UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY
[NEWARK VICINAGE]

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UNITED STATES OF AMERICA,
Plaintiff,

v. No. 14-CR-0277 (JLL)

KIRK EADY,
Defendant.

----------X

NOTICE OF MOTION
FOR BAIL PENDING APPEAL

TO:

CLERK OF THE ABOVE-NAMED COURT

HON. JOSE L. LINARES, U.S.D.J
UNITED STATES COURTHOUSE
50 WALNUT STREET (ROOM #5054)
NEWARK, N.J. 07102 VIA ECF and 1ST CLASS U.S. MAIL

ASSISTANT UNITED STATES ATTORNEY DAVID L. FOSTER
OFFICE OF THE U.S. ATTORNEY
UNITED STATES COURTHOUSE
970 Broad St. (Room # 700)
Newark, N.J. 07102 VIA ECF-FILING ONLY

Sirs/Madam:

PLEASE TAKE NOTICE that the defendant, KIRK EADY, through his attorney THOMAS R. ASHLEY, Esq., will move before the Honorable JOSE L. LINARES, United States District Judge for the District of New Jersey at the United States Courthouse, Newark, N.J. as soon as counsel may be heard for an Order, pursuant to 18 U.S.C. §3143(b) and Fed.R.App.P. 9(b), admitting the defendant to bail pending the appeal of his conviction.

For purposes of this motion defendant shall rely upon the brief in support filed herewith and requests oral argument.

Respectfully submitted,

THOMAS R. ASHLEY
_/s/_____
THOMAS R. ASHLEY, ESQ.
ATTORNEYS FOR DEFENDANT KIRK EADY

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T:(973)623-0501/F:(973)623-0329

Dated: OCTOBER 30, 2015

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY
[NEWARK VICINAGE]

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UNITED STATES OF AMERICA,
Plaintiff,

v. No. 14-CR-0277 (JLL)

KIRK EADY,
Defendant.

----------X

CERTIFICATION OF MAILING AND SERVICE

THOMAS R. ASHLEY, ESQ., of full age, do hereby certify as follows:

1. I am an attorney of the State of New Jersey and attorney for defendant Eady.
2. I hereby certify that on this 30TH day of OCTOBER, 2015, I caused the foregoing Notice of Motion For Bail Pending Appeal together with supporting brief as to Defendant EADY to be filed via ECF and served by e-mail upon all counsel of record.

I hereby certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

THOMAS R. ASHLEY
_/s/_____
THOMAS R. ASHLEY, ESQ.
ATTORNEYS FOR DEFENDANT KIRK EADY

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Dated: OCTOBER 30, 2015

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY
[NEWARK VICINAGE]

----------X

UNITED STATES OF AMERICA,
Plaintiff,

v. No. 14-CR-277 (JLL)

KIRK EADY,
Defendant.

----------X

ON MOTION OF DEFENDANT EADY FOR AN ORDER GRANTING BAIL PENDING APPEAL PURSUANT TO Fed.R.App.P. 9(b) AND 18 U.S.C. § 3143

[MOTION RETURNABLE NOVEMBER 12, 2015; ORAL ARGUMENT REQUESTED]

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BRIEF/APPENDIX ON BEHALF OF DEFENDANT EADY

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ON THE BRIEF:

THOMAS R. ASHLEY, ESQ.

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ATTORNEYS FOR DEFENDANT KIRK EADY

TABLE OF CONTENTS

I. PRELIMINARY STATEMENT [1]

KIRK EADY ("Eady" or in the alternate "Defendant") respectfully moves this Court, pursuant to Fed.R.App.P. 9(b) and 18 U.S.C. § 3143, for an order granting bail pending appeal of the judgment filed herein on September 10, 2015, which imposed a sentence of imprisonment of 21 months as to the guilty verdict rendered March 13, 2015, after trial by jury on Count 1[2] of Indictment No. 14-CR-00277 (JLL) ("Indictment").[3]

II. PROCEDURAL/FACTUAL STATEMENT

A federal grand jury charged defendant by Indictment with illegal wiretapping, in violation of 18 U.S.C. § 2511(1)(a).[4]

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[1] References to a "Rule", unless otherwise stated, are to the Federal Rules of Appellate Procedure.

[2] Count 1 charges defendant violated 18 U.S.C. § 2511(1)(a) in 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 intercepted, endeavored to intercept and procured another person to intercept and endeavor to intercept the wire, oral, and electronic communication of others."

[3] For purposes of citation, the following abbreviations are used throughout this brief:
"1T" refers to the proceedings of March 10, 2015 (vol. 2).
"2T" refers to the proceedings of March 11, 2015.
"3T" refers to the proceedings of March 13, 2015.
"4T" refers to the proceedings of September 10, 2015.

"PSR ¶___" refers to the Presentence Investigation Report, dated May 29, 2015.

[4] 18 U.S.C. § 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]."

Specifically, Count 1 of 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 intercepted, endeavored to intercept and procured another person to intercept and endeavor to intercept the wire, oral, and electronic communication of others."

At trial it was established that between March 8, 2012 and approximately July 8, 2012 (the "Time Period"), Mr. Eady was the Deputy Director of the Hudson County Correctional Facility; additionally, Louis Ocasio, Daniel Murray and Omar Ortiz were employed by the Hudson County Correctional Facility where Ocasio was the President of the Corrections Officers Union ("Union"), Murray was the Grievance Chairman for the Union, and Ortiz was the President of the Superior Officers Union.

During this same time frame, Patricia Aiken owned and operated the EDPDlaw website[5], which published articles critical of the defendant and assisted the Union with the preparation, filing and handling of employee grievances.

To counteract and neutralize the untrue and disruptive articles being published in EDPDLaw Defendant Eady utilized the Evil Operator[6] automated telephone service to originate and

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[5] WWW.EDPDLAW.COM.

[6] WWW.PRANKDIAL.COM is an internet website which provides paying customers with the ability (through a program called Evil Operator) to originate and then monitor two people surreptitiously by making the telephone calls appear as though one or both people, and not the website customer, originated the telephone call. While a criminal investigation was undertaken by

monitor telephone conversations among Ocasio, Murray, Ortiz and Patricia Aiken without their permission or knowledge.

Called by the Government, to testify as to the software, architecture, and operability of Evil Operator in 2012, was Todd Saul, a software engineer first employed by Tapfury[7] in 2014. Todd explained that because Tapfury had discontinued Evil Operator in 2013 (and implied that the original system had been deleted or otherwise rendered inoperable) he undertook to recreate it by reading manuals and software code. 1T86 to 1T87; 1T89-6/7.

On cross-examination Mr. Saul conceded that his testimony, as to the operation and structure of Evil Operator, was solely theoretical based on his after-the-fact investigation and not from any practical experience. 1T119-7/9.

LaTonya Freeman, a former corrections officer employed at the Hudson County Jail and "long time" friend of Mr. Eady, stated that in early spring, 2012 Mr. Eady confided in her that he was wiretapping the telephone conversations of Ocasio, Murray, Aiken and Ortiz; defendant even played some of the recorded telephone conversations and Freeman identified the speakers as Ocasio and Ortiz. 1T132 to 1T135.

Freeman then contacted Ocasio and told him that defendant was wiretapping his telephone conversations. 1T135-22/25.

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the FBI as to the owner and operator of Evil Operator ultimately no charges were filed.

[7] Tapfury is the entity which owns and operates Prankdial.

Interviewed in the summer of 2012 by the FBI, Freeman disclosed that the defendant was wiretapping Ocasio, Aiken, Ortiz and Murray. 2T92-1/13.

After he was told by Ms. Freeman that defendant was wiretapping his telephone calls, Mr. Ocasio reported the situation to the FBI, but did not change his telephone number. 2T177 to 2T179.

Subsequently, Ortiz, Aiken and Murray each testified that they did not give permission to defendant to overhear or wiretap any telephone conversation in which they were a party.

Prior to summations, the defendant objected to the Government's definition of "party," arguing that even if a person wiretapping a conversation did not speak during the conversation that person could still be deemed a "party" to the conversation if that person could talk at any time (but merely chose not to) and regardless of whether his overhearing of the conversation was concealed from or not known to the other participants. (3T56).

Ultimately, the Court adopted the Government's proposed definition of a "party,"[8] charging the jury that:

> "I charge you that it is not, it is not unlawful for a person to intercept a communication when such person is a party to the communication or when one of the parties to the communication has given prior consent to such interception, unless the communication was intercepted for the

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[8] This definition is taken almost *verbatim* from the Tenn. Code, § 39-13-604: "'Party' means only those individuals who participate in a conversation and whose presence as participants is known to all other participants."

> purposes of committing any criminal or wrongful act in violation of the constitutional laws of the United States or any states.
>
> A party is an individual who participates with at least one other individual in a communication and whose participation in that communication is known to the other participants in the communication at the time of the communication.
>
> The burden is on the Government to prove beyond reasonable doubt that Mr. Eady was not a party to the conversation, and that none of the parties to the conversation did, in fact, give prior consent to defendant intercepting it.
>
> If you find that the defendant was a party to the communication or had permission from a party of the communication to intercept it, then the Government must prove beyond a reasonable doubt that the purpose of the interception was to commit a criminal or wrongful act in violation of the law.
>
> If you find that the Government has not proven this, or if you have a reasonable doubt about this issue, you should find the defendant not guilty." 3T84-5/19; emphasis added.

As to the issue of the defendant's conduct contained in para. 3 of the Indictment conflicting with the statutory language of 18 U.S.C. § 2511(1)(a), the Court charged the jury that:

> "You will note also that the word 'and' is used between certain charging words in the indictment. For example, the indictment states that the defendant intentionally intercepted, endeavored to intercept and procured another person to intercept and endeavored to intercept the wire, oral and electronic communications of others.
>
> However, even though the indictment uses the word 'and,' the Government need not prove that the defendant did all of those things.

> It is sufficient for the Government to prove that the defendant did one of the things charged in that particular conduct. In other words, you should treat the conjunctive 'and' as it appears in many places in the indictment as being the disjunctive 'or.' Okay?
> Therefore, it is enough for the Government to prove that the defendant intentionally intercepted or endeavored to intercept or procured another person to intercept or endeavored to intercept the wire communications of others." 3T91-5/21.

As to the elements of the Count 1 offense the Court charged the jury that:

> "The indictment or charge against the defendant charges as follows:
>
> From on or about March 8th of 2012 to on or about July 8th of 2012 in Hudson County in the District of New Jersey and elsewhere, the defendant, Kirk Eady, intentionally intercepted, endeavored to intercept and procured another person to intercept and endeavored to intercept the wire, oral and electronic communication of others. * * *
>
> The indictment charges that the defendant violated Section 2511(1)(a) of Title 18 of the United States Code, which in pertinent part provides as follows:
>
> Any person who intentionally intercepts, endeavors to intercept or procures any other person to intercept, or endeavors to intercept any wire, oral or electronic communication shall be guilty of a crime.
> In order to prove the defendant guilty of illegally intercepting wire communications, the Government must establish each of the following elements beyond reasonable doubt:
>
> First: That the defendant intercepted or endeavored to intercept or procured

another person to intercept a communication;

Second: They must prove beyond a reasonable doubt that the intercepted communication was a wire communication, and I will explain those terms to you in a second.

And third: That the defendant acted intentionally.

Now, I will go through the elements separately.

The first element, interception of a communication.

The first element that the Government must prove beyond a reasonable doubt is that the defendant intercepted or endeavored to intercept or procured another person to intercept a communication.

The term "intercept" means to acquire access to the contents of that communication through the use of any electronic, mechanical or other device.

The indictment alleges that the defendant intercepted or endeavored to intercept or procured another person to intercept several telephone conversations. 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.

The second element is wire communication. The Government must prove beyond a reasonable doubt that the intercepted communication was a wire communication, a quote, unquote, wire communication is a communication containing the human voice made in whole or in part through the use of facilities for the transfer of communications by the aid of wires, cables or similar connections, or at any point between and including the point of origin and the point of reception. A land line, a cellular telephone communication, for example, are wire communications.

> The third element is that the defendant acted intentionally. The Government must prove beyond a reasonable doubt that the defendant acted intentionally. To act intentionally means to act deliberately and purposefully. That is, the 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." 3T81-1 to 3T83-48.

A sentence of 21 months was imposed by the Court on September 10, 2015. At sentencing the district court *inter alia* enhanced the base offense level of 9 by 2 levels, pursuant to the abuse of trust enhancement in U.S.S.G. §3B1.3, as recommended in the PSR. PSR ¶ 55.

In approving this enhancement the Court held that:

> "Also, with regard to the issue of the enhancement for abuse of trust, clearly the defendant was in fact the second in command at the jail. He was in a position of trust. He was in a position of directing the activities of others. He was in a position where he could affect the lives and the job, the quality of the job life, the people that worked under him. He utilized the position not only to obtain personal identifiers on the employees, but also used the position to take action against them by way of, for example, altering their work requirements and duties, and I think that that is certainly an abuse of trust under the enhancements of the statute, and the two-level enhancement for abuse of trust is appropriate." 4T76-24 to 4T77-11.

A timely notice of appeal to the United States Court of Appeals for the Third Circuit was filed from said judgment on

September 18, 2015. ECF DOC 58.

III. STANDARDS FOR ADJUDICATION

"Bail," Justice Douglas famously wrote, "is basic to our system of law." Herzog v. United States, 537 U.S. 998, 1001 (1955) (Douglas, J.).

Bail symbolizes the country's bedrock concern for personal freedom and the idea incorporated from English common law that "only those incarcerations which arise from absolute necessity are just." William F. Duker, The Right to Bail: A Historical Inquiry, 42 ALB. L. REV. 33, 33-34 (1978).

Indeed, ever since Congress granted federal appellate courts jurisdiction over criminal cases in 1879, convicted defendants have had the ability to obtain bail pending appeal under prescribed criteria.

This policy reflects the Supreme Court's contention that "[A] person accused of crime shall not, until he has been finally adjudged guilty in the court of last resort, be absolutely compelled to undergo imprisonment . . . ." Hudson v. Parker, 156 U.S. 277, 285 (1895); emphasis added.

Defendant files this motion pursuant to Rule 9(b) seeking bail pending appeal, *i.e.*, the continuation of his $100,000 unsecured bond.

Rule 9(c) states that the criteria for such release is statutorily permitted by and governed pursuant to 18 U.S.C.

§ 3143, which permits a convicted defendant such as Mr. Eady to bail pending appeal if the Court finds:

> "(A) by clear and convincing evidence that the person is not likely to flee or pose a danger to the safety of any other 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).

As set forth in § 3143(b), the Court performs a two-step analysis in determining whether a defendant is entitled to bail pending appeal. First, the court must determine whether the defendant is likely to flee, or poses a danger to any other individual or the community if released. United States v. Miller, 753 F.2d 19 (3d Cir. 1985).

Secondly, the court must then determine that the appeal is not filed for the purposes of delay and that the appellate issues present a "substantial question of law or fact." Id. If they do, and the court believes such appellate issues could be decided in the defendant's favor, the court must then determine whether the Court of Appeals is likely to reverse the conviction or grant a new trial as to all the counts for which the defendant is facing imprisonment. Id.

An appeal presents a "substantial question" when the "question at issue is one which is either novel, which has not been decided by controlling precedent, or which is fairly debatable." Miller, supra, 753 F.2d at 23.

Lack of controlling precedent, however, "does not necessarily make a question substantial, the question may lack merit on its face." United States v. Johnson, No. 09-698, 2010 WL 1688547, at *2 (E.D. Pa. Apr. 26, 2010) (citing United States v. Quiles, No. 07-391-01, 2009 WL 764306, at *3 (E.D. Pa. Mar. 23, 2009)). Instead, a question is significant as long as it is "fairly debatable." United States v. Smith, 793 F.2d 85, 89 (3d Cir. 1986).

The Third Circuit modified the Miller standard by adopting the Ninth Circuit's 'fairly debatable' standard. See United States v. Smith, 793 F.2d 85, 89 (3d Cir. 1986) ("Our definition of a substantial question requires that the issue on appeal be significant in addition to being novel, not governed by controlling precedent or fairly debatable . . . ."). In Smith, the Third Circuit stated that a question which is not governed by controlling precedent nonetheless must be significant. Clearly, "an issue that is 'patently without merit' cannot qualify as significant." Id.; see also United States v. Kale, 661 F. Supp. 724, 725 (E.D. Pa. 1987) (interpreting Smith as defining "substantial question" as a "'fairly debatable' question").[9]

[9] In United States v. Handy, expressly adopted by the Third Circuit in Smith, the Ninth Circuit held that a question may be substantial even though the judge or justice hearing the application for bail would affirm on the merits of the appeal.

Defendant must show by "clear and convincing evidence" that he satisfies all four factors. 18 U.S.C. § 3143(b).

IV. LEGAL ARGUMENT

POINT ONE

IF GRANTED BAIL PENDING APPEAL DEFENDANT IS NOT LIKELY TO FLEE AND DOES NOT POSE A DANGER TO THE COMMUNITY

On March 5, 2010, defendant was arraigned on the instant Indictment and released on a $100,000 unsecured personal recognizance bond. While on pre-trial release defendant was compliant with all rules and regulations regarding his bail and release with no reported violations; thereafter, upon conviction as to Count One and facing a potential 5 year sentence, defendant appeared for sentencing.

A sentence of 21 months was imposed by the Court on September 10, 2015; considering that defendant (if the conviction is affirmed on appeal) is required to serve only 85% of the sentence (coupled with the last six months being served in a halfway house or home confinement)[10] there is only a *de minimis* threat of flight.

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761 F.2d 1279, 1281 (9th Cir. 1985). The issue may be new and novel, present unique facts which are not plainly covered by the controlling precedent, or it may involve important questions concerning the scope and meaning of a Supreme Court decision. Id.

[10] From the total sentence 54 days will be deducted for good behavior for each 12 months of sentence and defendant is eligible for up-to six months of home confinement and/or half-way house

Defendant has also complied with all bail conditions, including the Court's restrictions; Defendant appeared at the many pretrial hearings, appeared at the trial every day, including during jury deliberations, and has also appeared at the post-trial sentencing hearing. In sum, Defendant has fully complied with the Court's bail release orders thereby demonstrating he is not a flight risk. See, e.g., United States v. Hicks, 611 F.Supp. 497, 498 (S.D. Fla. 1985) (finding that the defendant was not likely to flee because he was "released on bond over the course of the proceedings (a period of several years), was permitted to leave the jurisdiction, even after conviction, and appeared at sentencing when he faced a possible sentence of forty-five years").

Defendant does not pose a danger to the community.

First, Defendant has no prior felony conviction and was classified as Criminal History Category I. Cf. United States v. Hill, 827 F.Supp. 1354, 1357 (W.D. Tenn. 1993) (finding that the defendant did not present a danger to anyone or the community because, among other reasons, he had no prior criminal record). Furthermore, Defendant has not been convicted in the within matter of any violent crime. Henson, 663 F.Supp. at 1113 (finding no danger to the community where the defendants were convicted of non-violent crimes); Hart, 906 F.Supp. at 105 (finding no danger to the community when the convictions were non-violent).

Moreover, neither the Government nor the Probation Department

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placement. See 18 U.S.C. §§ 3624(b); -(c).

has at any time suggested there is any danger to the community by defendant remaining on bail after conviction and staying the self-surrender date for defendant to report to the federal bureau of prisons until resolution of his bail pending appeal motion. See, generally, United States v. Reynolds, 956 F.2d 192, 192-93 (9th Cir.1992) (danger may encompass pecuniary or economic harm); United States v. Provenzano, 605 F.2d 85, 95 (3rd Cir.1979) (the concept of danger includes the opportunity to exercise a substantial and corrupting influence).

Lastly, Defendant is 47 years old, and this criminal conviction is his first. The connection between age and the risk of recidivism has been recognized by many courts. United States v. Lucania, 379 F.Supp.2d 288, 297 (E.D.N.Y.2005) (Sifton, J.)("Post-Booker courts have noted that recidivism is markedly lower for older defendants."); Simon v. United States, 361 F.Supp.2d 35, 48 (E.D.N.Y. 2005) (Sifton, J.)("Post-Booker, however, at least one Court has noted that recidivism drops substantially with age.").

POINT TWO

DEFENDANT'S APPEAL IS NOT FOR THE PURPOSE OF DELAY AND WILL RAISE SUBSTANTIAL QUESTIONS OF LAW AND/OR FACT

A.] DEFENDANT'S APPEAL IS NOT FOR THE PURPOSE OF DELAY

In order to satisfy the second prong of § 3143(b), Defendant must show that the anticipated appeal is not for the purpose of delay and raises substantial questions of law. Here, it is clear that since arraignment, there have been no instances, let alone any

pattern, of even arguable dilatory defense tactics. See Hart, 906 F.Supp. at 105 (finding that the appeal was not taken for purposes of delay as there was no evidence of dilatory defense tactics and the defendant constantly maintained innocence).

Therefore, it is clear that the to-be-filed appeal is not simply for the purpose of delay.

B.] DEFENDANT'S APPEAL RAISES SUBSTANTIAL QUESTIONS OF LAW AND/OR FACT

Defendant asserts that each of the following proposed appellate issues constitute either reversible or plain error. Rule 52(b).

An error in an evidentiary ruling is harmless error only when "it is highly probable that the error did not affect the result." Hill v. Laeisz, 435 F.3d 404, 420 (3d Cir. 2006).

"Plain error exists only when (1) an error was committed (2) that was plain, and (3) that affected the defendant's substantial rights.'" United States v. Lopez, 650 F.3d 952, 961 (3d Cir. 2011) (quoting United States v. Lessner, 498 F.3d 185, 192 (3d Cir. 2007)).

An error is "plain" when it is "clear or obvious." United States v. Russell, 134 F.3d 171, 180 (3d Cir. 1998) (citation omitted). A plain error requires reversal "only if the error 'seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings.'" United States v. Stevens, supra.

1.] THE FLAWED JURY INSTRUCTIONS IMPERMISSIBLY CAUSED CONSTRUCTIVE AMENDMENT OF COUNT 1 OF THE INDICTMENT

The Count 1 wiretapping charge was constructively amended as the result of the plainly erroneous jury charge because, in part, it omitted charging the jury with all necessary elements of an 18 U.S.C. 2511(1)(a) prosecution and thereby impermissibly broadened the basis upon which a conviction could be returned.

"A constructive amendment occurs where a defendant is deprived of his substantial right to be tried only on charges presented in an indictment returned by a grand jury." United States v. McKee, 506 F.3d 225, 229 (3d Cir. 2007) (stating that an indictment may be deemed constructively amended when a jury instruction "broaden[s] the possible bases for conviction from that which appeared in the indictment").

Here, Count 1 of the indictment charged Defendant with wiretapping, in violation of 18 U.S.C. 2511(1)(a).

The two transactional elements for a violation of 18 U.S.C. § 2511(1)(a) are: (1) the intercepting, or endeavoring to intercept, or procuring any other person to intercept a wire, oral, or electronic communication; and (2) the doing of such acts intentionally.

In turn there are two jurisdictional elements: (1) a wire communication must be furnished or operated by a person engaged in providing facilities for the transmission of interstate or foreign communications, and (2) that such communication affects interstate or foreign commerce. See U.S. Attorneys' Manual (2015 Ed.),

Criminal Resource Manual § 1052.

While the Court correctly charged that the alleged wiretapping had to occur with respect to a "wire communication," it failed to charge that such a wire must affect interstate or foreign communications.

By failing to make any reference in the charge to the government's obligation to prove both the use and impact on interstate or foreign commerce beyond a reasonable doubt the court plainly erred because such an omission permitted conviction on an alternate and/or expanded basis not charged in the indictment. See United States v. Syme, 276 F.3d 131, 138 (3d Cir. 2002) (A criminal conviction as a matter of law is invalid if the indictment asserts or the district court's jury instructions contain an erroneous interpretation of law or a mistaken description of the law); United States v. Dentler, 492 F.3d 306, 312 (5th Cir. 2007) (stating that there is a constructive amendment "when the jury is permitted to convict the defendant based on an alterative basis permitted by the statute but not charged in the indictment" (internal quotation marks omitted).

The Fifth and Sixth Amendment prejudice to defendant is patently manifest: the jury was charged and the conviction returned on a basis reduced and different from that voted by the Grand Jury. United States v. Kelly, 722 F.2d 873, 876 (1st Cir.1983) ("To prevail on the theory that there has been a constructive amendment to the indictment, appellant must show that his Fifth and Sixth amendment rights have been infringed. The Fifth Amendment requires

that a defendant be tried only on a charge made by the grand jury.... The Sixth amendment working in tandem with the Fifth Amendment, requires that the defendant 'be informed of the nature and cause of the accusation.' U.S. Const. amend. VI"); and see United States v. Hannah, 584 F.2d 27, 30 (3d Cir. 1978) (rejecting government's alternate appellate theory of criminality to sustain challenged conviction, holding that on appeal the government is restricted to arguing the prosecutor's "theory submitted to the jury at trial by the prosecution.")

To now change the rules, after the race has been run, has irreparably prejudiced the defendant. United States v. Kemp, 500 F.3d 257, 280 (3d Cir. 2007) (A charge in an indictment is valid only if "(1) contains the elements of the offense intended to be charged, (2) sufficiently apprises the defendant of what he must be prepared to meet, and (3) allows the defendant to show with accuracy to what extent he may plead a former acquittal or conviction in the event of a subsequent prosecution.").

Moreover, this error is as clear as it is obvious. See Syme, 276 F.3d at 151 ("Cases from the Supreme Court and this court hold that it violates the Grand Jury Clause of the Fifth Amendment when a court instructs a jury on a ground for conviction that is not contained in the indictment.").

Defendant concedes that the plain error framework requires a showing that the error affected the defendant's substantial rights or, in other words, that the error "was prejudicial in that it affected the outcome of the District Court proceedings." United

States v. Ozcelik, 527 F.3d 88, 96 (3d Cir. 2008) (internal quotation marks omitted).

Although the defendant generally carries the burden of demonstrating prejudice, where a district court constructively amends an indictment through its instructions to the jury, such error is "presumptively prejudicial." Syme, 276 F.3d at 155.

This prejudice morphs from presumptive to patent in the face of incomplete or omitted instructions as to an essential element of the offense. See, e.g., McKee, 506 F.3d at 231-32 ("If we presume, as we must, that the jury followed the court's instructions, we must conclude that there is a real possibility that the jury relied upon the uncharged examples of conduct to convict the Defendants, just as the court instructed."); United States v. Dobson, 419 F.3d 231, 240 (3d Cir. 2005)(acknowledging that the government had presented evidence which the jury could have determined satisfied the knowledge element of the offense charged in the indictment, but that this alone "does not preclude a finding of prejudice for purposes of plain error").

Therefore, there was clear and obvious error which, under the circumstances of this case, affected Defendant's substantial rights, requiring vacation of the conviction on Count 1. See McKee, 506 F.3d at 232 (concluding that the constructive amendment prejudiced the defendants and that "[l]eaving this error uncorrected would seriously affect the fairness and integrity of the proceeding"); Syme, 276 F.3d at 155-56 (same).

2.] THE COUNT I JURY INSTRUCTIONS ARE FATALLY FLAWED AS THERE IS NO UNANIMITY INSTRUCTION; ALTERNATELY, THE COUNT 1 CONVICTION IS FATALLY FLAWED AS THERE IS NO BASIS TO CONCLUDE THERE WAS UNANIMITY AS TO THE MANNER BY WHICH DEFENDANT COMMITTED THE WIRETAPPING

It is respectfully submitted that the jury charge was fatally flawed as there was no unanimity instruction, requiring jurors to agree on the offense conduct defendant committed, and there is no basis to determine the method or manner by which the jury concluded defendant had violated 18 U.S.C. § 2511(1)(a). See, e.g., Yates v. United States, 354 U. S. 298 (1957) (constitutional error occurs when a jury is instructed on alternative theories of guilt and returns a general verdict that may rest on a legally invalid theory); United States v. Gipson, 553 F.2d 453 (5th Cir. 1977) (constitutional error occurs where statute may be violated in any number of different ways and jury not instructed that jurors must be unanimous as to specific offense conduct defendant committed before they can return a verdict of guilty); United States v. Beros, 833 F.2d 455 (3d Cir. 1987) (same, and explicitly adopting Gipson).

In charging the jury the Court noted that the language of the Indictment did not correctly track the statutory language of 18 U.S.C. 2511(1)(a) in that:

> "(T)he indictment uses the word 'and,' the Government need not prove that the defendant did all of those things. It is sufficient for the Government to prove that the defendant did one of the things charged in that particular conduct. In other words, you

> should treat the conjunctive 'and' as it appears in many places in the indictment as being the disjunctive 'or.' Okay? Therefore, it is enough for the Government to prove that the defendant intentionally intercepted or endeavored to intercept or procured another person to intercept or endeavored to intercept the wire communications of others." 3T91-5/21.

Where, as occurred herein, the offense charged has three different ways by which it may be violated, each of which has a different underlying factual basis, 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 at issue. United States v. Gipson, 553 F.2d 453 (5th Cir. 1977) (holding that where a single criminal statute provides a number of ways of satisfying the prohibited conduct of an offense, a defendant's right to a unanimous jury verdict requires all jurors to find that same criminal conduct element present by reaching agreement as to the specific offense conduct before they can return a verdict of guilty); United States v. Echeverry, 698 F.2d 375, 377 modified, 719 F.2d 974 (9th Cir. 1983) (*en banc*), (vacating conviction where no unanimity charge given, as to several alternate theories of criminal liability presented by government, because "[w]e are not free to hypothesize whether the jury indeed agreed to and was clear on the" transaction or theory by which it found defendant guilty); United States v. Beros, 833 F.2d 455 (3d Cir. 1987) (same and adopting Gipson and Echeverry).

The constitutional and due process danger and inherent

prejudice to a defendant, where such a unanimity charge is not given, is best illustrated by example.

A traffic control statute might prohibit (a) speeding, (b) driving without lights at night, (c) making a turn from the wrong lane, and (d) failing to use turn signals. At a trial for violating the statute, the prosecution might present some evidence that each of the prohibited acts was performed by the defendant, and the judge might charge the jury that the defendant would be guilty of violating the statute if the jury found he had done any one of the prohibited acts. If three members of the jury found that the defendant was guilty of speeding but had not committed any of the other prohibited acts, and three other jurors found that the only illegal act the defendant committed was driving without lights at night, and three other jury members found that the only prohibited act the defendant performed was making a turn from the wrong lane, and the final three jurors found that the only wrong the defendant committed was failing to use his turn signals, the defendant's right to a unanimous verdict would be violated if the jury found him guilty of violating the code section. The prosecution would not have convinced all of the jurors that the defendant committed one or more of the unlawful acts. Indeed, nine of the jurors would have found that the defendant did not perform each of the prohibited acts.

Replication of the above due process violation occurred in United States v. Beros, supra, where the defendant was prosecuted under 29 U.S.C. § 501(c) for theft of pension funds; the indictment

alleged that the offenses were committed by the defendant under four alternative theories, such as occurred with Mr. Eady, i.e., in that defendant engaged in "embezzling, (or) stealing, (or) abstracting or converting to his own use."

On appeal the guilty verdicts were reversed because of incomplete and misleading jury instructions, as occurred with defendant Eady; in part the Third Circuit held that without the unanimity charge confusion by the jury was unavoidable:

> "[A]ny one of the acts alleged in these counts could provide the basis for a conviction under the statutes, and appears to have recognized the necessity that the jury's verdict be unanimous not only as to its finding that Beros violated the statutes but also as to the particular act or acts by which he did so. In its charge to the jury, however, the district court failed to instruct the jury properly regarding this last aspect of unanimity." Id. at 459.

While the charge gave specific guidance to the jury regarding the necessity that it be unanimous with regard to the "mode or manner" by which it found the defendant to be guilty of the charged offenses, "in neither instance did it clearly instruct the jury that it must also unanimously agree upon the particular act or acts of criminality." Id; emphasis added.

Where an indictment charges a violation of a criminal statute, which violation may occur by or through means and methods, a general unanimity instruction is mandatory and will ensure that the jury is unanimous on the precise factual basis for a conviction, even where an indictment alleges alternate factual bases for

criminal liability. See United States v. Beros, 833 F.2d at 460; cf. United States v. Ryan, 828 F.2d 1010 (3d Cir. 1987) (noting that "in any case where a count will be submitted to the jury on alternative theories, prudence counsels the trial court to give an augmented unanimity instruction if the defendant requests such a charge" Id. at 1020).

Conviction by a jury that was not unanimous as to the defendant's specific illegal action is no more justifiable than is a conviction by a jury that is not unanimous on the specific count. In this case, there are at least three permutations that can support a conviction.

Stated somewhat differently, where a single criminal statute may be violated by a number of different prohibited acts or occurrences, and a finding by the jury that the defendant did any one of the prohibited acts is sufficient to convict him, it is the defendant's right to charge that all members of the jury agree the defendant performed one of the prohibited acts and also agree as to which one of the prohibited acts he performed.

Beros clearly acknowledged and adopted that "[t]he unanimity rule ... requires jurors to be in substantial agreement as to just what a defendant did as a step preliminary to determining whether the defendant is guilty of the crime charged." Id. at 460-61.

And where it appears that there is a possibility of jury confusion, or that a conviction may occur as the result of different jurors concluding that the defendant committed different acts, the general unanimity instruction does not suffice. The

remedy in such a situation, necessary to protect a defendant's Sixth Amendment right, is the trial judge must *sua sponte* augment the general instruction to ensure the jury understands its duty to unanimously agree to the same particular set of facts. Beros, supra, 833 F.2d at 461; United States v. Tarnopol, 561 F.2d 466, 471 (3d Cir. 1977)(where no specific unanimity charge given conspiracy conviction must be vacated if evidence is insufficient to support conviction on any one object of the multiple objects of the conspiracy.); United States v. Morelli, 169 F.3d 798 (3d Cir. 1999)(same).

Moreover, because the general verdict returned by the jury precludes determining which of the three different ways defendant committed the wiretapping the rule of unanimity requires vacation of the Court 1 conviction. United States v. Russell, 134 F.3d 171 (3d Cir. 1998)(specific unanimity rule requires jurors to be instructed that they must agree as to which of several steps alleged in the indictment the defendant committed in determining whether defendant is guilty of the charged conspiracy.)[11]

The general unanimity instruction given was insufficient and violated defendant's due process rights.

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[11] The Government's inevitable argument will be that as defendant acted alone no juror would have concluded the third prong of 18 U.S.C. 2511(1)(a) ("procures any other person to intercept or endeavor to intercept . . . .) applicable; this argument quickly fades upon consideration that a juror or two (or more) may have concluded that Evil Operator and/or Tapfury constitutes a "person."

3.] REVERSIBLE ERROR OCCURRED BY THE COURT DENYING DEFENDANT'S REQUEST TO BAR GOVERNMENT WITNESS SAUL WITHOUT FIRST QUALIFYING HIM AS AN EXPERT

It is respectfully submitted that reversible error occurred as a result of the Court denying defendant's motion that witness Saul be qualified as an expert witness before testifying. Fed. R. Evid. 702.

Government witness Saul opined to the jury with respect to the structure, operability, features and methodology underlying Evil Operator in 2012, based on his admitted after-the-fact investigation in 2015.

Contrary to the Court's ruling, it is respectfully submitted Mr. Saul could not be a fact witness for three reasons:

1. Saul admitted the entirety of his testimony was "theoretical," and not practical, because he had to "recreate" the Evil Operator program in 2015 as he believed it operated in 2012;
2. Saul admitted he had no practical, first-hand knowledge of Evil Operator, either as a subscriber or programmer, and that his knowledge and testimony were each based on his after-the-fact investigations;
3. Saul testified as to matters beyond the ken of the average juror, and assisted the jurors in understanding the electronic and computer operating features of Evil Operator.

Fed. R. Evid. 702 provides that:

> "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill,

> experience, training, or education, may testify thereto in the form of an opinion or otherwise."

Saul's 2015 testimony was his opinion as to the nature of Evil Operator's features in 2012, simply because he never used the system in 2012 and had to resort to an after the fact investigation.

Fed. R. Evid. 702 has two major requirements. The first is that a witness proffered to testify to specialized knowledge must be an expert. The second is that the expert must testify to "scientific, technical or other specialized knowledge [that] will assist the trier of fact." In re Paoli, 35 F3d 717, 741 (3d Cir. 1994).

The Government clearly established that Saul had such "specialized knowledge."

Equally as obvious is that Saul's testimony was technical and specialized knowledge of the construction and operation of Evil Operator, because the testimony of such an expert is indispensable to a juror "having practically no knowledge of the operation of computers and computer software systems . . . ." Whelan Associates v. Jaslow, 609 F.Supp. 1307, 1320 (E.D.Pa. 1985).

Alternatively, the code and software of Evil Operator are not in a form that is perceivable or understandable absent an expert's involvement. Apple Computer, Inc. v. Franklin Computer Corp., 714 F.2d 1240, 1247 (3d Cir. 1983).

Ultimately, the issue is not whether the subject matter is

common or uncommon or whether many persons or few have knowledge of the matter; but it is whether the specialized and technical testimony is an "aid to the court or jury in determining the questions at issue." Rempfer v. Deerfield Packing Corp., 4 N.J. 135, 141-142 (1950).

Additionally, it was error to not exclude Saul's testimony on the basis of the violation of Rule 16(a)(1)(G),[12] which requires the defendant to receive a written summary of any testimony that the Government intends to use under Rule 702.

Undeniably the average layperson today is able to interpret the end-reports of a software program as easily as he or she interprets a blood pressure machine reading, but interpretation and understanding the mechanics of a blood pressure machine is specialized knowledge to be provided only by an expert.

On occasion witnesses having specialized knowledge have been permitted to interject or base their lay testimony in part on their specialized knowledge. See, e.g., United States v. Wells, 211 F.3d 988, 997-98 (6th Cir. 2000) (affirming a decision allowing doctors to testify as fact witnesses that a person was cancer-free based on firsthand observations) (citing Richardson v. Consol. Rail Corp., 17 F.3d 213, 218 (7th Cir. 1994)); United States v. Smith, No. 96-1885, 1998 WL 385471, at *4 (6th Cir. June 29, 1998) (unpublished)

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[12] "The government must give to the defendant a written summary of any testimony that the government intends to use under Rules 702, 703, or 705 of the Federal Rules of Evidence during its case-in-chief at trial."
Testimony falls under Rule 702 if it is based on "scientific, technical, or other specialized knowledge."

(police officers allowed to give lay testimony explaining the code words used while negotiating a drug purchase).

However, the 2000 amendment to Federal Rule of Evidence 701 clarified that lay opinions or inferences cannot be based on "scientific, technical, or other specialized knowledge within the scope of Rule 702." Fed. R. Evid. 701.

Even before the amendment, witnesses who performed after-the-fact investigations (i.e., such as recreating Evil Operator) were generally not allowed to apply specialized knowledge in giving lay testimony. See Richardson, 17 F.3d at 218 (a doctor is not an expert witness when the testimony is based on observations made during the course of treatment and not acquired for purposes of litigation); Peoples, 250 F.3d at 641 (If not qualified as an expert police officer's testimony is admissible as lay opinion only when the officer is a participant in the conversation).

Accordingly, it is respectfully submitted reversible error occurred in holding Mr. Saul was a fact and not an expert witness, and compounded this error by not barring Mr. Saul's testimony for violation of Rule 16(a)(1)(G).

4.] IN LIGHT OF THE INHERENT AMBIGUITY AND UNCERTAINTY IN THE STATUTORY LANGUAGE IN 18 U.S.C. §§ 2510 AND 2511(1)(a), THE RULE OF LENITY MANDATES VACATION OF THE COUNT 1 CONVICTION

A.] Defendant submits that based on the ambiguity inherent in defining the statutory term "party," coupled with the Court

having prejudicially expanded[13] the concept, the rule of lenity compels the Count 1 conviction be vacated.

Because there is no federal precedent with respect to this issue, and the Congressional record contradicts the Court's ruling, the rule of lenity mandates vacation of the Count 1 conviction.

At trial the Government conceded there was neither a Federal Model Jury Instruction nor federal precedent which addressed or articulated exactly the contours of a "party" to a wire communication, and recommended that the Court resort to probably the most expansive and prejudicially onerous definition.[14]

When a term or phrase in a statute is undefined, courts give them their ordinary meaning and the first step in divining such meaning is to resort to a lexicon or dictionary. See, FDIC v. Meyer, 510 U.S. 471, 476 (1994); 1A N. Singer, Sutherland on Statutory Construction § 20.22 (5th ed. 1992)).

"If the intent of Congress is clear, that is the end of the matter[.]" United States v. Gregg, 226 F.3d 253, 257 (3d Cir. 2000).

The ordinary meaning of a "party" to a transaction or communication is "a person that participates in some action . . . ." Random House Dictionary, Collegiate Edition (2001) at 967.

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[13] The Court eventually held that to be a "party" the person, in addition to participating in the communication, must also: (1) be known to all the other participants, and (2) such knowledge must be contemporaneous with the time the communication occurs.

[14] 39 T.C.A. § 39-13-604(a)(5).

In passage of the subject statute Congress explained that the term "party" meant, contrary to the Government's instant expansive position, a "person actually participating in the communication." S. Rep. No. 1097, 90th Cong. 2d Sess. (1968), reprinted in 1968 U.S. Code Cong. & Admin. News 2112, 2182 (emphasis added).

The wiretap statute itself similarly interchangeably cross-references a "party" with an "aggrieved person" as one having standing to move to suppress the fruits of an illegal or unauthorized wiretap. 18 U.S.C § 2518 (10)(a). Congress specifically defined an "aggrieved person" as a person "who was a party to any intercepted wire, oral, or electronic communication or a person against whom the interception was directed." 18 U.S.C. § 2510(11).

Federal precedent clearly establishes that a "party" is an "aggrieved person" if that person was a participant in the intercepted conversation. E.g., United States v. Scaseno, 513 F.2d 47, 50-51 (5th Cir. 1975) (citing cases).

If anything may be clearly divined from the foregoing, it is that while a person is a "party" to a communication only if s/he participates in the conversation it just as surely is clear that there is neither Congressional mandate nor precedential support for the *ad hoc* notion contained within the jury charge that to be a "party" the participating person: (1) must be known to the all the other participants, and (2) that such knowledge must be contemporaneous with the time of the communication.

It is well settled that the rule of lenity specifically

applies to statutory interpretation and application of criminal statutes to "ensure there is fair warning of the boundaries of criminal conduct and that legislatures, not courts, define criminal liability." United States v. Edmonds, 80 F.3d 810, 821 (3d Cir. 1996) (*en banc*) (internal citation and quotation marks omitted).

Herein the two conflicting schools of thought are clear: is "party" status conferred merely upon a person participating in a wire communication, or, is it an indispensable element that the person must be known to all the other participants and that such knowledge must be contemporaneous with the time of the communication.

No federal Court has held or sustained the charge given to the jury and the fact that the Government had to reach into the statutory code of Tennessee for this definition speaks for itself.

"[W]hen there are two rational readings of [a] criminal statute, one harsher than the other, [courts] are to choose the harsher only when Congress has spoken in clear and definite language." United States v. Mumhy, 323 F.3d 102, 111 (3d Cir. 2003; emphasis added) (quoting McNally v. United States, 483 U.S. 350, 359-60 (1987)).

In application and amplification of the rule of lenity the Supreme Court has held:

> "The rule of lenity requires ambiguous criminal laws to be interpreted in favor of the defendants subjected to them. This venerable rule not only vindicates the fundamental principle that no citizen should be held accountable for a violation of a statute whose commands are uncertain, or

> subjected to punishment that is not clearly prescribed. It also places the weight of inertia upon the party that can best induce Congress to speak more clearly and keeps courts from making criminal law in Congress's stead." United States v. Santos, -- U.S. --, --, 128 S. Ct. 2020, 2025 (2008) (internal citations omitted).

In Scheidler v. Nat'l Org. for Women, Inc., 537 U.S. 393, 409 (2003), the Supreme Court applied the rule of lenity and rejected NOW's request to expand the concept of "property" contained in the Hobbs Act (based solely on New York State precedent), holding that expansion of the term to include inchoate claims (as NOW sought) is "such a significant expansion of the law's coverage (it) must come from Congress, and not from the courts." Id. at 409.

In United States v. Manzo, 714 F.Supp2d 486, 497 (D.N.J. 2010) affirmed 636 F.3d 56, 70 (3d Cir. 2011) the Third Circuit affirmed the district court's decision, dismissing the Hobbs Act charge under the rule of lenity, because it was "unsettled" as to whether the Hobbs Act element of "acting under official color" encompasses an unsuccessful candidate for public office (636 F.3d at 70); the Third Circuit opined that only resort to "legal alchemy" would make persuasive the Government's argument to the contrary. Manzo, 714 F.Supp.2d at 497.

Defendant Eady would be rightfully condemned if a federal consensus existed supporting the Government's proposition as to the definition of a "party" under 18 U.S.C. 2511(1)(a); but to condemn Mr. Eady solely on the basis of the non-federal, single precedent

of a Tennessee statute really needs no argument.

It would be difficult for even the Government to argue that the "unsettled" definition and concept of a "party," as employed against defendant, is not a "significant expansion of the law's coverage." See State v. Froland, 193 N.J. 186, 204 (2006) (The rule of lenity "has at its heart the requirement of due process."); see, also Lanzetta v. New Jersey, 306 U.S. 451, 59 S.Ct. 618 (1939).

B.] Defendant further submits that the above ambiguity was exacerbated and compounded by the linguistic conflicts of and contradictions in the language of 28 U.S.C. § 2510, as applied to the unique factual circumstances underlying defendant Eady's case.

The jury was charged that defendant Eady was guilty of wiretapping if the Government proved that the defendant intentionally intercepted, or endeavored to intercept or procured another person, to intercept or endeavored to intercept the "wire communication" of the four alleged victims.

18 U.S.C. § 2510(1) defines a "wire communication" as: "any aural transfer made in whole or in part through the use of facilities for the transmission of communications by the aid of wire, cable, or other like connection between the point of origin and the point of reception (including the use of such connection in a switching station) furnished or operated by any person engaged in providing or operating such facilities for the transmission of interstate or foreign communications or communications affecting interstate or foreign commerce;" Emphasis added.

The linguistic conflicts of and contradictions in the language

of 28 U.S.C. § 2510(1) becomes patent, and the instant conviction of dubious validity, upon consideration and acknowledgment that defendant Eady is and was the "originator" of each wire communication for which he was prosecuted.

The fact that the people constituting the "point of reception" believed they had originated the wire communication is of no moment, as is Congress' failure to legislatively anticipate the creation and use of such as the Evil Operator.

As presently configured 28 U.S.C. § 2510(1) bars defendant being convicted of wiretapping simply because he was the originator of the subject wire communications (as was amply proven by the Government), and defendant may not be prosecuted for wiretapping a wire communication for which he was the originator.

This linguistic conundrum pales in comparison to the companion issue of the Court defining the "contents" of a wire communication. See 18 U.S.C. § 2510(8) ("when used with respect to any wire, oral, or electronic communication, includes any information concerning the substance, purport, or meaning of that communication;").

In 1986 Congress amended 18 U.S.C. § 2510(8) by deleting the phrase "identity of the parties to such communication or the existence." Public Law 99-508 (Electronic Communications Privacy Act), § 101; emphasis added.

Obviously Congress concluded the identity of the individual participants or speakers was no longer a necessary or required statutory element.

However, by the Court adopting the above Tennessee statute,

the linchpin of which is identification of the individual participants, Congress' 1986 striking-out of the identity phrase was improperly undone because the Court charged the jury that to be deemed a "party" to a wire communication that person's identity must be known to the other participants in the communication at the time of the communication.

For the same reasons that the rule of lenity was applied by the Supreme Court in Scheidler and the Third Circuit in Manzo, Mr. Eady is entitled to vacation of the Count 1 conviction.

Consequently, the foregoing several linguistic and statutory ambiguities and conflicts, individually or in the aggregate, are a "grievous ambiguity or uncertainty in the language and structure of the Act ... such that even after a court has 'seize[d] everything from which aid can be derived,' it is still 'left with an ambiguous statute.'" Chapman v. United States, 500 U.S. 453, 463 (1991) (citations omitted).

5.] IT WAS PLAIN ERROR TO FIND A TWO-LEVEL ENHANCEMENT TO DEFENDANT'S SENTENCE FOR "ABUSE OF TRUST"[15]

At sentencing, the District Court applied a two-level enhancement to the defendant's base offense level of 9 for abuse of

[15] While prevailing with respect to this issue would not affect the conviction and only the sentence, it is nonetheless an appropriate appellate and bail pending appeal issue because "the use of an erroneous Guidelines range will typically require reversal." United States v. Langford, 516 F.3d 205, 215 (3d Cir. 2008).

a position of trust, pursuant to U.S.S.G. § 3B1.3. The District Court applied the enhancement primarily for two stated reasons: Mr. Eady's (1) supervisory employment position of directing the victims, and (2) retaliating against one of the victims by way of altering his work requirements and duties.

Pursuant to U.S.S.G. § 3B1.3, a two-level increase to a offense level applies "[i]f the defendant abused a position of public or private trust . . . in a manner that significantly facilitated the commission or concealment of the offense." Emphasis added.

Because Mr. Eady's employment as Deputy Warden at the Hudson County Jail neither significantly facilitated the wiretapping nor significantly facilitated concealment of the wiretapping this enhancement was plain error.

In applying this enhancement, the Third Circuit employs "a two-step analysis: (1) whether the defendant occupied a position of public or private trust; and (2) whether the defendant abused this position of trust in a way that significantly facilitated the crime." United States v. Iannone, 184 F.3d 214, 222 (3d Cir. 1999)).

In United States v. Pardo,[16] 25 F.3d 1187, 1192 (3d Cir. 1994), three factors were considered in addressing the first step of the two-step analysis, stating:

"[I]n considering whether a position constitutes a

[16] No abuse of trust enhancement permitted where it is based solely on defendant being a long-time social friend of the manager at the bank defendant defrauded. 25 F.3d at 1192.

> position of trust for purposes of § 3B1.3, a court must consider: (1) whether the position allows the defendant to commit a difficult-to-detect wrong; (2) the degree of authority which the position vests defendant vis-a-vis the object of the wrongful act; and (3) whether there has been a reliance on the integrity of the person occupying the position." Id. See also Hart, 273 F.3d at 375.

The Sentencing Guidelines further explain that a position of trust is "characterized by professional or managerial discretion (i.e., substantial discretionary judgment that is ordinarily given considerable deference)." U.S.S.G. § 3B1.3 cmt. n.1.

Interestingly, neither § 3B1.3 nor its applicable Commentary clearly defines what is meant by a 'position of trust.'

"'[T]hese factors should be considered in light of the guiding rationale of [§ 3B1.3]: 'to punish 'insiders' who abuse their position rather than those who take advantage of an available opportunity.'" United States v. Dullum, 560 F.3d 133, 140 (3d Cir. 2009) (holding that private position of trust existed because due to defendant's involvement with his church, he acted as a teacher, advisor, and counselor to victims over several years).

This enhancement more often than not arises in an employment relationship, but has been applied to other forms of trust relationships, e.g., a mother/daughter relationship[17] and a babysitter/child relationship.[18] E.g., id. at 140-41.

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[17] United States v. Ledesma, 979 F.2d 816, 822 (11th Cir. 1992), defendant had her young adult daughter bag cocaine and relay drug-related telephone messages.

[18] United States v. Zamarripa, 905 F.2d 337 (10th Cir. 1990), defendant sexually assaulted eight year-old girl while serving as

First of all, victim Patricia Aiken had no involvement or relationship whatsoever with Mr. Eady, employment or otherwise.

Secondly, defendant's position at the Hudson County Jail was of no moment in committing or concealing the wiretapping and at best appears only to have been a proximate cause as to why the wiretapping at all occurred.

Not one victim testified that defendant was relied on or trusted in any way or fashion prior to or during the wiretapping, and the evidence clearly shows distrust existed, thereby eliminating this necessary element.

That defendant committed the wiretapping while Deputy Jail administrator is also meaningless; even the lowliest correctional officer recruit could have dialed Evil Operator and undertaken the exact same wiretapping result for which defendant was prosecuted.

The same may be said equally as true for concealment of the wiretapping.

Lastly, while in a single instance defendant undertook an arguably retaliatory work reassignment of one of the victims, from a no-show union related office to actually having to work a shift at the jail, this reassignment was permitted under the union contract and was not otherwise actionable; moreover, defendant was well aware of the identity of the union personnel and the level of *animus* between them probably would have eventually caused the reassignment without any information from the wiretapping.

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her babysitter.

Consequently, it cannot be meritoriously argued that Mr. Eady's employment at the Hudson County Jail was a position of private or public trust which "significantly facilitated the commission or concealment of the offense."[19]

6.] 18 U.S.C. § 2511(1)(a) VIOLATES THE VOID FOR VAGUENESS DOCTRINE AND IS OVERBROAD IN GENERAL AND AS APPLIED TO DEFENDANT

It is respectfully submitted that 18 U.S.C. § 2511(1)(a) is unconstitutional, because it employs the undefined and ambiguous term "party," which is confusingly conditioned and modified by 18 U.S.C. § 2510, thereby rendering it overbroad and void for vagueness in general[20] and as applied to defendant Eady.[21] U.S.

[19] See, e.g., United States v. Craddock, 993 F.2d 338 (3d Cir. 1993) (abuse of trust applicable to bank teller who knowingly processed and cashed stolen money orders); United States v. Brann, 990 F.2d 98 (3d Cir. 1993) (abuse of trust applicable to DEA agent who filed false drug purchasing reports to cover his embezzling drug-buy money); United States v. Lieberman, 971 F.2d 989, 992-94 (3d Cir. 1992) (reversing failure to enhance for bank vice president for defrauding bank); United States v. Georgiadis, 933 F.2d 1219, 1225 (3d Cir. 1991), (abuse of trust applicable to assistant bank president who diverted bank funds to own account).

[20] A "facial" challenge means a claim that the law is "invalid *in toto* - and therefore incapable of any valid application." Steffel v. Thompson, 415 U.S. 452, 474, 94 S.Ct. 1209, 1223 (1974).

[21] A statute challenged facially is void if it is "impermissibly vague in all its applications," meaning there is no conduct that it proscribes with sufficient certainty. State v. Cameron, supra, 100 N.J. at 593. On the other hand, an as-applied challenge to a particular set of facts may be successful, "if the law does not with sufficient clarity prohibit the conduct against which it is sought to be enforced.... A party may test a law for vagueness as applied only with respect to his or her particular conduct." Ibid.

Const. amend. V.

Additionally, it is rendered void for vagueness in the unique factual context of defendant's prosecution because defendant may not be prosecuted for wiretapping a wire communication for which he was the originator. See 18 U.S.C. § 2510(1).

The void for vagueness doctrine is a well established procedural due process concept which requires that a penal statute define the criminal offense with sufficient definiteness that ordinary persons can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement. While the focus is upon notice to citizens and to bar arbitrary enforcement, a more important aspect of the doctrine is the requirement that the legislation establish minimal guidelines to govern its enforcement. Kolender v. Lawson, 461 U.S. 352, 357-358, 103 S.Ct. 1855, 1859 (1983).

The doctrine's rationale was expressed by the New Jersey Supreme Court in Town Tobacconist v. Kimmelman, 94 N.J. 85, 118 (1983):

> "Clear and comprehensible legislation is a fundamental prerequisite of due process of law, especially where criminal responsibility is involved. Vague laws are unconstitutional even if they fail to touch constitutionally protected conduct, because unclear or incomprehensible legislation places both citizens and law enforcement officials in an untenable position. Vague laws deprive citizens of adequate notice of proscribed conduct, and fail to provide officials with guidelines sufficient to prevent arbitrary and erratic enforcement. Papachristou v. City of Jacksonville, 405 U.S. 156, 162 (1972)."

In Grayned v. City of Rockford, 408 U.S. 104, 108-09, 92 S.Ct. 2294, 2298-99 (1972), the Supreme Court explained why vague laws are intolerable:

> "Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory applications. (Footnotes omitted)."

The constitutional prohibition against vagueness derives from the requirement of fair notice embodied in the Due Process Clause. See United States v. Williams, 553 U.S. 333, 339, 128 S.Ct. 1830, 1845 (2008). The doctrine requires that a statute or ordinance be sufficiently precise and definite to give fair warning to an actor that contemplated conduct is criminal. See Kolender, supra 461 U.S. at 357, 103 S.Ct. 1855; Grayned, 408 U.S. at 108, 92 S.Ct. 2294.

Thus, the language of a law is unconstitutionally vague if persons of "common intelligence must necessarily guess at [the] meaning [of the language] and differ as to its application." Connally v. General Construction Co., 269 U.S. 385, 391, 46 S.Ct. 126, (1926); accord Coates v. City of Cincinnati, 402 U.S. 611,

614, 91 S.Ct. 1686 (1971).

The constitutional prohibition against vagueness also protects citizens from the arbitrary and discriminatory enforcement of laws.

A vague law such as 18 U.S.C. § 2511(1)(a) invites disparate judicial treatment by impermissibly delegating subjective enforcement "to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application." Grayned, 408 U.S. at 108-09, 92 S.Ct. 2294; see Kolender, 461 U.S. at 357-61, 103 S.Ct. 1855.

Because legislative bodies are "[c]ondemned to the use of words," courts cannot require "mathematical certainty" in the drafting of legislation. Grayned, 408 U.S. at 110, 92 S.Ct. 2294.

Especially in criminal cases, context matters greatly. The "linguistic analysis" is conducted in "the reality in which the [statutory] provision is to be applied." State v. Warriner, 322 N.J.Super. 401, 408(App.Div. 1999). Therefore, in analyzing the clarity of the regulation, it is expected that a person of ordinary intelligence who is affected by the standard will use common sense and be guided by principles applicable to the context. See San Filippo v. Bongiovanni, 961 F.2d 1125, 1139 (3d Cir.), cert. denied, 506 U.S. 908, 113 S.Ct. 305(1992) (evaluating a vagueness challenge to a standard for discharge from public employment).

In the instant criminal case defendant is charged with wiretapping because he was not a "party" to the intercepted conversations; however, the term "party" is nowhere defined.

Arbitrary enforcement is not merely invited, it is virtually inescapable!

And by virtue of 18 U.S.C. 2510(1) defendant may not be prosecuted for wiretapping a wire communication for which he was the originator.

The term "party" contained in the subject statute creates an unascertainable standard. Coates, supra 402 U.S. at 614, 91 S.Ct. at 1688.

"Vague laws may trap the innocent by not providing fair warning." State v. Cameron, supra, 100 N.J. at 591. This standard leaves the citizen at the mercy of its enforcers. "A violation of an ordinance should not depend upon which enforcement officer, or for that matter which judge," happens to be considering the actor's conduct. State v. Piemontese, 282 N.J.Super. 307, 309 (App.Div. 1995).

The virtually same phrasing was considered and declared unconstitutional in Coates with the Supreme Court voiding a criminal statute for use of the single term "annoy," which criminalized three or more individuals assembling on public sidewalks in a manner "annoying to passersby." See id. at 612 fn. 1, 91 S.Ct. at 1687 fn. 1. The Court found the word "annoy" inherently vague and without notice to the public of the prohibited conduct. See id. at 614, 91 S.Ct. at 1688.

The Court observed that:

> "Conduct that annoys some people does not annoy others. Thus, the ordinance is vague, not in the sense that it requires a person to

> conform his conduct to an imprecise but comprehensive normative standard, but rather in the sense that no standard of conduct is specified at all. As a result, 'men of common intelligence must necessarily guess at its meaning.'(Citation omitted)" Id.; emphasis added.

In the same vein and for the same reason criminal statutes which contain and reflect a single undefined, ambiguous term or phrase are routinely held as unconstitutional on the grounds of either being overbroad and/or void for vagueness. See, e.g. Booth v. Commonwealth, 197 Va. 177, 88 S.E.2d. 916 (1955) (term "improper person" unconstitutionally vague and indefinite in the context of an alcohol interdiction order); Squire v. Pace, 380 F. Supp. 269 (W.D. Va. 1974), aff'd. 516 F. 2d 240 (4th Cir. 1975), cert. denied 423 U.S. 840 (1975) (granting habeas corpus and striking down on vagueness grounds a Virginia statute prohibiting "disorderly conduct" without defining term); Norfolk 302, LLC v. Vassar, 524 F.Supp.2d. 728, 739-40 (E.D. Va. 2007) (finding "noisy" to be a vague term in ABC statute and granting injunctive relief); Langford v. City of Omaha, 755 F.Supp. 1460, 1463 (D.C. Neb. 1989)(finding void for vagueness ordinance prohibiting a noise level which is "unreasonable"); Jim Crockett Promotion v. City of Charlotte, 706 F. 2d 486 (4th Cir. 1983)(affirming District Court finding that the term "unnecessary" in advertising regulation is unconstitutionally vague); Asquith v. City of Beaufort, 911 F.Supp. 974 (D.C.S.C. 1995) (finding void for vagueness a disorderly conduct ordinance prohibiting any noise level which is "willfully disturbing"); State

ex rel. Clemens v. ToNeCa, Inc., 265 N.W.2d 909 (Iowa 1978) (finding void for vagueness a disorderly conduct ordinance using undefined term "indecent" in a statute prohibiting a public nuisance).

The fatal denominator common to the foregoing precedent is use of a single term or phrase incorporating an undefined and ambiguous element.

Herein overbreadth is first demonstrated by the fact that the term "party" in the statute is undefined but conditioned and qualified by portions of 18 U.S.C. § 2510, and that the only recourse taken by the Government to correct this omission was reference to an obscure Tennessee statute, which no federal court has sustained.

Secondly, when viewed from the aspect of the investigating or arresting police officer, a statute which employs the term "party" as the sole basis to permit the officer to arrest has generally been held as overbroad and void for vagueness. See, e.g., Record Revolution No. 6, Inc. v. City of Parma, 638 F.2d 916, 935-36 (6th Cir. 1980) vacated and remanded on other grounds 451 U.S. 1013, 101 S.Ct. 2998 (holding void for vagueness city statute criminalizing sale of items if the seller had "reason to know" the articles would be utilized in drug consumption); Knoedler v. Roxbury Township, 485 F.Supp. 990, 993 (D.N.J.1980) (same; invalidating statute criminalizing sale of items if the seller had "reason to know" the articles would be utilized in drug consumption); New England Accessories Trade Ass'n, Inc. v. Browne, 502 F.Supp. 1245, 1252

(D.C.Conn. 1980) (same; invalidating statute criminalizing sale of items if the seller should have had "reason to know" the articles would be utilized in drug consumption and opining that "the 'reasonably should know' standard" vitiates the specific intent requirement of the statute.)

Accordingly, it follows that the standard of a "party" set forth in this statute is unconstitutionally vague. See, e.g., Tanner v. The City of Virginia Beach, 277 Va. 432, 440, 674 S.E.2d 848, 855 (2008) (holding city noise ordinance void for vagueness because "(t)he references in the ordinance to 'reasonable persons,' * * * do not provide a degree of definiteness sufficient to save the ordinance from the present vagueness challenge); Langford v. City of Omaha, 755 F.Supp. 1460, 1463 (D.C. Neb. 1989) (same; invalidating anti-noise statute which prohibited "unreasonable noise" and opining that phrase is not a precisely well-defined term and is capable of many different interpretations.)

The fact that the term "party" may be interpreted differently among the various officials enforcing the statute is virtually dispositive as to the term being void for vagueness. Lionhart v. Foster, 100 F.Supp.2d 383 (E.D. La. 1999)(holding as overbroad and void for vagueness city statute the making of any noise "likely to disturb, inconvenience or annoy a person of ordinary sensibilities... .")

As the appeals court noted approvingly in City of Parma, supra, a statute is necessarily void for vagueness where it criminalizes "the weakness of an individual's ability to perceive

rather than his criminal intent . . . .” 638 F.2d at 936.

Because these probable cause determinations can only be made by police officers on a subjective basis, 18 U.S.C. 2511(1)(a) is impermissibly vague and overbroad especially when read and applied with the qualifiers and definitions in 18 U.S.C. § 2510. See, Grayned, 408 U.S. at 108-09, 92 S.Ct. 2294; U.S. Labor Party v. Pomerleau, 557 F.2d 410, 412 (4th Cir. 1977).

The imposition of criminal penalties for the violation of a statute cannot rest on the use of subjective standards indefinite and imprecise in both meaning and application. Id.

Lastly 18 U.S.C. 2511(1)(a) imposes strict liability because it contains no scienter requirement. This exposes the innocent person who intercepts a wire communication. See Morales, supra, 527 U.S. at 64, 119 S.Ct. at 1849 (where the Court concluded that an ordinance was void for vagueness, which punished loitering “with no apparent purpose.” The Court noted that the ordinance contained no *mens rea* requirement, reached innocent conduct, provided police officers with too much discretion, was inherently subjective, and required no harmful purpose on the part of the accused.”); see, also, Village of Hoffman Estates v. Flipside, 455 U.S. 489, 499, 102 S.Ct. 1186 (1982) (stating that “a *scienter* requirement may mitigate a law's vagueness, especially with respect to the adequacy of notice to the complainant that his conduct is proscribed.”)

Indeed, “[i]n the absence of a scienter requirement ... [a] statute is little more than ‘a trap for those who act in good faith.’ ” Colautti v. Franklin, 439 U.S. 379, 395, 99 S.Ct. 675,

685 (1979).

VI. CONCLUSION

WHEREFORE, based upon the foregoing facts and argument, established by clear and convincing evidence, Defendant KIRK EADY has demonstrated he is entitled to bail pending appeal by continuation of his pre-trial $100,000 unsecured personal recognizance bond.

Respectfully submitted,

LAW OFFICES OF THOMAS R. ASHLEY
ATTORNEYS FOR DEFENDANT EADY

By: */s/ THOMAS R. ASHLEY*
_____
THOMAS R. ASHLEY, ESQ.

Dated: OCTOBER 19, 2015