No. _____

In the
Supreme Court of the United States

JON CASCELLA,

Petitioner,

v.

UNITED STATES,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the First Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether permitting a blanket claim of Fifth Amendment privilege and total exclusion of a confidential informant's testimony without independent inquiry is constitutional error and whether this Court should prescribe a uniform practice to be followed by all circuits.

2. Whether the First Circuit strayed too far from the rule in Brady v. Maryland when it failed to hold the government's failure to disclose relevant and material cell phone toll records violated Brady and due process and where the government failed to show harmlessness beyond all reasonable doubt.

3. Whether improper arguments in the government's closing violated the Fifth and Sixth Amendment.

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PETITION FOR A WRIT OF CERTIORARI

Jon Cascella respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit in this case.

OPINION BELOW

The First Circuit's opinion is reported at United States v. Cascella, 943 F.3d 1 (1st Cir. 2019). (App., infra, 1a-8a.)

JURISDICTION

The First Circuit had jurisdiction under 28 U.S.C. § 1291 and entered judgment November 12, 2019. Mr. Cascella did not seek rehearing. Justice Breyer's Order of January 23, 2020 granted Petitioner's application, in docket number 19A820, to extend time to file a petition until April 10, 2020. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1). This petition is timely under Supreme Court Rule 13.

RELEVANT CONSTITUTIONAL PROVISIONS

Fifth Amendment

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Sixth Amendment

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

STATEMENT OF THE CASE

Mr. Cascella appeals his 120-month sentence and final judgment of conviction entered in the United States District Court for the District of Rhode Island, following guilty verdicts rendered on December 5, 2017, after a six-day jury trial on nine counts, including four counts of distributing methamphetamine, two counts of distributing over five grams of methamphetamine, one count of being a felon in possession of a firearm, one count of possessing a firearm in furtherance of drug trafficking, and one count of possession with intent to distribute more than five grams of methamphetamine.[1] Mr. Cascella represented himself at trial, *pro se*, and at certain times with hybrid representation by appointed counsel.

He was arrested on May 5, 2018 following six sales of methamphetamine over the course of five weeks. The first five sales were to a Warwick undercover officer, introduced to Mr. Cascella by a confidential informant, who sometime after the first transaction told the undercover Mr. Cascella was interested in purchasing a gun. In the

[1] In violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(C) and (b)(1)(B); 18 U.S.C. §§ 922(g)(1) and 924(a)(2); 18 U.S.C. § 924(c)(1)(A); 21 U.S.C. §§ 841(a)(1) and (b)(1)(B).

final video-recorded sale to an undercover ATF agent, Cascella exchanged 7 grams of methamphetamine for a .380 Bryco pistol and $600 cash. All but one of the transactions were audio or videotaped, and certain calls before and after the transactions were also recorded. Mr. Cascella did not testify, but defended on grounds he had been a mere drug user who sold to fund his habit, that he had been entrapped by the confidential informant, a fellow drug user and customer, and that the government had fabricated the evidence and destroyed, altered, and withheld complete cell phone toll records relevant to his defense. In none of the recorded transactions did Mr. Cascella himself ask for a weapon or ask if the undercover wanted drugs, and all calls, and all discussions regarding exchanging a weapon for methamphetamine as part of the last transaction, were initiated by the undercover officer. Following his arrest, a search of the detached garage where Mr. Cascella lived revealed approximately 7 grams of methamphetamine. In his post-arrest interview, Mr. Cascella admitted he had wanted a gun because someone had robbed him of methamphetamine he had possessed at home, that he possessed methamphetamine at home at that time, that he had been buying from his supplier for the last six months, and that he had four customers.

The confidential informant did not testify for the prosecution, which relied solely on testimony from law enforcement officers.

Warwick Detective Perkins testified he had reason to believe Mr. Cascella wanted to purchase a firearm following conversations with the confidential informant, over the defendant's hearsay objections. Perkins also testified he had only spoken to Mr. Cascella once prior to a recorded March 30 telephone call with him. Two of Perkins' calls with Cascella after March 30 were not recorded because of a supposed recording device malfunction. When Perkins was asked why he believed the confidential informant, when the Warwick police had no record of Mr. Cascella ever having sold drugs, he answered that the informant, whom he admitted had a criminal record, had been deemed a reliable informant in the past. The court, outside the jury's presence, admonished Mr. Cascella for questions regarding the confidential informant, and Cascella pointed out the informant had been out of prison a mere 30 days before his participation in this case, that he had set Mr. Cascella up by selling him a grenade, and that the informant was the middle man who had induced him into wanting a firearm. (Joint Appendix ("JA") 2:124.). The informant had told Mr. Cascella that "all they had was a gun and 600 to buy my drugs. I never wanted to buy the gun." Id. He also proffered that contrary to the government's claim that the informant was not involved in any of the transactions, the informant was, in fact, involved "in every single day of every transaction." Id. at 125. Cascella also suggested the CI had a role in quelling his suspicions that Perkins was a

cop. Id. Cascella also proffered the informant would say it was the informant who "brought up that his friend works at a gun – he was a gunsmith at a gun show store, so he brings the gun in and plants it in my mind." Id. at 127. The government countered that after mid-March, "the CI was cut out of all future actions." Id. at 128. After March 29, the informant did advise that Mr. Cascella wanted a gun. Id. The district court then noted that if the conversations between Cascella and the informant were as described, it "seems right on point to me" that the informant was "directly relevant to the defense" of entrapment. Id. at 129-30. A defense subpoena for the informant issued that day.

The next day, the government introduced into evidence a forensic extraction of cell data from Mr. Cascella's phone that covered a mere five days, from April 20 to May 4, 2017. Mr. Cascella attempted to introduce the spreadsheet detailing his cell phone calls over a longer period of time, which the government produced to him in discovery, later discovered to be an incomplete summary of the actual cell phone toll records. (J.A. 2:284.). The government objected on grounds the toll record summary document it had produced to the defense was incomplete and unauthenticated, and Mr. Cascella countered that the spreadsheet demonstrated they were hiding evidence because he knew calls were missing from the sheet. Id. The document was excluded, and the court said it would reconsider if Cascella subpoenaed records or

witnesses that could authenticate the documents. Mr. Cascella asked the prosecutor in court "Who did he go to get it? Can you tell me that, or are you going to hide that from me." Id. at 228. The district court did not require the government to provide the information that would have permitted Cascella to authenticate or determine the provenance of the spreadsheet. Id.

The following Monday, when trial resumed, counsel appointed to advise the confidential informant regarding his Fifth Amendment privilege appeared at a bench conference. The court informed the attorney the informant may potentially "wish to invoke the Fifth with respect to his testimony" because he had also provided information regarding Mr. Cascella's supplier. (Id. at 356.). The attorney conferred with the informant, and returned to report the informant would invoke his Fifth Amendment right not to answer questions because he was "hypothetically exposing himself to some criminal culpability should he answer questions, he also is currently on a lengthy period of probation in the Superior Court" and could be exposed to a probation violation and thus would invoke the privilege "as to any questions posed to him." (Id. at 392-93.)

The government urged he could not be called. Standby counsel for Mr. Cascella objected to the exclusion and said of Mr. Cascella, "he wants Mr. Bennett to take the stand and inquiry to be made." (Id.) The

Court observed the informant's testimony was relevant to "whether he was asking at the behest of the ATF" and whether he "suggested to the ATF that he could get Mr. Cascella to purchase a firearm" and was relevant to the entrapment defense and whether he was acting as an agent of the ATF and "I'm not certain that the answers to those questions implicate the Fifth Amendment privilege." (J.A. 2:393-94.)

Informant's counsel argued any testimony would involve incrimination, even though counsel could not "forecast what, if anything, could come of his testimony." (Id.). The court ruled that it had conducted adequate investigation by appointing Fifth Amendment counsel and accepting counsel's representation that the informant would invoke a blanket Fifth Amendment claim. (J.A. 2:397-98.). The court made virtually no detailed inquiry of counsel, nor did he conduct any inquiry whatsoever of the informant, regarding questions the informant could or could not answer. The court was aware that the informant had been called in and interviewed by the prosecutor and federal agents just one day prior, on a Sunday, and made virtually no inquiry into the topics the informant felt comfortable enough to discuss with the prosecutor just a few hours earlier. (J.A. 2:441:22-2:442:8.)

In closing arguments, the government repeatedly called Mr. Cascella a drug dealer, and likened him to drug dealers:

"In dealing with the evidence in this case, let's start with drug dealing. What do drug dealers do? Well, the first thing they do is they deal drugs, and that's what this Defendant did."

(2:498.)

"So what do drug dealers do? Drug dealers take care not to be found out by law enforcement. You can't deal drugs if you're discovered." (2:499.)

Referring to Mr. Cascella avoiding hand-to-hand transactions and inquiring whether the Detective and Agent were undercover: "These are all the things that drug dealers do." (Id.)

"Now what do drug dealers do? Drug dealers have customers who buy their drugs. You can't really be a drug dealer without a customer base. So you heard the Defendant himself say on two occasions that he had drug customers." (2:500.)

"What else do drug dealers do? Well, they get their drugs from somebody. They get their drugs from someplace. You heard testimony, including the Defendant's own statements, that he obtained methamphetamine from a supplier." (Id.)

"Look, the Defendant was a drug dealer, and he sold methamphetamine to undercover officers." (2:501.)

"The drug customer has to ask, Will you sell me meth? The drug dealer has to agree or not agree. In this case, he agreed every time he was asked." (2:503.)

Regarding the March 29 transaction:

"Detective Perkins gave Jon, … gave Jon $100, and Jon, the Defendant, directed him to the bathroom. All this is consistent with drug dealing." (2:505.)

Regarding the April 4 transaction: "The April 4th transaction was a transaction where the Defendant revealed many aspects of his being a drug dealer." (2:507.) "Let's talk about the things he said in that SUV establishing he's a drug dealer." (Id.)

Regarding Cascella's statement that he could get Chau "whatever quantity of meth he wants," the government argued, "That's a drug dealer saying I can get whatever I need, whatever quantity of meth I need to make this transaction happen." (2:508.)

Later, "He says that his stuff is the best quality and he sells it for the lowest price. He's selling. This is what dealers do. He is transacting. He is selling. He is bolstering his knowledge, his ability." (2:509.)

Then, "He's a quality dealer. He's not out on the corner selling it, but he has five customers." (2:510.)

And, "This is learned behavior, concealment of what you're doing. This is not his first rodeo. He's been doing this a while." (2:510.)

Finally, "The undercover officers in this case presented a drug dealer an opportunity to do what the drug dealer does: Deal drugs. And he dealt drugs." (2:518.) "He was doing this of his own accord because he's a drug

dealer. He dealt drugs because he's a drug dealer and he wanted to deal drugs." (Id.)

Referring to the April 29 transaction with Perkins, the government argued as follows:

> He [Detective Perkins] didn't want to go into bathrooms. He didn't want to get into that, so he kept referencing that in subsequent calls and in subsequent meetings. Not once do you hear the Defendant, What are you talking about, what bathroom?
>
> Defendant is telling you that the March 29th transaction occurred. Defendant is telling you that that phone call occurred.

(2:504.)

At sentencing and the hearing on Mr. Cascella's motion for a new trial, Mr. Cascella proffered T-Mobile records produced to defense counsel post-trial pursuant to a subpoena. He asserted the government's summary spreadsheet of calls produced in discover omitted approximately 30 hours of relevant and material call data reflecting numerous calls with the confidential informant on the same day as contacts with the undercover, and that the government failed to produce the requested original toll records it had received from T-Mobile. (3:337.). He proferred that the evidence corroborated his defense that the CI was complicit throughout the offense, had extensive involvement contrary to the government's witnesses, and supported his defense of entrapment. The court conceded they "would have been useful, I guess, in examining the government agent with respect to the number of contacts or calls and so forth." (3:334.). Cascella argued the 30 hours of omitted calls in material produced to him would also have supported

his defense that the government was seeking to hide evidence material to his defense and to entrap him. (3:353.). When asked why the original toll records were not provided to the defense, the government responded that it had received the spreadsheet from T-Mobile. "It comes as a spreadsheet from T-Mobile. What we got we turned over." (3:348.)

Standby counsel failed to express any incredulity regarding the government's representation, or to point out that if the spreadsheet originated from T-Mobile, then apparently T-Mobile's subscriber name for Detective Perkins' number was "Det. Perkins," and provided this in the column titled "Dialed Name," and occasionally provided the type of communication rather than the dialed name in that column. See Doc. 86-3 at page 4.

Standby counsel also failed to express any incredulity regarding the fact that the spreadsheet, which the government represented came from T-Mobile, bore not a single indication that T-Mobile had provided it, nor any T-Mobile insignia. Cascella argued he was materially prejudiced: "I thought I could present it to my case. I could not admit it into evidence because he said it's incomplete." (3:355-56.)

Mr. Cascella appealed his convictions on grounds the exclusion of the confidential informant's testimony was constitutional error, on grounds the failure to disclose cell toll records violated Brady v. Maryland and due process, and on grounds improper arguments in closing violated the Fifth and

Sixth Amendments. Oral argument took place September 4, 2019. The First Circuit's decision affirming the convictions issued November 12, 2019. Mr. Cascella did not seek rehearing.

This Petition follows.

REASONS FOR GRANTING THE PETITION

This Court should grant *certiorari* to hold that (a) the total exclusion of a confidential informant's testimony and a grant of blanket Fifth Amendment privilege without conducting an independent and detailed inquiry is constitutional error that was not harmless beyond all reasonable doubt in this case, and this Court should articulate a uniform standard for a particularized Fifth Amendment inquiry to be conducted in all circuits, where currently the practices vary, (b) the First Circuit's ruling strays too far from the rule articulated in Brady v. Maryland, where the government's failure to disclose relevant and material telephone toll records violated Brady and Due Process and was not harmless beyond all reasonable doubt, and (c) improper arguments in the government's closing violated the Fifth and Sixth Amendments and were not harmless beyond reasonable doubt.

I. PERMITTING A BLANKET CLAIM OF FIFTH AMENDMENT PRIVILEGE AND TOTAL EXCLUSION OF INFORMANT TESTIMONY WITHOUT INDEPENDENT INQUIRY IS CONSTITUTIONAL ERROR; THIS COURT SHOULD PRESCRIBE A UNIFORM PRACTICE FOR ALL CIRCUITS.

The district court's total exclusion of the confidential informant's testimony, allowing a blanket claim of Fifth Amendment privilege, was

constitutional error. The ruling violated Mr. Cascella's right to Due Process, his Sixth Amendment rights to compulsory process and confrontation, and right to a fair trial. The total exclusion unconstitutionally deprived Mr. Cascella of a meaningful opportunity to present a complete defense. And the district court should have, at minimum, conducted a voir dire to determine the scope of the informant's claim of immunity and the questions that would be posed to him, and whether non-privileged testimony could have been elicited on a question-by-question basis before the jury. Mr. Cascella objected to the exclusion; the constitutional error is reviewed de novo. United States v. Villar, 586 F.3d 76, 84 (1st Cir. 2009); (2:393 (Cascella objecting to the exclusion, requesting that Mr. Bennett "take the stand" and "inquiry to be made" and the Court can "appropriately instruct the jury to avoid any potential issues.").) The district court's failures were an abuse of discretion as well as constitutional error.

Whether rooted in the Fifth Amendment right to Due Process, or the Sixth Amendment rights to compulsory process and confrontation, "the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'" Holmes v. South Carolina, 547 U.S. 319, 324 (2006); Chambers v. Mississippi, 410 U.S. 284, 302 (1973) ("Few rights are more fundamental than that of an accused to present witnesses in his own defense.") The right to a complete defense is "abridged by evidence rules that 'infring[e] upon a weighty interest of the accused' and are 'arbitrary' or

'disproportionate to the purposes they are designed to serve.'" Holmes, 547 U.S. at 324. So when a rule or evidentiary ruling excluded important defense evidence but "did not serve any legitimate interests," it is arbitrary. Id. at 325; Washington v. Texas, 388 U.S. 14, 19 (1967) (right to present own witnesses to establish defense is fundamental element of due process and may not be curtailed by arbitrary rules). The Sixth Amendment encompasses not only the right to call witnesses, but also right to put them on the stand. United States v. Melchor Moreno, 536 F.2d 1042, 1046 n.3 (5th Cir. 1976).

A witness' Fifth Amendment protection against self-incrimination "must be confined to instances where the witness has reasonable cause to apprehend danger from a direct answer." Hoffman v. United States, 341 U.S. 479, 486 (1951). A witness may not avoid questioning "merely because he declares that in doing so he would incriminate himself – his say-so does not of itself establish the hazard of incrimination. It is for the court to say whether his silence is justified." Id. (citing Rogers v. United States, 340 U.S. 367 (1951)); United States v. Castro, 129 F.3d 226, 229 (1st Cir. 1997); Melchor Moreno, 536 F.2d at 1046 ("courts cannot accept *Fifth Amendment* claims at face value"). While a witness is not required to prove the hazard of answering questions in a way that surrenders the privilege, it should "be evident from the implications of the quest, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result."

Hoffman, 341 U.S. at 486-87. For example, where answers to questions could disclose that a witness was engaged in proscribed criminal activity, or would tend to incriminate him, the privilege is legitimately invoked.

The responsibility for deciding whether invocation of the privilege is justified rests squarely on the district judge's shoulders. See, e.g., United States v. Castorena-Jaime, 285 F.3d 916, 931 (10th Cir. 2002); Hoffman, 341 U.S. at 487 (judge's appraisal of the invocation must be governed by personal perception of case as well as by facts in evidence); Melchor Moreno, 536 F.2d at 1046 (privilege ultimately a matter for the court to decide).

Numerous jurisdictions have adopted the practice of examining the witness outside the presence of the jury. The district court in Rivas Macias "properly attempted to employ that practice" in that case. United States v. Rivas Macias, 537 F.3d 1271, 1276 n.5. (10th Cir. 2008). The Fifth Circuit in United States v. Melchor Moreno also approved of an *in camera* process with the prospective defense witness invoking privilege, which was recorded and sealed, although it recognized the process was questionable for excluding defense counsel. Melchor Moreno, 536 F.2d at 1047 (noting lack of authority on question and listing cases from Second Circuit and Fourth Circuit that involved an *in camera* presentation for the Hoffman inquiry). "No standardized procedure exists for making this determination." Rivas Macias, 537 F.3d at 1276 n.5. The Fifth Circuit noted a divide in authority however,

because the Third Circuit has indicated *in camera* proceedings could violate the privilege. Id.

In some circumstances, '[i]t is impossible to say from mere consideration of the questions propounded, in the light of the circumstances disclosed, that they could have been answered with entire impunity." Emspak v. United States, 349 U.S. 190 (1955). However, where circumstances make clear that a question can, indeed, be answered with entire impunity, and answers could not possibly tend to incriminate the witness, invocation of the privilege should not be permitted. Rivas Macias, 537 F.3d at 1279.

In Melchor Moreno, where, as in Mr. Cascella's case, the government played a role in having its own confidential informant assert the privilege when subpoenaed by a defendant who sought to raise an entrapment defense, the Fifth Circuit held that the district court "gave too broad a scope to the privilege" for the informant and held where there was no finding the witness could legitimately refuse to answer "all" relevant and material questions, "[a] blanket refusal to testify is unacceptable." Melchor Moreno, 536 F.3d at 1048. The Fifth Circuit noted the witness had failed to carry his burden of establishing entitlement to the privilege "as to the entire subject matter of his prospective testimony," nor did he explain why negotiations about a heroin deal in which he was acting in cooperation with DEA agents would expose him to prosecution. Id. at 1049.

In a similar Second Circuit case, United States v. Anglada, the defendant was unable to call an informer who allegedly entrapped him in a critical conversation, in circumstances where the informant was protected against a criminal charge because he was acting at the Government's request, and in remanding on other grounds, the Second Circuit instructed the judge to "take a harder look at any blanket assertion of privilege and also at the possibility of allowing some carefully phrased, limited questions by Anglada's counsel." United States v. Anglada, 524 F.2d 296, 300 (2d Cir. 1976).

The First Circuit has held a taxpayer could be subject to contempt proceeding for making "solely a blanket objection" to IRS questions and noted that if the taxpayer objected on a question-by-question basis, the court "must evaluate the validity of such objection on the same particularized basis." United States v. Allee, 888 F.2d 208, 214 (1st Cir. 1989).

The Sixth Circuit has also held that a government agent "could not legitimately fear prosecution" answering questions regarding his cooperation, and that the district court erred when it improperly "simply accepted [the agent's] blanket assertion of the fifth amendment" and "did not undertake a particularized inquiry" as to "each of the posed questions." United States v. Zappola, 646 F.2d 48, 53 (6th Cir. 1981).

The Eleventh Circuit, in United States v. Argomaniz, also held the required inquiry is best made in an *in camera* proceeding, where the claimant

can "substantiate his claims of the privilege and the district court is able to consider the questions asked." United States v. Argomaniz, 925 F.2d 1349, 1355 (11th Cir. 1991); see also United States v. Taylor, 652 Fed. Appx. 902, 909 (11th Cir. 2016) ("district court must make a particularized inquiry," and "[w]here parts of a witness' testimony would be material and not incriminating, the defendant must be allowed to call the witness, who should be allowed to invoke the privilege '[o]nly as to genuinely threatening questions.")

The D.C. Circuit, however, does not appear to require a particularized inquiry before permitting a blanket assertion of privilege. See United States v. Thornton, 733 F.2d 121 (D.C. Cir. 1984).

Here, the district court impermissibly and improperly accepted the Fifth Amendment privilege assertion at face value, and failed to conduct any particularized inquiry with the prospective witness, whether by voir dire outside the jury's presence, or by in camera interview. Furthermore, even if the failure to conduct an inquiry of the witness could be excused, the court failed make its own findings to justify the invocation. This failure deprived the defendant of due process, compulsory process, confrontation rights, and a fair trial, and it deprives appellate courts of meaningful review. Furthermore, it undermines confidence in the criminal justice system when the prosecution can deprive a defendant of a witness by orchestrating the invocation of privilege by its own informant.

The confidential informant's testimony was material and relevant to Mr. Cascella's entrapment defense, particularly with respect to the gun, even if his role was more limited after Detective Perkins initiated communications with Cascella. "If a government agent truly 'implants the criminal design in the mind of the defendant,' United States v. Russell, 411 U.S. 423, 426 [] (1973), and then disappears, the requirements of entrapment can still be met." Melchor Moreno, 536 F.2d at 1051. Here, the government conceded the informant had some role throughout the process and conceded he was paid not at the conclusion of the mid-March controlled buy, but at the conclusion of Mr. Cascella's case. (2:418.)

And here, there was substantial evidence that Mr. Cascella knew absolutely nothing about guns, was reluctant and ambivalent about getting a gun, reluctant to hold it, and there was virtually no independent evidence that he had ever possessed a gun before, or that he was predisposed to commit a weapons offense. There was evidence the CI had an interest in providing Mr. Cascella with weapon-like items he could report to law enforcement. (2:129) (CI advised detective Cascella had a smoke grenade). The evidence was not so overwhelming that it showed beyond reasonable doubt that the deprivation of the informant's testimony was harmless. "[B]efore a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." Chapman v. California, 386 U.S. 18, 24 (1967).

Here, the district court's procedure, which relied entirely upon Mr. Dawson's representations, was improper and an abuse of discretion. The Court should have made an inquiry of Mr. Bennett himself, and examined the particular areas of inquiry that would be put to Mr. Bennett. First, Mr. Dawson himself indicated that Bennett was only "hypothetically exposing himself" (2:392) and he was speculating that all questions would lead to inquiry into the CI's history with Mr. Cascella (presumably involving drug use), because he expressly stated "as I stand here now I've had an interview this morning with him, I can't possibly forecast what, if anything, could come of his testimony." (2:394.) Second, Mr. Dawson was himself uncertain, and was clearly speculating, when he asserted Bennett's "answers to certain questions *may* amount to a waiver." (2:395.)

Certainly Mr. Bennett could have competently testified and answered questions about the duration and details of his relationship with the Warwick police department, questions about his criminal history, questions about whether he was also assisting in the investigation of Bergeron, questions about whether he was paid, and how, and when, by Warwick police or ATF, questions about his motives and benefits if he secured convictions of either Cascella or Bergeron, questions about how many times he called the Detective, questions about whether he encouraged or implanted the idea of purchasing a gun with Mr. Cascella, whether he hoped to gain any benefit by informing them about the grenade he had provided Mr. Cascella, whether he

vouched for or persuaded Cascella that Detective Perkins was not an undercover cop, and about the numerous topics he discussed with the prosecutor just the day before, all without venturing into the topic of his substance abuse or other criminal activity. The range of non-incriminating questions Bennett could have been asked is vast, and the court could easily have limited inquiry into the far more narrow topic of Mr. Bennett's drug use. The government was well aware of the drug use, and would not need it to be before the jury, nor would it be entitled to use that fact as Mr. Bennett could assert the privilege as to that narrow topic.

The informant could answer countless questions without any fear of incrimination, and invoke the Fifth if a question implicated his substance abuse.

The First Circuit failed to find error in the district court's conclusion Mr. Cascella would suffer no prejudice because he could testify unrebutted by Mr. Bennett. This presumes, without basis, that Mr. Bennett would rebut, rather than corroborate Mr. Cascella. Certainly corroboration of either Mr. Cascella's theory of defense or testimony, or facts contrary to Detective Perkins testimony, would provide Mr. Cascella with a substantial defense – and he was deprived of it here. "Disbelief of testimony is not the equivalent of proof of facts contrary to that testimony." Commonwealth v. Haggerty, 400 Mass. 437, 437-38 (1987).

Mr. Cascella should have been entitled to let the jury evaluate the informant's testimony and demeanor under adversarial questioning in evaluating Mr. Cascella's defense and Detective Perkins' credibility when Perkins stated he considered the informant reliable, and that the information from the informant was true. And the court's reasoning unreasonably burdened Mr. Cascella's right not to testify. Mr. Cascella has a constitutional right to present evidence without taking the stand.

Certainly Mr. Cascella's case, whether he testified or not, would have been stronger if a defense witness, and the government's own informant, rebutted what the Detective testified about the number of calls and contacts between them, or was otherwise shown to be unreliable or not credible. Mr. Cascella would have had a more substantial entrapment defense, even if Mr. Bennett initially offered unhelpful testimony, if Mr. Bennett's credibility were undermined by counsel.

In sum, the constitutional error was sufficiently serious to warrant reversal. The First Circuit utterly failed to require the trial court to follow any detailed inquiry with either counsel or the informant to ensure that the blanket assertion of privilege was constitutional, and because the circuits vary widely in the procedures for evaluating blanket invocations of privilege, this Court should grant certiorari to prescribe a uniform standard.

II. THE FIRST CIRCUIT STRAYED TOO FAR FROM THE RULE IN BRADY v. MARYLAND; THE FAILURE TO DISCLOSE RELEVANT AND MATERIAL TOLL RECORDS VIOLATED BRADY AND DUE PROCESS.

The First Circuit has strayed too far from the rule in Brady v. Maryland in holding that the failure to produce phone toll records was harmless because their impeachment value was cumulative and regarded a collateral matter. Mr. Cascella amply demonstrated his newly discovered toll records from T-Mobile established that the government had failed to disclose requested relevant and material evidence -- received by the government pursuant to its administrative subpoena -- to the defense in discovery. The evidence was both relevant to Mr. Cascella's defense and material in that it would have permitted Mr. Cascella to impeach contrary testimony by government witnesses and to support his entrapment defense, particularly as to the weapons transaction, and his claim that the CI was involved in the course of dealings he had with Detective Perkins.

In Brady v. Maryland, the Supreme Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process," "irrespective of the good faith or bad faith of the prosecution." Brady v. Maryland, 373 U.S. 83, 87 (1963). The obligation to disclose applies to evidence "material either to guilt or to punishment." Id. Brady's disclosure obligation also extends to impeachment evidence. Giglio v. United States, 405 U.S. 150, 154 (1972), United States v. Bagley, 473 U.S. 667, 676

(1985). It also applies to evidence in the possession of law enforcement. Kyles v. Whitley, 514 U.S. 419, 437-38 (1995).

Withheld evidence is "material" if there is a "reasonable probability," i.e., a "probability sufficient to undermine confidence in the outcome," such that disclosure would have let to a different result at trial or in punishment. United States v. Bagley, 473 U.S. at 682. It does not require a defendant to demonstrate it was more likely than not he would have been acquitted. Kyles, 514 U.S. at 434.

The "materiality standard for Brady claims is met when 'the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.'" Banks v. Dretke, 540 U.S. 668, 698 (2004) (quoting Kyles).

Where evidence can be used to contradict a key prosecution witness, courts have found a Brady violation. In Haley v. City of Boston, the defendant, who had been imprisoned on a murder conviction for thirty-four years, obtained a new trial on a successful Brady claim when a public records request revealed evidence that two key prosecution witnesses made initial statements that did not match their trial testimony and in part supported his version of events. Haley v. City of Boston, 657 F.3d 39, 49 (1st Cir. 2011). The First Circuit, addressing qualified immunity, held the defendant could assert a 42 U.S.C. § 1983 claim on grounds the prosecution violated due process when they engaged in deliberate deception, intentionally concealing

evidence and permitting false testimony at trial, citing Mooney v. Holahan, 294 U.S. 103 (1935) ("Deliberate concealment of material evidence by the police, designed to grease the skids for false testimony and encourage wrongful conviction, unarguably implicates a defendant's due process rights"). The Haley court noted there was "no doubt that this due process protection applies to police officers who deliberately keep the defense in the dark about important evidence." Haley, 657 F.3d at 49.

Not only would the new T-Mobile toll record material have been material and relevant in cross-examining and undermining the agents' claims that the CI had no involvement in the case after the initial controlled buy, but as Mr. Cascella argued, it was a Brady violation to fail to produce toll records and to instead produce summaries omitting relevant and material calls. (3:343, :348, :345 ("It's discovery violations, your Honor.").)

Indeed, stand-by counsel pointed out that the government's own discovery cover letter of November 9, 2017, concedes the existence of toll records received from the government by T-Mobile reflected call times in "GMT as originally provided by the carrier" (Doc. 99-1 at (2)), and that the material actually provided to Mr. Cascella in discovery was instead a "summary" "in the form of spreadsheet or summary sheet" and indeed, "not the original records form T-Mobile, the service provider for that cellphone." (3:339.) And "[i]n the summary, there is a gap of approximately 30 hours

where there are not any calls, text messages, anything that's listed," on March 29, the date of the first transaction with Detective Perkins.

Furthermore, the actual T-Mobile records would have been material and relevant because he could have actually introduced them as corroborating evidence at trial, and instead, "[h]e attempted during the trial to introduce into evidence this toll records summary, for lack of a better term, and when he did so was objected to by the government. The Court sustained the objection. So in the end there were no records of his cellphone usage before the jury." (3:340.)

Stand-by counsel argued "the government had those records, did not provide those originals, but provided the summary that has the 30-hour gap." (3:341.) The failure to produce the records, and the government's failure to candidly acknowledge to the court that it had received but not produced T-Mobile toll records, warrants reversal of the convictions, either on grounds of the Brady violation or as a sanction for misconduct.

Had Mr. Cascella had been provided with his toll records prior to trial, he would have been able to use them to impeach and to shed light on Detective Perkins' testimony that he had only had one prior call with Mr. Cascella before the March 30 call. (2:75.) The T-Mobile records show there were three contacts between Perkins and Cascella that day, and that Perkins' call was in close proximity to contact by the informant. Cascella received a text from the informant t at 19:11:24 coordinated universal time (UTC) (i.e.,

15:11:24 EST) and then 35 seconds later, at 19:46:04, received an incoming 50-second-long voice call from Detective Perkins. Twenty-three minutes later, Mr. Cascella received a text from Detective Perkins at 20:09:19 UTC, followed almost immediately by a 25 second voice call from Detective Perkins. (Doc. 106-1 at 6 of 8.)

The toll records could also have been used to question Detective Perkins regarding his claim that Mr. Bennett was not involved in the investigation after the controlled buy, because they show that Bennett and Perkins frequently had contacts or calls with Cascella on the same critical transaction or investigation call dates, in close proximity to each other. They were admissible evidence that showed a pattern of contact that could have led the jury to doubt Mr. Perkins' testimony that Mr. Bennett was not involved in the investigation.

Sample pages from those toll records are as follows:

04/04/2017	01:49:33		moc	Outgoing	14019997316	17726335729	17726335729	17726335729	310260776394656	14724001664690	Abnormal Completion		NVTAS004
04/04/2017	02:34:29	53	mtc	Incoming	14017716116	14019997316	14019997316	14019997316	310260776394656	14724001664690	Completed Successfully	11	NVTAS004
04/04/2017	04:56:12	1	mtc	Incoming	14019190943	14019997316	14019997316	14019997316	310260776394656	14724001664690	Completed Successfully	02A;11	NVTAS004
04/04/2017	04:56:44	1	moc	Outgoing	14019190943	18056377249	18056377249	14695319999	310260776394656	14724001664690	Completed Successfully	02A	NVTAS004
04/04/2017	05:21:22	3	mtc	Incoming	14019190943	14019997316	14019997316	14019997316	310260776394656	14724001664690	Completed Successfully	02A;11	NVTAS004
04/04/2017	05:21:54	3	moc	Outgoing	14019190943	18056377249	18056377249	14695319999	310260776394656	14724001664690	Completed Successfully	02A	NVTAS004
04/04/2017	05:37:08		mtc	Incoming	14019190943	14019997316	14019997316	14019997316	310260776394656	14724001664690	Abnormal Completion	11	NVTAS004
04/04/2017	07:26:22		mtc	Incoming	15153610130	14019997316	14019997316	14019997316	310260776394656	14724001664690	Abnormal Completion	11	NVTAS004
04/04/2017	09:24:45	196	moc	Outgoing	14019997316	15153610130	15153610130	15153610130	310260776394656	14724001664690	Completed Successfully		NVTAS004
04/04/2017	12:17:47	3	mtc	Incoming	14015458631	14019997316	14019997316	14019997316	310260776394656	14724001664690	Completed Successfully	02A;11	DATAS010
04/04/2017	12:18:17	3	moc	Outgoing	14015458631	18056377249	18056377249	14695319999	310260776394656	14724001664690	Completed Successfully	02A	DATAS010
04/04/2017	12:18:40	26	moc	Outgoing	14019997316	14015458631	14015458631	14015458631	310260776394656	14724001664690	Completed Successfully		DATAS010
04/04/2017	12:21:35	19	moc	Outgoing	14019997316	14015458631	14015458631	14015458631	310260776394656	14724001664690	Completed Successfully		DATAS010
04/04/2017	12:51:39	7	mtc	Incoming	17726335729	14019997316	14019997316	14019997316	310260776394656	14724001664690	Completed Successfully	029;11	DATAS010
04/04/2017	12:51:46	7	moc	Outgoing	17726335729	18056377249	18056377249	14695319999	310260776394656	14724001664690	Completed Successfully	29	DATAS010
04/04/2017	13:01:54	20	moc	Outgoing	14019997316	4013393269	4013393269	14013393269	310260776394656	14724001664690	Completed Successfully		DATAS010
04/04/2017	13:10:37	5	mtc	Incoming	17726335729	14019997316	14019997316	14019997316	310260776394656	14724001664690	Completed Successfully	02A;11	DATAS010
04/04/2017	13:11:07	5	moc	Outgoing	17726335729	18056377249	18056377249	14695319999	310260776394656	14724001664690	Completed Successfully	02A	DATAS010
04/04/2017	13:14:53	319	mtc	Incoming	17726335729	14019997316	14019997316	14019997316	310260776394656	14724001664690	Completed Successfully	11	DATAS010
04/04/2017	13:15:37	4	mtc	Incoming	14013393269	14019997316	14019997316	14019997316	310260776394656	14724001664690	Abnormal Completion	Completed	041;2A;11	DATAS010
04/04/2017	13:16:06	4	moc	Outgoing	14013393269	18056377249	18056377249	14695319999	310260776394656	14724001664690	Completed Successfully	02A	DATAS010
04/04/2017	15:33:04	335	moc	Outgoing	14019997316	19782041789	19782041789	19782041789	310260776394656	14724001664690	Completed Successfully		DATAS010
04/04/2017	15:39:25		moc	Outgoing	14019997316	14016010059	14016010059	14016010059	310260776394656	14724001664690	Completed Successfully		DATAS010
04/04/2017	15:40:08		moc	Outgoing	14019997316	14017716116	14017716116	14017716116	310260776394656	14724001664690	Abnormal Completion		DATAS010
04/04/2017	16:03:29	102	mtc	Incoming	14017716116	14019997316	14019997316	14019997316	310260776394656	14724001664690	Abnormal Completion		DATAS010
04/04/2017	16:47:19	6	moc	Outgoing	14019997316	14016010059	14016010059	14016010059	310260776394656	14724001664690	Completed Successfully	11	DATAS010
04/04/2017	16:47:31	23	mtc	Incoming	14016416192	14019997316	14019997316	14019997316	310260776394656	14724001664690	Completed Successfully		DATAS010
											Completed Successfully	29	DATAS010

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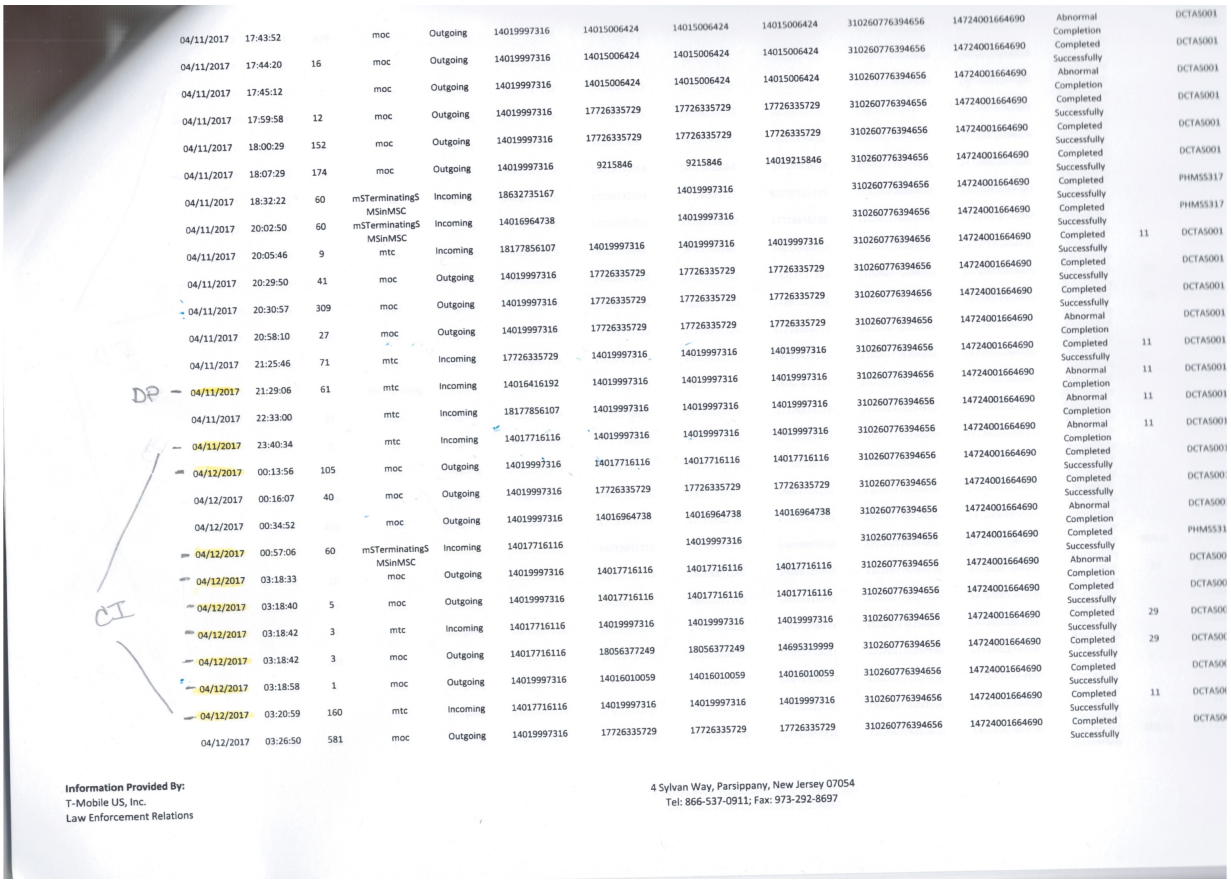

04/11/2017	17:43:52		moc	Outgoing	14019997316	14015006424	14015006424	14015006424	310260776394656	14724001664690	Abnormal Completion		DCTAS001
04/11/2017	17:44:20	16	moc	Outgoing	14019997316	14015006424	14015006424	14015006424	310260776394656	14724001664690	Completed Successfully		DCTAS001
04/11/2017	17:45:12		moc	Outgoing	14019997316	14015006424	14015006424	14015006424	310260776394656	14724001664690	Abnormal Completion		DCTAS001
04/11/2017	17:59:58	12	moc	Outgoing	14019997316	17726335729	17726335729	17726335729	310260776394656	14724001664690	Completed Successfully		DCTAS001
04/11/2017	18:00:29	152	moc	Outgoing	14019997316	17726335729	17726335729	17726335729	310260776394656	14724001664690	Completed Successfully		DCTAS001
04/11/2017	18:07:29	174	moc	Outgoing	14019997316	9215846	9215846	14019215846	310260776394656	14724001664690	Completed Successfully		DCTAS001
04/11/2017	18:32:22	60	mSTerminatingSMSinMSC	Incoming	18632735167		14019997316		310260776394656	14724001664690	Completed Successfully		PHMS5317
04/11/2017	20:02:50	60	mSTerminatingSMSinMSC	Incoming	14016964738		14019997316		310260776394656	14724001664690	Completed Successfully		PHMS5317
04/11/2017	20:05:46	9	mtc	Incoming	18177856107	14019997316	14019997316	14019997316	310260776394656	14724001664690	Completed Successfully	11	DCTAS001
04/11/2017	20:29:50	41	moc	Outgoing	14019997316	17726335729	17726335729	17726335729	310260776394656	14724001664690	Completed Successfully		DCTAS001
04/11/2017	20:30:57	309	moc	Outgoing	14019997316	17726335729	17726335729	17726335729	310260776394656	14724001664690	Completed Successfully		DCTAS001
04/11/2017	20:58:10	27	moc	Outgoing	14019997316	17726335729	17726335729	17726335729	310260776394656	14724001664690	Abnormal Completion		DCTAS001
04/11/2017	21:25:46	71	mtc	Incoming	17726335729	14019997316	14019997316	14019997316	310260776394656	14724001664690	Completed Successfully	11	DCTAS001
04/11/2017	21:29:06	61	mtc	Incoming	14016416192	14019997316	14019997316	14019997316	310260776394656	14724001664690	Abnormal Completion	11	DCTAS001
04/11/2017	22:33:00		mtc	Incoming	18177856107	14019997316	14019997316	14019997316	310260776394656	14724001664690	Abnormal Completion	11	DCTAS001
04/11/2017	23:40:34		mtc	Incoming	14017716116	14019997316	14019997316	14019997316	310260776394656	14724001664690	Abnormal Completion	11	DCTAS001
04/12/2017	00:13:56	105	moc	Outgoing	14019997316	14017716116	14017716116	14017716116	310260776394656	14724001664690	Completed Successfully		DCTAS001
04/12/2017	00:16:07	40	moc	Outgoing	14019997316	17726335729	17726335729	17726335729	310260776394656	14724001664690	Completed Successfully		DCTAS001
04/12/2017	00:34:52		moc	Outgoing	14019997316	14016964738	14016964738	14016964738	310260776394656	14724001664690	Abnormal Completion		DCTAS00
04/12/2017	00:57:06	60	mSTerminatingSMSinMSC	Incoming	14017716116		14019997316		310260776394656	14724001664690	Completed Successfully		PHMS531
04/12/2017	03:18:33		moc	Outgoing	14019997316	14017716116	14017716116	14017716116	310260776394656	14724001664690	Abnormal Completion		DCTAS00
04/12/2017	03:18:40	5	moc	Outgoing	14019997316	14017716116	14017716116	14017716116	310260776394656	14724001664690	Completed Successfully		DCTAS00
04/12/2017	03:18:42	3	mtc	Incoming	14017716116	14019997316	14019997316	14019997316	310260776394656	14724001664690	Completed Successfully	29	DCTAS00
04/12/2017	03:18:42	3	moc	Outgoing	14017716116	18056377249	18056377249	14695319999	310260776394656	14724001664690	Completed Successfully	29	DCTAS00
04/12/2017	03:18:58	1	moc	Outgoing	14019997316	14016010059	14016010059	14016010059	310260776394656	14724001664690	Completed Successfully		DCTAS00
04/12/2017	03:20:59	160	mtc	Incoming	14017716116	14019997316	14019997316	14019997316	310260776394656	14724001664690	Completed Successfully	11	DCTAS00
04/12/2017	03:26:50	581	moc	Outgoing	14019997316	17726335729	17726335729	17726335729	310260776394656	14724001664690	Completed Successfully		DCTAS00

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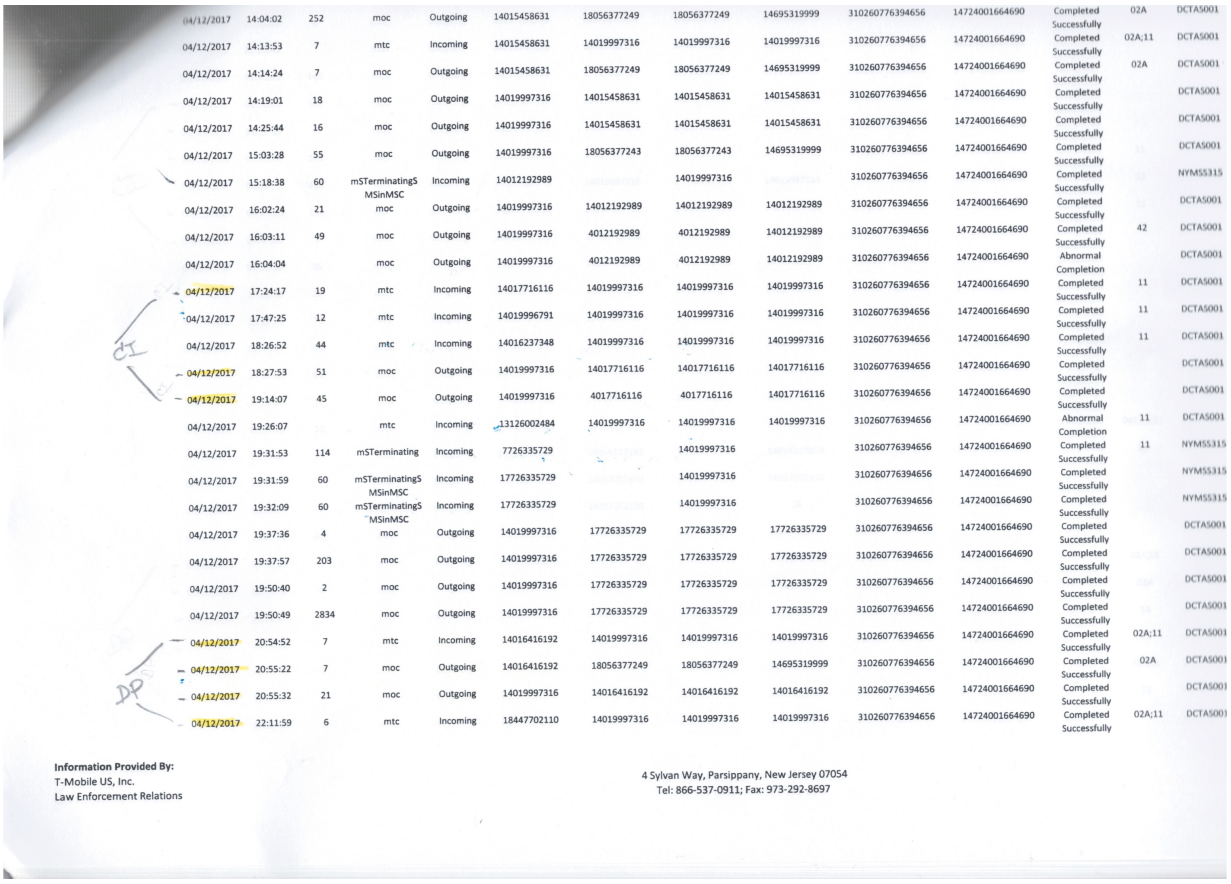

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04/12/2017	14:13:53	7	mtc	Incoming	14015458631	14019997316	14019997316	14019997316	310260776394656	14724001664690	Completed Successfully	02A;11	DCTAS001
04/12/2017	14:14:24	7	moc	Outgoing	14015458631	18056377249	18056377249	14695319999	310260776394656	14724001664690	Completed Successfully	02A	DCTAS001
04/12/2017	14:19:01	18	moc	Outgoing	14019997316	14015458631	14015458631	14015458631	310260776394656	14724001664690	Completed Successfully		DCTAS001
04/12/2017	14:25:44	16	moc	Outgoing	14019997316	14015458631	14015458631	14015458631	310260776394656	14724001664690	Completed Successfully		DCTAS001
04/12/2017	15:03:28	55	moc	Outgoing	14019997316	18056377243	18056377243	14695319999	310260776394656	14724001664690	Completed Successfully		DCTAS001
04/12/2017	15:18:38	60	mSTerminatingSMSinMSC	Incoming	14012192989	[illegible]	14019997316	[illegible]	310260776394656	14724001664690	Completed Successfully		NYM55315
04/12/2017	16:02:24	21	moc	Outgoing	14019997316	14012192989	14012192989	14012192989	310260776394656	14724001664690	Completed Successfully		DCTAS001
04/12/2017	16:03:11	49	moc	Outgoing	14019997316	4012192989	4012192989	14012192989	310260776394656	14724001664690	Completed Successfully	42	DCTAS001
04/12/2017	16:04:04	[illegible]	moc	Outgoing	14019997316	4012192989	4012192989	14012192989	310260776394656	14724001664690	Abnormal Completion		DCTAS001
04/12/2017	17:24:17	19	mtc	Incoming	14017716116	14019997316	14019997316	14019997316	310260776394656	14724001664690	Completed Successfully	11	DCTAS001
04/12/2017	17:47:25	12	mtc	Incoming	14019996791	14019997316	14019997316	14019997316	310260776394656	14724001664690	Completed Successfully	11	DCTAS001
04/12/2017	18:26:52	44	mtc	Incoming	14016237348	14019997316	14019997316	14019997316	310260776394656	14724001664690	Completed Successfully	11	DCTAS001
04/12/2017	18:27:53	51	moc	Outgoing	14019997316	14017716116	14017716116	14017716116	310260776394656	14724001664690	Completed Successfully		DCTAS001
04/12/2017	19:14:07	45	moc	Outgoing	14019997316	4017716116	4017716116	14017716116	310260776394656	14724001664690	Completed Successfully		DCTAS001
04/12/2017	19:26:07	[illegible]	mtc	Incoming	13126002484	14019997316	14019997316	14019997316	310260776394656	14724001664690	Abnormal Completion	11	DCTAS001
04/12/2017	19:31:53	114	mSTerminating	Incoming	7726335729	[illegible]	14019997316	[illegible]	310260776394656	14724001664690	Completed Successfully	11	NYM55315
04/12/2017	19:31:59	60	mSTerminatingSMSinMSC	Incoming	17726335729	[illegible]	14019997316	[illegible]	310260776394656	14724001664690	Completed Successfully		NYM55315
04/12/2017	19:32:09	60	mSTerminatingSMSinMSC	Incoming	17726335729	[illegible]	14019997316	[illegible]	310260776394656	14724001664690	Completed Successfully		NYM55315
04/12/2017	19:37:36	4	moc	Outgoing	14019997316	17726335729	17726335729	17726335729	310260776394656	14724001664690	Completed Successfully		DCTAS001
04/12/2017	19:37:57	203	moc	Outgoing	14019997316	17726335729	17726335729	17726335729	310260776394656	14724001664690	Completed Successfully		DCTAS001
04/12/2017	19:50:40	2	moc	Outgoing	14019997316	17726335729	17726335729	17726335729	310260776394656	14724001664690	Completed Successfully		DCTAS001
04/12/2017	19:50:49	2834	moc	Outgoing	14019997316	17726335729	17726335729	17726335729	310260776394656	14724001664690	Completed Successfully		DCTAS001
04/12/2017	20:54:52	7	mtc	Incoming	14016416192	14019997316	14019997316	14019997316	310260776394656	14724001664690	Completed Successfully	02A;11	DCTAS001
04/12/2017	20:55:22	7	moc	Outgoing	14016416192	18056377249	18056377249	14695319999	310260776394656	14724001664690	Completed Successfully	02A	DCTAS001
04/12/2017	20:55:32	21	moc	Outgoing	14019997316	14016416192	14016416192	14016416192	310260776394656	14724001664690	Completed Successfully		DCTAS001
04/12/2017	22:11:59	6	mtc	Incoming	18447702110	14019997316	14019997316	14019997316	310260776394656	14724001664690	Completed Successfully	02A;11	DCTAS001

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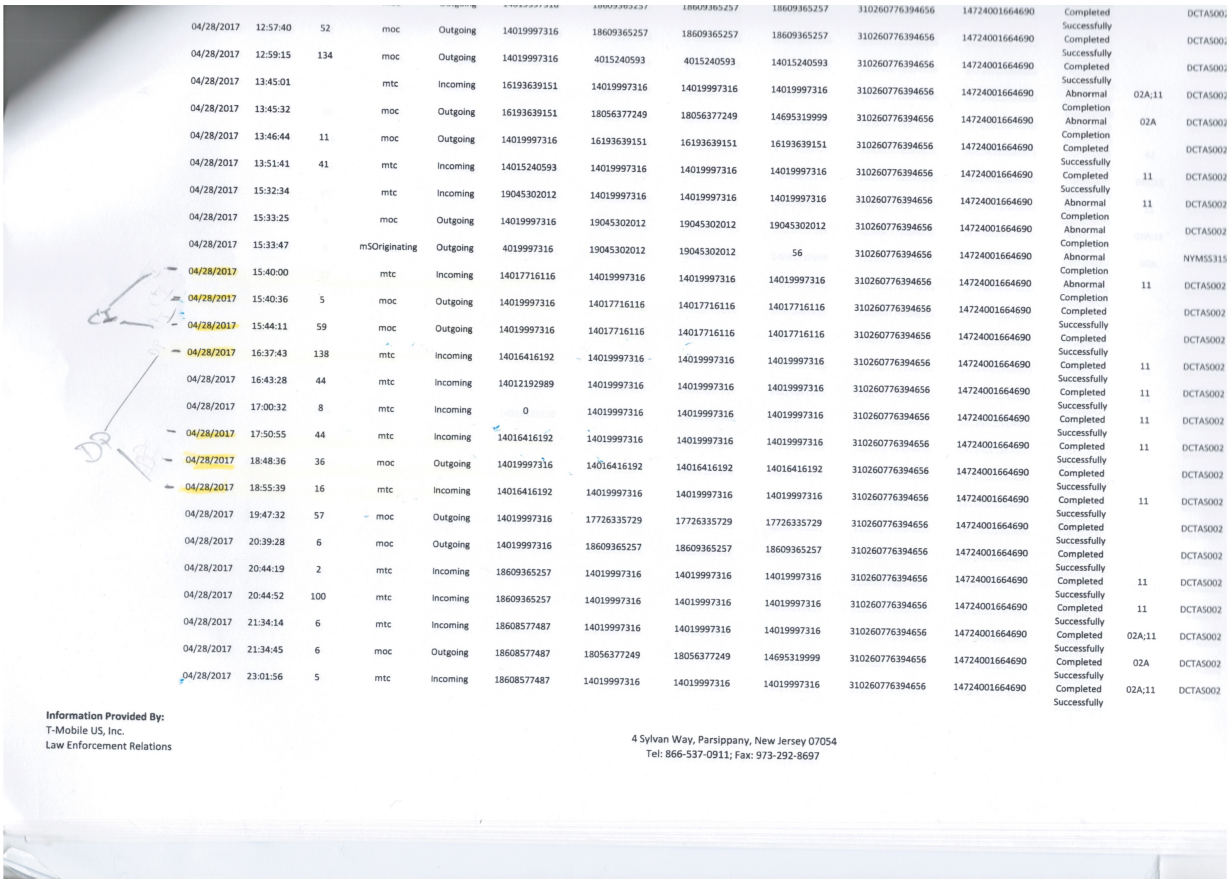

04/28/2017	12:57:40	52	moc	Outgoing	14019997316	18609365257	18609365257	18609365257	310260776394656	14724001664690	Completed Successfully	DCTAS002
04/28/2017	12:59:15	134	moc	Outgoing	14019997316	4015240593	4015240593	14015240593	310260776394656	14724001664690	Completed Successfully	DCTAS002
04/28/2017	13:45:01		mtc	Incoming	16193639151	14019997316	14019997316	14019997316	310260776394656	14724001664690	Completed Successfully	DCTAS002
04/28/2017	13:45:32		moc	Outgoing	16193639151	18056377249	18056377249	14695319999	310260776394656	14724001664690	Abnormal Completion	02A;11 DCTAS002
04/28/2017	13:46:44	11	moc	Outgoing	14019997316	16193639151	16193639151	16193639151	310260776394656	14724001664690	Abnormal Completion	02A DCTAS002
04/28/2017	13:51:41	41	mtc	Incoming	14015240593	14019997316	14019997316	14019997316	310260776394656	14724001664690	Completed Successfully	DCTAS002
04/28/2017	15:32:34		mtc	Incoming	19045302012	14019997316	14019997316	14019997316	310260776394656	14724001664690	Completed Successfully	11 DCTAS002
04/28/2017	15:33:25		moc	Outgoing	14019997316	19045302012	19045302012	19045302012	310260776394656	14724001664690	Abnormal Completion	11 DCTAS002
04/28/2017	15:33:47		mSOriginating	Outgoing	4019997316	19045302012	19045302012	56	310260776394656	14724001664690	Abnormal Completion	DCTAS002
04/28/2017	15:40:00		mtc	Incoming	14017716116	14019997316	14019997316	14019997316	310260776394656	14724001664690	Abnormal Completion	NYM55315
04/28/2017	15:40:36	5	moc	Outgoing	14019997316	14017716116	14017716116	14017716116	310260776394656	14724001664690	Abnormal Completion	11 DCTAS002
04/28/2017	15:44:11	59	moc	Outgoing	14019997316	14017716116	14017716116	14017716116	310260776394656	14724001664690	Completed Successfully	DCTAS002
04/28/2017	16:37:43	138	mtc	Incoming	14016416192	14019997316	14019997316	14019997316	310260776394656	14724001664690	Completed Successfully	DCTAS002
04/28/2017	16:43:28	44	mtc	Incoming	14012192989	14019997316	14019997316	14019997316	310260776394656	14724001664690	Completed Successfully	11 DCTAS002
04/28/2017	17:00:32	8	mtc	Incoming	0	14019997316	14019997316	14019997316	310260776394656	14724001664690	Completed Successfully	11 DCTAS002
04/28/2017	17:50:55	44	mtc	Incoming	14016416192	14019997316	14019997316	14019997316	310260776394656	14724001664690	Completed Successfully	11 DCTAS002
04/28/2017	18:48:36	36	moc	Outgoing	14019997316	14016416192	14016416192	14016416192	310260776394656	14724001664690	Completed Successfully	DCTAS002
04/28/2017	18:55:39	16	mtc	Incoming	14016416192	14019997316	14019997316	14019997316	310260776394656	14724001664690	Completed Successfully	11 DCTAS002
04/28/2017	19:47:32	57	moc	Outgoing	14019997316	17726335729	17726335729	17726335729	310260776394656	14724001664690	Completed Successfully	DCTAS002
04/28/2017	20:39:28	6	moc	Outgoing	14019997316	18609365257	18609365257	18609365257	310260776394656	14724001664690	Completed Successfully	DCTAS002
04/28/2017	20:44:19	2	mtc	Incoming	18609365257	14019997316	14019997316	14019997316	310260776394656	14724001664690	Completed Successfully	11 DCTAS002
04/28/2017	20:44:52	100	mtc	Incoming	18609365257	14019997316	14019997316	14019997316	310260776394656	14724001664690	Completed Successfully	11 DCTAS002
04/28/2017	21:34:14	6	mtc	Incoming	18608577487	14019997316	14019997316	14019997316	310260776394656	14724001664690	Completed Successfully	02A;11 DCTAS002
04/28/2017	21:34:45	6	moc	Outgoing	18608577487	18056377249	18056377249	14695319999	310260776394656	14724001664690	Completed Successfully	02A DCTAS002
04/28/2017	23:01:56	5	mtc	Incoming	18608577487	14019997316	14019997316	14019997316	310260776394656	14724001664690	Completed Successfully	02A;11 DCTAS002

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In sum, Mr. Cascella was deprived of toll records that would have been admissible at trial and were relevant and material to his defense, and this Brady violation warrants vacating the convictions and remanding for a new trial. The Court should grant certiorari to reaffirm what Brady requires.

III. IMPROPER ARGUMENTS IN THE GOVERNMENT'S CLOSING VIOLATED THE FIFTH AND SIXTH AMENDMENTS.

This Court should grant certiorari to rule that the First Circuit, and all circuits, have a duty to find constitutional error when closing arguments amount to unconstitutional misconduct. In this case, the government engaged in egregious unconstitutional misconduct, repeatedly referring to

Mr. Cascella as a confirmed drug dealer; referring to and suggesting special knowledge of unadmitted evidence of past misconduct of unspecified duration and frequency; and asking the jury to infer guilt in one of the drug transactions from his failure to testify. This misconduct so undermined his rights to a fair trial and impartial jury, as well as his confrontation rights, that the First Circuit should have vacated his convictions. The First Circuit, instead, failed to find any error at all.

Mr. Cascella asserted the improper argument was unconstitutional misconduct and grounds for a new trial. (Docs. 83, 99, 103, 160.) The claim of constitutional error was thus preserved and the government bore the burden of demonstrating its harmlessness beyond reasonable doubt, which it could not and did not do. Chapman v. California, 386 U.S. 18, 24 (1967). The error was so egregious that it also satisfied the plain error standard and seriously affected the fairness, integrity, and public reputation of judicial proceedings.

In at least a score of arguments, the government told the jury "Look, the Defendant was a drug dealer," (2:501) and that he "revealed may aspects of his being a drug dealer," (2:507) and "[h]e's a quality dealer" (2:510). The government told the jury, "That's a drug dealer saying I can get whatever I need." (2:508.) Then, "He's a quality dealer." (2:510.) The government offered its opinion that officers "presented a drug dealer an opportunity to do what the drug dealer does: Deal drugs. *And he dealt drugs because he's a*

*drug de*aler and he wanted to deal drugs." (2:518 (emphasis added).) Furthermore, it argued "This is not his first rodeo. He's been doing this for a while." (2:510.) The "not his first rodeo" statement impermissibly raises facts not in evidence and suggests the government has special access to unadmitted evidence of prior misconduct of unspecified duration and frequency. The extremely prejudicial arguments were numerous, would each warrant vacation standing alone, and mandate vacation when considered in totality. The prejudicial impact on the jury was not mitigated by any immediate curative instruction. In any case, it is difficult to conceive of any instruction that would successfully cure so gross an error. A remote general instruction that closing arguments are not evidence cannot erase from a jury's mind that a prosecutor, whose words are likely to carry more weight with the jury than any witness, has expressed an opinion regarding, indeed conclusively decided, the defendant's guilt. Here the arguments go further than opinion because they actually *declared* Cascella's guilt for drug distribution charges, by affixing this label on him. These statements were inflammatory, extremely prejudicial, and it would be difficult if not impossible for a juror to wipe the prosecutor's ultimate conclusion as to guilt from her mind.

Telling the jury "Not once did you hear the Defendant" deny going into the bathroom for the March 29th transaction, and telling the jury this meant the "Defendant is telling you that the March 29th transaction occurred," is an

egregious, prejudicial, and improper comment on Mr. Cascella's constitutional right not to present evidence. The First Circuit should have at minimum reversed Count 1, a conviction which rested entirely on Detective Perkins' testimony and credibility. The comment on the failure to testify and urging the jury to presume guilt from it deprived Mr. Cascella of the right to a fair trial, which includes a fair closing, violated his right to remain silent at trial, and impermissibly shifted the burden of proof. It cannot be said the constitutional violation was harmless beyond a reasonable doubt. Chapman, 386 U.S. at 24. It necessarily satisfies the plain error standard. United States v. Olano, 507 U.S. 725, 736 (1993) (The Supreme Court has "never held that a Rule 52(b) remedy is *only* warranted in cases of actual innocence.").

The First Circuit has held that argument the government's evidence "stands unimpeached and uncontradicted" is improper comment on the defendant's failure to testify or present evidence. Desmond v. United States, 345 F.2d 225, 227 (1st Cir. 1965). The argument that "Defendant is telling you that the March 29th transaction occurred" when it tells the jury "Not once do you hear the Defendant" deny the bathroom transaction is indistinguishable. See also United States v. Wihbey, 75 F.3d 770 (1st Cir. 1996) (statement "if defense counsel can stand up and explain away that conversation to you, then you should [aquit]" was impermissible comment on defendant's failure to testify and shifted burden); United States v. Skandier,

758 F.2d 43, 45 (1st Cir. 1985) (telling jury "see if he can explain the story that would be any different" held to impermissibly shift burden of proof and comment on defendant's silence). The First Circuit in Desmond also held that a general instruction cannot cure improper comment that "involves the infringement of a constitutional right." Desmond, 345 F.2d at 227. The total lack of immediate curative instruction here failed to remedy the severe violation of Griffin, and the U.S. Constitution.

Fundamental to the concept of an impartial jury is that its verdict "must be based upon the evidence developed at the trial," and in a fair trial, the evidence of guilt cannot come from repeated expressions of damnation and conclusions of guilt from the prosecutor in closing, but rather "from the witness stand in a public courtroom where there is full judicial protection of the defendant's right of confrontation, of cross-examination, and of counsel." Turner v. Louisiana, 379 U.S. 466, 472, 473 (1965). The improper statements more than likely affected jurors' perception of the evidence.

In assessing the strength of evidence in a prosecutorial misconduct claim, as opposed to a claim of insufficient evidence, the court will "not in such a case take the evidence in the light most favorable to the government or assume that credibility issues were resolved in its favor," for "the jury decision may itself be tainted by the improper remarks." Arrieta-Agressot v. United States, 3 F.3d 525, 528 (1st Cir. 1993); United States v. Roberts, 119 F.3d 1006, 1008 (1st Cir. 1997) (reversing conviction, taking "balanced" view

of evidence, not in light most favorable to government). A court will reverse for unobjected-to misconduct "if the error is manifest and if there is a substantial chance that absent the error the jury would have acquitted." Arrieta-Agressot, 3 F.3d at 528.

When a prosecutor expresses his opinion of the defendant's guilt of the charged conduct, it is constitutional error that deprives a defendant of a fair trial and the right to confront his evidence. Greenberg v. United States, 280 F.2d 472, 474-75 (1st Cir. 1960) (reversing conviction where prosecutor expressed opinion about guilt of the accused, which, if permitted, "affords him a privilege not even accorded to witnesses under oath and subject to cross-examination"). The misconduct here was so severe, frequent, intentional, and central to guilt, that it must be presumed prejudicial. The repeated statements that Mr. Cascella was a drug dealer were deliberate and not inadvertent and, at minimum, should independently be "a basis for reversal as a deterrent for the future." United States v. Moreno, 991 F.2d 943, 948 (1st Cir. 1993). Even if not prejudicial, all the misconduct and improper argument outlined above warranted reversal because the misconduct should be sanctioned. No appellate court should tolerate a prosecutor repeatedly telling the jury that a man charged with a crime is actually guilty of the crime – our judicial system cannot tolerate prosecutors telling juries that man charged with murder is a murderer, that a man charged with rape is a rapist, that a man charged with kidnapping is a kidnapper. The jury, not the

prosecutor, must determine that ultimate issue of guilt. Unless appellate courts reverse convictions obtained using egregiously improper closing arguments, such misconduct will continue unchecked and unabated and undermine the fairness of countless trials.

While the government may permissibly argue that facts in evidence are "consistent with drug dealing," (see 2:505), that is not what the government did when it repeatedly proclaimed to the jury that Mr. Cascella was in fact a "drug dealer," dictating to the jury the ultimate fact they needed to decide.

The prosecutorial misconduct here "undermine[d] the fundamental fairness of the trial." Roberts, 119 F.3d at 1014 (plain errors are those that seriously affect the fairness, integrity, or public reputation of the judicial proceedings).

This Court should not add to the scores of decisions in which courts have failed to correct similar constitutional errors, for those failures have given prosecutors a special dispensation from both their ethical and constitutional obligations to deliver fair closing arguments. Berger v. United States, 295 U.S. 78, 88 (1935) (government's interest in prosecuting a case is "not that it shall win a case, but that justice shall be done, and while a prosecutor "may strike hard blows, he is not at liberty to strike foul ones."). All the comments outlined above were constitutionally infirm and warranted reversal, and because they were deliberate they also warranted being

sanctioned, and the First Circuit has failed in its duty to condemn unconstitutional closing arguments.

CONCLUSION

This Court should grant the petition for a writ of certiorari and set the case for argument.

Respectfully submitted,

/s/ Ines McGillion

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April 10, 2020

United States v. Cascella

United States Court of Appeals for the First Circuit

November 12, 2019, Decided

No. 18-1353

Reporter
943 F.3d 1 *; 2019 U.S. App. LEXIS 33676 **; 2019 WL 5884160

UNITED STATES OF AMERICA, Appellee, v. JON CASCELLA, Defendant, Appellant.

Prior History: [1]** APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF RHODE ISLAND. Hon. William E. Smith, Chief U.S. District Judge.

Outcome
Judgment affirmed.

Core Terms

records, drug dealer, methamphetamine, drugs, entrapment defense, gun, confidential informant, conversation, bathroom, firearm, hear, closing argument, district court, phone call, entrapment, counts, overreaching, customer, proffer, talked, video

Case Summary

Overview

HOLDINGS: [1]-Court upheld defendant's conviction for possession and distribution of methamphetamine and possession of a firearm because the district court's allowing the confidential informant to avoid taking the stand based on a blanket assertion of his *Fifth Amendment* right not to incriminate himself, if error, was harmless where the entrapment defense was so weak that it need not have gone to the jury, even with the evidence that defendant claimed he might have secured from the informant; [2]-The government's provision of cellphone records that left out contacts was not prejudicial where defendant made no proffer that anything said on those calls would constitute overreaching conduct; [3]-The government's reference, in closing, to defendant as a drug dealer was not prejudicial where the record contained ample evidence to support the contention that defendant was a drug dealer.

LexisNexis® Headnotes

Criminal Law & Procedure > Defenses > Burdens of Proof

Criminal Law & Procedure > Defenses > Entrapment

HN1[] **Defenses, Burdens of Proof**

Entrapment is an affirmative defense. To present this affirmative defense, a defendant must first carry the burden of production, measured by the sufficiency-of-the-evidence standard. Carrying that burden of production requires proof, first, of government overreaching, such as intimidation, threats, dogged insistence, or excessive pressure directed at the target of an investigation by a government agent.

Criminal Law & Procedure > Defenses > Entrapment

HN2[] **Defenses, Entrapment**

An "opportunity" to commit a crime falls far short of the type of government overreaching that constitutes entrapment.

Criminal Law & Procedure > Defenses > Entrapment

HN3[] **Defenses, Entrapment**

Government conduct is not overreaching for purposes of entrapment where an officer gives the defendant an opportunity to back away from the crime.

Criminal Law & Procedure > Appeals > Procedural Matters > Briefs

HN4[] **Procedural Matters, Briefs**

Arguments available at the outset but raised for the first time in a reply brief need not be considered.

Criminal Law & Procedure > ... > Discovery & Inspection > Brady Materials > Appellate Review

Criminal Law & Procedure > ... > Discovery & Inspection > Discovery Misconduct > Appellate Review & Judicial Discretion

Criminal Law & Procedure > ... > Discovery Misconduct > Sanctions > New Trial & Reversal

HN5[] **Brady Materials, Appellate Review**

A Brady violation calls for a new trial only if, among other things, the defendant was prejudiced by the suppression of evidence in that there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. The appellate court reviews the denial of a new-trial motion on the basis of an alleged Brady violation for manifest abuse of discretion.

Criminal Law & Procedure > ... > Standards of Review > Plain Error > Definition of Plain Error

HN6[] **Plain Error, Definition of Plain Error**

Plain error requires a showing (1) that an error occurred (2) which was clear or obvious and which not only (3) affected the defendant's substantial rights, but also (4) seriously impaired the fairness, integrity, or public reputation of judicial proceedings.

Criminal Law & Procedure > Trials > Closing Arguments

Evidence > Types of Evidence > Testimony > Credibility of Witnesses

Criminal Law & Procedure > Appeals > Reversible Error > Prosecutorial Misconduct

HN7[] **Trials, Closing Arguments**

It is elementary that prosecutors may not present their own personal opinions to the jury. Calling a defendant a drug dealer can arguably be viewed as a form of vouching; i.e., offering the prosecutor's own opinion of the defendant's guilt. Cautious government attorneys might avoid this potential problem by saying instead, the evidence shows that the defendant is a drug dealer. But that could become quite repetitious, and trial courts generally remind jurors that comments and statements made by the government's attorneys are not evidence. In any event, the U.S. Court of Appeals for the First Circuit has not found a failure to employ such a finely parsed phrasing prejudicial, even in opening statements, at least where the record contained ample evidence to support the contention that the defendant was a drug dealer.

Criminal Law & Procedure > Trials > Closing Arguments

Evidence > Types of Evidence > Testimony > Credibility of Witnesses

HN8[] **Trials, Closing Arguments**

Government attorneys may not imply that a witness's testimony is corroborated by evidence known to the government but not known to the jury.

Criminal Law & Procedure > Trials > Closing Arguments > Defendant's Failure to Testify

HN9[] **Closing Arguments, Defendant's Failure to Testify**

Government attorneys may not comment to the jury on a

defendant's decision not to testify.

Counsel: Ines de Crombrugghe McGillion, with whom Ines McGillion Law Offices, PLLC was on brief, for appellant.

Donald C. Lockhart, Assistant United States Attorney, with whom Aaron L. Weisman, United States Attorney, was on brief, for appellee.

Judges: Before Torruella, Lipez, and Kayatta, Circuit Judges.

Opinion by: KAYATTA

Opinion

[*4] KAYATTA, Circuit Judge. Jon Cascella was tried and convicted on seven counts related to possession and distribution of methamphetamine and two counts related to possession of a firearm. His defense at trial was that he was entrapped by law enforcement officers and a confidential informant acting as their agent. On appeal, he claims that the following trial errors require reversal: (1) the court allowed the confidential informant to invoke a blanket *Fifth Amendment* privilege from testifying; (2) the government did not provide Cascella with certain telephone records showing communications he had with the confidential informant and an undercover officer; and (3) the government's attorney made improper statements during closing arguments. For the following reasons, we affirm Cascella's **[**2]** conviction.

I.

Between March and May 2017, Cascella sold methamphetamine on six occasions to undercover police detective Mark Perkins of Warwick, Rhode Island. Cascella was introduced to Perkins by Bennett, a confidential informant who had recently been released from prison on probation.

The first transaction between Perkins and Cascella occurred on March 29. On that occasion, Perkins purchased a small quantity of methamphetamine for $100 outside a gas station. After receiving payment, **[*5]** Cascella told Perkins that he had placed the methamphetamine in the gas-station bathroom, from which Perkins then retrieved the drugs. Around this time, Bennett informed

Perkins that Cascella was also interested in acquiring a firearm. Perkins again purchased methamphetamine from Cascella on April 4, April 13, April 20, and April 28. The government attempted to record telephone conversations between Perkins and Cascella leading up to each of these purchases, although the equipment failed to record some of these conversations. Some of the drug exchanges were also recorded on video. According to Perkins, the Warwick Police Department does not normally record phone calls. The Department nevertheless began recording **[**3]** the interactions with Cascella on March 30 at the request of the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) due to the "possible involvement" of a firearm.

The sixth and final transaction between Perkins and Cascella occurred on May 4. Perkins, with the help of undercover ATF agent Wing Chau, had arranged a drugs-for-firearm trade. Cascella gave Chau approximately seven grams of methamphetamine, and Chau gave Cascella a Bryco .380 handgun and $600 cash. Officers arrested Cascella immediately after this transaction. A search of Cascella's home later that day turned up additional methamphetamine and a smoke grenade. Following his arrest, Cascella told the police that he had been selling drugs to four different customers and that he wanted a gun for protection because he had previously been robbed.

A grand jury indicted Cascella on nine counts: four counts of distribution of methamphetamine to Perkins on March 29, April 4, April 13, and April 20 in violation of *21 U.S.C. § 841(a)(1)*, *(b)(1)(C)*; two counts of distribution of five grams or more of methamphetamine to Perkins on April 28 and May 4 in violation of *21 U.S.C. § 841(a)(1)*, *(b)(1)(B)*; one count of possession with intent to distribute five grams or more of methamphetamine in **[**4]** violation of *21 U.S.C. § 841(a)(1)*, *(b)(1)(B)*; one count of possession of a firearm in furtherance of drug trafficking in violation of *18 U.S.C. § 924(c)(1)(A)*; and one count of being a felon[1] in possession of a firearm in violation of *18 U.S.C. §§ 922(g)(1)*, *924(a)(2)*.

The government's evidence that the drug and gun transactions occurred, backed by videos, phone recordings, and the testimony of Perkins and Chau, was overwhelming. Cascella

[1]Cascella had twice previously been convicted of robbery, serving approximately eight years total.

nevertheless pleaded not guilty and went to trial, contending that he was merely a drug user whom Bennett and Perkins entrapped into selling drugs and buying a firearm. Cascella proceeded pro se with standby counsel for part of the trial, then switched to hybrid representation partway through. After closing arguments, the jury returned a verdict of guilty on all counts. The court denied Cascella's motions for a new trial and acquittal. Cascella timely appealed.

II.

A. Privilege Against Self-Incrimination

Cascella challenges the district court's decision allowing the confidential informant, Bennett, to avoid taking the stand at trial based on a blanket assertion of his *Fifth Amendment* right not to incriminate himself. Reliance on a blanket **[*6]** assertion of privilege that deprives a defendant of his ability to call a relevant witness to testify is "extremely **[**5]** disfavored." *In re Grand Jury Matters, 751 F.2d 13, 17 n.4 (1st Cir. 1984)* (quoting *In re Grand Jury Witness (Salas), 695 F.2d 359, 362 (9th Cir. 1982)*); see *United States v. Santiago, 566 F.3d 65, 70 (1st Cir. 2009)*; *United States v. Castro, 129 F.3d 226, 229 (1st Cir. 1997)*. We have nevertheless at least once allowed such a blanket assertion of privilege when the district court itself confirmed the witness's inability to offer any relevant, non-privileged testimony. See *United States v. Acevedo-Hernández, 898 F.3d 150, 168-71 (1st Cir. 2018)*. And we have also on one occasion sustained a similar decision made after the district court interrogated the witness and determined that any non-privileged testimony would be confusingly disjointed and would not substantially advance an entrapment defense. See *Santiago, 566 F.3d at 70-71*.

Here, the district court neither questioned the witness, nor allowed counsel to question the witness, relying instead on the representations of the witness's appointed counsel, whose understandable aim was to keep his client off the stand. Nevertheless, we need not decide whether the handling of the privilege-pleading witness was error. Rather, we agree with the government that even if there was error, it was harmless. See *Delaware v. Van Arsdall, 475 U.S. 673, 681, 106 S. Ct. 1431, 89 L. Ed. 2d 674 (1986)*; see also *United States v. Kaplan, 832 F.2d 676, 685 (1st Cir. 1987)* (deciding an improper assertion of privilege was harmless error).

Cascella's only proffered reason for calling the witness was to aid his entrapment defense. To Cascella's benefit, the trial judge let the entrapment defense go to the jury. For the following reasons, **[**6]** though, the entrapment defense was so weak that it need not have gone to the jury, even with the evidence that Cascella claims he might have secured from Bennett.

HN1[↑] "Entrapment is an affirmative defense." *United States v. Vasco, 564 F.3d 12, 18 (1st Cir. 2009)*. To present this affirmative defense, a defendant must first carry the burden of production, measured by the sufficiency-of-the-evidence standard. *United States v. Díaz-Maldonado, 727 F.3d 130, 137 (1st Cir. 2013)*; *United States v. Rodriguez, 858 F.2d 809, 812-14 (1st Cir. 1988)*. Carrying that burden of production requires proof, first, of "government overreaching," such as "'intimidation, threats, dogged insistence,' or 'excessive pressure' directed at the target of an investigation by a government agent." *Díaz-Maldonado, 727 F.3d at 137* (quoting *Vasco, 564 F.3d at 18*). The record in this case contains no evidence of any such overreaching. At most, it paints a picture of a government invitation to accept a government-created opportunity to commit a crime. But the law "expect[s] innocent persons to decline such opportunities in the absence of some additional importuning by the government." Id.

So we ask whether the hoped-for, non-privileged testimony from Bennett might have filled in this hole in Cascella's entrapment defense. Cascella tells us that Bennett would have admitted to working with the police, but that is neither contested nor sufficient. Presumably most **[**7]** confidential informants work with and seek to curry favor from the police. Such a relationship may make the informant's conduct attributable to the police, see *id. at 138-39*, but it says too little about the nature of the informant's contact with the defendant to support an entrapment defense. Cascella claims that Bennett would have also admitted to suggesting that Cascella get a gun, or even encouraging him to do so. But, as we have explained, offering ***HN2***[↑] "an 'opportunity' to commit a crime" falls far short of the **[*7]** type of government overreaching that constitutes entrapment. *United States v. Gendron, 18 F.3d 955, 961 (1st Cir. 1994)* (quoting *Sorrells v. United States, 287 U.S. 435, 441, 53 S. Ct. 210, 77 L. Ed. 413, 38 Ohio L. Rep. 326 (1932)*).

Nor need we entertain the possibility that Bennett might have said something in his testimony that exceeded the scope of Cascella's proffer. The hypothesis that frames our inquiry posits that Bennett brought undue pressure to bear on Cascella. Were that so, Cascella would obviously be aware of what testimony Bennett might have to help build such a defense; hence, we can expect Cascella's proffer to exhaust the plausible scope of any favorable testimony.

Cascella's contention that testimony from Bennett might have

supported a feasible entrapment defense fares even worse when placed in context. The day after the first **[**8]** methamphetamine purchase, Cascella had the following conversation with Perkins, as recorded by the police:

> **PERKINS**: . . . are you with Joe [Bennett] today? He called me.
>
> **CASCELLA**: Yeah.
>
> **PERKINS**: Oh, he said you might be interested in trying to get something?
>
> **CASCELLA**: Ah, no. I just wanted to know what the prices ra-, range.
>
> **PERKINS**: Yup. Um, I don't - I mean, I know somebody where I can get them.
>
> **CASCELLA**: Yeah.
>
> **PERKINS**: Um, do you know what kind you're looking for?
>
> **CASCELLA**: Ah, just for self-protection.
>
> **PERKINS**: No, I know. Like ah . . .
>
> **CASCELLA**: [voice inaudible]
>
> **PERKINS**: . . . like ah . . .
>
> **CASCELLA**: [voice inaudible]
>
> **PERKINS**: . . . a semi-automatic or a revolver?
>
> **CASCELLA**: Whatever's easiest.
>
> **PERKINS**: Okay.
>
> **CASCELLA**: Just not auto.
>
> **PERKINS**: What's that? I'm sorry.
>
> **CASCELLA**: Probably semi-auto, right?
>
> **PERKINS**: Yeah, yeah. Yup. Um, all right. What ah, m-, my boy is totally cool. Ah, he's always asking me if you ever want, want one. And basically, I, I never got one 'cause I'd probably shoot myself foot, in the foot. But um . . .
>
> **CASCELLA**: I just want it for my own personal protection.
>
> **PERKINS**: Yeah. No, I hear you. Um, what - if he's into the shit that I'm into, you know, the, the meth, would you **[**9]** be willing to . . .
>
> **CASCELLA**: Uh-huh.
>
> **PERKINS**: . . . trade? Ah, ah, I haven't talked to him or anything. I just wanted to talk to you first, you know, ah.
> . . .
>
> **PERKINS**: . . . he, he's the shit. Um, what was I gonna say? Yeah, I mean, he, he likes that shit. So I didn't know if you could - you know, wanted to trade some of that for that or if you . . .
>
> **CASCELLA**: I ah, you have to give me a number, so I, I get an idea.
>
> **PERKINS**: Okay. Yeah, I mean, like I said, I ha-, I haven't even talked to him or anything. Um . . .
>
> **CASCELLA**: Yeah, just ah, give him a call. Give him a call.
> . . .
>
> **PERKINS**: . . . what are you looking to spend if ah, if it was like money?
>
> **CASCELLA**: I'm probably looking to spend ah, ah, less than two.
>
> **PERKINS**: Okay. All right. All right.
>
> **[*8] CASCELLA**: I just want it just for myself, even if it's a two shooter, two, two shooter, you know?
>
> **PERKINS**: Right, okay. All right.
>
> **CASCELLA**: Yeah, I want the man know that's the cheapest you can get me, dude.
>
> **PERKINS**: No, I hear you. I hear you. I don't know if - again, I don't - I'm not a gun nut, so I don't know how much they cost.
>
> **CASCELLA**: Me neither. Ah, I ain't, either. That's why I said as long as it - if, if, if it fires, I won't miss.

Nothing **[**10]** in this conversation -- even as supplemented by the hoped-for testimony by Bennett -- suggests that anyone badgered Cascella into acquiring a gun against his own disposition. To the contrary, Perkins offered Cascella reason not to get a gun, explaining why Perkins did not have one. See *Vasco, 564 F.3d at 19* (observing that ***HN3***[↑] government conduct is not overreaching where an officer gives the defendant an "opportunity to back away from the crime"). In addition to this call, the jury heard Cascella's recorded, post-arrest confession in which he stated that he had been selling

drugs to four different customers and that he wanted a gun for protection because he had previously been robbed. And Perkins testified that Cascella had previously said that "normally he charges $450" for an "eight ball"[2] of methamphetamine.

Even viewing Cascella's proposed evidence, as we must, "in the light most favorable to the accused so as to determine whether the record supports an entrapment theory," *United States v. Shinderman, 515 F.3d 5, 13 (1st Cir. 2008)*, we agree that Cascella's defense was -- in the government's words -- "hopeless." On this record, the district court need not have put the entrapment defense to the jury. See *Díaz-Maldonado, 727 F.3d at 139*. A fortiori, the failure to allow Cascella a chance to elicit **[**11]** from Bennett the proffered, possibly non-privileged testimony was harmless beyond a reasonable doubt.

Four somewhat related loose ends remain. First, Cascella argues on appeal that the district court's observation that Cascella could testify himself about his conversations with Bennett "unreasonably burden[ed] Cascella's right not to testify." But Cascella had already clearly signaled to the district court that he planned to testify, claiming in his opening statements at trial that he would testify and only deciding not to do so after the court's ruling that Bennett would not take the stand. In any event, any possible error in this regard would suffer from the same harmless-error problem. Second, Cascella argues for the first time in his reply brief that the government could have granted Bennett formal immunity under *18 U.S.C. § 6003*. See Note, The *Sixth Amendment* Right to Have Use Immunity Granted to Defense Witnesses, 91 Harv. L. Rev. 1266 (1978); see also *United States v. Quinn, 728 F.3d 243, 251 n.1 (3d Cir. 2013)* (en banc); *Curtis v. Duval, 124 F.3d 1, 9 (1st Cir. 1997)*. That issue was not properly preserved, so we do not address it. See *United States v. Tosi, 897 F.3d 12, 15 (1st Cir. 2018)* ***HN4***[] ("[A]rguments available at the outset but raised for the first time in a reply brief need not be considered."). Third, for that same reason, we do not address the argument, also raised for the first time **[**12]** in the reply brief, that Bennett may have waived any claim of privilege by speaking with the government attorney and federal agents **[*9]** the day before appearing at trial. Fourth, we are not deciding whether Cascella could have requested a jury instruction that a confidential informant was unavailable to testify, or had pleaded the Fifth. Cascella never requested a jury instruction about Bennett's refusal to testify, and he does not raise the issue on appeal. So, we need not decide whether such an instruction would be appropriate or the precise contours of such an instruction. See *United States v. Zannino, 895 F.2d 1, 17 (1st Cir. 1990)* (requiring an argument on appeal to be sufficiently developed in the appellant's opening brief).

B. Brady Challenge

Cascella's next argument arises from what at best can be described as the government's sloppy handling of information it obtained prior to trial concerning his phone usage. The government subpoenaed T-Mobile for records of Cascella's cellphone usage between March 8 and May 4, the day of his arrest. Rather than turning over to Cascella the data as received from T-Mobile, the government put it into a spreadsheet, which it then produced to Cascella, describing it as "toll records received pursuant to **[**13]** . . . subpoena listing call times by EST, rather than GMT as originally provided by the carrier." The government also extracted call data from Cascella's phone (including the SIM card). It then sent a DVD to Cascella, describing it as "a DVD containing the report of data extraction from your cellular telephone."

After trial, Cascella's counsel obtained the actual customer cellphone records (rather than just the data) directly from T-Mobile. Those more extensive T-Mobile records showed eleven additional contacts between 1:45 p.m. and 8:45 p.m. on March 29. Those contacts consist of three texts from Bennett, a 75-second call from Bennett, another text from Bennett, a 50-second call from Perkins, a text from Perkins, a 25-second call from Perkins, a 19-second call from Cascella to Bennett, a 5-second call from Cascella to Bennett, followed by a 71-second call from Bennett to Cascella. None of the records revealed the substance of any communications, other than that the phone calls were extremely brief. With the additional records in hand, Cascella moved for a new trial. He claimed that the government had manipulated the data provided to him to hide those contacts. And he claimed as well **[**14]** that the government had destroyed and not produced additional text data that he says should have been extractable from his cellphone.

The hearing that ensued produced a confusing record concerning what happened. Understandably suspicious given the apparent disparity in the records, Cascella asserted that the government had manipulated and hidden data confirming his additional contacts with Bennett and Perkins prior to March 30. Government counsel added to the cause for suspicion by telling the court, imprecisely and incorrectly, "[w]hat we got, we turned over." Less imprecisely, the government flatly denied destroying or concealing anything, attributing the difference in the data to differences in what it received from T-Mobile and what T-Mobile provided in a different form to its customer.

The district court resolved all of this by turning to the issue of prejudice. ***HN5***[] A Brady violation calls for a new trial only if, among other things, "the defendant was prejudiced by the

[2]According to Perkins and Chau, "eight ball" is a slang term meaning one-eighth of an ounce of drugs.

suppression [of evidence] in that there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *United States v. Del-Valle, 566 F.3d 31, 40 (1st Cir. 2009)*; see *Brady v. Maryland, 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963)*. **[*10]** "We review the denial of a new-trial **[**15]** motion on the basis of an alleged Brady violation for manifest abuse of discretion." *United States v. Martínez-Mercado, 919 F.3d 91, 104-05 (1st Cir. 2019)*.

The record in this case includes recordings and videos of Cascella selling drugs to Perkins in a manner that makes clear Cascella had done it before. It also contains the transcript of his conversation with Perkins concerning the gun, which occurred after the missing calls. Nothing that Cascella said during that conversation reads as if he had previously been unduly pressured by anyone to get a gun against his own disposition. Furthermore, Cascella's contention that the evidence of the additional calls would have helped him reveals only that he misunderstands the burden of generating an entrapment defense. Although a party to all the calls, he makes no proffer that Bennett or Perkins said anything on those calls that would constitute the type of overreaching conduct required to prove entrapment.

Cascella also wished to use the phone records to impeach Perkins's testimony that he had only called Cascella once prior to March 30. The customer records provided directly by the carrier show an additional 25-second call. But there is no claim by Cascella that Perkins said anything in that brief call that **[**16]** would give rise to an entrapment defense. As we have said before, "there is no Brady violation compelling a new trial when the belatedly supplied evidence is merely cumulative or impeaching on a collateral issue." *Id. at 105*.

C. Closing Arguments

Finally, we consider Cascella's challenge to the government's statements in closing arguments. During closing arguments, the government frequently referred to Cascella as a "drug dealer." For example,

> **THE GOVERNMENT**: Look, the Defendant was a drug dealer . . . .
> . . .
>
> **THE GOVERNMENT**: [T]he Defendant revealed many aspects of his being a drug dealer.
> . . .
>
> **THE GOVERNMENT**: He's a quality dealer.
> . . .
>
> **THE GOVERNMENT**: The undercover officers in this case presented a drug dealer an opportunity to do what the drug dealer does: Deal drugs. And he dealt drugs. . . . [H]e's a drug dealer. He dealt drugs because he's a drug dealer and he wanted to deal drugs.

The government also said, in reference to a video played for the jury of Cascella slipping methamphetamine into the center console of a car rather than handing it directly to Perkins, that "[t]his is not something a novice does. This is learned behavior, concealment of what you're doing. This is not his first rodeo. **[**17]** He's been doing this a while."

The government also made the following comment in reference to a recorded phone call played for the jury between Perkins and Cascella in which Perkins had referred to the March 29 bathroom exchange:

> **THE GOVERNMENT**: This transaction at the Speedway [gas station] on April [sic] 29th involved Perkins having to go into a bathroom, collect the drugs from on top of a fire alarm or a fire box. Detective Perkins repeatedly referenced that. As you might understand, he was interested in obtaining the drugs and moving on. He didn't want to be out of his car. He didn't want to go into bathrooms. He didn't want to get into that, so he kept referencing that in subsequent **[*11]** calls and in subsequent meetings. Not once do you hear the Defendant, What are you talking about, what bathroom? Defendant is telling you that the March 29th transaction occurred. Defendant is telling you that that phone call occurred.

Cascella failed to make contemporaneous objections to these statements, so our review is for plain error. See *United States v. Salley, 651 F.3d 159, 164 (1st Cir. 2011)*. ***HN6***[⬆] "Plain error requires a showing (1) that an error occurred (2) which was clear or obvious and which not only (3) affected the defendant's substantial rights, but **[**18]** also (4) seriously impaired the fairness, integrity, or public reputation of judicial proceedings." Id. (quoting *United States v. Landry, 631 F.3d 597, 606 (1st Cir. 2011)*).

Cascella first challenges the government's repeated reference to him as a "drug dealer," claiming that such statements were "extremely prejudicial." ***HN7***[⬆] It is elementary that prosecutors may not present their own personal opinions to the jury. See *Greenberg v. United States, 280 F.2d 472, 474-75 (1st Cir. 1960)*; *Restatement (Third) of the Law Governing Lawyers § 107* (Am. Law Inst. 2000). Calling Cascella a "drug dealer" could arguably be viewed by some people as a form of vouching; i.e., offering the prosecutor's own opinion of the defendant's guilt. Cautious government attorneys might avoid this potential problem by saying instead, "the evidence shows

that the defendant is a drug dealer." But that could become quite repetitious, and trial courts, as here, generally remind jurors that comments and statements made by the government's attorneys are not evidence. In any event, we have not found a failure to employ such a finely parsed phrasing prejudicial, even in opening statements, at least where the record contained ample evidence to support the contention that the defendant was a drug dealer. See *United States v. Capelton, 350 F.3d 231, 237-38 (1st Cir. 2003)* (finding no prejudice from the government's reference to defendants as "drug dealers" in opening **[**19]** statements).

In this case, the government directly supported its assertion by pointing to the record evidence and did not claim any knowledge based on evidence outside the record. In context, the belatedly challenged statements plainly read more like "the evidence shows he is a drug dealer" than "I think he is a drug dealer." We see no plain error here.

Cascella makes a slightly different argument concerning the statement that "[t]his is not his first rodeo." According to Cascella, this statement "impermissibly raises facts not in evidence and suggests the government has special access to unadmitted evidence of prior misconduct of unspecified duration and frequency." We are not persuaded. It is true that ***HN8***[↑] government attorneys may not "impl[y] that [a] witness's testimony is corroborated by evidence known to the government but not known to the jury." *United States v. Valdivia, 680 F.3d 33, 48 (1st Cir. 2012)* (second alteration in original) (quoting *United States v. Francis, 170 F.3d 546, 551 (6th Cir. 1999)*). But here the comment was made in reference to a video of Cascella performing an evasive maneuver that a juror could assume was a behavior learned from drug dealing. We see no reason why the government could not point this out, nor was there anything unfair about the colloquial language used to make **[**20]** the point.

Lastly, Cascella argues that one of the government's statements impermissibly brought to the jury's attention Cascella's refusal to testify on his own behalf. ***HN9***[↑] Government attorneys may not **[*12]** comment to the jury on a defendant's decision not to testify. See *Griffin v. California, 380 U.S. 609, 613, 85 S. Ct. 1229, 14 L. Ed. 2d 106 (1965)*; *United States v. Wihbey, 75 F.3d 761, 769 (1st Cir. 1996)*. In support of his argument, Cascella points to the prosecutor's statement that "[n]ot once do you hear the Defendant, What are you talking about, what bathroom?" Again, context matters. This comment was part of a description of a phone call between Perkins and Cascella about the March 29 gas-station-bathroom transaction. The prosecutor was not saying "[n]ot once d[id] you hear the Defendant" testify that he did not put drugs in the bathroom. He was clearly saying "[n]ot once do you hear the Defendant" in this phone call deny knowledge of the previous transaction. The former would be improper in a case where the defendant did not take the stand, but the latter is permissible.

Finding no error as to any of Cascella's challenges to the closing arguments, we need not consider the remaining elements of plain-error review.

III.

For the foregoing reasons, we affirm Cascella's conviction.

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