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November 6, 2015

Honorable Jose L. Linares
United States District Judge
MLK Jr. Federal Bldg. & Courthouse
50 Walnut Street, Newark
New Jersey 078101

Re: United States v. Kirk Eady
Criminal No. 14-277 (JLL)

Dear Judge Linares:

Please accept this letter in lieu of a more formal opposition to defendant Kirk Eady's motion for bail pending appeal. Defendant Eady has failed to meet his burden under 18 U.S.C. § 3143, and thus is not entitled to bail pending appeal. Defendant Eady should be ordered to commence serving his term of imprisonment shortly after this Court denies his bail motion.

BACKGROUND

A federal grand jury charged defendant Eady by Indictment with illegal wiretapping, in violation of Title 18, United States Code, Section 2511(1) (a).[1] Specifically, the Indictment charged that:

> From on or about March 8, 2012 to on or about July 8, 2012, in Hudson County, in the District of New Jersey, and elsewhere, defendant Kirk Eady intentionally

[1] Title 18, United States Code, Section 2511(1) (a) states in pertinent part: "Except as otherwise specifically provided in this chapter any person who – (a) intentionally intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any wire, oral, or electronic communication . . . shall be [guilty of a federal offense]."

intercepted, endeavored to intercept and procured another person to intercept and endeavor to intercept the wire, oral, and electronic communication of others.

The evidence at the trial showed that from on or about March 8, 2012 to on or about July 8, 2012 (hereinafter, the "Relevant Time Period"), defendant Eady was employed by the Hudson County Correctional Center ("HCCC") in Kearny, New Jersey, as the Deputy Director. During the Relevant Time Period, (1) Louis Ocasio, Daniel Murray and Omar Ortiz were employed by the HCCC; and (2) Louis Ocasio also was the President of the Corrections Officers Union, Daniel Murray was the Grievance Chairman for the Corrections Officers Union, and Omar Ortiz was the President of the Superior Officers Union. Patricia Aiken owned a company called EdPDlaw, and operated a website, www.edpdlaw.com, which, prior to and during the Relevant Time Period, published articles critical of defendant Eady and some of his colleagues. Moreover, prior to, and at times during the Relevant Time Period, EdPDLaw assisted the Corrections Officers Union with the handling of grievances.

There was a website, www.prankdial.com, which provided paying customers with the ability to call, intercept and record two people simultaneously and surreptitiously by making the telephone call appear as though one or both people, and not the website customer, had initiated the telephone call. The website named this service, "Evil Operator." Defendant Eady paid for (through use the of the internet website Paypal) and used the Evil Operator service to intercept and record telephone conversations by and among Louis Ocasio, Daniel Murray, Omar Ortiz and Patricia Aiken without their permission or knowledge. Defendant Eady did so, to learn information to allow him to fight, and retaliate against, the Corrections Officers Union, its members, and Patricia Aiken. During the Relevant Time Period, defendant Eady also engaged in acts of retaliation and harassment against the interceptees and the Corrections Officers Union.

On March 9, 2015, trial commenced in this matter and, on March 13, 2015, defendant Eady was found guilty of illegal wiretapping in violation of Title 18, United States Code, Section 2511(1)(a). Shortly thereafter, defendant Eady filed a motion seeking judgment of acquittal pursuant to Fed. R. Crim. P. 29, or in the alternative, a new trial under Fed. R. Crim. P.33, based on this Court's definition of "party" which was included in the jury instructions. On April 15, 2015, the Court denied defendant Eady's motions. This Court's opinion stressed that the definition of "party" used in the jury instructions was the only definition that was consistent with common sense, the legislative history and the wiretap statue. On September 10, 2015, the Court sentenced defendant Eady to 21 months in prison. On September 18, 2015, defendant Eady filed his notice of appeal. On October 30, 2015, defendant Eady filed his motion for bail pending appeal.

ARGUMENT

The Court should deny defendant Eady's motion for bail pending appeal because (1) defendant Eady has failed to identify a substantial question of law or fact that will materially impact his case as set forth in the relevant bail statute and (2) defendant Eady has not proved by clear and convincing evidence that he is not a danger to the community.

Under 18 U.S.C. § 3143(b), there exists a presumption in favor of post-conviction detention during the pendency of an appeal. United States v. Miller, 753 F.2d 19, 22-23 (3d Cir. 1985) (examining legislative history of 18 U.S.C. § 3143(b) and observing that "the purpose of the Act was to reverse the presumption in favor of bail"). The statute expressly states that a defendant found guilty of a federal offense and sentenced to a term of imprisonment "shall" be detained pending appeal absent specified exceptional circumstances. 18 U.S.C. § 3143(b)(1).

The presumption against release of a convicted defendant who was sentenced to a term of imprisonment has strong basis in policy as well as in law. As the Third Circuit has emphasized:

> Once a person has been convicted and sentenced to jail, there is absolutely no reason for the law to favor release pending appeal or even permit it in the absence of exceptional circumstances. First and most important, the conviction, in which the defendant's guilt of a crime has been established beyond a reasonable doubt, is presumably correct in law, a presumption factually supported by the low rate of reversal of criminal convictions in the Federal system. Second, the decision to send a convicted person to jail and thereby reject all sentencing alternatives, by its very nature includes a determination by the sentencing judge that the defendant is dangerous to the person or property of others, and dangerous when sentenced, not a year later after the appeal is decided. Third, release of a criminal defendant into the community, even after conviction, destroys whatever deterrent effect remains in the criminal law.

Miller, 753 F.2d at 22 (quoting H. Rep. No. 907, 91st Cong., 2d Sess. 186-187 (1970)).

Accordingly, a defendant can overcome the presumption against bail only by proving:

> (A) by clear and convincing evidence that the [defendant] is not likely to flee or pose a danger to safety of any person or the community if released under section 3142(b) or (c) of this title; and
>
> (B) that the appeal is not for the purpose of delay and raises a substantial question of law or fact likely to result in —
>
> (i) reversal,
>
> (ii) an order for a new trial,
>
> (iii) a sentence that does not include a term of imprisonment, or
>
> (iv) a reduced sentence to a term of imprisonment less than the total of the time already served plus the expected duration of the appeal process.

18 U.S.C. § 3143(b)(1). Defendant Eady bears the burden of proving all of these factors. United States v. Messerlian, 793 F.2d 94, 95-96 (3d Cir. 1986); Miller, 753 F.2d at 24. See United States v. Elwell, 2012 WL 2133650, at *2 (D.N.J. 2012) (Linares, J.).

Defendant Eady's application fails because he has not met his burden. Defendant Eady cannot satisfy § 3143(b)(1)(B) because he has failed to demonstrate that his appeal raises a "substantial question of law or fact" likely to result in "a reversal," "an order for a new trial," "a sentence that does not include a term of imprisonment" or "a reduced sentence to a term of imprisonment less than the total of the time already served plus the expected duration of the appeal process." Defendant Eady also has not established by clear and convincing evidence that he would not pose a danger to the community if he remains released. Either one of these reasons would be sufficient for the Court to deny bail.

1. Defendant Eady has not Raised a Substantial Question of Law or Fact for Appeal

The Third Circuit has held that a "substantial question of law or fact" is one which is significant, implicating an issue which is either novel, previously undecided by controlling precedent, or "fairly doubtful." Miller, 753 F.2d at 23. This definition was refined further in United States v. Smith, 793 F.2d 85, 88-89 (3d Cir. 1986), which requires a defendant to show that the issues presented on appeal were not only significant, but also were "debatable among jurists of reason" or deserving of "encouragement to proceed further." Id. at 89 (citations omitted). Indeed, even in the absence of controlling precedent, or the presence of novelty or doubt, a question presented on appeal may not meet the substantiality requirement of § 3143(b). Id. Additionally, in assessing whether an issue is substantial, the Court also should consider the appellate legal standard underlying the particular question. See United States v. Brown, 755 F. Supp. 942, 944 (D. Colo. 1991). None of the claims raised in defendant Eady's brief raises substantial questions of law or fact under the above standard.

A. There was no Need to Include an Effect on Interstate/Foreign Commerce or Communications Element in the Jury Instructions

Defendant Eady contends that he raises a substantial question of law for appeal by asserting that the Court constructively amended the indictment (allegedly broadening the basis upon which a guilty verdict could be returned) by failing to charge that the intercepted wire communications had to "affect interstate or foreign communications" and/or affect interstate or foreign commerce (Defendant's Brief at 17). This claim is incorrect and cannot form the basis for a substantial question on appeal.

There was absolutely no need to instruct the jury on effect on interstate or foreign commerce or communications with respect to wire communications that were illegally intercepted. The constitutionality of 18 U.S.C. § 2511(1)(a) with respect to wire communications is clear because those communications invariably affect interstate commerce. See United States v. Carnes, 309 F.3d 950, 954 (6th Cir. 2002) ("the wiretapping statute . . . has a substantial relationship to interstate commerce since 'telecommunications are both channels and instrumentalities of interstate commerce.'" (citation omitted)). See also Spetalieri v. Kavanaugh, 36 F. Supp. 2d 92, 115-16 (N.D.N.Y. 1998) (telecommunications are both channels and instrumentalities of interstate commerce and bear a substantial relationship to interstate commerce even when the communications in question occur solely within the boundaries of a single state.). Accordingly, there was no need for the jury to find a constitutional predicate for this particular element of the wiretapping offense.

Further support for this point is found in the contrast between what is necessary from a constitutional perspective to prove the illegal interception of an oral communication under Section 2511((1)(a) as opposed to a wire communication under that section. The interception of

purely interstate oral communications does not necessarily implicate any federal interest other than the invasion of the right to privacy. So, when the original Wiretap Act was passed in 1968, the United States Senate Report on the Act observed that the interception of oral communications did "not necessarily interfere with the interstate or foreign communications network, and the extent of the constitutional power of Congress to prohibit such interception is less clear than in the case of the interception of wire communications." S. Rep. 90-1097, reprinted in 1968 U.S. Code Cong. & Admin. News, 90th Cong., 2d Sess., at 2180-81. That is why Judge Sand's model instruction on "oral communications" calls for the government to prove some "federal nexus" involving an oral communication, but omits such a requirement in the model instruction defining a wire communication. Compare Sand, Siffert, Model Federal Jury Instructions (Criminal), Instruction 65-5 (oral communication), with Instruction 65-4 (wire communication). In this case, the Court gave that very model instruction on wire communication to the jury (Trial Transcript 4.83). Moreover, defendant Eady did not object to it at the time. To the contrary, he concurred in its submission to the jury (see Trial Transcript 4.66 to .67).

In any event, defendant Eady's position that somehow this purported failure to instruct on effect on interstate or foreign commerce or communications thereby "impermissibly broadened the basis upon which a conviction could be returned" (Defendant's Brief at 16) misstates the issue. At most, there was a failure to instruct on an essential element of the offense, which would be reviewed only for plain error. See Johnson v. United States, 520 U.S. 461 (1997); see also United States v. Cotton, 535 U.S. 625, 633-34 (2002).

In this case, even if there was instructional error (and there was not), the Government overwhelmingly proved that defendant Eady had engaged in the unlawful interception of the telephone communications of others that occurred through defendant Eady's use of the internet

(using the Prankdial website to intercept the communications and using the Paypal website to pay for it). See United States v. MacEwan, 445 F.3d 237, 245-46 * 253(3d Cir. 2006) (internet is an instrumentality and channel of interstate commerce); see also United States v. Nestor, 574 F.3d 159, 161-62 (3d Cir. 2009) (internet and telephone services are means of interstate commerce). So even had the Court instructed the jury to find that the offense affected interstate or foreign commerce or communications, the jury surely would have made that finding beyond a reasonable doubt. Accordingly, defendant Eady is virtually certain not to prevail on appeal on this issue and it, therefore, cannot form the basis to bail him pending the Third Circuit's decision on his appeal.

B. The Court's Unanimity Instructions in this Simple, One-Count Case were Completely Sufficient

Defendant Eady also contends that he has a substantial question on appeal because purportedly "there was no unanimity instruction, requiring jurors to agree on the offense conduct that defendant committed and there was no basis to determine the method or manner by which the jury concluded that defendant had violated" the Wiretap Act (Defendant's Brief at 20). Defendant Eady has no chance of prevailing on appeal on this point.

The Court instructed the jury on unanimity on multiple occasions with respect to the one-count indictment. The Court, in its final instructions after the parties' closing arguments said to the jury: "I want you to remember that your verdict, whether it is guilty or not guilty, must be unanimous. To find the defendant guilty, every one of you must agree that the Government has overcome the presumption of innocence with evidence that proves each element of the offense beyond a reasonable doubt against them. To find the defendant not guilty, every one of you must

agree that the Government has failed to convince you beyond a reasonable doubt as to his guilt." (Trial Transcript 4.135 to .136). No more was necessary for this simple, one-count case.

Defendant Eady, however, asserts that more was necessary. Defendant Eady starts by intimating that there was something incorrect about the indictment charging the wiretapping offense in the conjunctive (that defendant "intentionally intercepted," "endeavored to intercept" **and** "procured another person to intercept **and** endeavor to intercept" the wire communications of others), as opposed to the Court instructing the jury that the case could be proven in the disjunctive (replacing the above "ands" with "ors") (see Defendant's Brief at 20). There is clearly nothing wrong with this approach--a case may be charged in the conjunctive where, as here, there is more than one way of violating the statute, and then proven by the government and instructed by the Court in the disjunctive. See United States v. Johnson, 452 Fed. Appx. 219, 225 (3d Cir. 2011) ("We have held that while an indictment employs the conjunctive, jury instructions may employ the disjunctive where, as here, the statute employs the disjunctive.") (not for publication); United States v. O'Grady, 280 Fed. Appx. 124, 132 (3d Cir. 2008) (same) (not for publication). See also United States v. Cusumano, 943 F.2d 305, 311 (3d Cir. 1991).

From there, defendant Eady asserts that since there were three different ways in which the statute could have been violated, "the jury must be charged that the precondition to return of a valid guilty verdict is that the jury must be unanimous as to the particular way(s) the defendant violated the statute. . . ." (Defendant's Brief at 21). Putting aside for the moment that this assertion relies on a false legal premise, the Court indeed instructed the jury on this point, stating: "[to] return a guilty verdict, therefore, you must unanimously agree that the defendant intercepted or endeavored to intercept or procured another person to intercept one of those communications" (Trial Transcript 4.82) (emphasis added). This was a sufficient unanimity

instruction, and was particularly so in light of the fact that defendant Eady did not ask for a more robust instruction at the time, and actually agreed to the jointly submitted jury instructions on almost all of the requests to charge the jury, including this one (id. at 4.66 to .67) . Even now in his briefing, defendant Eady does not offer a more specific or alternative instruction that the Court should have given under these circumstances.

The bottom line is that the unanimity instruction given in this one-count case, at a trial that heard testimony from a mere 7 witnesses over two days, was sufficient. The principal Third Circuit case that defendant Eady relies on to contend that the Court's unanimity instructions were insufficient is United States v. Beros, 833 F.2d 455 (3d Cir. 1987), which stands for the proposition that, in limited circumstances, the trial court should instruct that the jury must be unanimous that the defendant committed one of several disjunctive acts charged for a particular offense. But, the Third Circuit has observed that the rule in Beros "comes into play only when the circumstances are such that the jury is likely to be confused as to whether it is required to be unanimous on an essential element." Cusumano, 943 F.2d at 312. The Third Circuit has recognized that the need for a specific unanimity instruction is the exception to the "routine case" in which a "general unanimity instruction will ensure that the jury is unanimous on the factual basis for a conviction, even where an indictment alleges numerous factual bases for criminal liability." Beros, 833 F.2d at 460.

In Beros, the Third Circuit held that it was an abuse of discretion for the court not to specifically instruct the jury that it had to be unanimous as to at least one of the three separate and different acts that were committed that could have violated the statute at issue there. Id. at 460-63. Here, however, unlike Beros, but like Cusumano, the Government alleged only one set of facts (defendant Eady used the Prankdial website to intercept the wire communications of his

adversaries at the HCCC). In fact, defendant Eady at trial basically conceded that set of facts concerning the interception element—he never argued that he did not intercept these communications. Instead he argued other points, including that actually he was a party to these intercepted communications. Under such circumstances, there was no risk of jury confusion on the interception element, so no specific unanimity charge even was required with respect to it. Cusumano, 943 F.2d at 312. See United States v. Navarro, 145 F.3d 580 (3d Cir. 1998) (insufficient risk of juror confusion to trigger need for specific unanimity instruction). Hence, this point also does not warrant the Court granting defendant bail pending appeal.

C. The Court Correctly Allowed Mr. Saul to Testify as a Lay Witness

Defendant Eady next argues that this Court abused its discretion by permitting Mr. Saul to testify as a lay witness. (Defendant's Brief at 26). It was unnecessary to qualify Mr. Saul as an expert because his testimony was consistent with Federal Rule of Evidence 701. Federal Rule of Evidence 701 provides:

> If the witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is: (a) rationally based on the witness's perception, (b) helpful to clearly understanding the witness's testimony or to determining a fact in issue; and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

Rule 701 "does not mean that an expert is always necessary whenever the testimony is of a specialized or technical nature." Donlin v. Philips Lighting North America Corp., 581 F.3d 73, 81 (3d Cir. 2009). Indeed, "[w]hen a lay witness has particularized knowledge by virtue of her experience, she may testify-even if the subject matter is specialized or technical-because the testimony is based upon the layperson's personal knowledge rather than on specialized knowledge within the scope of Rule 702." Id.; see also Eichorn v. AT&T Corp., 484 F.3d 644,

649-50 (3d Cir. 2007); United States v. Miller, 248 Fed. Appx. 426, 428 (3d Cir. 2007) (not for publication) (testimony by a banks' internal investigator that a teller would sign in on a computer terminal by using a teller number and security password that no one else would know was a permissible lay opinion based on the witness' personal knowledge of bank operations); United States v. Wray, 87 Fed. Appx. 285, 287 (3d Cir. 2004) (not for publication) (testimony of an immigration inspector about United States Customs procedures at an airport based on his direct knowledge did not constitute improper opinion testimony).

During the trial, Mr. Saul testified about his knowledge of the operation of the Evil Operator software. He outlined for the jury how a paying customer would be able to surreptitiously record the telephone conversations of others without those individuals (1) knowing that the customer was the initiator of the telephone call or (2) that the customer was listening to the conversation. (Trial Transcript 2.65-.68). Mr. Saul explained that even though he was not an employee of TapFury in 2012, when the Evil Operator software was being used, he was able to gain personal knowledge of its functions by examining the information currently available at the Prankdial offices. Specifically, on direct examination, Mr. Saul explained the steps he took to learn about the functionality of the Evil Operator software:

Question:	And how have you come to gain knowledge about the Evil Operator?
Answer:	I was able to gain knowledge of it from people who have worked on the project, and also I was able to get the source code from our archives and do a code review on it.
Question:	Can you please explain what being able to look at the source code enabled you to do?
Answer:	Sure. I was able to review the source code, and it is very similar. It's based on a similar architecture as Prankdial. It is an extension

of it, so I was able to learn how it was used, how it works, and it works very similar to Prankdial.

Question: So you were able to learn about the functionalities of Evil Operator when it existed back in 2012?

Answer: Yes. I was able to load the code and see how it performed and how a user would interact with it at that specific time in 2012

(Trial Transcript 2.59 to .60). Based on these answers, it is clear that the information that Mr. Saul provided to the jury about Evil Operator was based upon his personal knowledge of the software.

In his motion, defendant Eady argues that Mr. Saul could not be a fact witness because his testimony was; (1) "theoretical"; (2) he learned of the Evil Operator software "after the fact"; and (3) he testified to matters "beyond the ken of the average juror." (Defendant's Brief at 26). That is insufficient to show an abuse of discretion, much less justify the grant of bail pending appeal.

First, Mr. Saul's testimony was not "theoretical." Mr. Saul's testimony was based on his personally having read the codes that created the Evil Operator software and, as Mr. Saul pointed out during his cross examination, he also recreated a semi- working version of the Evil Operator software in order to learn what the program did in 2012. (Trial Transcript 2.88 to .89). Thus, his testimony was based on his personal review and application of the actual codes used to create the software, easily meeting the "rational perception" requirement of Rule 701 (a).

Second, the fact that Mr. Saul learned of the Evil Operator software "after the fact" is irrelevant. Federal Rule of Evidence 701 does not require that information provided by the witness to the jury be obtained contemporaneously with the occurrence or use of the subject matter. That is, it does not matter when Mr. Saul learned how the Evil Operator feature worked, merely that at some point in time he obtained personal knowledge of its functionality.

Third, just because a witnesses testimony was "beyond the ken of the average juror, and assisted the jurors in understanding the electronic and computer operating features of Evil Operator" (Defendant's Brief at 26) does not make it expert testimony. Mr. Saul's testimony here mirrored the lay-opinon testimony in Donlin that the Third Circuit deemed appropriate because even though the subject matter was technical or specialized, the lay witness's testimony was based on personal knowledge rather than specialized knowledge. Donlin, 581 F.3d at 81.

Additionally, the information provided by Mr. Saul was akin to testimony in another case that the Third Circuit has previously deemed permissible. See United States v. Thompson, 393 Fed. Appx. 852, 858-59 (3d Cir. 2010) (not for publication). In that case, Uehlinger, the lay witness and employee of a company that sold GPS tracking devices, explained how law enforcement was able to use his company's GPS tracking system to apprehend defendant Thompson (who had robbed a bank), and he described the data generated by the device that was contained in the Government's exhibits. Id. at 858. In upholding the Government's use of this testimony, the Third Circuit ruled: "Because the opinions and inferences expressed by Mr. Uehlinger were based upon his perceptions, we conclude that the District Court did not abuse its discretion in allowing Mr. Uehlinger to testify concerning the operation of the GPS device." Id. at 859.

Finally, since Mr. Saul's testimony fell squarely within Rule 701, not Rule 702, the Government was not required to provide a written summary of Mr. Saul's expected testimony pursuant to Federal Rules of Criminal Procedure, Rule 16 (a)(1)(G). Defendant Eady's description of the harm suffered due the lack of a summary report of Mr. Saul's testimony is noticeably absent from his motion. He was not harmed by the Court's ruling because most of the information provided by Mr. Saul regarding Eady's use of Prankdial was not in dispute.

Defendant Eady admitted to Latanya Freeman that he used the Evil Operator program and that he used it as a great resource tool (Trial Transcript 2.132-149). In summation, defendant Eady did not contest that he used the Evil Operator program and even in this current motion pending before the court, defendant Eady does not deny having used the program. Thus, since the majority of the information provided by Mr. Saul was either not in dispute or corroborated by other forms of evidence, defendant Eady cannot show prejudice. See United States v. Leo, 941 F.2d 181,194 (3d Cir. 1991) (effect of improper admission of evidence by trial court considered under harmless error standard—error is harmless if it is highly probable that error did not contribute to jury's judgment of conviction). See also United States v. Kale, 445 Fed. Appx. 483, 486 (3d Cir. 2011) (not for publication) (same). His claim, therefore, cannot form a basis for a substantial question on appeal. See Miller, 753 F.2d at 23, 24 (even if the question is "substantial," a defendant must show that the issue is "so integral" and "sufficiently important to the merits that a contrary appellate ruling is likely" to result in a reduced term of imprisonment which would be less than the duration of the appeal process. A defendant cannot make this showing if the question could "be considered harmless, to have no prejudicial effect, or to have been insufficiently preserved.").

D. The Definition of the Term "Party" under Section 2511 was Correct and not Subject to Lenity or Vagueness Challenges

Defendant Eady also contends that he has a substantial question for appeal regarding the Court's definition of the term "party" because the term, according to him, is ambiguous and the Court's definition prejudicially expanded the concept of "party," and, therefore, the rule of lenity compels that defendant's conviction be vacated (Defendant's Brief at 29-30). Relatedly,

defendant Eady also contends that the statute is void for vagueness because the term "party" is undefined (Defendant's Brief at 40). These related claims cannot afford defendant Eady relief.

The definition of "party" was at issue in the case in connection with the jury instruction on a consent-based defense under 18 U.S.C. § 2511(2)(d)—that defendant was a "party" to the communication or that one of the parties to the communication had consented to the interception (Trial Transcript 4.83 to 4.84). For the reasons advanced in the Government's earlier Rules 29 and 33 brief regarding the definition of a "party" (see attached April 2, 2015 brief)[2] and the Court's April 15, 2015 opinion on the defendant's Rules 29 and 33 motions[3], the Court's definition was completely correct under the Wiretap Act, and the term party was neither grievously ambiguous so as to fall to the rule of lenity, see Muscarello v. United States, 524 U.S. 125, 138-39 (1995), nor impermissibly vague, see United States v. Lanier, 520 U.S. 259, 266-67 (1997).

A definition, apparently espoused by defendant Eady now, that merely states, without more, that a "party" was a participant in a wire communication, could arguably include even those who were illegally listening to (intercepting) the communication, or who illegally originated the communication under the false pretense of not being involved in the

[2] In that April 2, 2015 brief, the Government asserted, among other things: (1) that the Court's definition of "party" was proper because the Court gave the term its ordinary meaning; (2) that the legislative history of the Wiretap Act supported that definition and (3) that the raw ability to listen to another's communications could not make one a "party" because anyone who could surreptitiously intercept a conversation in real time and who had the technological capacity to speak to the intercepted parties during the communication could be considered a "party," thereby rendering unnecessary under the statute any requirement on the Government's part to obtain a court order before intercepting such conversations so long as the government had access to technology like that provided by Prankdial and like operators. The Government further asserted that the rule of lenity did not apply because Congress plain what it intended "party" to mean in the context of Section 2511(1) given the clear history and purpose of the statute.

[3] The Court's opinion already rejected defendant Eady's lenity contention (and, by implication, defendant's vagueness claim), finding no "grievous ambiguity or uncertainty" in the wiretap statute because accepting any definition of "party" other than the one that the Court provided to the jury would render the wiretap provisions of the Act unnecessary. United States v. Eady, Crim. No. 14-277, Opinion. at 3 (D.N.J. April 15, 2015) (JLL). The Court further observed that the legislative history of the wiretap statute supported the Court's instruction on the term "party." Id. at 4.

communication, like defendant Eady did in surreptitiously setting up these interceptions of others' communications through the Prankdial website. Such a proposed definition of "party" would render Section 2511(1) (a) useless because every interceptor/originator (1) could arguably be viewed as a "party" under that definition and (2) could inappropriately take advantage of the consent-based defense. Hence, this claim does not provide a basis to grant bail pending appeal.

Also tucked away in defendant Eady's assertion that Section 2511(1) (a) is unconstitutionally vague is his claim that this section is a strict liability offense because it contains no scienter requirement and, thus, exposes the innocent person who intercepts a wire communication to punishment and is "little more than a trap for those who act in good faith" (Defendant's Brief at 48). The record at trial firmly established that defendant Eady was not acting in "good faith" when he attempted to sabotage his PBA union adversaries by endeavoring to secretly record their seemingly private wire communications. Most important, the Court instructed the jury that, to find defendant guilty, the jury had to find that the Government had proven beyond a reasonable doubt that defendant acted "intentionally," as specified in Section 2511(1)(a) (Trial Transcript 4.82), meaning deliberately and purposefully—or in other words, that "defendant's acts must have been the product of defendant's conscious objective to intercept the communication in question rather than the product of a mistake or an accident" (Trial Transcript 4.83).

The Court's instruction on this "state of mind" (mens rea) element shows that this was not a strict liability offense as suggested by defendant Eady in his brief. See, e.g., United States v. Dean, 705 F.3d 745, 748 (7th Cir. 2013) (inclusion of state of mind element ("knowingly") reflects that child pornography statute was not a strict liability offense). See generally Third Circuit Model Jury Instructions (Criminal) (West 2009), Ch. 5, at 263 ("Federal crimes

commonly include the mental states intentionally, knowingly, or willfully, and less commonly recklessly or negligently. Some federal crimes are also strict or absolute liability offenses, without any mental state requirement."). Accordingly, Section 2511(1)(a) is not a strict liability offense either as drafted or as applied in this case because proof of a state-of-mind element was required. Defendant Eady's contention to the contrary therefore does not provide a substantial question for defendant Eady on appeal.

E. Defendant's Claim that the Court Erred in Applying the Abuse of Trust Adjustment at Sentencing Does not Advance his Claim for Bail Pending Appeal

Defendant Eady also contends that this Court should grant bail pending appeal because the Court erroneously imposed a two-level guidelines enhancement for defendant's abuse of a position of trust (Defendant's Brief at 36-37). This contention does not provide a predicate for bail pending appeal.

The relevant portion of the statute that governs the standard for bail pending appeal on this issue makes clear that the substantial question of law or fact must "likely result in—. . . (iii) a sentence that does not include a term of imprisonment, or (iv) a reduced sentence to a term of imprisonment less than the total of the time already served plus the expected duration of the appeal process." 18 U.S.C. § 3143(b)(1)(B)(iii) & (iv). Defendant's brief completely fails to deal with how these subsections of the bail statute affect his argument regarding this guidelines adjustment, despite it being defendant Eady's burden to do so, see Miller, 753 F.2d at 24. Defendant Eady was sentenced to 21 months in prison at an offense level 14 (imprisonment range of 15 to 21 months). Even in the unlikely event that the Third Circuit was to find that the Court erred in granting this upward adjustment, it only would make a two-level difference, meaning that defendant's guidelines range at a theoretical resentencing still would be an offense

level 12, calling for an imprisonment range of 10 to 16 months with no opportunity to be sentenced to probation under the guidelines, see U.S.S.G. § 5C1.1(d). So, it is likely that a sentence, even if this two-point enhancement was overturned on appeal, still would be to a term of between 10 and 16 months in prison, and likely be closer to 16 months given that the Court sentenced defendant at the high end of the Guidelines range the first time.

Moreover, it is not likely that defendant Eady will be in prison for more time than the expected duration of the appellate process, given that he has not yet been incarcerated and that he would likely have to serve roughly 16 months in prison before that became an issue in the context of his challenge to this two-level sentencing adjustment. His appeal should be decided well before then. Hence, a reading of the relevant portions of Section 3143(b)(1)(B) makes clear that defendant's contention regarding the abuse-of-trust guidelines adjustment cannot aid his application for bail pending appeal.

At any rate, the Court simply did not err in granting the abuse-of-trust adjustment. Defendant Eady used his position as Deputy Director of the HCCC, to, among other things, obtain personal contact information, including telephone numbers, of his victims. From there, for instance, he endeavored to illegally intercept telephone communications that he had surreptitiously set up between them. Guidelines Section 3B1.3 is clear: "[i]f the defendant abused a position of public . . . trust or used a special skill, in a manner that that significantly facilitated the commission or concealment of the offense, increase by 2 levels." Application Note 1 to this guideline further makes clear: (1) that a position of public trust refers to a position "characterized by professional or managerial discretion" and (2) the position of public trust "must have contributed in some significant way to facilitating the commission or concealment of the offense." At the very least, defendant Eady's obtaining the private telephone numbers of his

victims through use of his high-level position significantly facilitated the wiretapping offense, and demonstrates that the Court's decision to apply this guideline was comp a proper exercise of its discretion. Therefore, this contention does not advance defendant Eady's case for bail pending appeal.

2. Defendant Eady Has Failed to Prove by Clear and Convincing Evidence that he is not Likely to Pose a Danger to the Safety of Any Other Person or the Community

The reasons used by defendant Eady to show that he is not a danger to the safety of any other person or to the community are not clear and convincing, and, based on the record developed during this case, the Government certainly cannot concede this point. For example, defendant Eady claims that he is not a danger to the community because he is approximately 47 years old. However, defendant Eady's crime occurred a mere 3 years ago. Additionally, simply because defendant Eady has not violated his bail conditions, the Court should not be convinced that defendant Eady does not pose a danger to the personal safety and security of others, particularly the victims of the crime charged here.

In the Presentence Report provided to the Court prior to defendant Eady's sentencing, several victims, and family members of victims, provided statements detailing the lasting detrimental effects of defendant Eady's actions on their lives. (see PSR ¶s 44-47). All of the parties to this case are familiar with those statements, which can be summarized as a pervasive fear that at any time defendant Eady will use whatever means necessary to harass, annoy and ruin the victims' professional, as well as, personal lives. Moreover, defendant Eady's basic conduct during the offense displayed a complete disregard for the personal privacy of his victims, whether it was: (1) signing Murray up for the KKK without his permission; (2) obtaining the personal telephone number of the victims and using it to harass them at home; or

(3) divulging Omar Ortiz's sensitive medical history to his peers, defendant Eady's criminal acts and improper conduct were so pervasive and relentless that to view him as anything other than a continued threat to these victims would be incorrect. Thus, given defendant Eady's demonstrated ability to use multiple means to adversely impact the lives of others, including the ability to harass his victims through multiple means, defendant Eady's apparent compliance with his bail conditions and his change in age from 44 (when he committed the offense) to 47 now cannot amount to clear and convincing evidence that he is not a danger to the personal safety of his victims and the greater community. His conduct towards his victims in this case and their continued concerns over his ability to harm them provides a significant counterweight to his claim that he is not a safety risk, and, therefore the Court should find that defendant Eady has not satisfied his burden with respect to this element, and, accordingly, defendant Eady should not be bailed pending appeal on this ground, as well.

CONCLUSION

Defendant Eady has not raised substantial questions of law or fact that are material under the standards set forth in the bail statute. Alternatively, defendant Eady also has failed to show by clear and convincing evidence that he is not a danger to the safety of the victims and the community. Accordingly, this Court should deny his application for bail pending appeal and set a date for defendant Eady to surrender to begin his term of imprisonment.

Respectfully submitted,

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