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# OFFICERS AT THE GATE: WHY *UNITED STATES V. MEDINA-COPETE* SHOULD BE THE RULE AND NOT THE EXCEPTION

Mixcoatl Miera-Rosete\*

## INTRODUCTION

The illegal drug business in the United States is a multibillion dollar industry.<sup>1</sup> Like other major businesses, illegal drug sellers depend on sophisticated importation and distribution chains to supply their customers.<sup>2</sup> Sellers employ a variety of tactics to import illegal drugs into the United States.<sup>3</sup> However, “overland smuggling and subsequent transportation by vehicle exceeds all other methods combined.”<sup>4</sup> Drugs, often concealed in secret compartments,<sup>5</sup> traverse the country along eight principal corridors<sup>6</sup> to supply cities and states across the United States. When drugs are detected, sustaining a conviction against the traffickers can be difficult because prosecutors must prove that the occupants of the vehicle knew they were transporting drugs and or intended to manufacture, distribute, or dispense them.<sup>7</sup> To prove knowledge and intent, prosecutors must typically rely on circumstantial evidence. Recently, prosecutors have expanded their arsenal of circumstantial evidence to include expert testimony regarding the connection between religion and drug trafficking.

In 2011, police discovered roughly two pounds of 90% pure methamphetamine hidden in a secret compartment behind the dashboard of a truck

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\* University of New Mexico School of Law, Class of 2017. Thank you Professor Dawinder Sidhu for your invaluable instruction throughout the writing of this Note. I would also like to thank my friends and family for their help with everything in life, including this Note.

1. U.S. Department of Justice, *National Drug Threat Assessment*, 5 (2009), <http://www.justice.gov/archive/ndic/pubs31/31379/31379p.pdf> (“Mexican and Colombian DTOs generate, remove, and launder between \$18 billion and \$39 billion in wholesale drug proceeds annually”).

2. See U.S. Department of Justice, *Drug Movement Into and Within the United States*, JUSTICE.GOV, <http://www.justice.gov/archive/ndic/pubs38/38661/movement.htm> (last updated June, 30 2009).

3. For example, one of Mexico’s most notorious drug kingpins has been known to use underground tunnels, canned jalapeños, makeshift submarines, and catapults to get drugs across the U.S. Mexico border. See Patrick Radden Keefe, *Cocaine Incorporated*, NYTIMES.COM, [http://www.nytimes.com/2012/06/17/magazine/how-a-mexican-drug-cartel-makes-its-billions.html?\\_r=0](http://www.nytimes.com/2012/06/17/magazine/how-a-mexican-drug-cartel-makes-its-billions.html?_r=0) (last updated June, 15 2012).

4. See U.S. Department of Justice, *supra* note 2.

5. U.S. Department of Justice, *2015 National Drug Threat Assessment Summary*, 3 (2015), <http://www.dea.gov/docs/2015%20NDTA%20Report.pdf>

6. See U.S. Department of Justice, *supra* note 2.

7. See Brian R. Gallini, *To Serve and Protect? Officers as Expert Witnesses in Federal Drug Prosecutions*, 19 GEO. MASON L. REV. 363 (2012) (“The core federal drug statute . . . prohibits . . . knowingly or intentionally manufacturing, distributing, dispensing, or possessing with the ‘intent to manufacture, distribute, or dispense, a controlled substance’”) (quoting 21 U.S.C. § 841 (a)).

driven by Rafael Goxcon-Chagal (“Goxcon”).<sup>8</sup> Goxcon was pulled over for following another vehicle too closely.<sup>9</sup> His girlfriend, Maria Vianey Medina-Copete (“Medina”), was riding in the passenger seat at the time of the traffic stop.<sup>10</sup> During the stop, an officer noticed that Medina appeared to be reading a prayer from a small book.<sup>11</sup> At trial, the court allowed the prosecution to introduce the contents of the prayer that Medina was reading and admitted United States Marshal Robert Almonte (“Almonte”) as an expert to testify about the prayer’s meaning and its possible association with the drug trade.<sup>12</sup> Medina and Goxcon claimed to have been unaware of the presence of the methamphetamine in the truck,<sup>13</sup> but both were found guilty of “possession with intent to distribute” and conspiracy “to possess . . . with intent to distribute” more than 50 grams of methamphetamine.<sup>14</sup> On appeal, the United States Court of Appeals for the Tenth Circuit held that the trial court abused its discretion, under Fed. R. Evid. 702, by admitting Almonte’s expert testimony about the meaning of Medina’s prayer.<sup>15</sup>

The background section of this Note will provide a comprehensive overview of both the facts and law that were pertinent to the *Medina-Copete* court’s holding. It will track the historical development of Fed. R. Evid. 702 and the major cases that have shaped its application; explore the specific application of Fed. R. Evid. 702 to expert testimony by law enforcement officers in the Tenth Circuit; discuss the cultural phenomenon that has brought the religious practices of drug traffickers to the attention of prosecutors; discuss the rationale employed in the memorandum opinion order issued by the United States District Court for the District of New Mexico in *United States v. Goxcon-Chagal*,<sup>16</sup> and, conclude with a thorough discussion of the rationale employed by the United States Court of Appeals for the Tenth Circuit in *Medina-Copete*.

The first argument section of this Note will provide support for the *Medina-Copete* court’s holding. It will begin by discussing why Almonte’s testimony did not fall within one of the established lines of jurisprudence under which law enforcement officers are allowed to give experience-based expert testimony on subjects such as the tools of the drug trade. It will then explain why the *Medina-Copete* court applied the proper standard to evaluate Almonte’s experience-based expert testimony. It will conclude by arguing that the court was correct in holding that the question of whether an expert’s opinions are unfounded extrapolation from existing data must not turn on whether other courts have admitted similar testimony.

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8. U.S. v. Medina-Copete, 757 F.3d 1092, 1095, 1097 (10th Cir. 2014).

9. *Id.* at 1095.

10. Defendant-Appellant Maria Vianey Medina-Copete Opening Brief at 6, U.S. v. Medina-Copete 757 F.3d 1092 (10th Cir. 2014) (No. 13-2026).

11. *Medina-Copete*, 757 F.3d at 1096.

12. *Id.* at 1095, 1096.

13. *Id.* at 1098.

14. Appellee’s Answer Brief at 8, U.S. v. Medina-Copete 757 F.3d 1092 (10th Cir. 2014) (No. 13-2026).

15. *Medina-Copete*, 757 F.3d at 1105.

16. *United States v. Goxcon-Chagal*, 885 F. Supp. 2d 1118 (D. N.M. 2012) (on appeal the party’s names are switched so that the case becomes *Medina-Copete* not *Goxcon-Chagal*).

The second argument section of this Note will take the holding in *Medina-Copete* a step further and argue that the framework applied in *Medina-Copete* should extend to all experience-based expert testimony by law enforcement officers. This section will begin by presenting arguments to show that the rationale employed by the *Medina-Copete* court should not be limited to the facts of the case. It will then present arguments in favor of extending the three-part test applied in *Medina-Copete* to all forms of experience-based officer testimony and address possible counterarguments. The third argument section will present a series of test-suites and a framework for applying the *Medina-Copete* court's holding to common types of expert testimony offered by law enforcement officers.

The facts in *Medina-Copete* raise important issues about the degree to which courts are properly evaluating experience-based expert testimony. Although it is fairly recent, the *Medina-Copete* Court's holding has already been adopted as an instructive example by several leading practice manuals.<sup>17</sup> And, while many authorities have quoted or cited the *Medina-Copete* opinion, none have critically examined its rationale or explored its potential implications. Similarly, while several scholars have addressed the topic of law enforcement officer expert testimony,<sup>18</sup> none have addressed it in the specific context presented in *Medina-Copete*. This Note will seek to complement the scholarship surrounding the *Medina-Copete* court's holding by arguing in favor of the rationale of the opinion and by using the opinion to advocate for the adoption of a more rigorous standard to apply when evaluating experience-based expert testimony by law enforcement officers.

## BACKGROUND

### I. Expert testimony and the development of rule 702

Expert testimony plays both a persuasive and informative role in the litigation process.<sup>19</sup> Experts are powerful because, unlike lay witnesses, they are allowed to provide extensive opinion testimony<sup>20</sup> and they can base their opinion on a wide range of facts and data that may be otherwise inadmissible.<sup>21</sup> However, because experts are afforded exceptional breadth in terms of both the content and

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17. See § 6266 Scientific Evidence, Non-Scientific Experts, and Reliability, 29 Fed. Prac. & Proc. Evid. § 6266 (1st ed.); 1 Mod. Sci. Evidence § 1:27 (2014–2015 Edition); 31A Am. Jur. 2d Expert and Opinion Evidence § 172; 23A C.J.S. Criminal Procedure and Rights of Accused § 1497.

18. See e.g. Walter G. Amstutz, Bobby Marzine Harges, *Evolution of Controversy: The Daubert Dilemma: The Application of Daubert v. Merrell Dow Pharmaceuticals Inc. to Expert Testimony of Law Enforcement Officers in Narcotics-related Cases*, 23 U. HAW. L. REV. 67 (2001); Brian R. Gallini, *To Serve and Protect? Officers as Expert Witnesses in Federal Drug Prosecutions*, 19 GEO. MASON L. REV. 363 (2012).

19. See KENNETH S. BROUN ET AL., MCCORMICK ON EVIDENCE 53–54 (4th ed. Vol. 1 1992).

20. Compare Fed. R. Evid. 701 (explaining the limited instances in which it is permissible for a lay witness to provide opinion testimony), and Fed. Evid. 702 (explaining that an expert witness “may testify in the form of an opinion” so long as they meet the qualification outlined in subsection (a)–(d) of Fed. R. Evid. 702).

21. See Fed. R. Evid. 703.

basis of their testimony, Congress and the courts have seen fit to enact rules to prevent unqualified individuals from being admitted as experts.<sup>22</sup>

Prior to the adoption of the Federal Rules of Evidence, the “dominant standard” governing the admissibility of expert testimony in Federal courts came from *Frye v. United States*.<sup>23</sup> In *Frye*, the District of Columbia Court of Appeals held that the science or methodology “from which [an expert’s] deduction is made must . . . have gained general acceptance in the particular field in which it belongs” before the expert can be admitted to testify at trial.<sup>24</sup> The *Frye* rule remained “the predominant view” among courts until 1993 when the courts decided *Daubert v. Merrell Dow Pharmaceuticals*.<sup>25</sup>

In *Daubert*, the Supreme Court held that the “general acceptance” standard articulated in *Frye*<sup>26</sup> was “superseded by the adoption of the Federal Rules of Evidence.”<sup>27</sup> The court explained that the “general acceptance” standard was too “rigid” and not supported by the text of the Federal Rules,<sup>28</sup> which, at the time, stated that: “[i]f 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.”<sup>29</sup> The court distilled two requirements from the language of Fed. R. Evid. 702.<sup>30</sup> First, to qualify as “scientific knowledge” the expert’s opinion must be grounded in reliable principles and methods.<sup>31</sup> Second, to “assist the trier of fact” the expert must show that their reliable principles and methods can be applied to the case at hand in a way that will help the jury understand a pertinent fact or issue.<sup>32</sup> The first principle seeks to determine the reliability of the expert’s testimony, while the second principle is directed at testing the relevance of the proffered testimony.<sup>33</sup>

The *Daubert* court proceeded to offer “some general observations” about factors the trial court might consider when evaluating the reliability of an expert’s testimony.<sup>34</sup> Factors the court identified as useful were: (1) whether the technique or theory “can be tested” objectively; (2) whether it has a “known or potential” error rate; (3) whether the field maintains “standards controlling the technique” and its

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22. See, e.g., Fed. R. Evid. 702 § (a)–(d); *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993).

23. § 6266 Scientific Evidence, Non-Scientific Experts, and Reliability, 29 Fed. Prac. & Proc. Evid. § 6266 (1st ed.).

24. *Frye v. United States*, 293 F. 1013, 1014 (D.C. Cir. 1923).

25. DAVID H. KAYE ET AL., *THE NEW WIGMORE A TREATISE ON EVIDENCE*, 281–282 (2004).

26. *Id.*

27. *Daubert*, 509 U.S. 587.

28. *Id.* at 588.

29. See PL 93–595 (HR 5463), PL 93–595, Jan. 2, 1975, 88 Stat 1926.

30. *Daubert*, 509 U.S. 590–91.

31. *Id.* at 590.

32. *Id.* at 590–91.

33. *Id.*

34. *Id.* at 593–94.

application; and (4) the whether it has gained “general acceptance” within the scientific community.<sup>35</sup>

Two important cases that followed *Daubert* provided additional clarification and guidance. In *Gen. Elec. Co. v. Joiner*, the court held that a district court’s decision to admit or deny expert testimony must be reviewed under the deferential “abuse-of-discretion standard” that applies to other evidentiary rulings.<sup>36</sup> Further, the court explained that although *Daubert* requires courts to focus on the reliability of the expert’s principles and methods rather than on testing their conclusion “nothing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert.”<sup>37</sup> Hence, the court clarified that an expert’s principles and methods have to be both reliable in theory and reliable in the way that they have been applied to reach the conclusions offered in a particular case.

In *Kumho Tire Co., v. Carmichael*, the court extended *Daubert* to apply to non-scientific expert testimony.<sup>38</sup> Specifically, the court held that the “general principle” expressed in *Daubert* that the trial judge must “ensure that any and all scientific testimony . . . is not only relevant, but reliable,”<sup>39</sup> “applies to all expert testimony.”<sup>40</sup> Further, the court explained that the trial court “should” consider the *Daubert* factors (testability, peer review, error rate, maintenance of standards, and general acceptance<sup>41</sup>) to experience-based expert testimony if it finds that they are “reasonable measures” for determining the reliability of a particular expert’s proffered testimony.<sup>42</sup>

In 2000, Fed. R. Evid. 702 was amended to incorporate the principles expressed in *Daubert*, *Kumho* and *Joiner*.<sup>43</sup> The update to Rule 702 added the language contained in subsections (b)-(d), of the restyled rules.<sup>44</sup> In its current iteration the text of Fed. R. Evid. 702 is as follows:

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:

- (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

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35. *Id.*

36. *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 141, 143 (1997).

37. *Id.* at 146.

38. *Kumho Tire Co., v. Carmichael*, 526 U.S. 137, 147, 149 (1999).

39. *Id.* (quoting *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579, 589 (1993)).

40. *Id.*

41. *Id.* at 149–150.

42. *Id.* at 152.

43. See Fed. R. Evid. 702 advisory committee’s note to 2000 amendment (“[r]ule 702 has been amended in response to *Daubert* . . . and to the many cases applying *Daubert*, including *Kumho Tire Co.*”).

44. See GEORGE FISHER, EVIDENCE, 783 (2d ed. 2008).

(d) the expert has reliably applied the principles and methods to the facts of the case.<sup>45</sup>

The Advisory Committee notes explain that the amendment to Fed. R. Evid. 702 affirms “the trial court’s role as gatekeeper and provides some general standards that the trial court must use to assess the reliability and helpfulness of proffered expert testimony.”<sup>46</sup> The committee also explained that the amendment was designed to be consistent with the *Kumho* court’s holding that “all types of expert testimony” must be evaluated for reliability and relevance prior to admission.<sup>47</sup>

On the subject of experience-based testimony, the committee explained that the changes to Fed. R. Evid. 702 were not designed to disqualify experts whose qualifications stem primarily from direct experience.<sup>48</sup> The committee acknowledged that “[i]n certain fields, experience is the predominant, if not sole, basis for a great deal of reliable expert testimony.”<sup>49</sup> But, the committee also explained that the new subsections of Fed. R. Evid. 702 require experience-based experts to “explain how [their] experience leads to the conclusion reached, why that experience is a sufficient basis for the opinion, and how that experience is reliably applied to the facts.”<sup>50</sup>

## II. Tools of the trade in the Tenth Circuit

Law enforcement officers are the most common type of experts employed by prosecutors.<sup>51</sup> The topics upon which law enforcement officers testify is varied, but officers often testify about their “observations of drug dealing activities and the procedures used by the police in apprehending” individuals involved in the drug trade.<sup>52</sup> Officers’ expertise on topics related to the drug trade is developed through a mix of specialized training and firsthand experience dealing with drug related crimes.<sup>53</sup> Hence, officer expert testimony is typically of the non-scientific experience-based variety. Prior to *Daubert* and *Kumho*, the primary method of evaluating an officer’s expert testimony, in Tenth Circuit cases, was to simply inquire whether the officer’s testimony was specialized knowledge that would aid the jury in understanding a fact at issue.<sup>54</sup> In one line of cases, the courts found that experience-based officer expert testimony about the tools of the drug trade was admissible as specialized knowledge that would aid the jury.

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45. Fed. R. Evid. 702.

46. Fed. R. Evid. 702 advisory committee’s note to 2000 amendment.

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.*

51. See Jennifer L. Groscup et. al., *The Effects of Daubert on the Admissibility of Expert Testimony in State and Federal Criminal Cases*, 8 PSYCHOL. PUB. POL’Y & L. 339, 345 (2002).

52. *Id.*

53. See Amstutz, *supra* note 18, at 74–75.

54. See *United States v. Becker*, 230 F.3d 1224, 1231 (10th Cir. 2000) (“Federal Rule of Evidence 702 instructs us to admit specialized knowledge if it will ‘assist the trier of fact to understand the evidence.’ That Rule dictates a common-sense inquiry of whether a juror would be able to understand the evidence without specialized knowledge concerning the subject.”); *accord* *United States v. McDonald*, 933 F.2d 1519, 1522 (10th Cir. 1991); *United States v. Robinson*, 978 F.2d 1554, 1563 (10th Cir. 1992).

*United States v. McDonald*,<sup>55</sup> was the first<sup>56</sup> Tenth Circuit Court of Appeals case to describe police officer expert testimony about the items used in the sale and distribution of illegal drugs as “tools of the trade” testimony.<sup>57</sup> At trial, the prosecution offered expert testimony from a police officer, who was one of the supervisors of the “Denver Metro Crack Task Force” to explain the significance of several items that were found with the defendant.<sup>58</sup> The officer testified that (1) razor blades are used by crack dealers to cut up the crack rock into “saleable or usable quantities”; (2) guns are used by street dealers to “protect the merchandise and the money”; and (3) telephone beepers are used by “lookouts and runners . . . to communicate with the dealer.”<sup>59</sup> According to the court, the proper test under Fed. R. Evid. 702 was to inquire whether the expert’s “testimony consisted of specialized knowledge” that would “assist the jury in understanding the evidence.”<sup>60</sup> The court found that the officer’s experience had given him specialized knowledge and that a “jury could not be expected to understand” how razors, beepers, and guns are used in the drug business “without specialized knowledge” provided by the officer. Hence, the court held that the officer’s expert testimony was properly admitted.<sup>61</sup>

Two subsequent Tenth Circuit Court of Appeals cases clarified and expanded the definition of “tools of the trade.” In *United States v. Martinez*, the court defined tools of the trade as the “means for the distribution of illegal drugs.”<sup>62</sup> In *United States v. Robinson*,<sup>63</sup> the court relied on its *McDonald* holding to justify the admission of a police officer’s expert testimony on the association between various blue items and membership in the Crips gang.<sup>64</sup> The court explained that “[s]imilar to tools of the trade, the gang-related items may necessitate the appearance of an expert witness if the jury could not understand the significance of possession of these items” without the aid of expert testimony.<sup>65</sup> The practice of admitting expert testimony on the tools of the trade survived, with only slight modifications, after *Daubert* and *Kumho*.

In *U.S. v. Garza*,<sup>66</sup> the court was presented with a direct challenge to the methodology supporting an officer’s expert testimony that a gun was possessed in connection with a drug trafficking crime.<sup>67</sup> The officer testified at trial that the circumstances under which the gun was found—being near a large amount of drugs in a house with other paraphernalia associated with drug trafficking e.g. scales,

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55. *McDonald*, 933 F.2d 1519, 1520–24 (10th Cir. 1991).

56. Although *McDonald* was the first Tenth Circuit case employing the language “tools of the trade” it was not the first Tenth Circuit case to consider the admissibility of police officer expert testimony about the modus operandi of drug dealers. See e.g., *United States v. Harris*, 903 F.2d 770, 776 (10th Cir. 1990) (admitting expert testimony “regarding recordkeeping in the drug business”).

57. *McDonald*, 933 F.2d at 1522.

58. *Id.*

59. *Id.*

60. *Id.* at 1523.

61. *Id.*

62. *United States v. Martinez*, 938 F.2d 1078, 1083 (10th Cir. 1991).

63. *Robinson*, 978 F.2d at 1563.

64. *Id.* at 1561.

65. *Id.* at 1563.

66. *U.S. v. Garza*, 566 F.3d 1194 (10th Cir. 2009).

67. *Id.* at 1198–97.



Ziploc bags—led him to develop the opinion that the gun was possessed in connection with a crime of drug trafficking.<sup>68</sup> The defendant challenged the officer's testimony under Fed. R. Evid. 702(c), arguing that the officer's opinion was not "the product of reliable principles and methods."<sup>69</sup> The defendant contended that no actual "science" or scientific theory could definitively be used to connect the gun with use in drug trafficking.<sup>70</sup> He argued that the theory or methodology the officer used to connect the gun to the drugs must be tested under the reliability factors articulated in *Daubert*.<sup>71</sup> The court acknowledged that trial courts have a duty to screen all expert testimony.<sup>72</sup> But, it explained that the *Daubert* factors are not to be "applied woodenly in all circumstances."<sup>73</sup> Without explaining the proper test to apply when evaluating an officer's testimony, the court rejected the defendant's argument that the officer's testimony had to pass the *Daubert* reliability test.<sup>74</sup>

In *U.S. v. Roach*,<sup>75</sup> the court clarified its holding in *Garza* by finding that the trial court must make specific findings that the officer's testimony was reliable and relevant.<sup>76</sup> The defendant in *Roach* argued that the trial court failed to meet the requirements of Fed. R. Evid. 702 by not making "specific, on-the-record findings" that the expert's testimony about tools of the trade employed by gang members was reliable.<sup>77</sup> The Court of Appeals agreed, explaining that to fulfill its gatekeeping function, as prescribed in *Daubert* and *Kumho*, the trial court must make a specific finding that the expert's opinion is based on a "reliable foundation and is relevant to the task at hand."<sup>78</sup> However, because other evidence in the case "could have" been used to "draw[] the inference that Roach was a gang member" the court found that the admission of the officer's expert testimony was harmless error.<sup>79</sup>

### III. Religion and the drug trade

At Medina's trial, the prosecution's expert testimony was used to connect Medina's prayer to Santa Muerte with illegal activity.<sup>80</sup> Specifically, the prosecution's expert testified that members of the Mexican drug underworld commonly pray to Santa Muerte and that the purpose of Medina's prayer was to ask

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68. *Id.*

69. *Id.* at 1198 (quoting Fed. R. Evid. 702(c)).

70. *Id.* at 1199.

71. *Id.* ("(1) whether the proffered theory can and has been tested; (2) whether the expert's opinion has been subject to peer review; (3) the known or potential rate of error; and (4) the general acceptance of a methodology in the relevant scientific community") (quoting *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993)).

72. *Id.*

73. *Id.* (quoting *Kumho Tire Co., v. Carmichael*, 526 U.S. 137, 147, 149 (1999)).

74. *Id.* (according to the court the defendant "essentially concede[d] . . . in his reply brief that it was proper to admit the officer under Fed. R. Evid. 702).

75. *U.S. v. Roach*, 582 F.3d 1192 (10th Cir. 2009).

76. *Id.* at 12007.

77. *Id.*

78. *Id.*

79. *Id.* at 1208.

80. *U.S. v. Medina-Copete*, 757 F.3d 1092, 1099 (10th Cir. 2014).

for protection from law enforcement.<sup>81</sup> Almonte was not the first person to observe a connection between certain religious practices and the Mexican drug underworld.<sup>82</sup> This association has caught the attention of academics,<sup>83</sup> legal scholars,<sup>84</sup> newspapers,<sup>85</sup> courts,<sup>86</sup> and the FBI.<sup>87</sup>

Santa Muerte, with her macabre persona as a female grim reaper, has drawn particularly intense attention and scrutiny. Some consider Santa Muerte to be the patron saint of the notoriously violent Los Zetas cartel.<sup>88</sup> The Catholic Church has publicly condemned Santa Muerte veneration as blasphemous.<sup>89</sup> In late 2009, the Mexican army even went so far as to bulldoze dozens of Santa Muerte shrines along the U.S. Mexico border.<sup>90</sup> Yet, one of the most in-depth studies of Santa Muerte worship concluded that she is “first and foremost an unofficial saint who heals, protects, and delivers devotees to their destinations in the afterlife.”<sup>91</sup> Santa Muerte worship is rapidly expanding in Mexico and the United States.<sup>92</sup> And, her devotees have adopted veneration practices drawn heavily from Catholicism such as, praying of rosaries, constructing altars, and lighting votive candles.<sup>93</sup> Common prayers to Santa Muerte include: prayers for help with romantic and legal issues; as well as prayers for protection, healing, peace, financial prosperity, and revenge.<sup>94</sup>

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81. *Id.*

82. ANDREW CHESNUT, DEVOTED TO DEATH, 6 (2012) (“Unlike official saints, who have been canonized by the Catholic Church, folk saints are spirits of the dead considered holy for their miracle-working powers”).

83. *Id.*

84. Bradlee H. Thornton, *Soccer Mom or Drug Trafficker? Why the Consideration of Religious Symbols in An Officer’s Reasonable Suspicion Calculus Does Not Offend the First Amendment*, 42 TEX. L. REV. 123, 138–41 (discussing *Jesús Malverde*); Aaron M. Muñoz Silver, *Secret Drug Wars, & Selfies: The United States’ Justification for the Use of Force Against the Mexican Drug Cartels*, 41 W. ST. U. L. REV. 643, 648–50 (2013) (discussing *Jesús Malverde* and Santa Muerte).

85. See e.g., John Nova Lomax, *Santa Muerte: Know Your Narco Saints*, <http://www.houstonpress.com/news/santa-muerte-know-your-narco-saints-6595551> (last updated Sep., 12 2012); Rick Paulas, *Our Lady of the Holy Death is the World’s Fastest Growing Religious Movement*, <http://www.vice.com/read/our-lady-of-the-holy-death-is-the-worlds-fastest-growing-religious-movement-456> (last updated Nov., 13 2014).

86. *United States v. Bobadilla-Campos*, 839 F. Supp. 2d 1230, 1235 (D.N.M. 2012) *abrogated by* *United States v. Medina-Copete*, 757 F.3d 1092 (10th Cir. 2014); *State v. Villa-Vasquez*, 49 Kan. App. 2d 421, 430, 310 P.3d 426, 433 (2013), *review denied* (June 17, 2014); *United States v. Holmes*, 751 F.3d 846, 849–50 (8th Cir. 2014).

87. Robert J. Bunker, *Santa Muerte Ritualistic Inspired Killings Part 1*, FBI.GOV, <https://leb.fbi.gov/2013/february/santa-muerte-inspired-and-ritualistic-killings-part-1> (last updated 2013).

88. Muñoz, *supra* note 84, at 649, 671.

89. *Death to Santa Muerte: The Vatican vs. The Skeleton Saint*, HUFFINGTONPOST.COM, [http://www.huffingtonpost.com/r-andrew-chesnut/death-to-santa-muerte-the-vatican-vs-the-skeleton-saint\\_b\\_3291499.html](http://www.huffingtonpost.com/r-andrew-chesnut/death-to-santa-muerte-the-vatican-vs-the-skeleton-saint_b_3291499.html), (last updated May, 18 2013).

90. See Jo Tuckman, *Mexican ‘Saint Death’ Cult Members Protest at Destruction of Shrines*, THEGUARDIAN.COM, <http://www.theguardian.com/world/2009/apr/10/santa-muerte-cult-mexico> (last updated Apr. 10 2009).

91. CHESNUT, *supra* note 82, at 7.

92. *Id.* at 8–11.

93. CHESNUT, *supra* note 82 at 84, 64–65, 69–70.

94. See e.g. CHESNUT, *supra* note 82, at 188, 20–24; Robert J. Bunker, *supra* note 87.

#### IV. Medina's case

Medina and Goxcon were arrested during a traffic stop in 2011 after officers discovered a stash of methamphetamine hidden behind the dashboard of the truck they were driving.<sup>95</sup> At trial, Medina and Goxcon both claimed to have been unaware of the presence of the methamphetamine.<sup>96</sup> They claimed that they borrowed the truck from a friend in Las Vegas and that they were using it to travel to Oklahoma, where they had previously lived, to pick up some of their household goods from a storage shed.<sup>97</sup>

During the stop, an officer noticed that Medina appeared to be reading a prayer from a small note book.<sup>98</sup> At trial, the court allowed the prosecution to introduce the contents of the handwritten prayer<sup>99</sup> that Medina was reading and admitted Almonte as an expert to testify about the prayer's meaning and its possible association with the drug trade.<sup>100</sup> The translation of the prayer that was introduced is as follows:

For protection during a trip

Holy Spirit of Death, I invoke your Holy Name to ask you to help me in this venture. Make my way over the mountains valleys and paths an easy one, never stop bestowing upon me your good fortune weave the destiny so that bad instincts vanish before me because of your powerful protection. Prevent Santa Muerte problems from growing and embracing my heart, my Lady, keep any illness from embracing my wings (illegible) Glorious Santa Muerte be my protector and light my path. Be my advocate before the redeemer. Be my truth in times of darkness

Grant me the strength and faith to invoke your name and to thank you now and forever for all your favors  
Amen

Oh miraculous Santa Muerte, Niña Blanca of my heart and right arm of god our lord. Today I come to you with infinite devotion to implore you for health, fortune and luck

Remove from my path (illegible) that hurts me, envy and misfortune; don't allow my enemy's slander reach and harm my spirit

may no one prevent me from receiving the prosperity that I am asking of you today my powerful lady bless the money that will reach my hands and multiply it so that my family lacks for nothing and I can outreach my hand to the needy that crosses my path keep tragedy pain and shortage away from me with this votive

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95. U.S. v. Medina-Copete, 757 F.3d 1092, 1095.

96. *Id.* at 1098.

97. Defendant-Appellant Maria Vianey Medina-Copete Opening Brief at 7, U.S. v. Medina-Copete 757 F.3d 1092 (10th Cir. 2014) (No. 13-2026).

98. *Medina-Copete*, 757 F.3d at 1096.

99. Defendant-Appellant Maria Vianey Medina-Copete Opening Brief at 8, U.S. v. Medina-Copete 757 F.3d 1092 (10th Cir. 2014) (No. 13-2026).

100. *Medina-Copete*, 757 F.3d at 1095, 1096.

candle I will light so that the radiance of your eyes forms an invisible wall around me

grant me prudence and patience holy lady, Santa Reina de las Tinieblas (“Holy Queen of Darkness”) strength, power and wisdom tell the elements not to unleash their fury wherever they cross paths with me take care of my happy surroundings and that I want to adorn and decorate in my Santa Muerte Amen.<sup>101</sup>

At trial, Almonte was asked to explain elements of Santa Muerte worship and to give his opinion about the prayer found in Medina’s notebook. Almonte explained that Santa Muerte was not a Catholic saint, but that she is given saint-like status by her followers.<sup>102</sup> He stated that Santa Muerte is the most commonly used patron saint of the Mexican drug underworld.<sup>103</sup> However, he explained during cross examination that many of the millions of people who pray to Santa Muerte are not involved in crime.<sup>104</sup> He also stated that in the United States most of his observation of Santa Muerte worship has involved illegal activity.<sup>105</sup>

Almonte opined that the purpose of Medina’s prayer was for “protection from law enforcement.”<sup>106</sup> As support for his opinion about the prayer’s purpose he cited two main elements of the prayer (1) the fact that the prayer talked about “protection from enemies, protection from, I guess, people that are jealous” and not protection from other hazards of a trip such as traffic accidents, and (2) the fact that the prayer contained the theme of “gaining . . . money” which he claimed was a common theme among traffickers who pray to Santa Muerte.<sup>107</sup>

Both defendants were found guilty of drug trafficking.<sup>108</sup> On appeal, the court held that the trial court abused its discretion by admitting Almonte’s expert testimony.<sup>109</sup> Prior to trial, Medina and Goxcon filed a joint motion in *limine* with the trial court to exclude Almonte’s expert testimony.<sup>110</sup> The trial court issued a 67-page memorandum opinion order, *United States v. Goxcon-Chagal*, in which the court concluded that Almonte was qualified to provide testimony about Santa Muerte.<sup>111</sup>

The trial court’s conclusion that Almonte was qualified as an expert was based on several observations. First, the court noted that Almonte, had “over 25 years of combined state and federal law enforcement experience” and had devoted “hundreds, if not thousands of hours” to studying the patron saints of the Mexican

101. *Id.* at 1096 (original line breaks omitted).

102. Transcript of Trial Proceedings Aug. 7, 2012 at 132, *United States v. Goxcon-Chagal*, 885 F. Supp. 2d 1118 (D. N.M. 2012) (No. CR-11-2002).

103. *Id.* at 176.

104. *Id.* at 143.

105. *Id.* at 150.

106. *Id.* at 135.

107. *Id.*

108. *Medina-Copete*, 757 F.3d at 1100.

109. *Id.* at 1105.

110. Appellee’s Answer Brief at 26, *U.S. v. Medina-Copete* 757 F.3d 1092 (10th Cir. 2014) (No. 13-2026).

111. *United States v. Goxcon-Chagal*, 885 F. Supp. 2d 1118, 1126–1127 (D. N.M. 2012).

drug underworld.<sup>112</sup> Second, the court noted that prior to his testimony in *Goxcon-Chagal*, Almonte had “trained several thousand law enforcement officers” on recognizing the patron saints of the Mexican drug underworld and had created and produced a law enforcement training video on the same topic.<sup>113</sup> Finally, the court found it persuasive that Almonte had been qualified as an expert on the topic of recognizing the patron saints of the Mexican drug underworld in at least three other cases.<sup>114</sup>

The trial court concluded that Almonte’s testimony would be helpful to the jury. Specifically, it found his testimony would help the jury “flesh out” the connection between Santa Muerte and drug trafficking.<sup>115</sup> The court explained that because of the “covert and unique nature of narcotics trafficking” jurors are usually unfamiliar with how certain items are used as “tools of the narcotics trade.”<sup>116</sup>

The trial concluded that Almonte’s opinion was sufficiently reliable. The court conceded that the *Daubert* reliability factors did not readily apply to Almonte’s testimony.<sup>117</sup> However, it found that the inapplicability of the *Daubert* factors did not make Almonte’s opinion unreliable because the “Tenth Circuit has found . . . expert testimony regarding . . . tools of the trade of drug organizations” withstands scrutiny under *Daubert*.<sup>118</sup> It then explained that numerous cases have recognized that law enforcement officers can “acquire specialized knowledge of criminal practices and the expertise to opine on such matters.” It then classified Almonte’s testimony as an established method being employed in a new way<sup>119</sup> and proceeded to test it under the following factors:

[W]hether the witness’ conclusion represents an ‘unfounded extrapolation’ from the data; whether the witness has adequately accounted for alternative explanations for the effect at issue; whether the opinion was reached for the purpose of litigation or as the result of independent studies; or whether it unduly relies on anecdotal evidence.<sup>120</sup>

Applying these factors the court made several findings: (1) Almonte’s opinion was not “unfounded extrapolation” because other courts had admitted testimony on the connection between religious practices and the narcotics trade;<sup>121</sup> (2) Almonte adequately accounted for alternative explanations for his theory because he agreed that he would testify that “many law-abiding citizens honor Santa Muerte”;<sup>122</sup> (3) Almonte did not arrive at his conclusion solely “for the purpose of litigation” because his theories were developed to help law enforcement officers in

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112. *Id.*

113. *Id.*

114. *Id.* at 1143.

115. *Id.* at 1142.

116. *Id.* at 1142–43.

117. *Id.* at 1145–59.

118. *Id.* 1145.

119. *Id.* at 1145, 1148.

120. *Id.* at 1448.

121. *Id.* at 1149.

122. *Id.*

the field;<sup>123</sup> and (4) Almonte's opinion did not "unduly rely[] on anecdotal evidence" because his law enforcement background gave him "extensive firsthand experience" with the religious practices of drug traffickers.<sup>124</sup>

The United States Court of Appeals for the Tenth Circuit expressed three principle concerns with the trial court's admission of Almonte's expert testimony:

First, it applied our "tools of the trade" jurisprudence to Almonte's purported area of expertise without considering whether a prayer could qualify as a "tool of the drug trade" as we have previously used that phrase. Second, it allowed Almonte to testify as an expert based on his experience without considering the relevance or breadth of that experience, thereby eliding the "facts or data" requirement found in Rule 702(b). Third, it engaged in circular reasoning in determining that Almonte's opinion was not an "unfounded extrapolation," relying on other courts' treatment of facially similar testimony in very different contexts instead of the manner in which Almonte's techniques and methodology led to his opinion.<sup>125</sup>

In its discussion of the first error the court found that the trial court's reliance on other cases led them to improperly evaluate Almonte's qualifications.<sup>126</sup> The court explained that tools of the trade are the "means for the distribution of illegal drugs" and that the trial court had made no findings about how Santa Muerte worship is "used" as a "means of distribution" for illegal drugs.<sup>127</sup>

Regarding the second error, the court found that the trial court failed to ensure that Almonte's testimony was "based on sufficient facts or data" and "the product of reliable principles and methods."<sup>128</sup> On the sufficiency of data, the court found that the trial court had conflated Almonte's "experience" with "data" in support of his conclusions.<sup>129</sup> Moreover, the court found that the trial court had failed to inquire into how any data that Almonte observed had led to the opinions that he reached concerning Medina's prayer.<sup>130</sup> The court reiterated its holding in *Garza*, that law enforcement officers can acquire enough specialized knowledge to become qualified as experts on "criminal practices."<sup>131</sup> But, it explained that a witness whose expertise is derived primarily from experience must (1) "explain how that experience leads to the conclusions reached; (2) "why that experience is a sufficient basis for" their opinion; (3) "and how that experience is reliably applied to the facts."<sup>132</sup> It found that "nothing in the record provides the necessary connection" and that

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123. *Id.*

124. *Id.*

125. *Medina*, 757 F.3d at 1105.

126. *Id.* 1102–04.

127. *Id.* at 1103.

128. *Id.* at 1103 (quoting Fed. R. Evid. 702 (b) & (c)).

129. *Id.*

130. *Id.* at 1103–04.

131. *Id.* at 1103.

132. *Id.* at 1103 (quoting Fed. R. Evid. 702 advisory committee's notes (2000 Amendment)).

Almonte's opinion was "connected to existing data only by the *ipse dixit* of the expert."<sup>133</sup>

Finally, the court found that the trial court erred in finding that Almonte's opinion was not unfounded extrapolation simply because other courts had permitted testimony on the subject of narco-saint worship.<sup>134</sup> The court explained "that other courts may have permitted" narco-saint evidence had "minimal bearing" on whether Almonte's testimony was reliable.<sup>135</sup> The court further concluded that the trial court's comparison of Almonte's testimony to tools of the trade jurisprudence "was strained at best."<sup>136</sup>

## ANALYSIS

### I. *Medina-Copete* was correctly decided

The court in *Medina-Copete* came to the correct conclusion about admissibility of Almonte's testimony. Almonte's testimony differed in important respects from testimony offered in other established lines of jurisprudence, hence, the trial court's reliance on other cases in its evaluation of Almonte's qualification was misguided. Moreover, the *Medina-Copete* court applied the proper standard to evaluate the Almonte's experience-based expert testimony. And, finally the court was correct in finding that an expert's opinions can still be unfounded extrapolation even if other courts have admitted similar testimony.

The *Medina-Copete* court properly found that the trial court erred in its evaluation of Almonte's qualifications. The court's discussion of Almonte's qualifications is combined with its discussion of the requirement under Fed. R. Evid. 702(a) that the expert's testimony "will help the trier of fact to understand the evidence or to determine a fact at issue."<sup>137</sup> The primary concern raised by the appellate court was that the trial court failed to discuss how Almonte's testimony about Santa Muerte could "legitimately connect Medina's prayer to drug trafficking."<sup>138</sup> To establish a connection the trial court relied on a comparison between Almonte's testimony and other forms of officer testimony about subjects such as gang affiliation and tools of the drug trade. However, the appellate court explained that neither of these comparisons was properly applied.<sup>139</sup> The first comparison failed because evidence of an individual's association with a gang was only found helpful where the "main purpose" of the gang was to "traffic in cocaine."<sup>140</sup> And, the second comparison failed because Santa Muerte did not fit the definition of a "tool of the trade" laid out in cases such as *U.S. v. Martinez*.<sup>141</sup>

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133. *Id.* (quoting *Kumho Tire Co., v. Carmichael*, 526 U.S. 137, 147, 149 (1999)).

134. *Id.* at 1105.

135. *Id.* at 1104.

136. *Id.* at 1104–05.

137. *See id.* at 1102–03.

138. *See id.* at 1102.

139. *Id.* at 1102–03.

140. *Id.*

141. *Id.*

Almonte's testimony was not substantially similar to expert testimony about how gang related items are connected to the narcotics trade. In *U.S. v. Robinson*,<sup>142</sup> an officer testified about how the possession of certain items may indicate that a person is associated with the Crips gang.<sup>143</sup> The officer's testimony was helpful because the prosecution presented "uncontroverted evidence that the main purpose of the Crips was to traffic in crack cocaine."<sup>144</sup> Conversely, at Medina's trial<sup>145</sup> and on appeal<sup>146</sup> the defense vigorously disputed whether followers of Santa Muerte were primarily or even largely engaged in narcotics trafficking. And, the only evidence offered to show that the primary purpose of Santa Muerte worship was narcotics trafficking came from Almonte's testimony that "here in the United States my observation of Santa Muerte, most of it has involved illegal activity."<sup>147</sup> However, Almonte's study of Santa Muerte in the United States was primarily drawn from law enforcement experience, observing drug traffickers "praying for protection" "while working as a narcotics detective" and compiling cases where religious "items have been involved in drug trafficking or other criminal activity."<sup>148</sup> Hence, the appellate court properly observed that "mere observation that a correlation exists—especially when the observer is a law enforcement officer likely to encounter a biased sample—does not meaningfully assist the jury."<sup>149</sup>

Almonte's testimony about the use of Santa Muerte was not substantially similar to testimony about the tools of the drug trade. The appellate court explained that tools of the trade are "means for the distribution of illegal drugs" such as razor blades used to cut drugs, scales used to weigh drugs, and bags used to package drugs.<sup>150</sup> It observed that the trial court and the government failed to explain how a person would "use" Santa Muerte as a means for the distribution of illegal drugs.<sup>151</sup> Tools of the trade are items with physical qualities that make them useful in the drug trade. Praying to a saint for protection may be useful to placate fears in the mind of a devotee who is smuggling drugs. But, an opinion about how a prayer was used in the mind of devotee requires far more abstraction and speculation than an opinion about how a physical item was used by its possessor. Physical items have a limited range of practical functions. Whereas, religious beliefs can serve a wide variety of functions in the human mind and can be used for nearly any purpose. To accept the analogy between testimony about tools of the drug trade and testimony about a person's religious beliefs, the court would have to ignore the subtle but important differences between the two types of testimony.

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142. *U.S. v. Robinson*, 978 F.2d 1554 (10<sup>th</sup> Cir. 1992)

143. *Id.*

144. *Id.* at 1563.

145. *See e.g.* Transcript of Trial Proceedings Aug. 7, 2012, *supra* note 102, at 142–43.

146. *See e.g.* Defendant-Appellant Maria Vianey Medina-Copete Opening Brief, *supra* note 97, at 25–27.

147. *See e.g.* Transcript of Trial Proceedings Aug. 7, 2012, *supra* note 102, at 150.

148. *See* United States' Notice of Intention to Offer Expert Testimony, attached curriculum vitae, at 2, *U.S. v. United States v. Goxcon-Chagal*, 885 F. Supp. 2d 1118, 1148 (D.N.M. 2012) *vacated and remanded sub nom.*, *United States v. Medina-Copete*, 757 F.3d 1092 (10<sup>th</sup> Cir. 2014) (No. 11-2002).

149. *Medina*, 757 F.3d at 1102.

150. *Id.* at 1102–03 (quoting *U.S. v. Martinez*, 938 F.2d 1078 (10<sup>th</sup> Cir. 1991).

151. *Id.* at 1103.



The appellate court was also correct in concluding that there was a “complete absence of data supporting Almonte’s testimony.”<sup>152</sup> In its Notice of Intent to Offer Expert Testimony the prosecution explained that Almonte (1) has extensive experience dealing with narcotics cases as a law enforcement officer; (2) has devoted “hundreds, if not thousands of hours” to studying the patron saints used by drug traffickers; (3) has “trained several thousand law enforcement officers on” the topic of patron saints used by drug traffickers; and (4) has produced an educational video about the subject.<sup>153</sup> In its opinion, the trial court cited these facts as support for the conclusion that Almonte’s opinion was not “unreasonable” and did not “lack a sufficient basis.”<sup>154</sup> The cited facts support the notion that Almonte had general exposure to drug traffickers and their religious beliefs, but none of the cited experiences provides direct support for finding that Almonte was familiar enough with Santa Muerte to be qualified as an expert on how she is worshiped. None of the cited experiences show how much of Almonte’s time or experience was specifically devoted to studying Santa Muerte. And, none of the cited experience shows whether Almonte employed a reliable method for obtaining information to study. Without more specific information about Almonte’s experience, it is impossible to determine whether he could reliably discern Medina’s motivation in praying to Santa Muerte.

The trial court failed to properly apply Fed. R. Evid. 702’s reliability test to Almonte’s testimony. Fed. R. Evid. 702 requires that an expert testifying on the bases of experience must (1) “explain how that experience leads to the conclusions reached; (2) “why that experience is a sufficient basis for” their opinion; (3) “and how that experience is reliably applied to the facts.”<sup>155</sup> The *Medina-Copete* court applied these factors to evaluate Almonte’s testimony and found that none of the factors was satisfied.<sup>156</sup> The trial court cited the same factors but decided not to apply them. Instead the court tested Almonte’s reliability under other factors: asking whether his testimony was “unfounded extrapolation from the data; whether [he] adequately accounted for alternative explanations for the effect at issue; whether [his] opinion was reached for the purposes of litigation or as the result of independent studies; or whether [he] unduly relies on anecdotal evidence.”<sup>157</sup> The factors the court applied are helpful and, in fact, all but the final factor relating to anecdotal evidence are cited as helpful factors to consider in Advisory Committee’s notes to the 2000 Amendment to Fed. R. Evid. 702.<sup>158</sup> However, the trial court erred in its application of these factors, specifically it erred in applying the first factor because it relied primarily on other cases to decide that Almonte’s testimony was not “unfounded extrapolation from the data.”<sup>159</sup>

Evidence about the general reliability of a type of testimony or field of study does not prove that a particular expert’s testimony is not unfounded extrapolation. In

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152. *Id.* at 1103.

153. United States’ Notice of Intention to Offer Expert Testimony, *supra* note 148 at 1–2.

154. *Goxcon-Chagal*, 885 F. Supp. 2d at 1150.

155. *Id.* at 1103 (quoting Fed. R. Evid. 702 advisory committee’s notes (2000 Amendment)).

156. *Id.*

157. *Id.* at 1148.

158. See Fed. R. Evid. 702.

159. See *Goxcon-Chagal*, 885 F. Supp. 2d 1118, 1149.

*Gen. Elec. Co. v. Joiner*,<sup>160</sup> the plaintiff's theory of liability was that "his exposure to PCB's and their derivatives "promoted" his development of small-cell lung cancer."<sup>161</sup> The plaintiff's experts testified that exposure to PCBs contributed to him developing small-cell lung cancer.<sup>162</sup> The only direct evidence supporting the expert's claims came from animal studies on infant mice being exposed to concentrated amounts of PCBs.<sup>163</sup> The defendants contended that the animal studies were not sufficient to support the expert's opinions that the plaintiff's exposure to PBC lead to his development of small-cell lung cancer.<sup>164</sup> "Rather than explaining how and why the experts could have extrapolated their opinions from these seemingly far-removed animal studies" the plaintiff chose to respond by presenting evidence about the validity of using animal studies generally.<sup>165</sup> The court explained that the plaintiff misunderstood the issue, and that the burden was to explain how "these experts' opinions were sufficiently supported by the animal studies on which they purported to rely."<sup>166</sup> The *Goxcon-Chagal* court's analysis failed in the same way that the plaintiff failed in *Joiner*: rather than looking specifically at how the data that Almonte observed supported his opinions, the court looked at how opinions about narco-saints had been treated generally. Just because an opinion about a subject is reliable under one factual scenario does not mean that the same opinion will be valid under a different set of facts or when provided by a different expert.

## II. The *Medina-Copete* court's opinion applies to all forms of experience-based expert testimony

The *Medina-Copete* court's holding should be read broadly to apply to all forms of experience-based expert testimony by law enforcement officers. Although, the bases and subject of Almonte's expert testimony were unique, the court's opinion did not turn on the unique facts of the case. The three-part test the court used to evaluate Almonte's opinions should apply to all experience-based expert testimony. While there are some potential drawbacks to raising the bar for the admission of law enforcement officers as experts, these drawbacks do not outweigh the arguments in favor of subjecting officers to the same level of scrutiny that the court applied to Almonte.

The fact that Almonte's testimony did not fit into the tools of the trade or gang affiliation jurisprudence was not essential to the *Medina-Copete* court's holding. A surface level reading of *Medina-Copete* might lead to the conclusion the court failed to properly evaluate Almonte's opinion under Fed. R. Evid. 702 (a) simply because it applied an improper analogy between Almonte's opinion and cases

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160. See *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 141, 146 (1997) ("Trained experts commonly extrapolate from existing data. But nothing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert. A court may conclude that there is simply too great an analytical gap between the data and the opinion proffered.").

161. *Id.* at 146.

162. *Id.* at 143.

163. *Id.* at 144.

164. *Id.* at 140.

165. *Id.* at 144.

166. *Id.*

where officers testified about subjects such as the tools of the drug trade. Under this reading, a question about whether an officer's expert testimony regarding an item's association with the drug trade would be helpful to the jury would turn on whether that item has a "use" in the "distribution of illegal drugs."<sup>167</sup> But, this reading of the case would be inconsistent with the concerns raised by the court in *Medina-Copete*.

The *Medina-Copete* court raised two important concerns about the helpfulness of Almonte's testimony under Fed. R. Evid. 702(a). First, the court explained that in evaluating Almonte's qualifications the trial court did not consider "how his Santa Muerte testimony could legitimately connect Medina's prayer to drug trafficking."<sup>168</sup> Second, the court took issue with the fact that Almonte "proffered no manner of distinguishing individuals who pray to Santa Muerte for illicit purposes from everyone else."<sup>169</sup> Both of these considerations apply with equal force to other forms of officer expert testimony. For example, if an officer seeks to opine that a particular set of bags found in a defendant's kitchen were used for a drug trade purpose, then the court must make a finding that the officer can "legitimately connect [the bags] to drug trafficking"<sup>170</sup> and part of drawing this connection must involve finding that the officer has a theory or methodology for "distinguishing individuals who [use bags] for illicit purposes from everyone else."<sup>171</sup> To be helpful to the jury, there must be a sufficiently close nexus between the items that the officer testifies about and an established drug trade application of those items. This nexus can either come from an inherent quality of those items—where the "main"<sup>172</sup> purpose of the thing the officer seeks to connect the defendant to is related to drug trafficking—or by a theory that allows the officer to connect an otherwise innocent item with drug trafficking. Millions of people own items that could be considered tools of the drug trade.<sup>173</sup> To express a reliable opinion about how items found with a particular defendant were used in the drug trade, the officer must have a reliable method, theory, or explanation that connects the specific items with an illicit purpose.

The *Medina-Copete* court's holding that an experience-based expert must (1) "explain how that experience leads to the conclusions reached; (2) "why that experience is a sufficient basis for" their opinion; (3) "and how that experience is reliably applied to the facts"<sup>174</sup> should not be limited the specific type of testimony at issue in the case. One argument for limiting the court's holding in *Medina-Copete* would be that Almonte was subjected to heightened scrutiny because his experience came from both work in law enforcement and "self-study"<sup>175</sup> as a "cultural iconography hobbyist."<sup>176</sup> However, interpreting the *Medina-Copete* court's holding

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167. See *Medina*, 757 F.3d at 1103.

168. *Id.* at 1102.

169. *Id.* at 1102.

170. *Id.*

171. *Id.*

172. See *id.* (explaining that evidence about a person's gang affiliation was admissible because the main purpose of the gang was to traffic in crack cocaine).

173. See *id.* at 1102–03 (listing guns, food stamps, scales, bags, and razor blades as items that have been the proper subjects of tools of the trade testimony).

174. *Id.* at 1103 (quoting Fed. R. Evid. 702 advisory committee's notes (2000 Amendment)).

175. *Id.* at 1104 (quoting *U.S. v. Holms*, 751 F.3d 846, 854 (8th Cir. 2014) (Kelly, J., dissenting)).

176. *Id.* at 1098.

as applying only to the specific type of experience-based expert testimony at issue in the case would be inconsistent with the expressed purpose of Fed. R. Evid. 702 and with the logic employed by the court in *Medina-Copete*, *Kumho*, and *Joiner*.

The three reliability factors that the *Medina-Copete* court used are drawn directly from the language in the committee's notes accompanying the 2000 Amendment to Fed. R. Evid. 702. The committee explained that:

If the witness is relying solely or primarily on experience, then the witness *must* explain how that experience leads to the conclusion reached, why that experience is a sufficient basis for the opinion, and how that experience is reliably applied to the facts. The trial court's gatekeeping function requires more than simply "taking the expert's word for it."<sup>177</sup>

The committee notes make clear that these requirements are mandatory and that they apply to all experience-based experts.<sup>178</sup> Furthermore, the notion that a particular class of experience-based experts—officers testifying about tools of the drug trade—should be subject to less rigid scrutiny is contrary to the way Fed. R. Evid. 702 was applied in *Kumho* and *Joiner*.

In *Kumho*, the proffered expert sought to opine that a tire had separated from its steel-belted carcass due to a manufacturing defect.<sup>179</sup> The court explained that "the specific issue before [it] was not the reasonableness *in general* of a tire expert's methodology "[r]ather . . . [t]he relevant issue was whether the expert could reliably determine the cause of *this* tire's separation."<sup>180</sup> Similarly, in *Joiner* the court explained that the question under 702 was not whether the expert's methods can "ever be a proper foundation for an expert's opinion" but "whether *these* experts' opinions were sufficiently supported" by the methods employed.<sup>181</sup> *Kumho* and *Joiner* must be read as showing that in each case the court must make a finding that the expert's opinion is reliable based on the particular facts of the case. Evidence that the methods the expert employs are generally reliable is not sufficient. Hence, the fact that courts have admitted law enforcement officers to testify as experienced-based experts on a particular subject does not mean that all officers, or even the same officer, may be admitted to opine as an expert in subsequent cases until they have met the reliability requirements embodied in Fed. R. Evid. 702 as they are spelled out in cases like *Medina-Copete*.

Reading *Medina-Copete* as applying to all experience-based officer testimony is also consistent with the Tenth Circuit Court of Appeals precedent. In *U.S. v. Garza*,<sup>182</sup> the court rejected the defendant's argument that the officer's testimony, about how a firearm was used as a tool of the drug trade, had to be evaluated under the *Daubert* reliability factors, but it did not actually articulate a standard to be applied in screening officer expert testimony. The court merely held

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177. Fed. R. Evid. 702 advisory committee's notes (2000 Amendment) (emphasis added) (internal quotation marks omitted).

178. *Id.*

179. *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 143 (1999).

180. *Id.* at 153-54 (emphasis original).

181. *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 144 (1997).

182. *U.S. v. Garza*, 566 F.3d 1194 (10th Cir. 2009).

that “police officers can acquire specialized knowledge of criminal practices and thus the expertise to opine on such matters as the use of firearms in the drug trade.”<sup>183</sup> The court’s observation that an officer can acquire sufficient expertise to testify at trial does not provide guidance on exactly what experience is sufficient to make an officer qualified to give an expert opinion in a particular case. In *U.S. v. Roach*,<sup>184</sup> the court added some clarity to the *Garza* opinion by explaining that the trial court must make specific findings that the officer’s testimony rests on a “reliable foundation and is relevant to the task at hand.”<sup>185</sup> However, the court did not articulate the precise standard that should be applied to evaluate the reliability of an officer’s expert testimony because it found that the admission of the officer’s testimony was harmless error.<sup>186</sup> The court’s holding in *Medina-Copete* fills the jurisprudential gap left by the court’s previous holdings on the admission of experience-based officer expert testimony.

Opponents of applying the *Medina-Copete* holding to all officer experience-based testimony might argue that it will unduly burden the government’s resources if prosecutors have to conduct extensive hearings every time they wish to proffer an officer as an experience-based expert. After all, studies have shown that officers are the most common expert employed by the prosecution.<sup>187</sup> However, it is precisely because of the prevalence of experience-based officer expert testimony that the reliability of their methods must be scrutinized.

The Advisory Committee notes to the 2000 amendment to Fed. R. Evid. 702 specify a level of competency that all experience-based experts must meet. The *Medina-Copete* court simply applied the rule as it was intended. Both Supreme Court precedent and legislative history make it clear that Fed. R. Evid. 702 applies to all forms expert testimony. Hence, the purpose of the Fed. R. Evid. 702 is undermined by having a stringent test applied to some types of expert testimony and an extremely permissive test applied to others. Further, to assume that applying the *Medina-Copete* court’s holding to all experience-based expert testimony will result in longer or more complicated hearings may be a mistake. Meeting the requirements spelled out in the *Medina-Copete* court’s holding will simply require the government to adjust the focus of its foundation to ensure that it explains how the expert’s “experience leads to the conclusion reached, why that experience is a sufficient basis for the opinion, and how that experience is reliably applied to the facts.”<sup>188</sup>

### III. Applying *Medina-Copete*

Just like *Kumho* told Federal Courts that *Daubert* applies to non-scientific testimony *Medina-Copete* should be read as telling courts in the Tenth Circuit that officers seeking to provide experience-based expert opinions must still be subject to a stringent analysis under Fed. R. Evid. 702. The *Medina-Copete* court’s opinion

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183. *Id.*

184. *U.S. v. Roach*, 582 F.3d 1192 (10th Cir. 2009).

185. *Id.* at 1207.

186. *Id.* at 1208.

187. See Groscup, *supra* note 51 at 345.

188. Fed. R. Evid. 702 advisory committee’s note to 2000 amendment.

contains several important holdings, but the primary legacy of the case is that it imposed the following three requirements to the officer's testimony:

- Factor 1:           The expert must explain why their experience is a sufficient basis for the opinion
- Factor 2:           The expert must explain how that experience leads to the conclusion reached
- Factor 3:           The expert must explain how their experience is reliably applied to the facts

Factor 1 embodies the requirement spelled out in Fed. R. Evid. 702(b) that an expert's testimony must be "based on sufficient facts or data."<sup>189</sup> In applying this requirement the *Medina-Copete* court's opinion clarifies that a discussion of experience generally does not provide a "sufficient basis for the opinion."<sup>190</sup> Instead the expert must be able to point to specific facts from their experience that "lead to the conclusions reached." And, the fit between the data and the conclusions must be close.

Factor 2 embodies the requirement in Fed. R. Evid. 702(c) that the expert must show their "testimony is the product of reliable principles and methods."<sup>191</sup> Unfortunately, the *Medina-Copete* court's holding does not shed much light on how the lower courts should apply this rule. However, the reliable principles and methods portion of Fed. R. Evid. 702 has been the subject of extensive analysis by many courts both before and after *Medina-Copete*. The five *Daubert* factors are one method of testing the reliability of proffered expert testimony. Additionally the Advisory Committee note to the 2000 Amendment contains a list of other factors that the courts have found relevant when exercising their gatekeeping function such as:

- (1) Whether experts are proposing to testify about matters growing naturally and directly out of research they have conducted independent of the litigation, or whether they have developed their opinions expressly for purposes of testifying.
- (2) Whether the expert has unjustifiably extrapolated from an accepted premise to an unfounded conclusion.<sup>192</sup>
- (3) Whether the expert has adequately accounted for obvious alternative explanations.
- (4) Whether the expert is being as careful as he would be in his regular professional work outside his paid litigation consulting.

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189. Fed. R. Evid. 702(b).

190. *Id.*

191. Fed. R. Evid. 702(c).

192. This factor speaks more directly to the requirement under Fed. R. Evid. (d) that the expert "reliably applied the principles and methods to the facts of the case."

(5) Whether the field of expertise claimed by the expert is known to reach reliable results for the type of opinion the expert would give.<sup>193 194</sup>

Factor 3 embodies the requirement in Fed. R. Evid. 702(d) that the expert must show that they have “reliably applied [their] principles and methods to the facts of the case.”<sup>195</sup> The *Medina-Copete* court’s discussion of “unfounded extrapolation” highlights that in each case the expert must be able to point to specific facts drawn from their experience that support the opinions that they are offering. Whether other courts have allowed similar testimony has “minimal bearing” on whether the particular expert’s opinions in the case are unfounded extrapolation.

Without a chance to make a specific inquiry into an expert’s opinions and experience it is difficult to provide examples of the requisite findings that would be sufficient to allow an experience-based expert to offer an opinion under the *Medina-Copete* framework. However, the following examples may be instructive.

#### *Testimony about amount of drugs*

Officers are commonly called upon to testify about the value and or significance of the amount of drugs found with a defendant.<sup>196</sup> *U.S. v. Reynoso*,<sup>197</sup> provides an example of officer testimony that would probably not be allowed under the *Medina-Copete* court’s holding. *U.S. v. McDonald*<sup>198</sup> provides an example of officer testimony that would likely be admissible.

Example A: the court allowed an officer to testify “that the quantity of cocaine seized from [defendant’s] car was too large to have been exclusively for his personal use.”<sup>199</sup> However, the officer conceded that she “had no personal experience with cocaine users, as distinguished from cocaine distributors.”<sup>200</sup>

Without further information, the testimony offered in *Reynoso* would fail under all three of the *Medina-Copete* court’s factors. To meet the first *Medina-Copete* requirement the officer would have to show that either through education or experience she had obtained data that would allow her to know what amounts of cocaine are consistent with personal use. Failure under one factor is sufficient for complete exclusion, and in most cases failure under the first factor will ensure failure

193. Fed. R. Evid. 702 advisory committee’s note to 2000 amendment (internal quotation marks and citations omitted).

194. Other scholars writing on the subject of officer expert testimony have identified the reliability factors contained in the committee’s notes as useful measures for evaluating the reliability of an officer’s opinion. See Amstutz, *supra* note 18 at 91.

195. Fed. R. Evid. 702(d).

196. See Gallini, *supra* note 7 at 377–81. The author of this article would like to thank Professor Gallini for his work in analyzing the issue of officers being qualified as experts. Although it is beyond the scope of this case note, Professor Gallini’s work raise additional issues with officer expert testimony related to Fed. R. 704(b) that practitioners should consider. His article also provides a useful set of recommendations to help address the primary issues that he identifies as occurring when police officers provide expert testimony. Many of the example cases in this test suite section were drawn from Professor Gallini’s article.

197. *U.S. v. Reynoso*, 336 F.3d 46 (1st Cir. 2003).

198. *United States v. McDonald*, 933 F.2d 1519, 1520 (10th Cir. 1991).

199. *Reynoso*, 336 F.3d 46 (1st Cir. 2003).

200. *Id.*

under the latter two. Without having observed sufficient data to opine about a subject generally the officer cannot have employed a reliable methodology, and their conclusion on the facts in the case at bar would certainly be unfounded.

Example B: the expert testified that the defendant possessed an amount of crack that “was a lot larger than what would normally be considered as a dose.”<sup>201</sup> Specifically, the officer testified that the 6.7 grams of crack that was found with the defendant was “equal to about one quarter ounce; the average street sale dosage would be somewhere between an eight-hundredth of a gram and a tenth of a gram; and the normal dose sells for around \$20.”<sup>202</sup> The officer based his opinion on “training concerning cocaine and cocaine trafficking” and experience gained while serving as a supervisor “in charge of . . . ninety percent of the crack investigations performed by the Denver police.”<sup>203</sup>

In example B, the officer’s testimony would likely be permissible. Under the first *Medina-Copete* requirement the officer would simply need to identify how he gathered his knowledge about the sizes, prices, and dosages of crack cocaine. Under the second *Medina-Copete* factor, the officer would need to explain how the knowledge gained from his experiences was used to arrive at the conclusions he reached about the size and price of a normal dosage of crack cocaine. This explanation could be as simple as stating that he has directed undercover officers to make crack purchases and learned the normal price per dose of crack through their field work, or he could explain that most users who he has arrested have far less than 6.7 grams of crack cocaine in their possession. As long as the officer could point to data in his experience and explain the logic that the officer used to process that data into conclusions, it is likely that the officer’s testimony would be permissible under the second *Medina-Copete* factor. Finally, under the third *Medina-Copete* factor the officer would simply need to explain how his conclusion about the normal size dosage of crack and the price per dosage was reliably applied to the facts in the case. The officer could do this in a number of ways such as explaining that his data about the prices of crack is recent and collected from a similar geographical area.

#### *Testimony about the meaning of language employed by criminals*

Officers are also commonly asked to testify as experts about the meaning of language employed by criminals.<sup>204</sup> The facts of *U.S. v. Freeman*<sup>205</sup> provide helpful examples of both permissible and potentially impermissible expert testimony on the meaning of criminal communications.

Example A: the officer opined about the meaning of some words such as “bread,” “cheese,” and “chips” based on his prior knowledge about the slang meaning of those specific words.<sup>206</sup>

Example A would likely pass under first *Medina-Copete* factor. In *Freeman*, the officer explained that he had become familiar with certain terms from

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201. *McDonald*, 933 F.2d 1519, 1520 (10th Cir. 1991).

202. *Id.*

203. *Id.*

204. See Gallini, *supra* note 7 at 383–84.

205. *United States v. Freeman*, 498 F.3d 893 (9th Cir. 2007)

206. *Id.* at 899.



previous experience.<sup>207</sup> If he was able to list some specific instances from his previous experience where he heard the words being used in the same fashion then he would be able to survive scrutiny under the first factor.

The method the officer employed, cataloguing observed meanings of code words, could potentially pass under the second factor, but more information would be needed to test it under specific reliability factors such as: did the officer adequately account for obvious alternative explanations of the words, and is the field of expertise claimed by the expert known to reach reliable results about the meanings of code words?

Whether the officer's opinion would pass under the third factor depends largely on what evidence was produced under factors one and two. For instance, if the officer's data came from observing multiple people from the same gang using a specific type of slang, but he was seeking to apply this data to conversations between criminals from a different gang then the officer might need to provide stronger support for his opinion under the third factor. The officer could provide additional support in various ways such as explaining that his interpretation of the words is consistent with their grammatical use in the sentences observed, or explaining that he has observed instances of individuals from different gangs using the same set of slang words. Conversely, if there was evidence that the defendants in the case were members of the same gang that the officer had previously studied, then there would be a reduced need for the officer to provide other information linking his experience to the particular opinions he offered in the case.

Example B: the officer opined about the meaning of words that he was unfamiliar with by observing patterns in the dialogue of the defendants and other drug traffickers such as altering words "by placing 'e-z' or some variant thereof in the middle of words" changing words such as park to "peezark" and ready to "reezey."<sup>208</sup>

The opinions in example B would almost certainly pass under the *Medina-Copete* framework. The facts in *Freeman* show that the officer had observed "thirty-six recorded telephone calls" between the defendants,<sup>209</sup> assuming the grammatical structure the officer noted reoccurred in most of the phone conversations that he observed, it would be hard to argue that the officer did not review a sufficient amount of data under the first *Medina-Copete* factor. Under the second *Medina-Copete* factor, the principles and methodology the officer employed would also presumably pass muster when tested using factors such as did his methodology arise "naturally and directly out of research . . . independent of the litigation" and did the officer "adequately account for obvious alternative explanations" of the unique structure of the words.<sup>210</sup> Assuming the officer's testimony passed under the first and second *Medina-Copete* factors it seems likely that it would pass under the third factor as well. Specifically, the officer's opinion is unlikely to be "unfounded extrapolation" because his body of data was pulled from the defendant's own speech and because he has analyzed a substantial amount of the defendant's speech.

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207. *Id.*

208. *Id.*

209. *Id.*

210. See Fed. R. Evid. 702 advisory committee's note to 2000 amendment.

## CONCLUSION

The evolution of Fed. R. Evid. 702 shows that both Congress and the courts are concerned with preventing unreliable expert opinions from corrupting the judicial process. Cases such as *Daubert* and *Kumho* do not provide a perfect method for evaluating every category of expert testimony, but they do explain that *all forms expert testimony* must be carefully evaluated in order to fulfill the purpose of Fed. R. Evid. 702. Experience-based expert testimony by law enforcement officers is no different than any other form of experience-based expert testimony and it should be evaluated using the test the court applied in *Medina-Copete*.

To some, the idea that law enforcement officers would have to be examined under the same level of scrutiny as other experience-based experts may not seem novel or controversial. However, in a case decided just months after *Medina-Copete* the United States Tenth Circuit Court of Appeals held:

*Medina-Copete is the exception not the rule*, and, as noted, we have consistently allowed police officers to testify as to conclusions deriving from their expertise and experience . . . it is this circuit's longstanding view that "police officers can acquire specialized knowledge of criminal practices and thus the expertise to opine on such matters."<sup>211</sup>

The analysis applied in *Medina-Copete* should be the rule and not the exception. The practice of admitting officers as experts to testify began long before the Supreme Court announced its decisions in cases like *Daubert*, *Joiner*, and *Kumho*.<sup>212</sup> And, it appears that the courts have had difficulty reconciling the doctrines established before *Daubert* with cases in the post *Daubert* world.<sup>213</sup> However, the *Medina-Copete* court's analysis of officer Almonte's opinion provides a guide for courts seeking to properly apply Fed. R. Evid. 702. The *Medina-Copete* court's evaluation was consistent with the jurisprudence from both the United States Supreme Court and United States Court of Appeals for the Tenth Circuit. And, it was the first Tenth Circuit Court of Appeals case to provide a framework for evaluating officer testimony that is rigorous enough to satisfy the demands of Fed. R. Evid. 702.

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211. *United States v. Vann*, 776 F.3d 746, 759 (10th Cir. 2015) *cert. denied*, *Vann v. United States*, 2015 WL 5786498 (U.S. Nov. 2, 2015) (emphasis added).

212. *See e.g. U.S. v. Garza*, 566 F.3d 1199 (10th Cir. 2009) ("we do not believe that *Daubert* and its progeny (including the 2000 amendment to Rule 702) provide any ground for us to depart from our pre-*Daubert* precedents recognizing that police officers can acquire specialized knowledge of criminal practices and thus the expertise to opine on such matters").

213. *See generally* Amstutz, *supra* note 18.