ORAL ARGUMENT REQUESTED BUT NOT YET SCHEDULED

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

NO. 04-3076
Consolidated with NO. 04-3116

UNITED STATES OF AMERICA
Plaintiff-Appellee,

v.

WALTER HENRY and CHARLES HARRISON,
Defendant-Appellants.

A DIRECT APPEAL OF A CRIMINAL CASE
FROM THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF COLUMBIA

JOINT BRIEF OF APPELLANTS

WILLIAM MALLORY KENT
Fla. Bar No. 0260738
1932 Perry Place
Jacksonville, Florida 32207
904-398-8000
904-348-3124 Fax
kent@williamkent.com

Counsel for Appellant
WALTER HENRY

DEBORAH A. PERSICO, PLLC
Attorney At Law DC Bar No. 415210
643 South Washington Street
Alexandria, Virginia 22314
202-244-7127

Counsel for Appellant
CHARLES HARRISON

District Court Cr. No. 1:98-cr-00235-RCL-4

NO. 04-3076 and 04-3116

United States v. Walter Henry and Charles Harrison

CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), Defendant-Appellants Henry and Harrison hereby state as follows:

A. Parties:

These appeals arise from a criminal trial involving the two defendants-appellants, six other co-defendants (Daniel Stover, Vernon McCall, Veronica Henry, Michael Ball, Stephen Cooper, Alvin Noms, and Lisa Hamson), and the plaintiff-appellee, the United States of America. Daniel Stover and Vernon McCall were convicted of conspiracy to distribute and to possess with the intent to distribute a detectable amount of heroin. The jury convicted Walter Henry of two counts of possession with intent to distribute heroin, but failed to return a verdict as to the conspiracy charge. The jury failed to return a verdict against Charles Harrison. Both Henry and Hamson were convicted on the conspiracy charge at a subsequent trial. There are no intervenors or *amici*. The judgement against Henry and Harrison was affirmed in a prior appeal, but both Defendant-Appellants were remanded for resentencing. Both Henry and Harrison were resentenced and this second appeal followed.

B. Rulings Under Review:

These appeals are from judgments of the district court (the Honorable Royce C. Lamberth), adjudging appellants guilty after a joint jury trial. In this joint brief, appellants seek review of trial rulings and review of each sentence imposed on each appellant. None of these rulings has been reported.

C. Related Cases:

Henry and Harrison's prior appeal to this Court was reported as *United States v. Stover*, 329 F.3d 859 (D.C. Cir. 2003).

STATEMENT REGARDING ORAL ARGUMENT

Appellants Henry and Harrison respectfully request oral argument. The application of *Crawford v. Washington* to expert testimony [Issue I] is an issue of first impression in this Circuit; the admissibility of drug agent "expert" testimony interpreting drug code language, when in fact the language at issue was not code, but merely ambiguous or veiled conversation [Issue II], appears to be an issue of first impression in this circuit; and finally, the admissibility of a guilty plea of a non-testifying coconspirator [Issue III] appears to be an issue of first impression in this circuit. The argument that the remedy provision of *Booker* itself is unconstitutional [Issue V] is an issue of first impression in this Circuit and clearly merits oral argument. Counsel has filed a separate motion requesting oral argument.

TABLE OF CONTENTS

TABLE OF CITATIONS[1]

PAGE

CASES

[1] Authorities upon which we chiefly rely are marked with asterisks.

STATUTES

RULES

OTHER AUTHORITIES

STATEMENT OF JURISDICTION

This Court has jurisdiction over the appeal in this cause under 28 U.S.C. § 1291, which provides for an appeal from a final order of a district court, and under 18 U.S.C. § 3742. This appeal was timely filed within ten days of entry of judgment and sentencing by Henry filing his notice of appeal on June 10, 2004 from his sentencing on that same date, and Harrison filing his notice of appeal on July 28, 2004 from his sentencing on July 21, 2004.

STATEMENT OF THE ISSUES

I. **IMPROPER ADMISSION OF EXPERT OPINION BASED IN PART ON TESTIMONIAL HEARSAY IN VIOLATION OF *CRAWFORD v. WASHINGTON* WAS REVERSIBLE ERROR IN THE SECOND TRIAL AND IS COGNIZABLE ON THIS APPEAL BECAUSE THE CLAIM IS PREDICATED ON INTERVENING SUPREME COURT AUTHORITY.**

II. **IMPROPER ADMISSION OF "EXPERT" TESTIMONY INTERPRETING AMBIGUOUS CONVERSATIONS AS "CODE," WHEN IN FACT IT WAS JUST THE WITNESS'S PERSONAL OPINION BASED ON HIS KNOWLEDGE OF THE CASE, WAS REVERSIBLE ERROR IN THE SECOND TRIAL AND IS COGNIZABLE ON THIS APPEAL BECAUSE IT WAS INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL FOR HENRY AND HARRISON'S PRIOR COURT APPOINTED APPELLATE COUNSEL TO NOT RAISE THE ISSUE IN THE FIRST APPEAL.**

III. **ADMISSION OF GUILTY PLEAS OF NON-TESTIFYING CO-CONSPIRATORS WAS REVERSIBLE ERROR IN BOTH TRIALS AND IS COGNIZABLE ON THIS APPEAL BECAUSE IT WAS INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL FOR HENRY AND HARRISON'S PRIOR COURT APPOINTED APPELLATE COUNSEL TO NOT RAISE THE ISSUE IN THE FIRST APPEAL.**

IV. **HENRY AND HARRISON ARE ENTITLED TO RESENTENCING UNDER *UNITED STATES v. BOOKER* BECAUSE THEY PRESERVED A SIXTH AMENDMENT OBJECTION AT THEIR RESENTENCING AND THE GOVERNMENT CANNOT SATISFY ITS BURDEN OF SHOWING THAT THE CONSTITUTIONAL ERROR WAS HARMLESS.**

V. THE *BOOKER* REMEDY PROVISION IS UNCONSTITUTIONAL AND HENRY AND HARRISON ARE ENTITLED TO BE RESENTENCED UNDER BINDING SENTENCING GUIDELINES THAT ARE DETERMINED WITHOUT ANY GUIDELINE FACTOR BEING DETERMINED BY JUDICIAL FACT-FINDING.

STATEMENT OF THE CASE

Basic Case Facts and Procedural History

This is the second appeal in this case. The first appeal resulted in a resentencing. This appeal follows that resentencing. The facts and procedural history of the case are set forth in the opinion on the first appeal. *United States v. Stover*, 329 F.3d 859, 863-864 (D.C. Cir. 2003).

This case involves a conspiracy to import heroin from Thailand and other Asian countries and distribute it in the Washington D.C. and Baltimore areas. The evidence presented at trial established that, from 1995 to 1998, Nuri Lama, a citizen of Nepal residing in New York, arranged to import heroin from Asia into the United States, and delivered the heroin to appellant Walter Henry. Henry stored the drugs at his mother's home in Capitol Heights, Maryland, and then sold the heroin to appellant Charles Harrison, who was the "hub." Harrison "cut" or diluted the heroin and sold it to a network of dealers in the Washington D.C. and Baltimore areas, including appellant Vernon McCall. Daniel Stover, Harrison's right-hand man, also "cut" heroin, packaged and delivered it, and collected payment for it. Stover also operated a "stash house" for Harrison in Fort Washington, Maryland.

The Government's investigation of the heroin conspiracy produced tapes of more than 250 telephone conversations intercepted on telephone lines belonging to Lama,

Henry, and Harrison. On various dates in June and July 1998, the Federal Bureau of Investigation ("FBI") searched the homes of Harrison, McCall, Henry (who lived with his mother), and Michael Ball (another distributor in the conspiracy); the FBI also searched McCall's car and Stover's stash house. The searches recovered heroin, guns, cash, documents connecting individuals to the conspiracy, small baggies of heroin for street distribution, cutting agents, cutting and packaging equipment, and scales.

On May 4, 1999, appellants and others were charged with one count of conspiracy to possess with intent to distribute one kilogram or more of heroin in violation of 21 U.S.C. § 846. Henry was also charged with two counts of possession with intent to distribute heroin in violation of 21 U.S.C. § 841. Stover and Harrison were also charged with one count of conspiracy to commit money laundering in violation of 18 U.S.C. § 1956.

From October 20, 1999 to January 12, 2000, all appellants were tried in a jury trial before the District Court. Before trial, Lama pled guilty to having engaged in a conspiracy and provided evidence against appellants. Stover and McCall were convicted of conspiracy to possess with intent to distribute. Henry was convicted of possession with intent to distribute. Stover was acquitted of the money laundering conspiracy count. The jury was unable to reach a verdict as to Henry and Harrison on the drug conspiracy count, and as to Harrison on the money laundering conspiracy

count. From September 11 to October 20, 2000, a retrial on the drug conspiracy count against Henry and Harrison took place. The District Court dismissed the money laundering conspiracy count against Harrison. The jury returned a guilty verdict as to both Henry and Harrison on the drug conspiracy count. Henry and Harrison were sentenced to life imprisonment, Stover to 360 months, and McCall to 235 months.

Henry and Harrison appealed the verdict on various grounds and appealed the sentencing on guideline error grounds. This Court remanded Henry and Harrison for resentencing based on error in the determination of the drug quantity for sentencing guideline purposes but otherwise denied relief on the merits issues. [2]

Key Facts for the Current Appeal

There were two trials, the first of which resulted in a hung jury as to Henry and Harrison on the primary count, conspiracy to distribute heroin.[3] [Tr. 1/12/2000: 5771-5772; 5781; Docket 293] Henry and Harrison were retried on the conspiracy count and convicted. [Tr. 10/20/2000: 14-15]

There were two differences between the two trials.

---

[2] The foregoing statement of facts has been taken from the Court's opinion in *United States v. Stover,* 329 F.3d 859 (D.C. Cir. 2003). Other record references are in the form Tr. = transcript, followed by the date and page number.

[3] Henry was convicted at the first trial of two counts of possession of heroin with intent to distribute.

In the first trial the alleged source of the heroin, Nuri Lama, testified as a government witness under a cooperation guilty plea agreement. [Tr. 10/26/1999: 295 ff.; Tr. 10/26/1999: 324 ff.] Nuri Lama was extensively and effectively cross-examined about matters relating to his lack of credibility and what he stood to gain by his plea agreement. [e.g. Tr. 10/29/1999: 623 ff.]

Between the first and second trials, however, Nuri Lama died of natural causes. [Tr. 9/22/2000: 90] In the second trial the government did not have Nuri Lama's testimony nor did the defense have his cross-examination to show the jury that Nuri Lama was not credible. Instead of testimony, the government introduced the fact that Nuri Lama had pled guilty to the very same conspiracy that Henry and Harrison were on trial. [Tr. 10/13/2000: 25] This prejudicial evidence was introduced without any offsetting cross-examination.

The second difference between the first and second trials was that in the second trial but not in the first trial, Detective Tyrone Thomas was allowed to testify as an expert [Tr. 9/25/2000: 10; 37] and explain to the jury the meaning of numerous wiretap recorded telephone calls between the alleged coconspirators. [Tr. 9/25/2000: 81-83; Govt. Ex. 600 (glossary of 87 terms); Tr. 9/26/2000: 105-106 (FBI Agent explains wiretaps using glossary)] Language that was on its face not incriminating was explained by Detective Thomas to be drug coded conversations consistent with the

circumstantial evidence in the case. [Tr. 9/25/2000: 21-24; 82-84; 87] The very same wiretap telephone calls were presented in the first trial as in the second trial, the only difference was the use of a Detective who was qualified as an expert to tell the jury how to interpret the conversations.

The significance of these two differences has to be understood in the context of the overall case presented to the jury in the two trials. The evidence can summarily be described as consisting of four parts: (1) surveillance, (2) the testimony of cooperating co-conspirators including Nuri Lama in the first trial, (3) Nuri Lama's guilty plea standing alone without impeachment in the second trial, and (4) numerous wire tap tape recordings, standing alone in the first trial and interpreted by Detective Thomas in the second trial.

Henry Resentencing

On remand for resentencing Henry objected on *Apprendi* grounds, which were accepted in part, in that the district court reduced the sentences on counts three and four to twenty years but resentenced Henry on the conspiracy count to life. [Tr. 6/10/2004: 6-10]

Harrison Resentencing

During his resentencing hearing on July 21, 2004, Harrison objected to the calculation of the drug quantity and enhancements for role in the offense and possession

of a weapon based on *Apprendi* and *Blakely*. The district court found that "*Blakely* does not decide the question because of footnote nine, and until the Supreme Court overturns the U.S. Sentencing Guidelines, I will continue to apply the guidelines." [Tr. 7/21/04: 19]. The court then determined that the base offense level should be reduced from 38 to 36, finding Harrison responsible for "more than two kilograms and less than 30 kilograms," and that the "four-level enhancement for role in the offense and the two-level enhancement for the gun were appropriately issued in the first place. . ." *Id* at 20. The court reiterated that "[U]ntil the U.S. Sentencing Guidelines are overturned by a higher court, I will continue to apply the guidelines." *Id*. The court sentenced Harrison to life imprisonment. *Id* at 28.

STANDARDS OF REVIEW

I. IMPROPER ADMISSION OF EXPERT OPINION BASED IN PART ON TESTIMONIAL HEARSAY IN VIOLATION OF *CRAWFORD v. WASHINGTON* WAS REVERSIBLE ERROR IN THE SECOND TRIAL AND IS COGNIZABLE ON THIS APPEAL BECAUSE THE CLAIM IS PREDICATED ON INTERVENING SUPREME COURT AUTHORITY.

Henry and Harrison failed to object at trial, therefore this issue is subject to the plain error standard of Rule 52(b), Federal Rules of Criminal Procedure. *See United States v. Olano,* 507 U.S. 725, 113 S.Ct. 1770, 1779, 123 L.Ed.2d 508 (1993) (court should find plain error only if error "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings").

II. IMPROPER ADMISSION OF "EXPERT" TESTIMONY INTERPRETING AMBIGUOUS CONVERSATIONS AS "CODE," WHEN IN FACT IT WAS JUST THE WITNESS'S PERSONAL OPINION BASED ON HIS KNOWLEDGE OF THE CASE, WAS REVERSIBLE ERROR IN THE SECOND TRIAL AND IS COGNIZABLE ON THIS APPEAL BECAUSE IT WAS INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL FOR HENRY AND HARRISON'S PRIOR COURT APPOINTED APPELLATE COUNSEL TO NOT RAISE THE ISSUE IN THE FIRST APPEAL.

Henry and Harrison failed to object at trial, therefore this issue is subject to the plain error standard of Rule 52(b), Federal Rules of Criminal Procedure. *See United States v. Olano, supra*.

III. ADMISSION OF GUILTY PLEAS OF NON-TESTIFYING CO-CONSPIRATORS WAS REVERSIBLE ERROR IN BOTH TRIALS AND IS COGNIZABLE ON THIS APPEAL BECAUSE IT WAS INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL FOR HENRY AND HARRISON'S PRIOR COURT APPOINTED APPELLATE COUNSEL TO NOT RAISE THE ISSUE IN THE FIRST APPEAL.

Henry and Harrison objected at the first trial, therefore because of the timely objection, the district court's error is subject to harmless error review under Rule 52(a), Federal Rules of Criminal Procedure.

Henry and Harrison failed to object at the second trial, therefore this issue is subject to the plain error standard of Rule 52(b), Federal Rules of Criminal Procedure. *See United States v. Olano, supra*.

IV. HENRY AND HARRISON ARE ENTITLED TO RESENTENCING UNDER *UNITED STATES v. BOOKER* BECAUSE THEY PRESERVED A SIXTH AMENDMENT OBJECTION AT RESENTENCING AND THE GOVERNMENT CANNOT SATISFY ITS BURDEN OF SHOWING THAT THE CONSTITUTIONAL ERROR WAS HARMLESS.

Henry and Harrison presented a timely objection to the court and not the jury determining the guideline enhancements at their resentencing. Therefore because of the timely objection, the district court's error is subject to harmless error review under Rule 52(a), Federal Rules of Criminal Procedure.

V. THE *BOOKER* REMEDY PROVISION IS UNCONSTITUTIONAL AND HENRY AND HARRISON ARE ENTITLED TO BE RESENTENCED UNDER BINDING SENTENCING GUIDELINES THAT ARE DETERMINED WITHOUT ANY GUIDELINE FACTOR BEING DETERMINED BY JUDICIAL FACT-FINDING.

Henry and Harrison presented a timely objection to the court and not the jury determining the guideline enhancements at their resentencing. Therefore because of the timely objection, the district court's error is subject to harmless error review under Rule 52(a), Federal Rules of Criminal Procedure.

Newly Asserted Appellate Claim Based on Intervening Supreme Court Authority

Supplemental briefing should be permitted on the *Crawford* issue given that Henry and Harrison's conviction is not yet final on direct appeal, therefore under *Griffith v. Kentucky*, 479 U.S. 314, 107 S.Ct. 708 (1987), the appellants should be able to apply the new case and not be deemed to have waived this issue by not raising it in the first appeal.

Newly Asserted Appellate Claims Based on Ineffective Assistance of Appellate Counsel.

Ineffective assistance of appellate counsel is subject to the *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) standard when a defendant claims that he received ineffective assistance of appellate counsel because his counsel, although filing a merits brief, failed to raise a particular claim. *Smith v.*

Robbins, 528 U.S. 259, 287-289, 120 S.Ct. 746,765-766 (2000). In *Jones v. Barnes,* 463 U.S. 745, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983), the Court held that appellate counsel who files a merits brief need not (and should not) raise every nonfrivolous claim, but rather may select from among them in order to maximize the likelihood of success on appeal. Notwithstanding *Barnes,* it is still possible to bring a *Strickland* claim based on counsel's failure to raise a particular claim. See, *e.g., Gray v. Greer,* 800 F.2d 644, 646 (7th Cir. 1986) ("Generally, only when ignored issues are clearly stronger than those presented, will the presumption of effective assistance of counsel be overcome"); *Banks v. Reynolds,* 54 F.3d 1508, 1515-1516 (10th Cir. 1995) (finding both parts of *Strickland* test satisfied where appellate counsel failed to raise claim of violation of *Brady v. Maryland,* 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963)).

SUMMARY OF ARGUMENTS

I. IMPROPER ADMISSION OF EXPERT OPINION BASED IN PART ON TESTIMONIAL HEARSAY IN VIOLATION OF *CRAWFORD v. WASHINGTON* WAS REVERSIBLE ERROR IN THE SECOND TRIAL AND IS COGNIZABLE ON THIS APPEAL BECAUSE THE CLAIM IS PREDICATED ON INTERVENING SUPREME COURT AUTHORITY.

Detective Tyrone Thomas provided the decisive testimony in trial two as an expert witness under Rule 703, Federal Rules of Evidence, "interpreting" 73 "code words" he found in hundreds of wiretap telephone conversations of Henry and his alleged coconspirators.[4] Detective Thomas's interpretations were based on his years of experience as a narcotics detective in which he debriefed and interviewed hundreds of drug dealers about their activities and language. His interpretations were based on the information provided to him over the years by these unnamed drug dealers, none of whom testified at trial and none of whom were previously cross-examined by Henry and Harrison.

Detective Thomas's expert opinion testimony was predicated on testimonial hearsay as that term is used in *Crawford v. Washington*, and its use violated Henry and Harrison's right to confront and cross-examine the witnesses who were the source of the hearsay. The error was not harmless, as established by the fact that without this

---

[4] This testimony was excluded in the first trial which resulted in a hung jury on the primary conspiracy count.

testimony the Government was unable to obtain a guilty verdict against Henry and Harrison on the conspiracy charge in the first trial.

Although this issue was not raised in the first appeal, it should be considered on this appeal because the argument is based on intervening Supreme Court authority which issued after the first appeal but before Henry and Harrison's judgment and conviction has become final on direct appeal. The error was plain as demonstrated by the alternative outcomes of the first and second trials, accordingly the verdict in trial two and life sentences imposed as a result of that verdict should be reversed, leaving Henry with a conviction and twenty year sentence under the first trial and Harrison without a conviction.

II. IMPROPER ADMISSION OF "EXPERT" TESTIMONY INTERPRETING AMBIGUOUS CONVERSATIONS AS "CODE," WHEN IN FACT IT WAS JUST THE WITNESS'S PERSONAL OPINION BASED ON HIS KNOWLEDGE OF THE CASE, WAS REVERSIBLE ERROR IN THE SECOND TRIAL AND IS COGNIZABLE ON THIS APPEAL BECAUSE IT WAS INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL FOR HENRY AND HARRISON'S PRIOR COURT APPOINTED APPELLATE COUNSEL TO NOT RAISE THE ISSUE IN THE FIRST APPEAL.

Detective Thomas was allowed to testify as an expert under Rule 703 in the second trial and offer a devastating explanation for the numerous wiretap telephone conversations which otherwise on their face were not incriminating. His testimony was

predicated on the Government's argument that the conversations consisted of "code words," which required an expert in drug code to interpret. Except for the *Crawford* issue above, Henry and Harrison does not dispute the concept that a properly qualified expert in drug *code words* could be permitted to offer an interpretation of *drug code* given a proper foundation and predicate.

That is not what was done in Henry and Harrison's trial, however. There were no code words used by Henry or his alleged coconspirators. The wiretapped conversations were ambiguous and veiled and did not make use of any established code. The language employed was impromptu and off the cuff and not susceptible to interpretation as code by an expert. Detective Thomas's expert opinion was instead based on his knowledge of the case, not his knowledge of a non-existent code. Therefore it was error to allow Detective Thomas to testify as an expert and offer an expert interpretation of the wiretapped conversations. His testimony improperly intruded on the jury's function.

Although this issue was not raised in the first appeal, it should be considered on this appeal on the basis that it was ineffective assistance of appellate counsel to fail to raise it in the first appeal. Although there was no objection at trial, the error was plain as demonstrated by the alternative outcomes of the first and second trials.

The legal basis for the objection and the issue on appeal was well established at the

time of the trial and appeal, therefore had the issue been raised in the first appeal it would have been reversible error. Accordingly the verdict in trial two and life sentence imposed as a result of that verdict should be reversed, leaving Henry with a conviction and twenty year sentence under the first trial and Harrison without a conviction.

III. ADMISSION OF GUILTY PLEAS OF NON-TESTIFYING CO-CONSPIRATORS WAS REVERSIBLE ERROR IN BOTH TRIALS AND IS COGNIZABLE ON THIS APPEAL BECAUSE IT WAS INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL FOR HENRY AND HARRISON'S PRIOR COURT APPOINTED APPELLATE COUNSEL TO NOT RAISE THE ISSUE IN THE FIRST APPEAL.

Despite consistent settled authority to the contrary, and strenuous objection at the first trial (but no objection at the second trial), the Government elicited testimony that several alleged *non-testifying* coconspirators, including in the second trial, the putative Nepalese source of Henry's heroin, Nuri Lama, had pled guilty to the conspiracy charge.[5] This was clearly reversible error in the first trial based on the settled authority[6] prohibiting such evidence and the timely objection of defense counsel.

---

[5] The Government also introduced in the second trial the guilty plea of another alleged key coconspirator, Derek Stedman, who had died of natural causes after the first trial.

[6] Introduction of the guilty plea of a non-testifying coconspirator was prohibited under settled law at the time of both trials independent of any argument based on *Crawford v. Washington*. *Crawford*, however, has added a clear constitutional dimension to the prohibition.

It was equally reversible error in the second trial because it has been held that the admission of such highly prejudicial evidence is plain error, as indeed it was in this case.

The prejudice in this case is particularly easily demonstrated in the second trial by the alternative outcomes of trials one and two. Nuri Lama testified in trial one, but was so effectively cross-examined that he was not believed by the jury - this is proven by the fact that the jury could not reach a unanimous verdict in trial one on the conspiracy count, yet had Nuri Lama's testimony been accepted it would have established Henry and Harrison's guilt on the conspiracy charge. Nuri Lama died of natural causes between the two trials, so he was not a witness in the second trial, instead the Government presented to the jury only the fact that Nuri Lama had pled guilty to the conspiracy charge.

There was a virtual identity of evidence between the two trials, with the only important exceptions being the admission of Nuri Lama's guilty plea without cross-examination in trial two (and the drug "code" interpretation of Detective Thomas in trial two).

Although this issue was not raised in the first appeal, it should be considered on this appeal on the basis that it was ineffective assistance of appellate counsel to fail to raise it in the first appeal. There was a timely objection in the first trial, and although

there was no objection in the second trial, the error was plain. The legal basis for the objection and the issue on appeal was well established at the time of the trial and appeal, therefore had the issue been raised in the first appeal it would have been reversible error. Accordingly the judgment and sentences in both trial must be reversed.

IV. HENRY AND HARRISON ARE ENTITLED TO RESENTENCING UNDER *UNITED STATES v. BOOKER* BECAUSE THEY PRESERVED A SIXTH AMENDMENT OBJECTION AT THEIR RESENTENCINGS AND THE GOVERNMENT CANNOT SATISFY ITS BURDEN OF SHOWING THAT THE CONSTITUTIONAL ERROR WAS HARMLESS.

At their resentencings following remand from the first appeal Henry and Harrison raised *Apprendi* objections to the judge, and not the jury, making the necessary fact findings to determine their guideline sentencing range. Their objections were sufficient to preserve a Sixth Amendment challenge to the resentencing. The Government cannot satisfy its burden of showing that the constitutional error was harmless, therefore Henry and Harrison are entitled to a *Booker* resentencing on the convictions from both the first and second trials as to Henry and the second trial as to Harrison.

V. THE *BOOKER* REMEDY PROVISION IS UNCONSTITUTIONAL AND HENRY AND HARRISON ARE ENTITLED TO BE RESENTENCED UNDER BINDING SENTENCING GUIDELINES THAT ARE DETERMINED WITHOUT ANY GUIDELINE FACTOR BEING DETERMINED BY JUDICIAL FACT-FINDING.

The *Booker* remedy provision violates the Sixth Amendment to the United States Constitution. The proper remedy under *Apprendi, Blakely* and the merits opinion in *Booker* is for the district court to apply the guidelines in the mandatory manner required by law and intended by Congress, with only the offending portion of the guideline procedure excised, that is, any judicial fact-finding which increases the otherwise applicable guideline range is prohibited. Accordingly, Henry and Harrison are entitled to resentencing utilizing this approach.

ARGUMENTS

I. IMPROPER ADMISSION OF EXPERT OPINION BASED IN PART ON TESTIMONIAL HEARSAY IN VIOLATION OF *CRAWFORD v. WASHINGTON* WAS REVERSIBLE ERROR IN THE SECOND TRIAL AND IS COGNIZABLE ON THIS APPEAL BECAUSE THE CLAIM IS PREDICATED ON INTERVENING SUPREME COURT AUTHORITY.

In the second trial Detective Thomas was allowed to testify as an expert in drug code language, and as such, he offered an interpretation of 87 common words, that in the context, he opined were meant to refer to heroin and heroin dealing related activity. [Tr. 9/25/2000: 83-84] These words were not "code" in the ordinary sense of the word, that is, terms agreed upon by some system, rather it was all totally impromptu conversation in which the participants attempted off the cuff to cover their meanings. Detective Thomas based his interpretations on 28 years of experience debriefing and talking to drug dealers. [Tr. 9/25/2000: 8] It is Henry and Harrison's argument that this resulted in the improper admission of testimonial hearsay in violation of *Crawford v. Washington*, 541 U.S. 36, 68, 124 S.Ct. 1354, 1374, 158 L.Ed.2d 177 (2004).

Although Rule 703, Federal Rules of Evidence, allows experts to rely on otherwise inadmissible evidence in formulating their opinions, such expert testimony is inadmissible under the standard set forth in *Crawford*. The detective's testimony was based on information obtained from unidentified individuals he had spoken to over the

course of his lengthy career as a narcotics detective by which he had been told what various drug argot meant. Because his opinion was based on what other informants had told him, and it was foreseeable that this would be testified to in court, the hearsay evidence was testimonial in nature.

At the time of trial, Rule 703 of the Federal Rules of Evidence appeared to permit this testimony. Rule 703 provides:

> The facts or data in a particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

As one commentator has stated:

> Since Rule 703 is intended to liberalize previous practice, the court should concentrate on the reliability of the opinion rather than on technical demonstration that hearsay was employed.

Weinstein & Berger, 3 Weinstein's Evidence, P 703(03) p. 703-17 (1978).

However, this is no longer correct after *Crawford*. *Crawford* abrogated *Ohio v. Roberts,* 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980), which held that "[w]here testimonial evidence is at issue . . . the Sixth Amendment demands . . .

unavailability and a prior opportunity for cross-examination." 541 U.S. at 68, 124 S.Ct. at 1374. This is a bright-line rule: if a statement is testimonial and the defendant did not have a prior opportunity for cross-examination, the declarant must testify at trial for the Confrontation Clause to be satisfied. Put differently, the Confrontation Clause is violated if a testimonial statement is introduced at trial and the defendant did not have an opportunity to cross-examine the declarant.

In *Crawford,* the Supreme Court ruled that out-of-court statements that are "testimonial" and made by a witness not present at trial are admissible only if the declarant is unavailable and the defendant had a prior opportunity to cross-examine. According to *Crawford*, the Sixth Amendment's Confrontation Clause requires such safeguards on the use of out-of-court testimony. *Crawford*, 124 S.Ct. at 1370 ("Admitting statements deemed reliable by a judge is fundamentally at odds with the right of confrontation."). The Sixth Amendment "commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination." Id. Accordingly, *Crawford* requires exclusion of some hearsay statements that previously were admissible under hearsay exception rules. See 5 Jack B. Weinstein et al., Weinstein's Federal Evidence § 802.05[3][e] (2d ed.2004).

While the Supreme Court did not establish a comprehensive definition for the term "testimonial," it did provide some guidance on its meaning. The Supreme Court

noted that "testimony" is typically a "solemn declaration or affirmation made for the purpose of establishing or proving some fact." Id. at 1364 (internal quotation and citation omitted). "Whatever else the term [testimonial] covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; *and to police interrogations*." *Id.* At 1374 (emphasis supplied). Testimonial statements may also include, but are not limited to, affidavits, custodial examinations, confessions, depositions, prior testimony without the benefit of cross-examination, and "statements that declarants would reasonably expect to be used prosecutorially." Id. at 1364 (internal quotation and citation omitted).

There is no evidence in the record to establish whether the persons Detective Thomas talked to were "unavailable" at trial, but it is clear that none of these witnesses were present at trial for confrontation and cross-examination. More to the point, the record is clear that Henry and Harrison did not have an opportunity to cross-examine any of the persons relied upon concerning the basis for Detective Thomas's testimony.

Thus, it is left to this Court to determine whether these out of court statements were "testimonial" under the rubric of *Crawford*. If so, Detective Thomas's expert opinion was inadmissible.

The Oxford English Dictionary ("OED") defines "testimonial" as "serving as evidence; conducive to proof;" as "verbal or documentary evidence;" and as

"[s]omething serving as proof or evidence." XVII The Oxford English Dictionary 832 (2d ed., J.A. Simpson & E.S.C. Weiner eds., Clarendon Press 1989). The OED defines "testimony" as "[p]ersonal or documentary evidence or attestation in support of a fact or statement; hence, any form of evidence or proof." Id. at 833 (emphasis added). Similarly, Webster's defines "testimonial" as "something that serves as evidence: proof." Webster's Third New International Dictionary of the English Language (Unabridged) 2362 (Merriam-Webster Inc.1993). "Testimony" is "firsthand authentication of a fact: evidence;" "something that serves as an outward sign: proof;" or "an open acknowledgment: profession." Id.

A review of relevant lexicographic sources is consistent with the U.S. Supreme Court's own jurisprudence on this issue. See *Crawford*, 124 S.Ct. at 1364 ("[The Confrontation Clause] applies to 'witnesses' against the accused-in other words, those who 'bear testimony.' 1 N. Webster, An American Dictionary of the English Language (1828).").

When out-of-court statements are testimonial, the safeguards of the Sixth Amendment's Confrontation Clause must be observed. Thus, to be admissible at trial, the hearsay sources must have been unavailable for trial or Henry and Harrison must have had a prior opportunity to cross-examine the hearsay sources. *Crawford*, 124 S.Ct. at 1374. It is sufficient that Henry and Harrison did not have an opportunity to

cross-examine for this Court to find that Detective Thomas's testimony based on testimonial out-of-court statements was inadmissible at trial.

The admission of the drug code testimony had a demonstrable substantial effect on the outcome of the second trial, because without this testimony, but otherwise with the same evidence, the government was unable to obtain a conviction in the first trial. This unusual sequence of events, the hung jury on the conspiracy count in the first trial and the conviction in the second trial, with the virtual identity of evidence except for the inclusion of the drug code interpretation, is the equivalent of a controlled experiment to establish what had or did not have substantial effect on the verdict. The admission of this evidence cannot have been harmless, because without it the Government was unable to obtain a verdict in the first trial.

Therefore, the District Court committed reversible error by allowing the expert opinion relying upon these statements to be introduced during Henry and Harrison's trial. Accordingly, Henry and Harrison's conviction in the second trial of the conspiracy charge must be reversed.[7]

---

[7] In *United States v. Buonsignore,* 131 Fed.Appx. 252, *257, 2005 WL 1130367 (11th Cir., May 13, 2005), the Eleventh Circuit recognized that expert opinion testimony based on hearsay is no longer admissible under *Crawford v. Washington*:

> However, the [DEA expert witness] drug valuation testimony violated the Confrontation Clause. *Although Rule 703 allows experts to rely on*

Although this issue was not raised in the initial appeal brief in the first appeal, it nevertheless should be heard by this Court, because it is based on supervening Supreme Court authority which issued after the first appeal but prior to Henry and Harrison's conviction becoming final on direct appeal. Supplemental briefing should be permitted on this issue given that the case is not yet final on direct appeal, therefore under *Griffith v. Kentucky*, 479 U.S. 314, 107 S.Ct. 708 (1987), the appellants should be able to apply the new rule and not be deemed to have waived this issue by not raising it in the first appeal.

> *otherwise inadmissible evidence in formulating their opinions and the agent's testimony complied with our decision in Brown, it is inadmissible under the standard set forth in Crawford.* The agent's testimony was based on information obtained from an unidentified individual at the DEA in Washington, D.C. The evidence is testimonial in nature. The government has not shown that both (1) that individual is unavailable, and (2) Buonsignore had the opportunity to cross-examine that individual. Thus, it was a violation of the Confrontation Clause to admit it.

United States v. Buonsignore, 131 Fed.Appx. 252, *257, 2005 WL 1130367 (11th Cir, May 13, 2005) (emphasis supplied). Cf. *United States v. Stone*, 32 F.3d 651, 654 (6th Cir. 2005) ("Because [d]efendants d[id] not establish that [expert witness] relied on out-of-court interviews of witnesses not called to testify, their *Crawford* argument is not well taken.").

II. IMPROPER ADMISSION OF "EXPERT" TESTIMONY INTERPRETING AMBIGUOUS CONVERSATIONS AS "CODE," WHEN IN FACT IT WAS JUST THE WITNESS'S PERSONAL OPINION BASED ON HIS KNOWLEDGE OF THE CASE, WAS REVERSIBLE ERROR IN THE SECOND TRIAL AND IS COGNIZABLE ON THIS APPEAL BECAUSE IT WAS INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL FOR HENRY AND HARRISON'S PRIOR COURT APPOINTED APPELLATE COUNSEL TO NOT RAISE THE ISSUE IN THE FIRST APPEAL.

Even if this Court were not to accept the *Crawford* analysis, Detective Thomas's testimony was nevertheless inadmissible under ordinary pre-*Crawford* evidentiary rules applicable to the admission of expert testimony. The words Detective Thomas offered an expert interpretation of were not in any sense of the word a true code requiring interpretation, but only ambiguous and veiled conversation. There is a clear line of authority prohibiting this genre of "code" interpretation and reversing cases on this basis.

A district court's discretion to admit expert testimony is controlled by Rules 702, 703, and 403 of the Federal Rules of Evidence.[8] Rule 702 provides that an expert

---

[8] Rule 702 provides:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the issue, a witness qualified as an expert by knowledge, skill, experience, training or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

witness may testify "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the issue." Rule 703 states that an expert witness may base opinions on otherwise inadmissible facts or data "of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject." Of course, expert testimony, like other forms of evidence, "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." Fed.R.Evid. 403.

Detective Thomas's testimony was improper under the rules of evidence that generally govern expert testimony, Fed.R.Evid. 702-05, and the Supreme Court's decisions in *Daubert v. Merrell Dow Pharmaceuticals,* 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993), and *Kumho Tire Co. v. Carmichael,* 526 U.S. 137, 119 S.Ct. 1167, 143 L.Ed.2d 238 (1999). Under *Daubert, Kumho* and Rule 702, expert testimony should be excluded if the witness is not actually applying expert

---

Rule 703 as amended in 2000 clarifies that the expert generally may not disclose otherwise inadmissible evidence:

If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible into evidence in order for the opinion or inference to be admitted. Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect.

methodology.

Incorporating the *Daubert* standard, the Federal Rules of Evidence as amended in 2000, require that expert testimony be based on "sufficient facts or data" and on "reliable principles and methods" that the expert "witness has applied reliably to the facts of the case." Fed.R.Evid. 702. The Advisory Committee Notes to revised Rule 702 now state that,

> For example, when a law enforcement agent testifies regarding the use of code words in a drug transaction, the principle used by the agent is that participants in such transactions regularly use code words to conceal the nature of their activities. The method used by the agent is the application of extensive experience to analyze the meaning of the conversations. So long as the principles and methods are reliable and applied reliably to the facts of the case, this type of testimony should be admitted.

Fed.R.Evid. 702 advisory committee's notes.

But when an expert is no longer applying his extensive experience and a reliable methodology, *Daubert* teaches that the testimony should be excluded. Even if the testimony is admissible under Rule 702, it still must pass muster under Rule 403: its probative value must not be substantially outweighed by unfair prejudice. See *United States v. Young*, 745 F.2d 733, 765-66 (2nd Cir. 1984) (Newman, J., concurring). Straying from the scope of expertise may also implicate another concern under Rule 403, juror confusion. Some jurors will find it difficult to discern whether the witness is relying properly on his general experience and reliable methodology, or improperly

on what he has learned of the case. When the witness is a law enforcement agent who testifies about the facts of the case and states that he is basing his expert conclusions on his knowledge of the case, a juror understandably will find it difficult to navigate the tangled thicket of expert and factual testimony from the single witness, thus impairing the juror's ability to evaluate credibility.

In *United States v. Cruz*, 363 F.3d 187 (2nd Cir. 2003), upon arrest of the defendant following a drug transaction, the defendant told a DEA agent that he had been present at the sale "to watch" the seller's "back" while the seller "did business" and "[did] a deal." *Cruz*, 363 F.3d at 193. At trial, the prosecutor solicited the agent's "expert" testimony regarding the meaning of the phrase "to watch someone's back." The agent testified that individuals who watch someone's back are "lookouts" in "narcotics transactions." *Id*. On appeal, Cruz argued that the district court erred in admitting the agent's testimony because the phrase "to watch someone's back" is neither "coded nor esoteric." *Id*.

While acknowledging that "courts may allow witnesses to 'decipher' the codes drug dealers use and testify to the true meaning of the conversations," *Cruz*, 363 F3d at 194, quoting, *United States v. Garcia*, 291 F.3d 127, 139 (2nd Cir. 2002), it emphasized that "district courts, in their role as gatekeepers, must be ever vigilant against expert testimony that could stray from the scope of a witness' expertise." *Id*.

When such testimony strays, it should be excluded. *Id*. Moreover, the *Cruz* court noted, when such testimony strays, it may also implicate Rule 403 and be excluded because "its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury." *Id*. As the court in *United States v. Dukagjini*, 326 F.3d 45, 54 (2nd Cir. 2003) also noted, where an expert strays from the scope of his expertise, "some jurors will find it difficult to discern whether the witness is relying properly on his general experience and reliable methodology, or improperly on what he has learned of the case." *Dukagjini*, 326 F.3d at 54.

The *Cruz* court cautioned that district courts should be "especially vigilant" in evaluating the admissibility of expert testimony where a law enforcement official is called to testify as both a fact witness and an expert witness. *Cruz*, 363 F.3d at 194. This is so because "the government confers on law enforcement officials in this position an 'aura of special reliability and trustworthiness surrounding expert testimony, which ought to caution its use.'" *Id*, quoting *Dukagjini*, 326 F.3d at 53. As the *Cruz* court highlighted, "[t]his aura poses a particular risk of prejudice 'because the jury may infer that the agent's opinion about the criminal nature of the defendant's activity is based on knowledge of the defendant beyond the evidence at trial.'" *Cruz*, 363 F.3d at 194, quoting *United States v. Brown*, 776 F.2d 397, 401 n.6 (2nd Cir. 1985).

Moreover, *Cruz* held, there is more of a danger when an expert witness is also

a fact witness that his expert testimony will stray from "applying reliable methodology and convey to the jury. . . [his] sweeping conclusions' about [a defendant's] activities." *Cruz*, 363 F.3d at 195. The *Dukagjini* court explained:

> [A]ny expert in a criminal trial has the potential to deviate from the scope of his expertise. However, these difficulties are more likely to be encountered when the expert is . . . a fact witness because such witnesses are introduced to the case primarily through an investigative lens, rather than a methodological lens. [Law enforcement officials] who are called to testify about both their expert opinions and the facts of the case may easily elide these two aspects of their testimony. Given their role, their perspective, and their focus on the facts, these [law enforcement officials] are more likely to stray from the scope of their expertise and to testify about other aspects of the case.

Dukagjini, 326 F.3d at 54.

The *Cruz* court ruled that the district court had abused its discretion when it allowed the government "to overreach by admitting expert testimony regarding the meaning of words that did not fall within the ambit of drug jargon. . ." *Cruz*, 363 F.3d at 195-196. It noted that there was no evidence in the record that the phrase "to watch someone's back" constituted a drug code "with a fixed meaning in the narcotics world" rather than a phrase that could have equally referred to activities with no relation to narcotics transactions. In addition, the *Cruz* court held that the district court had failed to fulfill its gate-keeping function when it allowed the law enforcement officer to testify

as an expert.[9]

---

[9] *See also, United States v. Londono-Tabarez*, 121 Fed.Appx. 882, 884-885, 2005 WL 78788 (2nd Cir. 2005):

> More problematic are those portions of Zimmerman's testimony that sought to "de-code" certain statements on the tapes. Rule 702 allows expert testimony that will "assist the trier of fact to understand the evidence or to determine a fact in issue." Fed.R.Evid. 702. Thus, expert testimony regarding matters not beyond the ken of an average juror should generally be excluded. *See, e.g., United States v. Cruz,* 981 F.2d 659, 664 (2d Cir.1992) (expert testimony should have been excluded where it concerned narcotics operations that were not "reasonably perceived as beyond the ken of the jury"); *United States v. Long,* 917 F.2d 691, 701-03 (2d Cir.1990) (expert testimony should have been excluded where it concerned the structure and operations of an illegal kickback scheme that were not beyond the ken of an average juror). A question has arisen as to the extent to which a case agent may testify as an expert as to the meanings of certain words and phrases used in the course of narcotics transactions. This Court has now made clear that such agent-experts may not interpret statements that are "patently not drug code," nor give expert testimony as to those statements where there is "no evidence that these phrases were drug code with fixed meaning either within the narcotics world or within this particular conspiracy." *United States v. Dukagjini,* 326 F.3d 45, 55 (2d Cir.2003); *see also United States v. Tommy Cruz,* 363 F.3d 187, 196 (2d Cir.2004) (finding that "expert witness called on to testify about the meaning of narcotics codes strays from the scope of his expertise when he interprets ambiguous words or phrases and there is no evidence that these terms were drug codes"). Unarmed with the benefit of these later decisions, the district court allowed Zimmerman to testify, over objection, as to the purported meaning of certain words and phrases as to which an insufficient foundation had been laid under the teachings of *Dukagjini* and *Tommy Cruz.* Thus, in interpreting the taped conversations between Londono and Granados, Zimmerman not only decoded "tickets" and "receipt" as referring to kilograms of cocaine but went so far as to interpret in ways incriminatory to

Henry and Harrison's case is remarkably similar to that of *United States v. Grinage*, 390 F.3d 746, 749-752 (2nd Cir. 2004). In *Grinage* an agent was allowed to review hundreds of taped telephone calls, then offer his interpretation of the language in the selected calls admitted into evidence:

> In addition, the Government's claim that the agent's testimony was based solely on his listening to the telephone conversations is not supported by the record. The agent testified to the jury that his interpretations were "based on my knowledge of the entire investigation." Even though the Government did not seek to qualify him as an expert, he testified at great length about his background and expertise as a drug investigator and explained at length his role as case agent. Whether labeled as an expert or not, the risk that he was testifying based upon information not before the jury, including hearsay, or at the least, that the jury would think he had knowledge beyond what was before them, is clear. *See Dukagjini,* 326 F.3d at 53. Indeed, the Government in its rebuttal summation told the jury that "the agent has the background to make interpretations," suggesting either expertise, for which he had not been qualified, or investigative information not before the jury. On oral argument of the appeal, the Government acknowledged that this statement was improper under *Dukagjini.* In that case, we addressed at length our concerns about a case

---

> Londono such vague remarks as "bring it up here," "organize this," "pain in the neck" and "make us this loan." There was no showing that these ordinary words and phrases had any accepted code meaning in the narcotics trade, yet Zimmerman interpreted them. He also went well beyond his expertise in explaining, for example, that the references in the tapes to someone called "Sobrino" actually referred to two different people, one of whom was Londono, or that a reference to ""everyone is struggling"" referred to the economic consequences of selling low-quality cocaine. The average juror could understand these words and phrases without Zimmerman's assistance.

> agent testifying as an expert as to coded language and then going "beyond interpreting code words and summariz[ing] his beliefs about the defendant's conduct based upon his knowledge of the case." 326 F.3d at 53. Although in this case, unlike in *Dukagjini,* the case agent did not state explicitly that he was relying on his conversations with cooperating defendants, he did state that he was relying upon the "entirety" and the "totality" of the investigation, of which he was in charge.
>
> In sum, the agent's testimony as to his interpretations of the calls went beyond permissible lay opinion testimony under Rule 701(b) because, rather than being helpful to the jury, it usurped the jury's function. Moreover, as in *Dukagjini, supra,* the agent was presented to the jury with an aura of expertise and authority which increased the risk that the jury would be swayed by his testimony, rather than rely on its own interpretation of the calls.

The Second Circuit reversed *Grinage* on this basis, finding that *Grinage* was a close case, citing the fact that the jury had announced it was hung and had to receive an *Allen* charge - exactly what had happened in Henry and Harrison's first trial. Furthermore, the error in Henry and Harrison's case is more egregious, because Detective Thomas was formally qualified as an expert witness, unlike the agent in *Grinage.*

Throughout much of Detective Thomas's testimony, his conclusions appear to have been drawn largely from his knowledge of the case file and upon his conversations with the other agents, rather than upon his extensive general experience with the drug industry. [Tr. 9/25/2000: 82-83] It was error for the district court to allow Detective Thomas to stray from his proper expert function.

Detective Thomas's testimony illustrates two examples of how an expert on drug code can stray from the scope of his expertise. First, he testified about the meaning of conversations in general, beyond the interpretation of code words. This testimony often interpreted completely ambiguous statements that were patently not drug code. For example, when Detective Thomas testified that the question "Well, how is the fabric?" referred to "heroin," he essentially used his knowledge of the case file that the participants in the conversation were heroin dealers to conclude that they were discussing heroin. Detective Thomas's expert testimony on the tapes clearly had nothing to do with the interpretation of drug code.

Second, Detective Thomas interpreted ambiguous words out of context to be code or jargon. For example, Detective Thomas testified that words such as "garmets," "material," "clothes," "fabric," and even "car" all referred to heroin; these words may have been veiled references to drugs, but they were not code, merely veiled or ambiguous conversation. There was no evidence that these phrases were drug code with fixed meaning either within the narcotics world or within this particular conspiracy. There is a great risk that when a law enforcement officer-expert strays from the scope of his expertise, he may impermissibly rely upon and convey hearsay evidence.

It was improper to admit this testimony, and as explained in Issue I, *supra*, this

error was fundamental and not harmless as demonstrated by the different outcomes of the two trial, trials which were substantially similar but for the admission of this interpretation testimony (and the guilty plea without cross-examination of Nuri Lama objected to in Issue III, *infra*).

This issue was not raised in the initial appeal brief in the first appeal. Henry and Harrison submit that this Court should permit its consideration at this time under the standard applicable to ineffective assistance of appellate counsel. That is, a reasonably competent appellate counsel would have raised this issue, and had it been raised on the initial appeal, it would have been reversible error. Because this Court has a sufficient record on appeal to determine whether the issue meets the *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), standard as applied to ineffective assistance of appellate counsel, Henry and Harrison should be permitted to raise on direct appeal what otherwise would be an issue reserved for collateral review.

III. ADMISSION OF GUILTY PLEAS OF NON-TESTIFYING CO-CONSPIRATORS WAS REVERSIBLE ERROR IN BOTH TRIALS AND IS COGNIZABLE ON THIS APPEAL BECAUSE IT WAS INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL FOR HENRY AND HARRISON'S PRIOR COURT APPOINTED APPELLATE COUNSEL TO NOT RAISE THE ISSUE IN THE FIRST APPEAL.

In both the first and second trials, over strenuous objection and motions for mistrial in the first trial, the government introduced evidence that other coconspirators who were not witnesses at trial, had pled guilty and been sentenced in this same conspiracy.

Where evidence of a coconspirator's conviction is admitted a jury may abdicate its duty and "[t]he jury may regard the issue of the remaining defendant's guilt as settled and the trial as a mere formality." *United States v. Griffin,* 778 F.2d 707, 711 (11th Cir. 1985) (citing *Turner v. Louisiana,* 379 U.S. 466, 472-73, 85 S.Ct. 546, 549-50, 13 L.Ed.2d 424 (1965)). For this reason, the admission of guilty pleas or convictions of codefendants or coconspirators not subject to cross-examination is generally considered plain error. *United States v. McLain,* 823 F.2d 1457, 1465 (11th Cir.1987) (citations omitted); *United States v. Eason*, 920 F.2d 731, 734-735 (11th Cir. 1990).

Introduction of Lama and Stedman's guilty pleas violated two of the most basic tenets of our criminal jurisprudence. First, the evidence against an accused must come from the witness stand in open court so that a defendant may confront his accusers.

Turner v. Louisiana, 379 U.S. 466, 472-73, 85 S.Ct. 546, 549-50, 13 L.Ed.2d 424 (1965). A verdict of guilt must be based on the evidence developed at the defendant's trial, *id.* at 472, 85 S.Ct. at (quoting *Irvin v. Dowd,* 366 U.S. 717, 722, 81 S.Ct. 1639, 1642, 6 L.Ed.2d 751 (1961)), not the evidence developed at some other defendant's trial. By permitting the Government to introduce evidence of Lama and Stedman's guilty pleas before the jury, the trial court effectively barred Henry and Harrison's counsel from examining the motives behind a plea. *Cf. Bruton v. United States,* 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968) (introduction of codefendant's confession improper where cross examination of codefendant not possible). Second, guilt or innocence must be determined one defendant at a time without regard to the disposition of charges against others. In a conspiracy trial, which by definition contemplates two or more culpable parties, courts must be especially vigilant to ensure that defendants are not convicted on the theory that guilty "birds of a feather are flocked together." *Krulewitch v. United States,* 336 U.S. 440, 454, 69 S.Ct. 716, 723, 93 L.Ed. 790 (1949) (Jackson, J., concurring).

The problem was not the result of inadvertence; no witness volunteered or "blurted out" the fact that non-testifying coconspirators had been convicted. The government deliberately introduced the guilty pleas and convictions.

Although we have found no D.C. Circuit case directly on point, the Tenth Circuit

attempted to discover any authority finding admissible the conviction of someone not testifying and found none: "We have found no case, and the Government has not cited one, in which a conviction other than that of the witness himself was properly admitted on the issue of his credibility." *United States v. Austin,* 786 F.2d 986, 992 (10th Cir. 1986) (reversing the defendant's conviction where the government informed the jury that ten coconspirators had been previously tried and convicted for their parts in the conspiracy with which the defendants therein were charged). It is settled in every jurisdiction that has considered this practice that it is prohibited. *United States v. Blevins*, 960 F.2d 1252, 1260 (4th Cir. 1992); *United States v. Leach*, 918 F.2d 464, 467 (5th Cir. 1990).

This form of error occurred in both trials, objected to in the first trial, not objected to in the second trial. In the second trial the error is all the greater, because Nuri Lama, who might be considered the mastermind of the conspiracy, the Nepalese source of supply of the heroin, did not testify in the second trial. Nuri Lama had testified in the first trial, but was so unbelievable due to effective cross-examination, that even with his testimony the jury could not convict on the conspiracy charge. However, in the second trial when the Government was able to introduce his guilty plea

but avoid any cross-examination, the jury convicted.[10] The synergy of this error and the improper wiretap conversation interpretation by Detective Thomas was what shifted the balance from hung jury to conviction, shifted the result of the evidentiary weighing from not proven to a unanimous jury beyond a reasonable doubt to unanimously proven beyond a reasonable doubt - in other words, the error was not harmless in either trial and was plain in the second trial.[11]

Although this issue was not raised on the first appeal, the failure to do so constituted ineffective assistance of appellate counsel because had the issue been raised it would have been reversible error. Reversible error establishes the prejudice prong for ineffective assistance of appellate counsel. The issue was not novel, the law was well settled at the time of the first appeal, therefore the performance prong is likewise

---

[10] Derek Stedman, another alleged coconspirator also died between trials and his guilty plea was also admitted in the second trial. [Tr. 10/13/2000: 25-29; 32]

[11] We also argue that the introduction of Lama and Stedman's guilty pleas in the second trial, at which neither was available for cross-examination due to their intervening deaths of natural causes, was a *Crawford* error. *See United States v. Grinage*, 390 F.3d 746, 751 (2nd Cir. 2004) ("After submission of the briefs but before oral argument of this appeal, the Supreme Court decided *Crawford v. Washington,* 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004), which prescribed a limited rationale for the admission of prior testimonial statements. *Crawford* explicitly called into question cases, including cases in this Circuit, which had upheld the use of co-defendant plea allocutions for the purpose of establishing the existence of a conspiracy. *Crawford* 124 S.Ct. at 1372. On oral argument the Government conceded that, in this case, the plea allocutions would not have been admissible under *Crawford* . . . .").

met.

IV. HENRY AND HARRISON ARE ENTITLED TO RESENTENCING UNDER *UNITED STATES v. BOOKER* BECAUSE THEY PRESERVED A SIXTH AMENDMENT OBJECTION AT THEIR RESENTENCINGS AND THE GOVERNMENT CANNOT SATISFY ITS BURDEN OF SHOWING THAT THE CONSTITUTIONAL ERROR WAS HARMLESS.

Henry and Harrison presciently objected on *Apprendi*[12] grounds to the district court's application of the federal sentencing guidelines to their cases, arguing that it was unconstitutional for the court and not the jury to determine the guideline enhancements used to determine his sentence under the then mandatory federal sentencing guideline regime. Harrison also objected on *Apprendi* and *Blakely* grounds to the calculation of the drug quantity and enhancements for role in the offense and possession of a weapon. Henry and Harrison are entitled to resentencing on this basis. *United States v. Coumaris*, 399 F.3d 343, 350-351 (D.C. Cir. 2005).

In *Blakely v. Washington,* the Supreme Court held that Washington State's determinate sentencing regime violated the rule of *Apprendi v. New Jersey:* "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Blakely,* 542 U.S. 296, 124 S.Ct. 2531, 2536, 159 L.Ed.2d 403

---

[12] *Apprendi v. New Jersey,* 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000).

(2004) (quoting *Apprendi,* 530 U.S. 466, 490, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000)); *see id.* at 2538. In *United States v. Booker,* 543 U.S. 220, 125 S.Ct. 738 (2005), the Court applied *Blakely* to the United States Sentencing Guidelines, holding that the imposition of enhanced sentences under the Guidelines violates the Sixth Amendment. 543 U.S. at 244, 125 S.Ct. at 756. The Supreme Court cured this constitutional defect by severing the provisions of the Sentencing Reform Act that made the Guidelines mandatory, thereby rendering them "effectively advisory." *Id.* at 757. Under this new sentencing regime, a sentencing court is required "to consider Guidelines ranges" applicable to the defendant, but is permitted "to tailor the sentence in light of other statutory concerns as well." *Id.*

The mandatory enhancements of Henry and Harrison's sentences were unconstitutional under *Booker.* Henry and Harrison's sentencing objection that *Apprendi* required a jury to determine the factors that enhanced their sentences under the guidelines made a sufficient objection in the district court to preserve a Sixth Amendment challenge to his sentence. This means that Henry and Harrison's *Booker* challenge is governed by the harmless error standard appropriate for constitutional error, which cannot be satisfied on this record.

That is, the government cannot demonstrate "beyond a reasonable doubt that the error complained of did not contribute to the [sentence] obtained." *Id.* at 3 (quoting

Chapman v. California, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967).[13] Therefore, Henry and Harrison are entitled to remand for resentencing unless this Court reverses their convictions on the basis of the arguments presented in Issues I-III, *supra*.

V. THE *BOOKER* REMEDY PROVISION IS UNCONSTITUTIONAL AND HENRY AND HARRISON ARE ENTITLED TO BE RESENTENCED UNDER BINDING SENTENCING GUIDELINES THAT ARE DETERMINED WITHOUT ANY GUIDELINE FACTOR BEING DETERMINED BY JUDICIAL FACT-FINDING.

Henry and Harrison argue that the remedy provision in *Booker* itself violates the Sixth Amendment by permitting the very thing that the merits opinion in *Booker* found to violate the Sixth Amendment. The proper remedy under *Apprendi, Blakely* and the merits opinion in *Booker* is for the district court to apply the guidelines in the mandatory manner required by law, with only the offending portion of the guideline procedure excised, that is, any judicial fact-finding which increases the otherwise

---

[13] Henry and Harrison do not intend to abandon their objections made at resentencing to the proper calculation of the now advisory guidelines, but it is the law of this circuit that such objections should not be heard in an appeal which remands a case for *Booker* resentencing, because the objections may become moot at resentencing. *United States v. Coumaris*, 399 F.3d 343, 350-351 (D.C. Cir. 2005) ("Although Coumaris agrees that his sentence should be vacated and remanded, he urges us to resolve his specific challenges to the district court's application of the Guidelines before remanding. Coumaris Resp. to Gov't Mot. to Vacate and Remand for Resentencing at 2. We decline to do so. Because the district court might impose a different sentence on remand, and because the parties might choose not to appeal that sentence, consideration of objections to the court's original guidelines calculations would be premature at best and unnecessary at worst.").

applicable guideline range is prohibited. Henry and Harrison, if their convictions are not otherwise vacated, are entitled to resentencing in accordance with this procedure.

CONCLUSION

Appellants Walter Henry and Charles Harrison respectfully request this honorable Court vacate their judgments and sentences as to all counts and remand for a new trial or in the alternative remand for resentencing on all counts.

Respectfully submitted,

THE LAW OFFICE OF
WILLIAM MALLORY KENT

_____

WILLIAM MALLORY KENT
Florida Bar Number 260738
1932 Perry Place
Jacksonville, Florida 32207
904-398-8000
904-348-3124 Fax
kent@williamkent.com

_____

DEBORAH A. PERSICO, PLLC
Attorney At Law (DC Bar No. 415210)
643 South Washington Street
Alexandria, Virginia 22314
202-244-7127

CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing have been furnished to:Roy W. McCleese, III, Assistant United States Attorney, Room 8104, United States Attorney's Office, Criminal Appellate Division, 555 4th Street, N.W., Washington, D.C. 20530, and Deborah Watson, Department of Justice, Criminal Appellate Section, P.O. Box 899, Ben Franklin Station, Washington, D.C. 20044, by United States Postal Service, first class mail, postage prepaid, this March 31, 2006.

_____

William Mallory Kent

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(c), the undersigned counsel certifies that this brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B). This brief contains approximately 12,139 words.

CERTIFICATE OF TYPE SIZE AND STYLE

Counsel for Appellants Henry and Harrison certify that the size and style of type used in this brief is 14 point Times New Roman.