No. 14-3712

IN THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

YYYY JACKSON,
Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Pennsylvania

BRIEF OF DEFENDANT-APPELLANT

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STATEMENT REGARDING ORAL ARGUMENT

Oral argument is requested. Counsel submits that oral argument will be particularly helpful to the Court with regard to the first issue relating to the legality of the state and federal wiretap orders. Likewise, counsel submits that because of the breadth of the interpreted telephone conversations, oral argument will be helpful to the Court with regard to the second issue as well.

TABLE OF CONTENTS

Page No.

STATEMENT REGARDING ORAL ARGUMENT....2

TABLE OF CONTENTS....3

TABLE OF AUTHORITIES....5

STATEMENT OF JURISDICTION....8

STATEMENT OF THE ISSUES WITH STATEMENT OF PLACE RAISED AND RULED UPON....9

RELATED CASES AND PROCEEDINGS....10

STATEMENT OF THE CASE....11

SUMMARY OF THE ARGUMENT....18

ARGUMENT....22

I. The Federal Wiretap Orders Were Based Upon Interceptions Obtained Pursuant to State Wiretaps that Were Conducted in Violation of the Fourth Amendment to the United States Constitution As Well As State and Federal Law....22

II. It is Plain Error to Allow the Government's Case Agent to Continually Interpret Intercepted Phone Conversations Played for a Jury at Trial Absent the Use of "Code Words."....29

III. In Light of the Aggravating Circumstances Present in this case it was Error to Allow the two Alleged Co-Conspirators to Testify About Their Pleas and Convictions to a Conspiracy in Which Mr. Jackson was Charged Before the Jury....38

IV. The Government's Reference to an Alleged Co-Conspirator Asserting his Fifth Amendment Rights Against Self-Incrimination was Plain Error....43

V. The Various Plain Error in the Case Requires Reversal Especially When Viewed Cumulatively.....45

CONCLUSION.....48

CERTIFICATE OF SERVICE.....49

CERTIFICATE OF COMPLIANCE.....50

TABLE OF AUTHORITIES

Page No.

Cases

Bowles v. United States, 439 F.2d 536 (D.C. Cir. 1970)..44

*DeLoach v. United States,*307 F.2d 653 (D.C. Cir. 1962)......................................29

Katz v. United States, 389 U.S. 347 (1967)...24

Nezowy v. United States, 723 F.2d 1120 (3rd Cir. 1983)..44

St. Louis v. The Ferry Co., 78 U.S. 423 (1870)...27

United States v. Adams, 759 F.2d 1099 (3rd Cir. 1985)..22

United States v. Alfonso, 522 F.2d 605 (5th Cir.), *cert. denied,* 434 U.S. 857 (1977)...29

United States v. Aponte, 622 Fed. Appx. 118 (3rd Cir. 2015).................................43

United States v. Baete, 414 F.2d 782 (5th Cir. 1969)...42

United States v. Copple, 24 F.3d 534 (3rd Cir.), *cert. denied,* 513 U.S. 989 (1994)...46

United States v. Cosme, 2011 WL 3740337 (S.D. Cal. 2011), *aff'd,* 537 Fed. Appx. 752 (9th Cir. 2013), *cert. denied,* 135 S.Ct. 394 (2014)....................................27, 28

United States v. Cox, 633 F.2d 871 (9th Cir. 1980), *cert. denied,* 454 U.S. 844 (1981)...29

United States v. DeMaise, 745 F.2d 49 (3rd Cir. 1984)..24

United States v. De Peri, 778 F.2d 963 (3rd Cir. 1985), *cert. denied*, 475 U.S. 1110 (1986)...29

United States v. Dicker, 853 F.2d 1103 (3rd Cir. 1988)..29

United States v. Farries, 459 F.2d 1057 (3rd Cir. 1972), *cert denied,* 409 U.S. 888, 93 S.Ct. 143, 34 L.Ed.2d 145..41

United States v. Gaev, 24 F.3d 473 (3rd Cir. 1994)..42

United States v. Garcia, 413 F.3d 201 (2nd Cir. 2005)....................................33, 37

United States v. Giordano, 416 U.S. 505 (1974)...24

United States v. Geller, 560 F. Supp. 1309 (E.D. Pa. 1983)..................................24

United States v. Gullo, 502 F.2d 759 (1974)...41, 42

United States v. Hampton, 718 F.3d 978 (D.C. Cir. 2013).............................*passim*

United States v. Harrell, 436 F.2d 606 (5th Cir. 1970)....................................41, 42

United States v. Jafari, 2016 WL 1760653, *2 (3rd Cir. May 2, 2016)..................45

United States v. Johnson, 617 F.3d 286 (4th Cir. 2010)..31

United States v. Ladson, 643 F.3d 1335 (11th Cir. 2011).......................................46

United States v. Martinez, 277 F.3d 517 (4th Cir.), *cert. denied*, 537 U.S. 899 (2002)..46

United States v. Marion, 535 F.2d 697 (2nd Cir. 1976)..24

United States v. Marzano, 537 F.2d 257 (7th Cir.), *cert. denied,* 429 U.S. 1038 (1976)..29

United States v. Miller, 738 F.3d 361 (D.C. Cir. 2013)..30

United States v. Necoechea, 986 F.2d 1273 (9th Cir. 1993)....................................46

United States v. Restaino, 369 F.2d 544 (3rd Cir. 1966)..41

United States v. Sepulveda, 15 F.3d 11661 (1st Cir. 1993)....................................46

United States v. Stevens, 223 F.3d 239 (3rd Cir. 2000)....................................29, 38

United States v. Toner, 173 F.2d 140 (3rd Cir. 1949).......................................38, 41

United States v. Universal Rehabilitation Services, Inc., 205 F.3d 657 (3rd Cir. 2000)...38, 41

United States v. Vandetti, 623 F.2d 1144 (6th Cir. 1980).......................................45

United States v. Wac, 498 F.2dd 1227 (6th Cir. 1974)..24

United States v. White, 569 F.2d 263 (5th Cir.), *cert. denied,* 439 U.S. 848 (1978)...29

Other Statutes and Authorities

Amendment IV of the United States Constitution..22, 24

Amendment V of the United States Constitution..*passim*

Fed. R. Evid. 701..29, 31, 38

Fed. R. Evid. 702..24, 29, 30

Fed. R. Evid. 801(d)(2)(E)..43

18 U.S.C. § 2515..23

18 U.S.C. § 2516..26

18 U.S.C. § 2518...24, 26, 27

18 Pa. C.S. § 5710...25

21 U.S.C. § 846..12

28 U.S.C. § 1291..8

STATEMENT OF JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1291 as an appeal from a final judgment entered by the United States District Court for the Western District of Pennsylvania.

STATEMENT OF THE ISSUES WITH STATEMENT OF PLACE RAISED AND RULED UPON

I. Whether state courts in the Commonwealth of Pennsylvania are permitted to authorize wiretaps of phones where it is known that the phones are being used outside Pennsylvania simply because it is assumed that the "listening post" remained in Pennsylvania at all times.

Where Raised and Ruled Upon: Mr. XXXX filed four motions to suppress evidence that were seized in connection with federal court orders Authorizing the Interception of Wire Communications that were themselves based upon the fruit of the state wiretaps. (Docs. 377, 509, 538, 548) The District Court entered various orders denying the motions to suppress. (Appx. at 53a-60a).

II. Whether it is error to allow the government's case agent to continually interpret intercepted phone conversations played to a jury at trial absent the use of "code words."

Where Raised and Ruled Upon: This issue was not raised nor ruled upon below.

III. Whether it is error to allow alleged co-conspirators to testify about their

pleas and convictions to a conspiracy in which a defendant on trial is charged.

Where Raised and Ruled Upon: This issue was not raised nor ruled upon below.

IV. Whether it is error for the government to inform the jury that an alleged co-conspirator is not available to testify because he exercised his rights under the Fifth Amendment against self-incrimination.

Where Raised and Ruled Upon: This issue was not raised nor ruled upon below.

V. Whether the various plain error in this case requires reversal especially when view cumulatively.

Where Raised and Ruled Upon: This issue was not raised nor ruled upon below.

RELATED CASES AND PROCEEDINGS

A civil, *pro se* lawsuit brought by YYYY XXXX is currently pending before the United States District Court for the District of Columbia in Case No. 1:14-CV-00192-ABJ. The lawsuit seeks documents related to the Title III wiretaps which had intercepted Mr. XXXX's conversations with Arthur Brown and Arthur Gilbert.

STATEMENT OF THE CASE

I. Proceedings Below

YYYY XXXX, along with seven co-defendants, was charged by a superseding indictment with one count of conspiracy to possess with the intent to distribute cocaine, in violation of 21 U.S.C. § 846. (Doc. 18)[1] Mr. XXXX alone went to trial and the trial was held on March 17, 2014-March 21, 2014 and the jury found Mr. XXXX guilty on the sole count against him in the superseding indictment.

Mr. XXXX was sentenced, pursuant to a judgment entered on July 24, 2014, to 135 months imprisonment and five years supervised release. (Doc. 618)[2] He was also ordered to pay a $100 special assessment. (Doc. 618)

On July 28, 2014, Mr. XXXX filed a timely notice of appeal. (Appx. 52a)

II. Statement of the Facts

The government's evidence against Mr. XXXX consisted primarily of the testimony of two cooperating defendants and the use of phone calls obtained as a result of various wiretap orders.

Dietrick Bostick testified in exchange for a possible downward departure motion and after pleading guilty to a conspiracy to possess with the intent to distribute between five and fifteen kilograms of cocaine. (Tr. III:9) Bostick was a career

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[1]"Doc." refers to the document number as contained in the District Court's Docket Sheet.

[2]The imprisonment portion of the sentence was later reduced to 120-months imprisonment. (Doc. 707)

offender facing a minimum sentence of twenty years imprisonment. (Tr. III:11-12)

Bostick testified that, from on or around July 2010 until October 7, 2010, he was receiving cocaine from Arthur Gilbert from Atlanta, Georgia. (Tr. III:15) He received cocaine from Gilbert "about twice a month" and received anywhere from five kilograms to twenty kilograms at a time. (Tr. III:16) Bostick believed that Gilbert was receiving some of the cocaine from "Dom" in Texas because he was told that by Gilbert and Christopher Stanley. (Tr. III:16-19) The cocaine from Texas would come once or twice a month, one to three kilograms at a time. (Tr. III:20) According to Bostick, the Texas cocaine was delivered by mules on commercial air flights or buses. (Tr. III:21-22) Bostick would distribute the cocaine after he received it. (Tr. III:28) Money for the Texas cocaine was allegedly returned to "Dom." (Tr. III:25-26)

Bostick testified that "Dom" made one trip to the Pittsburgh area and stayed in the Doubletree Hotel in Monroeville, PA. and he identified Mr. XXXX in the courtroom as the person he knew as "Dom." (Tr. III:25-26, 31) In the end, however, Bostick admitted that he has "no firsthand knowledge or experience of dealing drugs with Mr. XXXX." (Tr. III:47)

Christopher Stanley also testified in the hopes of obtaining a reduced sentence after pleading guilty to possessing with the intent to distribute between five and fifteen kilograms of cocaine. (Tr. III:74-77) Stanley was also a career offender. (Tr. III:77-78) According to Stanley, he met Mr. XXXX in May of 2005 and originally

trafficked ecstasy pills with him. (Tr. III:80-87) Stanley claimed that, on around June 2010, Mr. XXXX began dealing in cocaine. (Tr. III:87-89)

Stanley testified that, on June 27, 2010, he received a phone call from Mr. XXXX asking him to get on a plane to Pittsburgh. (Tr. III:89) When he arrived in Pittsburgh he was allegedly directed by Mr. XXXX to call Dietrick Bostick to obtain approximately $34,800 for one kilogram of cocaine. (Tr. III:89-93) Stanley, along with two other persons, then secreted the money on their persons and flew to Dallas. (Tr. III:94-96)

Stanley testified that, around July 1, 2010, he flew one kilogram of cocaine to Pittsburgh at the behest of Mr. XXXX and gave it to Bostick. (Tr. III:96-98) Other mules also flew separately to Pittsburgh with cocaine for Bostick and a total of three kilograms of cocaine was ultimately given to Bostick. (Tr. III:96-99, 102-03) According to Stanley, Mr. XXXX flew to Pittsburgh the next day and, after spending the night, was given the money for the cocaine. (Tr. III:99-102)[3]

Stanley next testified to a mid-July trip to Pittsburgh. (Tr. III:104-10) At the time, cocaine had already been delivered to Bostick. (Tr. III:106-07) Stanley and other persons then allegedly assisted in returning cash to Mr. XXXX in Dallas. (Tr. III:108-10)

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[3]The government claimed that one of Mr. XXXX's cell phones was "using" a tower in Monroeville, Pennsylvania on June 30, 2010. (Tr. III:57-65; Gov't Ex. 66) The government also produced a receipt showing Stanley stayed at the Monroeville Doubletree from June 29, 2010-July 4, 2010. (Gov't Ex. 48)

Stanley testified that his last trip to Pittsburgh was at the end of July 2010 when he and another person transported one kilogram of cocaine to Bostick. (Tr. III:110) They then received $35,000 and allegedly returned it to Mr. XXXX in Dallas. (Tr. III:110)

Stanley further testified that, in the middle of August, he met Arthur Brown in Dallas after being given two kilograms of cocaine by Mr. XXXX to give to Brown. (Tr. III:111-14) On another occasion, in mid-September 2010, Brown allegedly came to Dallas to obtain two kilograms of cocaine. (Tr. III:114-15) According to Stanley he was then given the cocaine by Mr. XXXX to give to Brown. (Tr. III:115) Stanley then called Arthur Gilbert and was given a Western Union code that allowed him to pick up the proceeds for the cocaine. (Tr. III:115-17)[4]

Stanley also testified that he was aware that Brown came to Texas in October 2010 for three kilograms of cocaine but Mr. XXXX was allegedly unable to supply the cocaine so Brown obtained it from another source. (Tr. III:119) Allegedly Brown had come to Dallas with cash and gave the cash to Mr. XXXX but the cash had to be returned when the cocaine could not be secured. (Tr. III:120-21) Stanley testified that the cash was returned at a hotel starting with the word "Crowne" in downtown Dallas.

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[4]The Western Union receipt was introduced as a government exhibit at trial. (Gov't Ex. 51)

(Tr. III:121)[5]

Finally, Stanley testified that Mr. XXXX often used an apartment in Dallas as a place to "rest your head at or take any type of drugs or money for drugs...." (Tr. III:121-22) According to Stanley, Mr. XXXX got a friend, Allen Russell, to rent the apartment. (Tr. III:121-22) The apartment was later the subject of a police search on October 7, 2010. (Tr. III:121)[6]

During the time of the alleged conspiracy, the federal government had been authorized to conduct wire intercepts on several phones including the phone of Arthur Gilbert and Arthur Brown. (Tr. II:5-6) Significantly, the Office of the Pennsylvania Office of the Attorney General had also received authorization from a state court to intercept Arthur Gilbert's and Arthur Brown's phone. (Tr. II:6-7) During trial, many of these intercepted phone calls were played for the jury in order to support the

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[5]An Allegheny County Sheriff's officer testified that Arthur Brown and Shari Williams were arrested at a Greyhound Bus Station in Pittsburgh on October 7, 2010. It was determined that Mr. Brown and Ms. Williams were in possession of a kilogram of cocaine each. (Tr. I:188-91; II:9-11)

The government's case agent, Detective Shane Countryman, also testified that, prior to Brown's arrest in Pittsburgh, he observed Brown and Arthur Gilbert and others arrive at the Crowne Plaza hotel in Dallas and that Mr. XXXX came to the hotel carrying a backpack and later returned to the hotel with the backpack. (Tr. II:18-29)

[6]An FBI agent testified regarding the search of this Dallas apartment where various items were seized including a court document, a utilities receipt for another home and credit car in Mr. XXXX's name; ammunition; a food sealer with sealing bags; a cell phone receipt, credit cards and various identification cards in the name of Christopher Stanley; an auto insurance policy jointly in the name of Mr. XXXX and Stanley; and a money counter. (Tr. I:165-179)

The government also introduced a text message allegedly from Mr. XXXX's phone dated October 8, 2010 stating "I wish you would listen to me man I told you that shit was hot fbi went by da crib with search warrant meet me somewhere." (Tr. II:142; Gov't Ex. 71)

government's claims that these recorded phone calls were in furtherance of the charged drug conspiracy. (Tr. II:99) These intercepted phone calls and texts were also used in an attempt to corroborate the testimony of Dietrick Bostick and Christopher Stanley. (Gov't Ex. 72-116) Government Exhibits 74, 77, 79 and 87 were phone calls between Mr. XXXX and Arthur Gilbert intercepted from Gilbert's phone. Government Exhibits 87, 95, 102 were phone calls between Mr. XXXX and Arthur Brown intercepted from Brown's phone. Government Exhibit 78 was a text from Mr. XXXX to Gilbert intercepted from Gilbert's phone.

SUMMARY OF THE ARGUMENT

I. Under the United States Constitution, Federal Law and State Law, State Courts in the Commonwealth of Pennsylvania Are Not Permitted to Authorize Wiretaps of Phones Where it Is Known That the Phones Are Being Used Outside Pennsylvania Simply Because it Is Assumed That the "Listening Post" Remained in Pennsylvania at All Times.

The District Court ruled in this case that, under the United States Constitution, Federal law and State law it does not matter if an owner of a mobile phone is a resident of Pennsylvania or if the mobile phone is registered in Pennsylvania or if the phone is located in Pennsylvania or if the phone accesses cell towers in Pennsylvania. According to the District Court, as long as technology allows the contents of phone conversations to be "hijacked" to a "listening post" in Pennsylvania that is sufficient for a state court to order a wire intercept. This holding disregards the well understood territorial jurisdiction limitations of state courts and there is certainly no evidence that Congress intended a wholesale disregard of longstanding principles of territorial jurisdiction for purposes of allowing a state court to authorize its law enforcement officials to eavesdrop on citizens of other states or countries simply by locating the "listening post" in the state where the state court is located.

II. It Is Error to Allow the Government's Case Agent to Continually Interpret Intercepted Phone Conversations Played for a Jury at Trial Absent the Use of "Code Words."

Courts have universally held that, although a witness may properly be called upon in some circumstances to interpret coded conversations, it is not permissible for

witnesses to be asked to "interpret" clear conversations for a jury. Here, the government played tape recordings of approximately fifty phone conversations using a similar method of presentation. The government would play a conversation and then ask its case agent to interpret the conversations based on his investigation, interviews with cooperators, and "whatnot". The agent would then proceed to tell the jury what, in his opinion, "was going on in [a] particular call" and he would interpret ambiguous references to persons and things in the conversations and give his opinions as to who was being referred to and the actions that were being referenced. He would also often explain the speaker's feelings as to certain events or explain why a speaker was saying certain things. The agent was called to testify *seven* different times during the trial in the government's efforts to have him give the government's interpretations of the conversations to the jury during testimony. This type of testimony was a constant feature of the trial and constitutes plain error.

III. It Is Error to Allow Alleged Co-Conspirators to Testify about Their Pleas and Convictions to a Conspiracy in Which A Defendant on Trial is Charged.

This Court has long held that evidence of a co-conspirator's guilty plea or conviction is not admissible as substantive evidence of a defendant's guilt especially when the plea is to the very conspiracy in which a defendant is charged. Here, the government attempted to use the guilty pleas of both Dietrick Bostick and Christopher Stanley before the jury in order to infer the guilt of Mr. XXXX. Moreover, both

Bostick's and Stanley's pleas were to the very conspiracy in which Mr. XXXX was charged. Although the District Court did give a purported "curative" instruction, it was not done until the completion of the evidence. Moreover, the use of these pleas by the government amounted to "aggravating circumstances" in this case in light of the government's repeated attempts to interpret telephone conversations played for the jury and its gratuitous reference before the jury to yet another co-defendant asserting his right against self-incrimination.

IV. It Is Error for the Government to Inform the Jury That an Alleged Co-Conspirator Is Not Available to Testify Because He Exercised His Rights under the Fifth Amendment Against Self-incrimination.

It is a decades old rule that a party may not call a witness to testify before a jury if that party knows the witness will assert his or her Fifth Amendment rights against self-incrimination. For the same reasons, it is error for a party to inform a jury that a witness has chosen to exercise his constitutional privilege against self-incrimination. For the government to inform a jury, as it did in this case, that an alleged co-conspirator is asserting his Fifth Amendment rights against self-incrimination unfairly prejudices a defendant.

V. The Various Plain Error in this Case Requires Reversal Especially When View Cumulatively.

Almost all of the evidence in this case consisted of the playing of the phone conversations, with the jury being given the government's impermissible

interpretation of the conversations, and the testimony of the two co-defendants who the jury was told pleaded guilty to the same conspiracy for which Mr. XXXX was standing trial. As such, the cumulative effect of the interrelated errors detailed in Points of Error II-IV permeated almost all of the evidence presented by the government to the jury in this case.

ARGUMENT

I. THE FEDERAL WIRETAP ORDERS WERE BASED UPON INTERCEPTIONS OBTAINED PURSUANT TO STATE WIRETAPS THAT WERE CONDUCTED IN VIOLATION OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION AS WELL AS STATE AND FEDERAL LAW.

A. Standard of Review

Because this point of error involves only "the application and interpretation of legal precepts" with regard to state and federal wiretap statutes, this Court's review is plenary. *See, e.g., United States v. Adams*, 759 F.2d 1099, 1114 (3rd Cir. 1985).

B. Discussion

Mr. XXXX filed four motions to suppress evidence of the contents of his telephone conversations with Arthur Brown and Arthur Gilbert that were seized in connection with federal court orders Authorizing the Interception of Wire Communications. (Docs. 377, 509, 538, 548)[7] In each motion, Mr. XXXX argued that the affidavits in support of the federal wiretap orders relied upon evidence obtained as a result of a state court wiretaps and he further argued that the state court was without authority to authorize interception of calls made from a telephone when the telephone was located outside the Commonwealth of Pennsylvania.

Specifically, the affidavits for the federal wiretap order entered in Misc. No. 10-62(e) and Misc. No. 10-62(f) relied upon conversations intercepted pursuant to state

[7] *See* Orders entered in Misc. No. 10-62(e) and Misc. No. 10-62(f). (Appx. at 110a-194a)

court orders authorizing the wiretap of telephones allegedly belonging to Arthur Brown and Arthur Gilbert. *See* (Appx. at 110a-139a and Appx. at 140a-194a). Several of the conversations that were intercepted pursuant to the state court orders were intercepted on days when both federal and state agents knew that the target telephones were outside the Commonwealth of Pennsylvania. For example, the affidavits for the federal wiretap orders relied upon numerous phone calls placed or received by Arthur Brown on his targeted phone and intercepted pursuant to a state wiretap order when agents had Brown under surveillance in Dallas, Texas.

The District Court entered various orders denying Mr. XXXX's motions to suppress. (Appx. at 53a-60a). The District Court essentially held that a state court in the Commonwealth of Pennsylvania may authorize the interception of any phone conversation regardless of where the phone is located provided that the law enforcement officials intercepting the conversation are themselves located in the Commonwealth. *See, e.g.,* Appx. at 54a ("All that is required under both federal and state law is that the interception (not the conversation) occur within the Commonwealth.").

Analysis of this issue requires review of both federal and state law. Under federal law, intercepted telephone calls must be suppressed if those calls were obtained in violation of Title III requirements. 18 U.S.C. § 2515. Moreover, when a Title III interception is based upon illegally obtained evidence, the Title III

authorization is "fruit" of the illegally obtained evidence and must be suppressed. *United States v. Giordano*, 416 U.S. 505, 533 (1974); *United States v. Wac*, 498 F.2d 1227, 1231-32 (6th Cir. 1974).

Without question, the affidavits used by the government in this case to obtain the federal wiretap orders in Misc. No. 10-62(e) and Misc. No. 10-62(f)[8] were based in large part on conversations intercepted pursuant to the state wiretap orders. Thus, the question before this Court is whether the state wiretap orders were legally obtained under the Fourth Amendment to the United States Constitution,[9] federal wiretap laws *and* Pennsylvania wiretap laws.[10]

Pennsylvania law provides:

> (a) Application.--Upon consideration of an application, the judge may enter an ex parte order, as requested or as modified, authorizing the interception of wire, electronic or oral communications *anywhere within the Commonwealth*, if the judge determines on the basis of the facts submitted by the applicant that there is probable cause for belief that all

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[8]The government did not challenge Mr. XXXX's standing to challenge the wiretap orders. Indeed, as a party to conversations intercepted pursuant to both the state and federal court order, Mr. XXXX has standing as an "aggrieved party" to challenge the orders. 18 U.S.C. § 2518(1).

[9]*See generally Katz v. United States,* 389 U.S. 347 (1967).

[10]In examining this question it must be kept in mind that state wiretap laws can be more restrictive than Title III requirements but cannot be less restrictive. *See, e.g., United States v Geller*, 560 F. Supp. 1309, 1312 (E.D. Pa.1983) ("state law standards which relate to the issuance and execution of a wiretap order predominate where they are more demanding than the federal ones"), *aff'd sub nom. United States v. DeMaise*, 745 F.2d 49 (3rd Cir.1984); *United States v Marion*, 535 F.2d 697, 702 (2d Cir.1976) ("[i]f a state should set forth procedures more exacting than those of the federal statute, however, the validity of the interceptions and the orders of authorization would have to comply with that test as well").

the following conditions exist:

> (1) the person whose communications are to be intercepted is committing, has or had committed or is about to commit an offense as provided in section 5708 (relating to order authorizing interception of wire, electronic or oral communications);
>
> (2) particular communications concerning such offense may be obtained through such interception;
>
> (3) normal investigative procedures with respect to such offense have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous to employ;
>
> (4) the facility from which, or the place where, the wire, electronic or oral communications are to be intercepted, is, has been, or is about to be used, in connection with the commission of such offense, or is leased to, listed in the name of, or commonly used by, such person;
>
> (5) the investigative or law enforcement officers or agency to be authorized to intercept the wire, electronic or oral communications are qualified by training and experience to execute the interception sought, and are certified under section 5724 (relating to training); and
>
> (6) in the case of an application, other than a renewal or extension, for an order to intercept a communication of a person or on a facility which was the subject of a previous order authorizing interception, the application is based upon new evidence or information different from and in addition to the evidence or information offered to support the prior order, regardless of whether such evidence was derived from prior interceptions or from other sources.

18 Pa. C.S. § 5710 (emphasis added). Meanwhile, federal law provides that a "State

court judge of *competent jurisdiction*" may order interception if the interception is "within the territorial jurisdiction of the court in which the judge is sitting." 18 U.S.C. § 2516(2) (emphasis added); 18 U.S.C. § 2518(3).[11]

Here, the parties appeared to assume that, even when the phones targeted in the state court orders were outside of the Commonwealth of Pennsylvania, the "listening post" for intercepting those conversations was always within the Commonwealth. It was on that basis that the District Court denied Mr. XXXX's motions to suppress.

Notably, as interpreted by the District Court, the Pennsylvania statute allowing a state court to authorize interception "anywhere within the Commonwealth" regardless of where the phone is registered or located, as long as the "listening post" is located in the Commonwealth. Under this reading of the statute, a Pennsylvania Court could authorize the interception of the telephone conversations of an Alaskan citizen while using a phone registered in Alaska and while physically present in Alaska to talk to a fellow Alaskan as long as the "listening post" is located in Pennsylvania.[12]

Mr. XXXX submits that a more reasonable interpretation of the Pennsylvania

[11]Of significance, 18 U.S.C. § 2518(3) allows a federal court judge to authorize interception "outside that jurisdiction but within the United States in the case of a mobile interception device authorized by a Federal court within such jurisdiction."

[12]Taking it even a step further, under this interpretation a Pennsylvania court could authorize the interception of the telephone conversations of a Japanese citizen while using a phone registered in Japan and while physically present in Japan to talk to a fellow Japanese citizen as long as the "listening post" is located in Pennsylvania.

statute limits the authority of a state court judge to authorize the interception of targeted phones while the phones are located in the Commonwealth. In any event, to the extent that the Pennsylvania statute actually allows otherwise, Mr. XXXX submits that the statute exceeds what is allowed by Title III and federal law.

As noted above, Title III provides that state court orders are limited to orders by courts with "competent jurisdiction." Nevertheless, it is a long standing principle, dating back to the common law, that a state's jurisdiction is limited to the confines of its own borders. *See, St. Louis v. The Ferry Co.*, 78 U.S. 423, 430 (1870) ("If the legislature of a State should enact that the citizens or property of another State or country should be taxed in the same manner as the persons and property within its own limits and subject to its authority, or in any other manner whatsoever, such a law would be as much a nullity as if in conflict with the most explicit constitutional inhibition. Jurisdiction is as necessary to valid legislative as to valid judicial action.").

One can contrast this with the authority of federal judges under Title III. Title III authorizes *federal* judges, as opposed to state judge, to act extra-territorially. A federal judge, under certain circumstances, may authorize interception of mobile devices outside his jurisdiction but not outside the United States. 18 U.S.C. § 2518(3). An interesting case in this regard is *United States v. Cosme*, 2011 WL 3740337 (S.D. Cal. 2011), *aff'd*, 537 Fed. Appx. 752 (9th Cir. 2013), *cert. denied*, 135 S.Ct. 394 (2014). *Cosme* involved the authority of a San Diego federal judge to

authorize the interception of calls in Mexico. *Id*. at *8. At first blush, it would appear that *Cosme* supports the District Court's resolution in the instant case because the *Cosme* court denied suppression given that the listening post was in the Southern District of California. *Id*. at *10. Nevertheless, in *Cosme* the phone calls, although made in Mexico, accessed cell phone towers located in the Southern District of California. *Id*. at *11. Here there can be no argument that the calls made between parties located in Dallas, Texas did *not* access cell phone towers in Pennsylvania. In other words, the only way those conversations "entered" the jurisdiction of the Commonwealth of Pennsylvania was because the state court orders allowed the conversations to be diverted to Pennsylvania.

In sum, Title III specifically grants *federal* courts, who are, of course, units of the federal government to exercise extra-territorial jurisdiction in the case of mobile phones. It makes no such grant to state courts and surely Congress did not intend to authorize a state court to allow its law enforcement officials to eavesdrop on citizens of other states simply by locating the "listening post" in the state where the state court is located. Here, there was no evidence presented in connection with the motions to suppress that Arthur Brown or Arthur Gilbert were Pennsylvania citizens or that their phones were located in or even registered in Pennsylvania at the time the state court wiretap orders were entered. Meanwhile, there is evidence that both state and federal authorities knew that they were intercepting phone conversations that took place

wholly outside the Commonwealth.[13]

II. IT IS PLAIN ERROR TO ALLOW THE GOVERNMENT'S CASE AGENT TO CONTINUALLY INTERPRET INTERCEPTED PHONE CONVERSATIONS PLAYED FOR A JURY AT TRIAL ABSENT THE USE OF "CODE WORDS."

A. Standard of Review

Mr. XXXX acknowledges that he did not object to the admission of the testimony at issue below and, therefore, the Court will review this issue only for plain error. *See, e.g. United States v. Stevens*, 223 F.3d 239, 242 (3rd Cir.2000).

B. Discussion

1. Established Law

Courts have universally held that, although a witness may properly be called upon in some circumstances to interpret coded conversations, it is not permissible, under Fed. R. Evid. 701 and 702, for them to be asked to "interpret" clear conversations for a jury. *See, e.g.*, *United States v. Dicker*, 853 F.2d 1103 (3rd Cir. 1988).[14] Moreover, courts consider the allowing of such testimony to be plain error.

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[13]To be sure, that Brown's and Gilbert's phones had Pennsylvania area codes associated with them, however, in today's society people often move between states while retaining their mobile phone numbers.

[14]*Citing*, *See United States v. De Peri*, 778 F.2d 963, 977-78 (3rd Cir.1985), *cert. denied*, 475 U.S. 1110 (1986); *United States v. Cox*, 633 F.2d 871, 875-76 (9th Cir.1980), *cert. denied*, 454 U.S. 844 (1981); *United States v. White*, 569 F.2d 263, 267 (5th Cir.), *cert. denied*, 439 U.S. 848(1978); *United States v. Alfonso*, 552 F.2d 605, 618 (5th Cir.), *cert. denied*, 434 U.S. 857(1977); *United States v. Marzano*, 537 F.2d 257, 268 (7th Cir.), *cert. denied*, 429 U.S. 1038 (1976); *DeLoach v. United States*, 307 F.2d 653 (D.C. Cir.1962).

See, e.g., United States v. Miller, 738 F.3d 361, 374 (D.C. Cir. 2013) ("Admission of the government agents' interpretative lay opinion testimony was plain error...").

The recent case of *United States v. Hampton*, 718 F.3d 978 (D.C. Cir. 2013) is instructive especially given its many similarities to the instant case. In *Hampton*,

> FBI Agent Bevington was a key witness against Hampton at trial. The government did not attempt to qualify him as an expert witness under Rule 702 of the Federal Rules of Evidence. Instead, he was called as a lay witness. Agent Bevington testified that he had 20 years of FBI experience at the time of this trial, including more than 100 drug investigations and more than 50 investigations with court-ordered wiretaps. With respect to Glover's drug operation, Bevington testified that he was the case agent—the supervisor of the FBI agents conducting the investigation. In that capacity, he monitored wiretaps, performed physical surveillance, provided daily reports to the United States Attorney's Office, and supervised other personnel monitoring the wiretaps. He also testified that he had reviewed every conversation—some 20,000—captured by the wiretaps, not just the 100 or so recordings admitted into evidence. The government put Bevington on the stand five times during the trial, usually to give the context and an explanation of recorded statements admitted into evidence. As the government told the jury during its opening statement, the recorded telephone calls were "very, very cryptic," and the government used Bevington to interpret them for the jury.
>
> * * *
>
> On several occasions the district court allowed Agent Bevington to provide opinions about the meaning of ambiguous references in recordings admitted into evidence. The prosecutor, for example, played a tape in which Velma Williams asked Lonnell Glover: "[H]ave you talked [to] your brother? ... [H]e say he feeling fine then?" The prosecutor then asked Agent Bevington to interpret the questions. *When Agent Bevington opined that Williams was referring to Hampton*, defense counsel objected, calling this mere speculation, and adding at the bench conference that Glover himself had a brother. In response to the

> court's question about the basis of Bevington's opinion, the prosecutor replied: "I think he has listened to all of the calls, and he's done the surveillance, and he has seen all of the evidence in this case, and he has based his opinion ... on this investigation." Apparently convinced, the court overruled the objection.

Id. at 981-982 (emphasis added). The Court of Appeals reversed Hampton's conviction. In doing so, it noted:

> When an agent, particularly a case agent, provides interpretations of recorded conversations based on his "knowledge of the entire investigation," the risk that he was testifying based upon information not before the jury, including hearsay, or at the least, that the jury would think he had knowledge beyond what was before them, is clear. The *Grinage* court held that the agent's interpretation of conversations in that case was not a permissible lay opinion under Rule 701 because, rather than being helpful to the jury, it usurped the jury's function.

Id. at 982-83 (citations and quotations omitted). Likewise, the United States Court of Appeals for the Fourth Circuit reversed a case involving similar law enforcement interpretations of phone conversations and noting that "post-hoc assessments cannot be credited as a substitute for the personal knowledge and perception required under Rule 701." *United States v. Johnson*, 617 F.3d 286, 293 (4th Cir. 2010).

2. Instant Case

Here, the government gave pretrial notice that FBI Task Force Agent Shane Countryman would be interpreting "the meanings of code words used by co-defendants during the course of recorded and/or intercepted phone conversations." (Doc. 522 at 8). The government gave the example of Agent Countryman intending

to explain to the jury that "one in and one out" means hiding one kilogram of cocaine on one's person and hiding another kilogram in one's luggage. (Doc. 522 at 10)

If Agent Countryman's testimony was limited to such arguable code terms, as the government suggested it would be in its pretrial filing, such testimony would have been permissible. Nevertheless, Agent Countryman's testimony went way beyond simply explaining code words to the jury. Here, similar to the agent in *Hampton* who was called to the witness stand *five times* during the trial, Agent Countryman was called to the witness stand *seven times* during the instant trial. For the most part, the government's presentation of the evidence followed a pattern. The government would play an intercepted phone conversation for the jury and then ask Agent Countryman such open ended questions as:

- "Could you please tell the jurors what was going on in that particular call?"

- "And *what did your investigation reveal* was going on with respect to this particular call?"

- "Can you give us a little explanation as to this particular call?"

- "Can you give us a description of what is transpiring in this call"

- "And in this particular call, what is transpiring, *what did you learn from your investigation*?"

- "And could you explain the call for us?"

- "Can you tell us what is going on in this call, are they talking about any form of travel, what is going on at this point?"

•“What is transpiring?”

•“What are they speaking of in this call?”

•“What do they indicate in the call?”

•“Would you please describe the call for us?”

•“Tell us what you know with respect to these calls, *now*?”[15]

In total, approximately fifty calls were played for the jury and Agent Countryman was asked to interpret almost all of the calls for jury. For example, he would explain to the jury:

Okay, so a couple of different things *look like* it is going on in this call.”

(Appx. 85a) (Tr. II:89)[16] Again similar to the agent in *Hampton*, Agent Countryman testified that he based his interpretations of the conversations on “my investigation, interviews I have done with cooperators and whatnot...” (Appx. 88a) (Tr. II:99)[17] In fact, the interpretations provided by Agent Countryman were far more egregious than

[15] *See, e.g.,* (Appx. 61a-90a) (Tr. II:13, 17, 41-42, 44 47-49, 70, 72, 75-76, 78, 81, 83, 84-85, 88-89, 91. 94, 125, 127) (Emphasis added)

[16] On September 11, 2015, Mr. XXXX previously requested that the record be supplemented on appeal to include the transcripts of the recorded conversations given to jurors. The motion was referred to the merits panel. Counsel, who was not present at trial, relied upon these transcripts in preparing this brief and renews the motion.

[17] *United States v. Garcia*, 413 F.3d 201, 212 (2nd Cir. 2005) (“When an agent relies on the ‘entirety’ or ‘totality’ of information gathered in an investigation to offer a ‘lay opinion’ as to a person's culpable role in a charged crime, he is not presenting the jury with the unique insights of an eyewitness's personal perceptions.”).

in the cases cited above. The following are examples.[18]

In **Exhibit 75**, a phone call allegedly between Mr. XXXX and Arthur Gilbert, Mr. XXXX tells Gilbert: "you can go ahead and send him" with no reference to who the "him" is or where "him" is being sent and no reference, coded or otherwise, to cocaine. Nevertheless, Agent Countryman tells the jury:

> In this call when the defendant tells Arthur Gilbert you can go ahead and send him, that is, in fact, him telling Arthur Gilbert that it is okay not to send *Arthur Brown*, to purchase *cocaine* in *Dallas."*

(Appx. 63a) (Tr. II:41) (emphasis added)

In **Exhibit 79**, a phone call allegedly between Mr. XXXX and Gilbert, Gilbert makes reference to his "buddy D." Agent Countryman then testifies "we know this to be Dietrick Bostick." (Appx. 66a) (Tr. II:47)

In **Exhibit 84**, a phone call allegedly between Gilbert and Arthur Brown, Agent Countryman is asked to interpret the feelings and concerns of Gilbert.

> He is not aware of Christopher Stanley's insolvent in this set-up, in this transaction, in these transactions. He is uncomfortable with Christopher Stanley being in these transactions because he doesn't know him.

(Appx. 69a) (Tr. II:52) More importantly, the Exhibit 84 call refers to a "D" without elaboration. Nevertheless, Agent Countryman tells the jury:

[18]As noted above, the government played approximately fifty tape recorded conversations at trial, many of which followed the same pattern of asking Agent Countryman "what was going on" in the conversations based upon his investigation and then Agent Countryman interpreting the conversations. These examples merely illustrates some of the plainly inadmissible testimony by Agent Countryman interpreting the conversations but it is not to be meant to be comprehensive.

> In this call by context you can tell that D is a reference to YYYY XXXX....

(Appx. 70a) (Tr. II:53)

Agent Countryman interprets Exhibit 87 as "lay[ing] out the conspiracy" and proceeds to interpret the alleged phone call between Gilbert and Mr. XXXX to go way beyond the actual conversation:

> So, [Mr. XXXX] lays out the conspiracy for you in this telephone call that Gilbert is sending Brown with the money. Brown gives the money to either the defendant or Stanley at the direction of the defendant and the defendant take the money and goes and purchases the cocaine, gives the money back to Brown, Brown takes the cocaine back to Monroeville where it is sold and distributed.

(Appx. 72a) (Tr. II:56)

In **Exhibit 93**, a phone call allegedly between Dietrick Bostick and Gilbert, Gilbert tells Bostick, "I just heard from, uh, Dom, he is just, uh, said everything was alright..." Agent Countryman interprets this to the jury to be:

> Arthur Gilbert tells Dietrick Bostick that he had just spoken to Dom, *the defendant, and the defendant* told him everything was okay, *meaning that the cocaine is there.* It's ready for when Brown gets there."

(Appx. 77a) (Tr. II:76) (emphasis added).[19]

In **Exhibit 103**, Gilbert allegedly asks Brown if he "talk[ed] to them" with no recreance to who "them" might be. Nevertheless, that does not stop Agent

[19]No surprisingly, there is no testimony that "okay" is a code word for "the cocaine is there."

Countryman from telling the jury that "them" would be: "...the defendant and presumably, and/or presumably Christopher Stanley...." (Appx. 83a) (Tr. II:85)

In **Exhibit 113**, a phone call allegedly between Damell Gaines and Bostick, Bostick tells Gaines, "you best to hurry upon on that now, cause gonna need to be handling shit out, he's not gonna be with that shit." Agent Countryman interprets that for the jury to mean that Bostick is telling Gaines that "Gaines needs to hurry up if he wants to be able to purchase any of that *cocaine* because *Albert Gilbert is going to get rid of the majority of this cocaine.*" (Appx. 89a) (Tr. II:125) (emphasis added)

In addition to Agent Countryman, the government also asked cooperating witnesses to interpret phone calls. For example, the government, referring to **Exhibit 112**, had the following exchange with Christopher Stanley during his direct testimony:

> Q. ...While Mr. Brown doesn't use a name and refers to "he," what was your understanding as to who he was referring?
>
> A. He was referring to YYYY....

(Appx. 108a) (Tr. III:113)

<u>3. Conclusion</u>

In interpreting these conversations in the instant case, Agent Countryman and, to a lesser extent, the testifying co-defendants did exactly what *Hampton* forbids. First, the government repeatedly recalled Agent Countryman to the stand to explain to the jury what, in his opinion "was going on in [a] particular call." Agent Countryman then

proceeded to interpret the calls for the jury based upon his "investigation, interviews...and whatnot..." (Appx. 88a) (Tr. II:99) He would interpret ambiguous references to persons and things in the conversations and give his opinions as to who was being referred to and the actions that were being referenced. Other times, he would explain the speaker's feelings as to certain events or explain why a speaker was saying certain things. Like the agent in *Hampton*, Agent Countryman explained he was doing this to give the calls "context." (Appx. 70a) (Tr. II:53)[20] Nevertheless, as recognized by the United States Court of Appeals for the Second Circuit in *Garcia*:

> [W]hen a jury hears that an agent's opinion is based on the total investigation, there is a risk that it may improperly defer to the officer's opinion, thinking his knowledge of pertinent facts more extensive than its own. It is, however, the jury's singular responsibility to decide from the evidence admitted at trial whether the government has carried its burden of proof beyond a reasonable doubt.

Garcia, 413 F.3d at 215.

Ironically, the government recognized that, under the Federal Rules of Evidence, a witness is primarily limited to interpreting code words. (Doc. 522 at 7-8) and gave the permissible example of "one in and one out" in its pretrial filing As demonstrated above, however, the government, with full knowledge that it was adducing impermissible testimony, repeatedly asked Agent Countryman to interpret

[20]Indeed, Agent Countryman is often asked specifically to explain to the jury what is being said on the calls based upon the "context" of his investigation. (Appx. 70a, 74a, 75a, 79a) (Tr. II:53, 72, 74, 80)

conversations that involved no code words whatsoever. Agent Countryman, over the course of approximately fifty recorded conversations, was repeatedly asked to give the jury his opinion, based upon his investigation, as to the meaning of ambiguous references.[21] This Court, as well as several other courts, have found this type of testimony to be reversible error especially when the government's evidence is primarily based on the conversations and the testimony of witnesses cooperating in exchange for potential sentence reductions.

III. IN LIGHT OF THE AGGRAVATING CIRCUMSTANCES PRESENT IN THIS CASE IT WAS ERROR TO ALLOW THE TWO ALLEGED CO-CONSPIRATORS TO TESTIFY ABOUT THEIR PLEAS AND CONVICTIONS TO A CONSPIRACY IN WHICH MR. XXXX WAS CHARGED BEFORE THE JURY.

A. Standard of Review

Mr. XXXX acknowledges that he did not object to the admission of the testimony at issue below and, therefore, the Court will review this issue only for plain error. *See, e.g. Stevens*, 223 F.3d at 242.

B. Discussion

This Court has long held that evidence of a co-conspirator's guilty plea or conviction is not admissible as substantive evidence of a defendant's guilt. *United States v. Toner,* 173 F.2d 140, 142 (3rd Cir. 1949). *See also*, *United States v. Universal*

[21] When "attempts are made to introduce meaningless assertions which amount to little more than choosing up sides, exclusion for lack of helpfulness is called for by [Rule 701]." Fed. R. Evid. 701 advisory committee's note (1972).

Rehabilitation Services, Inc., 205 F.3d 657, 668 (3[rf] Cir. 2000)(en banc) ("We have repeatedly held that the government may introduce neither a witness's guilty plea nor his or her concomitant plea agreement as substantive evidence of a defendant's guilt."). Nevertheless, in this case, the prosecution did exactly that with regard to the guilty pleas of Dietrick Bostick *and* Christopher Stanley. (Appx. 91a-98a, 99a-103a) (Tr. III: 4-11, 74-78)

Indeed, the government attempted to use the guilty pleas of both Bostick and Stanley to infer the guilt of Mr. XXXX. For example, during the government's direct of Bostick, it attempted to connect his guilty plea to his substantive testimony.

> Q: Now you already indicated you pled guilty for your role in a drug conspiracy, correct?
>
> A: Yes.
>
> Q: So, let's talk about the conspiracy a little bit. Who were you receiving cocaine from during the timeframe of in and around July of 2010 until October 7 of 2010? During that timeframe who were you receiving cocaine from?
>
> A: You mean what city or - -
>
> Q. Let's state with people. Who were the individuals supplying you or bringing cocaine to you.
>
> A. Oh, that would be Arthur Gilber - - you like people who was coming with like the mules?
>
> * * *
>
> Q. So, we'll back up a little bit there. So the cocaine that was coming

from Texas, your belief from what you were told is it was coming from YYYY XXXX?

A. Yes.

Q. It was being brought here by what you referred to as mules?

A. Yes.

Q. Now, that same timeframe we just discussed - -

* * *

Q: You indicated that it was your understanding from speaking with Christopher Stanley and Arthur Gilbert that cocaine was coming from Texas, correct?

A: Yes.

Q: What was your understanding of who was supplying that cocaine?

A: YYYY, Dom, that's what they called him.

Q: You knew him as Dom?

A: Yes.

(Appx. 104a-106a) (Tr. III: 15-17)

Mr. XXXX recognizes that it is not always error to inform a jury as to a co-defendant's guilty plea especially when the jury is given a cautionary instruction. Mr. XXXX also acknowledges that, in this case, the jury was instructed that it could not "consider the guilty plea of either Dietrick Bostick or Christopher Stanley as any evidence of YYYY XXXX's guilt." (Appx. 109a-110a) (Tr. IV: 99-100)

Nevertheless, this instruction was only give at the end of the case and not when the evidence was presented to the jury.[22] Moreover, this exception to the circuit's general rule usually applies when the co-defendant's guilty plea is to a substantive count rather than to the very conspiracy in which the defendant on trial is charged. As this Court noted in *Gullo,* 502 F.2d at 761 (footnote omitted):

> It is the general rule in this Circuit that while the evidence of a guilty plea by a co-conspirator is not admissible, *United States v. Toner*, 173 F.2d 140 (3d Cir. 1949), under some circumstances curative instructions are adequate to remove the harm where the pleas are to substantive counts. *United States v. Farries*, 459 F.2d 1057 (3d Cir. 1972), *cert. denied*, 409 U.S. 888, 93 S.Ct. 143, 34 L.Ed.2d 145; *United States v. Restaino*, 369 F.2d 544 (3d Cir. 1966). The guilty plea to a conspiracy charge carries with it more potential harm to the defendant on trial because the crime by definition requires the participation of another. The jury could not fail to appreciate the significance of this and would realize, as the court said in a similar case, *United States v. Harrell*, 436 F.2d 606, 614 (5th Cir. 1970), that 'it takes two to tango.'

See also, *Universal Rehabilitation Services, Inc.,* 205 F.3d at 669 ("In the instant matter, it is significant that both Bonjo and Martin did not plead guilty to conspiracy charges, but rather pled guilty to substantive counts of mail fraud."). Finally, any exception to the repeated holdings by courts that it is error for the government to introduce a witness's guilty plea as substantive evidence of a defendant's guilt is

[22]"While the curative instructions which were given at the conclusion of the government's case were adequate, they came some twenty-four hours after the inadmissible question had been injected into the case. Whatever efficacy curative instructions possess cannot help but be weakened by the lapse of time." *United States v. Gullo,* 502 F.2d 759, 762 (1974).

inapplicable in the face of "aggravating circumstances."[23]

In this case, Bostick's and Stanley's guilty pleas *were* to the same conspiracy in which Mr. XXXX was charged and not simply to a substantive count. Moreover, as noted above, this Court recognizes that a co-defendant's "guilty plea to a conspiracy charge carries with it more potential harm to the defendant on trial because the crime by definition requires participation of another." *Gullo,* 502 F.2d 761. Likewise, Mr. XXXX submits that there are certainly aggravating circumstances present in this case given the government's repeated attempts to improperly interpret the various phone conversations played for the jury in the case as well as its gratuitous reference to Arthur Gilbert's assertion of his right against self-incrimination. *See* Issue II, *supra*. and Issue III, *infra.*

Although Mr. XXXX acknowledges that the complained of testimony was not objected to, courts have found this type of testimony to rise to the level of plain error. For example, the United States Court of Appeals for the Fifth Circuit found such testimony to constitute "plain error" despite the fact that there was no objection to the testimony. *United States v. Harrell,* 436 F.2d 606 (5th Cir. 1970).

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[23]*See United States v. Gaev,* 24 F.3d 473, 477 (3rd. 1994) *citing* 2 Jack B. Weinstein & Marget A. Berger, Weinstein Evidence ("Where the co-conspirator testifies for his part in the transactions, it is not error to inform the jury of the plea so long as a proper cautionary instruction is given and there are no *aggravating circumstances* which necessarily implicate the defendant in the pleaders admission of guilt.") (emphasis added); *United States v. Baete* 414 F.2d 782 at 783-84 (5th Cir. 1969) (emphasis added) ("[T]here may be *aggravated circumstances* in which the strongest corrective instruction would be insufficient, as, for example, where the guilty plea of one co-defendant necessarily implicates another or others.")

IV. THE GOVERNMENT'S REFERENCE TO AN ALLEGED CO-CONSPIRATOR ASSERTING HIS FIFTH AMENDMENT RIGHTS AGAINST SELF-INCRIMINATION WAS PLAIN ERROR.

A. Standard of Review

Mr. XXXX acknowledges that an argument that a prosecutor engaged in misconduct is viewed for plain error in the absence of a contemporaneous objection. *See, e.g., United States v. Aponte*, 622 Fed.Appx. 118, 119 (3rd Cir. 2015).

B. Discussion

As noted above, it was alleged that Mr. XXXX was supplying cocaine to Arthur Gilbert. Indeed, Dietrick Bostick believed that Gilbert obtained cocaine from Mr. XXXX because Bostick was allegedly told this by Gilbert and Christopher Stanley. (Tr. III:16-19) Likewise, during his testimony, Detective Countryman implied that Mr. XXXX met with Gilbert at the Crowne Plaza hotel in Dallas in an attempt to conduct a drug transaction. (Tr. II:18-29). Finally, telephone calls and a text exchange between Mr. XXXX and Gilbert was introduced by the government at trial.

Significantly, when Dietrick Bostick began to testify at trial that he knew that Mr. XXXX was getting his cocaine from Gilbert simply because he heard this from Gilbert, defense counsel objected. (Appx. 106a-107a) (Tr. III:17-18) Although defense counsel did not state the basis for his objection, the District Court "assum[ed] it was a hearsay objection" and asked the government to announce an exception. (Appx. 106a) (Tr. III:17) Rather than announce the obvious exception under Fed. R.

Evid. 801(d)(2)(E), the government instead announced to the jury that Mr. Gilbert was asserting his "Fifth Amendment privilege" and, therefore, would not be available to testify.

As noted by the United States Court of Appeals for the District of Columbia in *Bowles v. United States,* 439 F.2d 536, 541-42 (D.C. Cir. 1970) (citations omitted) (emphasis added):

> It is well settled that the jury is not entitled to draw any inferences from the decision of a witness to exercise his constitutional privilege whether those inferences be favorable to the prosecution or the defense. The rule is grounded not only in the constitutional notion that guilt may not be inferred from the exercise of the Fifth Amendment privilege but also in the danger that a witness's invoking the Fifth Amendment in the presence of the jury will have a disproportionate impact on their deliberations. The jury may think it high courtroom drama of probative significance when a witness'takes the Fifth.' In reality the probative value of the event is almost entirely undercut by the absence of any requirement that the witness justify his fear of incrimination and by the fact that it is a form of evidence not subject to cross-examination.
>
> An obvious corollary to these precepts is the rule that a witness should not be put on the stand for the purpose of having him exercise his privilege before the jury. This would only invite the jury to make an improper inference. *For the same reason no valid purpose can be served by informing the jury that a witness has chosen to exercise his constitutional privilege.* That fact is not one the jury is entitled to rely on in reaching its verdict.

Indeed, this Court, as well as numerous other courts, have held that a party may not call a witness for the sole purpose of allowing the jury hear the witness invoke his or her Fifth Amendment privilege. *See Nezowy v. United States*, 723 F.2d 1120, 1124

n. 6 (3rd Cir.1983). Moreover, to allow an alleged co-conspirator to assert his Fifth Amendment privileges before a jury, or in this case to have a prosecutor inform the jury that an alleged co-conspirator is asserting his Fifth Amendment rights against self-incrimination, is "imbued with the 'potential for unfair prejudice.'" *United States v. Vandetti*, 623 F.2d 1144, 1147 (6th Cir. 1980) (citation omitted)).

As noted above, there was a real danger in this case which occurred when the government adduced testimony from alleged co-conspirators, Dietrick Bostick and Christopher Stanley, regarding their guilty pleas to the conspiracy. Moreover, the government informed the jury about Gilbert's assertion of his right against self-incrimination at the same time it was linking Bostick's guilty plea to his substantive testimony. (Appx. 104a-107a) (Tr. III: 15-18) For the government to then unnecessarily inform the jury that another alleged co-conspirator was asserting his Fifth Amendment rights against self-incrimination was, in the context of this case, plain error.

V. THE VARIOUS PLAIN ERROR IN THIS CASE REQUIRES REVERSAL ESPECIALLY WHEN VIEWED CUMULATIVELY.

A. Standard of Review

Non-objected to cumulative error challenges, are themselves reviewed for plain error. *United States v. Jafari*, 2016 WL 1760653, *2 (3d Cir. May 2, 2016).

B. Discussion

This Court recognizes the concept of "cumulative error" where errors, when combined, had a substantial influence on the outcome of a trial. *United States v. Copple,* 24 F.3d 534 547 n.17 (3rd Cir.), *cert. denied*, 513 U.S. 989 (1994).

In addressing a claim of cumulative error, courts "consider all errors preserved for appeal and all plain errors in the context of the trial as a whole to determine whether the appellant was afforded a fundamentally fair trial." *United States v. Ladson*, 643 F.3d 1335, 1342 (11th Cir. 2011). Among other things, courts will look to the "interrelationship" of the various points of plain error. *See, e.g., United States v. Sepulveda*, 15 F.3d 1161, 1196 (1st Cir. 1993). As explained by one court:

> Although individual errors looked at separately may not rise to the level of reversible error, their cumulative effect may nevertheless be so prejudicial as to require reversal. In reviewing for cumulative error, the court must review all errors preserved for appeal and all plain errors. Even if a particular error is cured by an instruction, the court should consider any "traces" which may remain.

United States v. Necoechea, 986 F.2d 1273, 1282 (9th Cir. 1993). *See also United States v. Martinez*, 277 F.3d 517, 524 (4th Cir.) (Under the "cumulative error doctrine," an appellant can satisfy the requirements of the third prong of the Supreme Court's *Olano* test- that error affected a defendant's substantial rights- if the "combined effect" of the plain error affected his substantial rights), *cert. denied,* 537 U.S. 899 (2002).

Here, the errors in Points of Error II-IV were admittedly not preserved with objections by Mr. XXXX's trial lawyer. Nevertheless, Points of Error III and IV are

certainly interrelated. Moreover, almost all of the evidence in this case consisted of the playing of the phone conversations, with the jury being given the government's impermissible interpretation of the conversations, and the testimony of the two co-defendants who the jury was told pleaded guilty to the same conspiracy for which Mr. XXXX was standing trial. As such, the cumulative effect of the errors detailed in Points of Error II-IV permeated almost all of the evidence presented by the government to the jury in this case.

CONCLUSION

For the foregoing reasons, this Court should reverse Mr. XXXX's conviction and remand the case for a new trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, F. Clinton Broden, certify that on June 20, 2016, I caused two paper copies and one electronic copy of the foregoing Brief of Defendant-Appellant to be mailed by first class mail, postage prepaid to:

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/s/ F. Clinton Broden
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CERTIFICATE OF COMPLIANCE

1. I certify that the attorney whose name and signature appear on this brief is a member of the Bar of this Court.

2. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because:

this brief contains 9,468 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

3. This brief complies with the typeface requirements of 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 WordPerfect software in Times New Roman 14-point font in text and Times New Roman 12-point font in footnotes.

4. I certify pursuant to LAR 31.1(c) that the text of the electronically filed version of this brief is identical to the text in the paper copies of the brief as filed with the Clerk. The anti-virus program McAfee, with current updates, has been run against the electronic (PDF) version of this brief before submitting it to this Court's CM/ECF system, and no virus was detected.

/s/ F. Clinton Broden
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