

United States Court of Appeals For the First Circuit

No. 13-2352

UNITED STATES,

Appellee,

v.

TERRANCE MOON,

Defendant, Appellant.

Before

Howard, Chief Judge,
Souter, Associate Justice,*
Torruella, Selya, Lynch, Lipez, Thompson, Kayatta and Barron,
Circuit Judges.

ORDER OF COURT

Entered: May 16, 2016

The petition for rehearing having been denied by the panel of judges who decided the case, and the petition 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 petition for rehearing and the petition for rehearing en banc be denied.

* Hon. David H. Souter, Associate Justice (Ret.) of the Supreme Court of the United States, sitting by designation.

TORRUELLA and THOMPSON, Circuit Judges, dissenting from denial of en banc rehearing.

LIPEZ, Circuit Judge, joined by TORRUELLA and THOMPSON, Circuit Judges, Statement Re Denial of En Banc Review. I am disappointed that a majority of the active judges have rejected the opportunity presented by this case to reconsider en banc our aberrant and misguided law on the admission of opinion testimony by police officers. In my concurrence four years ago in United States v. Valdivia, I pointed out that our approach has "created in some of our precedents an unwarranted police exception from the requirements applicable to expert testimony." 680 F.3d 33, 61 (1st Cir. 2012). That approach not only seriously misconstrues Federal Rules of Evidence 701 and 702, but it is also "at odds with [the law of] virtually every other circuit." United States v. Moon, 802 F.3d 135, 147 n.9 (1st Cir. 2015) (citing Valdivia, 680 F.3d at 56 n.16 (collecting cases)). It is now well past the time when we should have confronted our flawed law and eliminated the ongoing unfairness to defendants

By the Court:

/s/ Margaret Carter, Clerk

cc:

Hon. Denise Jefferson Casper
Robert Farrell, Clerk, United States District Court for the District of Massachusetts
Mark T. Quinlivan
Dina Michael Chaitowitz
Robert Edward Richardson
Eric Paul Christofferson
Derege B. Demissie
Terrance Moon