UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

UNITED STATES OF AMERICA v. PAUL BERGRIN, Defendant.	Criminal No. 09-369 (DMC) Filed Electronically **NOTICE OF DEFENDANT PAUL BERGRIN'S POST-TRIAL MOTIONS**

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PLEASE TAKE NOTICE that Defendant Paul Bergrin, by appointed standby counsel, Gibbons P.C. (Lawrence S. Lustberg, Esq. appearing), hereby moves before the Honorable Dennis M. Cavanaugh, United States District Judge, for an Order granting his post-trial motions requesting that the District Court:

(1) Enter a judgment of acquittal as to Counts Twelve, Thirteen, One (Racketeering Act Four) and Three;

(2) Enter a judgment of acquittal as to Counts Twenty-Six and One (Racketeering Act Eight);

(3) Grant a new trial; and

(4) Conduct an inquiry of the jury.

In support of these motions, Mr. Bergrin relies on the arguments and authorities set forth within the accompanying brief and the arguments of counsel. A proposed form of order is filed herewith.

Respectfully submitted,

s/ Lawrence S. Lustberg

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

UNITED STATES OF AMERICA v. PAUL BERGRIN Defendant.	Criminal No. 09-369 Filed Electronically

BRIEF IN SUPPORT OF DEFENDANT PAUL BERGRIN'S POST-TRIAL MOTIONS

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I. PRELIMINARY STATEMENT

Defendant Paul Bergrin respectfully submits this brief in support of his post-trial motions requesting that the Court (1) vacate the verdict and enter a judgment of acquittal as to Counts Twelve, Thirteen, One (Racketeering Act Four), and Three of the Second Superseding Indictment pursuant to Federal Rule of Criminal Procedure 29(c); (2) vacate the verdict and enter a judgment of acquittal as to Counts Twenty-Six and One (Racketeering Act Eight) pursuant to Rule 29(c); (3) grant a new trial on all counts pursuant to Federal Rule of Criminal Procedure 33; and (4) interview the members of the jury, pursuant to Federal Rule of Evidence 606(b) and Local Criminal Rule 24.1(g), regarding whether any or all of the jurors were exposed to extraneous prejudicial information or outside influence prior to the delivery of the verdict.

As the Court is aware, following an initial remand from the United States Court of Appeals for the Third Circuit after the District Court had dismissed the racketeering counts against Mr. Bergrin, *see United States v. Bergrin*, 650 F.3d 257 (3d Cir. 2011), on June 2, 2011, a federal grand jury in the District of New Jersey returned a 33-count Second Superseding Indictment in this matter, of which 30 counts pertained to defendant Paul W. Bergrin. An initial severed trial before the Honorable William J. Martini on Counts Twelve and Thirteen alone resulted in a hung jury. After that verdict, the government appealed with respect to the issues of severance and the exclusion of certain evidence; it also sought, successfully, the reassignment of this matter. *See United States v. Bergrin*, 682 F.3d 261 (3d Cir. 2012). On remand to this Court, which denied Mr. Bergrin's pretrial motion to sever and for other relief, trial on twenty-three of the charges began with jury selection on January 7, 2013; approximately eight weeks of trial days followed. At the conclusion of the government's case, the defense moved for a judgment of acquittal pursuant to Federal Rule of Criminal Procedure 29(a) as to all counts, and this Court reserved judgment, as it was empowered to do under Federal Rule of Criminal Procedure 29(b). On March 14, 2013, the jury began its deliberations, which, despite the complexity of the charges and the length of the jury instructions and verdict form, lasted for only a few hours over

the course of three days. On March 18, 2013, the jury returned a verdict of guilty against Mr. Bergrin on all counts.

For the reasons set forth below, Mr. Bergrin's motions with respect to Counts Twelve, Thirteen, One (Racketeering Act Four), and Three should be granted because the government failed to establish by proof beyond a reasonable doubt essential elements of those allegations. Specifically, there is simply no evidence that Mr. Bergrin ever joined the agreement to murder Kemo Deshawn McCray (Count Twelve). Indeed, the government's evidence, even fully credited, showed that the agreement was not formed until after Mr. Bergrin left the company of the individuals who established it, and there was absolutely no evidence that he was informed of the agreement, or took any action with regard to it after that alleged meeting. Likewise, there is no evidence that Mr. Bergrin either knew of or in some way aided or assisted in the murder Mr. McCray (Count Thirteen). Rather, the evidence demonstrated that Mr. McCray would have been killed regardless of any involvement by Mr. Bergrin, and that the information he purportedly provided to William Baskerville's criminal associates — namely that Mr. McCray was the confidential informant and that Baskerville faced life in prison as a result of Mr. McCray's cooperation — was well known to those individuals at that time. Accordingly, a judgment of acquittal should be entered as to Counts Twelve and Thirteen. And because the same elements were also required to be found beyond a reasonable doubt for Counts One (Racketeering Act Four) and Three — which allegations were also premised on the facts of the Kemo murder case — judgments of acquittal should be entered on those counts as well.

Similarly, a judgment of acquittal should be entered as to Counts Twenty-Six and Racketeering Act Eight, because there is no evidence from which any reasonable juror could infer that Mr. Bergrin possessed the intent required under the pertinent statute, 31 U.S.C. § 5324(b). That is, the government adduced no evidence to show that, when Mr. Bergrin received $20,000 in cash from Oscar Cordova and failed to file an Internal Revenue Service Form 8300 with respect to that money, Mr. Bergrin had the purpose of evading the applicable

reporting requirements, an essential element of the offense. To the contrary, in the absence of any evidence as to Mr. Bergrin's intent, the government's proofs as to Count Twenty-Six (and Racketeering Act Eight of Count One, which tracks the language of Count Twenty-Six) tended to show that the failure to file the report was inadvertent, and innocent.

In addition, a new trial should be granted, pursuant to Rule 33, to correct the prejudicial error that occurred when the Court denied Mr. Bergrin's motion for judicial immunity with respect to Jamal McNeil and Jamal Baskerville, as it was permitted to do by Third Circuit precedent where, as here, those witnesses proffered powerful exculpatory evidence with respect to Counts Twelve and Thirteen. Specifically, those witnesses would have testified, had they been immunized, that Mr. Bergrin never met with the members of Hakeem Curry's drug trafficking organization after William Baskerville's arrest and never told them, "no Kemo, no case," as Anthony Young, the sole witness in the Kemo murder case, testified. Under the circumstances, the Court abused its discretion in denying Mr. Bergrin's application for judicially conferred immunity, under *Government of the Virgin Islands v. Smith*, 615 F.2d 964 (3d Cir. 1980), and its progeny.

Finally, the Court should make an inquiry of the jury, as permitted under Federal Rule of Evidence 606(b) and Local Criminal Rule 24.1(g), to ascertain whether, as appears unfortunately to be a possibility, extraneous influence was brought to bear upon the jurors as they reached their verdict. As is discussed below, such inquiry is encouraged by the United States Court of Appeals for the Third Circuit where, as here, circumstances indicate the possibility of exposure to extraneous information or outside influence. Because the manner in which the jury arrived at its verdict is highly suspect, the Court should inquire into whether any of the jurors learned of a highly prejudicial news account that ran one day before the verdict, or otherwise encountered outside influences in this case. For these reasons, discussed in detail below, the Court should grant the instant motions.

II. THE COURT SHOULD ENTER A JUDGMENT OF ACQUITTAL ON COUNTS TWELVE AND THIRTEEN PURSUANT TO FEDERAL RULE OF CRIMINAL PROCEDURE 29.

Because there is, as a matter of law, insufficient evidence to support the verdicts reached on Counts Twelve and Thirteen, as well as on the corresponding racketeering allegations charged in Counts One (Racketeering Act Four) and Three, the Court should, pursuant to Federal Rule of Criminal Procedure 29(c), enter a judgment of acquittal on those Counts. As Rule 29(c) provides:

> After the government closes its evidence or after the close of all the evidence, the court on the defendant's motion must enter a judgment of acquittal of any offense for which the evidence is insufficient to sustain a conviction.

Mr. Bergrin recognizes that his legal burden in establishing the insufficiency of the evidence is a heavy one. The Court must view the evidence in the light most favorable to the government, and cannot enter a judgment of acquittal "unless it is clear that no rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *United States v. Mercado*, 610 F.3d 841, 845 (3d Cir. 2010) (citing *United States v. Cunningham*, 517 F.3d 175, 177 (3d Cir. 2008)); *accord United States v. Dent*, 149 F.3d 180, 187 (3d Cir. 1998) (citing *United States v. Voigt*, 89 F.3d 1050, 1080 (3d Cir. 1996) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). Moreover, Mr. Bergrin also acknowledges that, in deciding this motion, the Court must give "full play" to the "right of the jury to determine credibility, weigh the evidence, and draw justifiable inferences of fact." *United States v. Reicherter*, 647 F.2d 397, 401 (3d Cir. 1981) (quoting *United States v. Phifer*, 400 F. Supp. 719, 724 (E.D. Pa. 1975) (citation omitted)), *aff'd*, 532 F.2d 748 (3d Cir. 1976); *accord United States v. Boria*, 592 F.3d 476, 480 (3d Cir. 2010) (courts must be vigilant not to usurp jury's role by weighing credibility and assigning weight to the evidence) (citing *United States v. Brodie*, 403 F.3d 123, 133 (3d Cir. 2005)).

Thus, while courts will reverse a jury verdict "only when the record contains no evidence, regardless of how it is weighted, from which the jury could find guilt beyond a reasonable doubt," *United States v. Mussare*, 405 F.3d 161, 166 (3d Cir. 2005) (quoting *United States v. Anderson*, 108 F.3d 478, 481 (3d Cir. 1997)), when that standard is met, the Court *must* grant the motion, as the language of the Rule is mandatory. *See United States v. Swidler*, 207 F.2d 47, 47-48 (3d Cir. 1953). *See also United States v. Davis*, 397 F.3d 340, 345 (6th Cir. 2005) ("if the district judge actually believed that the government failed to prove an essential element of the crime, he would have been bound to grant Defendant's Rule 29 motion"). The District Courts of this Circuit, of course, strive to fulfill this sacred responsibility and when they do not, the Court of Appeals does not hesitate to reverse. *See, e.g., United States v. Tyson*, 653 F.3d 192, 211 (3d Cir. 2011) (affirming judgment of acquittal because there was insufficient evidence of tacit agreement to support conspiracy conviction); *United States v. Cartwright*, 359 F.3d 281, 291 (3d Cir. 2004) (reversing conviction and remanding for entry of judgment of acquittal because evidence, based upon speculation, was legally insufficient to support conviction for conspiracy or aiding and abetting cocaine distribution scheme); *United States v. Idowu*, 157 F.3d 265, 270 (3d Cir. 1998) (reversing conspiracy conviction where jury could not draw a permissible inference that defendant had knowledge of the nature of deal though he knew it was illegal and though he was trusted member of the conspiracy); *United States v. Villard*, 885 F.2d 117, 121 (3d Cir. 1989) (affirming judgment of acquittal entered because testimony of agent provided insufficient basis for the jury to conclude beyond a reasonable doubt that sexually explicit conduct of a minor was depicted in subject materials); *United States v. Wexler*, 838 F.2d 88, 92 (3d Cir. 1988) (reversing convictions on appeal from denial of Rule 29 motion where position of trust within conspiracy was insufficient without evidence defendant knew its specific illegal object); *United States v. Samuels*, 741 F.2d 570, 571 (3d Cir. 1984) (reversing convictions for drug conspiracy because "we have serious doubts that the government has proven, beyond a reasonable doubt, that [defendants] were implicated in the crimes for which they have been convicted."); *United States v. Camiel*, 689 F.2d 31, 37 (3d Cir. 1982) (affirming judgment of

acquittal based on insufficient evidence of charged unitary scheme); *United States v. Schoenhut*, 576 F.2d 1010, 1024 (3d Cir. 1978) (affirming judgment of acquittal on the willful misapplication of bank funds count based on government's failure to prove intent); *United States v. Cooper*, 567 F.2d 252, 254-55 (3d Cir. 1977) (reversing convictions due to absence of "*some* evidence" that defendant knew contents of locked compartment in car in which he was traveling with a member of a drug conspiracy).

Finally, in reviewing the sufficiency of the evidence, the Court may not defer to the jury on issues of legal interpretation. *See United States v. Shambry*, 392 F.3d 631 (3d Cir. 2004) (citing *United States v. Sparrow*, 371 F.3d 851, 852 (3d Cir. 2004); *United States v. Cepero*, 224 F.3d 256, 258 (3d Cir. 2000) (*en banc*)). This case calls for such a legal interpretation with regard to particular elements of Count Twelve and Count Thirteen, and with them, Count Three and Racketeering Act Four of Count One. As explained below, because there was no evidence adduced by the government to establish by proof beyond a reasonable doubt essential elements of those Counts — namely that Mr. Bergrin ever joined an unlawful agreement to kill Mr. McCray during the existence of such agreement, as charged substantively in Count Twelve, and that he knew that someone was going to, and in some way aided or assisted someone to murder Mr. McCray, as charged substantively in Count Thirteen, the Court must grant Mr. Bergrin's motion for a judgment of acquittal.

A. There Is Insufficient Evidence To Sustain A Conviction For Conspiracy To Murder A Witness.

The Court must enter a judgment of acquittal as to Count Twelve, charging Mr. Bergrin with conspiring to kill Kemo McCray in violation of 18 U.S.C. § 1512(k), because the government failed to present any evidence from which a jury could permissibly find or infer that at some time during the existence or life of an unlawful agreement to murder Mr. McCray, Mr. Bergrin joined in that agreement. As this Court instructed the jury with respect to Count Twelve, the government was required to prove, beyond a reasonable doubt:

> First, that two or more persons formed, reached, or entered into an unlawful agreement to murder Kemo McCray with the intent to prevent Mr. McCray's attendance or testimony at an official proceeding, and, second, that at some time during the existence or life of that unlawful agreement, Defendant Bergrin knew the purpose of that agreement and intentionally joined in it.

Tr. (3/14/13) at 8883. *Accord* Third Circuit Model Criminal Jury Instruction 6.18.371C (existence of agreement) (citing, *e.g.*, *Iannelli v. United States*, 420 U.S. 770, 777 n. 10 (1975) (agreement is essential element of conspiracy and the evil at which the crime of conspiracy is directed); *United States v. Kelly*, 892 F.2d 255, 258 (3d Cir. 1989) (same)).

The Court further instructed the jury that to find that Mr. Bergrin:

> knowingly and intentionally joined that agreement or conspiracy during its existence[,] … [t]he government must prove that Mr. Bergrin knew the goal or objectives of the agreement or conspiracy and voluntarily joined it during its existence, intending to achieve that common goals or objective and to work together with the other alleged conspirators toward those goals or objectives.

Tr. (3/14/13) at 8871. *Accord* Third Circuit Model Criminal Jury Instruction 6.18.371D (membership) (explicitly rejecting "slight evidence" doctrine and citing *Cooper*, 567 F.2d at 255 ("One may not be convicted of conspiracy solely for keeping bad company.")). *See also United States v. Rigas*, 605 F.3d 194, 206 n.9 (3d Cir. 2010) (to prove conspiracy beyond a reasonable doubt, government must show "(1) an agreement to commit an offense proscribed by federal law; (2) the defendants intentionally joining in the agreement . . . ."); *Boria*, 592 F.3d at 481 ("To establish a charge of conspiracy, the Government must show (1) a shared unity of purpose, (2) an intent to achieve a common illegal goal, and (3) an agreement to work toward that goal, which [defendant] knowingly joined") (citing *United States v. Mastrangelo*, 172 F.3d 288, 291 (3d Cir. 1999)); *United States v. Robinson*, 167 F.3d 824, 829 (3d Cir. 1999) (to prove a conspiracy, government must establish agreement to work together toward common goal); *United States v. Rodriguez*, 392 F.3d 539, 545 (2d Cir. 2005) ("to sustain a conspiracy conviction, the government must present 'some evidence from which it can be reasonably be inferred that the

person charged with conspiracy knew of the existence of the scheme alleged in the indictment and knowingly joined and participated in it'") (quoting *United States v. Morgan*, 385 F.3d 196, 206 (2d Cir. 2004)); *United States v. Miller*, 405 F.3d 551, 555-56 (7th Cir. 2005) ("conspiracy conviction requires a showing that ... the charged party knew of and intended to join the enterprise") (quoting *United States v. Navarrete*, 125 F.3d 559, 662 (7th Cir. 1997)); *cf.*, *United States v. Jones*, 381 F. App'x 148, 150 (3d Cir. 2010) (evidence defendant knowingly joined and participated in drug conspiracy was overwhelming because he was directly involved in the transaction, making multiple deliveries of crack cocaine); *United States v. Gibbs*, 190 F.3d 188, 196, 200-201 (3d Cir. 1999) (sufficient evidence supported inference that defendant joined the conspiracy based upon defendant's willingness to protect his drug connection).

While the existence of the elements of a conspiracy certainly may be proved by circumstantial evidence, *Gibbs*, 190 F.3d at 197, a conspiracy, nevertheless, "cannot be proven ... by piling inference upon inference." *United States v. Coleman*, 811 F.2d 804, 808 (3d Cir. 1987) (internal quotation omitted). Moreover, "the inferences drawn must have a logical and convincing connection to the facts established." *United States v. Casper*, 956 F.2d 416, 422 (3d Cir. 1992); *United States v. McNeill*, 887 F.2d 448, 450 (3d Cir. 1989). Because of the dangers that inappropriate inferences will be drawn and piled one on top of the other, the United States Court of Appeals for the Third Circuit has held that the sufficiency of the evidence in conspiracy prosecutions "requires close scrutiny." *Coleman*, 811 F.2d at 807 (citation omitted); *see also Tyson*, 653 F.3d at 206 ("When a conspiracy conviction is at issue, we must closely scrutinize the sufficiency of the evidence.") (citation omitted). This is because "a defendant's guilt must always remain 'individual and personal,'" *Tyson*, 653 F.3d at 206 (quoting *Boria*, F.3d at 480), and because juries have an unfortunate tendency to believe a defendant "must have been involved in a conspiracy, once evidence has been presented of some questionable acts ...." *Samuels*, 741 F.2d at 574-75. Therefore, individual guilt must be proven beyond a reasonable

doubt, and slight evidence[1] connecting a defendant to a conspiracy is insufficient. *Coleman*, 811 F.2d at 807-08. *See also United States v. Mubayyid*, 2011-2 U.S. Tax Cas. (CCH) P50, 53 (1st Cir. Sept. 1, 2011) (noting the "broad sweep" of conspiracy liability "can capture the innocent as well as the culpable").

In sum, Courts of Appeals, including the Third Circuit, regularly reverse jury convictions when there is a lack of evidence of membership. *See, e.g.*, *United States v. Clanton*, No. 12-11002, 2013 U.S. App. LEXIS 6836 at *12-13 (11th Cir. April 4, 2013) (vacating defendant's convictions because of insufficient evidence to conclude that defendant entered into any agreement); *United States v. Davis*, 458 F. App'x 152, 159-60 (3d Cir. 2012) (reversing conspiracy conviction because district court erroneously denied defendant's Rule 29 motion where undue speculation was required to infer the requisite intent); *United States v. Dellosantos*, 649 F.3d 109, 126 (1st Cir. 2011) (vacating defendants' convictions because district court erroneously denied defendants' Rule 29 motion where the government failed to prove beyond a reasonable doubt that the defendants agreed to join the conspiracy that was charged); *United States v. Shull*, 349 F. App'x 18, 20 (6th Cir. 2009) (reversing conspiracy conviction because evidence that defendant agreed to join a drug conspiracy did not exist); *Rodriguez*, 392 F.3d at 548 (reversing conspiracy conviction because "the evidence was not sufficient to demonstrate that [defendant] 'knew the specific nature of the conspiracy or underlying crime'" despite evidence that defendant owned car from which drugs were seized, where the defendant had been sitting moments earlier while in possession of weapons, and despite evidence of telephone calls

[1] The Third Circuit has repeatedly and expressly rejected the argument that, once a conspiracy is established between two or more persons, only "slight evidence" is required to demonstrate an additional defendant's connection to it. *See Coleman*, 811 F.2d at 808; *Samuels*, 741 F.2d at 575; *Cooper*, 567 F.2d at 255. To the contrary, each defendant's agreement must be proven beyond a reasonable doubt. *See id. Accord* Third Circuit Model Criminal Jury Instruction 6.18.371D cmt. (eschewing notion expressed in some cases that only "slight evidence" is needed to allow jury to find defendant was a member, *e.g. United States v. Kates*, 508 F.2d 308, 310 n.4 (3d Cir. 1975); *United States v. Weber*, 437 F.2d 327, 336 (3d Cir. 1970), because of "concern that it would dilute the government's burden of proving beyond a reasonable doubt that the defendant was a member of the conspiracy") (citing *Cooper*, 567 F.2d at 255).

and pages between defendant and his alleged co-conspirator); *United States v. Alston*, 77 F.3d 713, 721 (3d Cir. 1995) (reversing denial of defendant's Rule 29 motion in conspiracy to defraud case for lack of sufficient evidence of *mens rea*); *United States v. Obialo*, 23 F.3d 69, 73 (3d Cir. 1994) (reversing denial of Rule 29 motion as to conspiracy conviction because the logical leaps urged by the government provided insufficient evidence that defendant conspired with anyone).

In this case, just as in Mr. Bergrin's last trial, which resulted in a hung jury as to Counts Twelve and Thirteen, Anthony Young provided the only testimony describing defendant Bergrin's actions in connection with the charged conspiracy to murder Mr. McCray. That is, Anthony Young alone[2] testified to the three conversations — two between Mr. Bergrin and Mr. Curry on the afternoon of the Baskerville arrest and the other some time later, in which Mr. Bergrin allegedly advised Curry, Young, Jamal Baskerville, Jamal McNeil, and Rakeem Baskerville that William Baskerville was facing life in prison and uttered the now infamous phrase "no Kemo, no case" — which provided the evidence of the actions whereby Mr. Bergrin purportedly joined the conspiracy. But even assuming the truth of that testimony, including that Young himself knowingly formed, reached, or entered into an unlawful agreement with one or more members of the Hakeem Curry organization to murder Kemo Deshawn McCray with the intent to prevent Mr. McCray's attendance or testimony at an official proceeding, there is simply

[2] To be precise, in response to a line of cross-examination of government witness Special Agent Stephen Cline, the Court permitted Agent Cline to testify as to the contents of the first of the two telephone conversation between Mr. Bergrin and Curry on the afternoon of November 25, 2003. As the Court is aware, the Drug Enforcement Agency had recorded these two conversation pursuant to a wiretap of Hakeem Curry, but the government did not introduce them into evidence here because they were not timely sealed, and therefore, inadmissible. *See* Tr. (1/30/13) at 1384. Nonetheless, as Agent Cline testified, in the initial conversation, Mr. Bergrin informed Curry that William Baskerville had been arrested, described the information contained in the complaint, and explained the legal process that would likely follow such an arrest. Tr. (2/6/13) at 3015-3019. Notably, this testimony actually contradicted, rather than corroborated, the testimony of Anthony Young, who claimed that Curry learned of Baskerville's arrest that morning and intended to reach out to his attorney, Mr. Bergrin, so he could "get on the case." Tr. (2/1/13) at 2238. *Compare* Tr. (2/6/13) at 3016, 3020 *with* Tr. (2/1/13) at 2231-2239.

no evidence that, at some time during the existence or life of that unlawful agreement, Mr. Bergrin knew the purpose of that agreement, or intentionally joined in it.

More specifically, in its entirety, the evidence connecting Mr. Bergrin to the Curry organization's conspiracy to murder McCray, all of which arose from Young's testimony, was that: a) in an initial phone conversation with Hakeem Curry on November 25, 2003, the day of William Baskerville's arrest, Mr. Bergrin described the crack sales with which Baskerville was charged, *i.e.*, "the information of how much it was and what dates they was on," Tr. (2/1/13) at 2242; b) later in the evening on the date of William Baskerville's arrest, Mr. Bergrin had a second phone conversation with Curry, in which he informed Curry that Baskerville had said the informant's name was "Kamo,"[3] Tr. (2/1/13) at 2243; and c) on some evening the following week (after the Thanksgiving weekend), Mr. Bergrin met Curry, Young, Jamal Baskerville, Jamal McNeil, and Rakeem Baskerville at Jamal Baskerville's house on 17th Street, Tr. (2/1/13) at 2249-50, told them that the federal authorities "got audio and video of Will making these crack sales, that Will was facing life in prison," *id.* at 2253, and said "if Kemo testify against Will, Will was never coming home. He said, telling us, don't let ... Mr. Kemo testify against Will, and if he don't testify, he'll make sure he gets Will out of jail," and "he said if no Kemo, no case." *Id.* Finally, Young testified that on parting, Mr. Bergrin "said, remember what I said, he said, No Kemo, no case" and made a finger pointing hand motion. *Id.* at 2254. Assuming, as the Court must at this stage, that all of this is true — and that it is all true notwithstanding the conflicting evidence provided by Young both generally[4] and regarding this meeting in particular[5]

[3] Even the government conceded on summation that it was William Baskerville who identified Kemo as the witness, before Mr. Bergrin mentioned the name to Curry. Tr. (3/13/13) at 8472 ("William Baskerville, he wanted it done. He passed along the name.").

[4] In his summation, Mr. Bergrin detailed many of the numerous inconsistencies between Young's testimony and what he previously told law enforcement officers, between his testimony in this case and his prior testimony in *United States v. Baskerville*, No. 03-836, between his testimony on direct examination and on cross (or otherwise within this case), and between his testimony and the testimony of other witnesses in this matter. Tr. (3/13/13) at 8603-04, 8611-8613, 8620-8644.

— it fails to establish, as a matter of law, that Mr. Bergrin joined a conspiracy during its existence or that he worked together with the other alleged co-conspirators toward the goal of the conspiracy such that he was a member of the conspiracy.

While, as the Court appropriately charged the jury, the government was not obligated to prove that Mr. Bergrin was a member of the conspiracy from the beginning, it certainly was required to prove beyond a reasonable doubt that at some time during the existence of the conspiracy, Mr. Bergrin, in fact, joined it. *See* Tr. (3/14/13) at 8872; *Rigas*, 605 F.3d at 206 n.9; *Boria*, 592 F.3d at 481; *Wexler*, 838 F.2d at 91 ("there must be evidence tending to prove that defendant entered into an agreement") (quoting *United States v. Scanzello*, 832 F.2d 18, 20 (3d Cir. 1987)). But based upon the government's own evidence, it is absolutely clear that first, all of Mr. Bergrin's actions predated the formation of the conspiracy to kill Mr. McCray, and second, that there is no evidence whatsoever of even a single action taken by Mr. Bergrin after

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[5] For example, as Mr. Bergrin argued in summation, there were inconsistencies in Young's testimony with regard to such critical facts as when the meeting took place, (whether the day of Baskerville's arrest, 4-5 days after Baskerville's arrest, or after Thanksgiving weekend), Tr. (3/13/13) at 8623, 8631; where the meeting took place (he originally told the Federal Bureau of Investigation that the meeting occurred on 16th Street rather than 17th Street), *id.* at 8627-28; with regard to with whom Mr. Bergrin met (he originally said that Mr. Bergrin met only with Hakeem Curry), *id.* at 8628; and even with regard to what Mr. Bergrin said, and what gestures accompanied his statements (he originally said that Mr. Bergrin said no more than "No Kemo, no case" as he was returning to his car and gave the thumbs up, not any other gesture), *id.* Young was likewise inconsistent as to whether he learned that Baskerville was facing life at that meeting or the day of Baskerville's arrest. *Id.* at 8623. Even Young's testimony with respect to Mr. Bergrin's phone calls to Curry on the day of Baskerville's arrest contained extremely significant inconsistencies, as to, for example, such facts as who (Jamal or Rakeem Baskerville) was in the car, *id.* at 8627, who ordered the murder, *id.* at 8634, and whether that was the moment Young decided to kill Kemo. *Id.* at 8622-23. Perhaps most significantly, Young's testimony on direct examination as to Mr. Bergrin's statements at the meeting differed in crucial respects from what he alleged at the last trial, notwithstanding repeated objections on the basis of leading. Tr. (2/1/13) at 2253. For example, Young did not allege here that Mr. Bergrin said "we need not to let Kemo ... we meant not to let Kemo testify. We need not to let him testify," as he did in 2011. Tr. (10/27/11) at 141-42. Nor, when describing the meeting on direct examination, did he testify, as he previously did, that Mr. Bergrin said "get rid of" Kemo. Tr. (2/6/13) at 2914. Similarly, as Mr. Bergrin argued on summation, Young also did not allege here, as he did in 2007, that Mr. Bergrin ever said that he wanted Kemo dead. Tr. (3/13/13) at 8628.

the conspiracy was formed. Specifically, Young testified that only *after* Mr. Bergrin left did the individuals present at Jamal Baskerville's house begin discussing "how we was gonna go about looking for Kemo ... who was gonna kill Kemo." Tr. (2/1/13) at 2255.

In other words, it is undisputed that the conspiracy did not begin until Mr. Bergrin had left the premises. Thus, there was no evidence whatsoever that any member of the organization ever communicated any plans to kill Mr. McCray to Mr. Bergrin while he was present. And, by Young's own account, no party to the meeting on 17th Street is alleged to have nodded, gestured, or verbally communicated any reciprocal willingness to take any action whatsoever, suggesting even a tacit mutual understanding at that time. *See Iannelli*, 420 U.S. at 777 n.10 (agreement is essential element of conspiracy); *Kelly*, 892 F.2d at 258 (same); *United States v. Cont'l Group, Inc.*, 603 F.2d 444, 462 (3d Cir. 1979) (approving of jury charge that in the "absence of an agreement or mutual understanding or meeting of the minds there can be no conspiracy").[6] The record is therefore clear that the only evidence indicating that *anyone* ever "knowingly and intentionally arrived at a mutual understanding or agreement ... to work together to achieve the overall objective of the conspiracy," Tr. (3/14/13) at 8869, was Young's testimony that he and the parties at the 17th Street meeting began to discuss killing Mr. McCray after Mr. Bergrin's departure.[7] Moreover, notably, the government did not present any other evidence with respect to any subsequent conversations, meetings or other interactions to demonstrate, or which would

[6] Even in cases in which circumstantial evidence serves to establish the conspiracy, evidence of some coordination must denote the existence of an agreement. *See Tyson*, 653 F.3d at 209 ("where several alleged co-conspirators engage in coordinated, 'unusual acts,' one may reasonably infer the existence of a tacit agreement").

[7] To be sure, Young testified that, at that meeting, Mr. Bergrin "walked off to the side with Hakeem Curry." Tr. (2/1/13) at 2254. But no evidence was offered as to what they discussed and accordingly, it would be rank speculation or conjecture, and not reasonable inference, to conclude that they were discussing the murder of McCray, as opposed, for example, to Mr. Bergrin's representation of others in the Curry clique, or even of drug dealing — both aspects of their relationship which the government went to great lengths to prove at trial. *See United States v. Thomas*, 114 F.3d 403, 406 (3d Cir. 1997) (conspiracy case law in the Third Circuit "forbids the upholding of a conviction on the basis of ... speculation."); *Casper*, 956 F.2d at 422.

permit a reasonable juror to infer, that Mr. Bergrin was apprised of the Curry organization's plan. In sum, even if one can reasonably infer that Mr. Bergrin knew that his statements would result in the death of Mr. McCray — an inference that, as set forth below is not, in fact, a permissible one — there is no evidence that, at the time of those statements any agreement to commit the murder existed. And, because there were no actions attributed to Mr. Bergrin subsequent to the agreement from which one could conclude that Mr. Bergrin ever joined the conspiracy, the evidence is simply insufficient, as a matter of law, to sustain his conviction on Count Twelve of the Second Superseding Indictment.

Beyond the government's failure to prove that Mr. Bergrin knew of any agreement — or even that there was one — at the time he allegedly took the actions to which Young testified, there was also no evidence adduced at trial that, as the Court instructed was necessary for a conviction on this Count, Mr. Bergrin "intend[ed] to … work together with the other alleged conspirators toward th[e] goals or objectives" of the conspiracy. Tr. (3/14/13) at 8871. *See Boria*, 592 F.3d at 481 ("To establish a charge of conspiracy, the Government must show ... an agreement to work toward that goal, which [defendant] knowingly joined") (citation omitted); *Robinson*, 167 F.3d at 829 (to prove a conspiracy, government must establish agreement to work together toward common goal). But neither Mr. Bergrin's remarks during either of the phone conversations with Curry nor his conduct at the 17th Street meeting can give rise to a reasonable inference of an intent to work together to murder Mr. McCray. First, this is so because no evidence was elicited which in any way even suggests that Mr. Bergrin was to take any additional action in furtherance of any agreement. Indeed, Young testified that he took Mr. Bergrin's statements to mean that Young should kill Kemo, but never discussed his understanding with Mr. Bergrin. Tr. (2/5/13) at 2759. Indeed, there was absolutely no evidence that Mr. Bergrin was even aware that a murder was planned, let alone that he participated in it in any way. In that regard, it is extremely notable that there was not one shred of evidence that anyone ever informed Mr. Bergrin that the object of the conspiracy was accomplished, thus

undermining any notion that he had joined it. In sum, Mr. Bergrin's sparse comments prior to the formation of the conspiracy did not provide legally sufficient evidence of the intent to work together that is necessary to establish his membership in the conspiracy, beyond a reasonable doubt.

While the government presented no evidence of any action that Mr. Bergrin took after the 17th Street meeting with respect to the Kemo murder, in accordance with Federal Rule of Evidence 404(b), the jury was permitted to consider the testimony of Richard Pozo as to events in 2004, as well as of Oscar Cordova, Vicente Esteves, and Thomas Moran, as to events in 2008 in their deliberations on Count Twelve and Thirteen. But, as the Court instructed, that evidence could only be considered for the limited purpose of determining whether Mr. Bergrin acted with "the specific intent to tamper with or kill a Federal witness," as charged in Count Twelve. Tr. (3/14/13) at 8959-60. This evidence consisted primarily of Pozo's testimony that Mr. Bergrin said in 2004, "if you know where [the witness against Pozo] lives, we can take him out, and all this headache will go away." Tr. (2/6/13) at 3057. The jury was also permitted to consider, again for this limited purpose, evidence of the Esteves murder-for-hire plot, including, for example, the oft-emphasized recorded conversation between Oscar Cordova and Mr. Bergrin in which Mr. Bergrin said "No, we gotta make it look like a robbery. It cannot under any circumstances look like a hit." Tr. (2/20/13) at 5093-5096. That is, even assuming that the jury credited this evidence, as well as the testimony of Anthony Young, it could consider these subsequent statements in determining Mr. Bergrin's intent when he said, "if no Kemo, no case" and "if Kemo testify against Will, Will was never coming home … don't let ... Mr. Kemo testify against Will, and if he don't testify, he'll make sure he gets Will out of jail." But this evidence, however probative of Mr, Bergrin's intent in making the statement he did, cannot establish the agreement necessary to a conspiracy conviction; certainly, it does not bear upon the fact that the

agreement to prevent Mr. McCray from testifying by murdering him did not, by Young's own account, occur until *after* Mr. Bergrin left the purported meeting.[8]

In lieu of any evidence that Mr. Bergrin joined the conspiracy during its existence, or worked together with the alleged conspirators to kill Mr. McCray, the government instead seeks to pile "inference upon inference" in an effort to establish Mr. Bergrin's culpability. *See Coleman*, 811 F.2d at 808 (conspiracy, cannot be proven by piling inference upon inference). But many of these inferences are, as a matter of law, impermissible bases for establishing conspiracy liability. For example, as the Court instructed the jury, even if a reasonable juror could somehow infer that Mr. Bergrin knew the Curry organization planned to kill Mr. McCray, a defendant's knowledge of the conspiracy is not enough to infer that he has joined in it. Tr. (3/14/13) at 8872; *accord United States v. Provenzano*, 620 F.2d 985 (3d Cir. 1980) (evidence of defendant's participation in conspiracy must show "agreement, as opposed to mere knowledge thereof or approval"). Likewise, as the Court also instructed the jury, a defendant's presence at a scene of planned criminal activity is not sufficient to infer that he has joined in that conspiracy. Tr. (3/14/13) at 8872; *accord Tyson*, 653 F.3d at 210 (defendant's presence at scene "is simply

[8] If anything, the contrast between Pozo's testimony, on the one hand, and Young's, on the other, underscores the lack of evidence of a mutual understanding, of which Mr. Bergrin was a part, with regard to the Kemo murder. According to Pozo, Mr. Bergrin asked Pozo to provide information about the witness's location and stated "*we* can take him out," to make Pozo's "headache go away." But that account, which includes Mr. Bergrin's use of the first person plural ("we") and solicitation of information (the location of the witness) that would further the goal of a conspiracy can, unlike the version of events related by Young, arguably be read to establish that Mr. Bergrin was attempting to form, reach, or enter into an unlawful agreement, of which he knew the goal or objectives and which he was voluntarily joining with the intent to achieve that common goal or objective. Likewise, the statement "we gotta make it look like a robbery" similarly invokes the first person plural in an exchange with the purported Hitman in which, if Cordova's testimony is credited, Mr. Bergrin is discussing the most advantageous means of carrying out the objective of an unlawful agreement to kill the witnesses against Vicente Esteves. By contrast, according to Young, no such exchange of ideas ever took place between Mr. Bergrin and the Curry gang with respect to the Kemo murder. Mr. Bergrin never insinuated himself in any plan to kill McCray — indeed, the evidence is clear that no such plan yet existed. As it stood, when Mr. Bergrin left the meeting, no one had any mutual understanding that anyone was going to take any action to prevent McCray from testifying.

too slim a reed upon which to hang a criminal conspiracy conviction"); *United States v. Abdunafi*, 301 F. App'x 146, 148 (3d Cir. 2008) (presence of men in van with drug paraphernalia and alleged conspirator insufficient to prove a conspiracy); *United States v. Desimone*, 119 F.3d 217, 223 (2d Cir. 1997)*; see, e.g. Shull*, 349 F. App'x at 20 (defendant's riding in alleged co-conspirator's car, remaining in the vehicle after co-conspirator exited, and the presence of cocaine was not enough to demonstrate that defendant agreed to join a drug conspiracy); *United States v. Sanchez-Mata*, 925 F.2d 1166 (9th Cir. 1991) (holding there was insufficient evidence to prove a conspiracy where defendant was a passenger in alleged co-conspirator's car); *United States v. Tyler*, 758 F.2d 66, 69 (2d Cir. 1985) (evidence that defendant "helped a willing buyer locate a willing seller ... is insufficient to establish the existence of an agreement between the facilitator and the seller"). Nor is a defendant's association with the members of a conspiracy a basis from which a jury could permissibly infer that a defendant intentionally joined that conspiracy. *Cooper*, 567 F.2d at 255 ("One may not be convicted of conspiracy solely for keeping bad company."); *accord United States v. Pearce*, 912 F.2d 159, 162 (6th Cir. 1990) ("[M]ere association with conspirators is not enough to establish participation in a conspiracy.") (quoting *United States v. Stanley*, 765 F.2d 1224, 1243 (5th Cir. 1985)); *United States v. Cruz*, 265 F. App'x 481, 483 (9th Cir. 2008) (inferring that two drug dealers who lived together were involved in a conspiracy to distributed does not meet requisite burden of proof). Finally, as the Court instructed the jury, even evidence that Mr. Bergrin approved of what was happening or did not object to it is insufficient. Tr. (3/14/13) at 8872.

Thus, even accepting all of Young's testimony as true, Mr. Bergrin's (a) knowledge that William Baskerville's associates would likely agree to kill Kemo or had already planned to kill Kemo; (b) his presence at the "meeting" at Jamal Baskerville's house prior to the time that those individuals were forming such an agreement; and (c) even his being counsel for William Baskerville and other of Curry's drug associates, all fail to provide sufficient evidence from which any rational trier of fact would be permitted to conclude that Mr. Bergrin intentionally

joined in any conspiracy to murder Mr. McCray. Moreover, beyond these prohibited inferences, the government is left only with unreasonable ones from which to surmise that Mr. Bergrin had any involvement in the conspiracy. Thus, for example, on summation, the government posited that the evidence that Mr. Bergrin intentionally joined the conspiracy consisted of the following:

> But it was Paul Bergrin, Paul Bergrin's legal advice that wrote Kemo Deshawn McCray's death warrant. The legal analysis from a trusted advisor, from their lawyer, from their gang's house counsel, when Paul Bergrin said, if Kemo testifies against Will, Will was never coming home, when Paul Bergrin said, don't let Mr. Kemo testify against Will, when Paul Bergrin said, if he don't testify, he'll make sure he gets Will out of jail, what their counsel had told the gang was that the only way William Baskerville was ever going to come home was if Kemo Deshawn McCray didn't get on a witness stand. The only option that left the group with was to kill him, to get rid of him. The die was cast. It wasn't a matter of if Kemo Deshawn McCray was going to be killed after that meeting; it was just a matter of when, when they could locate him and when it would happen. The evidence shows that beyond a reasonable doubt that Paul Bergrin was a member of that conspiracy that led directly to Kemo Deshawn McCray's murder.

Tr. (3/13/13) at 8472. But not only are these claims directly contrary to the government's evidence in this case; they also belie common sense. For one thing, and contrary to the government's contention, there is no evidence that Mr. Bergrin performed any "legal analysis"; indeed, Mr. Baskerville's exposure was a matter that was disclosed by the Court at his bail hearing (at which point Baskerville learned he was facing life imprisonment), Tr. (3/13/13) at 8506, and was, in any event, well known to Young and his coconspirators, Tr. (2/1/13) at 2251, (2/12/13) at 2912-13; Tr. (3/13/13) at 8507 (explaining that Young knew one serves 85% of the time sentenced in federal prison, that Curry told Young Baskerville was facing life, and that Young knew federal charges carry more time). Moreover, even assuming that he said not to let Kemo testify, it would be unreasonable and even absurd to infer that Mr. Bergrin's remarks at the 17th Street meeting were intended as a "winning strategy" when the evidence demonstrates that Mr. Bergrin — and the others — were aware that there was independent evidence in the

form of audio and video recordings, and FBI surveillance, documenting the hand-to-hand sales that Baskerville made to Kemo. Tr. (2/1/13) at 2253 (testimony of Anthony Young that Mr. Bergrin told Curry gang at the meeting that the federal government had audio and video surveillance of Baskerville's drug sales). In light of such evidence, Mr. Bergrin's remarks cannot possibly support the government's conclusion that, in the absence of any discussion about killing Kemo, Mr. Bergrin was communicating that the "only option … was to kill him" or that "the die was cast," let alone that it is sufficient evidence to conclude that Mr. Bergrin joined in the agreement formed after his departure. *See Tyler*, 758 F.2d at 69 (evidence that defendant found a willing seller for a willing buyer is insufficient to establish an agreement on part of facilitator); *United States v. Reed*, 575 F.3d 900, 927 (9th Cir. 2009) ("one who has knowledge of a conspiracy but happens to act in a way which furthers some object or purpose of the conspiracy doesn't thereby become a conspirator"); *United States v. Lechuga*, 994 F.2d 346, 349 (7th Cir. 1993) (*en banc*) (provision of weapon itself to individual knowing he will use it to murder someone does not demonstrate an agreement or render the seller a conspirator). The same common sense leads inexorably to the conclusion that the by now infamous statement, "no Kemo, no case" was, at most, an opinion about the strength of Baskerville's federal drug case, but more likely an accurate historical statement reflecting the fact that Kemo's cooperation was the catalyst for the government's case against William Baskerville.

In sum, the government's case requires not only piling inference upon inference, but including, in the pile, inferences that are contrary both to the evidence presented and to common sense. If such evidence were sufficient, the stray remarks of any criminal defense attorney discussing the merits of a case would subject him to criminal exposure. But that, of course, is not and cannot be the law.

Mr. Bergrin acknowledges that he made a similar motion following the hung jury in the severed trial of Counts Twelve and Thirteen in 2011, which was denied. But in denying that motion, Judge Martini relied heavily on evidence that was not presented in this case.

Specifically, in support of his opinion denying Mr. Bergrin's Rule 29 application, Judge Martini cited the testimony of Ramon Jiminez that he overheard Mr. Bergrin discussing the Kemo murder plot with Hakeem Curry and heard Mr. Bergrin say "no Kemo, no case," and the testimony of Alberto Castro that Mr. Bergrin allegedly solicited him to murder McCray. Op. at 5-6. Moreover, that opinion, in large part, rested on the motive evidence, which was not introduced here, presented through the testimony of Jimenez and Yolanda Jauregui that Mr. Bergrin was directly involved in the Curry organization's illicit drug trafficking. Op. at 4, 6. None of that evidence was, however, presented here, leaving the evidence that was presented legally insufficient to prove that Mr. Bergrin was a member of a conspiracy to kill Mr. McCray. That is, even engaging in the extraordinary exercise of accepting, in full, the testimony of Anthony Young, a reasonable trier of fact simply could not, as a matter of law, on this record, infer that Mr. Bergrin intentionally joined or was a member of the conspiracy to murder Mr. McCray. Mr. Bergrin's motion for a judgment of acquittal on Count Twelve must be granted.

B. There Is Insufficient Evidence To Sustain A Conviction For Aiding And Abetting The Murder Of A Witness.

The Court should enter a judgment of acquittal on Count Thirteen, as well, because there is no evidence from which a jury could permissibly infer that Mr. Bergrin's acts did, in some way, aid, assist, facilitate, or encourage, Anthony Young to murder Mr. McCray. As this Court instructed the jury, to find Mr. Bergrin guilty as an aider and abettor of Mr. McCray's murder, the government must prove beyond a reasonable doubt the following four elements:

> First, that someone committed each of the elements of the murder offense …;
>
> Second, that Mr. Bergrin knew that someone was committing or was going to commit murder of Kemo McCray to prevent him from testifying at an official proceeding;
>
> Third, that Mr. Bergrin knowingly did some act for the purpose of aiding, assisting, soliciting, facilitating, or encouraging another in committing that murder and with the intent that the murder be carried out;

> And, fourth, that Mr. Bergrin's acts did, in some way, aid, assist, facilitate, encourage, someone in murdering Kemo McCray;

Tr. (3/14/13) at 8886-87; *accord* Third Circuit Model Criminal Jury Instruction 7.02 (citing *United States v. Nolan*, 718 F.2d 589, 592 (3d Cir. 1983) (listing four requisite elements to sustain aiding and abetting liability); *Mercado*, 610 F.3d at 846 ("One is guilty of aiding and abetting if the government proves [that] ... the one charged with aiding and abetting knew of the commission of the substantive offense and acted to facilitate it."); *United States v. Carbo*, 572 F.3d 112, 118 (3d Cir. 2009) ("to convict a defendant of aiding and abetting, the government must prove that 'the defendant charged with aiding and abetting that crime knew of the commission of the substantive offense and acted with the intent to facilitate it.'"(citing *United States v. Kemp*, 500 F.3d 257, 293 (3d Cir. 2007); quoting *United States v. Dixon*, 658 F.2d 181, 189 n.17 (3d Cir. 1981))).

As the Court instructed the jury, Tr. (3/14/13) at 8887, and as the Third Circuit has emphasized, "facilitation" for aiding and abetting purposes is "more than associat[ion] with individuals involved in the criminal venture.'" *United States v. Soto*, 539 F. 3d 191, 194 (3d Cir. 2008) (quoting *Dixon*, 658 F.2d at 189). Rather, the defendant must "participate in" the criminal enterprise. *Id.* Neither mere presence (even under "extremely suspicious circumstances") nor mere knowledge of the crime is sufficient to support a conviction for aiding and abetting. *Mercado*, 610 F.3d at 849 (quoting *Soto*, 539 F. 3d at 194); *United States v. Bey*, 736 F.2d 891, 895-96 (3d Cir. 1984); *accord United States v. Garcia*, 238 F. App'x 821, 824 (3d Cir. 2007) (quoting *United States v. Gordon*, 290 F.3d 539, 547 (3d Cir. 2002)); *Garth*, 188 F.3d at 113; *see, e.g., United States v. Jenkins*, 90 F.3d 814, 816, 821 (3d Cir. 1996) (defendant's presence at scene of crime, close proximity to drugs and firearms, and his acquaintance with principal offender insufficient to support finding of participation in drug distribution scheme). Thus, to convict for aiding and abetting, the government must prove that the defendant associated himself with the venture and sought by his actions to make it succeed, *United States v. Powell*, 113 F.3d 464, 467 (3d Cir. 1997). To meet this requirement, the government must show some affirmative

participation which, in some way contributes to the commission of the unlawful scheme. *United States v. Frorup*, 963 F.2d 41, 43 (3d Cir. 1992) (quoting *United States v. Raper*, 676 F.2d 841, 850 (D.C. Cir. 1982)). *See also United States v. Lester*, 363 F.2d 68, 73 (6th Cir. 1966) (only the person "who willfully *causes* the forbidden act to be done is guilty" pursuant to aiding and abetting liability) (emphasis added), *quoted in United States v. Am. Investors of Pittsburgh, Inc.*, 879 F.2d 1087, 1095 (3d Cir. 1989).

After the conclusion of the government's case, however, it is clear that the second and fourth elements of aiding and abetting were not, as a matter of law, satisfied because there was absolutely no evidence from which a reasonable juror could infer either that Mr. Bergrin knew that McCray would be murdered at the time Mr. Bergrin committed the acts alleged of him or — more significantly — that his acts actually did in some way aid, assist, facilitate, or even encourage Anthony Young to kill Mr. McCray. For example, as set forth above, the government did not present any evidence that proved or from which it even may be inferred that Mr. Bergrin ever knew that one of Curry's associates was going to murder Mr. McCray. Indeed, as discussed above, Young testified that he and the other participants in the scheme to murder Mr. McCray began discussing that scheme only *after* Mr. Bergrin left the meeting on 17th Street. Tr. (2/1/13) at 2254-55. Although Young testified as to what Mr. Bergrin told the individuals present at that meeting, there was no testimony that the group, in turn, provided any information about their scheme to Mr. Bergrin then or at any time thereafter. In fact, there was no evidence whatsoever that Mr. Bergrin ever learned of the Curry organization's plot to murder Mr. McCray until that tragic scheme was completed and Mr. McCray's death was publicized in the news media.

Nor did the government explain, in its summation or otherwise, how it believed it had satisfied the second element of aiding and abetting in the Kemo murder. In its rebuttal, the government implied that Mr. Bergrin contacted Curry to "pass on the name so Kemo could be killed." Tr. 3/14/13 at 8826. But even assuming that this was Mr. Bergrin's intent, there was absolutely no evidence from which a jury could infer that Mr. Bergrin knew or received any

information that would give rise to the knowledge that the Curry gang intended to kill the informant.[9] Moreover, that theory is contrary to the government's own theory of the case, which was that it was necessary for Mr. Bergrin to have a subsequent meeting with the members of the Curry gang to inform them "no Kemo, no case." Tr. (3/13/13) at 8507 (government argument, on summation, that "at that meeting, the impact of Paul Bergrin's words is what's critical"). Alternatively, the government suggested on summation that evidence of Mr. Bergrin's actions in the Pozo and Esteves cases might demonstrate that Mr. Bergrin had the requisite knowledge to satisfy aider and abettor liability. As the government argued to the jury with respect to evidence that Mr. Bergrin's passed along Kemo's name to Curry and said "no Kemo, no case":

> Rely on his statements Paul Bergrin made to Mr. Pozo, on his statements that he told Vinny Esteves, if there is no witnesses, there is no case. Does that sound familiar? In deciding whether or not he had the intent to kill Kemo Deshawn McCray when he relayed the name Kemo to … Hakeem Curry on November 25th, and when he said those words, No Kemo, no case a week or so later, I submit to you that when … Mr. Bergrin urged Mr. Pozo to get to, to take out Pedro Ramos, when he told Vinny Esteves he needed to kill Junior the Panamanian, when he told Oscar Cordova that they had to make it look like a home invasion robbery, not a hit, that that is something in accordance with the Judge's instructions you can use when trying to determine what was in Mr. Bergrin's head, not just the evidence of the William Baskerville case.

Tr. (3/13/13) at 8523-24.

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[9] Were this kind of suspicion sufficient to support a finding of the requisite knowledge to justify liability for aiding and abetting, then the government's own actions might, disturbingly, suffice. Thus, for example, although Mr. Bergrin does not contend that the government is culpable as a result, as the evidence at trial demonstrated, in devising the complaint against William Baskerville, the government referenced a distinctive pattern of sales that Baskerville had made only to Mr. McCray, which enabled — or at least "assisted" — William Baskerville to immediately identify Kemo and pass that identity on to his brother independent of Mr. Bergrin. *See* Tr. (2/1/13) at 2058, 2060 (testimony of Eric Dock that William Baskerville figured out the identity of the informant in his case based on reading the Criminal Complaint, and shared that information with Rakim Baskerville over the phone in connection with the plan to kill Mr. McCray).

In fact, however, the government's argument points up the contrast between the cases. Unlike the situation with regard to the Kemo murder case, the government expressly delineated how it believed the second prong was met in the Esteves case. Tr. (3/13/13) at 8570 ("Let's skip to Paul Bergrin knowing about the conspiracy when he joined, what the purpose of the conspiracy was ... Paul Bergrin knew the purpose of the conspiracy when he joined it and assisted in the furthering of it. Vinny Esteves made that clear to Paul Bergrin that he wanted Junior killed and the truck driver killed. Paul Bergrin made the same thing clear to Vinny Esteves. Oscar Cordova made it clear and you heard it in the recordings to Mr. Bergrin that he was going to kill them. Paul Bergrin made it clear to Oscar that he knew Oscar was going to kill them. Recording after recording after recording."). No such delineation was attempted with regard to the Kemo murder case, because, of course, the evidence would not support it. That is, again, the presentation of evidence in the Esteves case highlights the government's inability to meet its burden on the Kemo murder. Thus, unlike in the Esteves case, there was no evidence that Mr. Bergrin's client, William Baskerville, communicated to Mr. Bergrin that he wanted Mr. McCray killed. Rather, if anything, the evidence shows that Baskerville called his brother to communicate this message. Tr. (2/1/13) at 2060. Nor is there any evidence that Young, the shooter, or any member of the Curry organization, ever told Mr. Bergrin that they were going to act on the information that Baskerville was facing life by killing the witness. Nor, in this regard, is the evidence relating to the actions of others in subsequent witness tampering plots helpful, let alone dispositive, in establishing that Mr. Bergrin knew how Curry and his associates would respond to his remarks. Indeed, although the government argues that it is powerful 404(b) evidence, Richard Pozo (like Curry, a major drug trafficker, and according to the government, a criminal associate of Mr. Bergrin, Tr. (2/6/13) at 3041), testified that he *rejected* Mr. Bergrin's suggestion to "take out" the witness in his case. Tr. (2/6/13) at 3057. It follows, at least from this evidence adduced by the government, that Mr. Bergrin could not have known what Curry's associates would do, and, of course, their silence in the face of his statement that McCray should not testify fails to convey any indication. And, while the government offered evidence that Mr.

Bergrin represented Curry and other members of his organization in criminal cases and that he was involved in drug activity with Curry, Tr. (3/13/13) at 8536-39, the mental leap required to conclude that Mr. Bergrin's legal representation of these drug dealers, or even his provision of a "connect" to Curry, demonstrated knowledge that these individuals would, as a result of his action, determine to kill the informant, and then actually do so, is far too tendentious to establish a "logical and convincing connection between the facts established and the conclusion inferred," as is necessary to establish aider and abettor liability, *Mercado*, 610 F.3d at 849 (quoting *Soto*, 539 F.3d at 194); indeed, it is more akin to a guess than to a permissible inference. *See United States v. Wiley*, 846 F.2d 150, 154 (2d Cir. 1988) (general suspicion that an unlawful act may occur is not enough to establish aider/abettor liability) (quoting *United States v. Zambrano*, 776 F.2d 1091, 1097 (2d Cir. 1985)). *See generally Cartwright* 359 F.3d at 291 ("Our case law 'forbids the upholding of a conviction on the basis of ... speculation'" in aider/abettor and conspiracy contexts) (quoting *Thomas*, 114 F.3d at 406). Nor, as in the conspiracy context, is it permissible to infer aiding and abetting liability based on Mr. Bergrin's association with the members of the Curry gang, as the government argued to the jury. *Mercado*, 610 F.3d at 846 ("We have emphasized that 'facilitation' for aiding and abetting purposes is 'more than associat[ion] with individuals involved in the criminal venture.'" (quoting *Soto*, 539 F.3d at 194 (quotation omitted)); *United States v. Medina-Roman*, 376 F.3d 1, 4 (1st Cir. 2004) ("[M]ere association with the principal, or mere presence at the scene of a crime, even when combined with knowledge that a crime will be committed, is not sufficient to establish aiding and abetting liability.") (quotation omitted).

But even if one were to deduce from Young's account of the meeting on 17th Street that Mr. Bergrin had knowledge of the Curry organization's unlawful scheme — which the Third Circuit has emphasized is insufficient to sustain an aiding and abetting conviction, *Mercado*, 610 F.3d at 849 (quoting *Soto*, 539 F. 3d at 194) — the fourth element of aiding and abetting liability cannot be met because there was absolutely no evidence at trial that Mr. Bergrin's acts did, in

fact aid or assist someone to murder Mr. McCray. *See Nolan*, 718 F.2d at 592 ("the aider must in fact render aid or assistance"). To the contrary, it was tragically clear from the evidence at trial that the murder of Kemo as revenge for betraying Baskerville was an absolute inevitability, with or without the actions of Paul Bergrin, assuming (as the Court must for purposes of this motion) that he in fact took these actions. As Young testified in this case in 2011 and 2013, as well as in the trial against William Baskerville, it was the thought of the Curry organization that, "As … soon as the name is passed along, from whoever Paul got the name from, which would be Will Baskerville, that mean if you cross the Baskervilles and somebody give you the name who did it, get rid of 'em." Tr. (2/4/13) at 2552. Indeed, the "Curry clique" was willing, according to Young, to kill for much less. As Young testified at trial, Jamal Baskerville and Jamal McNeil were going to kill Young for mentioning to his girlfriend that those men were involved in a shooting in Nutley. Tr. (2/4/13) at 2397. Thus, members of the Curry organization resolved to kill their own associates, for any leak about their illegal activities — even when that leak was by Young, who was "as close as a brother" with the Baskerville family, Tr. (2/4/13) at 2509 — and would, the record shows, have killed the cooperating informant McCray, with or without Paul Bergrin.[10]

Moreover, the determination to kill Mr. McCray also did not depend upon Mr. Bergrin's assessment of the potential significance of McCray's testimony in a trial against Baskerville, as the government argued. First, of course, as became clear at trial, that evidence was not, in fact, critical, given the existence of tape recordings, videotapes and surveillance — all placed in evidence during the government's case, Tr. (1/30/13) at 1526 — that readily established Baskerville's guilt. But, in any event, the evidence also established that the members of the

[10] The government's evidence at trial further showed that for the members of the Curry organization, shootings on the street were customary. Young had been involved in multiple shootings prior to McCray's murder Tr. (2/1/13) at 2204-09, because, as he testified, "Ain't no honor in the drug game when people want to kill you." Tr. (2/4/13) at 2536. Likewise, Abdul Williams, a longtime friend and drug associate of Hakeem Curry, testified that he was involved in several shooting incidents on the streets, Tr. (2/14/13) at 3505-3510.

Curry organization were inclined to (and, it is reasonably inferred, did) pursue such a course of action simply because as Young explained, "when somebody cross us, our first thing in our mind, we gonna — we gonna get rid of them." Tr. (2/4/13) at 2552. As government witness Eric Dock further explained, William Baskerville was prepared to carry out such a hit whenever he determined it was called for in his drug business:

> he said that they have a few cars, these cars have what you call like secret compartments, stash box, where you can transport guns, drugs, and if you need to do a hit, you could ride up to a person in broad daylight and just shoot him, flee the scene, leave the gun in the stash box and just go to the next car.

Tr. (2/1/13) at 2073. Indeed, the evidence presented at trial was consistent with just such a chilling scenario — a scenario which in no way implicates the advice, statements, or actions of Mr. Bergrin.

It is furthermore clear that Mr. Bergrin did not even assist the members of the Curry organization in their murder plot. The evidence adduced at trial indicated that Mr. Bergrin did two things which, in the government's view, facilitated the murder: first, he identified the informant to be Kemo, and second, he told the individuals at the 17th Street meeting that William Baskerville was facing life for the four hand-to-hand sales. Tr. (3/13/13) at 8472-73, 8478. When viewed in light of the evidence adduced throughout the government's case, however, it is patently obvious that neither action provided any aid or assistance whatsoever to the members of the Curry organization.

In fact, as Eric Dock and Richard Hosten both testified in the government's case, William Baskerville knew the identity of the informant when he received the criminal complaint against him and conferred with Richard Hosten in a holding cell at the Hudson County Jail when he was first arrested; he thereafter passed that information to his brother Rakim. Tr. at (2/1/13) at 2145 (testimony of Richard Hosten that William Baskerville told him on the day of his arrest that "Kemo's the reason why we in here"); Tr. (2/1/13) at 2060-61 (testimony of Eric Dock that

Baskerville "said after he talked to Rick, he said he called his brother, he told him who the informant was…. He said he called his brother and told his brother who the informant was, and he said they was out there trying to put a hole in his melon."). Thus, whether or not Mr. Bergrin ever stated that the informant was "Kamo," the members of the organization knew or soon would inevitably have known his identity. And, as Young testified, the order or demand to kill Kemo came from William Baskerville, not Mr. Bergrin. Tr. (2/5/13) at 2735 ("He kept asking us could we hurry up and make that happen.").

The members of the Curry organization also knew, without any assistance from Mr. Bergrin, the amount of time that William Baskerville was facing in his federal drug case. As of November 25, 2003, William Baskerville knew, based on the government's argument at the initial hearing, that he was facing forty years. Tr. (1/30/13) at 1573. At the subsequent detention hearing on December 4, 2003 (which may or may not have been before the 17th Street meeting, a matter that was unclear from Young's testimony), William Baskerville was told that he was facing life in prison. Tr. (1/30/13) at 1577. Moreover, as Young testified, Baskerville passed messages directly to members of his organization from prison. Tr. (2/5/13) at 2734. Young further testified that, notwithstanding his greater familiarity with state penalties, from the moment that the members of the Curry organization knew that it was "the feds" who arrested Baskerville, they knew he was facing significant time because, in contrast with their experiences with state sentencing procedures, "it's hard to get a bail, and you do 85 percent of your time." Tr. (2/1/13) at 2250.

In sum, as a matter of law, fact and plain common sense, it is simply not the case that Mr. Bergrin, by telling Hakeem Curry that William Baskerville had identified the informant as "Kamo," or by telling the individuals at the 17th Street meeting that William Baskerville was facing life in prison, by stating "no Kemo, no case," or even by stating that they "if Kemo testify against Will, Will was never coming home," in any way assisted Baskerville, Curry, Young or any of the other alleged coconspirators, with regard to the murder of Mr. McCray because, in

short, that murder would have occurred whether or not Mr. Bergrin had ever taken those actions. Rather, it is absolutely clear and indisputable from the troubling evidence adduced at this trial that, even if Mr. Bergrin had never spoken with Curry on the phone or visited 17th Street following Baskerville's arrest, that — just as William Baskerville (not Paul Bergrin) ordered[11] — his family or "his people," Tr. (2/26/13) at 6363 (testimony of Thomas Moran that "his people" meant William Baskerville's drug associates), the members of the Curry organization, would still have searched for and ultimately found Mr. McCray "to put a hole in his melon" Tr. (2/1/13) at 2061. Thus, Mr. Bergrin's two telephone conversations and his remarks to the effect of "no Kemo, no case" at the meeting on 17th Street, as alleged by Young, simply fail to meet the requirements for the fourth element of aider and abettor liability. Accordingly, a judgment of acquittal is warranted on Count Thirteen as well. *E.g.*, *United States v. Cuevas-Reyes*, 572 F.3d 119, 122-23 (3d Cir. 2009) (reversing denial of Rule 29 motion and entering judgment of acquittal as to aiding and abetting in the shielding of aliens because evidence did not support that defendant helped aliens remain in United States); *United States v. Labat*, 905 F.2d 18, 23 (2d Cir. 1990) (reversing conviction because of insufficient evidence of aiding and abetting liability in part because there was no evidence that defendant's efforts "made any contribution whatever" to success of specific venture); *United States v. Crews*, No. CR587-7, 1988 U.S. Dist. LEXIS 860, at *6-7 (S.D. Ga. Jan. 11, 1988) (noting question of whether a defendant can aid or abet a criminal venture that was a "fait accompli" should be addressed to a motion for acquittal). *Cf. Nolan*, 718 F.2d at 591, 593 (upholding aiding and abetting conviction, as to fourth element, because defendant's "detailed instructions" enabled principal offender to carry out the crime).

[11] Of course it is highly significant that there is no evidence that Baskerville's order was in any way predicated on Mr. Bergrin's advice or assistance. In fact, the questions that Baskerville asked Eric Dock in prison give rise to an inference that Baskerville was not consulting with Mr. Bergrin with respect to the importance of the witness in his case. Tr. (2/1/13) at 2058 ("Baskerville asked us ... could he be indicted in a conspiracy by himself").

C. There is Insufficient Evidence to Sustain a Conviction for Violent Crimes in Aid of Racketeering and Racketeering Act Four.

It is, thus, clear that there is insufficient evidence to sustain a conviction on Charges Twelve and Thirteen. The same analysis applies to Count One (Racketeering Act Four) and Count Three as well. As the Court charged the jury, Racketeering Act 4(a) requires that, as with Count Twelve, the government must prove that Mr. Bergrin "knowingly and intentionally conspired with others to murder" Mr. McCray, Tr. (3/14/13) at 8882, and that "at some time during the existence or life of that unlawful agreement, Defendant Bergrin knew the purpose of that agreement and intentionally joined in it," *id.* at 8883. Similarly, Racketeering Act 4(c) required the jury to find beyond a reasonable doubt that Mr. Bergrin "did knowingly and intentionally conspire and agree with others to cause the death and serious bodily injury resulting in death of another person, namely Kemo McCray," *id.* at 8889. Therefore, if the Court enters a judgment of acquittal as to Count Twelve, the jury's verdicts as to Racketeering Act 4(a) and 4(c) cannot stand.

Likewise, Racketeering Act 4(b) requires a finding that "Mr. Bergrin knew that someone was committing or was going to commit murder of Kemo McCray to prevent him from testifying at an official proceeding," *id.* at 8886, and that Mr. Bergrin's acts "did, in some way, aid, assist, facilitate, encourage, someone in murdering Kemo McCray," *id.* at 8887. Similarly, Racketeering Act 4(d) requires a finding that Mr. Bergrin is accountable for the acts of the shooter "if, with the purpose of promoting or facilitating the commission of the offense, he solicits such other person to commit it and/or aids or agrees or attempts to aid such other person in planning or committing it," *id.* at 8894. This requires finding beyond a reasonable doubt, among other elements, both that "Mr. Bergrin solicited [Anthony Young] to commit [the crime of murder] and did aid or agree or attempt to aid him in planning or committing it," *id.* at 8895. Accordingly, since Racketeering Acts 4(b) and (d) require that Mr. Bergrin knew that Mr. McCray would be murdered and/or that his acts did, in some way, aid, assist, facilitate, encourage someone in murdering Mr. McCray, the jury's verdicts as to these acts also must be

vacated if, as set forth above, the Court enters a judgment of acquittal on Count Thirteen. Finally, since Count Three requires a finding that Mr. Bergrin "conspired to murder, or aided and abetted in the murder, of Kemo McCray," *id.* at 8939, a judgment of acquittal must be entered with regard to this Count, for the reasons discussed above in Sections II.A and II.B.

III. THE COURT SHOULD ENTER A JUDGMENT OF ACQUITTAL ON COUNT TWENTY-SIX PURSUANT TO RULE 29.

The Court should also set aside the verdicts as to Count Twenty-Six and Racketeering Act Eight, and enter a judgment of acquittal on those charges. It is clear, after the completion of the government's case, that the record contains absolutely no evidence from which the jury could find beyond a reasonable doubt that Mr. Bergrin failed to file an IRS Form 8300 "for the purpose of evading the report requirements of section 5331 or any regulation prescribed under such section." Tr. (3/14/13) at 8928. *See Mussare*, 405 F.3d at 166. As the Court correctly instructed the jury, to find Mr. Bergrin guilty of failing to file an IRS Form 8300 in violation of 31 U.S.C. § 5324(b), the government was required to prove, beyond a reasonable doubt,

> One, that on or about September 4, 2008, in the County of Essex, in the District of New Jersey and elsewhere, Defendant Paul Bergrin was engaged in a trade or business, that is, the Law Office of Paul Bergrin.
>
> Two, that Defendant Bergrin had knowledge of the currency transaction reporting requirements.
>
> Three, that in the course of that trade or business, and with such knowledge, Defendant Bergrin knowingly caused or attempted to cause the trade or business to fail to file a Form 8300 with the Government within 15 days of a currency transaction wherein he received more than $10,000 in cash; and
>
> Four, that the purpose of the transaction was to evade the transaction reporting requirements in section 5331 of Title 31.

Tr. (3/14/13) at 8928-8929. Section 5331 expressly governs only cash transactions. *See* 31 U.S.C. § 5331 ("Reports relating to coins and currency received in nonfinancial trade or

business"). The language of Count One (Racketeering Act Eight) tracks the language of Count Twenty-Six and requires the same elements to be proved beyond a reasonable doubt.

In light of that fourth element, simply knowing that one is obligated to file a Form 8300 and not doing so is insufficient. One must deal in cash with the purpose of evading the reporting requirement. As the legislative history makes clear, Congress intended that mere inadvertent failure to file a Form 8300 cannot suffice to show that the transaction was designed to avoid the reporting requirements. When Congress amended the statute in the wake of the United States Supreme Court's decision in *United States v. Ratzlaf*, 510 U.S. 135 (1994),[12] it lessened the *mens rea* necessary for a conviction, but reaffirmed that:

> The prosecution would need to prove that there was an intent to evade the reporting requirement ... a person who innocently or inadvertently structures or otherwise violates section 5324 would not be criminally liable.

See House Conf. Rep. No. 103-652, 103d Cong. 2d Sess., *reprinted* in 1994 U.S. Code Cong. & Admin. News 1977, 2024. *Accord* Modern Federal Jury Instructions — Criminal § 50B -19 (2012) (describing the *mens rea* requirement for a § 5324 conviction: "The defendant's acts must have been the product of defendant's conscious objective rather than the product of a mistake or accident."); *cf. United States v. MacPherson*, 424 F.3d 183, 188-9 (2d Cir. 2005) (explaining that the "net result" of Congressional amendment of § 5324 is that the *mens rea* required for a structuring conviction is proof that the defendants "intend[ed] to deprive the government of information to which it is entitled"). In this case, however, the government did not offer *any* evidence, let alone sufficient evidence, from which a reasonable juror could infer that Mr. Bergrin had the intent required by the fourth element of the offense or that there was anything

[12] In *Ratzlaf*, the Supreme Court held, in the structuring context, that the language of the statute in effect at the time, which prohibited "willfully violating" § 5324, required "proof that the defendant knew not only of the bank's duty to report cash transactions in excess of $10,000, but also of his duty not to avoid triggering such a report. *Id.* at 146-47.

more than an inadvertent or careless failure to file the appropriate form in accordance with the statute. *See* Tr. (3/14/13) at 8929 ("The term 'purpose' is the same as 'intent.'").

Certainly, as is the case in the conspiracy context, discussed above, "in most tax evasion cases," which are analogous here, "much of the Government's evidence is circumstantial," and evidence of intent, as a matter within the mind of the defendant, "necessarily must be circumstantial." *Elwert v. United States*, 231 F.2d 928, 933, 935 (9th Cir. 1956). Yet, the difficulties inherent in proving state of mind do not relieve the government of its obligation to adduce some fact from which intent may be inferred. *See, e.g.*, *United States v. $500,000 in U.S. Currency*, 62 F.3d 59, 63 (2d Cir. 1995) (reversing forfeiture judgment predicated on attempted failure to file CMIR in violation of 31 U.S.C. § 5324(b) where government failed to prove "purpose of evading the reporting requirements"); *Schoenhut*, 576 F.2d at 1024 (affirming judgment of acquittal on the willful misapplication of bank funds count based on government's failure to prove intent); *see generally Casper*, 956 F.2d at 422 ("While drawing inferences from established facts is an acceptable method of proof when direct evidence is not available, the inferences drawn must have a logical and convincing connection to the facts established"); *United States v. Iafelice*, 978 F.2d 92, 98 (3d Cir. 1992) (government may circumstantially establish the element of knowledge "grain-by-grain until the scale finally tips"). But the record here contains *no* evidence to demonstrate that the purpose of the transaction in which Cordova gave Mr. Bergrin $20,000 in cash was to evade the applicable cash transaction reporting requirements.

Specifically, at trial, the government presented evidence that by 2008, Mr. Bergrin had established the Law Office of Paul Bergrin. Tr. (3/4/13) at 7492-93. It further presented evidence that on September 4, 2008, Mr. Bergrin received $20,000 in cash from Oscar Cordova. Tr. (2/19/13) at 4899-4900 (testimony of Cordova that Mr. Bergrin asked him about bringing money because he was supposed to be "financing some of the legal fees" for Esteves's case); Tr. (2/20/13) at 5024 (testimony of Cordova that, as reflected on the recording labeled Exhibit 4123,

he provided Mr. Bergrin with $20,000 of the promised funds, apologizing that it "took so long"); Tr. (2/28/13) at 6832-33 (testimony of DEA Special Agent Robert Afanasewicz that, in response to pressure from Mr. Bergrin for money, the DEA provided Cordova with funds to "keep Cordova's cover"). There is really no dispute, however, that this money was provided as payment for legal fees in connection with Mr. Bergrin's representation of Vicente Esteves.[13] *See* Tr. (2/19/13) at 4857; (2/21/13) at 5296, 5330, 5347 (testimony of Cordova that he promised to finance Esteves's case, and that the only money he did, in fact, provide for that purpose was the $20,000) ("I handed you $20,000 cash shrink-wrapped. That was towards the case ... I'm going to repeat again, sir, I handed you $20,000 that was shrink-wrapped towards the case of Vicente Esteves sir. Yes, I did."). Finally, the government presented evidence that Mr. Bergrin did not file a Form 8300 with the Government after receiving that money. Tr. (2/27/13) at 6738 (testimony of Special Agent Bryant Movarek that a search of a government database yielded no results regarding a Form 8300 for this transaction).

In the absence of any evidence that Mr. Bergrin conducted this transaction with the intent to evade the reporting requirements applicable to the Law Office of Paul Bergrin, the government argued on summation that Mr. Bergrin failed to file the Form 8300 after he received the payment because he did not want to call attention to his connection to Cordova:

> Remember that Form 8300? All right? Now, that wasn't the most, say, significant charge in the case, but remember what that document had on it, the type of information it had on it. It had the name of the guy who gave the money, the name of the guy who received the money, the date he received the money, the amount he received the money, and the reason why. And that record is kept in the Federal Government for all. Why do you think Mr. Bergrin when he received $20,000 in cash from Oscar Cordova in that heat-sealed drug-dealer sort of wrapping did not report that money

[13] Even if the evidence were not as clear as it is on this point, this is the only rational inference that one could draw to explain the unusual fact that, according to the government's theory of the case, the purported hitman paid the person who solicited him to commit murder, in an apparent reversal of roles. *See* Tr. (3/13/13) at 8561 (government summation arguing that Mr. Bergrin formed a plan and enlisted Oscar Cordova to kill the witnesses against Esteves).

> to the Government? It's the exact same reason why he did not want Oscar Cordova to go to the Monmouth County Prosecutor's Office to create a link, a sign-in sheet where he would have said, Oscar Cordova on this day met with Vinny Esteves. There would be no record of it. Do you think Mr. Bergrin wanted a record in the Federal database that's going to show Oscar Cordova paid Paul Bergrin $20,000 towards Vinny Esteves's defense fund that will be searchable by all law enforcement? ... This was a decision he made to avoid links, to avoid detection to Oscar Cordova, plain and simple.

Tr. (3/13/13) at 8569-8570. Thus, instead of arguing that Mr. Bergrin received cash from Cordova to avoid reporting the transaction, the government suggested that Mr. Bergrin received money towards Esteves's case from Cordova and subsequently did not report it, speculating that, otherwise, Mr. Bergrin risked being associated with Cordova. But that theory is not, as a matter of law, sufficient to establish the *mens rea* required for liability under the statute. In fact, Section 5324 requires the purpose of the transaction to be evasion of the obligation to report cash transactions. By way of illustration, in *United States v. Seher*, 562 F.3d 1344, 1364 (11th Cir. 2009), the Court of Appeals determined that the record was "replete with proof" that the defendant had the requisite intent to avoid the transaction reporting requirement in violation of § 5324(b)(1). In that case, the defendant, a jeweler who sold his wares to drug dealers to help launder their illegal proceeds, had, for example, suggested that his customer (an undercover IRS Agent) pay for a ring in installments split between three parties, and repeatedly reassured him that there would be no paperwork for a $19,000 transaction. *Id.* at 1353-54. On multiple occasions, Seher had removed a "0" from the price when recording sale amounts over $10,000, agreeing that "the magic thing is to keep" written figures "under ten," despite the true purchase price. *Id.* Clearly, in *Seher*, there was ample evidence from which one could infer that the transaction occurred for the purpose of avoiding the reporting requirements. *See also United States v. Loe*, 262 F.3d 427, 436 (5th Cir. 2001) (reasoning that the evidence suggested the jury could reasonably infer defendant had intent to commit crime of failing to file Form 8300 in violation of 26 U.S.C. § 7203 where he attempted to divert funds from prior sales exceeding

$10,000 cash to escape the reporting requirement, lied to the IRS about making such sales, and refused to turn over records to the IRS). Nothing remotely similar was offered as evidence here.

Moreover, even if the government's theory satisfied the Section 5324 intent requirement, its argument relies on inferences that bear no "logical and convincing connection to the facts established," *Casper*, 956 F.2d at 422. First, the fact that the money was shrink-wrapped is irrelevant to Mr. Bergrin's intent with respect to the reporting requirement; that it was shrink wrapped does not give rise to any inference of an intent to conceal its origin. Nor does Section 5331 require the filer to list how the money was packaged. *See* 31 U.S.C. § 5331. And, while Thomas Moran testified that Mr. Bergrin did not want Cordova to visit Mr. Esteves in prison because it risked connecting Cordova's drug activity to Esteves and vice versa, Tr. (2/26/13) at 6399, the evidence also demonstrated that Mr. Bergrin had no qualms bringing Cordova to visit a different drug dealing client in jail. *See* Tr. (2/21/13) at 5162 (testimony of Cordova that Mr. Bergrin brought him to visit a drug dealing client at Ocean County Jail). Indeed, the record shows that Mr. Bergrin took no steps to hide his relationship with Cordova while he was working on Esteves's case. He openly associated with Cordova, bringing him wherever he went, *see id.*, introducing him to friends, *see* Tr. (2/19/13) at 4902 (testimony of Cordova that Mr. Bergrin brought him to meet his friend Vito Rappa at Rappa's restaurant), visiting Cordova in Chicago, Tr. (2/20/13) at 4979, and celebrating his birthday with Cordova in a public restaurant with other people associated with the Esteves case, *id.* at 5104. Accordingly, there is no evidence that Mr. Bergrin sought to hide his association with Cordova, and therefore, no basis from which the jury could infer that Mr. Bergrin intentionally transacted this payment in cash to avoid reporting it.

Likewise, the fact that Mr. Bergrin received cash, as opposed to a check, cannot give rise to an inference that he intended to evade the reporting requirements. For one thing, such a theory would serve as proof in every section 5324 case, thereby eviscerating the *mens rea* requirement, because the statute exclusively governs cash transactions. Additionally, evidence throughout this case showed that Mr. Bergrin regularly received cash payments from clients in

amounts exceeding $10,000 for his legal services. *See, e.g.*, Tr. (2/1/13) at 2258-59 (testimony of Anthony Young that Mr. Bergrin was paid $10,000 in cash for representing William Baskerville); (2/6/13) at 3034, 3049 (testimony of Richard Pozo that he paid Mr. Bergrin tens of thousands of dollars in cash for legal representation); (2/7/13) at 3295 (testimony of Natalie McClennan that Jason Itzler paid Mr. Bergrin's retainer in cash in an envelope); (2/15/13) at 3809-10 (testimony of Abdul Williams that his family members brought Mr. Bergrin cash wrapped in rubber bands to pay the investigator as part of Mr. Bergrin's legal representation); (3/1/13) at 7043 (testimony of Eugene Braswell that a client's friend paid Mr. Bergrin $50,000 in cash to represent him on an appeal). As Special Agent Bryant Movarek testified, Mr. Bergrin also neglected to file a Form 8300 for these transactions. In fact, Agent Movarek testified that in the last eleven years, Mr. Bergrin had only filed one Form 8300, regarding $20,000 received as legal fees from Carmen Dente on January 9, 2007.[14] Tr. (2/27/13) at 6736, 6738. This is significant given that Special Agent Cline testified that the Law Office of Paul Bergrin received $1.126 million in 2007 alone — and the government does not contest that portions of this revenue were legitimate legal fees, Tr. (3/4/13) at 3505 ("Even from the beginning, in the opening statement, we conceded that this business did legitimate work."). Tr. (3/5/13) at 7628. There is therefore no reason to believe that Mr. Bergrin intentionally tried to avoid the reporting

[14] The fact that Mr. Bergrin did file a Form 8300 on one occasion arguably demonstrates that he had knowledge of the currency transaction reporting requirements, but is simply too thin a reed to support a finding that every other such transaction had as its purpose the desire to evade the reporting requirements. *See, e.g.*, *United States v. Mulheren*, 938 F.2d 364, 372 (2d Cir. 1991) (reversing conviction for conspiracy to commit securities and mail fraud where conviction was based on evidence "at least as consistent with innocence as with guilt" because the government failed to prove defendant purchased shares of company common stock with the intent to raise its price) (quotation omitted). *See also In re Regions Morgan Keegan Secs.*, 743 F. Supp. 2d 744, 758 (W.D. Tenn. 2010) ("A court cannot infer fraudulent intent from the mere fact that a particular defendant had access to information."); *United States v. D'Amato*, 39 F.3d 1249, 1256 (2d Cir. 1994) ("a conviction based on speculation and surmise alone cannot stand ... the government must introduce sufficient evidence to allow the jury to reasonably infer that each essential element of the crime charged has been proven beyond a reasonable doubt").

requirements on this one occasion with Cordova, as opposed to routinely neglecting to file such reports.

Finally, notwithstanding its speculation that filing a Form 8300 would alert law enforcement to Cordova's involvement in the Esteves case, the government did not introduce any evidence suggesting that officers ever check such data in the course of investigating witness tampering cases. For example, Special Agent Brokos made no mention of performing such a search to help identify the shooter in her investigation of the Kemo murder case. It would be, therefore, irrational to infer that local Monmouth County police officers would have undertaken such a search of the records of Mr. Bergrin's law practice in investigating a plot against the life of Junior the Panamanian. Accordingly, the idea that Mr. Bergrin failed to file the report to hide the fact that Cordova paid him lacks any real support from the evidence.

In sum, even if one accepts the government's evidence as to the $20,000 Cordova provided to Mr. Bergrin as true, there is not one fact in the record to support a reasonable inference that the purpose of this transaction was to evade the currency reporting requirements. Accordingly, Mr. Bergrin's motion for a judgment of acquittal on Counts Twenty-Six and One (Racketeering Act Eight) should be granted.

IV. DEFENDANT PAUL BERGRIN IS ENTITLED TO A NEW TRIAL PURSUANT TO FEDERAL RULE OF CRIMINAL PROCEDURE 33.

Federal Rule of Criminal Procedure 33 provides, in pertinent part, that the Court "may vacate any judgment and grant a new trial if the interest of justice so requires," including when an error committed by the Court or the prosecution prejudiced the defendant. *See United States v. Villard*, 700 F. Supp. 803, 815-16 (D.N.J. 1988). "[T]he interests of justice" require a new trial when, for example, the defendant was deprived of his constitutional rights, including the right to fair trial. *See United States v. Arango*, 670 F. Supp. 1558, 1566 (S.D. Fla. 1987) (stating that a motion for a new trial pursuant to Rule 33 may be brought in the interests of justice where there has been a deprivation of a constitutionally guaranteed trial right). *See also United States*

v. Smith, 179 F. Supp. 684, 686-87 (D.D.C. 1959) (stating that a new trial should be granted if there is a reasonable probability that a miscarriage of justice has occurred); *United States v. Parelius*, 83 F. Supp. 617, 618 (D. Haw. 1949) (stating that a new trial should be granted if the court concludes that a miscarriage of justice has occurred). If the motion is based on errors which may have been committed during the course of trial, the defendant has the burden of showing that an error was committed, and that such an error was prejudicial. *United States v. D'Amario*, No. 06-112, 2007 U.S. Dist. LEXIS 21638, at *34 (D.N.J. March 26, 2007). A new trial is necessary when the errors "so infected the jury's deliberation that they had a substantial influence on the outcome of the trial." *United States v. Thornton*, 1 F.3d 149, 156 (3d Cir. 1993). *See also United States v. Stewart*, 325 F. Supp. 2d 474, 485 (D. Del. 2004); *see also Gov't of the V.I. v. Commissiong*, 706 F. Supp. 1172, 1184 (D.V.I. 1989) (the court "must grant a new trial if trial error had a substantial influence on the verdict"); *Gov't of the V.I. v. Bedford*, 671 F.2d 758, 762 (3d Cir. 1982) ("The reviewing court must decide whether the error itself had substantial influence on the minds of the jury") (brackets and quotation omitted); *United States v. Binstein*, No. 94-386 (JBS), 1996 U.S. Dist. LEXIS 260, at *53 (D.N.J. Jan. 3, 1996), (stating that a new trial is the proper remedy where an injustice would occur if the court failed to act).

Here, the Court should grant a new trial based on its erroneous denial of Mr. Bergrin's request for judicial immunity for the testimony of Jamal McNeil and Jamal Baskerville. Specifically, Mr. Bergrin was denied a fair trial when the Court declined to extend judicial immunity to Mr. McNeil and Mr. Baskerville for their testimony about the Kemo murder. The Court will recall that, on March 6, 2013, during the defense case, Mr. Bergrin sought judicial immunity for these individuals' testimony. McNeil was available to testify that day owing to a subpoena issued pursuant to Federal Rule of Criminal Procedure 17(b); he was present as a result of the Court having executed a Writ of Habeas Corpus Ad Testificandum. Mr. McNeil, however, chose to assert his Fifth Amendment privilege against compelled self-incrimination. Tr. (3/6/13) at 7838, 7853. *See Doe v. United States*, 487 U.S. 201, 210 (1988) (privilege

protects against being incriminated by one's own compelled testimonial communications). Through standby counsel, Mr. Bergrin also indicated that "we would have a similar application for Jamal Baskerville," Tr. (3/6/13) at 7855, who was not available on that day, but who was also subpoenaed pursuant to Rule 17, and who, would have asserted his Fifth Amendment privilege when called, Tr. (3/8/13/) at 8227, as he had done at the last trial when he was called pursuant to subpoena, *see* Tr. (11/9/11) at 117. Notably, however, as Baskerville told the Court at that time, "I don't think I'm incriminating myself because I didn't do nothing. I had nothing to do with that." *Id.* at 99.

Mr. Bergrin's application was not speculative but was specifically based upon two reports summarizing interviews that Mr. Bergrin's investigator, Louis F. Stephens, conducted with these individuals. That is, on October 26, 2011, Mr. Stephens met with Baskerville in Newark, New Jersey, where Baskerville stated that

> he has never met with or spoken to Paul Bergrin circa November 25, 2003 and November 30, 2003 or at any other time. He was never present at any meeting between Bergrin, his brother William Baskerville, Jamal McNeil and Hakim Curry at which Bergrin uttered the phrase "no Kemo, no case" or words to that effect.

Exhibit 8. Likewise, on November 7, 2011, Mr. Stephens met with McNeil at the South Woods State Prison, where he is incarcerated. During that interview, McNeil advised that

> he never attended a meeting at a residence located in the vicinity of 17th Street and Avon Avenue in Newark, New Jersey, or anywhere else with Rakeem Baskerville, Jamal Baskerville, Anthony Young and/or Paul Bergrin to discuss an arrest of William Baskerville ... he never heard Paul Bergrin state the words "No Kemo, no case" or words to that effect. He has never met Paul Bergrin in person ... never spoken to him and he never overheard a conversation between Bergrin and [William Baskerville, Jamal Baskerville, Rakeem Baskerville, Anthony Young, or Hakim Curry] ... via telephone or otherwise.

Exhibit 9. Both reports were disclosed to the government and the Court in accordance with Mr. Bergrin's obligations pursuant to Federal Rule of Criminal Procedure 26.2. Despite the highly and obviously exculpatory character of these proffers, the Court denied Mr. Bergrin's application with respect to Mr. McNeil, reasoning that

> Mr. Bergrin has not made a convincing showing sufficient to satisfy the Court that the testimony which will be forthcoming is both clearly exculpatory and essential to his case. It is proper for the court to deny if the proffered testimony is found to be ambiguous and not clearly exculpatory, cumulative or if it is found to relate only to the credibility of the Government's witnesses. Testimony has been found to be not clearly exculpatory if it is "undercut by ... prior inconsistent statements[,"] or ["]undercut by other witness in the case ["].... Because Mr. Bergrin has not met his burden to demonstrate that this is so the Court declines to extend judicial immunity to the individual involved. So that takes care of that.

Tr. (3/6/13) at 7854-55 (citing and quoting *United States v. Perez*, 280 F.3d 318, 350 (3d Cir. 2002); *United States v. Thomas*, 357 F.3d 357, 366 (3d Cir. 2004)). The Court went on to state that, as to Baskerville, "I think I know what my decision will be, but I'd like to read [the proffer]," which had been provided to the Court earlier that day. Tr. (3/6/13) at 7856. Ultimately, neither McNeil, nor Baskerville testified.[15]

The United States Court of Appeals for the Third Circuit, unique among the federal circuit courts, recognizes this Court's discretion to immunize a defense witness. *See Gov't of the V.I. v. Smith*, 615 F.2d 964 (3d Cir. 1980); *see, e.g., United States v. Nagle (In re United States)*,

[15] As the Court will recall, there were several witnesses who asserted their Fifth Amendment privilege, *see* Tr. (3/8/13) at 8251 ("So far, the Marshal Service have brought in numerous individuals who, once they get here, they refuse to testify, and invoke the Fifth."), as to whom Mr. Bergrin might have sought judicial immunity, had the Court not so clearly indicated its intention to deny all such applications. Nor did the Court conduct any inquiry to determine whether the assertions were valid. *See Ohio v. Reiner*, 532 U.S. 17, 21 (2001) (Fifth Amendment privilege against self-incrimination "extends only to witnesses who have 'reasonable cause to apprehend danger from a direct answer.' ... That inquiry is for the court; the witness' assertion does not by itself establish the risk of incrimination.") (quoting and citing *Hoffman v. United States*, 341 U.S. 479, 486 (1951)).

441 F. App'x 963, 967 (3d Cir. 2011) (district court did not abuse its discretion in relying on *Smith* to determine its authority to confer judicial immunity). *Compare* 18 U.S.C. §§ 6002, 6003 (setting forth district court's role in effecting use immunity). In *Smith*, the Court of Appeals established two grounds based upon which a district court may grant immunity to a defense witness. First, when the government's denial of use immunity to a defense witness is "undertaken with the 'deliberate intention of distorting the judicial fact finding process,'" the Court may order acquittal unless the prosecution will grant statutory immunity on retrial. *Smith*, 615 F.3d at 966 (quoting *United States v. Herman*, 589 F.2d 1191 (3d Cir. 1978)). *See also United States v. Morrison*, 535 F.2d 223, 229 (3d Cir. 1976) (ordering new trial where prosecutor discouraged exculpatory defense witness from testifying and instructing that a judgment of acquittal would be entered unless government requested use immunity for the witness on retrial). Yet, even in the absence of prosecutorial misconduct, courts may confer immunity upon a defense witness "whose testimony is essential to an effective defense," to safeguard the criminal defendant's Sixth Amendment right to compulsory process and Fifth Amendment right to present exculpatory evidence as a matter of due process. *Smith*, 615 F.3d at 966. *Cf. Morrison*, 535 F.3d at 229 ("due process may demand that the Government request use immunity for a defendant's witness"). Of course, as might be expected, grants of this kind are rare, and "bounded by special safeguards and ... subject to special conditions." *Id.* at 971.

That is, *Smith* identified five requirements that must be met in order for a trial court to grant a defense application for judicial immunity where it is "essential to the defense": "immunity must be properly sought in the district court; the defense witness must be available to testify; the proffered testimony must be clearly exculpatory; the testimony must be essential; and there must be no strong governmental interests which countervail against a grant of immunity." 615 F.2d at 972. In this matter, Mr. Bergrin properly sought a grant of judicial immunity from this Court. As to the second factor, certainly, McNeil was available to testify when Mr. Bergrin made his application; and had the Court not foreclosed the possibility that immunity would be

granted to Baskerville, he too could have been compelled by subpoena to appear, as occurred at the last trial.

Furthermore, there is no question but that the proffered testimony is "clearly exculpatory" and "essential," in accordance with the third and fourth *Smith* factors. More specifically, both parties provided statements averring that, consistent with Mr. Bergrin's theory of defense to Counts Twelve and Thirteen, and inconsistent with the government's version of events as related by its witness Anthony Young, Tr. (2/1/13) at 2249-2253, neither Mr. Baskerville nor Mr. McNeill was present an any meeting at Jamal Baskerville's house several days after William Baskerville's arrest and that they never heard Mr. bergrin say "no Kemo, no case," or words to that effect. Indeed, again contrary to Mr. Young's testimony, which alone described this meeting, each stated that he never met with Mr. Bergrin during the time period between William Baskerville's arrest and Mr. McCray's murder. Such evidence, far from "ambiguous," is crystal clear and is, in fact, highly specific to the allegations generated by the sole witness called to describe these events. Indeed, since Anthony Young's testimony about that meeting formed the only evidence linking Mr. Bergrin to the conspiracy to kill Kemo McCray, the testimony of McNeil and Baskerville would have established that Mr. Bergrin had no involvement whatsoever in Mr. McCray's murder. Instead of "cumulative," such evidence is, then, the singular means of countering Young's testimony that Mr. Bergrin attended such a meeting with these individuals and said "no Kemo, no case." And, without this essential testimony, Mr. Bergrin lacked any means to demonstrate that such an event did *not* occur. *See Elkins v. United States*, 364 U.S. 206, 218 (1960) ("[A]s a practical matter it is never easy to prove a negative.").

Nor, does such testimony "relate only to the credibility of the Government's witnesses." Rather than merely undermining Young's testimony — although the proffered testimony would certainly do that — the proffered statements provide independent evidence that supports Mr. Bergrin's theory of defense: that the events in question never occurred. While such testimony fundamentally conflicts with that of Young, the mere fact that a jury could disregard McNeil or

Baskerville's testimony in favor of Young's certainly cannot *preclude* a grant of judicial immunity. As the Court of Appeals has explained, "[s]uch a broad prohibition of use immunity would be tantamount to eliminating that tool altogether even when a witness's testimony was required to satisfy the requirements of due process because credibility is always an issue whenever any witness testifies." *United States v. Mike*, 655 F.3d 167, 173 (3d Cir. 2011). Accordingly, the jury was entitled to hear — and Mr. Bergrin had the constitutional right to present — this proffered testimony. *Cf. Gov't of the V.I. v. Mills*, 956 F.2d 443, 446-47 (3d Cir. 1992) (reversing defendant's conviction because his Sixth Amendment right to present favorable evidence was violated when district court refused to allow witness to testify and countermand evidence that defendant was at scene of crime).

Finally, there are absolutely no "strong governmental interests which countervail against a grant of immunity" here. Although courts are often concerned that conferring immunity will enable co-conspirators to "whitewash" one another through "unchallengeable" testimony, *United States v. Lowell*, 649 F.2d 950, 961 (3d Cir. 1981), that concern is not implicated here. In particular, as brought out at this trial, in the nearly ten years since Mr. McCray was killed, the government has never arrested or charged either Jamal McNeil or Jamal Baskerville with this conspiracy. Tr. (1/31/13) at 1893. Nor, is it likely that the government ever will do so, given that there is no evidence to corroborate Young's account. *Id.* at 1778. Thus, the only effect a grant of immunity would have would be to enable Mr. Bergrin to present exculpatory evidence. If this had changed the result, then both sides would have won, because justice would have been done. *See United States v. Leon*, 468 U.S. 897, 900-901 (1984) (recognizing general goal of establishing "procedures under which criminal defendants are 'acquitted or convicted on the basis of all the evidence which exposes the truth'") (quoting *Alderman v. United States*, 394 U.S. 165, 175 (1969)); *Berger v. United States*, 295 U.S. 78, 88 (1935) ("The [prosecutor] is the representative not of an ordinary party to a controversy, but of a sovereignty ... whose interest ... in a criminal prosecution is not that it shall win a case, but that justice shall be done").

Moreover, it would be error to deny these witnesses immunity solely out of suspicion that granting immunity "may provide them with an opportunity to lie," *Smith*, 615 F.2d at 973; of course, determining credibility is a matter committed exclusively to the jury, which would have had the opportunity to do that, but was denied it as a result of Mr. Bergrin's inability to call these critical witnesses. It is not for the Court to prejudge their credibility in determining Mr. Bergrin's application, either initially or at this point. *See Morrison*, 535 F.2d at 228 ("where the Government has prevented the defendant's witness from testifying freely before the jury, it cannot be held that the jury would not have believed the testimony"). *Cf. Perry v. New Hampshire*, 132 S. Ct. 716, 723 (2012) (trial judges need not conduct preliminary assessments of the reliability of eyewitness identifications made under suggestive circumstances) (citing *Kansas v. Ventris*, 556 U.S. 586, 594, n. (2009) ("Our legal system ... is built on the premise that it is the province of the jury to weigh the credibility of competing witnesses."); *see also United States v. Haut*, 107 F.3d 213, 220 (3d Cir. 1997) ("a basic tenet of the jury system [is] that it is improper for a district court to substitute[ ] [its] judgment of the facts and the credibility of the witnesses for that of the jury") (citations and quotations omitted). Since the denial of immunity for McNeil and Baskerville infringed on Mr. Bergrin's Fifth Amendment right to due process and Sixth Amendment right to compulsory process, and severely prejudiced him at trial, the Court should order a new trial in accordance with Federal Rule of Criminal Procedure 33.

V. THE COURT SHOULD INQUIRE WHETHER THE JURY WAS EXPOSED TO EXTRANEOUS INFORMATION PRIOR TO REACHING ITS VERDICT.

The jury had the duty to determine, at the end of approximately eight weeks of trial, whether the government had sustained its burden of proof beyond a reasonable doubt on 23 counts, which included four racketeering offenses and eight distinct racketeering acts comprising nineteen sub-acts. After listening to the Court's instructions for the majority of the afternoon on March 14, 2013, the jury began deliberating for a little over an hour that first day. It continued its deliberations for about six and a half hours the next day and requested several pieces of

evidence and an early dismissal. The following Monday, the jury returned a verdict immediately following lunch, after deliberating for less than four and a half hours that day, and less than about twelve hours in total. These circumstances — namely, that the jury reached its verdict so quickly on Monday, after giving every indication the preceding week that its deliberations were unhurried and that it was in the process of considering just two of the charges — give rise to the reasonable inference that over the course of the intervening weekend a juror or jurors may have been exposed to extraneous information or influence. Moreover, Mr. Bergrin respectfully requests that the Court, pursuant to Federal Rule of Evidence 606(b) and Local Criminal Rule 24.1(g), inquire of the jurors whether they were exposed to extraneous information or outside influence.

More specifically, the Court instructed the jury on Thursday, March 14, 2013, and permitted the jury thereafter to begin its deliberations, which it did for about an hour before being excused for the day at 3:30 p.m. *See* Tr. (3/14/13) at 8968. Jury deliberations resumed the next day, when the jury sent four notes to the Court: two containing multiple questions about the evidence, one requesting a smoking break, and another seeking a 3:20 p.m. dismissal. *See* Exhibits 1-4, ECF No. 514. Notably, the jury's notes concerning the evidence were focused exclusively on the Kemo murder case, seeking "help finding exhibits (audio) of conversations between Paul Bergrin and Hakeem Curry" on the date of William Baskerville's arrest, testimony of Anthony Young from February 4, 2013, Eric Dock's prison log, and any "particular times" that jurors could be "directed to" in the recording between Hassan Miller and Anthony Young from the Hudson County Jail, which Mr. Bergrin had used to impeach Mr. Young during cross-examination on February 4, 2013.[16] *See* Exhibits 1, 2; Tr. (2/4/13) at 2434-2448, 2456-2459, 2467-2484. The jury was told that it would receive Young's testimony, but that the other items were either not in evidence, or that they must rely on their recollection of the trial to navigate it.

[16] The jury also requested "404B," *see* Exhibit 3, presumably in response to the fact that, in summation, both parties referred to Federal Rule of Evidence 404(b) with respect to the Kemo murder. *See* Tr. (3/13/13) at 8533, 8624, 8662.

See Exhibits 1, 3. After the jurors were excused on Friday, as is customary, they returned to their homes and presumably had regular contact with their families, friends, and other members of the public over that weekend.

Significantly however, on Sunday, March 17, 2013, a news article about the case appeared in the *New York Daily News*. Although press about the case was common throughout, this article was particularly inflammatory, depicting Mr. Bergrin as "cold-blooded Bergrin," a murderer akin to "John Gotti with a law degree — a ruthless racketeer every bit as dirty as his lowlife clients." *See* Exhibit 6. In fact, the article quoted Assistant United States Attorney Joseph Minish, as saying "He chose to become a criminal himself ... He used his law license to disguise the fact that he was a drug dealer and a murderer." The article went on to state that "[a]ccording to prosecutors, Bergrin actually went one step beyond the late Dapper Don ... Bergrin allegedly embraced whacking a witness. Or two. Or three." *Id.* The article featured three large color photographs: one depicting Mr. Bergrin wearing a suit and tie, another depicting John Gotti dressed similarly, and a third depicting Mr. Bergrin wearing handcuffs and prison garb, escorted by two U.S. Marshals. *Id.* The next day, a Monday, the jury deliberated for about four more hours, or until just after lunch. Notably, the jurors did not receive the lengthy testimony that they had requested on Friday until late morning or early afternoon on Monday. Tr. (3/18/13) at 9030. Nevertheless, at approximately 12:45 pm, the jury sent a note to the Court announcing that it had reached a verdict. *See* Exhibit 5, ECF No. 516. Upon return to the courtroom, the jury returned that verdict, finding Mr. Bergrin guilty on all counts charged in the Indictment. Tr. (3/18/13) at 9030-9037.

Based upon the circumstances of the deliberations, Mr. Bergrin respectfully requests that the Court, as permitted by Rule 606(b) of the Federal Rules of Evidence, inquire of the jurors whether they were exposed to extraneous information or outside influence. If this inquiry reveals that any jurors were, in fact, so exposed, then this Court should order a new trial in the interest of justice, in accordance with Federal Rule of Criminal Procedure 33, or, at the very

least, hold a hearing to determine whether a new trial is warranted as a result of the prejudice caused by the jurors' exposure to such extraneous information.

That the Court has the authority to do so in indisputable: pursuant to Rule 606(b), the Court may, within its discretion, question jurors as to whether they encountered any extraneous prejudicial information or any outside influence during the course of their deliberations. *See Wilson v. Vermont Castings, Inc.*, 170 F.3d 391, 394, 395 n.5 (3d Cir. 1999) (district courts have discretion to investigate alleged juror misconduct and extraneous information); *see also Gov't of the V.I. v. Dowling*, 814 F.2d 134, 137-38 (3d Cir. 1987) (recognizing district court's discretion regarding the method for addressing allegations of extraneous influence on the jury). Thus, Rule 606(b) provides, in pertinent part:

> During an inquiry into the validity of a verdict ... [a] juror may testify about whether (A) extraneous prejudicial information was improperly brought to the jury's attention; (B) an outside influence was improperly brought to bear on any juror, or (C) a mistake was made in entering the verdict onto the verdict form.

On its face, the Rule permits the *voir dire* requested here. Indeed, historically, such inquiries have specifically included asking jurors about their exposure to a prejudicial newspaper account, *see Mattox v. United States*, 146 U.S. 140, 149 (1892), third-party statements about the case, *see Parker v. Gladden*, 385 U.S. 363, 363-64 (1966), or regarding any pre-deliberation discussions of the case among the jurors themselves, *see United States v. Pantone*, 609 F.2d 675, 679 (3d Cir. 1979). The procedure safeguards a criminal defendant's constitutional right, under the Sixth Amendment, to an impartial jury; that is, "a determination of his or her guilt by an unbiased jury based solely upon evidence properly admitted against him or her in court," *United States v. Lloyd*, 269 F.3d 228, 237 (3d Cir. 2001) (quoting *Dowling*, 814 F.2d at 138), and a fair trial in accordance with the Fifth Amendment. *See Smith v. Phillips*, 455 U.S. 209, 217 (1982) ("Due process means a jury capable and willing to decide the case solely on the evidence before it, and a trial judge ever watchful to prevent prejudicial occurrences *and to determine the effect of such occurrences when they happen*. Such determinations may properly be made at a hearing like that

ordered in *Remmer* and held in this case.") (emphasis added) (citing *Remmer v. United States*, 347 U.S. 227 (1954) (juror permitted to testify about improper third-party contact)).

In conducting an examination pursuant to Rule 606(b), "the court may only inquire into the existence of extraneous information, and not into the subjective effect of such information on the particular jurors." *Lloyd*, 269 F.3d at 237 (internal quotations and citation omitted). The results of this objective inquiry will warrant a new trial "if the defendant likely suffered 'substantial prejudice' as a result of the jury's exposure to the extraneous information." *Id.* (quoting *United States v. Gilsenan*, 949 F.2d 90, 95 (3d Cir. 1991)). In ascertaining the existence of such prejudice, courts conduct "an objective analysis by considering the probable effect of the allegedly prejudicial information on a hypothetical average juror."[17] *Id.* Failing to ascertain what extra-record information the jury has received is an abuse of discretion where, as here, the jury may have been exposed to prejudicial publicity. *See Gilsenan*, 949 F.2d at 96 (citing *United States ex rel. Greene v. New Jersey*, 519 F.2d 1356 (3d Cir. 1975); *Dowling*, 814 F.2d at 134). As the Court of Appeals has explained, "how can a court determine on an objective standard the effect of information on a hypothetical average juror if it does not know what that information was?" *Gilsenan*, 949 F.2d at 96; *see also United States v. Moten*, 582 F.2d 654, 664 (2d Cir. 1978) ("when reasonable grounds exist to believe that the jury may have been exposed to such an

[17] Significantly, as would be the case here, where the "extraneous information is of a considerably serious nature," "in some cases the publicity that occurs is so fundamentally prejudicial that actual prejudice is presumed as a matter of law." *Lloyd*, 269 F.3d at 237, 238 (quoting *Waldorf v. Shuta*, 3 F.3d 705, 710 n.6 (3d Cir. 1993)). Likewise, a presumption of prejudice is particularly applicable "when a juror is directly contacted by third-parties." *Id.* at 237 (citing *United States v. Console*, 13 F.3d 641, 666 (3d Cir. 1993) (application of the presumption is most appropriate when there is direct communication between a juror and a third-party during deliberations)). *See also United States v. Resko*, 3 F.3d 684, 690 (3d Cir. 1993) ("It has long been recognized that when jurors are influenced by the media and other publicity, or when they engage in communications with third parties, these extra-record influences pose a substantial threat to the fairness of the criminal proceeding because the extraneous information completely evades the safeguards of the judicial process."); *Gov't of V.I. v. Weatherwax*, 20 F.3d 572, 580 (3d Cir. 1994) (if jurors "read the damaging article with its distorted reporting ... the likelihood of resulting taint to the fairness of the trial is apparent").

influence, the entire picture should be explored. Often, the only way this exploration can be accomplished is by asking the jury about it.") (citations and internal quotations omitted).

Accordingly, the examination and interview of jurors is encouraged where extraneous information or outside influence may have reached the jury. *See Resko*, 3 F.3d at 690-91; *see also Console*, 13 F.3d at 669 ("If there is a reason to believe that jurors have been exposed to prejudicial information, the trial judge is obliged to investigate the effect of that exposure on the outcome of the trial.") (quoting *United States v. Vento*, 533 F.2d 838, 869-70 (3d Cir. 1976)); *Weatherwax*, 20 F.3d at 578 ("We have emphasized the importance of questioning jurors whenever the integrity of their deliberations is jeopardized."); *Kemp*, 500 F.3d at 302 (relying on *Resko* for the assertion that the interview of jurors is encouraged). Indeed, in *Resko*, the United States Court of Appeals for the Third Circuit vacated a conviction and remanded for a new trial because the district court had erred by not conducting a searching inquiry into a question of potential of jury misconduct that had arisen. 3 F.3d at 690-91. Similarly, in *Dowling*, 814 F.2d at 141, the Court of Appeals found reversible error where the district court failed to interview jurors potentially exposed to extraneous information. *See also Greene*, 519 F.2d 1356 (affirming grant of habeas corpus based upon state court's failure to conduct jury interviews to determine if jury was exposed to detrimental newspaper article). Thus, the interviewing of jurors is an approved practice within the Third Circuit, particularly where it appears the jurors were exposed to extraneous information or an improper influence like a prejudicial news account, or the opinions of a third party.

Local Criminal Rule 24.1(g) also supports the interview of jurors. That Rule permits attorneys, parties or their representatives, following conclusion of the trial and without leave of court, to contact jurors as long as there is no inquiry into the jury's deliberations or verdict. "[U]nder the local rule, [any party] obviously has the right to interview *any* juror/witnesses on matters *extraneous* to the jury deliberation room." *United States v. Militello*, 673 F. Supp. 141, 144 (D.N.J. 1987); Lite, *N.J. Federal Practice Rules*, Comment 4 to L. Crim. R. 24.1 ("After a

verdict has been returned, the rule is clear that any party has the right to interview any juror, either directly or through counsel or an investigator, as to matters extraneous to the verdict or the jury's deliberations."). If inquiry into the deliberations or verdict is sought, however, then the parties must first seek leave of court. *Id.* at 143-44 ("As is clear from a reading of the rule, it does not on its face prohibit the questioning of jurors with respect to their deliberations or verdict; it rather permits such questioning with leave of court."); Lite, *N.J. Federal Practice Rules*, Comment 4 to L. Crim. R. 24.1 ("Where inquiry touches on those verdict-related matters, however, leave of court must be sought and must be founded on good cause."). Although Local Criminal Rule 24.1(g) permits interviews without leave of court, Bergrin respectfully requests the Court's supervision in this regard, particularly given the allegations of this case and specifically so that if the circumstances require, as a result of jurors' responses, for example, inquiry into "the deliberations or verdict of the jury" may occur so that the effect of any extraneous influences may be assessed. L. Crim. R. 24.1(g).

This relief is appropriate here, where Mr. Bergrin submits that the circumstances demonstrate reasonable grounds to believe that the jury may have been exposed to extraneous information or influence. The jury began deliberations on Thursday, March 14, 2013, with regard to the mass of evidence introduced after this eight-week trial, on the 127-page indictment, which trial had generated nearly 8,000 pages of transcript, involved the introduction of hundreds of exhibits and required jury instructions covering over 160 pages and over five hours to deliver; the verdict form alone covered eight pages. It deliberated for only about an hour and fifteen minutes the first day and only six and a half hours the next, ending its deliberations early on both days. The jury's first four notes indicate that, as of Friday, it was actively considering the evidence that Mr. Bergrin had relied upon in his defense of the Kemo murder case, but was not yet considering evidence related to any other charges at that time. Moreover, the fact that the jurors sought early dismissal and a smoke break indicated that their deliberations were unhurried. In no way did a decision seem imminent. Yet, on Monday, the jury abruptly came to a verdict

just after lunch, finding Mr. Bergrin guilty on all counts, despite having only just received the lengthy testimony requested the Friday before, but without having had sufficient time to review it. *See Gilsenan*, 949 F.2d at 96 (implying that, unlike fractured verdicts, across-the-board verdicts demonstrate prejudicial effect of extraneous information). These circumstances create a reasonable inference that over the weekend, one or more of the jurors was exposed to an improper influence or extraneous information that tainted the fairness of their deliberations. *Lloyd*, 269 F.3d at 240 (noting an exposure to extraneous information close in time to verdict is a significant factor in evaluating prejudice).

Nor is this concern hypothetical. Instead, the manner in which the jury reached its verdict is particularly troubling given that on the intervening Sunday, the *New York Daily News* published an article describing Mr. Bergrin as a killer and likening him to John Gotti, even going so far as to publish photographs of Mr. Bergrin and Mr. Gotti that resemble one another.[18] *See* Exhibit 6. The impartiality of any juror who may have come across the article — even by merely viewing the photographs — or who may have been confronted by a third party who read it, would certainly have been compromised. *See Greene*, 519 F.2d at 1357 (affirming grant of habeas where state court should have conducted *voir dire* inquiry to determine if jurors had read widely disseminated and prejudicial news account about the case). Indeed, although this inflammatory article is sufficiently troubling, the drastic turnaround of the verdict in such a short period of time — particularly given the complexity of the evidence and charges the jury was considering — gives rise to the reasonable inference that over the course of the intervening weekend a juror or jurors may have been exposed to extraneous information or influence, even if from, for example, the jurors' own family members.

[18] Thus, this case is distinguishable from *Lloyd*, in which the Court of Appeals relied upon the fact that the information contained in the publicity at issue was unrelated to the facts or theories of that case in holding that there was not a substantial likelihood it prejudiced the jury's decision. 269 F.3d at 243.

Notably here, it is inappropriate to presume, as would be customary, that the jury adhered to the Court's instructions not to read or communicate about the case. *E.g.*, Tr. (3/14/13) at 8834-35. *See generally Richardson v. Marsh*, 481 U.S. 200, 211 (1987). That presumption cannot apply where, as the Court is undoubtedly aware, it is rebutted by the fact that, shortly after delivering the verdict, one juror candidly described to the press how the jury, in fact, disregarded some of the Court's most important instructions. Specifically, Juror #5, identified in the press as Tad Hershorn, though his identity was anonymous at trial, explained that, notwithstanding his impression that "the judge's instructions were helpful in leading the jurors through a thorough consideration of each count," he nonetheless believed that "the accumulation of evidence ... was important ... in terms of blending into an overall scope of the story" and that "the mounting testimony, documents and tapes ... created a pattern of criminal activity that, in its totality, was impossible to deny." *See* Exhibit 7. These comments demonstrate that at least one juror disregarded the Court's instructions to "separately consider the evidence that relates to each offense," Tr. (3/14/13) at 8854, and that "[w]ith the exception of those racketeering acts ... your decision on one offense, whether guilty or not guilty, should not influence your decision on any of the other offenses charged. Each offense should be considered separately." *Id.* at 8854-55. Furthermore, Hershorn "said that Bergrin should not have represented himself during the trial. 'The risk is that you show character ... who you are.'" Exhibit 7. This comment similarly demonstrates that Hershorn ignored the Court's instruction that Mr. Bergrin's "decision [to represent himself] has no bearing on whether he is guilty or not guilty, and it must not affect your consideration of the case." Tr. (3/14/13) at 8836. Both Hershorn's comments about the "accumulation of evidence" and his remarks about Mr. Bergrin's *pro se* status also at the very least suggest that this one juror failed to heed the Court's instruction not to use particular evidence of other acts to infer "that Mr. Bergrin has the character trait or propensity for wrongdoing."[19] [20] Tr. (3/14/13) at 8959-60. Under these circumstances, it would be error to

[19] In addition, Hershorn's comments demonstrate how highly likely it is that at least one juror was exposed to the *Daily News* article, notwithstanding the Court's instruction; and how

impressionable jurors are with respect to this kind of press. In reality, it was hard to avoid the dramatic coverage of Mr. Bergrin's trial. *See United States v. Schiavo*, 504 F.2d 1, 23 (3d Cir. 1974) (Aldisert, C.J., dissenting) ("To not read a certain article one must first scan the news stories or at least the headlines to determine what not to read; thus, to not read anything about a case one must first read."). When, prior to the start of his service, Hershorn read news "about the arrest of an allegedly greedy and dangerous lawyer" named Paul Bergrin, who was "accused of plotting the killing of witnesses in cases against his clients," "[i]t stayed with [him]." Exhibit 7. Moreover, Hershorn framed the trial in the inflammatory terms common to the press coverage in this case, describing the trial as "a zoo," and observing, "what a story." *Id.* As he put it, "this is scary stuff ... I don't know if I want some of these people sitting around ... getting to know what I looked like," indicating that reading about the case made him fearful of the defendant. *Id.* Thus, even assuming that Hershorn adhered to the Court's charge and only read about the case prior to the start of his service, based on that exposure alone, he appears to have assimilated the unfairly prejudicial caricatures of Mr. Bergrin and descriptions of the evidence that dominated the press coverage. *Id.* Thus, to the extent that any of the jurors were exposed to the *Daily News* article or others' views about the case based on such coverage, there is no question but that it would be "so fundamentally prejudicial that actual prejudice is presumed as a matter of law." *Lloyd*, 269 F.3d at 238.

[20] At the very least, the Court should interview Hershorn in light of his comments to the press following the trial to determine whether, during his initial *voir dire*, he truthfully conveyed his full bias against Mr. Bergrin to the Court as a result of having read about the case prior to his jury service. In his statements to *The Star Ledger*, Hershorn revealed that his pretrial consumption of news about the case colored his perception of the guilt or innocence and credibility of the parties and witnesses from the beginning. *See* Ex. 7 ("when Hershorn ... showed up for ... jury duty ... 'I just thought, 'What a zoo of a case,' ... this is going to be amazing ... in terms of ... the real parade of people who would come through that courtroom, all the way from felons convicted of serious offenses to the murderer of a federal witness to just some of the more innocent parties involved.'"). To the extent that these remarks conflict with his statements to the Court during his initial *voir dire* that he could disregard what he had learned about the case from the news, such a discrepancy would provide an independent basis for relief. *See United States ex rel. De Vita v. McCorkle*, 248 F.2d 1, 8-9 (3d Cir. 1957) (remanding for a new trial because, where a juror lied on *voir dire* about questions that would otherwise have disqualified him, inherent prejudice attached in violation of defendant's fundamental right to a fair trial); *see also United States v. Mitchell*, 690 F.3d 137, 155 (3d Cir. 2012) (Jordan, C.J., dissenting) (approvingly citing proposition that courts should "presume bias where a juror lies in order to secure a seat on the jury") (quoting *Dyer v. Calderon*, 151 F.3d 970, 983 (9th Cir. 1988)); *United States v. Skelton*, 893 F.2d 40, 41 (3d Cir. 1990) (noting district court held a hearing after the verdict to determine whether a juror had prejudicial information about defendant that had not been revealed in *voir dire*); *Gov't of the V.I. v. Nicholas*, 759 F.2d 1073, 1087 (3d Cir. 1985) (Garth, C.J., dissenting) ("where a juror, on *voir dire*, has concealed information or has answered untruthfully, and because of the failure to disclose or the false answer, is impanelled as a juror — the knowledge of the untrue *voir dire* answers not being learned until after verdict ... a hearing must be ordered not only to learn the true fact as distinguished from the lie, but to assess prejudice").

presume that the jurors adhered to the Court's instruction not to read or communicate about the case. Rather, in light of the highly inflammatory article that was published in one of the most widely read newspapers in the world, and in the area the weekend before the verdict, and the startlingly sudden manner in which the jury arrived at its decision, it seems highly likely that one or more jurors were exposed to a prejudicial extrinsic influence prior to the verdict. Accordingly, the Court should grant Mr. Bergrin's request to inquire of the jurors whether they were exposed to extraneous information or improper outside influence. *See United States v. Anwo*, 97 F. App'x 383, 387 (3d Cir. 2004) (duty to investigate juror misconduct arises where there is an "adequate showing of extrinsic influence to overcome the presumption of jury impartiality") (citing and quoting *United States v. Ianniello*, 866 F.2d 540, 543 (2d Cir. 1989)).

VI. CONCLUSION

For the foregoing reasons, the Court should grant defendant Paul Bergrin's motions and enter a judgment of acquittal pursuant to Federal Rule of Criminal Procedure 29 as to Counts 12, 13, One (Racketeering Act Four), and Three, as well as to Counts Twenty-Six and One (Racketeering Act Eight); order a new trial pursuant to Federal Rule of Criminal Procedure 33, and *voir dire* the jurors concerning any exposure to extraneous prejudicial information or outside influence prior to the delivery of the verdict.

Respectfully submitted,

GIBBONS P.C.

Standby counsel for Defendant Paul Bergrin

By: s/ Lawrence S. Lustberg
Lawrence S. Lustberg, Esq.

Date: May 16, 2013

UNITED STATES DISTRICT COURT
DISTRICT of NEW JERSEY

UNITED STATES OF AMERICA

-v-

PAUL W. BERGRIN

CR. 09cr369-11
Jury Communication # 1

We request help finding exhibits (audio) of conversations between Paul Bergrin and Hakeem Curry on 11/25/2003, as well as any calls from that date from or to Paul Bergrin. SAC NOT IN EVIDENCE

We request testimony be read back from Anthony Young's testimony from Monday 2/4 SAC. TRANSCRIPT TO BE PROVIDED

If Eric Dock's prison log (journal) is in evidence, can we review it? NOT IN EVIDENCE SAC.

DATE: March 15, 2013

FOREPERSON: _____

Exhibit 1

UNITED STATES DISTRICT COURT
DISTRICT of NEW JERSEY

UNITED STATES OF AMERICA

-v-

PAUL W. BERGRIN

CR. 09cr369-11
Jury Communication # 2

Jurors need a smoke break
12:15pm

DATE: 3-15-2013

FOREPERSON: ___

Exhibit 2

UNITED STATES DISTRICT COURT
DISTRICT of NEW JERSEY

UNITED STATES OF AMERICA

-v-

PAUL W. BERGRIN

CR. 09cr369-11
Jury Communication # 3

1) Recording 4213 - are there particular times in this recording [redacted] we could be directed to?

2) What is 404B? We want it.

SPC 1) You heard the evidence and are to rely on ~~their~~ your own recollection.

SPC 2) Instruction #67 pg 154 corresponds to Fed. Rule of Evidence 404(b)

DATE: March 15, 2013

FOREPERSON: _____

Exhibit 3

UNITED STATES DISTRICT COURT
DISTRICT of NEW JERSEY

UNITED STATES OF AMERICA

-v-

PAUL W. BERGRIN

CR. 09cr369-11
Jury Communication # 4

We need to leave at 3:20pm today

YES

DATE: 3-15-2013

FOREPERSON:

Exhibit 4

UNITED STATES DISTRICT COURT
DISTRICT of NEW JERSEY

UNITED STATES OF AMERICA

-v-

PAUL W. BERGRIN

CR. 09cr369-1
Jury Communication # 15

We have reached our verdict.

DATE: 3-18-2013

FOREPERSON: _____

Exhibit 5

DAILY NEWS

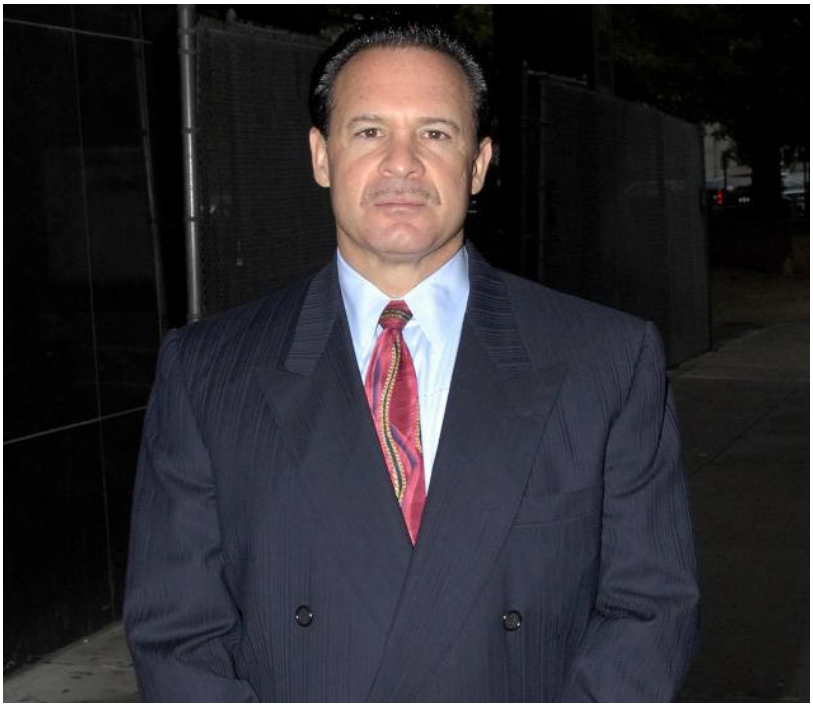
New York

Defense lawyer Paul Bergrin faces life in prison if convicted in 23-count federal murder, conspiracy and racketeering case

Bergrin's bold-faced clients included rapper Li'l Kim and Iraq war veterans accused of war crimes

BY LARRY MCSHANE / NEW YORK DAILY NEWS

SUNDAY, MARCH 17, 2013, 12:08 AM



MARC A. HERMANN FOR NEW YORK DAILY NEWS

Disgraced attorney Paul Bergrin faces life in jail for his alleged crimes.

Disgraced defense lawyer Thomas Moran, after confessing to a multitude of sins, clung tightly to the Sixth Commandment: He would not kill.

Not even for his friend and mentor, renowned New Jersey attorney Paul Bergrin.

"I won cases the old-fashioned way," the hard-drinking, coke-snorting Moran snapped from the Newark Federal Court witness stand, his implication clear: Bergrin preferred a more lethal approach toward acquittals.

Bergrin, a former federal prosecutor turned cutthroat defense lawyer, stands accused as John Gotti with a law degree — a ruthless racketeer every bit as dirty as his lowlife clients.

According to prosecutors, Bergrin actually went one step beyond the late Dapper Don. While Gotti preferred buying a juror to beat the rap, Bergrin allegedly embraced whacking a witness.

Or two. Or three.

The son of a Brooklyn cop faces life in prison if convicted in a 23-count federal murder, conspiracy and racketeering case staggering in breadth and content.

Exhibit 6

"He chose to become a criminal himself," Assistant U.S. Attorney Joseph Minish told the Newark Federal Court jury. "He used his law license to disguise the fact that he was a drug dealer and a murderer."

The panel began deliberations last Thursday after closing arguments in one of the Garden State's most prominent recent prosecutions. Even New Jersey's top federal prosecutor, Paul Fishman, turned out to watch Bergrin's last stand.

MARC A. HERMANN

Authorities haul defense attorney Paul Bergrin to a familiar place: court.

In addition to murder, the indictment details the high-powered lawyer's purported roles in a cocaine ring and a Manhattan call girl operation once headed by "King of All Pimps" Jason Itzler.

"The 18 months I was with you, it was quite a run," Moran told Bergrin, who represented himself. "It was filled with conspiracies."

Bergrin spun a different scenario. Moran and other federal informers were morally bankrupt and eager to save their own skins, he charged. During an animated and impassioned 31/2-hour summation, Bergrin cajoled, challenged and even begged jurors to find him innocent.

"I have lost everything but my pride and my dignity," Bergrin declared. "I have lost everything I worked for. But you are the real triers of fact. And you can lift this black cloud and show that this system of justice works."

Bergrin, 57, is fighting for his life at an age when most lawyers with his résumé are making weekend plans with the grandkids.

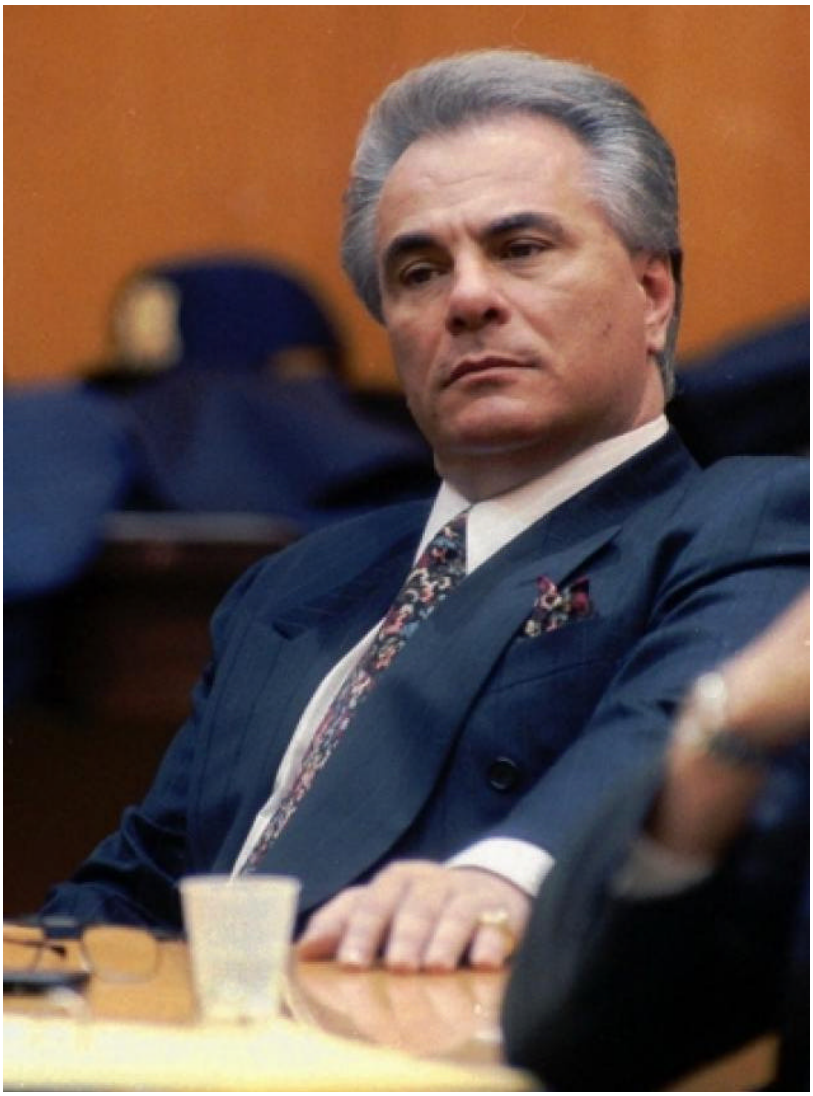
RELATED: EX-LAWYER IN SLAY RAP

Exhibit 6

The combative legal veteran — labeled " The Baddest Lawyer in the History of New Jersey" in a 2011 magazine piece — was held without bail immediately after his May 2009 arrest and remains jailed in a Brooklyn federal lockup.

All of the nearly 50 government witnesses against Bergrin reached the witness stand in this case. But some of the most troubling remarks came from Bergrin's own mouth.

The lawyer met more than a dozen times with Oscar Cordova, a purported Chicago hit man who was actually a federal informant.



RICHARD DREW/AP

Bergrin is accused of being John Gotti (pictured) with a law degree - a ruthless racketeer every bit as dirty as his lowlife clients.

"We gotta make it look like a robbery," Bergrin advised Cordova about the proposed killing of a drug trial witness. "It cannot under any circumstances look like a hit."

In another instance, authorities charged, the cold-blooded Bergrin signed off on a 2004 hit against FBI informant Kemo McCray: "No Kemo, no case."

Bergrin offered his explanation directly to the jury for the damning comments to Cordova. "I am humbled, ashamed and embarrassed at some of the words that came out of my mouth," said Bergrin, insisting his tough-guy talk was "immature, stupid role-playing."

The mounting evidence did little to sway Bergrin's loyal supporters, who sat through eight weeks of testimony.

Exhibit 6

"I know Paul as being honest and fair," said Jahidah Sharif, a community activist from East Orange, N.J. "I know the mothers. Paul saved their children."

Bergrin's bold-faced clients included rapper Lil' Kim, and the former U.S. Army major also took on the federal government — representing U.S. soldiers accused of Iraq war crimes.

But he really went to war against federal prosecutors in this case.

On cross-examination, the jut-jawed Bergrin pounded away like Mike Tyson in a double-breasted suit, sparing none of the government witnesses from his scorn. "How could you believe a wor d that they say?" Bergrin asked the jury. "I pray with all my heart and soul that you can separate fact from fiction in this case."

Bergrin, if convicted on the informants' words, provided his own legal epitaph in one taped conversation.

"Yeah, man, you gotta live by a code of f---ing not trusting anybody," he said. "It's a hard way to live. It's a terrible way to live, man."

lmcshane@nydailynews.com

LAWYER'S JUST A THUG IN A TIE
Charges against rogue attorney Paul Bergrin in 23-count federal indictment include:

2004 drug gang murder of federal informant Kemo McCray on a Newark street.
Conspiracy to murder two witnesses in a Monmouth County, N.J., drug probe.
Convincing a 9-year-old girl to lie in a 2003 attempted murder trial.
Conspiracy to distribute multi-kilo quantities of cocaine, in some cases using his law office.
Running the infamous "New York Confidential" prostitution ring after owner/client Jas on Itzler was jailed.

Exhibit 6

Everything Jersey

Juror in Bergrin trial talks about verdict and a case he'll never forget

By Jason Grant/The Star-Ledger
on March 20, 2013 at 6:15 AM, updated March 29, 2013 at 10:45 AM

In 2009, Tad Hershorn read a news article about the arrest of an allegedly greedy and dangerous lawyer accused of plotting the killing of witnesses in cases against his clients.

That lawyer's name was Paul Bergrin. It stayed with Hershorn.

Flash forward to January of this year, when Hershorn, 58, showed up for the first time in his life for jury duty in a criminal trial. As he began to hear about the case he would decide — Mafia-like accusations, witness-murder, drug trafficking and a defendant acting as his own lawyer — Hershorn realized he'd be deliberating the fate of one Paul Bergrin.

He also realized, quickly, he said yesterday in a lengthy interview, that the case itself would be one he'd never forget.

"I just thought, 'What a zoo of a case," Hershorn, an archivist for the Institute of Jazz Studies, said yesterday. "And I just thought, this is really going to be amazing in scope — both in terms of the charges and the real parade of people who would come through that courtroom, all the way from felons convicted of serious offenses to the murderer of a federal witness to just some of the more innocent parties involved."

The Newark-based trial ended on Monday with a resounding, across-the-board guilty verdict against Bergrin. It did not disappoint, Hershorn said. And that's despite the fact that he and his fellow jurors reached unanimity on 23 counts against Bergrin in just two short days of deliberations.

Bergrin, a once prominent lawyer to rap stars, drug kingpins and U.S. soldiers in Iraq, was convicted of using his law office in Newark as a front for a racketeering enterprise marked by plotting the murders of witnesses against his clients, other instances of witness tampering, promoting prostitution and trafficking in kilogram quantities of cocaine.

Still awestruck, but weary-sounding, Hershorn laid out the tale of his own trials and tribulations as a juror in an eight-week courtroom drama that at times frightened and always fascinated.

RELATED COVERAGE:

• Bergrin guilty on all counts, including murder and drug trafficking, in sweeping verdict

Exhibit 7

He also explained, repeatedly, how the mounting testimony, documents and tapes of Bergrin put forward by prosecutors John Gay and Joseph Minish created a pattern of criminal activity that, in its totality, was impossible to deny.

Yet, said Bergrin's supporting counsel, Lawrence Lustberg, yesterday — after hearing of Hershorn's comments — the juror's reasoning also gives weight to the appellate issue he and Bergrin still plan to bring to the fore: That the judge erred in not allowing Bergrin to sever out counts and try them separately, thereby forcing Bergrin, 57, to battle the landslide of eight years' worth of allegations at once.

• Bergrin trial: Prosecutor makes rebuttal argument; jury deliberations begin

• At closing arguments, Bergrin pleads innocence as prosecutor says he plotted murders

• Prosecutor to jury: Don't let lawyer get away with murder

• 'Hit Man': Bergrin wanted someone killed

• Bergrin cross-examines accuser who claims he coerced her into lying as a child

"When I hear a juror talking about the accumulation of evidence, it makes me extremely concerned that the jurors did not follow the judge's instructions that each count must be considered separately," Lustberg said. "That was the reason that we moved (unsuccessfully) for a severance."

As to how he viewed Bergrin's guilt, Hershorn said, "I think the accumulation of evidence and witnesses and exhibits and the (prosecutors') presentation was important … in terms of blending into an overall scope of the story."

Asked about the speed with which the federal jury returned its verdict, Hershorn pointed out that the jurors had two months to consider evidence presented at trial — even though they didn't start to discuss it with each other until deliberations. He added that the judge's instructions were helpful in leading the jurors through a thorough consideration of each count. And, he said, the jury was confident in its verdict, and did not rush its decision.

At the same time, Hershorn's talk about the feelings he battled opening a window on the life of a juror. Hershorn revealed that days before the trial got under way with opening statements, he asked U.S. District Judge Dennis Cavanaugh to remove him from the case. He'd already had some thoughts about his own safety, as he mulled over the task of judging Bergrin and the felon-witnesses to be called to the stand.

"I had mixed feelings," he said yesterday, "because you figure, 'Man, this is scary stuff.' You know, I don't know if I want some of these people sitting around for three months getting to know what I looked like."

But, in the end, he asked to be taken off the case because he worried about whether he could handle the emotional toll of going through what was clearly going to be an intense trial. Cavanaugh, he said, didn't accept his reasons for leaving the jury — and just a few days later he was thankful he was still on it.

And as the riveting opening arguments unfolded, Hershorn also realized the incredible nature of the trial he'd

Exhibit 7

be watching. A former journalist and recent author, he said, "What a story it is."

Then, he added, that Bergrin — who now faces mandatory life sentences, post-conviction — is a "somewhat seedy, swashbuckling lawyer who can hold his ground." He also said that Bergrin should have not represented himself during the trial. "The risk is that you show character," he explained, continuing, "As smart as he is and he thinks he is, you cannot totally disguise who you are."

He added, "Without the buffer of a defense attorney, you have witnesses saying, 'No, Paul, this is what you did to me; this is what you said to me."

Hershorn also said the same hubris that led Bergrin to commit crimes may have undermined his ability to think clearly about the risks of defending himself — including the toll it takes to be "up every day and every night" preparing for trial. "The sheer physical and emotional drain on him — you could see it around the edges," the juror said of Bergrin. "But look, the guy's a tough guy."

Exhibit 7

Privileged & Confidential/Attorney Work Product

Date of Interview:	October 26, 2011
Person Interviewed:	JAMAL BASKERVILLE 56 Farley Avenue Newark, New Jersey 07108
Interview Conducted By:	Louis F. Stephens John W. Crouthamel

JAMAL BASKERVILLE was interviewed at his residence regarding his knowledge of PAUL BERGRIN. He stated as follows:

He is familiar with the name PAUL BERGRIN as a criminal defense lawyer who once represented BASKERVILLE's brother WILLIAM. He is aware that BERGRIN is a defendant in a criminal proceeding in federal court in Newark, New Jersey and he acknowledged that he has been subpoenaed to testify in that case.

BASKERVILLE advised that he has never met with or spoken to PAUL BERGRIN, circa November 25, 2003 and November 30, 2003 or any other time. He was never present at any meeting between BERGRIN, his brother WILLIAM BASKERVILLE, JAMAL MCNEIL and HAKIM CURRY at which BERGRIN uttered the phrase "no Kemo, no case" or words to that effect.

BASKERVILLE expressed concern that if he testified as to the above his safety may be compromised. He advised that if his testimony was required that he wanted as much prior notice to appear as possible, since he works nights, must sleep during the day and must notify his employer.

The interview thus concluded.

Exhibit 8

Privileged & Confidential/Attorney Work Product

Date of Interview:	November 7, 2011
Person Interviewed:	JAMAL MCNEIL Inmate 682928/982413B South Woods State Prison 215 Burlington Road, South Bridgeton, New Jersey 08302
Interview Conducted By:	Louis F. Stephens

MCNEIL stated that he is currently confined at South Woods State Prison on a conviction for Resisting Arrest/Eluding and operating a Motor Vehicle recklessly. He was sentenced on April 15, 2011 to a minimum mandatory term of 5 years with a maximum term of 10 years.

MCNEIL stated that he is familiar with the name of PAUL BERGRIN as an attorney with a good reputation for defending people charged with criminal offenses in New Jersey.

MCNEIL advised that he was unfamiliar with the name KEMO DESHAWN MCCRAY and the circumstances of MCCRAY's murder on March 2, 2004. Moreover, when informed of the charges against BERGRIN, WILLIAM BASKERVILLE, HAKIM CURRY and ANTHONY YOUNG, and the general facts surrounding the MCCRAY murder, he advised as follows:

He knows WILLIAM and JAMAL BASKERVILLE and the BASKERVILLE family as they are family friends. He does not know ANTHONY YOUNG or HAKIM CURRY. MCNEIL stated that he never attended a meeting at a residence located in the vicinity of 17th Street and Avon Avenue in Newark, New Jersey, or anywhere else with RAKEEM BASKERVILLE, JAMAL BASKERVILLE, ANTHONY YOUNG and/or PAUL BERGRIN to discuss an arrest of WILLIAM BASKERVILLE. He advised that he never heard PAUL BERGRIN state the words "No Kemo, no case" or words to that effect. He has never met PAUL BERGRIN in person, never retained BERGRIN, and has never spoken to him and he never overheard a conversation between BERGRIN and one or all of the aforementioned persons via telephone or otherwise.

MCNEIL's demeanor was cooperative. He was incredulous when told of information that he had any involvement in the "KEMO" murder and surrounding circumstances.

MCNEIL was served with a trial subpoena to testify as a defense witness in the ongoing BERGRIN murder/conspiracy trial upon concluding the interview.

Exhibit 9

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

UNITED STATES OF AMERICA v. PAUL BERGRIN, Defendant.	Criminal No. 09-369 (DMC) Filed Electronically **PROPOSED ORDER GRANTING POST-TRIAL MOTIONS**

THIS MATTER having come before the Court upon the post-trial motions of defendant Paul Bergrin ("Bergrin") and the Court having considered the submissions of the parties, and the arguments of counsel and for good cause shown,

IT IS on this _____ day of _____, 2013,

ORDERED that Bergrin's post-trial motions be and they hereby are granted.

_____
Honorable Dennis M. Cavanaugh, U.S.D.J.

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Standby Counsel for Paul Bergrin

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

UNITED STATES OF AMERICA v. PAUL BERGRIN, Defendant.	Criminal No. 09-369 (DMC) Filed Electronically **CERTIFICATE OF SERVICE**

I, **LAWRENCE S. LUSTBERG**, hereby certify as follows:

1. I am a Director with the law firm of Gibbons P.C., and have been appointed standby counsel for Paul Bergrin (Bergrin) in the above-captioned matter.

2. On this date, I electronically filed, on behalf of Bergrin, the following:

- Notice of Motion;
- Brief in Support of Post-trial Motions
- Proposed Form of Order; and
- Certificate of Service.

3. On this date, service was made upon the following attorneys in accordance with the United States District Court for the District of New Jersey's Local Rules on Electronic Service:

John Gay, Ass't U.S. Attorney
Joseph N. Minish, Ass't U.S. Attorney
Steven G. Sanders, Ass't U.S. Attorney
United States Attorney's Office
970 Broad Street
Newark, New Jersey 07102

I hereby certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

By: s/ Lawrence S. Lustberg

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Attorneys for Paul Bergrin

Dated: May 16, 2013