The Government admits that the court erred by failing to give a cautionary instruction limiting the use of Anzalone’s plea to an evaluation of his credibility. In a conspiracy case, this error is devastating. *U.S. v. Carson*, 560 F.3d 566, 576 (6th Cir. 2009). But the prejudice in this case was even more extreme because the Government wrongfully used the plea to establish guilt of the co-defendants and did not even attempt to use it for credibility purposes.

Unlike in cases where the issue is whether the defendant committed an inherently criminal act (e.g. murder), there was no dispute here that the defendants were involved with I2G. A critical question was not whether the defendants participated but whether the Government could prove the requisite *mens* *rea*.

The Government used Anzalone’s plea in an attempt to prove the presence of this element, a prohibited use. Defendants repeatedly fought this to no avail--the court “trust[ed] the United States kn[ew] what they’re doing” and ordered defense counsel not to object during opening statement. (R.678,#8029-33.) The result was devastating. In opening, the Government called Anzalone “Hosseinipour’s partner in this crime [who] has pleaded guilty in this case.” There was nothing about this statement that related to credibility. The statement explicitly connected the fact that the conspirator (Anzalone) pleaded guilty with his partnership with an alleged coconspirator. A comment like this one in an opening statement is improper because “[i]t strongly suggests a logical variant of guilt by association.” *U.S. v. Dworken*, 855 F.2d 12, 31 (1st Cir. 1988). The Government stressed this in its opening because of its prejudicial impact.

In its response brief, the Government falsely claims that the Government’s questioning about Anzalone’s guilty plea “constituted approximately a single transcript page at the beginning of his multi-day testimony.” (*Compare* GovBr.97 with R.465, #3576 *with* R.511, #4921, #4935).) That is not true but even the testimony about the plea during Anzalone’s direct testimony was devastating. The testimony had nothing to do with credibility. Rather, the Government elicited testimony from Anzalone that he pleaded guilty to securities fraud “the one I feel for sure **we** did.” (R.465;#3576; emphasis added.) The “we” clearly references the defendants on trial. This is strictly prohibited. Then, the Government asked whether Anzalone “**also** commit[ted] the crime in Count 1, the conspiracy to commit mail fraud.” (*Id.*; emphasis added.) Anzalone’s response, “I believe so, now that I understand it,” reveals that the purpose of this testimony was not for Anzalone to detail first-hand factual knowledge to the jury; the purpose was to bolster the notion that because there was a guilty plea there must be legal validity to the Government’s conspiracy theory.

Anzalone’s redirect testimony—ignored by the Government in its brief—was worse:

Q. Yeah. Did you know the definitions involved in the two crimes you were charged with, conspiracy to commit securities fraud and conspiracy to commit mail fraud?

A. I didn't. In 2013-2014, I never heard of those charges.

Q. Right. And your background -- you went to high school. Santa Monica?

A. Yes, sir.

Q. And then after that, you took some classes in plumbing and cable TV?

A. Yes, uh-huh.

Q. Okay. And you have no college degree or advanced degree after that?

A. No, I'm not -- I wouldn't consider myself an educated person.

Q. Okay. So you -- during 2013 and 2014, you didn't know the legal definition of a security?

A. No, I did not.

Q. And you didn't know the legal definition or significance of the phrase "reckless disregard for the truth"?

A. Correct.

Q. And you didn't know the legal definition and significance of concealment of material facts?

A. Correct.…

Q.When you spoke to your lawyer, did you and he go through all the elements of the offense and these same definitions that I just mentioned?

A.Yeah. Patrick was phenomenal. Patrick is a phenomenal, phenomenal attorney. He did.

Q.And did that –

THE COURT: Sir, Mr. Anzalone, please answer the question.

THE WITNESS: Yes.

BY MR. SEWELL:

Q.Did that discussion help lead you to your decision to plead guilty?

A.Yes.

(R.511,#4935.) This had nothing to do with credibility. It also had nothing to do with first-hand testimony about facts. Rather, the Government used the plea in an attempt to prove the defendants’ guilt by rebutting their *mens rea* defense. The Government improperly used the guilty plea in an attempt to prove that, despite Anzalone being uneducated and not knowing he was violating the law, his lawyer concluded that he was still guilty resulting in the plea. This was used by the Government in attempt to prove the guilt of the defendants at trial.

The Government demonstrated this by relying on this testimony in closing. Contrary to its position in its brief, the Government used Anzalone’s plea to infer the defendants’ guilt:

So there's a lot of terms in the jury instructions that are defined for you. And can a defendant commit the crimes without knowing all of the official definitions? Absolutely.

So look at Richard Anzalone. His background is he has a certificate in plumbing and in cable TV. Right? Did he know all the definitions for what is a security, what is a pyramid scheme, what does a material misrepresentation mean? No. Can he still commit the crime? Absolutely. Just because you don't know the official definition doesn't mean that you can't be found guilty of selling securities and fraud with respect to securities.

(R.671, #7689.) The Government was explicitly arguing that the defendants were guilty based on Anzalone’s testimony that the education he received from his lawyer led him to plead guilty despite his lack of education concerning the legal concepts at issue. This was a highly improper use of the plea agreement to rebut defendants’ *mens rea* defense.

The record shows that the Government affirmatively used Anzalone’s guilty plea as substantive evidence, and the requested limiting instruction was not given. Reversal is required. *See* *U.S. v. Sanders*, 95 F.3d 449, 454 (6th Cir. 1996) (“guilty pleas and convictions are never admissible as substantive evidence of the defendant's guilt.”).

The Government conceded that it used Anzalone’s guilty plea as substantive in response to the defendants’ post-trial motions: “Anzalone admitted his guilt for his activity with i2G, and he testified at length about his activity and that he and Hosseinipour were partners who communicated daily regarding their work with i2G.” (R.583, #5479.) The Government cannot credibly now attempt to contradict this admission. Even the court relied on this argument, the court noted that the convictions would not have happened if “one person on the inside who took responsibility and recognized that this was a scheme to really sell opportunities to recruit,” which infers co-conspirator’s guilt based on Anzalone’s guilt. (R.675, #7855.)

This misconduct by the Government and the error by the court were not harmless. The instructions the Government points to in its brief do not satisfy the strict requirement that the jury limit its consideration of the plea to credibility. And closing arguments of Barnes and Hosseinipour about the plea agreement were limited to its impact on evaluating Anzalone’s credibility. (R.671;#7648-51; 7674-77.) In fact, during Hosseinipour’s closing argument the court twice improperly prohibited counsel from rebutting the testimony concerning the impact of Anzalone’s counsel in the plea process (*id.* at #7676) and from attempting to minimize the Government’s suggestion that the conspirators were guilty because Anzalone pleaded guilty. (*Id.* at #7677.) The Government’s improper use of Anzalone’s plea and the failure to give a required limiting instruction require reversal.