SUPREME COURT CASE NO._____

SUPREME COURT OF THE UNITED STATES

EMANUEL HIGUERA,

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, COURT OF APPEAL CASE NO. 19-50169

PETITION FOR A WRIT OF *CERTIORARI*

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QUESTION PRESENTED

Whether district courts should be required to hold some type of preliminary proceedings before allowing experienced-based law enforcement experts to testify before the jury.

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PETITION FOR A WRIT OF CERTIORARI

Emanuel Higuera petitions this Court for a writ of *certiorari* to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS AND JUDGMENTS BELOW

The Ninth Circuit's order denying petition for rehearing is unreported. (Appendix ("App.") C.) The Ninth Circuit's decision affirming the district court's judgment and Petitioner's convictions is reported at *United States v. Holguin*, 51 F.4th 841 (9th Cir. 2022) (*see also* App. A). The court of appeal also issued an unpublished memorandum decision addressing other issues, which can be found at *United States v. Holguin*, 2022 WL 7441252 (9th Cir. 2022), (*see also* App. B).

JURISDICTION

The Ninth Circuit denied a petition for rehearing on January 20, 2023, (App. C), and affirmed Petitioner's convictions on October 13, 2022 (App. A).

This Court has jurisdiction under 28 U.S.C. § 1254(1). The Ninth Circuit had jurisdiction pursuant to 28 U.S.C. § 1291. The district court had jurisdiction under 18 U.S.C. § 3231.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fifth Amendment to the United States Constitution states: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the

land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

2. Rule 702 of the Federal Rules of Evidence states: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise."

STATEMENT OF THE CASE

In January 2014, Petitioner Higuera was found to be in possession of 5.9 grams of methamphetamine. For this, Higuera was charged in Count 16 of the indictment with possession with the intent to distribute at least 5 grams of methamphetamine in violation of 21 U.S.C. §§ 841 (a)(1), (b)(1)(B)(viii).

In addition, however, the government charged Higuera with RICO conspiracy in violation of 18 U.S.C. § 1962 (d) (Count One), and conspiracy to possess with intent to distribute and distribute at least 50 or 5 grams of methamphetamine in violation of 21 U.S.C. §§ 846, 841 (a)(1), (b)(1)(A)(viii),

(b)(1)(B)(viii), and at least one kilogram or 100 grams of heroin in violation of 21 U.S.C. §§ 841 (a) (1), (b) (1) (A) (i), (B) (i) (Count 11), all in connection with the Canta Ranas gang. After a fourteen-day trial, the jury unanimously found that Higuera was not involved in any heroin trafficking as charged in Count 11, but convicted him of the remaining charges.

At trial, "Officer Robert Rodriguez, lead case agent for the Whittier Police Department, provided background information about Canta Ranas and explained how the gang operates. Officer Rodriguez testified that Canta Ranas had about 140 members active in the Santa Fe Springs and Whittier areas. He explained that the gang generates revenue through criminal activity – primarily drug trafficking. Younger gang members sell drugs 'fronted' to them by gang leaders. Officer Rodriguez also explained that Canta Ranas collects taxes both from their own membership and from the surrounding community. Revenue generally goes to Canta Ranas's leader, an incarcerated Mexican Mafia member named David Gavaldon." *Holguin*, 51 F.4th at 851-52.

"Officer Rodriguez then transitioned into lay testimony, describing investigative activities he conducted, explaining the meaning of gang language and monikers, and characterizing the roles that individuals played in the organization. During this phase, Officer Rodriguez identified David Gaitan as a senior gang member who distributed narcotics to foot soldiers." *Id.* at 852.

Before trial, defendants moved for a *Daubert*[1] hearing regarding the testimony of Officer Rodriguez among other purported experts. The district court held no hearings, conducted no voir dire, and made no reliability findings before letting the government's proposed experts testify. *See Holguin*, 51 F.4th at 855. The Ninth Circuit's majority opinion held that such preliminary proceedings are not required. But, as the dissent explained, given the difficulty in evaluating the reliability of experienced-based expert testimony, a preliminary proceeding or hearing as part of district court's *Daubert* gatekeeping function should be required. *See Holguin*, 51 F.4th at 866.

District courts should be required to hold preliminary proceedings when requested prior to allowing testimony by police, detective or other law enforcement witnesses who base their expertise on their experience rather than scientific methodology, in order to accurately assess their reliability.

This Court should grant certiorari to consider this important question.

REASONS FOR GRANTING THE WRIT

Because no *Daubert* hearing was conducted, the district court failed to assess the methodologies, reasoning, or principles Rodriguez applied. Indeed, none of the *Daubert* factors was considered. Instead, the court allowed the parties to submit Rodriguez's unfiltered testimony to the jury. "Because the

[1] *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).

district court abused its discretion by admitting [Rodriguez's] testimony without having performed its gatekeeping function, [this Court] must next determine whether the error was harmless." *United States v. Ruvalcaba-Garcia*, 923 F.3d 1183, 1190 (9th Cir. 2019). Courts "begin with the presumption of prejudice," *United States v. Valencia-Lopez*, 971 F.3d 891, 902 (9th Cir. 2020), and "[t]he government bears the burden to show harmlessness, a burden it can sustain in this context by showing either that 'it is more probable than not that the jury would have reached the same verdict even if the expert testimony had not been admitted, or that the admitted expert testimony was relevant and reliable . . . based on the record established by the district court," *Ruvalcaba-Garcia*, 923 F.3d at 1190 (cleaned up).

The government here cannot meet its burden. First, the district court's failure to inquire specifically into the basis for Rodriguez's testimony before he took the stand resulted in the impermissible introduction of testimony that does not appear connected to any indicia of reliability based on identifiable experience. The record is too sparse, and this Court cannot determine whether certain testimony was admitted pursuant to Rule 701 or Rule 702, or whether the witnesses were qualified. "[R]elaxation of the usual requirement of firsthand knowledge" for experts "is premised on an assumption that the expert's opinion will have a reliable basis in the knowledge and experience of his discipline" and

that it "rests on a reliable foundation." *Daubert*, 509 U.S. at 592, 597. Rodriguez only had contacts with "50" members of the Canta Ranas gang. (5-ER[2]-886-887.) His "contacts" with these gangs would "[m]ost often" involve "'consensual contacts,' where [his] partner and [him] would be . . . driving around," and they would contact random gang members "and have a conversation with [them] and see what they were doing, where they were going." (4-ER-713.) Though Rodriguez had participated in "80 arrests," only "approximately 15 to 20 " of them involved Canta Ranas members. (5-ER-958.) And while Rodriguez testified that "in [his] estimation" it was "pretty common," or about "30 to 40 percent," of Canta Ranas members carry firearms, he "never checked" any "records to see how many times law enforcement encountered a known Canta Ranas gang member" who was armed. (5-ER-932.)

With respect to Brown Brotherhood gang, "in total," Rodriguez has come into contact with "say 10 to 15 " of their members in his career. (5-ER-948, 949.) Rodriguez also admitted that he was "not" an expert on Brown Brotherhood, (5-ER-950-51), and that he had "never" testified as an expert on Brown Brotherhood, (5-ER-950). Thus, basis for Rodriguez's opinions was "subjective belief or unsupported speculation," which is not a reliable basis for testimony

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[2] Citations are the Excerpts of Record filed in the Ninth Circuit preceded by the volume number. (*See* Ninth Circuit Case No. 19-50169, Docket Entry No. 20.)

under Rule 702. *Daubert*, 509 U.S. at 590. He offered numerous opinions regarding the alleged roles of the defendants and coconspirators based entirely on his "participation in th[e] investigation" or "knowledge [he] obtained as lead case agent . . . in this investigation," or no source at all. (4-ER-835, 837, 841, 849, 852, 854-56, 866, 868; 5-ER-878, 880-81.) Thus, when Rodriguez was testifying about the defendants' respective roles and collective guilt, the identity and structure of the Canta Ranas's leadership, membership requirements, methods of communication and generating income, sub-groups of the gang, rivalries and alliances with other gangs, and the possession and use of firearms, (4-ER-837, 840, 841, 852, 854, 855, 856, 868), he was simply "repeating what someone else told him . . . during this or any other investigation." *United States v. Vera*, 770 F.3d 1232, 1239 (9th Cir. 2014).

There is also no question that the error in admitting Rodriguez's testimony was harmful. First, "[t]he absence of" an appropriate "instruction prejudiced the defendants by materially increasing the risk that the jury gave [Rodriguez's] testimony undue deference[.]" *Vera*, 770 F.3d at 1246. Moreover, Rodriguez's erroneously admitted statements were relevant to several critical issues, including the identity and structure of the Canta Ranas's leadership, membership requirements, methods of communication, methods of generating income for the enterprise, including drug trafficking and violent crimes within

its territory and collecting "taxes," the use of coded language, signs, and symbols, and the meaning of those terms and symbols, sub-groups of the gang, rivalries and alliances with other gangs, and the possession and use of firearms. "The importance of [Rodriguez's] testimony was underscored by the prosecution in its closing argument[,]" *Hayes v. Brown*, 399 F.3d 972, 986 (9th Cir. 2005), where the prosecutor repeatedly relied on it, (*see* 11-ER-2629, 2636, 2637, 2646, 2705, 2707, 2709); *see also Kyles v. Whitley*, 514 U.S. 419, 444 (1995) ("The likely damage is best understood by taking the word of the prosecutor . . . during closing arguments[.]"); *United States v. Sedaghaty*, 728 F.3d 885, 902 (9th Cir. 2013) ("Cabral's importance is confirmed by her starring role in the government's closing argument[.]"); *United States v. Kojayan*, 8 F.3d 1315, 1323 (9th Cir. 1993) ("Evidence matters; closing argument matters; statements from the prosecutor matter a great deal.").

As to the defendants here, there was significant evidence that they were acting on their own rather than part of a RICO conspiracy with Conta Ranas. For example, the government presented no evidence whatsoever to even suggest that the drugs found on Higuera when he was arrested in January 2014 were in any way connected to the alleged conspiracy or that they had any connection to Canta Ranas. Rather, the government's case depended on a handful of phone conversations between Higuera and David Gaitan – whom Rodriguez claimed

"based on [his] participation in the investigation . . . distributed narcotics to foot soldiers for the Canta Ranas gang." (5-ER-880; *see also* 10-ER-2706: [government's counsel telling the jury during closing arguments that "Higuera's conversations with David Gaitan" establish that Higuera "is directly connected to the right-hand man and the major drug supplier of this criminal enterprise."); *Gautt v. Lewis*, 489 F.3d 993, 1013 (9th Cir. 2007) ("The purpose behind a closing argument is to explain to the jury what it has to decide and what evidence is relevant to its decision. The government's closing argument is that moment in the trial when a prosecutor is compelled to reveal her own understanding of the case as part of her effort to guide the jury's comprehension.").

The calls between Rodriguez and Gaitan – upon which the government's entire case depended – only spanned a period of less than two months – from May 17, 2013 to July 11, 2013 – and discussed drugs in small quantities. (3-ER-430-471.) And, Higuera was found with drugs in January 2014, (9-ER-1983-1984) – more than six months after his last conversation with Gaitan in July 2013, (3-ER-471).

Moreover, it was undisputed that Higuera was not a member of the Canta Ranas gang; rather, he was a member of Brown Brotherhood. (9-ER-2627.) And, the government's expert, Rodriguez, testified that Brown Brotherhood is not a subset of Canta Ranas. (E-ER-1023.) Indeed, according to Rodriguez, Canta

Ranas and Brown Brotherhood "historically" have "been rivals," and that their relationship is "very fluid" such that "at any given time," it could change from "good" to "bad." (5-ER-950, 951.) And, Rodriguez admittedly did "not" know the status of the relationship between Brown Brotherhood and Canta Ranas in 2013, *i.e.*, when the calls took place. (5-ER-955.) Nonetheless, Rodriguez was permitted to testify that Canta Ranas aligns with Brown Brotherhood "[f]or the sales of narcotics," (4-ER-735), which served as the only basis for the government's theory that Higuera was somehow responsible for more than the 5.9 grams of methamphetamine that was in his possession when arrested in January 2014.

It is thus no wonder that the jury doubted the government's case – so much so that it found it necessary to interrupt its deliberations and asked to rehear the conversations between Higuera and Gaitan, (*see* 12-ER-2807); *see also Merolillo v. Yates*, 663 F.3d 444, 457 (9th Cir. 2011) ("[T]he jury's request for a read back of . . . testimony illustrates the difficulty presented by the . . . testimony."); *United States v. Caruto*, 532 F.3d 822, 832 (9th Cir. 2008) ("The jury asked to see a copy of Kelley's written report, demonstrating that it was concerned with Caruto's post-arrest statement."); *United States v. Blueford*, 312 F.3d 962, 976 (9th Cir. 2002) ("[T]he jury asked for readbacks of . . . testimony while it was deliberating, so it evidently did not regard the case as an easy

one."). Further, the jury unanimously found that Higuera was not involved in any heroin trafficking, (12-ER-2818), which was undoubtedly because there was no evidence tying Higuera to any one in Canta Ranas's trafficking enterprise.

The fact that the error in this case was not harmless makes this petition a good vehicle for this Court to consider whether experienced-based experts should be required to undergo some type of preliminary proceeding before they are allowed to testify before a jury.

CONCLUSION

The Ninth Circuit's decision in this case allowed an officer with stale and limited information to testify as an expert without any *Daubert* hearing or reliability finding. More should have been required before such prejudicial and poorly supported evidence was used to convict petitioner of a RICO charge with a special drug quantity verdict that resulted in a significant increase in his sentence. This Court should grant certiorari to consider this important question.

Dated: April 19, 2023

Respectfully submitted,

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