No. 16-2269

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

UNITED STATES OF AMERICA,	) Appeal from the United States
	) District Court for the Southern District
Plaintiff–Appellee,	) of Indiana, Indianapolis Division
v.	)
	) Case No. 15-cr-00069
JAIME C. LOPEZ,	)
	)
Defendant–Appellant.	) Hon. Tanya Walton Pratt

PETITION FOR REHEARING EN BANC

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DISCLOSURE STATEMENT

I, the undersigned counsel for the Defendant-Appellant, Jaime Lopez, furnish the following list in compliance with FED. R. APP. P. 26.1 and CIR. R. 26.1:

1. The full name of every party or amicus the attorney represents in the case:
Jaime C. Lopez.

2. Said party is not a corporation.

3. The names of all law firms whose partners or associates are expected to appear for the party before this Court:

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4. The names of all law firms whose partners or associates have appeared for the party in the district court and are not expected to appear in this Court:

Charles Hayes and Kathleen Sweeney of Sweeney Hayes LLC, 141 E. Washington St. Ste. 225, Indianapolis, IN 46204.

Attorney's Signature: /s/ Sarah O. Schrup

Dated: September 26, 2017

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Please indicate if you are Counsel of Record for the above listed parties pursuant to Circuit Rule 3(d). Yes

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TABLE OF CONTENTS

DISCLOSURE STATEMENT ii

TABLE OF AUTHORITIES v

STATEMENT OF REASONS FOR REHEARING 1

BACKGROUND 1

DISCUSSION 3

I. The panel decision is contrary to Supreme Court and Seventh Circuit precedent regarding expert testimony under Federal Rule of Evidence 702 3

CONCLUSION 6

CERTIFICATE OF COMPLIANCE WITH FED R. APP. P. 32(a) and 40 and SEVENTH CIRCUIT RULES 32 and 40 ..... a

CERTIFICATE OF SERVICE ..... b

TABLE OF AUTHORITIES

Cases

Hall v. Flannery, 840 F.3d 922 (7th Cir. 2016) 4

Fuesting v. Zimmer, Inc., 421 F.3d 528 (7th Cir. 2005) 4

Kumho Tire Co. v. Carmichael, 526 U.S. 137 (1999) 3

United States v. Hall, 93 F.3d 1337 (7th Cir. 1996) 4

United States v. Lopez, No. 16-2269, 2017 U.S. App. LEXIS 16492 (7th Cir. Aug. 29, 2017) ..... *passim*

Other Authorities

FED. R. EVID. 701 ..... 4, 5

FED. R. EVID. 702 ..... 3, 4, 5

STATEMENT OF REASONS FOR REHEARING

This Court should grant rehearing en banc because the panel opinion in this case blesses for the first time a twilight-zone category of witness crafted by the district court: a lay witness who can provide opinion testimony based on technical expertise . The panel opinion endorsing this anomalous approach will create confusion across the circuit. What is more, the panel opinion means that an acknowledged expert may be precluded from testifying in that capacity based on a rationale that is not only wholly absent from the Federal Rules of Evidence, but also directly contrary to them. Lopez therefore respectfully requests rehearing en banc.

BACKGROUND

As relevant to this Petition, the government charged Jaime Lopez with a variety of fraud-based crimes arising from his financial advisory business in Indiana. During his jury trial, Lopez sought to introduce the testimony of his expert witness, Michael Alerding, whom he had retained to review his business records and to opine on the following topics: the nature of Lopez's businesses, the nature of the business Lopez chose as the investment vehicle for his client's funds (413 Solutions), and the actions that typical small, closely held businesses take in the early years of their existence (R.42-1 at 8) (Expert report). There is no indication in the record that Alerding had any personal knowledge or involvement in Lopez's business; his role in the case was based solely on his post-hoc evaluation of Lopez's business records. (R.42-1 at 7.)

The government moved to prohibit or severely restrict Alerding's testimony based on relevancy and prejudice grounds. (1/14/16 Hr'g Tr. 4.) The district court rejected the government's proffered rationales and ultimately ruled that, although the government had not challenged Alerding's expertise in his field, Alerding could only testify as a lay witness and only offer opinions in that capacity. (R.53 at 2, 4.) Against this backdrop of the district court's ruling,

Alerding took the stand. (Trial Tr. 3-572.) The government repeatedly interrupted his testimony with objections, mostly complaining that it was either irrelevant or what it termed "gold-plated expert testimony." (*E.g.*, Trial Tr. 3-575) (Prosecutor objecting: "Your Honor, this is gold-plated expert testimony. He is arguing the government's case as an expert CPA what -- opining about what a promissory note is now."); (Trial Tr. 3-578–79) (district court sustaining a relevancy objection as Alerding explained what it meant to have equity in a company). The district court ruled on several of these objections by limiting Alerding's testimony. (*E.g.*, Trial Tr. 3-579) ("Mr. Ong: Objection, relevance again, Your Honor. The Court: I'll sustain. Mr. Hayes: I'll move on, Judge."). As a result, defense counsel was unable to elicit the entirety of his intended examination of Alerding at trial.

The jury convicted Lopez on all counts. On appeal, Lopez challenged the district court's handling of his expert witness, Alerding. The panel concluded that Lopez "cannot point to any evidence or testimony that the court's ruling prevented him from eliciting." *United States v. Lopez*, No. 16-2269, 2017 U.S. App. LEXIS 16492, at *16, slip op. at 13 (7th Cir. Aug. 29, 2017). Lopez, however, had repeatedly pointed out specific points that were absent from trial as a direct result the district court's ruling on his expert. Appellant's Br. 38 ("The district court's decision had tangible and deleterious effects on Lopez's trial. . . . [Testimony] would have shown that Lopez and his wife operated the very kinds of middle-market businesses with prospects for high rates of returns that were represented in the offering materials, thus explaining Lopez's decision to invest monies there."); Appellant's Reply Br. 20 ("[A]lthough Alerding was permitted to briefly describe his experience with start-up small businesses . . . he was not able to explain why because the district court's confusing ruling enabled repeated government objections that curtailed the testimony."); *see also* Appellant's Br. 39–40. The dissenting judge

agreed: "As a result of th[e] confusion the judge permitted Alerding to give only lay testimony and prevented him from discussing typical small businesses (which he wanted to compare to the defendant's business) on the ground that by doing so he would be straying into 'expert witness' territory." Slip op. at 18–19 (Posner, J., dissenting). Lopez is currently serving fifty-seven months in prison.

DISCUSSION

I. The panel decision is contrary to Supreme Court and Seventh Circuit precedent regarding expert testimony under Federal Rule of Evidence 702.

The panel has, for the first time, blessed a new type of witness, one not contemplated by or provided for in the Federal Rules of Evidence or governing precedent. By amalgamating expert and lay witness testimony, the panel's opinion will inevitably foment confusion and will prejudice parties whose experts will be hamstrung by indeterminacy. As a threshold matter, the panel incorrectly held that the district court's pretrial order on the admissibility of Lopez's expert witness testimony "applied the standards for Rule 702 set forth [in Supreme Court precedents]." *United States v. Lopez*, No. 16-2269, 2017 U.S. App. LEXIS 16492, at *15, slip op. at 12 (7th Cir. Aug. 29, 2017). The district court did no such thing, as the dissent correctly pointed out. Slip op. at 19 ("By substituting its muddled admissibility standard for the Rule 702 framework set forth in *Daubert* . . . the district court again erred.").

The four-prong Rule 702 framework is mandatory and precise; Rule 702 requires a relevance determination, as well as findings whether an expert's testimony is based on sufficient facts and is the product of reliable principles and methods. Finally, the court must examine whether the expert reliably applied the principles and methods. FED. R. EVID. 702. *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 149 (1999). The district court must analyze the proposed testimony's relevance *and* its scientific validity and methodology to appropriately

apply the Rule 702 framework. *Fuesting v. Zimmer, Inc.*, 421 F.3d 528, 535–36 (7th Cir. 2005) (emphasizing that, under *Daubert*, the judge must "ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable."), *modified on other grounds*, 448 F.3d 936, 937 (7th Cir. 2006); *United States v. Hall*, 93 F.3d 1337, 1341–42 (7th Cir. 1996) ("The judge must determine 'whether the expert is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue.'"); *Hall v. Flannery*, 840 F.3d 922, 926 (7th Cir. 2016) ("We review de novo whether a district judge has properly followed Rule 702 and *Daubert*. . . . [Judges must] appl[y] the Rule 702/*Daubert* framework.").

The district court recited only some of the applicable Rule 702 factors and failed to apply Rule 702 correctly. (R.53 at 2.) After devoting a brief paragraph to Alerding's relevance, the district court elided any discussion of scientific principles or methodology, and then puzzlingly admitted Alerding to testify "but only as a lay witness." (R.53 at 4.) The district court completely ignored whether Alerding's testimony would have been "based on sufficient facts or data," whether the proposed testimony was "the product of reliable principles and methods," and whether "the expert has reliably applied the principles and methods to the facts of the case." FED. R. EVID. 702(b)–(d). The district court instead "substitut[ed] its muddled admissibility standard for the Rule 702 framework." Slip op. at 19 (Posner, J., dissenting). The panel excused the district court's failure to faithfully apply Rule 702; this Court should not for the reasons that follow.

First, this new, hybrid lay-expert witness category places Rule 701 and Rule 702 in direct conflict and sows confusion. As a lay witness, Alerding's opinion could only be based on his personal knowledge, and "*not* based on scientific, technical, or other specialized knowledge

within the scope of Rule 702." FED. R. EVID. 701(c). Yet Alerding had no personal knowledge of the facts underlying Lopez's prosecution; he only proposed to testify based on his expertise and technical knowledge. The district court's designation of him as a lay witness prevented him from testifying as to the sole matters on which he was competent.

The district court's failure to apply Rule 702 and its decision to cobble together its own standard are troubling not only for this case but for future cases involving expert testimony. Under the panel's decision, district courts may inappropriately limit expert opinions by calling them lay witnesses, as happened here. (R. 53 at 4.) This approach is confusing to the litigants who now must present their cases amid a moving target of admissibility. *See* slip op. at 18 (Posner, J., dissenting) (noting that the panel's endorsement of the district court's flimsy, improper analysis will only foster confusion between the rule "about *calling* Alerding an 'expert' in the presence of the jury with the question whether he could testify as an expert at all under governing Rule 702.").

Sheer guesswork will have to guide litigants who must, on the fly and in front of the jury, decide when the witness "would be straying into 'expert witness' territory" and held unable to give any further lay-expert testimony. Slip op. at 19 (Posner, J., dissenting). Nearly any material question would be a target for an interrupting objection, as happened here. In Lopez's case, just as defense counsel elicited Alerding's testimony about the definitions of certain financial terms, which served as context for him to then discuss his opinions regarding the outlays and funding of small businesses, the government objected. (Trial Tr. 3-575–78) (government objecting to Alerding's "gold-plated expert testimony" and asserting that Alerding's testimony was irrelevant and "purposefully confusing."). Though the district court first gave Alerding "some leeway . . . . [because she thought] those terms would be

helpful to the jury," (Trial Tr. 3-576), the district court soon retracted, sustaining an objection on the same ground just minutes later, (Trial Tr. 3-579). This approach injects unfair arbitrariness into proceedings. Another judge might just as easily hold, under this twilight category of lay-expert witness, that definitions of financial terms or comparisons between the defendant's business and the typical start-up venture are inadmissible expert testimony because they are "based on scientific, technical, or other specialized knowledge within the scope of Rule 702." FED. R. EVID. 701(c). Counsel has no way of knowing and, as a result, cannot prepare to educe testimony in advance with reasonable certainty as to what will be admissible. Lopez's case lays bare the quandary. Defense counsel—forced to "move on" from testimony he had planned to elicit in order to draw essential comparisons between typical small businesses and Lopez's company, (R.42-1 at 8) (expert conclusions)—had to conduct this examination with the certainty of objections and the uncertainty of their outcome, all in front of the jury, (Trial Tr. 3-579).

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that this Court grant rehearing en banc.

/s/ Sarah O. Schrup

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CERTIFICATE OF COMPLIANCE WITH FED R. APP. P. 32(a) and 40 and SEVENTH CIRUCIT RULES 32 and 40

1. This petition complies with the type-volume limitations of FED. R. APP. 40(b) and Circuit Rule 40 because:

X this petition contains 6 pages, excluding the parts of the brief exempted by FED. R. APP. P. 32(a)(7)(B)(iii).

2. This petition complies with the typeface requirements of FED. R. APP. P. 32(a)(5) and Circuit Rule 32 because:

X this petition has been prepared in a proportionally-spaced typeface using Microsoft Word, in 12-point Time New Roman font with footnotes in 11-point Times New Roman Font.

/s/ Sarah O. Schrup

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CERTIFICATE OF SERVICE

I certify that I served electronically this corrected petition for rehearing through the Court's electronic filing system on September 26, 2017, which will send notice to counsel of record.

/s/ Sarah O. Schrup

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