Villaunueva. Or he was paid by a man named Jose Carreon, but not Mr. Villanueva. Ruiz is the source of identifying the voice of Mr. Villanueva and claims that Mr. Villanueva was speaking in code to disguise the drug business. Mr. Villanueva lacked memory to respond to this. We know Ruiz was in the drug business for four years before he met Mr. Villanueva when he worked for a boss named Rolando Compita. He had also worked for another boss in alien smuggling, about six years before. Roberto Ruiz admitted that it was safer to blame Mr. Villanueva than

Compita: “And did -- did you begin then to try to approach Compita in order to make a -- make a case on him?” A. “No.” Q. “Because he's a scary guy, right? “A. “I don't know. Yeah, I guess.” Ruiz had been released from jail to work for federal agents, but rather than go to his employer, he starts anew setting up a case against Mr. Villanueva. Ruiz had enough against him to spend the rest of his life in prison and he had to get busy and make a case against someone and the person he chose was Mr. Villanueva. Ruiz had almost no contact with Mr. Villanueva until he started initiating phone calls for the government. Through his testimony, by making Mr. Villanueva, rather than himself, the leader, Ruiz gained point adjustments on his sentencing both for leadership role and safety valve. These benefits contributed to the reduction of Ruiz’ sentence from a mandatory ten year minimum to 39 months.

2. Jose Carreon. Similarly, Mr. Villanueva could neither respond to nor assist in providing material for cross-examination of Mr. Carreon. Carreon knew Mr. Villanueva through family relations and claimed Mr. Villanueva brought him into the drug business at a young age. This is damning testimony, if true, but Mr. Villanueva required a memory of the events to respond either by testimony or through cross-examination. Carreon admitted to loading the drugs into a Cherokee himself and then he claimed not to remember where he got the drugs. Carreon did go on to claim it was Mr. Villanueva who had installed the false compartment. Carreon came from jail and a reduced sentence of 24 months based on his willingness to testify against Mr. Villanueva. Even if Carreon

correctly described the words of the recruitment, Carreon admitted that he may have been bragging to sound more important than he was because he had been drinking. Mr. Villanueva may have remembered these conversations differently or may have remembered that had not occurred at all or may have explained it as puffing himself up if he had remembered the incident. Carreon admitted to having before falsely represented the incident—Carreon blamed the false statements of his own emotional state saying he was "nervous and crying." Carreon had already received credit in his letter from the Government on his sentence for testifying against Julian Muraira as his boss. In this trial, before he was impeached by the letter, he changed the person he claimed was the drug boss from Muraira to Villanueva.

3. Julian Muraira. Again, Muraira recites what he claims Mr. Villanueva, his brother-in-law, said. This is admissible, under Federal Rule of Evidence 801(d)(2)(E) permitting statements made during and in furtherance of a conspiracy. He cannot deny the statement, but this should not allow it to somehow gain a greater level of reliability as would be the case of a coconspirator who remembers but is unwilling to respond to an allegation. Muraira received a reduced sentence for his testimony, moving from a risk of a life to 288 months to a sentence of 60 months.
4. Agent Jose Francisco Chapa. Agent Chapa was engaged in wire intercepts of what he claimed were Mr. Villanueva's phone. Agent Chapa had never heard Mr. Villanueva's voice so he was dependent upon a witness who was trying to

minimize his sentence. Because Mr. Villanueva lacked memory of the events he could not know if he had a basis to challenge the foundation of the calls or his identity or the agent's interpretation of the calls that were purportedly in code. Maybe the agent is correct that "brewskies" means cocaine and not beer and maybe "Gordo" means Lopez and not Fat, but certainly Mr. Villanueva should have been able to respond to this if it did not and his loss of memory deprived him of this defense.

5. Felicia Vinson, forensic chemist with DEA.
6. Lorenzo Ponce, DEA.
7. Xavier Padilla, investigator for Cameron County District Attorneys' Office.
8. Keith Lahay, DEA. Also lacked foundation to identify Mr. Villanueva.
9. George Garcia, deputy sheriff, Cameron County.
10. Carlos Martinez, investigator Cameron County Sheriff.
11. David Lopez identifies Mr. Villanueva. Then, during government testimony he testifies that he had already falsely accused Mr. Villanueva, claiming that he had made many trips for Mr. Villanueva transporting cocaine and money. He admitted this was false, but he said it to protect Gerardo Rojas who "was like a father to me." So, Mr. Lopez blamed the patsy and not the real boss. Mr. Villanueva had no memory of any of it and was therefore unable to expand on this false accusation to show it was a pattern among his accusers. Mr. Lopez was relied in part upon by the federal agents to identify Mr. Villanueva's voice. He first denied he could recognize it and then changed his story. So, was it his

voice? We cannot find out from Mr. Villanueva because of his memory loss, but this testimony would have been helpful to help the jury decide at which time Mr. Lopez was telling the truth. Mr. Lopez reduced his sentence by his testimony against Mr. Villanueva from 235 months to 27 months. This rendition by the court reporter highlights the unreliability of Mr. Lopez' testimony against Mr. Villanueva when Mr. Lopez says to the prosecutor: *And, then, of course, you were mad at me (slight chuckle) for not telling the truth at the beginning."*

12. Gabriela Cavazos, homeland security. Cavazos was present at the house when Mr. Villanueva was arrested nearly a year after his stroke on July 31, 2017. She found no drugs. The trial court prohibited cross-examination about Mr. Villanueva's restricted mobility because of the stroke, despite allowing the introduction of his wife's weapon.
13. Meagan Elizabeth Huerta. Forensic scientist. Weight of cocaine load.
14. Gerardo Rojas. Mr. Rojas was the drug kingpin being protected by David Lopez. He was facing life in prison. Like the others, he had a great deal to gain by shifting blame to Mr. Villanueva. He made claims of drug transactions that had no other corroborating evidence, beyond his testimony. His story was both self-serving and may well have been made up out of whole cloth, but with no memory of the events, Mr. Villanueva was in no position to contradict it. Further, Rojas laid the foundation by claiming to recognize Mr. Villanueva's voice and interpreted purported "code." This was after the federal agents

reported that Rojas had previously said the recordings were not about drugs. Again, Mr. Villanueva, lacking memory, could not dispute his account.

15. Juan Enrique Velasquez. Facing a mandatory minimum term of ten years in prison to life, Mr. Velasquez received a 16-month sentence and was free by the time of trial. The government flew him in for his testimony. He was under the impression that he didn't cooperate with his testimony, he would go back to prison: "Q. Okay. And, by the way, even though you finished your sentence, what would happen to you if you were to say I don't want to testify? A. (No response.) Q. Did they tell you? A. I don't know. Well, they would probably take me in." He admitted he lied to the federal agents.

16. Brennan Brophy. The DEA agent who put a value on the drugs.

17. Sonia Hurtado. Agent Hurtado, IRS criminal investigator, testified that if Mr. Villanueva had unexplained income, it was related to illegal activity. She opined that he had too much money for his income, in part because he paid off a mortgage loan with $12,000. Mr. Villanueva could neither respond and explain where the money came from nor provide any basis for cross-examination.

18. Jose Pineda, Jr. Homeland Security investigator. Pineda summarized the testimony of the codefendants who had already testified.

A few comments from precedent about the reliability of this testimony: Jailhouse testimony is particularly suspect, and although allowed, caution should be taken to avoid abuses. *United States v. Cervantes-Pacheco*, 826 F.2d 310 (5th Cir. 1987).

Coconspirator testimony claiming Mr. Villanueva said certain things in furtherance of a conspiracy is also suspect. Admission of a coconspirator's statement against Mr. Villanueva anticipates a gatekeeping function showing a reason to rebut the presumption of unreliability of the out of court statement. *United States v. Bailey,* 973 F.3d 548, 561 (5th Cir. 2020). The basis for allowing this testimony includes a concept that the defendant has adopted the accusatory statement by remaining silent. *United States v. Williams*, 445 F.3d 724, 735 (4th Cir. 2006). This test of reliability disappears if the accused person has no memory of the statement. The testimony of most of the agents was based on no personal knowledge under Federal Rule of Evidence 602, but merely summaries and opinions about what coconspirators had claimed. This type of testimony neither assists the jury as lay opinion testimony under Federal Rule of Evidence 701, nor does it qualify as expert testimony under Federal Rule of Evidence 702. Moreover, this summary testimony by federal agents is not contemplated by Federal Rule of Evidence 1006 and is only allowed under limited circumstances under *United States v. Castillo*, 77 F.3d 1480, 1499 n.36 (5th Cir. 1996)) and *United States v. Lucas*, (5th Cir. 2017). Differently put, all of the government evidence, although admissible, is legally suspect, because of the high risk of unreliability. Mr. Villanueva's testimony, with full memory of the event, would have been important for responding to this witness's testimony.

The issue of amnesia arose in another 5th Circuit case after the *Doke* case in *United States v. Atkins*, 294 Fed. Appx. 892, 898 (5th Cir. 2008). Although the 5th Circuit reversed and remanded *Atkins* on other grounds, the opinion of the concurring

judge wrote separately to challenge a finding of competence in a case in which the defendant had suffered amnesia. Like our case, Atkins had amnesia following brain injury and coma. The concurring opinion notes, as we argue here, that merely understanding the proceedings does not create competence to assist in the defense if memory of the event is gone. As with Mr. Villanueva: "There is no way to reconstruct the scene accurately, through the time-tested method of the adversarial process, without his testimony." *Id. at 898*. Mr. Villanueva's case, like that of Atkins' does not permit reconstruction of the events from a paper-trail: "But, in fact, it is the complex financial nature of *Doke* that made the defendant's amnesia less problematic there than it is here." *Id*. at 899. The amnesia prevented Atkins from getting a fair trial in a similar way that Mr. Villanueva was prevented from getting a fair trial. Mr. Villanueva could not defend himself because of his memory loss. He could not effectively testify, he could not assist in the cross-examination of his accusers, he could not dispute the foundation or explain the "code" in the wiretaps. These facts deserve a "hard look" and a decision that the district court's finding of competence was "clearly arbitrary and unwarranted."

2. Because it is not one of the federal crimes enumerated by the constitution and further is beyond the scope of the Commerce Clause and further that it is unconstitutionally vague, the trial court and then the Fifth Circuit erred by failing to declare unconstitutional the statute under which Mr. Villanueva was prosecuted.

Review of this issue is preserved by rulings of the trial court on January 15, 2020:

> ORDERED that the Opposed Motion to Hold the Statute under which Mr. Villanueva is being Prosecuted is Beyond the Scope of the Commerce Clause (Doc. 318) is DENIED.
>
> ORDERED that the Opposed Motion to Hold the Statute under which Mr. Villanueva is being Prosecuted Unconstitutional because the Controlled Substance Act and Others are not among the Federal Crimes Enumerated by the Constitution and are Beyond the Scope of the Commerce Clause (Doc. 327) is DENIED.

Mr. Villanueva is charged with count (1) Conspiracy to possess with intent to distribute more than 5 kilograms of cocaine 21 USC 846, 841(a)(1), and 841(b)(1)(A), count (2) Possession with intent to distribute more than 5 kilograms of cocaine; that is approximately 11.96 kilograms of cocaine 21 USC 841(a)(1) and 841(b)(1)(A) and 18 USC 2, count (3) Possession with intent to distribute more than 5 kilograms of cocaine; that is approximately 27.5 kilograms of cocaine 21 USC 841(a)(1) and 841(b)(1)(A) and 18 USC 2, count (4) Conspiracy to laundering of monetary instruments 18 USC 1956(h), count (5) Bulk Cash Smuggling 31 USC 5332(a)(1) and (b) and 18 USC 2 and count (6) International Money Laundering 18 USC 1956(a)(2)(B)(i) and 2.

Mr. Villanueva would show that as to each of these statutes, this is an exercise of federal jurisdiction beyond that permitted by the Commerce Clause. The United States Constitution, Article 1, Section 8, Clause 3, provides: "To regulate Commerce with foreign Nations, and among the foreign States, and with the Indian Tribes." The power to regulate interstate commerce was defined as also regulating interstate

navigation in *Gibbons v. Ogden*, 22 U.S. (9Wheat.) (1824). Then, in *United States v. Lopez*, 514 U.S. 549 (1995) the Supreme Court held that under the Commerce clause a law was unconstitutional if the crime alleged does not have a substantial effect on interstate commerce. The Court found in *Seminole Tribe v. Florida*, 517 U.S. 44 (1996) that the Commerce Clause does not give the federal government the power to abrogate the sovereign immunity of the states. Although the Court seemed to step back from this principle in in *Gonzales v. Raich*, 545 U.S. 1 (2005), please see the dissent of Justice Thomas.

We urge that all federal criminal penalties will soon be limited by a textualist and originalist view of the federal criminal statutes under which Mr. Villanueva is being prosecuted. We ask these statutes to be held unconstitutional as beyond the scope of the Commerce Clause or any enumerated powers of Congress.

Precedent

We bring the trial court's attention to *Gonzales v. Raich*, 545 U.S. 1 (2005) and *United States v. Alvarez*, 670 Fed. Appx. 881 (Cir. 2016) (unpublished) for a consideration of the constitutionality of the Controlled Substances Act (CSA). We ask that these cases be reversed or superseded based on the principles described below. For the reasons described below, we challenge 21 U.S.C. Section 841 and 846, 18 U.S.C. Section 2, 31 U.S.C. Section 5316, 18 U.S.C. Section 1956, 21 U.S.C. 853, and 18 U.S.C. Section 982. This motion is based on recent rulings by the Supreme Court:

> *Indeed, it seems possible that much of Title 18, among other parts of the U. S. Code, is premised on the Court's incorrect interpretation of the Commerce Clause and is thus an incursion into the States' general criminal jurisdiction and an imposition on the People's liberty.*

Gamble v. United States, 139 S. Ct. 1960, 1980 n.1 (2019)

Unconstitutionality of 21 USC Sections 841 and 846, the Controlled Substances Act

21 USC 841(a) states. "Unlawful acts Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally— (1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance. 21 USC 841(a). Moreover, 21 USC 846 state, "Any person who attempts or conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy." 21 USC 846

We urge that *Gonzales v. Raich* and the cases upon which it relies are in error and should be reversed. The Controlled Substances Act (CSA) is unconstitutional on the following grounds:

1. It is not one of the four enumerated specific crimes over which the Constitution gives the federal government authority: counterfeiting, piracy, offenses against the law of nations, and treason.

2. The CSA is not "necessary and proper for carrying into Execution" the enumerated powers of congress.

3. The Commerce Clause (previously used to support the statute) does not authorize the CSA.

4. Treaty obligations may not be used to expand the power of Congress beyond its constitutional limits.

5. The CSA creates risk for violations of the Double Jeopardy Clause by allowing two sovereigns to prosecute the same acts.

6. A violation of the Separation of Powers and an unconstitutional delegation of legislative powers has been made to the Attorney General, the Secretary of State, the Drug Enforcement Administration and the United States Sentencing Commission, to determine what are controlled substances and their precursors, who is a 'regulated person', what is a 'regulated transaction,' what are the penalties under the sentencing guidelines under the Chemical Diversion and Trafficking Act of 1988, Domestic Chemical Diversion Control Act of 1993, The Comprehensive Methamphetamine Control Act of 1996, the Methamphetamine Anti-Proliferation Act of 2000, and the Combat Methamphetamine Epidemic Act of 2005

7. The CSA is unconstitutionally vague based on (a) failure to give notice of the offense and (2) legislation of general guidelines and delegating to another its non-delegable duty to establish legislation.

No pleading or proof have been offered against Mr. Villanueva that he has violated any enumerated crimes or provisions of the Constitution. We urge the indictment be dismissed because of a failure to state a federal claim.

Put simply, much if not all of Art. I, § 8 (including portions of the Commerce Clause itself), would be surplusage if Congress had been given authority over matters that substantially affect interstate commerce. An interpretation of cl. 3 that makes the rest of § 8 superfluous simply cannot be correct. Yet this Court's Commerce Clause jurisprudence has endorsed just such an interpretation: The power we have accorded

Congress has swallowed Art. I, § 8.3. Indeed, if a "substantial effects" test can be appended to the Commerce Clause, why not to every other power of the Federal Government? There is no reason for singling out the Commerce Clause for special treatment. Accordingly, Congress could regulate all matters that "substantially affect" the Army and Navy, bankruptcies, tax collection, expenditures, and so on. In that case, the Clauses of § 8 all mutually overlap, something we can assume the Founding Fathers never intended. Our construction of the scope of congressional authority has the additional problem of coming close to turning the Tenth Amendment on its head. Our case law could be read to reserve to the United States all powers not expressly prohibited by the Constitution. Taken together, these fundamental textual problems should, at the very least, convince us that the "substantial effects" test should be reexamined. *Lopez* at 589. The CSA is unconstitutionally vague based on (a) failure to give notice of the offense and (2) legislation of general guidelines and delegating to another its non-delegable duty to establish legislation. *United States v. Davis,* 139 S. Ct. 2319 (2019), describes the Constitutional violations caused by this vagueness. For example, otherwise legal and helpful substances may be illegal under the CSA such as (I) Iodine and (J) Hydrogen chloride and Claritin-D. “Suspicious transactions” are criminalized, but not defined. The regulation is delegated without a basis for knowledge.

We ask this court to again review the federal controlled substances act.

CONCLUSION

Mr. Villanueva's trial could not be a normal trial in which normal standards of

fairness apply. Because he was brain damaged from the stroke and suffered memory loss, every part of the trial was impacted. We urge this court find that the trial court erred and find de novo that Mr. Villanueva was not competent to stand trial and reverse the judgment of the trial court. Further, we urge this Court to reconsider federal drug and money laundering criminal statutes to see whether they are allowed by the Commerce Clause.

Respectfully submitted,

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