Paul W. Bergrin
Reg. No. 16235-050
MDC Brooklyn
Metropolitan Detention Center
P.O. Box 329002
Brooklyn, NY 11232

August 26, 2013

Honorable Judge Dennis M. Cavanaugh
United States District Judge
United States Post Office and Courthouse Building
Room 451
P.O. Box 999
Newark, New Jersey 07101-0999

Re: *United States v. Bergrin,* Docket Number 09-369
Reply to Government's opposition to Bergrin's *Pro Se* Motion for Reconsideration

Dear Honorable Judge Cavanaugh:

Defendant did not receive the Government's answer to my *pro se* motion for reconsideration until August 21, 2013. It contained eight pages of legally meritless argument, inapplicable case law, factual inaccuracies, and misstatements of Defendant's position.

Defendant was in the process of replying in order to set the record straight and to assert the truth as to its position on the legal and factual issues when I received this Court's opinion and order denying my motions in their entirety and essentially adopting the Government's erroneous arguments on all legal issues. The defendant was never afforded the opportunity to reply in accordance with the Federal Rules of Criminal Procedure and Local Rules.

Motions for reconsideration in the District of New Jersey are governed by Local Criminal Rule 1.1 which provides that Local Civil Rule 7.1 (i) is applicable to criminal cases tried in the District of New Jersey. " L. Crim. R. 1.1 affords a defendant the right to reply to responses to their submissions; see *United States v. Vargas*, Mag No. 13-2044, 2013 WL 3223, 3419, at 3 (D.N.J. June 25, 2013); *United States v. Curry*, Crim. No. 04280, 2006 WL 1320083, at 1 (D.N.J. May 12, 2006). Local Rule 7.1 (i) provides that a party may file a motion for reconsideration within ten (10) days after entry of the Order of Judgment on the motion by the Judge and it may be granted if (1) an intervening change in the controlling law has occurred; (2) evidence not previously available has become available; or it is necessary to correct a clear error of flaw or prevent a manifest injustice. *Database Am., Inc. v. Bellsouth Adver, and Pub. Corp.*, 825 F. Supp 1216, 1220 (D. N.J. 1993). Defendant meets all three criteria and respectfully requests this Honorable Court vacate its Order and Decision and at least read and consider this submission.

Defendant incorporates by reference all facts contained in all prior submissions, motions, replies and the trial transcripts of *United States v. Baskerville* and *United States v. Bergrin*, 2011, before the Honorable Judge William J. Martini, District of New Jersey and *United States v. Bergrin*, 2013, before this Honorable Court.

I. THIS COURT MUST RECUSE ITSELF FROM THIS MATTER AS ITS IMPARTIALITY IS REASONABLY QUESTIONED BY A REASONABLE AND OBJECTIVE REVIEWER OF THE CASE.

This Court must recuse itself from this case as a reasonable and objective viewer of this case, knowing the facts as presented, would clearly conclude that the Judge's impartiality might be questioned. *Allen v. Parkland School District*, 230 Fed. Appx. 189, 193 (3d Cir. 2007).

Bergrin filed a *pro se* submission and asserted clear and unequivocal facts categorically depicting the Court's background and close knit relationships to intrinsic components of the government's case. Bergrin signed his submission as a *pro se* litigant and therefore and obviously attested to the facts contained therein. Henceforth, the factual depictions were as if certified to by Bergrin and not a scintilla of objective evidence has ever been presented, that disputes or contests the factual contentions contained therein.

More importantly, Due Process and the interests of justice mandate the Court's consideration and recusal and to rule otherwise, would evoke indicia of partiality, as fervently asserted. This Court's denial to Bergrin of the opportunity to submit a responsive pleading to the government's answer is only one example of its partiality. Additionally, Bergrin was never served a copy of the government's eighteen page sentencing memorandum wherein the government seeks five life sentences against him. When Bergrin sought a short adjournment from his scheduled sentencing date to read the memorandum and prepare a reply, due to this court's partiality and bias, this request was also denied.

Bergrin asserts with absolute certainty that he has had no internet access, since his continuous incarceration which began 20 May 2009; and although defendant was aware of basic generalities pertaining to the background information of the attorneys whom intrinsically participated in the government's case, it would be virtually impossible to ascertain, learn about or have known this district judge's relationship with them. The specific facts were not "public knowledge;" nor were they even known to Bergrin until subsequent to the verdict. Unless someone specifically researched the issue and information, it would remain unknown.

Consequently, the government's contention that Bergrin was aware of the grounds supporting the recusal is nothing more than a self-serving concession. Moreover, the verdict and judge's rulings on post-trial relief motions never bore on defendant's determination and decision to file a recusal motion. It was the totality of facts and circumstances during the course of pretrial hearings, the trial and information ascertained subsequent to the verdict that gave rise to the motion.

In sum: the totality of facts and circumstances, in conjunction with Bergrin learning of the Judge's close knit ties and inter-relationships with parties for extended periods of time, familial relationships with known participants, working relationships with individuals closely affiliated with known parties and the seminal and vital nature of allegations made against the attorneys, as

well as the ramifications of the accusations, that would lead any reasonable and objective person to conclude that recusal is appropriate in this case.

In re Kensington International, Ltd., held that motions for recusal are untimely if a party is aware of the facts supporting removal yet fails to act until the Judge issues an adverse ruling. 368 F. 3d 284, 314 -315 (3d Cir. 2004). To reiterate, Bergrin wholeheartedly pleads and submits that he had no knowledge whatsoever of the Judge's relationships with Roberts, Nuzzi, Hayden, Walder, the Whipple family, nor of the nexus between his wife, Linda Lordi and his late father in law, Joseph Lordi and Roberts, until he was provided this information and material post-verdict and subsequent to the Court's ruling on his post conviction relief motions; and there is not an iota of evidence that exists to the contrary.

Bergrin concedes that the Stephens' Certification demonstrated intimate knowledge of Roberts'-misconduct, unprofessionalism and even criminality. It contained information commonly known to the public as to Roberts' "American Gangster" movie affiliation, but was devoid of the Judge's connection and nexus to Roberts; which has never been made public nor explained or disclosed by this court.

Bergrin was cognizant of Nuzzi's misconduct, breach of the Rules of Professional Responsibility, as well as the allegations made against him resulting in his recusal from the Curry case, but never learned nor knew of the Judge's intricate, intimate and devout friendship, with Nuzzi until after motions were decided in this case. Bergrin admits that he was aware that Nuzzi worked for the Essex County Public Defender's Office, Newark, New Jersey and that he was First Assistant Essex County Prosecutor, Newark, New Jersey, but defendant had no clue that Nuzzi's relationship with the Court far exceeded mere acquaintances within the legal community. Moreover, Bergrin had no idea as to the Judge's prior employment history, clerkships, legal partnerships and personal relationships with extremely important individuals associated with the government's case, until post verdict. It is the totality of facts and circumstances which required the Court to recuse itself.

The appearance of partiality mandated this Judge to disqualify himself. With the Court's inherent and proven relationships, an objective observer would question the Judge's impartiality and although a Judge has discretion to determine whether a basis for recusal is present, it is not unfettered discretion. The overt as well as subliminal and subconscious impact of the relationships in this case affected and altered the Judge's perceptions, decisions and rulings. *In re Kensington, supra* at 301, and n. 12. The objective findings and analysis by an impartial observer would clearly compel at the minimum judicial inquiry. *Liteky v. United States*, 510 *U.S.* 540, 548 (1994).

Bergrin never waited until the eve of sentencing or until the Court ruled on his omnibus post trial motions to file this motion, in contravention of Title 28 section 455. This motion was submitted upon proof and ascertainment of facts, to corroborate and support Bergrin's position and there exists no "objective" evidence to neither dispute this assertion nor refute its premise.

The government wrongfully and deceptively attempts to argue that Bergrin had knowledge of the relationships underlying recusal (government's answer dated 8-16-13, at P.2, hereinafter answer") and vehemently argues about Bergrin's untimeliness; because they fear the merits of this motion and know that the attorneys were integral participants. But for the participating

attorney advising, consulting and bringing their clients to the cooperation table, Bergrin would not have been convicted. Furthermore, but for attorneys actually aiding the government in the case and their relationships to the court, there would have not been any convictions.

The government and Court in its opinion, dated 8-22-13, P.2 (government's answer, p.2), assert that the attorneys of record were not counsel to any party at the 2013 trial. This is inaccurate. Richard Roberts represented Rondre Kelly in Pittsburgh, Pennsylvania and traveled from Newark, New Jersey to Pennsylvania, approximately eight (8) hours away to proffer Kelly against Bergrin. Roberts was present during the entire proffer session between Kelly and the government and he was the attorney whom aggressively sought Kelly's acceptance as a cooperator. Tr.5030. Kelly testified how his New York charges were transferred to Pennsylvania because Roberts had problems with his New York license and how Roberts was present when he proffered for cooperation against Bergrin. TR.3046-48. Kelly initially denied Roberts' representation and falsely swore, in the presence of the government, that Roberts would not represent him if he cooperated, but then admitted that he did represent him.

Moreover, Roberts had immeasurable contact with Abdul Williams in multiple attorney-client meetings at the Hudson County Jail, Kearny, N.J.; although he was not retained formally on Williams' behalf until after Williams began cooperating. Roberts was an influential factor in Williams' cooperation, as Roberts' was with Albert Castro, whom Judge Martini called a liar. Roberts knew of his ethical responsibilities, yet clearly violated them and no action nor complaints have ever been lodged against him; nor any other of the named attorneys.

Vincent Nuzzi represented Eugene Braswell from the inception of his state drug distribution charges and was material in convincing Braswell to cooperate.

John Azzarello is a partner in Arsenault, Whipple, Fassett and Azzarello, the same firm that employed government prosecutor Steven Sanders; and the same Whipple that is the brother of the Whipple to the partner of the firm with whom Your Honor was associated. At the very minimum, these facts should have been disclosed pre-trial for defense inquiry and an intelligent and informed decision made as to recusal. The failure to make such disclosures resulted in the deprivation of Bergrin's due process rights.

The government obnoxiously argues that Roberts initially represented Rondre Kelly but then ceased, as Kelly began cooperating. This Court heard Kelly's testimony and was aware that this was factually inaccurate. Yet, this Court cited this as fact in its opinion, denying reconsideration and even a defense reply (answer, p.5, Courts opinion, page 2). In sum: Kelly articulated at trial how it was Roberts who was present in the Allegheny County Jail, Pittsburgh, Pa. when he was introduced to government representatives, for the express purpose of cooperating against Bergrin; and it was Roberts who arranged the meeting, so Kelly could cooperate. It was also Roberts who secured the condition that Kelly not be prosecuted for all his heroin and cocaine drug trafficking in New Jersey; as Roberts enjoyed an established relationship with these same prosecutors and agents when he, while in conflict with Kelly, falsely cooperated Albert Castro against Bergrin (an underling of Kelly). It cannot be accentuated enough that Castro's cooperation commenced immediately prior to Kelly and was incredulous. Again, see tr. 3030, 3046 and 3070. It is an insult to intelligence that the government plays fast and loose with the judicial system and asserts that Roberts refused to represent Kelly and how the Court adopted this position.

All of the Attorneys involved represented cooperating witnesses whom were either codefendants or unindicted co conspirators to Bergrin. Consequently, they were related parties to this case and intractably interwoven into it, with an inherent interest in receiving benefits. The Attorneys were also concerned with ingratiating themselves with the government and saving themselves from ethics and criminal allegations and violations; which they committed while representing cooperators against Bergrin. They made themselves parties of interest in the proceedings and their relationships with this Judge and government, also inured to this benefit.

An important point of accentuation is attorney John Azzarello's representation of coconspirator Ramon Jimenez. This Court meticulously reviewed the transcripts of the first trial against Bergrin, before the Hon. William J. Martini, and was aware that a formal ethics complaint was lodged, by Jimenez against Azzarello and Prosecutor Gay. They were accused of being in collusion and intimidating, coercing and interrogating Jiminez, in order to brain wash him to testify falsely against Bergrin. Azzarello and Gay worked in conjunction with each other to interrogate Jimenez and, by repeatedly asking the same question over and over about Bergrin over an extensive period of time, wrongfully suggested what they wanted Jimenez to testify to. They rehearsed him together until Jimenez broke and told them exactly what they wanted to hear. Judge Martini was able to objectively see through this and noted it on the record, when he called Jimenez incredulous. See Tr., October 21, 2011, pages 138-163. What makes these facts relevant to the issue of point one in this case is the professional misconduct committed by the government and Jimenez' attorney which causes both of them to face potential disciplinary and even criminal charges for suborning perjury. One of the chief prosecutors in the trial was Steven Sanders, who was an associate in the firm to which Azzarello is a partner. This fact was known by this Court and Judge but never queried. Additionally, John Whipple, a close friend to this Judge and the brother of the Judge's former law partner, is the partner of this Court; yet these facts were never revealed, disclosed and alone, are enough to raise the issue of whether this Court could have sat as an impartial arbiter.

Lastly, in the new case of, *Madeline Apollo v. Pennsylvania Convention Center, et al.* decided by the Third Circuit on August 14, 2013 and in a per curium opinion, the U.S. Court of Appeals for the Third Circuit, - - No. 12-3033, in facts analogous to the case sub judice, rejected arguments that recusal was not necessary because of the Judge's "coincidental" connections and rejected the contention that "professional interactions with potential witnesses and defense attorneys does not mandate disqualification and would not cause a reasonable person to question the Judges impartiality." The Third Circuit ruled, just as this Court and Judge should have that the judiciary thrives not only with the absence of actual bias but also with the absence of perceived partiality.

Upon being presented with the Stephens' certification implicating Roberts in such egregious misconduct, this Court should have immediately recused himself from the proceeding given Roberts' close relationship with Your Honor and Your Honor's close family members. . The Third Circuit panel wrote, "...while we do not doubt the Judge's ability to preside impartially over Apollo's action against the PCCA, the accumulation of the Courts connections to the litigation endangers the neutrality that is essential for the judiciary to retain the public's trust."

The government submits that the Court was impartial in its rulings as it permitted direct examination of Lemont Love about Roberts urging him to falsely incriminate Bergrin. Tr. at 8320-21. What the government failed to disclose is how the Judge, erroneously and in contravention of the Rules of Evidence, permitted the government to cross examine Love about

telephone conversations he had with his girlfriend using the terms "rape" and jokingly threatening assault; or how the Court restricted the scope of Love's full knowledge of government corruption and misconduct.

For the aforementioned reasons this Court must recuse itself and make no further decisions on this case.

II. THE GOVERNMENT'S RESPONSE --LADDDEN WITH MISREPRESENTATIONS -- UNDERSCORES THE EGREGIOUSNESS OF PROSECUTORIAL MISCONDUCT IN THIS CASE AND THE EXTENT TO WHICH THE GOVERNMENT WILL GO TO CONCEAL THE FACT THAT IT BASED ITS CASE ON TESTIMONY IT KNEW OR HAD TO HAVE KNOWN WAS PERJURED .

The government wrongfully argued that Bergrin based his claim of prosecutorial misconduct on the fact that none of the calls intercepted over a cell phone used by Hakeem Curry show him actually arranging the meeting with Bergrin and on his belief that two December 4, 2003, calls, prove that no such meeting occurred.(Answer, p.7).

The Court ruled as argued by the government and accepted their position without even an objective and basic analysis of the substance of the calls, in conjunction with the other evidence at trial. (Opinion, p.3). The government's argument belies reality and is factually and legally inaccurate.

The manifest denial of justice against Bergrin is blatant in the totality of facts and circumstances, commencing with Johnny Davis' testimony; that the person whom shot and killed his son, Kemo, was tall, muscular and black skinned and had shoulder length dreads.Tr.1430-31. Davis was absolutely certain, ("*one thousand percent*" positive), that the shooter was not Anthony Young; (we know that Young was bald, brown skinned, wore a New York Yankees hat, according to Young and came nowhere close to Davis' physical description of the shooter).Tr. 1466, 1469-70,1474. Davis was emphatic in his sworn testimony that the shooter was William Lattimore and positively identified him. Additionally, on March 3, 2004, the day after the Kemo shooting, Davis had a physical confrontation with Lattimore, which confirmed and corroborated his identification.

One cannot question Davis' ability to identify the shooter as he stood within inches from Kemo, at the time of the shooting. As Davis swore at trial, "If someone come to you and tell you that someone is in jail for 30 years for killing your child(meaning Young), and you look at their papers and you find that that might not be the killer because you understand I said, black hair, dark skin and dreadlocks..."Tr. 1474. Then Mr. Davis is shown a photograph of Anthony Young and swears that he is not the man who shot his son. Tr. 1477, you know that Young lacks credibility and reliability. Compound these proven facts concerning Young, with the facts, that contrary to the government's assertion, that they did not have knowledge that Young lied nor should have known that he lied; and you have serious *Napue* issues, as Bergrin argued.(P. 3, Answer, P.2,3, Opinion).

An objective jurist and arbiter of the facts must realize that an injustice and manifest denial of justice occurred in this case.

The government knew that Young perjured himself and falsely testified, when he testified that "he was never informed to tell the truth" during meetings with the government. (See testimony of SA Brokus and Attorney Paul Feinberg); that he denied informing Brokus that Curry placed Bergrin on a speaker telephone during conversations with Bergrin, in Curry's motor vehicle; that Young never informed Brokus that the vehicle he rode to the Kemo shooting in, with Rakeem Baskerville, was a Grand Prix; the testimony by Young that all handguns purchased by members of the Curry Organization, including himself, as well as the handgun he was arrested with in July, 2004, were all modified to be automatic weapons; the sworn testimony of Young at the trial of William Baskerville, in 2007, that the alleged meeting with Bergrin occurred three to four days after Baskervilles arrest and that at the meeting; Bergrin used the specific words "kill" Kemo; the fact that Young repeatedly swore in 2007, at the Baskerville trial, that Rakeem Baskerville was present in Curry's automobile when Bergrin telephoned Curry; the additional facts that Young swore at the Baskerville trial that He and Rakeem identified Kemo in Curry's automobile on November 25, 2003; that He Young made the decision on November 25, 2003 to kill Kemo, because he crossed a Baskerville; the sworn statement in the Baskerville trial that it was Curry, on November 25, 2003 and not Bergrin, that informed him that Baskerville was facing life in prison; and his blatant lies to law enforcement about Bergin's daughter Beth and how she was engaged in a sexual relationship with Curry and that Curry paid for Beth's college and automobile. It is inconceivable for anyone to credibly argue that they did not know that Young was committing perjury and offering false testimony.

All these proven lies, along with Davis' vociferous sworn testimony that Young was not the shooter, along with the recorded conversations of December 4, 2003; which to an absolute certainty prove that there was no meeting on December 4, 2003, as the government originally argued, prove Bergin's assertion that the government knew or should have known that Young was testifying falsely and that substantial prosecutorial misconduct took place.

The crystal clear statements and substance of the recordings, discovered by Bergrin subsequent to the verdict, wherein Bergrin informed Curry that Baskerville is only facing between 12 to 13 years incarceration, for his role in the offense, for which he was arrested for on November 25, 2003 and that the evidence against Baskerville (devoid of Kemo), is overwhelming, prove the *Napue* violations as Bergrin argued.

What is curious is how the government fails to set forth even one conversation, recording or independent witness to establish this contrived meeting with Bergrin. The government recklessly asserts the fact that the November 25, 2003 recording corroborates Young, in that Bergrin revealed the name Kemo and mistakenly mispronounced it as "Kamo." The reality of the situation is that Young could have received this information from anyone and, assuming arguendo, he was present during the telephone calls, between Curry and Bergrin, and did overhear this information, it has no bearing whatsoever nor material relevancy as to whether there was a meeting with Bergrin; wherein Bergrin informed anyone of anything Young alleged. The recordings unequivocally establish that Bergrin would not have stated that getting rid of Kemo will free Baskerville and that Baskerville was facing life in prison, if Kemo is around to testify. That is the seminal issue in the Kemo case that has been lost sight of and that gives rise to serious *Napue* concerns with Young's testimony.

The government in artfully submits that Bergrin was lying to Curry when he advised Curry, that Baskerville was only facing 12 to 13 years in prison(during the December 4, 2003 recorded

conversation, see Answer p. 11). If this is fact, then it establishes beyond any doubt, that Bergrin as THE ADVISER {*emphasis added*}, of the Curry Organization, as the government argued repeatedly (Tr. 14-15), and consistently and to which the Curry Organization relied (according to the government); then Bergrin made it clear that he did not want anything done to Kemo, because he assured Curry that Baskerville was only facing TWELVE (12), years. {Emphasis *added*}, and not life in prison as Young swore falsified. The government cannot deny the words on the recordings and there exists no other explanation. Henceforth, Bergrin proved his actual innocence and the government committed misconduct by knowingly permitting Young to swear falsely.

The government must accept the fact that Curry accepted and believed Bergrin's words as the recordings prove because Curry called Jarvis Webb on that same date. In a recorded conversation, Curry advised his trusted associate Webb that Baskerville was only facing 12 years. Curry and Webb are recorded agreeing that Baskerville will only have to spend about ten (10) years in prison, according to Bergrin.

The government again attempts to deceive the Court by arguing that, although there were 33,000 intercepted conversations, only a small fraction pertained to Bergrin. (Answer, P.8). This is absurd and defies logic. This was a conspiracy case and Bergrin was charged with accomplice liability; so potentially every conversation had relevance. Furthermore, none of the recordings depicted the parties to the conversations and were formatted in such a manner that each one had to be listened to, in order to determine the conversant, relevance and materiality.

There was no evidence that attorney David Ruhnke, whom was involved in the Bergrin case for the limited purpose of defending against the death penalty, ever possessed any recorded conversations nor ever listened to even one recording in this case. The government never provided the Curry recordings nor transcripts to Ruhnke. The government is fully aware of this fact, yet they argue otherwise. Ruhnke and Stand By Counsel, Lawrence Lustberg, relied upon representations made by Curry's investigators and attorneys, that there were no incriminatory conversations against Bergrin and that they should not waste their time listening to the Curry intercepted conversations. Henceforth, Bergrin detrimentally relied upon these representations and concentrated his preparation time on the thousands of pages of discovery and recorded evidence that the government sought to admit. The government's veiled attempts to twist and spin the truth is apparent in their baseless answer, page 8, and recitation of the Ruhnke letter; with no evidence to support Ruhnke possessing any Curry recordings or having listened to them.; other than a blanketed assertion by Rhunke that the recordings are devoid of any evidence that a meeting took place.

The Court considered the prosecutorial misconduct motion, so obviously it held that it was timely. Additionally, because Bergrin, in a time limited summation, did not re espouse and argue his position, relevant to prosecutorial misconduct, bears no weight on the merits of the issue. Bergrin vociferously argued the facts of how corrupt the government and their witnesses were and how the witnesses falsely swore, incessantly, during the course of the trial. Bergrin also informed the jury of the government's lack of investigation into knowingly false testimony and the witnesses and government's motivation to submit false testimony to the jury. Consequently, the government's ludicrous allegation that Bergin's failure to reassert these points during summation is an indication that they have no merit is absurd. (See Bergin's summation).

The government erroneously argued that Bergrin pleaded with the Court to remain at the MDC, Brooklyn and he should suffer any consequences of the dysfunctionality and corrupted recordings and further, that by going *Pro Se*, he waived any issues of not being provided discovery lacks any merit. As a matter of fact, it strikes at the heart of Bergrin's Sixth Amendment right to counsel and Fifth and Fourteenth Amendment Due Process rights; the exact arguments Bergrin has been imploring throughout the course of this brief, *to wit*, that the government disregarded Bergin's constitutional rights and trampled upon the Constitution.

Lastly and of utter importance, is the fact that the government blatantly lies in their Answer, at page 10, when they submit that they had additional corroborative evidence against Bergrin and in support of Young; and that was why they decided to prosecute Bergrin for Kemo's murder, in 2009.

Bergrin was indicted in May of 2009 for the Kemo murder. At the time Bergrin was indicted, there was not a shred of additional evidence against Bergrin, since 2005 and supportive of Young. The only two witnesses to the Kemo murder were Davis and allegedly Young, according to the government. Moran, Williams and Esteves had not even proffered yet. That is why there are so many errors of constitutional dimension here. The government wrongfully used the compounding of evidence and propensity arguments, in derivation of the law, to convict Bergrin.

For the aforementioned reasons Bergrin clearly and unequivocally established prosecutorial misconduct, in accordance with *Napue* and the progeny of cases delineated there from. The government suborned perjury and knew or should have known that their material witnesses against Bergrin testified falsely. Their misconduct was outrageous.

III. THE COURT'S FAILURE TO CONSIDER THE CONSTITUTIONAL MANGITUDE OF THE GOVERNMENT'S DELAY IN PROSECUTING BERGRIN TO GAIN A TACTICAL ADVANTAGE RESULTED IN A MISCARRIAGE OF JUSTICE.

The district courts failure to consider points three and four of Bergrin's motion for reconsideration, based upon manifest errors of law and fact or for the reason that it found that it did not contain newly discovered evidence, was erroneous. (Opinion, p. 4.). The government violated Bergrin's constitutional right to the due process of law, acted outrageously and unconscionably and the Court should have considered all arguments submitted to correct this miscarriage of justice.

Bergrin's motion for reconsideration was pursuant to Pre-Indictment delay based on outrageous government conduct and to obtain a tactical advantage in the trial. It is of constitutional dimension and was never waived by Bergrin. The magnitude of the issue did not arise until Bergrin was served and able to review the voluminous Jencks' material and it became blatantly apparent that the New York District Attorney's Office and federal government colluded together against Bergrin to achieve a tactical advantage.

United States v. Marion, sets forth the requirements to establish a due process violation. 404 *U.S.* 307, 322, 324. The facts surrounding the delay in indicting Bergrin as well as the massing of charges against him in the Superseding Indictment was specifically designed to accomplish just that.

Bergrin concedes that the prosecution has wide discretion in deciding to delay the securing of an Indictment, in order to gather additional evidence against an individual, but in the case sub judice, this was not what occurred; especially with the prostitution allegations. *U.S. v. Lovasco*, 431 *U.S.* 783, 790 (1977).

All facts, investigation, evidence and relevant information on the prostitution case had been obtained years (since 2005) prior to the Indictment against Bergrin. The only logical conclusion any objective analysis could draw and infer from the delay in the federal government initiating the Indictment against Bergrin was to entice him to plead guilty to the State charges and thereby, obtain an unfair tactical advantage in proving their case. The government acted in concert with New York authorities in offering Bergrin such a favorable plea offer, that no one would reject it and thus, they would benefit by establishing the proofs required for one of two predicate acts and the RICO charges.

Bergrin suffered substantial prejudice through the tactical delay in indicting his case, as the government had a plea of guilty to immoral conduct and had easily proven one of two predicate acts required to sustain a RICO conviction.

The government has the audacity to argue that there is no deviation from "fundamental conceptions of justice" when a prosecutor refuses to seek Indictment until he is completely satisfied that he should prosecute and establish guilt beyond a reasonable doubt. *U.S. v. Lovasco*, 431 *U.S.* 783, 790 (1977). What the government conceals and fails to enunciate, is the fact that no new evidence was discovered against Bergrin, for the majority of all charges brought, which would enable them to advance a logical argument and conclusion that the delay was not to obtain an unfair tactical advantage. The government merely asserts that the delay in seeking Indictment was to establish that Bergrin was operating a criminal enterprise. (Answer p. 13). This shallow argument is meritless as the government had already, according to their theory and alleged proofs, obtained the evidence to support their wrongful position. More importantly, the government is unable to recite even one fact proving this point because not an iota of evidence exists.

The loss of evidence due to the government's callous, misguided and outrageous delay was catastrophic to Bergrin's defense. If the government had not delayed the Kemo indictment, they would have Indicted Bergrin at the same time as Baskerville and Young would have testified that the incredulous meeting with Bergrin occurred three to four days after Baskerville's arrest; as he swore repeatedly before the trial jury, in 2007. Moreover, Bergrin's EZ Pass records would have been available and clearly proved that Bergrin was never in Newark, New Jersey during the period Young alleged, for the meeting. Additionally, Bergrin would have been able to establish a credible alibi for this time period and witness Stacey Williams, would have been alive to testify. He passed away in 2013. Williams would have sworn that, although he never saw the face of the shooter, he was able to determine that the shooter wore his hair in dreadlocks or braids; that the hair was shoulder length; that the shooter of Kemo never wore a New York Yankee hat; and other facts he failed to reveal to law enforcement because he was afraid to get involved.

The government cited the Shelton Leverett drug investigation as their poor excuse for the delay in Indicting and arresting Bergrin, in 2007. (See Answer page 14). This frivolous and contrived defense is meritless as the majority of the Leverett recordings had already taken place prior to the

period in question and Bergrin was released on bail within 24 hours from the date of the New York arrest and Indictment; and the government continued the investigation with Leverett.

For the aforementioned reasons Bergrin proved that the delay in his arrest on the New York case, with the collusion and urging of the government, as well as the government's failure to Indict him on the Kemo case, was to obtain an unfair tactical advantage in clear violation of established case law and his due process rights.

IV. THE GOVERNMENT ACTED OUTRAGEOUSLY AND VIOLATED THE RULES OF PROFESSIONAL CONDDUCY WHEN IT INTRUDED ON BERGRIN'S SIXTH AMENDMENT RIGHTS BY READING BERGRIN'S LEGAL AND INVESTIGATIVE CORRESPONDENCE WITH MEMBERS OF HIS DEFENSE TEAM IN ORDER TO ASCERTAIN TRIAL STRATEGY AND WORK PRODUCT.

The government submits in their Answer that it never intruded upon the attorney- client relationship of Bergrin and his defense team nor violated his Sixth Amendment rights because they never monitored the telephone and e- mail communications he had with Stand by Counsel, Lawrence Lustberg. They erroneously and meritlessly argue that the Filter team employed procedures that prevented both the Filter team and the trial AUSAs from reviewing any potentially privileged information. The Government stated that, "All reviews of e mails and other communications of Bergrin were done in accordance with established Department of Justice and Bureau of Prisons policies and procedures, utilizing a Filter team of agents and attorneys separate and distinct from the prosecuting team." "The filter team specifically set up a protocol so that communications between Bergrin and his stand by counsel were not reviewed by the filter team. Material was relayed to the prosecution team after the filter team insured that no attorney client communications were disclosed." They also provided as an exhibit a letter from AUSA Thomas Eicher, dated August 14, 2013 depicting this fact. (Answer, p.16).

The Government cites *United States v. Voigt*, 89 F. 3d 1050,1067 (3d Cir. 1996), and *U.S. v. Taylor*, 764 F. Supp. 2d 230, 236 (D.Me. 2011), thereby acknowledging and conceding that, although there is allegedly implied consent to the Prison monitoring communications from inmates, the attorney- client privilege and the Sixth Amendment of the United States Constitution is still applicable.

Initially, the Court must ask itself whether the Bureau of Prisons, which is part of the Department of Justice, has any right to even monitor communications that are privileged and constitutionally protected, beyond reasons concerning the security of the prison; and secondly, whether another Assistant United States Attorney, working in the exact same office as the trial prosecutors, with a working relationship to these same attorneys, whom socializes with them and wherein there is daily interaction on a high profile case, is an acceptable barrier to protect the constitutional rights of an accused, in a highly adversarial situation.

Most importantly, what the government neglected to ensure was that the privileged communications between Bergrin's investigative team, that collaborated with and/or worked under the supervision and guidance of Stand by Counsel, in a protected relationship and consisting of licensed attorney, Lavinia Mears, and State Licensed Private Investigator, Louis Steven's, was protected. As a matter of fact, the government unlawfully, wrongfully and in

contravention of Bergrin's constitutional rights seized and scrutinized the legal and work product conversations to the extreme prejudice and detriment of Bergrin. The magnitude of the prejudice Bergrin suffered cannot be accentuated enough. The government ambushed Bergrin's preparation of witnesses; ascertained defense strategies; prepared their witnesses for cross examination with information they learned through privileged communications; and obtained extraordinary tactical and strategic advantages, in the prosecution of their case. They were able to learn Bergrin's cross examinations of material and vital prosecution witnesses in advance of their testimony and learned of evidence that the investigators obtained as well as sought which would have crippled the government's case and impeded their theory of prosecution. Through the seizure of privileged communications, the government knew how Bergrin intended to strategically defend his case and what witnesses the defense intended to call.

The unlawful, unfair and wrongful acts of seizing privileged communications from and to Bergrin gave the government an unfair trial advantage and abused the detention status they sought against Bergrin; especially since the information they seized and obtained had nothing to do with the security of witnesses nor the prison. Through the receipt of highly privileged evidence and information, the government was also able to make the determination as to whether to call certain witnesses, and learned of evidence Bergrin's investigative team had secured, to impeach the credibility of material witnesses. Thus, they were able to prepare the witness for cross examination to the severe detriment of Bergrin.

Prosecutors knew which potential jurors Bergrin intended to peremptorily challenge so it could select a favorable prosecutorial jury. All of these matters and issues were discussed between Bergrin and his defense team from MDC, Brooklyn, New York and by use of the only communication devices made available to an inmate, the telephone and e-mail system.

Bergrin was never aware of these serious constitutional rights breaches until the defense case and the government's cross examination of witnesses. Most significantly, Bergrin was not aware of the extent to which the Government intruded upon his sixth amendment rights until he received the government's answer to the defense's supplemental motions. That is why the opportunity to Reply was so critical for this court to consider and why the Rules of Procedure expressly permit such a response.

Bergrin knew that his implied consent permitted the monitoring of Prison communications, but also believed that it was for security purposes only and that the government would be bound by their ethical and professional responsibilities; as well as protecting Bergrin's constitutional rights.

The government deliberately intruded into Bergrin's attorney- client privilege and one must conclude that Bergrin suffered immeasurable and substantial prejudice. It was another outrageous violation of Bergrin's due process rights by a government team that sought victory at all costs and clearly in violation of *Voigt*, Id. at 1050-1067 and *United States v. Cariello*, 536 F. Supp. 698, 702 (D. N.J. 1982).

CONCLUSION

It is for the aforementioned reasons that Bergrin asks this Court to grant Bergrin's Motion for Reconsideration, dismiss the Kemo counts with prejudice, and because of its taint, vacate the

verdict and order a new trial.

Respectfully Submitted,

/s/
Paul Bergrin

cc: S. Sanders, Esq., AUSA