No. _____

IN THE SUPREME COURT OF THE UNITED STATES

_____

CARLOS BARRAGAN LEON, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Mr. Carlos Barragan Leon was arrested at the border between Mexico and United States when border patrol agents found methamphetamine and fentanyl in the trunk of his car. Agents seized Mr. Leon's cell phone and downloaded texts written in Spanish from WhatsApp. Because the texts were deleted, the words of the original texts appeared in a different order. The words in the text were "scrambled". The government interpreter "rearranged" the words of the texts in an order that she "thought" the texter was thinking and writing.

The district court allowed the interpreter to testify as to the English meaning of the Spanish words in the text that she "rearranged" as evidence against Mr. Leon.

The Question Presented is:

Did the district court's failure to make the required reliability finding pursuant to Federal Rule of Evidence 702 of the methodology and principles underlying the expert translator's testimony of the translation of the text messages from Spanish into English when the words appeared "out of order and scrambled" after the texts were downloaded from WhatsApp violate Daubert v. Merrill, 509 U.S. 579 (1993) and Kumho Tire v. Carmichael, 526

U.S. 127 (1999) when the expert translator "rearranged" the scrambled words in a manner she "thought" Mr. Leon was "thinking", then translated her words into English and testified to the meaning of the words she rearranged?

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Petitioner respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINION BELOW

On February 6, 2025, the United States Court of Appeals for the Ninth Circuit affirmed in part, vacated in part and remanded Mr. Leon's appeal in United States v. Carlos Barragan Leon, No. 23-1025. A copy of this Memorandum Decision is attached hereto as Appendix "A".

JURISDICTION

On February 6, 2025, the United States Court of Appeals for the Ninth Circuit affirmed and remanded Mr. Leon's appeal. Jurisdiction is invoked

under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Federal Rule of Evidence 702:

Testimony by Expert Witnesses

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if the proponent demonstrates to the court that it is more likely than not that:

(a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;

(b) the testimony is based on sufficient facts or data;

(c) the testimony is the product of reliable principles and methods; and

(d) the expert's opinion reflects a reliable application of the principles and methods to the facts of the case.

STATEMENT OF THE CASE

On September 21, 2022, Mr. Leon was charged by an Indictment in count 1 with knowingly and importing 500 grams and more, to wit: approximately 20.54 kilograms (451.8 pounds) of a mixture and substance containing a detectable amount of methamphetamine into the United States from a place outside thereof in violation of Title 21 U.S.C. §§ 952 and 960.

(3-ER-471.) [1]

In count 2, Mr. Leon was charged with knowingly and intentionally importing 400 grams and more, to wit: approximately 3.52 kilograms (7.74 pounds) of a mixture and substance containing fentanyl into the United States from a place outside thereof in violation of Title 21 U.S.C. §§ 952 and 960. (3-ER-472.)

A jury found Mr. Leon guilty of both counts of the Indictment. (1-ER-2.) On May 19, 2023, the district court sentenced Mr. Leon to a term of 60 months on count 1 and count 2. The district court ordered that the two terms run concurrently with each other. (1-ER-3.)

Mr. Leon filed his timely Notice of Appeal on May 25, 2023. (3-ER-473.) On February 6, 2025, the Ninth Circuit affirmed in part, vacated in part, and remanded the case. (App. A.)

STATEMENT OF FACTS

In October 2021, Mr. Leon was driving his car from Mexico into the United States. At the San Ysidro port of entry, Mr. Leon was stopped by border patrol. Inside Mr. Leon's trunk, border patrol found packages of

[1] "ER" refers to the Excerpts of Record filed in the Ninth Circuit.

methamphetamine and fentanyl. Mr. Leon was arrested. (2-ER-89-95, 2-ER-133-135.)

REASONS FOR GRANTING THE WRIT

Federal Rule of Evidence 702 imposes a duty on the district court to ensure the expert translator's testimony is not speculative and is based on reliable principles and methods and in this case the district court failed to adhere to this duty when the expert translator was allowed to testify she "rearranged" the words of Mr. Leon's texts in a manner she "thinks" Mr. Leon was writing and then testified to the jury the English version of her rearranged words

During the government's case in chief, pursuant to Federal Rules of Evidence 702, the government presented expert testimony of a Spanish-English interpreter/translator. The government extracted deleted WhatsApp messages written in Spanish from Mr. Leon's cell phone that was seized when he was arrested. Because the messages were originally deleted, the words in the text messages came up in a different order than those written by the texter: The words were scrambled.

The translator "rearranged" the order of the scrambled words in a manner that she "thinks" Mr. Leon was writing. Mr. Leon argues that the

interpreter's testimony of the translation of the "scrambled" text messages should have been excluded because the testimony was unreliable. Under Rule 702, before admitting expert testimony, the district court must perform a "gatekeeping role" to ensure that the testimony is both relevant and reliable. Here, the district court failed to conduct a gatekeeping role to ensure that the interpreter's testimony regarding the unscrambled text messages was reliable. The interpreter's testimony also was not harmless because a government witness testified in manner consistent with the interpreter's version of the meaning of the text messages.

The Federal Rules of Evidence, and Rule 702, in particular, assign the trial court "the task of ensuring that an expert's testimony both rests on a *reliable foundation* and is relevant to the task at hand." (Emphasis added.) Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 597, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993). A court must further examine whether the reasoning or methodology underlying the expert's proffered opinion is reliable. Daubert v. Merrell, supra, 509 U.S. at 590, n. 9. Thus, an expert's testimony is admissible under Rule 702 if it rests on a reliable foundation and is relevant. Kumho Tire Co. v. Carmichael, 526 U.S. 137, 141, 119 S. Ct. 1167, 143 L. Ed. 2d 238 (1999).

During the government's case in chief, the interpreter translated "scrambled" WhatsApp text messages purportedly between Mr. Leon and an individual named "Ivan" relating to the charges in this case. (3-ER-331-360.) The WhatsApp text messages were originally deleted. If data has been deleted by a user from a cell phone, it can be retrieved by a program called Cellebrite. (2-ER-211-212). Sometimes Cellebrite scrambles the words when they are recovered from WhatsApp. (2-ER-211-212.)

Ms. Ruth Aida Smith, an interpreter from the U.S. Attorney's Office, testified she had difficulty translating the message thread between Mr. Leon and "Ivan" because of the order of the words that appeared within these messages:

> "Yes, they were provided as scrambled messages, text messages. So there are some of the text messages that are very long, many words. So you can rearrange them in different ways, and I actually wrote a translator's note in one particular text to let you know that it could be rearranged in different ways." (1-ER-39, 1-ER-51.)

Ms. Smith testified that she translates "what she thinks the person is saying". (1-ER-40.)

Ms. Smith's explanation that scrambled words in a text can be "rearranged in different ways" and that she translates the words in a manner that "she thinks the person is saying" demonstrates no sound basis to support

her methodology of translating scrambled words and certainly is not scientifically valid. Basically, Ms. Smith's "methodology" of translating scrambled words is what "she thinks the person is saying". How is this method reliable? It is really a guessing game on the part of the interpreter.

In this case, the district court relied solely on Ms. Smith's general qualifications and accepted Ms. Smith as "an expert in that area based on her education and experience. It will be both relevant and reliable for the jury to hear." (1-ER-218.) The district court did not require the government to explain the method Ms. Smith used to arrive at her interpretation of the scrambled words. "This was error. As a prerequisite to making the Rule 702 determination that an expert's methods are reliable, the court must assure that the methods are adequately explained." United States v. Hermanek, 289 F.3d 1076, 1094 (9th Cir. 2001).

The Ninth Circuit in this case found: "Here, in a finding supported by the expert's recounting of her extensive qualifications as a translator, including her ability to rearrange the order of the words in, i.e. "unscramble," the text messages, the district court concluded that it would be 'both relevant and *reliable* for the jury to hear [her testimony]." (Appendix "A", p. 2.) This finding is not supported by the record. The expert's explanation of

methodology "regarding her ability to rearrange the order of words in a scrambled text message" is as follows: she rearranges the scrambled words in a manner "she thinks the person is saying". This method does not explain how the expert knows "what the person is thinking" in a scientific manner or any reliable manner. This method is guessing game on the part of the expert and the expert should not be able to testify to her own thoughts.

Ms. Smith failed to adequately explain that her methods of unscrambling the words were reliable. She stated that she was able to unscramble the word order because of her knowledge of Spanish grammar and context. Ms. Smith emphasized that context is everything "because you are not in the mind of the person who texting" (1-ER-42.) If an interpreter is "not in the mind of the person texting," how can the interpreter really know what the person is texting? Ms. Smith's explanation of her methodology does not even meet minimum standards of reliability because her methodology is guessing what is on the mind of the texter. United States v. Rincon, 28 F. 3d 921, 924 (9th Cir. 1994)(explaining that the methods used by the expert must be described "in sufficient detail" such that the district court can determine if they are reliable.) "The trial judge in all cases of proffered expert testimony must find that it is properly grounded, well-reasoned, and *not speculative*

before it can be admitted. The…expert must explain how the conclusion is so grounded." (Emphasis added.) United States v. Hermanek, supra, 289 F. 3d at 1094.

Ms. Smith's testimony about her methods of translating scrambled words is not properly grounded and not well-reasoned. In fact, by her own admission, her methods are very speculative: "you can rearrange [the words] in different ways" and she translates in a manner "what she thinks of the person is saying". (1-ER-39, 1-ER-40, 1-ER-51.) "Under Rule 702, the proffered expert must establish that reliable principles and methods underlie the particular conclusions offered- [here, the interpretation of the scrambled words]. United States v. Hermanek, supra, 289 F. 3d at 1094.

"As the Supreme Court stated in Kumho, the expert must establish the reliability of the principles and methods employed 'to draw a conclusion regarding *the particular matter to which the expert testimony was directly relevant.*" (Emphasis in original.) United States v. Hermanek, supra, 289 F. 3d at 1094, citing to Kumho, supra, 526 U.S. at 154. Here, the interpreter failed to establish the reliability of her methods that underlie her particular conclusions of the English translation of the Spanish scrambled text messages.

The district court did "not have discretion to abandon the gatekeeping

function" altogether, Kumho Tire, 526 U.S. at 158-59, for Rule 702 clearly contemplates *some* degree of regulation of the subjects and theories about which an expert may testify". (Emphasis in original.) United States v. Ruvalcaba-Garcia, supra, 923 F.3d at 1189, Daubert v. Merrell, supra, 509 U.S. at 589.

"The admission of an expert's testimony without making any findings regarding the efficacy of [the experts] opinions constituted an abdication of the district court's gatekeeping role, and necessarily an abuse of discretion." United States v. Ruvalcaba-Garcia, supra, 923 F.3d at 1189. "To satisfy its 'gatekeeping' duty under Daubert, the court must make an explicit reliability finding." United States v. Ruvalcaba-Garcia, supra, 923 F.3d at 1190. Here, the district court failed to make an explicit reliability finding of the soundness of the interpreter's method of rearranging the scrambled words in the texts prior to translation.

The issue in this case is the reliability of the interpreter's testimony. "Reliability, which requires that the expert's testimony have 'a reliable basis in the knowledge and experience of the relevant discipline." United States v. Ruvalcaba-Garcia, supra, 923 F.3d. at 1188-1189, quoting Kumho Tire Co. v. Carmichael, supra, 526 U.S. at 149.

"The district court must assess whether 'the reasoning or methodology underlying the testimony is scientifically valid' and 'properly can be applied to the facts in issue'". United States v. Ruvalcaba-Garcia, supra, 923 F.3d at 1189, quoting Kumho Tire Co. v. Carmichael, supra, 526 U.S. at 152. "The test is not the correctness of the expert's conclusions but the soundness of his methodology." United States v. Ruvalcaba-Garcia, supra, 923 F.3d at 1189.

Here, the district court's failure to establish the required reliability findings of the methodology and principles underlying the expert translator's method of "rearranging" scrambled Spanish words in a text in a manner that she "thinks" the Mr. Leon is writing, then offering the English translation as evidence against Mr. Leon violates Federal Rule of Evidence 702 and this Court's precedent.

This petition for writ of certiorari should be granted.

CONCLUSION

For the foregoing reasons, Mr. Leon respectfully submits that the petition for writ of certiorari should be granted.

Dated: May 15, 2025

Respectfully Submitted,

Karyn H. Bucur

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Attorney for Petitioner

NOT FOR PUBLICATION

FILED

FEB 6 2025

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff - Appellee, v. CARLOS BARRAGAN LEON, Defendant - Appellant.	No. 23-1025 D.C. No. 3:22-cr-02191-JLS-1 MEMORANDUM*

Appeal from the United States District Court
for the Southern District of California
Janis L. Sammartino, District Judge, Presiding

Submitted February 4, 2025**
Pasadena, California

Before: WARDLAW, CALLAHAN, and HURWITZ, Circuit Judges.

Carlos Barragan Leon appeals his conviction and sentence for two counts of knowing importation of a Schedule II controlled substance in violation of 21

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

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

U.S.C. §§ 952 and 960. We have jurisdiction under 28 U.S.C. § 1291 and 18 U.S.C. § 3742. We affirm in part, and reverse and remand in part.

1. Leon contends that the district court erred by admitting the expert testimony of a Spanish-English translator without making a specific reliability finding as to the expert's ability to "unscramble" recovered WhatsApp messages between Leon and "Ivan," the owner of the vehicle Leon was driving when he was stopped at the border. Because Leon did not object below, we review his claim for plain error and will reverse only if there is "(1) error, (2) that is plain, and (3) that affects substantial rights." *United States v. Myers*, 804 F.3d 1246, 1257 (9th Cir. 2015) (internal quotation marks and citation omitted).

The district court did not plainly err in admitting the expert testimony. "The inquiry envisioned by Rule 702 is . . . a flexible one," *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 594 (1993), and district courts have broad latitude in determining both how to assess an expert's reliability and whether an expert's testimony is reliable, *see United States v. Jimenez-Chaidez*, 96 F.4th 1257, 1269 (9th Cir. 2024). Here, in a finding supported by the expert's recounting of her extensive qualifications as a translator, including her ability to rearrange the order of the words in, i.e. "unscramble," the text messages, the district court reasonably concluded that it would be "both relevant and *reliable* for the jury to hear [her testimony]."

APPENDIX A

2. The district court erred, however, by failing to orally pronounce the standard conditions of supervision at Leon's sentencing. The parties agree that a limited remand is appropriate in light of *United States v. Montoya*, which held that "a district court must orally pronounce all discretionary conditions of supervised release in the presence of the defendant." 82 F.4th 640, 652 (9th Cir. 2023) (en banc). We agree that a limited remand is warranted, and thus "vacate only the conditions of [Leon's] supervised release that were referred to as the 'standard conditions' in the written sentence but were not orally pronounced" at sentencing. *Montoya*, 82 F.4th at 656. On remand, the district court should orally pronounce "any of the standard conditions of supervised release that it chooses to impose," so that Leon may object to them if he chooses. *Id.*

AFFIRMED IN PART, VACATED IN PART, AND REMANDED.

APPENDIX A