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.
No. 1:15-cr-00069— Hon. Tanya Walton Pratt, *Judge*.

BRIEF OF THE UNITED STATES

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JURISDICTIONAL STATEMENT

The Appellant's jurisdictional statement is complete and correct.

STATEMENT OF THE ISSUES IN THE APPEAL

1. Whether the district court abused its discretion when it permitted Agent Janet DeLancey to use the common factual term "lulling payments" to summarize her description of Lopez's use of lulling payments.

2. Whether the prosecutor's limited comparison of a device Lopez used to Bernie Madoff's use of the same device was improper and, if so, whether that narrow comparison infected the entire trial with unfairness.

3. Whether the district court's decision not to admit Michael Alerding as an expert was an abuse of discretion, where Alerding's testimony was irrelevant and designed to confuse the jury.

4. Whether the district court's exclusion of certain extrinsic impeachment evidence warrants reversal, where Lopez was already able to emphasize the omission at issue repeatedly with other impeachment evidence, and where the additional impeachment evidence Lopez wanted would have had little impact on the substantial body of evidence demonstrating his guilt.

STATEMENT OF THE CASE

This appeal follows a guilty verdict by a jury. The Court therefore views the facts in the light most favorable to the jury's verdict. *United States v. Mitten*, 592 F.3d 767, 776 (7th Cir. 2010).[1]

Jaime Lopez's Fraud Scheme

Between December 2009 and January 2012, Jaime Lopez created various business entities on paper. He then utilized those businesses to commit wire fraud, money laundering, and securities fraud. (PSR ¶¶ 4-43.)

Lopez's paper business entities all carried names beginning with his initials. They included JCL Interest Plus, JCL Capital Inc., JCL & Company, Inc. and JCL Direct (the JCL Entities). (T. 1-33; 3-422–24; 3-428.) The companies had no employees and were essentially alter egos of Lopez, who conducted all of his business from his home. (T. 3-420–21.)

The victims of Lopez's fraud scheme were all people that he met personally at his church or through family members. His victims included Thomas Holsworth, (T. 2-356–57), Jerry and Colleen Wilson, (T. 2-186–88; 2-268), and Danny Cole, (T. 2-301–02). The only people who ever invested with

[1] Throughout this brief, the government will make the following references: (T. = Trial Transcript); (PSR = Presentence Investigation Report); (S. = Sentencing Hearing Transcript); (R. = District Court Docket Number); (A. Br. = Appellant's Brief).

Lopez were these four victims and his father-in-law, Stevie Brown. (T. 3-552–53.)

Lopez persuaded his victims to transfer their retirement funds to him for further investment. In soliciting business from his victims, Lopez represented that he would take their funds and turn them into specific types of investments: loans to outside businesses, corporate bonds or notes, and investments in real estate. (T. 2-190–93; 2-303–11; 2-365–67.) In a letter to Danny Cole, Lopez claimed that JCL Capital was engaged in the business of "small equipment financing to large corporate loans." (T. 2-307–08; Gov't. Exh. 7J.) Lopez never actually undertook any such investments. (T. 3-450–73; Gov't. Exhs. 31–44.)

Beyond the solicitations he made to the investors in personal conversations, Lopez also provided flyers and used a website, www.jcl-companies.com, to generate business under false pretenses. For example, flyers for JCL Capital indicated that the company provided real estate lending throughout North America and claimed that other companies "make use of JCL's broad industry expertise" to achieve their financial goals. The flyers further claimed that JCL Capital had "industry-specific expertise in aviation, energy, infrastructure, healthcare, and media." (Gov't. Exh. 7H.) JCL Capital never conducted any such business. (T. 3-441–45; 3-519–22; Gov't. Exh. 28; Gov't. Exh. 38.) The website also falsely described the JCL

Entities' investments, advancing false claims of a portfolio that included such major corporations as Exxon Mobil, Wells Fargo, Visa, American Express and Procter & Gamble. (T. 2-361–66; 3-590–91; Gov't. Exhs. 8G and 8H.)

To execute his scheme, Lopez directed his victims to transfer funds from their current Individual Retirement Accounts (IRAs) into self-directed IRAs administered by an independent IRA management company, Entrust IRA, later known as Midland IRA. (T. 1-67–121.) Lopez told his victims that, after they transferred their retirement funds to Midland IRA, he would move the funds into one or more of the JCL Entities for further investment. As a further part of the process, the investors executed promissory notes to the JCL Entities, as Lopez instructed them. (T. 2-194–203; 2-271–77; 2-312–14; 2-367–70; Gov't. Exhs. 7A–7G; 8A–8E; 9A–9E; 10A–10D; 11A–11E; 12A–12F.)

At Lopez's direction, once the investor funds went to Midland IRA, they were deposited into bank accounts Lopez controlled. The accounts were in the names of one or more of the JCL Entities or an assumed business name thereunder. (T. 3-428–54.) In total, the victims invested the following amounts of money with Lopez:

Thomas Holsworth	$49,215.20
Jerry Wilson	$140,261.46
Colleen Wilson	$36,351.60
Danny Cole	$222,963.53
Aggregate Investments	$448,791.79

(3-496–514; Gov't. Exhs. 31–35; 43.)

Lopez invested very little of that money. He invested $45,000 of Danny Cole's money into an E*Trade account, which was completely lost. (T. 3-520–22.) As for the remainder, Lopez diverted all the funds for his own use, including $70,574 for his home mortgage payments, $41,208 for personal automobiles, and $45,870 for landscaping of his home. (T. 3-525–26; Gov't. Exh. 43.) The four money laundering counts of conviction relate to transactions in which he used some of the diverted money to make mortgage and landscaping payments and to purchase two Mercedes-Benz automobiles. (R. 47, Counts 16–19; Gov't. Exh. 44.)

Lopez converted the investment funds for his personal use in two basic ways. With respect to much of the money, Lopez simply wrote checks using JCL Entities accounts, into which he had transferred the victims' funds, to cover personal expenses. (T. 3-426–50; Gov't. Exhs. 26–29.) With respect to the remaining funds, Lopez transferred investors' money into a bank account in the name of 413 Solutions, Inc. He then paid for personal expenses out of that account. 413 Solutions was a business operated by Lopez's wife; Lopez

managed the business's bank records, writing every check on the account. Lopez's victims obtained no ownership interest or any other benefit from his movement of their funds into the 413 Solutions account. (T. 3-425; 3-563; 3-571; Gov't. Exh. 30.)

Lopez made some payments to investors during the course of the scheme, but they were not actually investment returns. On multiple occasions, Lopez used funds he received as part of later investments to pay purported interest on earlier investments. Lopez did this by causing the deposit of these later funds to be entered on an investor's account as an interest payment. (3-425–26; 3-468–71.) Of course, because he had never actually invested the original funds, those deposits were not actually interest payments but were what is called "lulling payments." (T. 1-74–75, 3-532.) Believing those entries were investment payments, Lopez's victims relaxed their vigilance. (T. 2-203–12; 2-285; 2-321–23.)

Late in the scheme, Lopez created new promissory notes for each victim with one or more of the JCL Entities. Each of these new notes had less favorable terms for the investor than the original notes; the required investment term was longer and the rate of return to be paid was lower. (PSR ¶ 10.) Although these notes appeared to bear the signatures of the investors, Lopez's victims testified that they had not agreed to the revised terms and had not signed any documents authorizing the new notes. (T. 2-

215–20; 2-277–82; 2-317–18; 2-370–72; Gov't. Exhs. 7E, 8D, 9D, 9E, 10C, 10D, 11E, 11F, 12E, 12F.) The new notes gave Lopez access to more of his victims' money, including the artificial interest payments that he caused to be entered on the investors' accounts. (T. 3-448–49; 3-468–71.)

Danny Cole testified that he authorized Lopez to sign certain documents executed in December 2010 on his behalf because he trusted Lopez at that time. (T. 2-312–14; 2-334–36.) Cole further testified that he did not sign the later promissory note and related documents dated in July 2011 and did not authorize Lopez in any fashion to sign his name or execute those documents. (T. 2-317–18.)

Cole confronted Lopez regarding an unauthorized transfer of $122,000 of funds from Cole's Midland IRA account to JCL Capital, based ostensibly on the latter promissory note bearing the forged signature of Cole. Lopez returned that amount plus some interest to Cole in September 2012. (T. 2-324; 2-348.) Otherwise, none of the investors, including Cole, ever received any money back from Lopez. (T. 3-524–26; Gov't. Exh. 43.)

At trial, Lopez called Michael Alerding, a certified public accountant, as a witness. Lopez had hired Alerding to analyze various business records and practices of the JCL Entities. (3-579–80; R. 42-1.) The government objected to Alerding's testimony on various grounds, but the district court admitted the evidence, although not as expert testimony. (T. 3-575–76; R. 42; R. 53.)

In his testimony, Alerding provided his definition of certain terms, including "promissory note," "secured note," "unsecured note" and "subordinated debt," and he explained various ways that small businesses may obtain their initial funding. (T. 3-574–78.) He also testified about his qualifications. Alerding then presented his analysis of extensive business records associated with JCL & Company. The district court admitted a document he prepared that summarized the income, expenses and cash flow of the company. (T. 3-579–81.) Following admission of the document, Alerding explained his analysis to the jury in detail. (T. 3-581–86.)

On cross-examination, Alerding testified that his review of the JCL Entities records indicated no evidence of a commercial lending and leasing business and no evidence of investments in notes. (T. 3-589–91.) He also testified that he saw no evidence that Lopez's corporate portfolio included any interests in Coca-Cola, Exxon, Wells Fargo, Visa, American Express or Procter & Gamble, as Lopez had represented to his investors. (T. 3-589–91.)

After four days of trial, the jury returned a verdict of guilty on all counts. (R. 61.)

Sentencing

The district court sentenced Lopez on May 19, 2016. (R. 86; S. 1.) Lopez asked for probation, or in the alternative 30 to 37 months in prison. (R. 81; S. 26.) The government asked for a sentence of 78 months in prison.

(S. 34.) The court sentenced Lopez to 57 months in prison (per count, to run concurrently), and ordered restitution in various amounts to Lopez's victims. (S. 36; R. 89.) This timely appeal followed.

SUMMARY OF THE ARGUMENT

The district court's decision to permit Agent DeLancey to describe Lopez's lulling payments with the correct term, "lulling payment," was not an abuse of discretion. As with other terms she used, "lulling payment" summarized the government's evidence in accordance with this Court's precedents on summary witness testimony. In all events, any error was harmless.

The prosecutor's two narrow comparisons of Lopez's conduct and Bernie Madoff's similar conduct did not constitute prosecutorial misconduct. Even if those limited references were undue, they came nowhere close to undermining the fairness of the trial.

The district court was right not to admit Michael Alerding as an expert. Out of a generous concern for Lopez's right to present a defense, the court permitted Alerding to testify despite the irrelevance of his opinions and the danger they posed of confusing the jury. Indeed, the court gave Lopez almost everything he wanted with respect to Alerding's evidence. Calling Alerding an expert on top of that would have been a bridge way too far.

The district court did not abuse its discretion when it declined to permit Lopez to bolster his impeachment of Danny Cole. Cole's omission of information during the investigation was not the blatant lie Lopez claims. In all events, Lopez was able to highlight the omission repeatedly and to underscore his view of Cole's motivation for the omission. Given that, and the government's overall strong case against Lopez, any error in this regard was harmless.

The Court should affirm.

ARGUMENT

I. The District Court's Decision to Allow Agent DeLancey to Use the Term "Lulling Payments" Was Not An Abuse of Discretion

A. Standard of Review

This Court reviews a district court's decision to admit or exclude testimony for abuse of discretion. *United States v. Wantuch*, 525 F.3d 505, 513 (7th Cir. 2008).

B. Lopez Asked DeLancey About "Lulling Payments" And Cannot Now Reasonably Complain That He Did Not Like the Answer

Lopez says Agent Janet DeLancey's use of the descriptive term "lulling payment" constituted an "argument," which was impermissibly outside the scope of her role as a Rule 1006 summary witness. (A. Br. 17.) That argument has several fatal flaws.

First, Lopez faces a considerable procedural obstacle. While Lopez lodged a continuing objection to Agent DeLancey's use of the term "lulling payment," (T. 3-426), he brought the subject up himself during cross-examination in an attempt to recast her testimony:

> Q. Now, in your testimony, you referred to payments to the lenders as lulling payments; is that right?
> A. Yes.
> Q. But the terms of this agreement actually require Mr. Lopez to make payments on a monthly basis to Ms. Wilson of $210; is that right?
> A. Yes.
> Q. So when you refer to some of these as lulling payments, you're actually referring to payments that Mr. Lopez made to lenders per these written contracts?
> A. Right. When I refer to them as lulling payments, I'm referring to the fact that those are just the investor's funds that are being used to pay back -- to make the payments that he's required to make as interest payments, but.
> Q. But they are payments that Mr. Lopez was required to make to the lender by these contracts?
> A. Yes, that JCL Direct is required to make, yes.
> Q. So he was adhering to the terms of this contract when he was making those payments to Mrs. Wilson?
> A. Yes.

(T. 3-532.) Accordingly, even if this Court agreed to scrub DeLancey's direct testimony, Lopez is stuck with various references to "lulling payments" that passed through a door he opened.

Lopez tries to turn this on its head, claiming that the government and district court hijacked his cross-examination and that DeLancey did not answer his question. But that is demonstrably incorrect.

Lopez's counsel asked DeLancey to adopt a different interpretation of what she had called "lulling payments." She answered the question but declined to accept Lopez's viewpoint. (*Id.*) Lopez interrupted, at which the government chimed in, and the district court stated, "Let her explain. She was in the process of explaining. You may finish your answer." (T. 3-533.) The cross examination continued:

> THE WITNESS: Okay. All right. I'm referring them to lulling payments because when you're doing fraud investigations --
> MR. HAYES: Judge, my question was, he was required by the terms of this agreement to pay that money.
> MR. WARDEN: Judge, she should be allowed to answer the question.
> THE COURT: Yes. I think your question, you asked her why was she referring to them as lulling payments, so let her explain.
> MR. HAYES: Okay.
> THE COURT: You may.
> THE WITNESS: The reason that I refer to them as lulling payments is because in these types of fraud investigations, what you're looking for is to see if those funds that are invested as, in this case Lopez represented to the investor. So when I look at these payments, I was looking to see if these funds were then going to third-party investments. And what I expected, if Lopez had done what he represented he was going to do, you would see those funds then going to a third party and them making payments back to JCL, and then those funds being used to make the payments, because in this case the promissory note was used as a vehicle for the individuals for Mr. Holsworth; and in this case, Colleen Wilson, to get their funds for JCL to invest in the way he promised.
> MR. HAYES: Judge, I don't believe I asked the question --
> THE COURT: She answered the question. Next question.
> MR. HAYES: Thank you.

(T. 5-533-3-534.)

Lopez says that when the judge said "next question," the judge was effectively preventing him from "hav[ing] his initial question answered." (A. Br. 26.) DeLancey did, however, answer his question, at length. He tried to spoon-feed her an answer he wanted, but she rejected his premise. The reason was not the judge's ruling but rather DeLancey's review of Lopez's accounts, which indicated that these transactions were lulling payments. Lopez explored that inference at his own peril and cannot reasonably complain to this Court that he wished she had agreed with him.

C. DeLancey Used "Lulling Payment" as a Factual Term to Summarize and Describe a Portion of the Government's Evidence

Lopez is wrong to assert (or assume) that "lulling payment" is a legal argument or opinion. The term is a common one used to describe a specific factual scenario, and DeLancey correctly used the term to organize and summarize a portion of her testimony for the jury.

This Court has used the term "lulling payments" to refer to payments made to investor clients that were "drawn from funds provided by other clients." *United States v. Moskop*, 499 F. App'x 592, 594 (7th Cir. 2013) (unpublished); *see also SEC v. Holschuh*, 694 F.2d 130, 143-44 (7th Cir. 1982). Similarly, other courts have described "'lulling' interest payments" as payments from one client's account to another client as a purported investment earning. *E.g.*, *United States v. Pacheco-Martinez*, 791 F.3d 171,

175 (1st Cir. 2015). As courts have used the term, it is not a legal conclusion or an ultimate indicator of guilt or intent, but simply a name for a type of payment. *Id.* at 175, 179. If the device Lopez used went by another name, courts and DeLancey would have used that term instead.

In summarizing investigative efforts to trace money flowing through Lopez's accounts, DeLancey used other phrases to organize and describe her observations. Relying on her experience, she testified about "IRA investments" (T. 3-434) and "buy direction letters" (T. 3-439), and inferred that some of Lopez's payments were for personal "mortgages" and "bills," not for his business, (T. 3-444-45). Lopez apparently has no problem with those other inferences, some of which may not have had obvious meanings to jurors. Like those concepts, "lulling payment" is a term investigators (and courts) employ to describe a specific factual scenario, not an argument.

D. DeLancey's Use of "Lulling Payment" Was Properly Meant to Help the Jury Organize Complex Evidence

Lopez takes an overly cabined view of the permissible scope of Rule 1006 summary testimony. Rule 1006 permits the use of "a summary, chart, or calculation to prove the content of voluminous writings, recordings, or photographs that cannot be conveniently examined in court." Fed. R. Evid. 1006. Under the rule, "[t]he witness who prepared the summary may testify about how [s]he prepared it." *United States v. Mitchell*, 816 F.3d 865, 876

(D.C. Cir. 2016); *see United States v. Brown*, 822 F.3d 966, 972 (7th Cir. 2016).

"The nature of a summary witness' testimony requires that [s]he draw conclusions from the evidence presented at trial." *United States v. Pree*, 408 F.3d 855, 869 (7th Cir. 2005) (quoting *United States v. Esser*, 520 F/2d 213, 218 (7th Cir. 1975)). A summary witness may "testif[y] as to what the Government's evidence shows" and may provide her "analysis of the facts based on [her] special expertise." *Id.* at 870 (quoting *United States v. Moore*, 997 F.2d 55, 58 (5th Cir. 1993)). That includes "the agent's analysis of [a] transaction" in the case. *Id.* "The key to admissibility is that the summary witness's testimony does no more than analyze facts already introduced into evidence and spell out the . . . consequences that necessarily flow from those facts." *United States v. Stierhoff*, 549 F.3d 19, 28 (1st Cir. 2008) (citing *Pree,* 408 F.3d at 869); *see also United States v. Hatch,* 514 F.3d 145, 165 (1st Cir. 2008); *see also United States v. Sabino,* 274 F.3d 1053, 1067 (6th Cir. 2001), *amended on rh'g of separate issue*, 307 F.3d 446 (6th Cir. 2002).

DeLancey's testimony met that standard. She summarized voluminous records in evidence, including Lopez's accounts, which she had reviewed and analyzed. In doing so, DeLancey used the term "lulling payment" to describe certain transactions. That fell squarely within *Pree*.

Lopez says DeLancey testified as to his intent, but that is not correct. (A. Br. 15, 17.) She did not lace her testimony with "expert" opinions using phrases such as "scheme to defraud," "manipulation," and "fraud." *Cf. United States v. Scop*, 846 F.2d 135, 142 (2d Cir. 1998) (addressing agent testimony under Rule 704(b)). At most, DeLancey made factual observations that certain of Lopez's disbursements to investors had the appearance of lulling payments. Contrary to Lopez's assertions, DeLancey did not bake into this an opinion that Lopez ultimately *intended* to dole out lulling payments. She simply testified to the facts of the transaction as they appeared from the investigation. The district court did not abuse its discretion in permitting her to do that and to use the exact phrase that describes such conduct.

E. DeLancey's Use of the Appropriate Term Was Not Meant to Prejudice the Jury and the Term Is Not Inherently Inadmissible Under Rule 403

Lopez probably distinguishes "lulling payments" from terms like "IRA investment" because he does not prefer the root "lull." Indeed, Lopez's real objection is his view that the name for this type of payment is unduly and unfairly prejudicial. That is how he phrased the objection below. (T.3-426) ("that's an opinion she's offering that's prejudicial and not probative").

A close examination of DeLancey's statements shows that they were not inflammatory or prejudicial. She explained her use of the term this way:

> I refer to as those are lulling payments, because the records show that instead of using the funds, investing them in a third party as he represented to Mr. Cole and Mr. Holsworth and the Wilsons, those funds actually would go into like the JCL account. And they would sit there, and then they would just be used to pay back to Midland to make the interest payments.

(T. 3-425.) That is hardly the testimonial equivalent of labeling Lopez a "fraudster" or even of stating that he "intended to defraud with these payments." She was describing key facts underlying his scheme to defraud.

That Lopez dislikes the connotation "lull" carries is not a sufficient basis for reversal. Courts have approved law enforcement agents' use of the term "scam" to describe defendants' actions. "Scam" is worse than "lull." *See United States v. Hoffecker*, 530 F.3d 137 (3d Cir. 2008); *cf. United States v. Aggarwal*, 17 F.3d 737, 743 (5th Cir. 1994) (expert witness's use of terms "scam," "fraudulent," and "fraud" did not violate Federal Rule of Evidence 704(b)). The point of a summary witness is to helpfully organize the facts—DeLancey's use of "lulling payments" did just that, helping the jury to sort through complicated transactions by using the applicable term.

Moreover, "lulling payment" was no more prejudicial than Lopez's own expert's repeated characterizations of his transactions as "common" and "typical." (*E.g.*, T. 3-582, 5-385,) In fact, "lulling payment" was an accurate factual term, while those opinions were skewed value judgments that Lopez put in evidence to suggest his lack of intent.

When DeLancey described Lopez's use of other money "for expenses for eating out" or for "paying a bill," the facts she summarized also arguably suggested Lopez was using his victims' investments inappropriately, but he has no objection to that testimony. (T. 3-444.) As with "lulling payment," that testimony relied on DeLancey's background experience investigating the flow of funds through accounts. For all of these reasons, Lopez's contention that the term "lulling payment" is an inherently prejudicial argument rings hollow.

F. Any Error Was Harmless

In any event, even assuming error, Lopez's substantial rights were not affected. At least one court has deemed a summary law enforcement witness's use of the terms "lulling payment" and "Ponzi scheme" harmless error. *United States v. Plato*, 593 F. App'x 364, 375 (5th Cir. 2015) (unpublished). If the Court finds the admission of the term "lulling payment" an abuse of discretion, the same harmless error result should still obtain here.

Critically, after lodging the objection that his claim revisits in this appeal, Lopez opened the door to separate "lulling payment" testimony by DeLancey that he cannot now reasonably challenge. Plus, Lopez's counsel cross-examined DeLancey on the issue, including attempting to supplant DeLancey's factual interpretation with his own argument. (T. 3-532-33.)

Furthermore, the evidence of Lopez's guilt was overwhelming. Even without the term "lulling payment," the jury would have heard DeLancey's testimony describing how he was paying new investors with old investors' funds. And the jury would have heard that he was using investors' funds for his own personal benefit. And the jury would have heard multiple victims' testimony about his fraud. Given the overwhelming evidence, any error in DeLancey's use of this factual description was harmless.

II. The Prosecutor's Comparison of a Specific Device Bernie Madoff Employed to Lopez's Use of the Same Device Was Not Improper

A. Standard of Review

This Court's "two-part test for improper prosecutorial comments is difficult to satisfy." *United States v. Bell*, 624 F.3d 803, 811 (7th Cir. 2010); *see United States v. Recendiz*, 557 F.3d 511, 523 (7th Cir. 2009). "As a general matter, improper comments during closing arguments rarely rise to the level of reversible error, and considerable discretion is entrusted to the district court to supervise the arguments of counsel." *United States v. McMath*, 559 F.3d 657, 667 (7th Cir. 2009).

The Court first "consider[s] the prosecutor's disputed remarks in isolation to determine whether they are improper." *McMath,* 559 F.3d at 667 (quotation omitted). "If the comments are improper standing alone," the Court "consider[s] the remarks in the context of the record as a whole and

assess[es] whether they denied the defendant his right to a fair trial." *Bell*, 624 F.3d at 811.

B. The Prosecutor's Narrow Citation of a Device Both Lopez and Madoff Used In Their Fraud Schemes Was Not Improper Standing Alone

Lopez says the government "compared Lopez to Bernie Madoff," using a "blunt emotional appeal" for the sole purpose of "inflaming the jury's prejudices." (A. Br. 29.) On the contrary, the prosecutor used a limited illustration that accurately compared a device Lopez used in his scheme with Madoff's use of the same device.

Lopez's reliance on what he calls a "well-known principle" that prosecutors should not compare defendants to notorious criminals is overstated. While of course a prosecutor should not inflame jurors' passions, not all courts accept Lopez's principle that a comparison to an infamous criminal during closing constitutes reversible error. *See, e.g.*, *United States v. Papajohn*, 212 F.3d 1112, 1121 (8th Cir. 2000), *abrogated on other grounds by Crawford v. Washington*, 541 U.S. 36 (2004); *Szubielski v. State*, 82 A.3d 730 (De. 2013) (table). As in *Papajohn*, this is not a case involving repeated direct comparisons to such figures as Adolph Hitler or Charles Manson. *Id.*

Indeed, the government here did not compare Lopez to Madoff in the sort of one-to-one manner at issue in the cases he cites. (A. Br. 30.) Rather, the prosecutor compared Madoff's case in this way: "Lots of people got money

back through Bernie Madoff. It doesn't mean they weren't defrauded in the process, and that's exactly what happened to Mr. Cole for his entire investment." (T. 4-618.) Later, the prosecutor stated,

> Just like, again, Bernie Madoff paid people for 15, 20 years or more, hundreds of thousands of people . . . paid people back doesn't mean they were getting interest on their capital or returns on their capital. They were getting lulling payments designed to keep this from being revealed, and that's exactly what these payments are.

(T. 4-626.) That was a narrow comparison of a shared aspect of the two men's schemes.

Nor was the comparison "outsize" simply because Madoff's fraud was bigger. (A. Br. 29.) The prosecutor compared specific conduct, not the overall magnitude of the two men's culpability. The prosecutor did not say that Lopez's fraud was as bad as Madoff's, and the jury would not have concluded, based on the prosecutor's limited Madoff references, that Lopez had "defrauded hundreds of thousands of people and lost billions of dollars." (A. Br. 32.)

This also was not an "outright falsehood," nor a case of "superficial similarities." (A. Br. 29.) Madoff used lulling payments. Lopez used lulling payments. The comparison was accurate and substantive.

Furthermore, the comment was meant as a direct response to Lopez's defense that he intended to pay his victims back in the end. And if the jury

recalled DeLancey's testimony when the prosecutor mentioned Madoff, (A. Br. 32), they did so because the comparison made sense, given that both men used lulling payments.

Finally, Lopez seems to suggest that the district court violated its own prior order precluding the government from eliciting testimony regarding Madoff. (A. Br. 32 n.9.) Of course, the district court knew best what its prior order encompassed. The court understood Lopez's request as a motion to exclude evidence connecting him to Madoff, and the court granted that request on Rule 403 grounds. (R. 37, at 4.) Closing arguments are not evidence and thus did not fall within that pretrial order. If Lopez thought the court should have expanded its ruling to cover closing arguments, he should have sought clarification. In short, this point does not advance Lopez's argument an inch.

While courts have cautioned against the use of inflammatory comparisons, the comparison here was a narrow and factually accurate response to one of Lopez's central defenses.

C. The Two References to Madoff's Use of Lulling Payments Did Not Undermine the Fairness of the Trial

This Court's "ultimate concern is whether improper argument 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" *United States v. Hale*, 448 F.3d 971, 986 (7th Cir. 2006)

(quoting *Darden vs. Wainwright,* 477 U.S. 168, 181 (1986)). To carry his burden, Lopez "must show that it is at least likely that the misconduct complained of affected the outcome of his trial—*i.e.*, caused the jury to reach a verdict of guilty when otherwise it might have reached a verdict of not guilty." *Rodriguez v. Peters,* 63 F.3d 546, 558 (7th Cir. 1995).

To that end, the Court considers "1) whether the prosecutor misstated the evidence; (2) whether the remark implicated specific rights of the accused; (3) whether the defendant invited the response; (4) the efficacy of curative instructions; (5) the defendant's opportunity to rebut; and, most importantly, (6) the weight of the evidence." *Id.* Lopez's argument does not fare well on those metrics.

1. No Misstatement of Evidence. Lopez does not even claim the prosecutor misstated evidence but instead says the comments "invited the jury to make an improper inference." (A. Br. 33.) Even accepting *arguendo* Lopez's expansive reading of "misstatement of evidence," his claim is not correct.

The government's comparison of Lopez's and Madoff's use of lulling payments conformed to the evidence. The prosecutor did not indicate that Lopez was "like Madoff" in any way beyond his use of lulling payments. Both Lopez and Madoff used lulling payments, meaning the inference was natural, not improper.

2. No Specific Right Implicated. Lopez also does not claim that the comment implicated one of his specific trial rights. (A. Br. 33.) Instead, he says the statement "in concert with other trial errors deprived [him] of a fair trial." (*Id.*) That does not fit neatly within the standard articulated in this Court's prosecutorial misconduct cases. *See, e.g.*, *Hale*, 448 F.3d at 986; *United States v. Love*, 336 F.3d 643, 646 (7th Cir. 2003). Even if that notion were hypothetically sufficient, it would fail on the merits because Lopez's other claims of trial error are unavailing.

3. No Invitation by Lopez. Lopez did not invite the comment.

4. The Court's Relevant Instructions. At the beginning of trial, the judge instructed the jury, "Any statements and arguments that the lawyers make are not evidence." (T. 1-43.) At the end of trial, when Lopez objected to the first "Madoff" comment, the judge overruled on the ground that it was "closing argument." (T. 4-618.) When Lopez objected to the second comment, the court stated, "he can argue what he wants in closing." (T. 4-626.) The jury heard those reasons. In its final instructions, the district court reminded the jury that "lawyers' statements and arguments are not evidence. If what a lawyer said is different from the evidence as you remember it, the evidence is what counts." (T. 4-655.)

Accordingly, the court did not "utterly fail" to address the comments. (A. Br. 33). And Lopez's contention that the court "sent a signal" to the jury

"legitimiz[ing]" the Madoff comments is entirely unfounded. The court stated, "*he* can argue what *he wants*." (T. 4-626.) That is not an endorsement but a signal that it was the prosecutor's argumentative viewpoint, not evidence. These various instructions and comments from the court were sufficient to cure the prosecutor's limited comparison of Madoff's and Lopez's similar use of lulling payments. *See United States v. Morgan*, 113 F.3d 85, 91 (7th Cir. 1997); *see also United States v. Cornett*, 232 F.3d 570, 576 (7th Cir. 2000).

5. Lopez's Opportunity to Rebut. The "Madoff" comments came in the first phase of the government's closing argument. Lopez's closing followed, meaning he had an opportunity to point to any flaws he saw in the comparison, as the does now on appeal. *See Morgan*, 113 F.3d at 90. He chose not to respond.

6. The Evidence Weighed Heavily Against Lopez. The "most important" consideration is the weight of the evidence. *Hale*, 448 F.3d at 986. Lopez does not even attempt to claim that the evidence against him was weak. That is because the evidence of his guilt was strong, including multiple victim witnesses and voluminous documents.

Taken together, the six "unfair trial" factors outlined in *Hale* and elsewhere, as applied here, reflect reality: The prosecutor's "Madoff" comments were limited to a comparison of one type of conduct, were not

inflammatory, were highlighted as argument rather than evidence by the court, and were a speck in a sea of evidence establishing Lopez's guilt beyond doubt. For these reasons, even if the Court is inclined to frown upon the "Madoff" comments, Lopez's claim must fail.

III. The District Court's Decision Not to Label Michael Alerding an Expert Witness Was Not an Abuse of Discretion

A. Standard of Review

This Court reviews a district court's decision to allow or exclude evidence for an abuse of discretion. *United States v. Causey*, 748 F.3d 310, 315-16 (7th Cir. 2014).

B. Alerding's "Expert" Testimony Was Not Relevant And Posed a Serious Danger of Confusing the Jury

Lopez argues that the district court abused its discretion when it required Michael Alerding to testify in a lay, rather than expert, capacity. (A. Br. 35.) That argument fails because Alerding's testimony was not relevant, and emphasizing his "expertise" would have confused the jury. Plus, the district court gave Alerding wide latitude to offer essentially all of the opinions Lopez wanted him to offer, which blunts any force Lopez's claim might otherwise have.

1. Alerding's Opinions Were Irrelevant Under Rule 401

As an initial matter, the government maintains its objection to the district court's decision to deem Alerding's opinions relevant. Out of concern

for Lopez's right to present his defense, the court sliced thinly between the relevance inquiries of Rules 401 and 403 and the technical helpfulness inquiry of Rule 702(a).

Specifically, the court held, "Given the heavy presumption in favor of admissibility and the Defendant's right to present a full defense, the Court is persuaded that Mr. Alerding's testimony is at least minimally relevant and should be admitted." (R. 53, at 4.) While that was not unreasonable, the government maintains that Alerding's testimony was irrelevant.

Evidence is "relevant" and thus generally admissible if:

> (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and
> (b) the fact is of consequence in determining the action.

Fed. R. Evid. 401.

Alerding's testimony did not concern facts "of consequence in determining the action." Fed. R. Evid. 401(b). Alerding opined that Lopez operated profitable and ordinary businesses, including that Lopez's use of investments to pay personal expenses was ordinary. (R. 42-1, at 8; T. 3-582-86.) Even if that were a valid "expert" conclusion, it was irrelevant to the issues in this case.

To convict Lopez of wire fraud, 18 U.S.C. § 1343, the government had to prove three elements: "(1) the defendant participated in a scheme to defraud; (2) the defendant intended to defraud; and (3) a use of an interstate wire in furtherance of the fraudulent scheme." *United States v. Turner*, 551 F.3d

657, 664 (7th Cir. 2008); *see also United States v. Leahy*, 464 F.3d 773, 786 (7th Cir. 2006). The fraud charge centered on Lopez's false claims about how he was going to invest his victims' money. Lopez cannot seriously be claiming that such actions are "typical" in business. Even if they were, that would not be relevant to any of the above elements.

The elements of securities fraud, 15 U.S.C. §§ 78j(b) & 78ff(a), as relevant here, are: (1) in connection with a securities transaction; (2) the defendant employed a scheme to defraud; (3) made a materially false statement or omitted a material fact; (4) engaged in an act that operated as a fraud or deceit upon a purchaser; (5) acted with intent to defraud, and (6) knowingly used an interstate communication in furtherance of the fraud. *See, e.g.*, *United States v. Nouri*, 711 F.3d 129, 140 (2d Cir. 2013) (citing *Chiarella v. United States*, 445 U.S. 222, 234-35 (1980)). Again, even if Lopez thought he was doing something typical or profitable, that would be irrelevant.

If what Lopez wants to say is that he did not really intend to violate the law because he was just doing what he thought was normal, then his claim has a fundamental legal problem. In wire fraud cases, the specific intent the defendant must have is simply the intent to defraud someone for the purpose of personal gain. *United States v. Pust*, 798 F.3d 597, 601 (7th Cir. 2015); *United States v. Paneras*, 222 F.3d 406, 410 (7th Cir. 2000). Intent to defraud

does not require knowledge of the illegality of the conduct. *See United States v. Stockheimer*, 157 F.3d 1082, 1088 (7th Cir. 1998) (collecting cases); *see also United States v. Blagojevich*, 794 F.3d 729, 739 (7th Cir. 2015). Alerding's testimony would have offered nothing to rebut evidence of his intent to defraud.

Likewise, the purported profitability of some aspect of a business Lopez was connected to was not relevant to the trial. Lopez wanted his victims to think he was investing their money in real estate and loans to large businesses and municipalities. He never told them that their money would go to his wife's business because he knew they would have refused to invest with him on that basis. No amount of honest belief on Lopez's part about the viability of his wife's business could excuse misrepresentations or omissions he made with the intent to obtain money. *United States v. Radziszewski*, 474 F.3d 480, 485 (7th Cir. 2006). Alerding's opinions were therefore irrelevant to whether that scheme met the elements of the fraud statutes.

2. Alerding's Testimony Posed a Substantial Danger of Confusing the Jury

Federal Rule of Evidence 403 also dictated exclusion of Alerding's testimony. The rule states: "The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue

delay, wasting time, or needlessly presenting cumulative evidence." Fed. R. Evid. 403.

Alerding's suggestion that Lopez was a normal businessman and that he acted in good faith even while he lied to his victims carried a serious danger of confusion. Any probative value in Alerding's proposed testimony—which was very limited—was therefore "substantially outweighed by a danger of . . . confusing the issues [or] misleading the jury." Fed. R. Evid. 403. The district court was right to limit this confusion by declining to admit Alerding as an expert.

C. Alerding's Testimony Did Not Meet the Expert Testimony Standards of Rule 702

Rule 702 of the Federal Rules of Evidence defines testimony by expert witnesses 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
> (d) the expert has reliably applied the principles and methods to the facts of the case.

Alerding has substantial qualifications, as the district court acknowledged. (R. 53, at 2.) And assessing the profitability and typicality of

a type of business could require expertise. But that is not, as Lopez argues, enough to meet the requirements of Rule 702. (A. Br. 37.)

Alerding's testimony was not "specialized knowledge" that would "help" the jury "to understand the evidence or to determine a fact in issue." Fed. R. Evid. 702(a). On the contrary, identifying Alerding as an expert risked encouraging the jury to elevate his testimony and decide the case on an improper basis—*i.e.*, his opinion that Lopez was a successful businessman operating a normal investment business. *See United States v. Williams*, 81 F.3d 1434, 1441 (7th Cir. 1996); *see United States v. Glover*, 479 F.3d 511, 517 (7th Cir. 2007).

The "helpfulness" requirements of Rule 702 provided a critical bulwark in this case against improperly elevating evidence that Lopez designed to confuse the jury. (T. 3-575.) Alerding's testimony was not meant to "help the trier of fact to understand the evidence or to determine a fact in issue," but rather to divert the jury's attention from the real issues in the case. Fed. R. Evid. 702(a).

Lopez laments at length that the district court "abandoned" Rule 702. (A. Br. 37.) But the court did its job, refusing to elevate dubious testimony to an "expert" level. Lopez should be grateful the district court admitted Alerding's testimony at all, a decision the district court made out of a concern for Lopez's right to present a defense. (R. 53, at 4.) That Lopez did not get

everything he wanted—where what he wanted ran afoul of Evidence Rules 401, 403, and 702—is no reason to reverse the district court's prudent decision.

D. The District Court's Use of an Expert Instruction Over the Government's Objection Further Undermines Lopez's Argument

Prior to trial, the parties submitted proposed jury instructions in line with the district court's decision not to admit expert testimony. (R. 30, 31, 57.) Although those proposals did not include an "expert" instruction, the district court's final instructions included the following, Instruction No. 13:

> You have heard a witness who gave opinions and testimony based on their scientific, technical, or otherwise specialized knowledge. You do not have to accept this witness' opinions or testimony. You should judge this witness' opinions and testimony the same way you judge the testimony of any other witness. In deciding how much weight to give to these opinions and testimony, you should consider the witness' qualifications, how he reached his or her opinions or conclusions, and the factors I have described for determining the believability of testimony.

(R. 63, at 14.)

Lopez says this instruction was "at the request of neither party." (A. Br. 40 & n.11). The record belies that claim.

As Lopez's counsel stressed, the instruction was given "over the government's objection." (T. 4-605.) Lopez did not object to the instruction. That was consistent with the approach each party had taken throughout the proceedings. Lopez wanted to tender Alerding as an expert. (R. 24, 44.) The

government, by contrast, consistently maintained that no trial witness was an expert. (*E.g.*, T. 3-575; R. 42.)

In other words, Lopez approved of an expert instruction at trial—the very instruction he now complains about several times. (A. Br. 16, 35, 38, 41.) If anything, the instruction improperly elevated Alerding's irrelevant testimony. That is why the government objected to the instruction. Given this context, the Court should reject Lopez's complaints about the instruction out of hand.

In the end, Lopez got the opinion testimony he wanted and the instruction the government did not want. All of this despite the fact that Alerding's testimony was irrelevant, unduly prejudicial, designed to confuse, and fell far short of the "helpfulness" requirement of Rule 702. The district court's decision not to give Lopez one more thing—admitting Alerding as an expert—was prudent.

E. The District Court Permitted Alerding to Offer the Opinions Lopez Wanted, Making Any Purported Error in Not Labeling Those "Expert" Opinions Harmless

Over the government's Rule 401 and 403 objections, the district court admitted Alerding's testimony, including his opinions regarding the "typicality" and "profitability" of Lopez's business. (*E.g.*, T. 3-581.) And the court permitted Alerding to cite his qualifications as a certified public

accountant and to rely on his background knowledge of how other businesses operate. (T. 3-579-80.)

In fact, contrary to Lopez's argument, the court gave Lopez most of what he wanted out of a concern for his right to present a defense. (A. Br. 35-36.) Some excerpt of Alerding's testimony are illustrative:

> Q. So it's not uncommon to see start-up companies resort to loans in order to generate capital to start their business?
> A. Actually, it's preferable if you're the small business . . . .

(T. 3-586.)

> This is a fairly typical line that we see in first stage growth companies, and by that I mean there is a progression. In our business we actually refer to it as a regression.

(T. 3-582.)

> These expenses are fairly traditional. In fact, not fairly traditional, they are very traditional to almost any kind of business.

(T. 3-583.)

> This is, again, a pretty typical scheme that we'll see in first stage growth companies who are emerging, if you will, into profitability by overcoming the initial fixed costs that a company will have. . . . So when you recast this, it really is showing loss, loss, loss, break even, make a little, break even, and then have a pretty good year in 2015.

(T. 3-585.)

> Q. Mr. Alerding, is it uncommon for a start-up business to operate out of a residence?

A. Many do. In fact, some of the largest companies we have in this country started in a garage or in their residence. So, it is not uncommon.
Q. And I guess a final question, that would be, is it uncommon for businesses to purchase vehicles on behalf of their employees and officers?
A. No. Most businesses do.
Q. And do most businesses have to pay rent?
A. Yes.

(T. 3-585-86.)

Q. Were you paid for this work that you did here that you've been talking about?
A. Yes.
Q. How much were you paid?
A. My rate is 325 an hour, and the staff that worked with me are 275 an hour. And I think the cumulative amount of fees is about $30,000.
Q. And who paid that?
A. That was paid by Mr. Lopez.

(T. 3-586.)

Q. Is it common for small business people you've been talking about you represent to live, pay their personal expenses out of the revenue of their small business?
A. Absolutely.
Q. Pay credit card bills?
A. Yes.
Q. Buy cars?
A. Right.
Q. Pay for groceries?
A. Yes.

(T. 3-592.)

A. I see people paying personal expenses out of their business and classifying them in the financial statements as a loan to themselves, because a business is a separate, distinct entity. So

it's very common, almost always do you have due to and due from the owners of the company.
Q. Is that especially true in family-owned businesses?
A. Absolutely.

(T. 3-595.) As this collection of excerpts also shows, the government's objections hardly disrupted Lopez's ability to get Alerding's opinions before the jury. (A. Br. 40.)

In short, Alerding offered the "opinion" he "was prepared to offer," (A. Br. 40), *i.e.*, that Lopez was "operated a profitable business in a matter not atypical," (A. Br. 38). Any error was therefore harmless.

IV. The District Court's Decision to Exclude Purported Impeachment Evidence Was Not An Abuse of Discretion

A. Standard of Review

This Court reviews a district court's decision to allow or exclude evidence for an abuse of discretion. *United States v. Gant*, 396 F.3d 906, 908 (7th Cir. 2005); *Causey*, 748 F.3d at 315-16.

B. Danny Cole's Omission of Information Was Hardly the Blatant Lie Lopez Claims and Additional Evidence of the Omission Was Not Obviously Admissible to Impeach His Testimony at Trial

Lopez contends the district court should have permitted him to offer certain testimony of Agent Jeremy Shivers to impeach Danny Cole's testimony. (A. Br. 41.) But the evidence Lopez wanted to offer was not

obviously proper impeachment material and certainly was not so damning as he depicts it.

In 2014, Danny Cole complained to law enforcement authorities about Lopez. Among other things, he told Agent Shivers that the signature on certain documents was not his own, apparently leading Shivers to believe that Lopez had signed the documents on Cole's behalf without Cole's authorization.

During direct examination at trial, Cole filled in an important gap his earlier statement to Shivers had left open. On direct, he stated that he let Lopez sign the document because he "trusted him at that point." (T. 2-317; *see* T. 2-312-13.)

On cross, the jury learned about Cole's earlier omission in a lengthy exchange with Lopez's counsel:

> Q. Now, do you remember on February 12, 2014, speaking with Special Agent Jeremy Shivers?
> A. Yes.
> * * *
> Q. He showed you the Midland account application dated December 10th, 2010, didn't he?
> A. I'm sure he did.
> Q. And you told him it was not your signature because you always use your middle initial L., correct?
> A. On legal --
> Q. Right? That's what you told him?
> A. Yes.
> Q. You never told him, "Oh, I let Jaime sign this for me," did you?
> A. No.

Q. He also showed you a buy-direct letter that you said, again, was not your signature because you always use your middle initial L., correct?
A. Correct.
Q. And you never said, oh, and by the way, I didn't sign it, but I let Jaime sign it for me. You never said that to him, did you?
A. No.
Q. It's kind of important, don't you think?
A. I trusted Jaime.
Q. Sir, if you tell someone "I didn't sign this," it makes you think somebody else signed it without your permission, right?
A. Correct.
Q. And that's what -- and now you're telling us for the first time that he actually had your permission, right?
A. On the initial investment.
Q. Oh, but it's for the first time, because you didn't tell the agent?
A. I guess, no.
Q. Right. So today is the first time?
A. Yes.
* * *
Q. He showed you the interest Midland fee schedule dated December 10th, 2010, and you said it wasn't your signature because there wasn't a middle initial L., right? And you always use the middle initial L., correct?
A. On legal, yes. I wouldn't say always, but --
Q. Well, that's what you told the agent, right?
A. I guess you would have to define how important it was.
Q. Sir, that's what you told Agent Shivers, I know this isn't my signature, "Because I always use my middle initial L."?
A. Yes.
* * *
Q. Now, you also were shown by Agent Shivers the outgoing wiring instructions dated January 12th, 2011, and you said that wasn't your signature because there was no middle initial L., correct?
A. That's not the only reason. Yes.
Q. That's what you told him, though, sir, isn't it?
A. Yes.
Q. And you never told him, "Well, I let Jaime sign these legal documents for me just this one time," did you?
A. No.

(T. 2-335-39.) In short, Cole testified that he had authorized Lopez to sign the documents on his behalf because he trusted Lopez at that time. (T. 2-312–14, 2-334–36.)

Lopez twice calls Cole's omission a "lie" and generally paints the omission in dramatic terms, but that is an unfair representation of what Cole did and said. (A. Br. 44.) "Prior statements that omit details covered at trial are inconsistent if it would have been 'natural' for the witness to include them in the earlier statement." *United States v. Stock*, 948 F.2d 1299, 1301 (D.C. Cir. 1991) (citing *Jenkins v. Anderson*, 447 U.S. 231, 239 (1980)); *see United States v. Houston*, 648 F.3d 806, 814 (9th Cir. 2011). Thus, while Cole's statement may have been inconsistent with his trial testimony, it would be wrong to accept the picture Lopez paints of a dramatically or obviously inconsistent statement.

C. This Court's Precedents Generally Encourage the Admission of Extrinsic Evidence Offered to "Emphasize" a Prior Inconsistent Statement

As Lopez points out, this Court has faced similar issues before. In *United States v. Lashmett*, 965 F.2d 179 (7th Cir. 1992), the Court addressed this question: "if a witness admits to making a prior inconsistent statement (or lie), is the adverse party still entitled to introduce extrinsic evidence to emphasize the fact that the witness made the prior statement?" *Id.* at 182.

The Court answered "yes," reasoning: "a party should be allowed to make his case by the most convincing evidence he can obtain and extrinsic proof of a prior statement will often be far more convincing than the acknowledgment of the declarant, and not cumulative." *Id.* (quotation omitted). The Court has since reaffirmed the rule that "[p]rior inconsistent statements are admissible even though the witness admits making the prior inconsistency." *United States v. Wimberly*, 60 F.3d 281, 286 (7th Cir. 1995).

D. Any Error in Excluding the Additional Impeachment Evidence Was Harmless

This Court found the errors in *Wimberly* and *Lashmett* harmless. The district court's decision here was at least as harmless as in both of those cases.

Indeed, Lopez's objective is the same as Lashmett's was: "getting the [prior statement] before the jury . . . to give them a concrete look at [the] deceit and to reinforce the notion that if they lied once in court, they might well be lying again." 965 F.2d at 182. As in *Lashmett*, "that objective was met in this case" because "[t]he jury was fully apprised" of Cole's false statement and its ramifications. *Id.* Likewise, as in *Wimberly*, the inconsistencies in Cole's testimony were "disclosed" to the jury, and the "conviction did not rest entirely upon" the inconsistent statement. *Wimberly*, 60 F.3d at 286.

Cole's omission was isolated and placed squarely and repeatedly in front of the jury. If the jury had also heard Agent Shivers testify about Cole's false statement, that would not have changed very much. The jury still would have heard overwhelming evidence of Lopez's guilt.

Lopez says Agent Shivers's testimony would have "highlighted" Cole's previous statement. (A. Br. 44.) But Lopez made sure the jury was well aware of Cole's false statement to Agent Shivers:

> The man that the prosecutor just told you is a guy you should respect, Danny Cole, a nice guy, a hard working guy, a truthful guy. This man intentionally misled federal agents, unequivocally.
>
> * * *
>
> Now, yesterday or two days ago he told you, well, I guess I didn't sign them. Jaime signed them. That's what I told the agents. Cole claims to have never signed any of these notes with JCL. He unequivocally and intentionally misled investigators about his knowledge and execution of his note. When he met with federal agents, he said, no, no, none of these signatures are mine and implied clearly that these were forged documents. He said, well, I don't sign anything with any legal document that doesn't have an L. in it, and so that's why I know these aren't my signatures. And, of course, the one signature that he does admit was his doesn't have an L. in it. But he tells federal agents that this man had forged these documents when, clearly, that hadn't been the case.
>
> * * *
>
> Would you threaten somebody if you thought you might lose your retirement funds? Danny Cole sure did.
>
> * * *
>
> Would you claim you hadn't filled out the paperwork to set up this stuff, that you hadn't initialed the notes, hadn't authorized the notes when you clearly had, like Danny Cole did. Danny Cole lied to federal authorities.

(T. 4-641-42, 4-645-46.)

And Lopez told the jury his view of Cole's purported motivation for the omission, to do "everything in his power" to see Lopez in jail. (T. 2-346; *see* A. Br. 44.) Just like Lopez's defense at trial, his approach on appeal seems to be to attack Cole for an isolated omission and to try to make that the story, when the real story is Lopez's own injurious fraud scheme.

Lopez also says the additional impeachment evidence would have bolstered "evidence in the record" that the investments were not fraudulent. (A. Br. 44.) But Lopez does not really point to any good "evidence" that the investments were not fraudulent. The evidence, as provided by Cole and other victims, as well as other witnesses such as DeLancey, established Lopez's fraud beyond reasonable doubt. Hearing Cole's omission again would have had little impact.

Lopez even takes that argument a step further, suggesting that if only the jury had heard more about Cole's omission, then perhaps they would have extended their doubts to discredit essentially all of the testimony offered by his victims at trial. That is not realistic. A repetition of Cole's omission would not have convinced the jury to disbelieve most of what they heard at trial.

In a misguided effort to mount a zealous defense, Lopez unfairly attacks the credibility of a man whose life savings he stole. But Cole's

isolated omission during the investigation cannot solve Lopez's problems, which are of his own making.

CONCLUSION

For the reasons stated above, this Court should affirm.

Respectfully submitted,

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STATEMENT CONCERNING ORAL ARGUMENT

The plaintiff-appellee believes that oral argument is necessary or would be useful in this appeal.

s/ James M. Warden
James M. Warden
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CERTIFICATE OF COMPLIANCE IN ACCORDANCE WITH FED. R. APP. P. 32(a)(7)(C)

The foregoing BRIEF OF THE UNITED STATES complies with the type volume limitations required under Fed. R. App. P. 32(a)(7)(B)(i) in that there are not more than 13,000 words or 1,300 lines of text using monospaced type in the brief, that there are 9,769 words typed in Microsoft Word word-processing this 17th day of March, 2017.

s/ James M. Warden
James M. Warden
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CERTIFICATE OF SERVICE

I certify that on March 17, 2017, I electronically filed the foregoing BRIEF FOR THE UNITED STATES with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system to the following:

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