IN THE COURT OF COMMON PLEAS OF BEAVER COUNTY
PENNSYLVANIA
CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA	:	
	:	
vs.	:	No. 1788 of 2015
	:	
GERALD V. BENYO, JR.	:	

ROSS, J. January 13, 2016

MEMORANDUM OPINION

INTRODUCTION

Defendant, Gerald V. Benyo, Jr., is charged by the Attorney General of the Commonwealth of Pennsylvania in a two-count Information with the following violations of the Pennsylvania Crimes Code: (1) disclosing the contents of a wire, electronic or oral communication in violation of 18 Pa.C.S. §5703(2); and (2) intentionally using or endeavor to use the contents of a wire, electronic or oral communication knowing or having reason to know that the information was obtained through the interception of a wire, electronic or oral communication in violation of 18 Pa.C.S. §5703(3). Defendant is an attorney licensed to practice in the Commonwealth of Pennsylvania. The specific charges against him state that he disclosed the alleged illegal wiretap information in a motion filed on behalf of a client with another judge of this Court. After defendant's arraignment in this case, he filed an initial Petition for Habeas Corpus and, thereafter, an Amended Petition for Habeas Corpus. The petitions assert two primary grounds for habeas corpus relief, namely (1) that the defendant cannot be prosecuted, based upon the facts of this case, under the United States Supreme Court decision in *Bartnicki v. Vopper,* 532 U.S. 514, 121 S.Ct. 1753 (2001), because the criminal statute as applied to him in this case violates his First Amendment right to

disclose information of alleged public concern/importance, and (2) that the interception of the information was not illegal because a cell phone was used to record the conversation, and a cell phone is excluded from the definition of an electronic device under the dictates of the Pennsylvania Supreme Court decision in *Commonwealth v. Spence*, 625 Pa. 84, 91 A.3d 44 (2014).

A preliminary hearing was held, after which all charges were bound over for trial. The parties have submitted the transcript of the preliminary hearing to the Court as part of the record. The Court also conducted two days of evidentiary hearings (December 1 and 7, 2015), and the parties were entitled to make argument to the Court on December 7, 2015. The Court also ordered briefs from the parties, which were submitted and considered by the Court. Based upon the entire record of this case, as well as the applicable law, the Court grants the habeas corpus petition and dismisses the charges.

FACTS

The facts for purposes of this Memorandum Opinion are derived from the following six sources:

(1) The preliminary hearing transcript of September 1, 2015 (hereinafter "Prelim. Hr. T.")

(2) The three Commonwealth exhibits introduced at the preliminary hearing (hereinafter "Prelim. Hr. Ex. 1, 2, 3");[1]

(3) The transcript of the hearing conducted before this Court on December 1, 2015 (hereinafter "Dec. 1, 2015 Hr. T.");

(4) The In-Chambers meeting with counsel on December 7, 2015 (hereinafter "Dec. 7, 2015 In-Chambers Tr.");

[1]The Commonwealth introduced Exhibits 1 through 3 at the preliminary hearing and they are Commonwealth exhibits.

(5) The transcript of the hearing before this Court on December 7, 2015 (hereinafter "Dec. 7, 2015 Hr. T."); and

(6) The four Commonwealth exhibits introduced at the hearings on December 1 and 7, 2015 (hereinafter "Hr. Ex. 1, 2, 3 and 4").

From these sources, the Court was able to ascertain the following facts.

In 2014, Kendraneshia Barnett (hereinafter "Barnett") was facing state drug charges filed in the Court of Common Pleas of Beaver County by the Midland Borough Police Department. She was represented on those charges by Attorney Gerald Benyo (hereinafter "Benyo"). (Prelim. Hr. Ex. 3, pp. 2 and 3, ¶¶6-9; Prelim. Hr. T., pp. 30-31, and Dec. 7, 2015 Hr. T., p. 63). While Barnett was facing those charges and while Benyo was representing her, there was personal, text message and telephonic communication between Barnett and Dionna Steele (hereinafter "Steele"), a paralegal employed in the Beaver County Public Defender's Office. It should be noted that the Public Defender's Office had no involvement in that Barnett criminal case. Nevertheless, in October of 2014, the father of Barnett's son told Barnett that Steele (with whom he was personal friends and had maintained a relationship since high school) wanted to speak to Barnett about her (Barnett's) case and that she (Steele) may be able to help her (Barnett) with the charges in that case. (Prelim. Hr. Ex. 3, p. 3, ¶11). Steele was employed at that time with the Beaver County Public Defender's Office and vested with the responsibility of interviewing clients, helping attorneys and preparing matters for trial. (Dec. 7, 2015 Hr. T. p. 50).

Commencing in November of 2014 (specifically on November 4), and continuing through December of 2014 (specifically December 15), there were a series of text messages and oral communications between Barnett and Steele that revolved around not only Barnett's case, but also a criminal case pending against her (Barnett's) son, Rance Vaughn,

in the Court of Common Pleas of Beaver County. Those communications are all contained in Exhibits 1 and 3 entered into evidence at the preliminary hearing by the Commonwealth. Most of the conversations contained in those exhibits are text messages, but there are also references to personal conversations between Barnett and Steele, the content of which was later relayed to Benyo by Barnett. Specifically, Steele advised Barnett that if she (Barnett) could act as a confidential informant and engage in a drug transaction/buy from Benyo, it would help not only with her charges, but also the charges against her son, Rance Vaughn.[2] Steele represented that this offer was coming to Barnett from an Assistant District Attorney through Steele. (Prelim. Ex. 3, pp. 4-5, ¶14). This Assistant District Attorney is identified in the exhibits and testimony as Frank Martocci (hereinafter "Martocci"). It should be noted at this time (December of 2014), that Martocci and Benyo had each publicized their intention to run for the position of District Attorney of Beaver County in the upcoming 2015 election. (Dec. 7, 2015 Hr. T., pp. 60-61 and 63).

The conversations contained in Preliminary Hearing Exhibits 1 and 3 are replete with references that Steele was not only recruiting Barnett as a confidential informant for the District Attorney's Office, but also that Steele offered to secure the services of an Assistant Public Defender from her (Steele's) office to represent Barnett in negotiations and meetings with the District Attorney's Office, while Barnett was still being represented by Benyo.

When Steele testified at the hearing on December 7, 2015, she was initially called on direct examination by the Attorney General's Office on behalf of the Commonwealth. (Dec.

[2] According to Exhibit 3 introduced into evidence at the preliminary hearing by the Commonwealth, at pages 4 and 5, ¶14c, when Barnett was presented with this proposal, she allegedly responded that she would consider the offer, but "did not know Benyo like that" as to any drug transactions and that she was hesitant about becoming a confidential informant.

7, 2015 Hr. T., p. 45).[3] On cross-examination, Steele admitted to the multiple communications with Barnett by text and telephone. (Dec. 7, 2015 Hr. T., p. 52). She went on to indicate that the communications were aimed at securing representation for Barnett with the Public Defender's Office. (Dec. 7, 2015 Hr. T., p. 52). Steele confirmed that references to the name "Frank" specifically referred to Assistant District Attorney Frank Martocci. (Dec. 7, 2015 Hr. T., pp. 52-53). She also testified that the telephone conversation that was the subject of a tape recording discussed herein was for the purpose of making an application for Barnett with the Public Defender's Office. (Dec. 7, 2015 Hr. T., p. 53). Steele specifically testified that Frank Martocci instructed her to take the application for the Public Defender's Office and maintain it at her desk. (Dec. 7, 2015 Hr. T., p. 54).[4]

It is at this point that Steele's testimony got extremely interesting. She testified that she was working not only on this case, but also a separate case with the District Attorney's Office. She was acting without the knowledge of any individual in the Public Defender's Office; specifically, neither the Public Defender (Paul Steff) nor his First Assistant (Tom Phillis) knew anything about her involvement in the Barnett case. (Dec. 7, 2015 Hr. T., pp. 59-60). This creates an extremely difficult and unethical problem in that a paralegal in the Public Defender's Office, acting in her official capacity, was, according to Steele's testimony, acting at the direction of the District Attorney's Office, which was the office prosecuting the cases against Barnett.

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[3] Steele testified that she had criminal charges pending against her as a result of a matter, that will be discussed herein, concerning the return of a prohibitive offensive weapon returned to Barnett by Steele and that she agreed to cooperate with the Commonwealth as part of a resolution of those charges. (Dec. 7, 2015 Hr. T., pp. 46-48 and Hr. Ex. 3).

[4] It is important to note that Martocci is an employee of the Beaver County District Attorney's Office, and this Court finds it hard to understand how he believed he could direct an employee of another office, which is constantly on the opposing side to the District Attorney's Office. The Commonwealth offered no testimony or evidence to refute Steele's statements.

Steele went on to indicate that Benyo's name was referenced in the conversations and that she was doing this knowing that both Martocci and Benyo intended to run for District Attorney at the time. (Dec. 7, 2015 Hr. T., pp. 60-61 and 63). Steele specifically testified that she was acting at the direction of Assistant District Attorney Frank Martocci. (Dec. 7, 2015 Hr. T., p. 66).

According to Exhibit 3 introduced into evidence by the Commonwealth at the preliminary hearing, at pages 8 and 9, ¶25, Barnett requested a meeting with Benyo in early December, 2014 and at the meeting revealed to Benyo the communications she had been having with Steele. In paragraph 25b(2), Barnett reported to Benyo that Steele had advised her that if she did not become a confidential informant, the Assistant District Attorney (Martocci) would "bury" Barnett and her son, Rance Vaughn, with state prison sentences of at least 5 to 10 years. According to the same paragraph at page 9 of the preliminary hearing exhibit, Benyo advised Barnett that he was somewhat dubious of the involvement of the Assistant District Attorney and that he could do nothing with it without additional evidence.

The communication between Barnett and Steele continued from December 4 through 15, 2014, primarily through text messages, and is documented in Exhibits 1 and 3 introduced into evidence by the Commonwealth at the preliminary hearing. (Prelim. Hr. T., p. 26). In the text messages that occurred between December 4 and 15, 2014, Barnett inquired as to what was occurring in connection with the topic of discussion between the two, and Steele responded that she was still waiting to hear from "Frank" and that Barnett should stay on Benyo's good side.

The tape recorded telephone conversation between Barnett and Steele occurred on December 15, 2014. A transcript of the conversation is set forth at pages 11 through 14, ¶29, of the Commonwealth's Exhibit 3 entered into evidence at the preliminary hearing. The state police trooper in charge of the investigation, Gregory Bogan, testified at the preliminary hearing that it was, in fact, an eight minute conversation and that he reviewed the transcript and determined it to be an accurate transcript of the recorded conversation between Steele and Barnett. (Prelim. Hr. T., pp. 18-22). The Court will discuss the manner in which this conversation was recorded later on in this section.

Paragraph 29 of Exhibit 3 reflects that, during the December 15, 2014 telephone conversation, Steele initially secured information for an application to the Public Defender's Office for representation of Barnett and thereafter stated that she would maintain the application at her desk because "[t]hey don't ever want to [sic] many people to know anything, you know." Steele went on to advise Barnett that there would be a meeting set with her (Barnett) at the District Attorney's Office for Barnett to speak with investigators. Steele again emphasized that the meeting and Barnett's cooperation should be kept quiet. Specifically at page 13, paragraph 29, Steele advised Barnett that she was going to talk to "Frank" in person. Steele went on to state that Frank (Martocci) may have to get another Assistant District Attorney involved because "Frank's running for DA now." Steele went on to state in the same paragraph that Frank (Martocci) would be involved in the matter, but stay behind the scenes. Steele stated that Barnett would have to meet with Pennsylvania State Police troopers as part of an interview. Finally, Steele encouraged Barnett to cooperate fully and advised Barnett that if she "set" Benyo up, she (Barnett) would probably walk away with nothing. (Prelim. Ex. 3, p. 14). After recording the

conversation with Steele, Barnett sent a text to Benyo stating "Boom. Got her." (Dec. 7, 2015 Hr. T., pp. 31 and 37-39).

According to page 15, ¶¶30-31 of Exhibit 3 entered into evidence by the Commonwealth at the preliminary hearing, Steele made additional contact with Barnett for the purpose of signing the application for a public defender to represent her. Although Barnett signed the application, the Public Defender's Office never became involved with representation of her. Barnett thereafter turned all information over to Benyo.

While all of the foregoing was transpiring, Barnett appeared at a preliminary hearing for her son, Rance Vaughn, at the Beaver County Courthouse on November 14, 2014. While passing through security, a pair of brass knuckles was seized from her by a representative of the Beaver County Sheriff's Department when the brass knuckles went through an x-ray machine. Steele apparently secured them back from the Deputy Sheriff and returned them to Barnett that same morning at the Courthouse. (Prelim. Ex. 3, p. 6, ¶¶17-19). Trooper Bogan was eventually assigned to investigate the return of the prohibitive offensive weapon because he is from the Pennsylvania State Police Mercer Barracks and a decision was made to not involve any troopers from the Beaver County Barracks. Specifically, Bogan was investigating potential prohibitive offensive weapons, tampering with evidence and hindering apprehension charges. (Prelim. Hr. T., pp. 6-7).[5] While Bogan was investigating these matters, he interviewed Barnett on January 9, 2015, with Barnett being represented by Benyo. (Prelim. Hr. T., pp. 7-8). This meeting came about as a result of Benyo contacting Trooper Bogan and requesting a meeting, with no promises being made to Barnett before the meeting. (Prelim. Hr. T., p. 28). During that meeting,

[5] This investigation led to the charges against Steele referenced in footnote 3, supra.

Benyo produced the brass knuckles for the trooper that had been seized from Barnett by the Beaver County Sheriff's Department and returned to her by Steele. (Prelim. Hr. T., pp. 9-10). Also at the meeting, Barnett advised Bogan of the tape recorded telephone conversation, and Benyo provided Bogan with a transcript of the recorded conversation of December 15, 2014. (Prelim. Hr. T., pp. 14-17). As stated above, Bogan listened to the recording a half dozen times or more and determined that the transcript was an accurate reflection of the actual recording. (Prelim. Hr. T., pp. 17 and 22).[6]

At the meeting on January 9, 2015, Trooper Bogan requested that Barnett turn her cell phone, and password for the same, over to him as part of the investigation. Barnett voluntarily turned the phone over to Bogan on January 28, 2015 in Cranberry Township, Pennsylvania. Bogan acquired the text messages and recorded conversation from the phone. (Prelim. Hr. T., pp. 14-17).

When the Court held a hearing on these matters in December, 2015, it reviewed the response to the habeas corpus petition filed by the Commonwealth, which alleged that Benyo was complicit in the tape recorded conversation. At the hearing before the Court on December 1, 2015, the Court advised counsel for the Commonwealth that it had reviewed this allegation and cautioned the Commonwealth that it better have evidence to prove that an attorney was complicit in an alleged illegal wiretap secured by his client. (Dec. 1, 2015 Hr. T., pp. 52-54). When the parties returned for the second hearing on December 7, 2015, the prosecution asked to meet with the Court in chambers. The Court placed that meeting on the record, and a transcript is contained in the Court file. At that time, the Commonwealth stated clearly that it had no evidence that Benyo was complicit in securing

[6] A disc of the recording was entered into evidence as Exhibit 3 at the hearing on December 7, 2015.

the tape recorded conversation and that it would no longer pursue that argument. (Dec. 7 In-Chambers Tr., pp. 5-7).

At the hearing on December 7, 2015, Trooper Bogan testified that he advised both Barnett and Benyo at the meeting on January 9, 2015 about the potential illegality of the tape recorded conversation. (Dec. 7, 2015 Hr. T., pp. 28-29). On cross-examination, Bogan admitted that at the time he gave the advice regarding the alleged illegality of the conversation, he was not aware of the cases cited by defendant here, *Bartnicki v. Vopper* and *Commonwealth v. Spence.* (Dec. 7, 2015 Hr. T., pp. 33-34).

Thereafter, in representing Barnett on the drug charges pending in the Court of Common Pleas of Beaver County, Benyo filed a motion for an evidentiary hearing in Barnett's cases at Nos. 1101, 1095 and 1599 of 2014, on February 25, 2015. That motion was entered into evidence in this case by the Commonwealth as Exhibit 3 at the preliminary hearing. In the motion, Benyo set forth the background referenced above. Benyo specifically stated in the motion that he had no direct evidence that the Assistant District Attorney (Frank Martocci) was involved in misconduct or unethical behavior concerning the defendant, but wanted the evidentiary hearing to determine whether there was, in fact, such conduct, alleging that said conduct would not only violate the Rules of Professional Conduct, but also deny defendant her rights under the Sixth and Fourteenth Amendments to the United States Constitution. In essence, defendant, through counsel, was asserting in part that the conduct supported by the communications violated defendant's right to counsel. The motion contained all of the text messages in question, along with a transcript of the recorded telephone conversation of December 15, 2014. The motion was

accompanied by a verification signed by Barnett, acknowledging that she had reviewed the document and that the revelation of the content may subject her to additional criminal charges involving the recording of telephone calls and the possession of brass knuckles. See Prelim. Hr., Ex. 3. Judge Tesla of this Court denied the motion, ruling that the issue of professional conduct was something that had to be dealt with by the Disciplinary Board and not the pending criminal case. This Court will not comment on that ruling; rather, the Court focuses upon the attorney strategy. Counsel obviously believed that he had a matter that he had to bring to the Court's attention, especially as it related to the Sixth Amendment right to counsel and possible interference with it. Although the motion was denied, the Court finds no impropriety in connection with defense counsel's strategy in raising the issue with the Court. The content of the text messages and recorded conversation were essential to the content of the motion.

Trooper Bogan's investigation obviously led to the charges against both Benyo and Steele, which are referenced in the Introduction section and earlier in the Facts section of this Opinion. The charges against Benyo are specific, namely, that the only alleged disclosure of the contents of the alleged illegally recorded conversation occurred by Benyo's filing of the same with the Court on February 26, 2015. That is the specific language used in the criminal Information filed by the Attorney General on October 2, 2015. See Criminal Information.

As stated in the Introduction section of this Opinion, defendant filed a Petition for Habeas Corpus and Amended Petition for Habeas Corpus. Those petitions are grounded in the *Bartnicki v. Vopper* and *Commonwealth v. Spence* decisions referenced earlier. They are two separate and distinct grounds for alleged habeas corpus relief.

Also as stated earlier, the Court conducted a hearing on the Petitions for Habeas Corpus on December 1 and 7, 2015. At the hearing on December 1, the Commonwealth offered the testimony of Agent Robert John Mattis of the Pennsylvania Attorney General's Electronic Surveillance Unit. (Dec. 1, 2015 Hr. T., p. 21). Mattis testified regarding the telephone in question. Although Mattis was offered as an expert witness (Dec. 1, 2015 Hr. T., p. 34), he never examined the telephone used in the recording of the conversation. (Dec. 1, 2015 Hr. T., pp. 42-43). A reading of the December 1, 2015 transcript in conjunction with Exhibit 1 introduced at that hearing (Dec. 1, 2015 Hr. T., pp. 35-36), it is very clear that Mattis was testifying based upon a brochure given in conjunction with the phone that explained its features. The agent had no actual working knowledge of the phone in question outside of the brochure because he had not examined it. The phone in question is a Samsung Galaxy III smart phone. (Dec. 1, 2015 Hr. T., pp. 35-36). The Commonwealth also attempted to have Mattis testify as to the law under the Wiretap Act, which the Court did not believe was relevant, but the Court permitted some limited testimony that did not assist the Court in this decision. (Dec. 1, 2015 Hr. T., pp. 51-57).

At the hearing on December 7, 2015, the Commonwealth offered the testimony of Pennsylvania State Police Trooper Christopher O'Neill. O'Neill is employed with the Bureau of Criminal Investigations and works in the Computer Crime Unit, northwest office in Meadville, Pennsylvania. He analyzes cell phones, computers, portable hard drives or flash drives, etc. as part of investigations. (Dec. 7, 2015 Hr. T., p. 6). O'Neill was involved in the investigation in this case in that he extracted the information from the cell phone in question as part of this investigation. (Dec. 7, 2015 Hr. T., pp. 7 and 8). The cell phone was identified at the hearing as a Samsung Galaxy III and offered into evidence as Exhibit 2, but

maintained in the possession of the Pennsylvania State Police. (Dec. 7, 2015 Hr. T., pp. 7-8). The essence of O'Neill's testimony was that the recording in question was extracted from the cell phone and the cell phone, itself, was used to make the recording. Specifically at pages 16-17 of the December 7, 2015 transcript, O'Neill testified that the Samsung Galaxy III "has the capability and the software, the technology to make this recording." It is done on what is called "S Voice." On cross-examination, O'Neill conceded that the cell phone in question had the S Voice application built into it and that the phone was not modified in any way and no app was placed into the phone to make the recording. (Dec. 7, 2015 Hr. T., pp. 19-22).

At the same December 7, 2015 hearing, the Commonwealth offered the testimony of Trooper Bogan and Steele, and their testimony at that hearing has been referenced extensively in the preceding paragraphs. The Commonwealth offered this additional testimony on December 1 and 7, 2015, to supplement the preliminary hearing transcript as it is entitled to do in a habeas corpus situation. *Commonwealth v. Morman*, 373 Pa. Super. 360, 365-6, 541 A.2d 356, 359 (1988).

As noted in the Introduction section of this Opinion, the parties submitted briefs and were given the opportunity to make argument to the Court on December 7, 2015. It is interesting to note that the Commonwealth conceded in the argument that the Pennsylvania Supreme Court decision in *Spence* creates a problem for the Commonwealth's position in this case. (Dec. 7, 2015 Hr. T., p. 83). The parties differed in their arguments on the applicability of *Bartnicki*, and those differences will be addressed in the Analysis section of this Opinion.

GENERAL LAW ON PRELMINARY HEARINGS and HABEAS CORPUS RELIEF

Before trial, a defendant may use a petition for writ of habeas corpus to challenge whether the Commonwealth has established a *prima facie* case to hold the case for trial. *Commonwealth v. Karlson*, 449 Pa. Super. 378, _____, 674 A.2d 249, 251 (1996). To meet its burden, the Commonwealth must produce evidence that each element of each crime charged is present and that the defendant is the one who committed the offense. *Commonwealth v. Carroll*, 936 A.2d 1148, 1152 (Pa.Super. 2007). To meet this burden, the Commonwealth may rely upon the evidence presented at the preliminary hearing and may present additional proof at a habeas corpus hearing, if desired. *Commonwealth v. Fowlin*, 450 Pa.Super. 489, _____, 676 A.2d 665, 673 (1996). The Pennsylvania Supreme Court made the following statement regarding the Commonwealth's burden of proof to establish a *prima facie* case pretrial in *Commonwealth v. Huggins*, 575 Pa. 395, 402, 836 A.2d 862, 866 (2003):

> At the pre-trial stage of a criminal prosecution, it is not necessary for the Commonwealth to prove the defendant's guilt beyond a reasonable doubt, but rather, its burden is merely to put forth a *prima facie* case of the defendant's guilt. *Commonwealth v. McBride*, 528 Pa. 153, 595 A.2d 589, 591 (1991). A *prima facie* case exists when the Commonwealth produces evidence of each of the material elements of the crime charged and establishes sufficient probable cause to warrant the belief that the accused committed the offense. *Id.* (citing *Commonwealth v. Wojdak*, 502 Pa. 359, 466 A.2d 991 (1983)). The evidence need only be such that, if presented at trial and accepted as true, the judge would be warranted in permitting the case to go to the jury. *Commonwealth v. Marti*, 779 A.2d 1177, 1180 (Pa.Super.2001). Moreover, "[i]nferences reasonably drawn from the evidence of record which would support a verdict of guilty are to be given effect, and the evidence must be read in the light most favorable to the Commonwealth's case." *Id.* at 1180 (quoting *Commonwealth v. Owen*, 397 Pa.Super. 507, 580 A.2d 412, 414 (1990).

These principles guide this Court in its analysis of and determination on defendant's habeas corpus petition in this case.

LEGAL ANALYSIS

As noted in the Introduction to this Memorandum Opinion, defendant has asserted two separate and distinct theories/bases for habeas corpus relief. The first contention is grounded in the United States Supreme Court decision of *Bartnicki v. Vopper,* 532 U.S. 514, 121 S.Ct. 1753 (2001), and the second is grounded in the Pennsylvania Supreme Court decision of *Commonwealth v. Spence,* 625 Pa. 84, 91 A.3d 44 (2014). The Court addresses each contention in separate subsections below.

I. *BARTNICKI V. VOPPER*

Defendant contends that this case is controlled by the United States Supreme Court decision in *Bartnicki v. Vopper,* 532 U.S. 514, 121 S.Ct. 1753 (2001).[7] The Court agrees with that assertion. The best summary/analysis of the *Bartnicki* decision that the Court found is contained in the federal appellate court decision in *Jean v. Massachusetts State Police,* 492 F.3d 24, 27-8 (1st Cir. 2007):

> In *Bartnicki,* the Supreme Court considered "what degree of protection, if any, the First Amendment provides to speech that discloses the contents of an illegally intercepted communication." *Id.* at 517, 121 S.Ct. 1753. The dispute in *Bartnicki* arose during contentious collective bargaining negotiations between a Pennsylvania school board and a union representing teachers at the local high school. An unidentified person intercepted and recorded a cellular phone call between the union's chief negotiator and the president of the local union, during which the president stated: "If they're not gonna move for three percent, we're gonna have to go to their, their homes.... To

[7] *Bartnicki* involved an alleged violation of the Pennsylvania Wiretap Statute.

blow off their front porches...." *Id.* at 518–19, 121 S.Ct. 1753 (first omission in original)(internal quotation marks omitted).

Jack Yocum, the head of a local taxpayer's organization, subsequently found a recording of the intercepted conversation in his mailbox. He played the tape for members of the school board and later delivered the tape to Frederick Vopper, a radio commentator, who played the tape on his public affairs talk show. The union officials brought an action for damages under federal and state wiretap statutes against Yocum and Vopper, who invoked their First Amendment right to speak on issues of public importance.

The relevant provision of the federal wiretap statute, 18 U.S.C. §2511(1)(c), provides that any person who "intentionally discloses, or endeavors to disclose, to any other person the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral or electronic communication in violation of this subsection" may be sued. The Pennsylvania state wiretap statute contains a similar provision. 18 Pa. Cons.Stat. §5703. Both statutory schemes also provide for recovery of damages for violations. 18 U.S.C. §2520(c)(2); 18 Pa. Cons.Stat. §5725(a).

Following discovery, the parties filed cross-motions for summary judgment before the district court. The court denied both motions and granted a motion for an interlocutory appeal to the Third Circuit. That court concluded that the statutes were invalid as applied because they deterred significantly more speech than was necessary to protect the privacy interests at stake, and remanded with instructions to enter summary judgment for defendants. *Bartnicki,* 532 U.S. at 521–22, 121 S.Ct. 1753 (citing *Bartnicki v. Vopper,* 200 F.3d 109, 121 (3d Cir.1999)). The Supreme Court then granted certiorari to determine whether the First Amendment shielded defendants from suits for damages for violation of §2511(1)(c) and its Pennsylvania analog.

Since the grant of certiorari followed a remand with instructions to enter summary judgment for defendants, the

> majority opinion (authored by Justice Stevens and joined by five other Justices) viewed the facts in the light most favorable to the plaintiffs. *Bartnicki,* 532 U.S. at 525, 121 S.Ct. 1753. It assumed "that the interception was intentional, and therefore unlawful, and that, at a minimum, [defendants] 'had reason to know' that it was unlawful." *Id.* at 525, 121 S.Ct. 1753. The plaintiffs were thus entitled to recover damages under the statutes unless application of the statutes in such circumstances would violate the First Amendment. *Id.* The Court also accepted three other factual propositions "that serve to distinguish most of the cases that have arisen under §2511." First, the defendants "played no part in the illegal interception. Rather, they found out about the interception only after it occurred, and in fact never learned the identity of the person or persons who made the interception." Second, defendants' "access to the information on the tapes was obtained lawfully, even though the information itself was intercepted unlawfully by someone else." Third, "the subject matter of the conversation was a matter of public concern." *Id.*

The *Bartnicki* Court determined that the recorded conversation in that case was illegally obtained and that the recording lawfully came into the hands of a third party who delivered it to a radio station, which played it on a public affairs talk show. Thus, the first two prongs of the analysis were met. *Id.* at 525, 121 S.Ct. at _____. The *Bartnicki* Court then focused attention on whether the conversation contained information that was a matter of public importance/pubic concern. Specifically, the *Bartnicki* Court posed this question: "Where the punished publisher of information has obtained the information in question in a manner lawful in itself but from a source who has obtained it unlawfully, may the government punish the ensuing publication of that information based on the defect in a chain?" *Id.* at 528, 121 S.Ct. at _____ (quoting *Beoehner v. McDermott,* 191 F.3d 463, 484-85 (D.C. Cir. 1999) (Sentelle, J. dissenting)). In the final analysis, the Court held that

the discussion on the tape recording in *Bartnicki* was of public importance and, in such cases, "privacy concerns give way when balanced against the interest in publishing matters of public importance." *Id.* at 534, 121 S.Ct. at _____. In making this decision, the Court explained that "[o]ne of the costs associated with participation in public affairs is an attendant loss of privacy." *Id.* at 534, 121 S.Ct. at _____.

The Court must now apply the *Bartnicki* decision to the facts of this case. First, there is the question of whether the recorded conversation in this case was recorded illegally. In the next section, the Court will discuss whether the recording, itself, was even illegal under the Wiretap Statute on the basis of the Pennsylvania Supreme Court decision in *Commonwealth v. Spence* cited above, but for purposes of this discussion and *Bartnicki*, the Court will treat the interception as illegal.

The second consideration/factor is whether the recording came into the lawful possession of defendant. In its response and brief to defendant's petition and amended petition for habeas corpus relief, the Commonwealth initially argued, at pages 5 and 6, ¶8, that "circumstantial evidence exists to establish that the defendant was complicit and/or did play a role in the illegal recording by Kendraneshia Barnett." However, the Commonwealth retreated from the position at the in-chambers hearing on December 7, 2015, specifically stating on the record that it did not have any evidence that defendant was complicit in the creation of the recording and that the Commonwealth was abandoning that argument under *Bartnicki*. (Dec. 7, 2015 In-Chambers Tr., pp. 5-6).

Alternatively, at the hearing on December 7, 2015, the Commonwealth argued under the second prong of *Bartnicki* that this case can be distinguished because the "facts are very different." (Dec. 7, 2015 Hr. T., p. 90). Specifically, the Commonwealth argued that "the

recording itself, the creation of it was illegal, so the transfer from Miss Barnett to Mr. Benyo was illegal. So his receipt of that recording cannot be classified as legal. In other words, the illegality of the recording cannot be purged by its transfer from Miss Barnett to Mr. Benyo."[8] (Dec. 7, 2015 Hr. T., p. 90). This particular issue has already been addressed by the United States Court of Appeals for the First Circuit in *Jean v. Massachusetts State Police*, 492 F.3d 24 (1st Cir. 2007). Specifically, the *Jean* case involved "the question of whether the First Amendment prevents Massachusetts law enforcement officials from interfering with an individual's internet posting of an audio and video recording of an arrest and warrantless search of a private residence, when the individual who posted the recording had reason to know at the time she accepted the recording that it was illegally recorded." *Id.* at 25. The *Jean* Court addressed this issue at pages 29 through 32 of its Opinion. Specifically, at page 30, the *Jean* Court stated as follows:

> Moreover, the state's interest in deterring illegal interception by punishing a subsequent publisher of information—already accorded little weight by the Court in *Bartnicki*—receives even less weight here, where the identity of the interceptor is known. In *Bartnicki*, the government argued that punishing a subsequent publisher of information "remov[es] an incentive for parties to intercept private conversations" by deterring would-be publishers of illegally intercepted material and thus reducing the demand for such material. *Id.* at 529–30 & n. 17, 121 S.Ct. 1753. This argument rested, in part, on the assumption that the interceptors themselves could not be punished because their identities usually were unknown. Unimpressed, the Court explained that the available evidence did not support this assumption of anonymity. First, the legislative record did not indicate that a significant number of interceptors were anonymous. *Id.* at 531 n. 17, 121 S.Ct. 1753. Moreover, fewer than ten of the 206 cases filed under §2511 (the federal wiretap statute) involved an anonymous

[8] In *Bartnicki*, the identity of the person who recorded the conversation was unknown; whereas, here the identity is known.

> interceptor. *Id.* Thus, the Court concluded that the relatively small number of anonymous interceptors meant that it was not "difficult to identify the persons responsible for illegal interceptions" and, consequently, not "necessary to prohibit disclosure by third parties with no connection to, or responsibility for, the initial illegality," *Id.*
>
> Given this logic, there is a *better* argument for prosecuting a subsequent publisher of information when the interceptor is anonymous. In such a situation, the government is unable to punish the interceptor directly; punishing the subsequent publisher might be more justifiable as a deterrent. However, even after taking into account the anonymity of the interceptor in *Bartnicki,* the Court held that "[a]lthough there are some rare occasions in which a law suppressing one party's speech may be justified by an interest in deterring criminal conduct by another, this is not such a case." *Id.* at 530, 121 S.Ct. 1753 (citation omitted). Thus, where, as here, the identity of the interceptor is known, there is even less justification for punishing a subsequent publisher than there was in *Bartnicki.*

Given this quote and discussion by the *Jean* Court, the Commonwealth's alternative argument has no merit.

The Commonwealth further argued, on December 7, that the decision in *Boehner v. McDermott,* 484 F.3d 573 (D.C. Cir. 2007) (*en banc*) supports its argument on the second prong of the *Bartnicki* discussion. In *Boehner,* two individuals illegally intercepted a cell phone conversation between United States Representative John Boehner and several other House Republican leaders. Those individuals delivered a copy of the tape to their local representative. The recorded conversation was eventually delivered to the Office of United States Representative James McDermott, the ranking Democrat on the House Ethics Committee. McDermott discussed the matter with the individuals and accepted the recording. *Id.* at 576. McDermott thereafter listened to the recording and disclosed it to

various newspapers on the following day. That disclosure resulted in a lawsuit by Boehner against McDermott for violation of federal and state wiretap statutes.

The D.C. Circuit Court of Appeals determined, *en banc*, that McDermott's disclosure was improper and illegal because McDermott's position on the Ethics Committee imposed a "special duty on him not to disclose the tape in these circumstances." *Id.* at 579. Therefore, McDermott had no First Amendment right to disclose the tape to the media. *Id.*

It is important to note that the *Boehner* Court distinguished *Bartnicki* by stating that "*Bartnicki* has little to say about" McDermott's special duty. *Id.* "The individuals who disclosed the tape in . . . [*Bartnicki*] were private citizens who did not occupy positions of trust." *Id.* It is very apparent from the *Boehner* decision that a majority of the Court would have found McDermott's actions protected by the First Amendment if he were not subject to a special duty as a member of the Ethics Committee. See *Id.* at 580 (Griffith, J., concurring) and *Id.* at 581 (Sentelle, J., dissenting). As the *Jean* Court noted in its decision at 492 F.3d at 32:

> In other words, if McDermott had been a private citizen like *Jean*, the Court would have concluded that his disclosure of the tape was subject to First Amendment protection regardless of the fact that he received the tape directly from the Martins and thus served as the 'first link' in the chain leading to publication.

This analysis of *Boehner* and *Jean* also renders the Commonwealth's argument on the basis of the *Boehner* decision meritless because there is no special duty here and the First Amendment privilege does exist. Therefore, the Court finds that the first two prongs of the *Bartnicki* decision are satisfied.

Turning to the third prong of *Bartnicki*, this Court must determine whether the content of the conversation is a matter of public concern that warrants First Amendment

protection. For direction, the Court looks to the United States Supreme Court decision in *Snyder v. Phelps*, 562 U.S. 443-44, 131 S.Ct. 1207, 1211 (2011), wherein the Supreme Court stated as follows:

> The Free Speech Clause of the First Amendment can serve as a defense in state tort suits, including suits for intentional infliction of emotional distress. *Hustler Magazine, Inc. v. Falwell,* 485 U.S. 46, 50–51, 108 S.Ct. 876, 99 L.Ed.2d 41. Whether the First Amendment prohibits holding Westboro liable for its speech in this case turns largely on whether that speech is of public or private concern, as determined by all the circumstances of the case. "[S]peech on public issues occupies the ' "highest rung of the hierarchy of First Amendment values" ' and is entitled to special protection." *Connick v. Myers,* 461 U.S. 138, 145, 103 S.Ct. 1684, 75 L.Ed.2d 708. Although the boundaries of what constitutes speech on matters of public concern are not well defined, this Court has said that speech is of public concern when it can "be fairly considered as relating to any matter of political, social, or other concern to the community," *id.,* at 146, 103 S.Ct. 1684, or when it "is a subject of general interest and of value and concern to the public." *San Diego v. Roe,* 543 U.S. 77, 83–84, 125 S.Ct. 521, 160 L.Ed.2d 410. A statement's arguably "inappropriate or controversial character ... is irrelevant to the question whether it deals with a matter of public concern." *Rankin v. McPherson,* 483 U.S. 378, 387, 107 S.Ct. 2891, 97 L.Ed.2d 315 . . .
>
> To determine whether speech is of public or private concern, this Court must independently examine the " 'content, form, and context,' " of the speech " 'as revealed by the whole record.' " *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.,* 472 U.S. 749, 761, 105 S.Ct. 2939, 86 L.Ed.2d 593. In considering content, form, and context, no factor is dispositive, and it is necessary to evaluate all aspects of the speech.

Here, the content of the recorded conversation clearly meets the definition of a matter of public concern as set forth above. As noted by the above quote, the Court must look not only at the actual conversation, but the record as a whole. That record, as set forth

in the Facts section of this Opinion, clearly indicates that a public employee in the Beaver County Public Defender's Office was recruiting a criminal defendant, represented by private counsel, as a confidential informant for the Beaver County District Attorney's Office, which was on the opposite side of the defendant's case. The public employee of the Public Defender's Office was doing this not only without the knowledge of her superiors, but also without the knowledge of defendant herein, who was the counsel of record for the criminal defendant. This was done at a time when both the defendant herein and the Assistant District Attorney, who Steele testified was the person behind the scenes directing the recruitment of defendant as a confidential informant, were both about to commence a run against each other for the Office of District Attorney.

It must further be emphasized that defendant is not alleged to have taken this to a radio station or media outlet, but rather to have specifically raised this matter before a Court in a pleading on behalf of his (defendant's) client. That is the specific charge against the defendant in the Information. In his motion for an evidentiary hearing, defendant was very careful to say that he has no direct knowledge of the involvement of the Assistant District Attorney at issue, but had circumstantial evidence that he wanted to develop, through a hearing, to determine whether there has been a violation his (defendant's) client's Sixth and Fourteenth Amendment rights under the United States Constitution. This appears to be a valid trial strategy, even though it was not successful. Furthermore, the record makes it very clear that the Commonwealth did not even consider *Bartnicki* and its dictates before filing these charges.

For these reasons, the Court finds, based upon the record as a whole, that this is a matter of public concern, thereby satisfying the third and final requirement of *Bartnicki*.

Since the Court has found that *Bartnicki* controls this case and that defendant had a First Amendment right, under the Free Speech Clause of the United States Constitution to disclose this information under these circumstances, the Pennsylvania Wiretap Statute, as applied to him, is unconstitutional and cannot serve as the basis for these charges. Therefore, no *prima facie* case has been established.

II. *COMMONWEALTH V. SPENCE*

Alternatively, defendant relies upon the Pennsylvania Supreme Court decision in *Commonwealth v. Spence*, 625 Pa. 84, 91 A.3d 44 (2014), as a basis for habeas corpus relief. In *Spence*, the defendant was charged with three counts of violation of the Pennsylvania Drug, Device and Cosmetic Act. In the investigation, the Pennsylvania State Police Trooper conducting the investigation utilized the services of a confidential informant. In arranging a drug transaction with defendant, the confidential informant placed a telephone call to the defendant on his (the confidential informant's) cell phone. While engaging in the telephone call, the confidential informant activated the speaker function on the phone to allow the Trooper to listen to the conversation. *Id.* at 85, 91 A.3d at 44-5.

After defendant was charged, he filed a suppression motion alleging that the Trooper's direction to activate the speaker function on the phone was an illegal interception of the telephone conversation in violation of the Pennsylvania Wiretap Statute. In response, the Commonwealth argued that the cell phone used in the conversation in *Spence*, was not an "electronic, mechanical or other device" as defined under 18 Pa.C.S.A. §5702. The Commonwealth further argued that to violate the Wiretap Statute, the alleged illegal interception of the communication must occur through the use of an electronic, mechanical or other device. Since, according to the Commonwealth, the cell phone in

Spence did not constitute an electronic device, the interception by the Trooper was not unlawful. In agreeing with the Commonwealth, the Pennsylvania Supreme Court stated as follows:

> Statutory interpretation is a matter of law, and our standard of review is *de novo* and our scope of review is plenary. *Commonwealth v. Wright*, 609 Pa. 22, 14 A.3d 798, 814 (2011). Under the Statutory Construction Act of 1972, 1 Pa.C.S. §§1501 *et seq.*, our paramount interpretative task is to give effect to the intent of our General Assembly in enacting the particular legislation under review. The object of all interpretation and construction of statutes is to ascertain and effectuate the intention of the General Assembly. 1 Pa.C.S. §1921(a). Generally, the best indication of the General Assembly's intent may be found in the plain language of the statute. *Wright, supra* at 814.
>
> Analyzing the statutory language employed by the General Assembly in the definitional portion of the Wiretap Act, we see no basis upon which to categorize the arrestee's cell phone as a device with respect to him, but not as a device with respect to the Commonwealth. The intent of the General Assembly may be discerned from the plain language of the words employed in the statute. The cell phone over which the trooper heard the conversations between the arrestee and Appellee clearly was a telephone furnished to the subscriber or user by a provider of wire or electronic communication service in the ordinary course of its business. The language of the statute states that telephones are exempt from the definition of device; the language of the statute does not state that it is the **use** to which the telephone is being put which determines if it is considered a device. We reject the statement by the Superior Court that only **certain uses** of a telephone may exempt the telephone from being considered a device, as being contrary to the plain language contained in the definitional section of the Wiretap Act. *See* Memorandum Opinion at 12 (emphasis in original). Accordingly, we hold that a state trooper does not violate the Wiretap Act when he listens through the speaker on an informant's cellular telephone as the informant arranges a drug deal.

Id. at 88-89, 91 A.3d 46-47.

The Commonwealth attempted here to portray the cell phone as a smart phone. However, the Commonwealth's own evidence indicates that the conversation was recorded on the cell phone with no modification. The recording device was part of the cell phone provided to Barnett by the service provider.[9]

At the hearing on December 7, 2015, the following exchange/discussion between counsel for the Commonwealth and the Court occurred at pages 82-89 of the hearing transcript:

> If I may argue in reverse, Your Honor, and start with Spence. I rely on our responsive pleading, and I would only emphasize regarding Spence that the underlying factual distinction between Spence and this case is significant. If the Spence exception, as I'm referring to it, stands, it will swallow the entire rule. If Spence is interpreted to apply broadly to all devises [sic] and all functions on a cell phone, it will swallow the entire Wiretap Act. Invalidating the Wiretap Act was not the intention of the Legislature.
>
> I know that the Court is familiar with Commonwealth versus Diego, the case that came down this year. In Diego they discussed Spence, and they determined that Spence did not broaden the telephone exception of what constitutes an electronic, mechanical, or other device.
>
> In *Diego,* the device that they're talking about is an iPad, essentially a computer, and in Diego that was determined, the Wiretap Act was determined to be applicable to the computer functions of that iPad.
>
> The testimony was clear from the various forensic witnesses regarding the, the computer functions of the Samsung Galaxy S III that we've been talking about.
>
> I, I admit to the Court in full candor that Spence is, is a problem and that Spence, the decision in Spence has left open a wide area that the Supreme Court I don't think anticipated.

[9] The definition of an electronic, mechanical or other device in 18 Pa.C.S.A. §5702 exempts any telephone . . . or any component thereof furnished to the subscriber . . .

THE COURT: Yeah. And, and let me ask you this, because this is the language from Spence. They address this at page 89:

"Analyzing the statutory language employed by the General Assembly in the definitional portion of the Wiretap Act, we see no basis upon which to categorize the arrestee's cell phone as a device with respect to him, but not as a device with respect to the Commonwealth. The intent of the General Assembly may be discerned from the plain language of the words employed in the Statute. The cell phone over which the trooper heard the conversations between the arrestee and Appellee clearly was a telephone furnished to the subscriber or user by a provider of wire or electronic communication service in the ordinary course of its business. The language of the Statute states that telephones are exempt from the definition of device; the language of the Statute does not state that it is the use to which the telephone is being put which determines if it is considered a device."

Now, you carry that one step further, and you look at the definition in the Statute of an electronic device, and here's what it says. Let me find it here. Exempted from the, the Statute is "any telephone or telegraph instrument, equipment or facility, or any component thereof, furnished to the subscriber or user by the provider of wire or electronic communication services in the ordinary course of business."

Now, the testimony we got today from the trooper was that this was a Samsung telephone that came with a recording device right in it. The plain reading of this Statute is, which the Supreme Court applied in Spence, is that Ms. Barnett used a cell phone with a recording device already equipped in it to record this. How can you distinguish, because I, I agree with you. I think this case creates a big problem in this case.

If you look at the plain reading of this Statute, it's a telephone or any component thereof. Was the device that was used to record, wasn't it a component?

MS. SHEEHAN-BALCHON: I would argue that it's not, Your Honor, and first I would ask the Court to recognize that in the Wiretap Act the definition of telephone is, it's absolutely accurate as the Court read it to us, I'm sorry, of device, in where it discusses a, a telephone, but that language is years old, and it doesn't contemplate smartphones --

THE COURT: I understand that.

MS. SHEEHAN-BALCHON: -- and it doesn't contemplate computers doing interceptions and computers having communications with other telephones. So I would ask the Court to, to keep that part in mind.

THE COURT: I understand that, but what you're asking me to do is to go beyond the purview of the language of the Statute and say that it's no longer applicable because the times have passed it by; right?

MS. SHEEHAN-BALCHON: Not necessarily. I think that the Court could find that an application on a computer is not a component of a telephone.

THE COURT: But what evidence did you present today that this recording device was something that was a downloaded app or anything like that?

MS. SHEEHAN-BALCHON: I didn't, Your Honor. If you recall Trooper O'Neill's testimony, it was his belief that whatever mechanism was used, whether it was the S feature I believe he called it, was possibly a function that was preloaded by the manufacturer, so you're correct. I didn't present any testimony that it was an application that the user added --

THE COURT: I mean, this --

MS. SHEEHAN-BALCHON: -- but I don't think that makes --

THE COURT: This case presents a very significant problem if you read Spence and the Statute literally. Would you agree?

MS. SHEEHAN-BALCHON: It's complicated, yes, I agree.

THE COURT: Okay. All right. I'm sorry. I didn't want to interrupt your [sic], but I wanted to, I'm kind of addressing these things as we're --

MS. SHEEHAN-BALCHON: Sure.

THE COURT: -- arriving at them. I've tried to give this thing careful consideration and read all the cases in [sic] the Statute, and when I read them, and based upon the testimony, what we have here is, is just a situation where these phones had a recording device as part

of it. Is that a component of a phone under the Statute? I, that's a plaguing problem here.

MS. SHEEHAN-BALCHON: I, I agree that it's a problem, Your Honor, but I think that this component as we keep referring to it is more of a computer function of this device.

THE COURT: But where's the evidence of that?

MS. SHEEHAN-BALCHON: Well, we heard it from Agent Mattis. We heard it from Trooper O'Neill as to the structure of these smartphones that they are not, in particular when Agent Mattis testified regarding the specifications of a Samsung Gallery (sic), Galaxy S III, he went through all the different specifications and the components and the capabilities of that cell phone, and only once did he mention that it's, it's capable of being used as a telephone.

So the function of this device, its primary intention is not as a telephone. It's as a computer. It's as, something that the Court in Diego had found to have the Wiretap Act applicable to.

THE COURT: But that was an iPad, not a telephone; correct?

MS. SHEEHAN-BALCHON: An iPad that could make telephone calls.

THE COURT: Okay.

MS. SHEEHAN-BALCHON: It's very --

THE COURT: I understand. I'll --

MS. SHEEHAN-BALCHON: It's very murky, Judge, I agree.

THE COURT: I'll, I'll, I'll sort this out. That's no problem, but it is a literal application of Spence to this case. It is, would indicate, at least at first glance, that this telephone did not meet the definition of a device, but I will look at Diego at your request.[10]

MS. SHEEHAN-BALCHON: Thank you, Your Honor.

---

[10] The Court has reviewed *Commonwealth v. Diego*, 119 A.3d 370 (Pa. Super. 2015). In that decision, the Superior Court refused to equate a tablet computer to a telephone, even though the tablet was used to set up a drug deal. That case is distinguishable from these facts because no tablet/computer was involved here. The *Diego* Court specifically held that "[a]n IPad is not a telephone or telegraph instrument." *Id.* at 375. Moreover, the Court further noted that "there is not any evidence of record that appellee used an IPad to communicate with the Still [(the informant)]." *Id.* at 374. These facts/findings distinguish *Diego.*

It is clear from this discussion that the Commonwealth is asking this Court to become a legislative body and change the language of the Wiretap Statute without any action by the legislature. A careful reading of the *Spence* Opinion specifically reflects that the Pennsylvania Supreme Court rejected the Superior Court's argument that only certain uses of the telephone may exempt the telephone from being considered a device. *Id.* at 89, 91 A.3d 47. Likewise, here, the Court cannot pick and choose when a cell phone violates the Wiretap Statute and when it does not because the specific language of the statute exempts a cell phone from an electronic device necessary to make an illegal recording. It may be that the language of the Wiretap Statute is antiquated and out of touch with technological advances as argued by the Commonwealth above, but that is not for the Court to consider; rather, the Court must give the language its plain and ordinary meaning as directed by *Spence.*

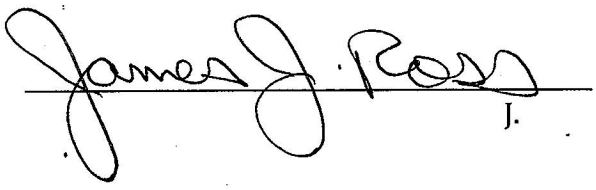
In this case, the conversation was recorded on a cell phone without the download of any application and no modification to the original state in which the subscriber received it from the provider. This may be something that the legislature needs to address, but until that time, the Court must apply the statute as it exists, and the statutory language reflects that this was not an illegal intercept because an electronic device as defined by Section 5702 was not used. This serves as a second basis for habeas corpus relief.

CONCLUSION

Even viewing the evidence in a light most favorable to the Commonwealth and giving them the benefit of every conceivable inference, there is no *prima facie* case

established based upon these facts and circumstances. An appropriate Order will be entered.

BY THE COURT:



J.

BY THE COURT
2016 JAN 13 P 1:46
JAMES J. ROSS
JUDGE

JUDY R. ENSLEN
CLERK OF COURTS
2016 JAN 13 PM 2:40
BEAVER COUNTY
PENNSYLVANIA

IN THE COURT OF COMMON PLEAS OF BEAVER COUNTY
PENNSYLVANIA
CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA	:	
	:	
vs.	:	No. 1788 of 2015
	:	
GERALD V. BENYO, JR.	:	

ORDER

AND NOW, this 13th day of January, 2016, upon consideration of defendant's Petition and Amended Petition for Habeas Corpus Relief, the response to said Petitions by the Commonwealth, the briefs filed by the parties, and all evidence of record,

IT IS HEREBY ORDERED that defendant's Petitions are granted and the charges are hereby dismissed.

BY THE COURT:

J.

JUDY R. ENGLER
CLERK OF COURTS
2016 JAN 13 PM 2:40
BEAVER COUNTY
PENNSYLVANIA

BY THE COURT
2016 JAN 13 P 1:46
JAMES J. ROSS
JUDGE