United States Court of Appeals
For the First Circuit

Nos. 19-1305
19-1312
19-1315
20-1603
20-1604
20-1920
20-1951
21-1098
21-1100

UNITED STATES OF AMERICA,

Appellee,

v.

AUREA VÁZQUEZ RIJOS, a/k/a Beatriz Vázquez, a/k/a Aurea Dominicci; MARCIA VÁZQUEZ RIJOS; and JOSÉ FERRER SOSA,

Defendants, Appellants.

Before

Barron, Chief Judge,
Lipez, Thompson, Gelpí, Montecalvo, Rikelman, and Aframe,
Circuit Judges.

ORDER OF COURT

Entered: September 30, 2025

The petitions for rehearing having been denied by the panel of judges who decided the case, and the petitions for rehearing en banc having been submitted to the active judges of this court and a majority of the judges not having voted that the case be heard en banc, it is ordered that the petitions for rehearing and the petitions for rehearing en banc be denied.

BARRON, Chief Judge, and THOMPSON, Circuit Judge, statement respecting the denial of the petitions for panel rehearing. Defendants' petitions for rehearing and rehearing en banc raise many issues. But a majority of judges on the original panel vote to deny the petition for rehearing. Even so, we think it appropriate to say a little more to the bar and bench about the judicial-notice issue — the only issue that resulted in a panel split. See United States v. Vazquez Rijos, 119 F.4th 94, 112-19 (1st Cir. 2024); id. at 132-43 (Lipez, J., dissenting in part). As we proceed, we assume the reader's familiarity with Vazquez Rijos — including how the majority and partial dissent explained its take on the district judge's telling the jury (via judicial notice) that he had found witness Alex Pabón Colon "competent" in 2008 to plead guilty for his part in Adam Anhang's murder, 10 years before Defendants' 2018 trial for their parts in the murder.

With all that in mind, we wish to make the following very clear: (1) there is no dispute that the notice accurately recounted the facts described; (2) no objection to the notice was made below pursuant to either Federal Rule of Evidence 401 or Federal Rule of Evidence 403; (3) no argument pursuant to either of these rules as to that notice was pressed on appeal; (4) we do not address whether a different result might obtain if, for example, a challenge under Rule 403 were made to the district judge that the notice's prejudice would unfairly outweigh its probative value; and (5) lawyers and judges are cautioned to stay attuned to the possibility of jury confusion when addressing a judicial-notice matter concerning the plea competency of a testifying witness.

LIPEZ, Circuit Judge, statement respecting the denial of en banc review. With respect, I must express my strong disagreement with the decision by the majority of active judges in this murder case to deny en banc review on the ruling by the trial judge to take judicial notice that Alex Pabón Colon was found competent to plead guilty to murder for hire. As my dissent from the panel decision makes clear, the district court's intervention on the critical issue of witness Pabón's credibility was a legal error, and there is at least a reasonable probability that the error was the decisive factor in the jury's finding of guilt for two of the defendants, Marcia Vázquez Rijos and José Ferrer Sosa. See United States v. Rivera-Rodríguez, 761 F.3 105, 112 (1st Cir. 2014) (stating the standard for evaluating the impact of improper judicial intervention in jury factfinding). Indeed, the panel majority acknowledged that Pabón's testimony "devastated the defendants' innocence theory." United States v. Vázquez Rijos, 119 F.4th 94, 112 (1st Cir. 2024). Aside from Pabón's testimony, the evidence showed no more than after-the-fact knowledge of the murder at the heart of the case on the part of Marcia and Ferrer, not their participation in the crime. Given the exceptionally severe consequences -- life sentences -- there is no justification for denying Marcia and Ferrer careful consideration of the judicial-notice issue by the en banc court.

As a legal matter, the petition for en banc review raises an important question about the relationship between a witness's competency -- an issue for the court -- and credibility -- a determination reserved for the jury. In the context of this case, the court's instruction on Pabón's competency inescapably would be understood by the jurors as commentary on his credibility as a witness at the trial:

> [T]he district court's judicial notice that it had found [Pabón] competent at [the time of his guilty plea] -- despite his apparently longstanding mental illness and bizarre past behaviors -- spoke directly to the jury on Pabón's credibility. That intervention by the

> court created the unacceptable risk that the jurors understood the judicial notice of the competency finding to reflect the trial judge's view that Pabón's mental illness did not make him untrustworthy -- regardless of the jury's perception of his performance on the witness stand.

Id. at 135 (Lipez, J., dissenting).

The timing of the district court's instruction and intervention was particularly devastating for the defense because it effectively constituted rehabilitation of Pabón by the court after "the defense launched an all-out attack on [his] credibility." Id. at 134. As the dissent observed, "[t]he government understandably wanted to counter the negative depiction of its star witness and restore his credibility. It could have attempted to do so in the redirect questioning it conducted . . . ." Id. Instead, at the government's request, the court effectively assumed that burden by taking judicial notice of its competency determination, thus placing its imprimatur on the credibility of the government's key witness at what probably was the most critical moment of the trial -- that is, a reasonable juror would probably have thought that the judge had chosen not to disbelieve Pabón, at least to some extent. The court's intervention on the government's behalf was legally improper and thus an abuse of discretion.

That error involved a fundamental misperception of the trial judge's role in relation to the jury. This misperception was plainly evident in the judge's comment that he needed to "balance the equities here." Id. at 133. There should be no disagreement that en banc review is needed to restore the correct balance of "the equities" -- i.e., to eliminate the prejudice from the court's improperly bolstering the government's case and, by doing so, to give Marcia and Ferrer the opportunity to obtain the fair trial to which they are entitled.

There is, however, such disagreement. In response to the petition for panel and en banc rehearing, the panel majority has taken the rarely employed step of issuing a speaking order emphasizing and clarifying aspects of their opinion. They highlight that defendants did not explicitly invoke Rules 401 and 403 of the Federal Rules of Evidence when objecting to the court's judicial notice on Pabón's competency. The speaking order shows that defense counsels' omission was a significant advocacy misstep and the vote to deny en banc review -- against the backdrop of that order -- reinforces that counsels' failure to expressly reference the rules had serious consequences for the defendants. "[C]ourts have held that, on a motion for judicial notice, relevant facts are subject to the exclusionary rules of evidence, including Rule 403." Deakle v. Westbank Fishing, LLC, 559 F. Supp. 3d 522, 526 (E.D. La. 2021); see also United States v. Villa-Guillen, 102 F.4th 508, 516-18 (1st Cir. 2024) (finding that the district court erred in its Rule 403 balancing on evidence for which it took judicial notice); 21B Wright & Miller's Federal Practice & Procedure § 5104 (2d ed. 2025) (describing as "sensible" the application of Rule 403 to judicially noticed facts). Notably, the panel majority acknowledges in their speaking order that "a different result might obtain if . . . a challenge under Rule 403 were made . . . that the notice's prejudice would unfairly outweigh its probative value."

Our criminal justice jurisprudence recognizes that attorney mistakes that cannot be addressed on direct appeal will sometimes lead to unjust outcomes. The federal habeas statute, 28

U.S.C. § 2255, exists to guard against such outcomes, permitting defendants to claim, inter alia, that their trial was fundamentally unfair because of attorney ineffectiveness. As I have articulated here and in my panel dissent, there are strong arguments for a finding of such unfairness here. The speaking order makes clear that the panel opinion should not be read as taking any view on the merits of the Rule 401 or 403 arguments that could have been made to challenge the district court's decision to judicially notice Pabón's competence. Thus, if the defendants choose to raise such claims in a collateral proceeding pursuant to § 2255, those claims will have considerable merit under the framework set out in Strickland v. Washington, 466 U.S. 668 (1984), because the evidence admitted through judicial notice was both irrelevant and plainly more prejudicial than probative. Although they have been denied relief by the en banc court, if Marcia and Ferrer seek collateral relief based on the omission of explicit advocacy on Rules 401 and 403, it should be granted. They deserve a new trial untainted by the court's highly prejudicial error.

By the Court:

Anastasia Dubrovsky, Clerk

cc: Hon. Daniel R. Dominguez, Ada García-Rivera, Clerk, United States District Court for the District of Puerto Rico, Lydia J. Lizarribar-Masini, Julia Meconiates, José A. Ruiz-Santiago, Jenifer Yois Hernández-Vega, Mariana E. Bauzá-Almonte, David O. Martorani-Dale, Sofia Vickery, Juan F. Matos-de Juan, Manuel San Juan DeMartino, José A. Contreras, Maria L. Montanez-Concepcion, Carlos M. Sánchez La Costa, Victor O. Acevedo-Hernández, José Ramon Olmo-Rodriguez, Ovidio E. Zayas-Perez, Aurea Vázquez-Rijos, José Ferrer-Sosa, Marcia Vázquez-Rijos