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August 24, 2012

FILED & SERVED ELECTRONICALLY

Honorable Dennis M. Cavanaugh
United States District Judge
U.S. Post Office & Courthouse Building, Rom 451
P.O. Box 999
Newark, NJ 07101-0999

Re: United States v. Paul W. Bergrin
Criminal No. 09-369 (DMC)

Dear Judge Cavanaugh:

Please accept this letter, pursuant to the Court's Order of August 7, 2012, in lieu of more formal brief in response to the Government's Brief in Support of its Pretrial Motions (GB) filed August 21, 2012. For the reasons set forth below, and in the Brief in Support of Defendant Paul W. Bergrin's Pretrial Motions (DB) filed on the same date, Mr. Bergrin's pretrial motions should be granted and the Government's should be denied, except as set forth below.

Severance (Point I of the Government's Brief)

The Government first moves to try Counts 1 through 26 in a single trial.[1] Five reasons are set forth for doing so, each of which has already been addressed in Mr. Bergrin's brief, at least implicitly. *See* DB 2-23. Mr. Bergrin explicitly addresses those reasons here, without repeating his prior submission.

First, the Government contends that the Third Circuit's decision in *United States v. Bergrin*, 682 F.3d 261 (3d Cir. 2012) (*Bergrin II*), "strongly counsels against severing any counts." GB 16. The Court of Appeals, however, carefully eschewed any such counseling. To the contrary, at the conclusion of its opinion, the Court reiterated that it "d[id] not mean to imply that a district court is powerless in a RICO case to consider severance orders." 682 F.3d at 284 n.28. "On the contrary," the court stated, "as we said the first time we had this case, the District Court could appropriately 'discuss joinder and severance under Rules 8 and 14 of the Federal Rules of Criminal Procedure' when presented with the former iteration of the Indictment." *Id.* (citing *United States v. Bergrin*, 650 F.3d 257, 276 (3d Cir. 2010) (*Bergrin I*)). The Court of Appeals then specifically refused to "attempt to delineate" the contours of this Court's powers in that regard, *Bergrin II*, 682 F.3d at 284 n.28, directing this Court "to consider anew whether the Indictment should be severed in any respect." That inquiry, of course, proceeds under the familiar standards of Rule 14, which asks (in pertinent part) whether "the joinder of offenses …

[1] In so moving, the Government concedes that Counts 27 through 33, alleging the filing of false tax returns under 26 U.S.C. § 7206(1), are to be severed.

in an indictment … appears to prejudice a defendant …," in which case "the court may order separate trials of counts …," Fed. R. Crim. P. 14(a), a matter left, as Mr. Bergrin has always recognized, to the Court's "sound discretion." DB 2 (citing, *e.g.*, *United States v. Zafiro*, 506 U.S. 534, 539 (1993)).

Mr. Bergrin's brief sought to assist the Court to apply this standard and to exercise its discretion, painstakingly describing the prejudice at issue. DB 3-13. That prejudice flows from the very real, common-sense and "serious risk that a joint trial [will] compromise a specific trial right … or prevent the jury from making a reliable judgment about guilt or innocence." DB 3 (quoting *Zafiro*, 506 U.S. at 539). *See also United States v. Riley*, 621 F.3d 312, 335 (3d Cir. 2010); *United States v. Davis*, 397 F.3d 173, 182 (3d Cir. 2005); *United States v. Palma-Ruedas*, 121 F.3d 841, 853-54 (3d Cir. 1997); *United States v. Balter*, 91 F.3d 427, 432 (3d Cir. 1996). More specifically, as Mr. Bergrin set forth at length, trying the very serious charges contained in Counts Twelve and Thirteen along with the remainder of the Indictment risks convicting Mr. Bergrin based not upon the facts of the Kemo Murder Case, but upon otherwise inadmissible facts regarding other cases, and especially the far more extensive evidence of the so-called Esteves Plot. *See* DB 8, 11-12. The Government does not, in its brief, recognize that risk, or seek to apply Rule 14, as the Third Circuit required this Court to do. Instead, it essentially argues that the law of discretionary severance is different in the RICO context than elsewhere. But that is a proposition that the Third Circuit expressly refused to adopt.

Finally, the portion of the Third Circuit's decision in *Bergrin II* which the Government cites concludes that "if the government ever brings its RICO charges in this case to trial, it will necessarily introduce evidence of those murder plots to meet its burden of proof." GB 16 (quoting *Bergrin II*, 682 F.3d at 284). The passage is an interesting one, for it recognizes the possibility, discussed further below and in Mr. Bergrin's brief, *see* DB 13, that the RICO case may be avoided. That can happen if Mr. Bergrin is convicted and the Government, in its wisdom and desire for closure, determines that it is not in the public's interest to prolong this matter. And, if Mr. Bergrin is acquitted, then as he also argues, DB 13 and n.6, that evidence will not, as a matter of principles of double jeopardy and collateral estoppel, be admissible in the subsequent RICO case, an issue that was not before the Third Circuit.

Second, the Government argues that "courts routinely refuse to sever counts in RICO cases." GB 17. Of course, courts routinely deny severance counts in most cases, often because they are confronted with less-than-serious severance motions. And those decisions withstand appeal, as counsel conceded would likely occur here, *see* GB 18, precisely because the decision is a highly discretionary one even in the RICO context, as the Third Circuit makes clear in the primary authority upon which the Government relies, *United States v. Eufrasio*, 935 F.2d 553, 571 (3d Cir. 1991) ("it was within the discretion of the trial court to determine if the economies afforded by a joint trial of all of the charges against [the defendant] outweighed any potential for trial prejudice caused by joinder of the RICO and non-RICO counts"), *quoted in* GB 30. *See*

also, e.g., *United States v. Lore*, 430 F.3d 190, 205 (3d Cir. 2005) ("the choice of whether to sever defendants' trials rests in the sound discretion of the district courts"). But it does not follow that, as the Government expressly contends here, the "'heavy burden'" [borne by defendants in gaining severance] becomes insurmountable in RICO cases…" GB 17. That is, contrary to the Government's position, there is simply no *per se* rule prohibiting severances in RICO cases. Indeed, in both *Bergrin* opinions, the Third Circuit expressly recognized the very possibility of a severance that the Government does not. *Bergrin II*, 682 F.3d at 284 n.28; *Bergrin I*, 650 F.3d at 276. Nor is it the case, as the Government repeatedly intones, *see* GB 18, that severances of RICO from non-RICO counts are unprecedented. They are not. *See, e.g.*, *United States v. Burke*, 789 F. Supp. 2d 395, 400 (E.D.N.Y. 2011) (severing RICO charges from witness tampering charges, noting the risk of spillover prejudice from the RICO conspiracy because the proof required to sustain a conviction on the witness tampering charge substantially differed from the proof required for the RICO conspiracy, which alleged racketeering activities such as murder, drug trafficking, and robbery); *United States v. Paul*, 150 F.R.D. 696 (S.D. Fla. 1993) (ordering that non-racketeering offenses in which one of the two defendants was named as the sole defendant would be tried first, followed by a joint trial on the remaining counts, including two racketeering counts); *see also United States v. Cyprian*, 23 F.3d 1189, 1194 (7th Cir. 1994) (affirming conviction but noting that the trial court had decided to sever RICO counts from remaining charges in the indictment). One is appropriate and, contrary to the Government's position, certainly within the Court's discretion, here.

Third, the Government contends that "a substantial amount of the evidence offered to prove the RICO counts would be admissible in a stand-alone trial of any of the substantive counts." GB 18. Specifically, the Government argues that certain counts are "inextricably intertwined" with others, GB 18; that witnesses to some crimes were also involved in others, GB 19; that the witness tampering episodes are part of a pattern for RICO purposes, *id.*; and that the Pozo Plot and Esteves Plot provide evidence of Mr. Bergrin's intent with regard to the Kemo Murder. *Id.* This is not a surprising argument; Mr. Bergrin anticipated and addressed it at length in his moving brief. DB 13-30. But what is surprising is the Government's complete failure to answer the question that Judge Martini posed and that the Third Circuit understood, consistent with Rule 14, to be the crux of the matter: whether Mr. Bergrin may receive a fair trial on the Kemo Murder case, for which he faces mandatory life imprisonment without parole, if that case -- based as it is on demonstrably weak evidence -- is tried along with the remaining counts in the Indictment. Indeed, the Government's severance argument barely touches on this question: only one of its four bullet points purporting to establish that the "evidence offered to prove the RICO counts would be admissible in a trial of any single substantive count," GB 18, even addresses the admissibility of other acts evidence in a stand-alone trial of Counts Twelve and Thirteen, and with regard to that one -- that "the Pozo Plot and the Esteves Plot prove Bergrin's intent to murder Kemo," GB 19 -- the Government's submission does not, at least in connection with its severance opposition, even purport to address the requirements of Federal Rule of Evidence 403, though the Government had to know that this would be the focus of Mr. Bergrin's submission.

On this motion, defendant Bergrin has sought to establish and has established one single point: that he cannot receive a fair trial for the Kemo Murder -- a trial in which the jury will decide his fate based only upon evidence relevant and admissible on that charge, without risking a verdict based upon criminal disposition, so that it will in fact make "a reliable judgment about guilt or innocence," *Zafiro*, 506 U.S. at 539 -- if that case is tried jointly with the remainder of the Indictment. *See* DB 5-13. The Government's cursory showing fails to persuade that he can.

Fourth, the Government conclusorily contends that "limiting instructions are sufficient to guard against any risks posed by a single trial on Counts 1 through 26." GB 19-20. Of course, Mr. Bergrin anticipated this boilerplate, but truly quixotic, argument as well. DB 4-5, 8, 10. Leaving aside the numerous cases previously cited by the defense for the proposition that juries cannot always, in the words of the Third Circuit, "follow the court's instruction to ignore information," *United States v. Lee*, 573 F.3d 155, 163 (3d Cir. 2009), *cited in* DB 4, and should not even be presumed to be able to do so, *see Greer v. Miller*, 483 U.S. 756, 766 n.8 (1987), *cited in* DB 4, the time has come to be practical. Does the Government really believe, as it contends, that in this case, limiting instructions "'will suffice to cure any risk of prejudice'"? GB 19 (quoting *Zafiro*, 506 U.S. at 539). As dubious as that proposition would be in a stand-alone trial of the Kemo Murder Case, where a Court would be required to give an appropriate limiting instruction if it allowed evidence under Federal Rule of Evidence 404(b), *see, e.g.*, *Bergrin II*, 682 F.3d at 278 (citing *United States v. Green*, 617 F.3d 233, 249 (3d Cir. 2010)); *see also Huddleston v. United States*, 485 U.S. 681, 691-92 (1988),[2] it is even more absurd in the context of the RICO case, where the jury would likely have to be instructed with regard to nearly every piece of evidence that (1) it is admissible to prove certain substantive allegations, but (2) with regard to other charges, it is admissible for such limited purposes as to prove a RICO pattern or to satisfy the requisites of 404(b), and (3) with regard to still other counts, it is completely inadmissible.

No juror will be able to comprehend, let alone apply, such instructions or, as the D.C. Circuit put it, "perform such mental gymnastics." *United States v. Daniels*, 770 F.2d 1111, 1118 (D.C. Cir. 1985). To put it another way, a jury simply cannot be "reasonably expected to compartmentalize the allegedly prejudicial evidence in light of the quantity and limited admissibility of the evidence." DB 4 (quoting *United States v. Charles*, 432 F. App'x 57, 60 (3d Cir. 2011) (quoting *United States v. DePeri*, 778 F.2d 963, 984 (3d Cir. 1985))). The risk, then, of a verdict that is based upon impermissible evidence of criminal disposition, by a jury that was unable to "segregate the evidence as to each count," *United States v. Torres*, 251 F. App'x 763,

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[2] The Government contends that "[b]y adverting to limiting instructions, the Third Circuit reiterated that severance is not required even if this Court deems evidence proving one witness-tampering plot inadmissible to prove another." GB 20, citing *Bergrin II*, 682 F.3d at 281-82 n.25. But surely, the *Bergrin II* Court did not mean to repudiate *sub silentio* the well-established Supreme Court and Third Circuit jurisprudence cited by Mr. Bergrin which holds that Courts must actually assess whether such instructions will be effective. *See* DB 4.

764 (3d Cir. 2007) (citing *United States v. Weber*, 437 F.2d 327, 332 (3d Cir. 1970)), is simply too great to permit -- not in every RICO case, but in the unique circumstances of this matter, in which the Kemo Murder Case carries such high stakes and is supported by such weak evidence. That case simply must be tried alone.

In truth, to give credit where it is due, the Government recognizes this problem, and candidly casts jury instructions as simply a "less drastic" but more economical and efficient alternative to the multiple trials that a severance will engender. GB 19. In particular, the Government again focuses, as it repeatedly does, on the delay inherent in having two trials rather than one, insisting that such "delay is unacceptable given the significant concerns for witness safety." GB 20. It supports this concern by citing the decision detaining Mr. Bergrin without bail. *Id.* (citing *United States v. Bergrin*, Crim. No. 09-369, 20090 WL 1560039, at *5 (D.N.J. May 29, 2009)). But, of course, Mr. Bergrin's detention was designed to address this issue and, to the extent it was necessary at all, has apparently succeeded in doing so. For more than three years now, including during a lengthy trial, there has not been a single reported instance of a witness being threatened or harmed. The Government's concern then appears fanciful, but in any event, does not justify the "serious risk" that Rule 14 is designed to remedy. *Zafiro*, 506 U.S. at 539. *See also* DB 12 (citing *United States v. Desantis*, 802 F.Supp. 794, 802-03 (E.D.N.Y. 1992)). Indeed, as Mr. Bergrin argues, severed trials even hold the promise of enhanced, rather than compromised efficiency. DB 12-13. That said, even if that is not the case, the benefit of a fair trial, and all that such a trial will say about the legitimacy of our system of justice in general and the outcome of this high-profile case in particular, far outweighs the modest imposition that two trials rather than one would engender.

Fifth and finally, the Government argues that "conducting a single trial will prevent Mr. Bergrin from again misleading the jury." GB 21. Specifically, the Government contends that last time, Mr. Bergrin "unfairly exploited the severance to mislead the jury …" GB 21. Of course, the Government cites no authority -- since there is absolutely none -- for the proposition that the Court should deny a severance on the basis of a presumption that Mr. Bergrin will open the door to otherwise inadmissible evidence. Indeed, elsewhere in its brief, the Government proposes a number of steps, far short of denying Mr. Bergrin a fair trial (as a severance would do) in an effort to assure that Mr. Bergrin does not overstep. *See* GB 31-36 (regarding testifying in opening and summation),[3] 37-39 (regarding mentioning military service and representation of

[3] Throughout its submission, the Government expresses frustration that Mr. Bergrin did not testify in his trial, such that he would have been subjected to cross-examination. *E.g.*, GB 31, 45. Given the weakness in the Government's proofs, it was not surprising that he did not testify. Indeed, this fact gives rise to yet another reason for severance. Given the disparity in the proofs between the Kemo Murder trial, on the one hand, and the Esteves Plot on the other, to which Mr. Bergrin has pointed, *see supra* at 2; DB 11, Mr. Bergrin might very well wish to tesify as to the latter but not the former. This too is a powerful basis for severance, *see, e.g.*, *United States v. Sampson*, 385 F.3d 183, 193 (2d Cir. 2004), *cert. denied*, 544 U.S. 924 (2005); *Cross v. United States*, 335 F.2d 987, 989 (D.C. Cir. 1964); *United States v. Best*,

police officers and soldiers), 40-43 (regarding use of FBI 302s), 51 (regarding performing a new *Faretta* inquiry[4]). Mr. Bergrin presumes that this Court will properly rule on those potential measures and fully implement them where appropriate. Should he open the door to otherwise inadmissible evidence, for example, he knows the consequences that will befall him; Judge Martini simply found that that had not occurred the last time. *See, e.g.*, Tr. (10/19/11) at 4-5, 64-67, 221-22 (various attacks on government's case did not open door to evidence of other crimes); Tr. (10/24/11) at 12-25 (attacks on witness credibility for failure to implicate Mr. Bergrin during early stages of cooperation did not open door to otherwise inadmissible evidence of other misconduct by Mr. Bergrin corroborated by those witnesses); Tr. (10/15/11) at 60-68, 89-91 (attacking witness credibility did not open door to all criminal activity with that witness); Tr. (11/7/11) at 88, 109-113 (comments did not open the door and evidence adduced at trial supported Mr. Bergrin's good faith basis for raising issues of witness credibility during opening statements). The notion that Mr. Bergrin will nonetheless act so as to lose the benefit of the severance for which he is fighting so hard should certainly not be presumed. Nor is it a basis for denying an otherwise necessary and appropriate severance under Rule 14.

In fact, many of the examples cited by the Government are not in any way related to whether they came in a joint or severed trial. For example, Mr. Bergrin's statements that he was acting as Baskerville's attorney, or that he was "framed" by the Government, would be as appropriate or inappropriate in a joint trial as in a severed one. And his cross-examination of Abdul Williams, in which, according to the Government, he "stressed that Williams had waited until his fifth proffer session with the Government to mention his April 2007 conversation with Bergrin regarding the Kemo murder," legitimately questions whether Williams withheld that information (a matter that goes to its credibility) regardless of what was said in the earlier proffer sessions. With regard to his other statements -- for example, his remark that "he would never counsel a drug-dealing client like Pozo to murder a cooperating witness," Judge Martini considered whether it had opened the door to additional proofs and concluded that it had not. A3870-A3879. The Government disagrees, but that disagreement does not provide any basis for the denial of a severance. That severance is required so that, consistent with the Government's stated goal of obtaining a trial that is "a search for the truth," GB 22, Mr. Bergrin receives a trial that in fact ascertains whether he committed the offenses alleged in Counts Twelve and Thirteen,

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235 F. Supp. 2d 923, 929 (N.D. Ind. 2002), assuming Mr. Bergrin makes the showing that the cases require, *see, e.g.*, *Baker v. United States*, 401 F.2d 958, 977 (D.C. Cir. 1968) ("[I]t is essential that the defendant present enough information -- regarding the nature of the testimony he wishes to give on one count and his reasons for not wishing to testify on the other -- to satisfy the court that the claim of prejudice is genuine and to enable it intelligently to weigh the considerations of 'economy and expedition in judicial administration' against the defendant's interest in having a free choice with respect to testifying."), as he will certainly do when given the opportunity at the hearing scheduled for September 12, 2012.

[4] *Faretta v. California*, 422 U.S. 806, 821 (1975).

untainted by otherwise inadmissible evidence that will someday be used to prove other crimes. Mr. Bergrin's motion for a severance should be granted.

404(b) (Point II of the Government's Brief)

The Government moves under Federal Rule of Evidence 404(b) to admit five categories of "other crimes" evidence in a trial of the Kemo Murder Case. GB 23-30. Mr. Bergrin has already moved to preclude three of those categories of proof as inadmissible under Rule 404(b), Rule 403 or both. *See* DB 15-30. He here responds briefly to the Government's motions with regard to those categories of proof and addresses -- very briefly, since these matters were fully briefed before the last trial and were not the subject of the Government's appeal -- the other issues re-raised here.

First, the Government moves to admit evidence of the Pozo Plot, arguing, in essence, that the Third Circuit already decided the issue. GB 24-25. As Mr. Bergrin argued, however, it did not. DB 24. Rather, the Court of Appeals expressly left to this Court the Rule 403 balancing that Mr. Bergrin urges. *Bergrin II*, 682 F.3d at 284 n.29. The Government argues that such balancing is a foregone conclusion, based upon certain language in the Third Circuit's Opinion. GB 25. But, of course, were that the case, then the Court of Appeals would not have made clear twice in its Opinion, including in its final footnote, that "the new judge may well be asked to determine the admissibility of the Pozo Plot evidence with respect to the Kemo Murder Counts and will, in that event, need to conduct an appropriate Rule 403 balancing." 682 F.3d at 285 n.29. *See also id.* at 281 n.25 ("We … leave it to the new judge to whom this case will be assigned to conduct his or her own balancing under Rule 403 if the government again seeks to prove the Kemo Murder Counts using evidence of the Pozo Plot.").

Mr. Bergrin has here requested exactly that Rule 403 balancing, and has argued that the balance tips in favor of excluding the evidence for two reasons: first, because "there is an overwhelming likelihood that the jury will use evidence that Mr. Bergrin allegedly advised Pozo to kill the witness in his case to convict him of the Kemo Murder charge based on the inference that he has a propensity to commit such crimes, rather than because of any evidence that he actually was involved in the McCray's murder," DB 24; and second, because, given how hotly disputed the evidence will be, "evidence of the Pozo Plot will devolve into a mini-trial on an issue that is truly collateral to the essential question of whether Mr. Bergrin in fact conspired to commit the murder of Kemo McCray." DB 25. Neither of these issues are addressed in any way by the Third Circuit's Opinion, even as interpreted by the Government. To be sure, the Court of Appeals held the Pozo Plot evidence to be "highly probative," 682 F.3d at 280, and rejected Judge Martini's determination that it would be confusing. *Id.* But it did not address either of the concerns here articulated by Mr. Bergrin in his motion, just as the Government has not. The analysis set forth in Mr. Bergrin's brief establishes why the Pozo evidence should be excluded.

Second, the Government argues that the Esteves Plot evidence is admissible for two reasons. As it articulates them, first, "it provides critical context to Bergrin's admission that he has 'done this before,' (*i.e.*, murdered witnesses for a client), thus allowing a jury to infer that Bergrin was referring to Kemo." GB 26. And second, "the Esteves Plot demonstrates that when Bergrin uses the term 'no witness, no case,' he means 'murder the cooperating witness.'" *Id.* As Mr. Bergrin demonstrated in his moving brief, neither of these bases renders the evidence sufficiently probative to justify the extraordinary -- and completely unfair -- prejudice that would be engendered by evidence that the Government would admit, were it candid, is meant to prove that because he was engaged in a plot to kill a witness five years later, he must have been involved in the Kemo Murder Plot five years before.[5] *See* DB 23 (citing, *e.g.*, *United States v. Murray*, 103 F.3d 310, 318-19 (3d Cir. 1997) ("It should go without saying that evidence in a murder trial that the defendant committed another murder poses a high risk of unfair prejudice."). *See also Bergrin II*, 682 F.3d at 281 n.25 (quoting Judge Martini's finding that, even with proper jury instructions, "I don't see how [the jury] could humanly put that out of their mind and … weigh the rest of this case accordingly").

Indeed, the probative value of the Esteves Plot evidence in the Kemo Murder case is slight indeed. The Government's first contention, that it provides context for an alleged statement by Mr. Bergrin to Esteves that "this is not the first time I've done this," ignores that, as Judge Martini correctly found, "[t]he admissions that Bergrin allegedly made are too vague to be or great probative value -- indeed, Bergrin does not mention the K.D.M. murder specifically, but only alludes in general terms to some past act of indeterminate nature." A13. Indeed, the Government's argument that this statement necessarily referred to the Kemo Murder is ironic, given its persistent contention that Mr. Bergrin was engaged in a pattern of such witness tampering, including during the period between the two incidents. *See, e.g.*, GB 26-27. Thus, the statement itself lacks sufficient probative value to warrant its introduction at all, let alone to require that it be contextualized through the introduction of *all* of the Esteves Plot evidence. Moreover, although the Third Circuit requires that the Government show a "genuine need" for the evidence based upon, *inter alia*, the absence of other evidence to the same effect, *see, e.g.*, *United States v. Sriyuth*, 98 F.3d 739, 748 (3d Cir. 1996); *United States v. Scarfo*, 850 F.2d 1015, 1019 (3d Cir. 1988), the prosecution has never explained why, in order to explain why Mr. Bergrin would make this statement to Esteves, it needed to prove anything other than their attorney-client relationship, rather than presenting all of the facts of the Esteves Plot.

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[5] In so arguing, Mr. Bergrin does not argue that the Esteves Plot is inadmissible as 404(b) evidence simply because it came later. Indeed, the Third Circuit's decision forecloses this argument. *Bergrin II*, 682 F.3d at 281 n.25. But he does contend that the length of time -- five (5) years -- between the Kemo Murder and the Esteves Plot bears upon the probative value of the latter. *See* DB 20 n.8 (citing cases). Indeed, the Government's accusation to the contrary notwithstanding, GB 27, Mr. Bergrin has *never* argued that the Esteves Plot evidence had no probative value simply because it came later. Rather, it always opposed the introduction of this evidence as part of a comprehensive Rule 404(b) analysis, including a 403 weighing. *See, e.g.*, C303-312.

Likewise, Mr. Bergrin's alleged "no witness, no case" statement to Esteves is, as Mr. Bergrin has already argued, an insufficiently distinctive turn of phrase to constitute signature 404(b) evidence. DB 18-21 (citing cases). And, while the Third Circuit has made clear that the jury must consider Mr. Bergrin's intent in saying "No Kemo, no case," even though Mr. Bergrin's defense is that he did not in fact say those words, 682 F.3d at 280 n.24, the probative value of the alleged statement in the Esteves Plot is decreased by the fact that the meaning of that phrase really is not key to Mr. Bergrin's defense.[6] That probative value is far outweighed by the devastating effect of this evidence in a case that should, after all, be about whether Mr. Bergrin in fact conspired to murder Kemo McCray.

Third, the Government again seeks to admit evidence of Mr. Bergrin's involvement in a cocaine distribution conspiracy "to infer Bergrin's motive to tamper with and murder Kemo: to prevent Baskerville from turning on Curry, who was in a position to turn on Bergrin." GB 29. Mr. Bergrin anticipated and directly addressed this argument in his moving brief, DB 26-30, and the Government's one-paragraph argument fails to sustain its burden, as proponent of this evidence. *See United States v. Mitchell*, 365 F.3d 215, 240 (3d Cir. 2004) ("Rule 104(a) places the burden of proof on the proponent of the evidence....") (citing *Bourjaily v. United States*, 483 U.S. 171, 175 (1987)); *see also United States v. Himelwright*, 42 F.3d 777, 782 (3d Cir. 1994) (with regard to Rule 404(b), "the proponent must clearly articulate how that evidence fits into a chain of logical inferences, no link of which may be the inference that the defendant has the propensity to commit the crime charged."). To the contrary, as Mr. Bergrin showed in his brief, the drug-conspiracy evidence adduced at the first trial was never, in any way, connected to the Kemo Murder. It failed to show motive because there was and is no evidence that Mr. Bergrin profited from the single incident at issue (in which he is alleged to have introduced "Changa," a wholesale cocaine distributor, to Hakeem Curry, a retail distributor) or even continued to play any role with regard to that relationship after the initial introduction. Nor was Changa alleged to be involved in any way with the Kemo Murder, while Curry, who was, was readily tied to Bergrin through many other means. DB 28 n.11. In sum, evidence of this meeting -- the only

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[6] The Government misquotes the Third Circuit's Opinion in this regard, stating that the Court of Appeals "accepted the Government's argument that 'intent is *the* key issue in' the Kemo Murder case." GB 23 (emphasis added). In fact, in the footnote cited by the Government, the Court said that "intent was *a* key issue in the case." (emphasis added). It certainly was not "the" key issue with regard to the Mr. Bergrin's alleged "No Kemo, no case" statement, which is the specific purpose asserted by the Government in seeking the admission of the Esteves Plot proofs. GB 26. Indeed, the passage cited by the Government discusses not the Esteves Plot, but the Pozo Plot, which could, at least arguably, shed light, as the Third Circuit pointed out, on Mr. Bergrin's "purpose in telling Curry who the witness against Baskerville was." *Bergrin II*, 682 F.3d at 280 n.24.

purported evidence of drug dealing prior to the Kemo Murder -- failed to shed any light on the Kemo Murder case, failing not only Rule 404(b) and Rule 403, but also Rule 401.[7]

Finally, the Government, in single paragraph arguments, seeks to admit evidence of all of the other witness tampering episodes alleged in the Second Superseding Indictment to prove *modus operandi*, as well as all of the proofs underlying Counts 17-26 of that Indictment to prove the relationships between Mr. Bergrin and Messrs. Moran and Williams, "to show why Mr. Bergrin confided in Moran and Williams and to explain why they are testifying for the Government." GB 28-29. These arguments were fully addressed by Mr. Bergrin prior to trial, C255-C265, C307-C309 (regarding *modus operandi* evidence, showing that they were too different from the Kemo Murder case to constitute a "pattern"), C265-C268, C309-C311 (regarding context evidence, showing, *inter alia*, that the amount of context evidence that the Government sought to introduce was far greater than necessary to explain these relationships), and the Court agreed. *See* A9-10 (regarding common scheme evidence), A11-13 (regarding context evidence). The Government appealed from none of these rulings and they were not addressed in the Third Circuit's Opinion or mandate. Accordingly, they are not now properly before the Court, *see* DB 14-15 n.7, and, as the Court made clear at the August 7, 2012 status conference, should not have been raised. The Government's motion should be denied.

Bergrin's Opening (Points III, IV, VII and IX of the Government's Brief)

The Government raises several points which are, in their essence, addressed to Mr. Bergrin's *pro se* status. It seeks to prevent him from "testifying" during his opening and summation, but at the same time, seeks to introduce the statements he did make as false statements, going to his consciousness of guilt. It wishes the Court to preclude him from mentioning his military service. And it seeks to conduct a new *Faretta* inquiry, in light of the relief it anticipates that the Court will order in response to these applications. For the convenience of the Court, Mr. Bergrin responds to these motions together.

First, the Government accuses Mr. Bergrin of testifying during his opening and summation at the first trial of this matter. GB 31-36 (Point III). He did not. Each of his remarks to the jury, and all of those discussed by the Government in its brief, were, as required, his good faith predictions of what he expected the evidence at trial would show. *See infra* at 14 n.9. The Government states, without any possible basis, that his statements were "unsworn assertions to the jury that he had no intention of proving through competent evidence and without subjecting himself to cross-examination." GB 31. But this is simply incorrect. Each and every assertion was one that Mr. Bergrin intended to prove, through legitimate means. And if he proved to be wrong, that should have been to the Government's great advantage, insofar as it could point out,

[7] To the extent that the Government seeks to admit evidence of Mr. Bergrin's alleged drug dealing after the Kemo Murder, such evidence obviously cannot establish his motive, which is the purported basis for its admissibility.

in summation, that Mr. Bergrin had failed to make good on his promises, thus undermining his credibility and strengthening the prosecution case. Indeed, the Government knows this well -- it sought to do just this (without objection) during the first trial, criticizing Mr. Bergrin when he did not make good on his opening. A4050, 4147 (summation of AUSA Minish); A4372-76, A4379-81 (rebuttal summation of AUSA Gay).

The examples cited by the Government prove the point. Thus, for example, the Government argues that Mr. Bergrin's cross-examination of Agent Brokos regarding the Government's investigation of Roderick Boyd was improper because he "had no intention of subpoenaing the declarant [Mr. Boyd]." GB 32. This is simply false -- although the Government would have no way of knowing it, Mr. Bergrin, having received a pertinent FBI 302 that provided the good faith basis for his questioning, in fact attempted to serve Mr. Boyd with a subpoena, though he failed to do so. His assertion that he would never counsel a drug-dealing defendant as he allegedly did Mr. Pozo was a matter that he intended to establish through his cross-examination of Mr. Pozo himself -- whose testimony was, at the time, anticipated to be forthcoming.[8] And, as discussed below, both the evidence regarding his military background and that addressed to his expectation about what the actual sentencing exposure that Mr. Baskerville faced for a hand-to-hand drug sale (far less than life) were matters that are in fact admissible and that, in particular with regard to the latter, he sought to adduce. *See infra* at 13, 16-17.

The Government seeks a range of measures to prevent Mr. Bergrin from testifying without taking the stand. GB 35. Many are unobjectionable to Mr. Bergrin, who is, by this motion, already forewarned. He does not, for example, oppose the Court reminding him that he cannot testify without taking the stand or warning him about the potential waiver of his Fifth Amendment rights should he do so. Others must await the course of events, including argument in the specific context of what occurs. For example, whether he should be admonished in the presence of the jury, whether particular statements should be stricken, as well as far more extreme examples, including whether the Government should have the right to comment on his failure to testify, or at the far extreme, whether his *pro se* status should be revoked, are all matters that will, of course, depend upon what actually occurs in the courtroom.

One issue should, however, be addressed now. The Government seeks to preclude Mr. Bergrin "from speaking in the first person in opening statements, when questioning witnesses, and in summation." GB 35. The inefficiency, awkwardness and confusion that will be occasioned by Mr. Bergrin referring to himself as "Mr. Bergrin" or "the defendant," for example, would seem to outweigh the benefits of such a requirement, in a trial which is, after all, about

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[8] Mr. Bergrin recognizes that his turn of phrase "I would never say that," A692, potentially opened the door to the evidence of the Esteves Plot. But, as discussed above, the Court considered whether it had done so and determined it did not. *See supra* at 6. That said, Mr. Bergrin will be more careful not to repeat this mistake the next time around.

Mr. Bergrin's actions. Indeed, those benefits, as described in the case upon which the Government relies in seeking this relief, *United States v. Sacco*, 563 F.2d 552, 556 (2d Cir. 1977), flow mainly to co-defendants; that is, the court's opinion in *Sacco* was meant to avoid or minimize the prejudice to co-defendants arising from a joint trial with a *pro se* co-defendant. *See also United States v. Brown*, 227 F. App'x 795, 799-800 (11th Cir. 2007); *cf. United States v. Joiner*, 418 F.3d 863, 869 (8th Cir. 2005) (use of the term "we"). And, in any event, the courts have made clear that barring the use of the first person in a joint trial is, in any event a "suggestion[] not [a] requirement[]." *Brown*, 227 F. App'x at 800; *United States v. Oglesby*, 764 F.2d 1273, 1276 (7th Cir. 1986) (describing "suggested precautionary measures" and declining to make them mandatory). The Court should, for reasons derived from common sense and plain speaking, decline that request here.

Nor should the Government be permitted to introduce Mr. Bergrin's remarks to the jury as false exculpatory statements, as it seeks to do. GB 46-48 (Point VII). Specifically, the Government seeks to introduce "Bergrin's assertion that he knew William Baskerville was not facing a substantial amount of prison time, and Bergrin's assertion that he would never counsel a drug-dealing client like Pozo to murder a cooperating witness" which it terms "demonstrably false factual assertions," contending that "[b]y making such false assertions in an effort to avoid liability for his actions, Bergrin betrayed a consciousness of guilt, which is relevant and admissible in the forthcoming trial." GB 46. The Government further claims that if "engaging in conduct before trial" evidencing consciousness of guilt is admissible, "then false statements by Bergrin at trial which sought to mislead the jury are evidence of consciousness of guilt, as well." GB 46.

Unfortunately for the Government, its proposal is flatly contradicted by the Third Circuit's model criminal jury instruction on "Consciousness of Guilt (False Exculpatory Statements)," which expressly limits proof of consciousness of guilt to false statements made pretrial, outside the courtroom, and prohibits such evidence with respect to a defendant's statements at trial. That Instruction states:

> You have heard testimony that *(name of defendant)* made certain statements outside the courtroom to law enforcement authorities in which *(he)(she)* claimed that *(his)(her)* conduct was consistent with innocence and not with guilt. The government claims that these statements are false. If you find that *(name of defendant)* made a false statement in order to direct the attention of the law enforcement officers away from *(himself)(herself)*, you may, but are not required to conclude that *(name of defendant)* believed that *(he)(she)* was guilty. It is reasonable to infer that an innocent person does not usually find it necessary to invent or fabricate an explanation or statement tending to establish *(his)(her)* innocence. You may not, however, conclude on the basis of this alone, that *(name of defendant)* is, in fact, guilty of the crime for which *(he)(she)* is charged. You

> must decide whether or not the evidence as to *(name of defendant)* shows that *(he)(she)* believed that *(he)(she)* was guilty, and the significance, if any, to be attached to this evidence. In your evaluation, you may consider that there may be reasons -- fully consistent with innocence -- that could cause a person to give a false statement that *(he)(she)* did not commit a crime. Fear of law enforcement, reluctance to become involved, or simple mistake may cause an innocent person to give such a statement or explanation.

Third Circuit Model Criminal Jury Instruction 4.31 (Consciousness of Guilt (False Exculpatory Statements)). As noted by the Comment to that instruction, "The instruction states that the false statements were made outside the courtroom. This language is particularly important if the defendant testifies at trial, as the instruction would not be appropriate to cast doubt on the defendant's testimony at trial. *United States v. Clark*, 45 F.3d 1247, 1251 (8th Cir. 1995)." As the court stated in *Clark*:

> The government's case included evidence that Clark gave false exculpatory statements to investigators following his arrest. Clark also testified at trial, and the jury obviously did not believe him. *The false exculpatory statement instruction is aimed at pretrial fabrications*, on the theory that the innocent do not fabricate to avoid being accused of crime. That theory *does not apply to a defendant's trial testimony*. While adverse inferences will inevitably be drawn from disbelief of a defendant's trial testimony, this instruction is not appropriate every time the government casts doubt on a defendant's testimony. Thus, we are somewhat concerned that the district court's instruction was not clearly limited to Clark's pretrial false exculpatory statements.

Clark, 45 F.3d at 1251 (citation omitted) (emphasis added).

As set forth above, the assertions relied upon by the Government, with regard to Baskerville and Pozo, *see* GB 32-33 (citing A665 and A691-92), were made during the course of Mr. Bergrin's opening statement, and as such did not constitute "factual assertions" at all but were instead trial arguments of counsel about what the evidence would show. And during trial, Mr. Bergrin did in fact elicit evidence to support his statement during opening argument that Baskerville was not likely to face life in prison because he had only been charged with hand-to-hand sales of small amounts of drugs. Mr. Bergrin conducted extensive cross-examination of Anthony Young on this topic, challenging Young's claim that it was Mr. Bergrin rather than Hakeem Curry who informed Young that Baskerville was facing life imprisonment, and asking Young whether he had been told by Baskerville's brothers that the judge at Baskerville's court appearance had said that Baskerville had only been charged with a five- to 40-year offense, not one carrying life imprisonment. A2877-78; A2933-A2947; A2968-69. And of course, at the time of Mr. Bergin's October 17, 2011 opening argument, it was anticipated that trial evidence

would focus on the topic of the other statement from Mr. Bergin's opening argument that the Government seeks to admit -- concerning whether Mr. Bergrin told Pozo to murder a cooperating witness -- because Judge Martini had ruled pretrial that Pozo's testimony was admissible under Rule 404(b), before excluding Pozo's testimony on November 8, 2011. To the extent that Mr. Bergrin makes the same arguments about what the evidence will show during opening in this trial, the Government is free, of course, to introduce contrary evidence, and to argue in summation that the evidence showed Mr. Bergrin's arguments to be false, and if Mr. Bergrin were to testify, to argue that "adverse inferences" should "be drawn from disbelief of a defendant's trial testimony." *Clark*, 45 F.3d at 1251. But because the statements that the Government seeks to admit were arguments of counsel, which of course are not evidence[9] or factual assertions, they are not admissible as evidence of false exculpatory statements showing consciousness of guilt.[10]

Nonetheless, even if the Court were to accept the Government's characterization of these statements as Mr. Bergrin's "[t]estifying [i]n [h]is [o]pening [s]tatement" (GB 31-33; *see also* GB 21 ("Bergrin in his *pro se* opening statement testified…")), they would be inadmissible for that reason as well, because as the Third Circuit model instruction expressly states, it "would not be appropriate to cast doubt on the defendant's testimony at trial" under the theory that they were allegedly false exculpatory statements showing consciousness of guilt. *Id.* (citing *Clark*, 45 F.3d at 1251, which stated that the basis for admitting such evidence -- *i.e.* the theory "that the innocent do not fabricate to avoid being accused of crime" -- "does not apply to a defendant's trial testimony").[11] As the model instruction confirms, statements by a defendant during trial testimony are utterly unlike the sort of pretrial conduct cited by the Government as admissible

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[9] Third Circuit Model Criminal Jury Instruction 1.07 ("The opening statements are simply an outline to help you understand what each party expects the evidence to show. What is said in the opening statements is not itself evidence.").

[10] In *United States v. Durham*, 139 F.3d 1325, 1331-32 (10th Cir. 1998), which the Government describes as "affirming 'instruction on false exculpatory statements, which this court allows to prove consciousness of guilt,'" GB 47, the court actually held that where the statements at issue were "essentially denials of the [conduct] charged in the indictment," it was "error to give a false exculpatory statement instruction" because the "jury can only find an exculpatory statement false if it already believes other evidence directly establishing guilt" which creates a "circularity problem" and thus the instruction given was "faulty" (though harmless error). So too here, Mr. Bergrin's statements constituted denials of aspects of the charged conduct, and the only way that the jury could find them false is if it believes the Government's evidence establishing guilt, thus creating the very same "circularity problem."

[11] While the statements that the government seeks to admit were made before *this* trial, they nonetheless were made "at trial" and are not the type of statements "made outside the courtroom" contemplated by the instruction.

evidence of consciousness of guilt such as "flight, threatening a witness, subornation of perjury, and the like." GB 46 (quoting *United States v. Dittrich*, 100 F.3d 84, 86-87 (8th Cir. 1996)).

Thus, the out-of-circuit cases cited by the Government, GB 46-48, are readily distinguished, because unlike the statements made by a *pro se* defendant at trial, the courts in those cases -- consistent with the Third Circuit's consciousness of guilt instruction -- admitted evidence about defendants' *pretrial* conduct. *See United States v. Burrous*, 147 F.3d 111, 117 (2d Cir. 1998) (evidence of throwing cash out of a window); *United States v. Wilson*, 11 F.3d 346, 353 (2d Cir. 1993) (evidence of false identification); *Dittrich*, 100 F.3d at 86-87 (evidence of "bribing another person to take the blame for the crime charged"); *United States v. Deutsch*, 451 F.2d 98, 115 (2d Cir. 1971) (documentary evidence showing evasive conduct aimed at concealing an investment transaction); *United States v. Macklin*, 927 F.2d 1272, 1279 (2d Cir. 1991) (evidence that defendant attempted to bribe witness not to testify); *United States v. Perkins*, 937 F.2d 1397, 1402 (9th Cir. 1991) (pretrial statements to FBI agent). *See also United States v. Hart*, 273 F.3d 363, 373-374 (3d Cir. 2001) (not cited by the Government) (consciousness of guilt instruction warranted where defendant concealed evidence of crime from auditors).

Similarly, *United States v. Kemp*, 500 F.3d 257 (3d Cir. 2007), *cited at* GB 48, involved pretrial conduct, *i.e.*, grand jury testimony by the defendant, which of course occurs before a defendant is accused in an indictment. *Kemp* is thus consistent with the Model Instruction, which allows evidence of a defendant's false "statements outside the courtroom to law enforcement authorities … *in order to direct the attention of the law enforcement officers away from (himself)*" (emphasis added), and *Clark*'s statement that "[t]he false exculpatory statement instruction is aimed at pretrial fabrications, on the theory that the innocent do not fabricate *to avoid being accused of crime*," *id.*, 45 F.3d at 1251 (emphasis added). But *Kemp* does not trump the model instruction Comment's statement that it is inappropriate to use the consciousness of guilt theory to "cast doubt on the defendant's testimony at trial," *after* a defendant has been accused of a crime. Finally, the Government has not claimed, nor could it at this point, that Mr. Bergrin will say something at this trial inconsistent with the statements from the prior trial, and thus *United States v. McKeon*, 738 F.2d 26, 31-33 (2d Cir. 1984) (cited by the Government at GB 47), admitting an attorney's opening statement in a first trial against his client on retrial because of a change in defense, is irrelevant, at least currently. In sum, because statements made during an opening argument at trial are simply not admissible as false exculpatory statements showing consciousness of guilt, the Court should not permit the Government in this trial to introduce Mr. Bergrin's statements during his opening argument in the prior trial as proof of consciousness of guilt.

Next, again criticizing Mr. Bergrin's opening statement, the Government seeks to bar Mr. Bergrin from referring to or offering evidence that is relevant and probative of his innocence of the charges at issue, specifically the details of his service in the military, and his legal

representation of police officers and soldiers. GB 37-39 (Point IV). As set forth above, Mr. Bergrin understands that his opening statement must be a good faith prediction of what the evidence will show. He will carefully adhere to the rules in that regard. But actual evidence that Mr. Bergrin may wish to present to the jury of his background as a military officer, should he seek to admit it, may be relevant to a number of disputed factual issues in the case.

Thus, as just a few examples, Mr. Bergrin may wish to introduce evidence that his military background led him to instruct Ramon Jimenez and Yolanda Jauregui that because his firm aggressively represented clients and challenged the Government, they must always conduct their practice entirely above board, which Jimenez vowed to do; that Mr. Bergrin's work in the Abu Ghraib case required him to be absent from his practice at the time of illegal activities by Jimenez and Jauregui; and that Albert Castro was aware of Mr. Bergrin's military background and retained Mr. Bergrin because of it.

Moreover, Mr. Bergrin may, of course, submit evidence of pertinent traits of his character, such as his peacefulness and nonviolence, his general law-abiding nature, honesty, and commitment to the pursuit of justice, because a criminal defendant "can bring in evidence of good character to show that he is not the type of person who would have committed [the] offense charged." 1 McCormick on Evidence § 187, at 746. As stated in one of the cases that the Government cites, "a defendant 'may introduce affirmative testimony that the general estimate of his character is so favorable that the jury may infer that he would not be likely to commit the offense charged.' … '[S]uch testimony alone … may be enough to raise a reasonable doubt of guilt.'" *United States v. Washington*, 106 F.3d 983, 999 (D.C. Cir. 1997) (quoting *Michelson v. United States*, 335 U.S. 469, 476 (1948)). This evidence may properly include testimony related to Mr. Bergrin's military background and representation of police officers and soldiers.

Even more fundamentally, evidence of Mr. Bergrin's military service may properly be admitted as background evidence. *See Government of Virgin Islands v. Grant*, 775 F.2d 508, 513 & n.7 (3d Cir. 1985) ("During the course of a trial, it is customary for the defendant to introduce evidence concerning his background, such as information about his education and employment. Such evidence is routinely admitted without objection," though noting that "the line between background evidence and character evidence is blurred" and if introduced to show good character, background evidence may open the door to rebuttal); *United States v. Blackwell*, 853 F.2d 86, 88 (2d Cir. 1988) ("The testimony concerning Blackwell's service in the Marine Corps and his completion of two years of college was properly received as background. It told the jury something about the defendant as a person, and his experience in life.").

Finally, evidence of Mr. Bergrin's prior acts that angered the Government, such as his testimony in the defense of police officers in contravention of the United States Attorney's instructions while he was employed as an Assistant United States Attorney, his subsequent successes as a defense attorney after he left the United States Attorney's Office, and the position

he took in the Abu Ghraib prisoner-abuse scandal as a defense attorney, are crucial to Mr. Bergrin's defense theory of prosecutorial vindictiveness. Since it is Mr. Bergrin's burden to prove prosecutorial vindictiveness before this Court, *United States v. Reynolds*, 374 F. App'x 356, 361 (3d Cir. 2010), *cert. denied*, 131 S. Ct. 289 (2010), the exclusion of this crucial evidence would entirely deprive Mr. Bergrin of a complete defense. In presenting that defense, Mr. Bergrin must be permitted to offer evidence to either show that the prosecution has an actual retaliatory motive or demonstrate that a "realistic likelihood of 'vindictiveness'" exists here. *United States v. Paramo*, 998 F.2d 1212, 1220 (3d Cir. 1993) (citation omitted), *cert. denied*, 510 U.S. 1121 (1994).[12]

In sum, Mr. Bergrin's background, including his service in the military, and his legal representation of police officers and soldiers, is relevant and admissible, if he decides to present it, and thus is properly a part of his opening statement. The Government's application to bar it should therefore be denied.

Finally, the Government, anticipating that the above rulings will go in its favor, wishes the Court to conduct a new *Faretta* colloquy with Mr. Bergrin, to assure that, even in light of these rulings, he nonetheless wishes to proceed *pro se*. GB 51 (Point IX) (citing, *e.g.*, *Faretta*, 422 U.S. at 821). Leaving aside that that request presumes what the Court's rulings will be, and although Mr. Bergrin is unshakably determined to proceed *pro se*, he is happy to address any concerns that the Court might have and to respond to its inquiries at any time.

Cross-Examination (Points V and VI of the Government's Brief)

The Government raises two points regarding Mr. Bergrin's cross-examinations during the first trial. First, it complains about the way in which Mr. Bergrin conducted cross-examination using FBI 302s. And second, it seeks to curtail Mr. Bergrin's cross-examination of Albert Castro, a key Government witness, whose credibility was decimated during the first trial. For the convenience of the Court, Mr. Bergrin addresses these claims together.

Mr. Bergrin understands the Government's position with regard to his use of 302s, which focuses primarily on his questioning witnesses regarding why an FBI report says that the witness

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[12] Prosecutorial vindictiveness may still exist even where a different prosecutor or United States Attorney is involved now than when Mr. Bergrin testified for the defense in a case brought by the United States Attorney's Office, represented the American soldiers in the Abu Ghraib prisoner-abuse scandal, and secured countless acquittals for his clients after his career as a prosecutor. *See Thigpen v. Roberts*, 468 U.S. 27, 31 (1984) (indicating that (1) because the presumption of vindictiveness may "reflect[] 'institutional pressure that … might … subconsciously motivate a vindictive prosecutorial … response[,]' … it does not hinge on the continued involvement of a particular individual[,]" and (2) one district attorney may not be any less vindictive than the one before him because actions of a prosecutor are "actions by 'the State,' rather than 'the prosecutor'" (citations omitted)).

said something different than what the witness now testifies he said. GB 42. The Government states, and Mr. Bergrin agrees, that he must show witnesses their reports and ask them if, in fact, they made the statements set forth therein. *Id.* Should they say no, Mr. Bergrin may clarify whether they are saying they did not make the statement or that they do not recall. If the latter, Mr. Bergrin may refresh their recollection under Federal Rule of Evidence 612; if the former, then, as the Government suggests, Mr. Bergrin will simply "call[] the FBI agent who had compiled the report." GB 42 (quoting *United States v. Marks*, 816 F.2d 1207, 1211 (7th Cir. 1987)). Though less efficient, perhaps, than the way he was doing it, Mr. Bergrin agrees with the Government's reading of the Rule; he also believes that this may occur less during the second trial where, instead of 302s, he may be able to rely upon the actual sworn statements of witnesses at the first trial, which will, of course, be the witness's "prior statement" within the meaning of Federal Rule of Evidence 613(a). *See* GB 40 (arguing that FBI 302 is not a witness's own statement).

The Government also seeks to bar Mr. Bergrin from eliciting testimony from key Government witness Albert Castro regarding his efforts to dissuade Mr. Castro from blaming his daughter for his drug offenses, as he admitted he sought to do; Mr. Bergrin also opened on the subject, based upon his good faith belief that this is what the evidence would show. *See supra* at 6. This was a matter that was fully briefed and argued at trial and decided by the Court adversely to the Government. *See* A2286-2306. Moreover, the Court's decision was correct: Castro could not invoke the attorney-client privilege because clients who deliberately seek the advice of counsel in order to facilitate a future or continuing crime lose the benefit of that privilege. *In re Grand Jury Investigation,* 445 F.3d 266, 274 (3d Cir. 2006); *In re Impounded*, 241 F.3d 308, 316 (3d Cir. 2001) (crime-fraud exception applies to otherwise protected communications intended "to further a continuing or future crime or tort"). Indeed, the exception definitively applies "when a client knowingly seeks legal counsel to further a continuing or future crime." *United States v. Doe*, 429 F.3d 450, 454 (3d Cir. 2005). That, of course, is precisely what Mr. Bergrin sought to show through the cross-examination of Castro -- that Castro sought to use Mr. Bergrin and the legal process to obstruct justice, including falsely placing the blame upon his daughter for his criminal activity and falsely accusing police officers of stealing money from him.[13] Mr.

[13] Beyond the application of the crime-fraud exception to these circumstances, it is also the case that, far from being absolute, the attorney-client privilege must give way when necessary for the attorney to defend himself, especially against the accusations of a client. *United States v. Weisberg*, No. 08-CR-347, 2011 U.S. Dist. LEXIS 37221 at *12-13 (E.D.N.Y. April 5, 2011). *See also United States v. Bilzerian*, 926 F.2d 1285, 1292 (2nd Cir. 1991) (attorney-client "privilege may implicitly be waived when defendant asserts a claim that in fairness requires examination of protected communications"); *Tasby v. United States*, 504 F.2d 332, 336 (8th Cir. 1975) ("Surely a client is not free to make various allegations of misconduct and incompetence while the attorney's lips are sealed by invocation of the attorney-client privilege."). *See generally Swidler & Berlin v. United States*, 524 U.S. 399, 408 n.3 (1998) (suggesting that exceptional circumstances implicating a criminal defendant's constitutional rights may warrant breaching the privilege). Here, Castro's statements were sufficiently critical to the Government's case

Bergrin's cross-examination is for the permissible purpose of impeaching a critical witness and not for the impermissible purpose cited by the Government. GB 45. It must be allowed.

Reference to the Outcome of the First Trial (Point VII of the Government's Brief)

The Government requests an Order barring both parties from referring to the outcome of the previous trial. GB 49-50. Mr. Bergrin agrees and consents to the entry of such an Order, limited, as the Government proposes, to the outcome of the trial, but not precluding appropriate references to it -- for example, in the course of cross-examination of witnesses. *See, e.g.*, *United States v. Giovanelli*, 945 F.2d 479, 487 (2d Cir. 1991), *cited in* GB 49. *See also United States v. Blackshear*, 313 F. App'x 338, 343 (2d Cir. 2008) ("An attorney may 'seek to impeach a witness by eliciting that he or she testified differently regarding a material matter at a prior trial, [but] it is well within the discretion of the trial judge to disallow any testimony as to the outcome of the prior trial, where that information would be prejudicial.'") (quoting *United States v. Wilkerson*, 361 F.3d 717, 734 (2d Cir. 2004)).

Additional Motions (Point X of the Government's Brief)

The Government appropriately seeks leave to file additional motions, as issues arise. GB 52. Mr. Bergrin has moved for similar relief, necessitated not only by developments as they occur, but by the short time frame allowed for these motions. DB 38. Like the Government, Mr. Bergrin has "endeavored to include in [his] brief as many motions as possible." GB 52. There may well be others. He joins in the Government's application in this regard.

Thank you for your kind consideration of this submission.

Respectfully submitted,

/s/ Lawrence S. Lustberg
Lawrence S. Lustberg
Standby Counsel for Defendant Paul W. Bergrin

LSL/leo

cc: Steven G. Sanders, Assistant U.S. Attorney
Paul W. Bergrin

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that Mr. Bergrin should not be deprived of the ability to effectively impeach him by placing these statements off-limits during cross-examination.