**No. 16-2269**

**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE SEVENTH CIRCUIT**

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

JAIME C. LOPEZ,
Defendant-Appellant.

---

On Appeal from the United States District Court
For the Southern District of Indiana, Indianapolis Division
The Honorable Tanya Walton Pratt
Case No. 15-cr-00069

---

# REPLY BRIEF OF APPELLANT

---

BLUHM LEGAL CLINIC
Northwestern Pritzker School of Law
375 East Chicago Avenue
Chicago, Illinois 60611
(312) 503-0063

SARAH O'ROURKE SCHRUP
*Attorney of Record*
WYATT HONSE
*Senior Law Student*
PATRICK SIMONAITIS
*Senior Law Student*
CARTER PLOTKIN
*Senior Law Student*

Counsel for Defendant-Appellant
JAIME C. LOPEZ

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

### Cases

**Rules**



**Other Authorities**

## ARGUMENT

To defend the serious and prejudicial missteps in Lopez's trial, the government proclaims that its evidence neutralizes all errors in each of its twenty counts. (Gov't Br. 19, 25, 41) (resting its harmlessness arguments in whole or in part on its belief that the evidence was "overwhelming"). But this case breaks into at least two parts, and the many erroneous rulings below directly stymied Lopez's theory of defense as to the counts arising from the initial investments. Specifically, Lopez claimed that his wife's growing business was a legitimate starting point for these admittedly open-ended investment agreements. And although the same theory may not apply to Lopez's subsequent decision to unilaterally alter the agreements, at least eight counts were directly impacted by the four errors raised on appeal. The government, for its part, employed prejudicial terms ("lulling" payments) and comparisons (Bernie Madoff) and then fought—contrary to governing precedent—to exclude important expert and impeachment evidence from the defense's case. The district court sanctioned these tactics, which alone and in concert denied Lopez his constitutional rights to due process and to present a defense.

### I. The district court abused its discretion when it permitted Agent DeLancey's argumentative and prejudicial "lulling payment" testimony.

The district court blessed an improper use of the summary-witness mechanism by permitting Agent DeLancey to impose her own argumentative characterization of Lopez's payments to his investors. The government skirts this

question on appeal. (Gov't Br. 12.) Instead, the government leads off with a novel procedural challenge that directly conflicts with more than a century of precedent. It discusses courts' (not witnesses') use of the term "lulling payments" before opting to devote just two pages of argument to DeLancey's actual use of the offending term. Finally, the government renews its strained procedural argument as the central basis for harmlessness.

### A. DeLancey's use of the term "lulling payment" was argumentative and prejudicial because it necessarily implies a fraudulent intent.

As the court below initially recognized—but then neglected at trial—"lulling payment" is argumentative "when used to summarize bank accounts that do not otherwise include the term." (A.47.) The fact that courts have used the term in their rulings, (Gov't Br. 13), or that DeLancey used other uncontested terms in her testimony, (Gov't Br. 14), is irrelevant to whether the court improperly allowed her to label contractual money transfers as lulling payments.

The term "lulling payment" cannot be divorced from its argumentative meaning, as amply demonstrated by the government's use of it during closing argument, (Trial Tr. 4-626) ("This is just lulling. It's, in the fraud scheme, it's a way of making sure you don't get caught . . . . [The clients] were getting lulling payments designed to keep this from being revealed, and that's exactly what these payments are"), and in its pretrial representations, (1/14/16 Hr'g Tr. 14) (government opposing defense expert and describing the term with reference to intent: "I know Your Honor knows what the word 'lulling' means, but the victim investors are being lulled into believing that there's a return on their investment . . . ."); *see also*

(Appellant Br. 17, 26) (citing definition of "lull" and "Ponzi scheme"). The government has not demonstrated how that same term—one that the district court found impermissibly argumentative if used as a label on actual documents at trial—is sanitized by virtue of coming from a witness whose purpose at trial is to summarize those documents.

Instead, the government points to a few courts that have used the term as a post-hoc characterization of a defendant's conduct. (Gov't Br. 13–14) (citing *United States v. Moskop*, 499 F. App'x 592, 594 (7th Cir. 2013), *SEC v. Holschuh*, 694 F.2d 130, 143–144 (7th Cir. 1982), and *United States v. Pacheco-Martinez*, 791 F.3d 171, 175 (1st Cir. 2015)). But a *court's* use of the term does not inform whether the rules of evidence preclude a *lay witness* from using the term to summarize bank statements.[1] In any event, courts using the term do so as shorthand for payments serving a particular criminal purpose, as the government's own cases demonstrate. *See Moskop,* 499 F. App'x at 594 ("When Moskop could not dissuade clients who wanted to liquidate their investment accounts, he made 'lulling' payments . . ." and other strategies "to avoid detection"); *Holschuh*, 694 F.2d at 143–44 (affirming the district court's conclusion of law that "[a] scheme to defraud may well include later efforts to avoid detection of the fraud" including "lulling activities"; and that such activities were "evidence of a scheme which . . . was relevant to the question of

[1] Reviewing courts are not subject to the limitations imposed by the Rules of Evidence on witness testimony at trial. Just because a court uses a term does not imply that the term has a non-argumentative or non-prejudicial meaning. By the government's logic, a court's use of the term "murderer" in a decision to refer to an individual convicted of murder would mean that a witness could use the same term during the trial.

intent"); *Pacheco-Martinez*, 791 F.3d at 175 ("Pacheco would for a short period of time make 'lulling' interest payments to the investor *in order to give him or her the mistaken impression that the investment was safe and would generate the promised return.*" (emphasis added)); *see also United States v. Allen*, 491 F.3d 178, 186 (4th Cir. 2007) (citing *United States v. Painter,* 314 F.2d 939, 943 (4th Cir. 1963) for the proposition that "lulling payments do not establish good faith as they are intended to conceal the fraud and 'ensnare other victims'"). Far from a simple "name for a type of payment" (Gov't Br. 14), the term "lulling payment" inherently carries an intent-based meaning.

Rather than remedy its unsatisfying answers to the arguments Lopez briefed, the government spends several pages discussing an argument that Lopez did not: a Rule 403 challenge to DeLancey's testimony as unduly prejudicial. But even viewed through that lens, Lopez prevails. DeLancey's opinion testimony was prejudicial because it imbued facially neutral acts—interest payments on bank statements—with a deceptive intent and did so no less than twenty times in front of the jury. (Trial Tr. 3-425–534.) In truth, the only "consequence[] that necessarily flow[ed]" from the bank statements DeLancey summarized was—at most—that the payments were contractually obligated. *United States v. Stierhoff*, 549 F.3d 19, 28 (1st Cir. 2008) (noting the limitations on lay summary witness testimony in financial-transaction cases). Because she was designated a lay witness and because she lacked personal knowledge of the facts underlying the payments, anything beyond that was an unfounded opinion. *See* (A.43) (government stating that "Agent

DeLancey is not testifying as an expert witness" and explicitly confirming that her summary analysis was not expert testimony under Rule 702).

The government's broad assertion that "[c]ourts have approved law enforcement agents' use of the term 'scam,'" which it pronounces "worse" than lulling (Gov't Br. 16–17), grossly oversimplifies the issue.[2] Courts reverse when government agents use terms that go beyond description and veer into opinion on the document's significance. *See*, *e.g.*, *United States v. Dicker*, 853 F.2d 1103, 1110 (3d Cir. 1988) (finding abuse of discretion where government witness "simply ascribed his own, illicit meaning to straightforward, potentially legitimate statements" by referring to documents as "phony"); *United States v. Scop*, 846 F.2d 135, 140–43 (2d Cir. 1988) (reversing as improper *expert* opinion where witness used phrases "scheme to defraud," "manipulation," and "fraud"). Coming from the mouth of an IRS Special Agent, (Trial Tr. 3-415), whom the government held out as having simply analyzed and summarized the evidence, DeLancey's unwarranted

[2] The case the government cites for its "scam" versus "lull" distinction is readily distinguishable. (Gov't Br. 16–17) (citing *United States v. Hoffecker*, 530 F.3d 137 (3d Cir. 2008)). There, the witness was not a law enforcement agent nor a summary witness, but rather an informant who had been the defendant's longtime friend, lawyer, and business partner. *Hoffecker*, 530 F.3d at 152. The Third Circuit affirmed because, as a fact witness, his opinion was based on his firsthand knowledge and interactions with the defendant. *Id.* at 171. Here, of course, DeLancey was a summary witness who lacked any personal knowledge. The government's reliance on the Fifth Circuit case *Aggarwal* and this Court's *Pree* decision is misplaced for the opposite reason: they involved expert opinion testimony. (Gov't Br. 17) (citing *United States v. Aggarwal*, 17 F.3d 737, 743 (5th Cir. 1994) and *United States v. Pree*, 408 F.3d 855, 870 (7th Cir. 2005) (witness not proffered as expert but nonetheless "qualified to express an opinion of the proper tax consequences of a transaction" (internal quotation marks omitted)).

and unfounded opinion characterizing Lopez's payments to his investors as lulling was unfairly prejudicial.

### B. The government sets up procedural strawmen that do not undermine the fact that DeLancey delivered improper testimony.

The government cites no authority at all to support its claim that Lopez now "faces a considerable procedural obstacle" on appeal because he probed DeLancey's characterization of "lulling payments" during the defense's cross-examination. (Gov't Br. 11.) Nor does the government explain what "procedural obstacle" is present here. (Gov't Br. 11.) To the contrary, more than a century of precedent establishes that a party's decision to raise an issue on cross-examination—as Lopez did here to counter the government's ill-gotten narrative regarding Lopez's intent—has no impact whatsoever on the ultimate preservation of the issue for appellate review. *Feuchtwanger v. Manitowoc Malting Co.*, 187 F. 713, 719 (7th Cir. 1911) (rejecting "the contention that an exception to the admission of incompetent evidence is waived because the wronged party endeavors to break its force by cross-examination"); *United States v. Marshall*, 762 F.2d 419, 425 (5th Cir. 1985) (A party's "cross-examination of a witness as to the inadmissible evidence . . . does not waive the vitality of his continuing objection, for the party is entitled to rely upon the trial judge's ruling"); *Clark v. City of Los Angeles*, 650 F.2d 1033, 1038 (9th Cir. 1981) ("Reference to evidence admitted over a party's objection does not constitute a waiver of their original objection. Otherwise, a party would unfairly be required to

give up its opportunity to convince the jury to find in its favor in order to preserve its right to raise evidentiary issues on appeal.").[3]

For the same reason, the government's baffling "door opening" argument—that "Lopez is stuck" because references to lulling payments during cross-examination "passed through a door he opened"—is barred by the same governing precedent cited above. It is also a gross mischaracterization of the true "opening the door" doctrine, which when articulated properly would only apply to the government in this case. WRIGHT & GRAHAM, 21 FED. PRAC. & PROC. EVID. § 5039.1 (Estoppel to Object—"Opening the Door") (2d ed. 2017) (noting that when evidence is introduced over the objection of the other party, then "[n]othing in the 'opening the door' concept, properly understood, requires the [objecting] party to give up its objection as the price of rebutting the evidence").

Perhaps worse, in stating that Lopez became "stuck" when DeLancey "answer[ed] his question, at length," (Gov't Br. 11–13), the government presents this Court with an incomplete and misleading picture of what happened during cross-examination. *Compare* (Gov't Br. 11) *with* (Appellant Br. 24–25) *and* (Trial Tr. 3-532–34). A review of the full exchange, which the government did not include in its brief, plainly shows that defense counsel's line of questioning related to Lopez's contractual obligations to make monthly payments. After DeLancey admitted that

[3] The government also suggests a curious remedy. (Gov't Br. 11.) In finding error, this Court would not "scrub" the record of DeLancey's direct testimony, nor would it leave intact the cross-examinations references that arose exclusively because the government introduced the term. Instead, this Court should vacate and remand for a new trial directing the exclusion of the erroneous testimony.

Lopez was "adhering to the terms of th[e] contract when he was making those payments," the government interrupted, which in turn led to a colloquy where the district court diverted defense counsel's true line of inquiry into a question defense counsel never asked: "*why* she was referring to them as 'lulling payments.'" (Trial Tr. 3-533) (emphasis added).

By denying Lopez the opportunity to sufficiently cross-examine DeLancey on the lulling payments issue, the court failed to cure its error in allowing her testimony in the first place. In reframing and redirecting the defense counsel's questioning, the district court improperly interfered with DeLancey's cross-examination. The district court's decision, in turn, precluded Lopez from countering the government's narrative, and thus prevented him from presenting a complete defense.

**C. The district court's error was not harmless.**

The government bears the burden of showing that DeLancey's lulling payment testimony was harmless, *United States v. Ortiz,* 474 F.3d 976, 982 (7th Cir. 2007), and "[t]he test for harmless error is whether, in the mind of the average juror, the prosecution's case would have been significantly less persuasive had the improper evidence been excluded," *United States v. Vargas,* 689 F.3d 867, 875 (7th Cir. 2012). The government's case with respect to at least the first eight counts of conviction would have been significantly weaker without DeLancey injecting her own characterization of Lopez's contractually required payments, and the government's three proffered rationales do not alter this conclusion.

First, the government claims that because an unpublished Fifth Circuit decision deemed a witness's use of the terms "lulling payment" and "Ponzi scheme" harmless error, this Court should as well. (Gov't Br. 18) (citing *United States v. Plato,* 593 F. App'x 364, 375 (5th Cir. 2015)). There, however, the court based its conclusion on the fact that the government witness—who was not a summary witness like DeLancey—never directly attributed either lulling or a Ponzi scheme to the defendant. Rather, the witness simply described the characteristics of the practices. *Plato,* 593 F. App'x at 375. Not so here. *See, e.g.*, (Trial Tr. 3-436) (witness directly attributing those terms to Lopez).

Next, the government invokes its same novel "door opening" argument. (Gov't Br. 18.) But again, no authority supports the government's view, and because DeLancey's cross-examination was re-directed by the court, the availability of cross-examination did not cure the court's error.

Finally, the government defaults to its blunt claim that its evidence was "overwhelming." (Gov't Br. 19.) When viewed in context of the whole trial, including the government's heavy reliance on the term, the absence of Agent DeLancey's lulling payment testimony would have left a significant hole in the government's case. *See* (Trial Tr. 4-625) (government closing argument citing DeLancey's lulling payment testimony, comparing the payments to "fake" Potemkin villages, and stating that these villages, like Lopez's payments, were "designed to mislead"); *see also* (Trial Tr. 4-626) (using the disputed transactions to equate Bernie Madoff's victims to Lopez's clients: "They were getting lulling payments designed to keep this

from being revealed, and that's exactly what these payments are"); (Trial Tr. 4-627) ("[T]he money that Danny Cole gets are [sic] nothing but continuing lulling payments to try and still perpetuate this scheme.").

This testimony would have had the most impact in the fraud counts focused on the initial investments. A key premise of the defense's theory was that the promissory notes did not specify particular investments and the materials given to the investors expressly reserved Lopez's discretion to invest where he saw fit. And unlike the post-July 2011 period, where the government introduced documentary evidence in the form of altered notes to support its charges, the early counts rested on witness testimony, some of which was vague and equivocal, as discussed below. *See infra* Section II. Allowing DeLancey to characterize these early payments to his clients as lulling during this 2010 period, *see* (Trial Tr. 3-435–36), injected fraudulent intent at the weakest part of the government's case. Finally, this error worked in close conjunction with the other errors discussed below to unfairly restrict Lopez's defense.

## II. The government improperly compared Lopez to Bernie Madoff.

The government's argument that it properly compared in closing argument Jaime Lopez to Bernie Madoff cannot be correct for two reasons. First, the distinction the government tries to draw between one-on-one comparisons and what it calls "narrow" device comparisons is a non-starter. (Gov't Br. 20.) It cites no on-point authority for this novel approach that creates a loophole whereby prosecutors could repeatedly mention notorious criminals during closing arguments so long as

they tethered those references to a specific act: "Like Hitler, the defendant used marketing materials to recruit individuals to his side" is no less improper than "Hitler and the defendant are similar." Both are also irrelevant to a defendant's guilt for a charged crime. The government's cited circuit authority is unhelpful because the Eighth Circuit did not articulate sufficient facts to determine the nature of the so-called "device" that government now claims with the prosecutor's approach in *Papajohn* regarding O.J. Simpson. (Gov't Br. 20); *United States v. Papajohn*, 212 F.3d 1112, 1121 (8th Cir. 2000). Accordingly, *Papajohn* is not readily comparable to the government's conduct in Lopez's case. In any event, *Papajohn* also made clear that the prosecutor's reference to Simpson was fleeting (unlike the three mentions that occurred here), and that Simpson's notoriety was not on par with, for example, Hitler or Charles Manson. *Id.* Madoff, however, is commonly believed to be the poster child for large-scale financial fraud, so the government's invocation of him in Lopez's case is much more harmful.[4] Further, in neither of the government's cited cases did the defendant stand trial for murder like Simpson, lessening the likelihood that the jury would equate them; here, of course, the government tied Lopez to a notorious financial criminal who pleaded guilty to a bevy of the same financial crimes.

[4] The government's second case, *Szubielski v. State*, No. 190, 2012, 2013 WL 6211807 (Del. Nov. 26, 2013), is similarly off-point. There, the Delaware Supreme Court declined to reverse an assault conviction where the prosecution pointed out during cross examination, not closing argument, that the defendant engaged in a high-speed police chase, not a low-speed chase, like O.J. Simpson's. *Id.* at *3–5.

Second, the government's statements at trial cannot in good faith be squared with the district court's explicit pretrial exclusion of evidence "drawing any similarity to other infamous fraud prosecutions such as 'Bernie Madoff.'" (R.37 at 4.) Because the motion in limine prohibited evidence on this topic, the government's statements cannot be deemed fair inferences or comments on the evidence, which is the whole purpose of closing arguments. *United States v. Morgan*, 113 F.3d 85, 89–91 (7th Cir. 1997); *United States v. Mendoza*, 522 F.3d 482, 490–91 (5th Cir. 2008) ("A prosecutor is confined in closing argument to discussing properly admitted evidence and any reasonable inferences or conclusions that can be drawn from that evidence") (citation omitted).

Finally, the Madoff references in this case are not harmless. First, the prosecutors' comments invited the jury to view *all* of Lopez's actions as analogous to Madoff's, thereby encouraging the jury to decide the case without examining Lopez's specific conduct relative to each individual count. This is particularly harmful because the government chose to introduce evidence of the investors' losses. These emotionally charged facts can spur a jury to overlook key differences among the charges: in Lopez's case, the clear breaking point between the early investments and those that occurred after July 2011, when Lopez allegedly began making unilateral extensions of the loans and mislabeling investments.

Eight wire-fraud counts (Counts One through Eight) and three money-laundering counts (Counts Sixteen, Seventeen, and Eighteen) involve conduct prior to July 2011, and the evidence at trial related to those first-round investments was

equivocal when compared to the post-July 2011 conduct. For example, the marketing materials that Cole acknowledged receiving, (Trial Tr. 2-304), do not specify where the funds would be invested, and instead merely stated that JCL Capital was promising a rate "higher than most money market accounts, savings accounts and short-term CDs," (Gov't Ex. 7H) ("Looking for CD or Money Market rates"). JCL Capital delivered on that promise. *Compare* (Gov't Ex. 7F) (showing $500 monthly deposits into Cole's Entrust account, money that he could have withdrawn himself at any time) *with* (Gov't Ex. 7H) (promising such payments). These acknowledged written representations, combined with Cole's equivocal testimony about where his money would be invested, could have led a reasonable juror to conclude that Lopez did not engage in fraud with respect to the initial investment:

> **[The Prosecutor]:** What was the deal when you gave him his -- your money? You looked through all of those marketing materials. Was that what you understood your money was going towards?
>
> **Cole:** Yes. I thought my money would be pooled with others to be invested in businesses.

(Trial Tr. 2-350.) Similarly, both Holsworth and J. Wilson[5] vacillated about their initial investments. *See* (Trial Tr. 2-375–76; Trial Tr. 2-202) (Wilson's testimony acknowledging receipt of Gov't Ex. 9I, which does not specify where the money would be invested, admitting that he did not know where specifically his capital

[5] The initial Jerry Wilson and Holsworth investments relate to Counts One through Five (their money was commingled in the JCL & Company account and the Colleen Wilson investment was placed into the JCL Direct account and relates to Count Six).

would go, and stating his belief at the time that Lopez "had different clients" with different financing needs); (Trial Tr. 2-366; Trial Tr. 2-376) (Holsworth testifying that he believed Lopez would be investing money with the companies that were listed on Lopez's website and authenticating website screenshot exhibit disclosing Transform Consulting (a/k/a 413 Consulting) as potential investment vehicle).

Lopez thus suffered prejudice by the government's injection of Madoff (and, as discussed above, lulling payments) into its case because it encouraged the jury to ignore the evidence in the record showing that Lopez invested in a legitimate business and in accordance with his investors' expectations. Finally, the government ignores the fact that the district court penalized Lopez for objecting during closing arguments, which exacerbated the prejudice to Lopez. By openly awarding additional minutes of argument time to the government, the district court solemnized this damaging analogy, effectively endorsing the government's improper argument. (Trial Tr. 4-618, Trial Tr. 4-626.)

## III. The district court erroneously forced Michael Alerding to testify as a lay witness, thus depriving Lopez of his constitutional right to present a complete defense.

As Lopez pointed out in his opening brief (Appellant Br. 35–36), and discusses in more detail below, the district court failed to adhere to this Court's requirements for applying Federal Rule of Evidence 702, which catapulted Lopez's expert into a twilight category of lay-expert who could not possibly give a full-throated explanation of his expert conclusions. As a threshold matter, the government's flat pronouncement that abuse of discretion review applies ignores

both governing precedent and the opening brief. *Compare* (Gov't Br. 26) *with* (Appellant Br. 35). This Court has stated time and again that its first inquiry is whether the district court properly applied the Rule 702 framework, a question it reviews de novo. *United States v. Glover*, 479 F.3d 511, 517 (7th Cir. 2007); *Hall v. Flannery*, 840 F.3d 922, 926 (7th Cir. 2016). If this Court determines that the district court caused a substantial error by improperly applying the Rule 702 framework, then it will reverse. *Hall*, 840 F.3d at 930; *Fuesting v. Zimmer, Inc.*, 421 F.3d 528, 535–36 (7th Cir. 2005), *modified on reh'g*, 448 F.3d 936, 937 (7th Cir. 2006) (finding that district court failed to follow Rule 702, reviewing de novo, and granting a new trial based on its independent analysis). The government raised a Rule 702 challenge to Alerding's testimony (R.42 at 1–3), which triggered the district court's duty to apply the Rule 702 framework to its decision-making, *Gayton v. McCoy*, 593 F.3d 610, 616 (7th Cir. 2010) ("[T]he district court is tasked with determining whether a given expert is qualified to testify . . . ."). The district court's failure to do so is subject to de novo review. *Hall*, 840 F.3d at 926.

### A. The district court failed to follow Rule 702 and improperly rejected Alerding as an expert.

The government is unable to point to a single page in the record demonstrating that the district court gave a moment's thought to prongs two, three, and four of the Rule 702 framework. FED. R. EVID. 702(b)–(d) (tests for reliability of methods, sufficient data, and principled application to the case). Application of the framework is not optional. *United States v. Hall*, 93 F.3d 1337, 1341 (7th Cir. 1996) ("In *Daubert* . . . , the Supreme Court established the approach a trial judge *must*

take when faced with a Rule 104(a) proffer of expert scientific testimony, for possible admission under Rule 702.") (emphasis added). Once the prongs are satisfied, the witness should be admitted as an expert and permitted to offer his opinions.[6] *See* FED. R. EVID. 702 advisory committee's note to 2000 amendment ("So long as the principles and methods are reliable and applied reliably to the facts of the case, this type of [expert] testimony *should* be admitted.") (emphasis added); *Hall v. Flannery*, 840 F.3d at 926 ("[Expert] testimony *is permitted*" when the district court correctly applies Rule 702) (emphasis added). The district court should have, but did not, rely on Rule 702 in its decision-making.

Had the district court applied the Rule 702 framework, Alerding would have satisfied it. As for the first prong, FED. R. EVID. 702(a), the government admitted that Alerding is an expert, (R.104 at 3), did not bother to challenge his qualification to be admitted as an expert, *see* (R.42 at 1–3), and the district court expressly found that Alerding's testimony was relevant, (A.46); *see also Daubert v. Merrell Dow Pharm.*, 509 U.S. 579, 591 (1993) (Rule 702's requirement that the testimony "assist the trier of fact" goes "primarily to relevance"). A review of his expert report, (R.42-1), and trial testimony, (Trial Tr. 3-572–95), shows that he satisfied the other prongs of Rule 702 as well: Alerding relied on standard accounting methods, thoroughly analyzed Lopez's financial data, and the opinions that he would have offered aligned with those analyses. (R.42-1; Trial Tr. 3-579–80.)

[6] If a district court harbors concerns after completing the Rule 702 analysis and qualifying a proposed expert, it may employ prophylactic measures. (Appellant Br. 38 n.10.) But wholesale rejection of an expert, in the absence of the required Rule 702 analysis, is never appropriate.

The district court erred not only in neglecting Rule 702, but also in the approach it applied instead. The district court's failure to apply Rule 702 caused it to fill that void with its own novel approach that effectively eliminates *any* expert testimony in any trial as well as a district court's obligations under Rule 702. *Compare Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 147 (1999) *and Gayton*, 593 F.3d at 616, *with* (A.44) (district court concluding any "expert testimony" would "inappropriately elevate" that testimony, therefore "an expert determination by the [district court] is not warranted").[7] As discussed below, these errors were harmful.

### B. The district court's inappropriate exclusion of Alerding substantially harmed Lopez's defense.

The government bears the burden of proving the harmlessness of a constitutional error beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18, 24 (1967). Thus, here, the government needed to show that the district court's Rule 702 error did not contribute to the verdict, and that the error was

[7] The government muddies the otherwise straightforward inquiry of Rule 702 by injecting arguments about Rule 401 relevance and Rule 403 confusion that are not properly before this Court. (Gov't Br. 26–30.) The district court expressly rejected the relevance argument (A.46), the government did not cross-appeal, and concedes in any event the ruling was reasonable, (Gov't Br. 27). Because relevance is not at issue in this appeal, the government's reliance on *United States v. Radziszewski*, 474 F.3d 480 (7th Cir. 2007) is misplaced. (Gov't Br. 29.) And it is distinguishable in any event because Alerding's testimony about Lopez's business aimed to show more than a good-faith intent to repay in order to defeat an intent to defraud—the issue in *Radziszewski*. 474 F.3d at 485–86. Alerding's testimony had independent relevance in that it rebutted the government's decision to introduce evidence of loss. (R.104 at 8–9.) Moreover, Alerding's testimony went to whether 413 Solutions was a legitimate business enterprise, (R.104 at 8–9; R.42-1 at 4–5), and thus whether a jury could conclude that investing in it fell within the terms of Lopez's agreement with his clients. Finally, the government's suggestion that Rule 403's proscription on confusing testimony should influence this appeal is undercut by the district court's decision to admit him solely as a lay witness, to which, the district court noted, the government did not object. (A.46) (citing R.39 at 2).

"unimportant in relation to everything else the jury considered on the issue in question, as revealed in the record." *Williams v. Chrans*, 945 F.2d 926, 949 (7th Cir. 1991) (internal quotation and citation omitted). The government not only fails to articulate this standard, it makes no effort to meet it. In offering just one conclusory reason—its belief that "the court gave Lopez most of what he wanted" by permitting Alerding to testify at all, (Gov't Br. 34)—the government simply cannot meet its beyond-a-reasonable-doubt burden.

In actuality, the district court did not give Lopez most everything he wanted; Lopez could not fully examine his expert as an expert. As noted in the opening brief, the district court's error was in conflating some courts' cautionary measure of prohibiting the use of the label "expert" in front of the jury as warranting the wholesale denial of Alerding's expert status. Yet it is the status, not the label, that matters most to a defendant. Expert status means that the witness can offer opinions based on his expertise. FED. R. EVID. 702. This is a unique role in a trial that cannot be filled in any other way. Thus, precluding an otherwise qualified expert from a criminal defendant's case can rise to constitutional error. *Howard v. Walker*, 406 F.3d 114, 131, 133 (2d Cir. 2005) (finding Sixth Amendment violation in habeas context where defendant's expert was precluded from testifying at trial); *see also United States v. Smead*, 317 F. App'x 457, 462 (6th Cir. 2008) ("Because expert testimony often forms a critical part of a defendant's presentation of evidence, '[i]n rare instances,' a district court's exclusion of testimony under

Rule 702 might violate a defendant's Sixth Amendment right to present a defense") (quoting *United States v. Vasilakos,* 508 F.3d 401, 410 (6th Cir. 2007)).

Alerding was prepared to offer three major opinions about Lopez's businesses based on his knowledge, experience, and expertise, and was prevented from offering any of them. (1/14/16 Hr'g Tr. 9) (defense counsel stating to court that Alerding's opinions were ones he "uniquely can talk about"). This alone was a significant deprivation. For example, the jury did not have the benefit of Alerding's third opinion: that Lopez's company, which included his wife's Transform Consulting "is currently a profitable business that has the potential to generate a viable and consistent revenue stream in the future if the Defendant has the ability to operate the business going forward." (R.42-1 at 8.) Defense counsel could have elicited this opinion—which went to the legitimacy of that business as an initial investment vehicle—had the district court admitted Alerding as an expert.

The jury also did not hear significant supporting facts underlying Alerding's three conclusions. *Compare* (Trial Tr. 3-572–95) *with* (R.42-1 at 8.) For example, Alerding intended to testify about the "economic substance" of Lopez's businesses and their generation of "significant revenues" that "resulted in value to [Lopez's] clients." (R.42-1 at 8.) Alerding's trial testimony contained none of this, however, and this testimony would have directly rebutted not only the government's theory that Lopez engaged in fraud from the get-go, but also the government's evidence of loss. *See* (1/14/16 Hr'g Tr. 8–10) (defense counsel explaining that Alerding's testimony was necessary to show that Lopez's initial investment choices were not

aimed at defrauding investors). Similarly, although Alerding was permitted to briefly describe his experience with start-up small businesses—and in particular whether they resort to loans—he was not able to explain *why* because the district court's confusing ruling enabled repeated government objections that curtailed the testimony. (Trial Tr. 3-575, Trial Tr. 3-579) (government initially objecting on "relevance" grounds because it believed Alerding's testimony to be "gold-plated expert testimony" and then renewing it as "[r]elevance again"). The district court sustained the objection, intimating that Alerding was treading in expert-witness territory. (Trial Tr. 3-579.) Defense counsel was forced to "move on" from his line of questioning relating to typical businesses to a line of questions relating to Lopez's own businesses. (Trial Tr. 3-579.) Having been forced to abandon the testimony based on Alerding's knowledge of and experience with other typical companies, the defense lost the opportunity to draw essential comparisons between typical start-up companies and Lopez's company. *See* (R.42-1 at 8.)

Finally, the district court gave an expert jury instruction, (R.63 at 14), even though the government and district court stressed that there were no expert witnesses at trial, (R.42 at 3; A.46). The government simply assumes that the expert instruction elevated Alerding's testimony, (Gov't Br. 33), ignoring that the instruction actually could have elevated DeLancey's testimony in the jurors' minds and thus improperly bolstered the government's case. (Appellant Br. 40–41); *see also* (Trial Tr. 3-415–18) (detailing DeLancey's experience and qualifications). At a minimum, it would have confused the jury. At best, the instruction is a wash,

because it refers to "*a* witness who gave opinions"—a single witness—and the jury could not know whether that witness was DeLancey or Alerding. (R.63 at 14) (emphasis added).

## IV. The government concedes that the district court erred when it forbade Lopez from impeaching Cole's prior inconsistent statement through Agent Shivers's testimony.

Abandoning the position it staked out below, the government now concedes that Cole's prior statement to Shivers—where he told the agent that he did not sign the initiating documents and thus implied that Lopez forged them—"may have been inconsistent with his trial testimony." (Gov't Br. 39.) Now the government further acknowledges that omissions—like the one Cole chose—can be precisely the type of inconsistent statements that this Court permits the other side to counter with extrinsic evidence. (Gov't Br. 39–40) (stating that this Court has "faced similar issues before," citing this Court's decisions in *United States v. Lashmett*, 965 F.2d 179 (7th Cir. 1992) and *United States v. Wimberly*, 60 F.3d 281 (7th Cir. 1995)); *cf.* (Trial Tr. 3-542) ("[The government]: Your Honor, he admitted he made the statement, so it's not inconsistent.").

Having all but confessed error, the government turns to harmlessness. The government neither acknowledges its burden, nor satisfies it. FED. R. CRIM. P. 52(a); *United States v. Vonn*, 535 U.S. 55, 58 (2002) (the government must "show[]" harmlessness); *United States v. Mansoori*, 480 F.3d 514, 523 (7th Cir. 2007) ("it is the government's burden to prove that the error was *not* prejudicial") (emphasis in original). The three rationales the government unearths do not meet its burden.

As a threshold matter, extrinsic evidence trumps the acknowledgement of the declarant who might have "a flimsy recollection of events or worse, a propensity to lie." *Lashmett*, 965 F.2d at 182. Against this backdrop, the government wrongly claims that this case is on all fours with *Lashmett* and *Wimberly* with respect to harmlessness. The government ignores key distinguishing characteristics between those cases and Lopez's. For example, the government asserts that Lopez's objective aligned with Lashmett's: to ensure "'[t]he jury was fully apprised' of Cole's false statement and its ramifications." (Gov't Br. 40) (quoting *Lashmett*, 965 F.2d at 182). But unlike *Lashmett*—where the jury was given ample additional, independent evidence that established a single "ramification" (prior perjury demonstrating current perjury)—Lopez's jury heard only Cole's words and thus was denied the benefit of Shivers's explanation. Specifically, in *Lashmett*, the "full apprisal" on which the government here relies consisted of more than the witnesses' own admissions that they had lied. In *Lashmett*, the jury was informed of the witnesses' prior crimes of dishonesty, they saw the plea agreements detailing the witnesses' various falsehoods in prior litigation, and were even later supplied, via a different witness, one of the two pieces of extrinsic evidence defense counsel initially sought to admit. 965 F.2d at 183. This Court's *Wimberly* decision likewise rested on the fact that several additional witnesses disclosed the inconsistencies that the defendant sought to admit via extrinsic evidence. 60 F.3d at 286. Here, however, Lopez's lawyer had only Cole's direct testimony—hardly the "most convincing evidence" that

this Court in *Lashmett* recognized as essential to a defendant making his case. 965 F.2d at 182 (citation omitted).

Second and similarly, the government ignores that the "ramifications" of Shivers's testimony about Cole's omission were more and different than the single ramification arising from the extrinsic evidence in *Lashmett*: perjury. Not only would Shivers have confirmed Cole's prior omission, he could have described the details and circumstances of that conversation in a way that Cole did not, undermining Cole's credibility in a different and more meaningful way. Finally, Shivers could have revealed the impact of that omission on the budding investigation—a second crucial "ramification" that *Lashmett* lacked.

Finally, the government suggests that Cole's omission would hardly have made a dent in the jurors' decision-making given the remaining evidence in the case that it sweepingly claims to have proved "Lopez's fraud beyond reasonable doubt." (Gov't Br. 42.) Yet the strength of remaining evidence is not dispositive; impairing a defendant's sole avenue of defense can have a substantial and injurious effect on the jury, requiring reversal. *Wimberly*, 60 F.3d at 286 (citing *United States v. Hogan*, 886 F.2d 1497, 1512 (7th Cir. 1989)).

These concerns become particularly acute where, as here, there are multiple counts that rise or fall on different evidence. Thus, if the credibility of Cole's testimony was instrumental to certain counts, then the fact that other counts may well have been proven is irrelevant; every conviction is consequential in its own right. *See Ray v. United States,* 481 U.S. 736, 737 (1987) (in "concurrent sentence

doctrine" case, remanding for consideration of a second, concurrent drug-possession conviction that the lower court had opted not to review because the $50 assessment imposed for each count meant that each one had to be considered separately on appeal).

Cole's credibility was in fact instrumental to Count Seven.[8] Specifically, Cole stated on the stand that Lopez promised safe investments backed by real estate. (Trial Tr. 2-311.) Other record evidence contradicted Cole's testimony. First, the notes Cole signed clearly indicated that they were "unsecured" (Trial Tr. 2-320–2-321), and the promotional materials likewise did not mention the investments would be collateralized by real estate, (Gov't Ex. 7H). And there was also evidence that Cole was willing to do everything in his power to put Lopez in jail. (Trial Tr. 2-346–47.) In this close case, Cole's credibility was essential to Lopez's conviction on Count Seven, yet the defense was deprived of the opportunity to challenge Cole with its best evidence: a federal agent taking the stand against one of the government's own witnesses to expose his wavering story. Contrasting this best evidence with Cole's own testimony—stilted one-line responses to questioning on cross-examination (Trial Tr. 2-335–36)—makes plain the importance of Shivers's testimony to Lopez's defense.

[8] Count Seven can be traced to directly to Cole's money because Cole's initial investment, and only Cole's, was placed into JCL Capital. (Gov't Ex. 7B.) Count Seven dealt with a $25,000 investment from JCL Capital into 413 Solutions on January 26, 2011. This transaction took place exclusively with the funds Cole freely gave Lopez, not the later funds that Cole claims were invested without his permission.

## CONCLUSION

For the foregoing reasons, Appellant Jaime Lopez respectfully requests that the Court vacate his convictions and remand for a new trial.

Respectfully Submitted,

Jaime Lopez
Defendant-Appellant

By: /s/ SARAH O'ROURKE SCHRUP
Attorney
SARAH O'ROURKE SCHRUP
*Attorney of Record*
WYATT HONSE
*Senior Law Student*
PATRICK SIMONAITIS
*Senior Law Student*
CARTER PLOTKIN
*Senior Law Student*

BLUHM LEGAL CLINIC
Northwestern Pritzker School of Law
375 East Chicago Avenue
Chicago, Illinois 60611
(312) 503-0063

Counsel for Defendant-Appellant
Jaime Lopez

**CERTIFICATE OF COMPLIANCE WITH FEDERAL RULE OF APPELLATE PROCEDURE 32**

1. This brief complies with the type-volume limitation of FED. R. APP. P. 32(a)(7)(B)(ii) because this brief contains 6705 words, excluding the parts of the brief exempted by FED. R. APP. P. 32(f).

2. This brief complies with the typeface requirements of Circuit Rule 32 and FED. R. APP. P. 32(a)(5) and the type style requirements of FED. R. APP. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2010 with a 12-point Century Schoolbook font and footnotes in 11-point Century Schoolbook font.

By: /s/ SARAH O'ROURKE SCHRUP
*Attorney of Record*
WYATT HONSE
*Senior Law Student*
PATRICK SIMONAITIS
*Senior Law Student*
CARTER PLOTKIN
*Senior Law Student*

BLUHM LEGAL CLINIC
Northwestern Pritzker School of Law
375 East Chicago Avenue
Chicago, Illinois 60611
(312) 503-0063

Dated: April 10, 2017

## CERTIFICATE OF SERVICE

I, the undersigned, counsel for Defendant-Appellant, Jaime Lopez, hereby certify that I electronically filed this brief with the clerk of the Seventh Circuit Court of Appeals on April 10, 2017, which will send the filing to counsel of record in this case.

By: /s/ SARAH O'ROURKE SCHRUP
*Attorney of Record*
WYATT HONSE
*Senior Law Student*
PATRICK SIMONAITIS
*Senior Law Student*
CARTER PLOTKIN
*Senior Law Student*

BLUHM LEGAL CLINIC
Northwestern Pritzker School of Law
375 East Chicago Avenue
Chicago, Illinois 60611
(312) 503-0063

Dated: April 10, 2017