UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES	:	12 Cr. 266 (ABJ)
v.	:	
DWIGHT KNOWLEs	:	

DEFENDANT KNOWLES' MOTION
***IN LIMINE* RE COOPERATING WITNESS "MF"**

INTRODUCTION

The Government has advised the defense that it intends to call as one of its next witnesses a cooperator identified by the initials "MF." Moreover, the Government has stated that it intends to introduce "lay opinion" testimony from this witness, which would include the meaning of code words and the general interpretation of numerous recorded phone calls where he was not a participant.

Defendants Dwight Knowles respectfully moves this Court to preclude the Government from attempting to elicit any such "lay opinion" testimony. First, the defense believes that asking MF to interpret the meaning of specific code words in calls where he was not a participant is actually "expert" testimony under Federal Rule of Evidence 702. United States v. Glover, 681 F.3d 411, 422 (D.C.Cir.2012). No expert notice was provided to the defense with respect to this witness.

Second, the procedure used to prepare MF for trial included playing for him many phone calls from the Colombia wiretap that have not been introduced into evidence in this case. Under the Court of Appeals decision in United States v. Hampton, 718 F.3d 978 (D.C. Cir. 2013) this witness cannot offer lay opinion testimony because the full basis of his opinion will not be presented for the jury's consideration.

ANALYSIS

The Meaning Of Drug Codes Is Expert Testimony

Federal Rule of Evidence permits the introduction of "lay" opinion testimony when it is: (a) rationally based on the witness's perception; (b) helpful to clearly understanding the witness's testimony or to determining a fact in issue; and (c) not based on scientific, technical, or other specialized knowledge that is properly the subject of expert testimony. United States v. Williams, 827 F.3d 1134, 1155 (D.C. Cir. 2013). The *Williams* court noted that examples of lay opinion testimony would be testimony as to how fast an object was traveling, or whether a person appeared sad. The rule also specifically prevents the Government from presenting expert testimony under the guise of lay opinion without providing appropriate notice under the federal rules of evidence. Williams, 827 F.3d at 1156.

In United States v. Smith, 640 F.3d 358, 365 (D.C.Cir.2011) and United States v. Williams, 827 F.3d 1134, 1155 (D.C. Cir. 2013), the Court of Appeals held that testimony concerning the meaning of code words or phrases in conversations constitutes expert testimony within the meaning of the federal rules. Thus, this Court should preclude the Government from eliciting testimony from MF concerning the meaning of code words or phrases in conversations involving other co-defendants because no expert notice was provided to the defense.

The Basis Of The Lay Opinion Will Not Be Presented To The Jury

In addition, the Government should not be permitted to ask MF more generally what he understands was the meaning of phone calls where he was not a participant. Based upon recent conversations with the prosecutors, it is expected that the Government

will attempt to play for the jury intercepted phone calls between defendants Thompson and Knowles and ask MF what was the "subject matter" of the phone call, what "deal" did it involve, or the like.

The *Jencks* material provided for this witness reveals that during trial preparation, the Government has played for MF numerous (possibly seventy-five or more) intercepted phone calls from the Colombian wiretap that were not introduced into evidence at this trial. Thus, these phone calls are part of the witness' basis of knowledge for his interpretation of the more general meaning and/or context of the calls in which he was not a participant.

In United States v. Hampton, 718 F.3d 978 (D.C. Cir. 2013) the trial court permitted an FBI agent to testify about the meaning of recorded conversations based upon his knowledge of the "entire" investigation. The court of appeals reversed the defendant's conviction because the Government did not introduce all the phone calls into evidence. The Court reasoned as follows:

> Here there were approximately 20,000 recorded calls, but only 100 or so were admitted into evidence, and fewer still were played in court. And so when [the FBI agent] interpreted those conversations on the basis of his listening to "all of the calls," the jury had no way of verifying his inferences or of independently reaching its own interpretations.

Id. at 983.

In this case, MF has listened to numerous phone calls from the Colombia wiretap that have not been introduced into evidence at the trial. Those calls now form a part of the witness' basis of knowledge and just as in *Hampton*, the jury will not be able to independently verify the interpretations and/or opinions that MF will be asked to express about the meaning of these calls. To permit MF to offer any lay opinion about the

meaning of the calls that he did not personally participate in would constitute reversible error.

CONCLUSION

For all of these reasons, the defendant asks that the Motion In Limine be granted.

Respectfully submitted,

Robert Feitel

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was sent, via Electronic Case Filing, to Adrian Rosales, Charles Miracle, and Erin Cox, Trial Attorneys, Narcotic and Dangerous Drug Section, via this Court's ECF system, this 23rd day of May 2016.

Robert Feitel

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