PRELIMINARY STATEMENT

The breadth and magnitude of the Constitutional errors in the trial of United States v. Paul Bergrin, is extraordinary. This motion for post-conviction relief will clearly and unequivocally establish that Bergrin never received a "fair trial" based upon deliberate, knowing and intentional conduct by the government and the prosecution sought victory at any and all costs.

Each and every point delineated in this petition invokes violations of either the Fifth, Sixth, Eighth, or Fourteenth Amendments, of the United States Constitution and makes it ripe and permissible in this forum. Most importantly, the violations harmed and prejudiced the Petitioner's constitutional rights and detrimentally impacted his verdict. Consequently, under no circumstances could they be considered "harmless errors." Brecht v. Abrahamson, 507 U.S. 619, 623, 113 S. Ct. 1710, 1714, 123 L. Ed. 2d 353, 363 (1993). Additionally, the deliberate and serious errors that follow this statement, combined with the pattern of prosecutorial and judicial misconduct, will warrant reversal of Petitioner's convictions. Kotteakos v. United States, 328 U.S. 750, 66 S. Ct. 1239, 90 L. Ed. 1557 (1946). Brecht, id., at 638, n. 9.

Petitioner will conclusively prove that a Fundamental Miscarriage of Justice occurred in this case and this Honorable

Court is being implored to reverse the convictions and halt this travesty of justice.

Most importantly, Petitioner submits that each ground-point contains the factual and legal evidence clearly delineating violations of the constitutional right to due process of law, as espoused in Amendment's Five, Six, Eight and Fourteen of the United States Constitution; collectively and as viewed in their totality they overwhelmingly mandate complete reversal of Petitioner's convictions. It is impossible to argue that the errors were either harmless, invited or that only some of the charges/ counts should be reversed. The magnitude of the errors and extraordinary prejudice Petitioner endured in this trial usurps and contravenes the right to a fair trial, which encompassed all counts in the Indictment.

A motion for a new trial pursuant to R. 33 is due to be filed by appointed counsel shortly. Because the 18 U.S.C. §2255 deadline to file is before the R. 33 motion filing, Petitioner makes this court aware that he has additional grounds of actual evidence which are not detailed in this Petition. Petitioner may be required to supplement this petition to more specifically state the specific facts and new evidence which support these grounds should they not be before the court in the R. 33 motion.

I. BERGRIN'S CONSTITUTIONAL RIGHTS TO DUE PROCESS OF LAW WERE CLEARLY VIOLATED WHEN "USE IMMUNITY" WAS DENIED AND/OR NEVER OFFERED TO SEMINAL DEFENSE WITNESSES, THAT WOULD HAVE EITHER EXCULPATED BERGRIN OR EVISCERATED THE CREDIBILITY OF THE GOVERNMENT'S WITNESSES.

This is not a motion pursuant to whether judicial immunity should have been offered material defense witnesses, whom either asserted their Fifth Amendment Constitutional right against self-incrimination, or had it wrongfully asserted for them, by the District Court. The magnanimous issue pertains to the infringement of Bergrin's constitutional right, to the due process of law.

A. The Kemo Case

The uncontroverted facts establish that the sole and exclusive witness against Bergrin in the Deshawn McCray (Kemo) murder case was one Anthony Young (Young).

On March 2, 2004, Kemo was shot three times at approximately 2:00pm and in the area of South 19th Street and South Orange, Newark, New Jersey. His stepfather and employer, Johnny Davis (Davis), was present and in such close proximity to the shooting that he actually felt powder burns on his neck.

At the scene of the shooting, law enforcement interviewed Davis and he unambiguously described the shooter as being a

dark-skinned black male with shoulder length dreadlocks. It was conclusively proven that Young had a bald head on this date. During the course of the homicide investigation, leads evinced that the shooter may have been one Malik Lattimore (Lattimore); an individual known to be a dangerous "hit man" and associated with one William Baskerville (Will).

Will had been arrested on November 25, 2003 for making six (6) hand to hand sales of crack cocaine to Kemo and the motive for killing Kemo was his betrayal of Will.

Davis reiterated his description of the shooter in a sworn homicide statement, on the date of the shooting and several months later was shown a six (6) photo array of homicide suspects wherein he identified Lattimore as Kemo's murderer. Moreover, within 48 hours of his son's murder, Davis was shopping at a local area convenience store where he had a confrontation with Lattimore, who threatened him against being a witness. Davis was absolutely certain as to Lattimore being the person who confronted him and killed Kemo and he executed a photo of Lattimore to a defense investigator writing the words he was 1000% positive of this identification. Most importantly, he was shown a photo of Young and he was 1000% sure that he was not the shooter.

Approximately fourteen months subsequent to Kemo's murder and on January 13th, 2005, Young telephonically contacted the

Federal Bureau of Investigation (FBI) alleging he had knowledge of the Kemo murder. The FBI was intricately involved and extremely interested in this case, as Kemo was an FBI informant and one of the witnesses in the prosecution of Will. Will had made multiple hand to hand sales to Kemo of crack cocaine which were recorded, videoed and under law enforcement surveillance. The drug trafficking evidence independent of Kemo was both overwhelming and incriminating.

1. ***Young's Numerous Lies and Inconsistencies in Proffers Sessions and in Three Trials.***

Young was interviewed multiple times by agents of the FBI over approximately a year period and gave multiple versions which were diverse and inconsistent as to Kemo's murder. It must also be accentuated that Young was a violent career criminal with an extensive criminal history and was facing federal weapons charges under the "trigger lock" statute. He alleged that he sought FBI protection against Jamal McNeil (McNeil) and Jamal Baskerville (JB) whom he alleged fear of retaliation.

Young swore that McNeil and JB had killed an innocent female victim during a shoot-out in Irvington, New Jersey, had confided in him and he in turn informed his girlfriend Rashida Tarver (Tarver). There was no evidence ever presented of this Irvington killing and Tarver denied ever being so informed.

Young also asserted that Tarver told Baskerville's family, resulting in his fears.

Young's version of the Kemo murder initially had McNeil being the shooter. As a matter of fact, Young positively identified a photo of McNeil as Kemo's murderer and was willing to testify at trial, under oath, to this fact, even if it meant McNeil receiving the death penalty. Young's second version was his absence from the scene completely and his third, to which he finally testified at trial, was that he was the shooter.

Will was not only indicted for the hand to hand drug offenses, in November 2003, but in 2005 indicted for Kemo's murder. He would proceed to trial on these matters in 2007. Bergrin was the only other person also prosecuted for Kemo's death and he proceeded to trial in both 2011 and 2013; the first trial had resulted in a hung jury-mistrial.

Despite Young's inconsistencies, incredulousness and dichotomous versions, and him being the only witness against Bergrin, the government pressed forward.

The government relied upon Young's statements and testimony that on November 25, 2003, the date of Will's arrest for drug dealing with Kemo, Bergrin contacted Will's cousin Hakeem Curry (Curry), while Young and Rakeem Baskerville (Rakeem) were seated in Curry's auto and advised them of the charges against Will.

Additionally, Bergrin informed them that the hand to hand sales by Will were made to an individual named "Kemo".

Upon receiving this information Young swore at Will's trial in 2007 that he and Rakeem determined that the informant was Kemo and that he, Young, decided to get rid of or kill Kemo, because he crossed a Baskerville. Young also testified in 2007 that Curry informed him Will was facing life in prison for his drug sales. Young would later completely change his testimony as to Rakeem being in the car, his testimony of deciding to get rid of Kemo on November 25, 2003 for crossing a Baskerville and as to whom informed him that Will was facing life in prison.

Young further swore at the 2007 trial that four (4) to five (5) days subsequent to Will's arrest, he was present at a meeting, at approximately 8pm, on Avon Avenue, Newark, N.J. with McNeil, JB, Curry and Rakeem when Bergrin drove up and spoke to them. According to Young, Bergrin advised the group that they had to kill Kemo or Will would get life in prison and never come home; that without Kemo the government had no case and before Bergrin left he uttered the infamous words, "No Kemo, no case."

It must be understood that despite his 2007 testimony, at Bergrin's trials in both 2011 and 2013, Young's new version was that it was Bergrin whom for the first time advised the group (the same individuals), that Will was facing life in prison, that Bergrin never used words to kill Kemo and said words to the

effect that if Kemo was not a witness then Will would go free as Bergrin would win the case; and that Bergrin stated, "No Kemo, no case."

At Bergrin's trial Young completely changed the dates of this meeting to on or about December 4, 2003, the date of Will's detention hearing that Rakeem was never in the auto and he never decided to get rid of Kemo as he swore in 2007. The inconsistencies in Young's testimony between Baskerville and Bergrin's trials were glaring.

In 2007, Young testified Deidre Baskerville (Deidre), Will's wife, was present at a meeting on November 25, 2003 (Trial 4343), as well as Curry, Al Hanif Baskerville, McNeil and JB, to discuss Will's arrest. He excluded her at Bergrin's trial in 2011, (Tr. 10-27-11 at 122-129).

In 2007, Young testified he learned about Will's arrest through Rakeem and Deidre (Tr. 4341); but in 2011 he alleged Rakeem informed him. (Tr. 122).

In 2007, Young was absolutely certain that on November 25, 2003, when Bergrin called, Rakeem was in Curry's car with him (Tr.3450-55) and it was he and Rakeem that collectively determined the FBI informant was Kemo. But, in 2011, it was Jamal Baskerville and not Rakeem in the car.

In 2007, Young supposedly learned from Curry on November 25, 2003, that Will was facing life in prison (Tr. at 4358-

4359), but in 2011 it was four to five days after Will's arrest , he learned for the first time when Bergrin showed up at the street meeting at 8pm on Avon Avenue in Newark, that Will was facing life. (Tr 138-41). A date he would deny and swear the meeting was now not four to five days post arrest, but on or about the date of the detention hearing, December 4.

At trial in 2007, Young said it had not been determined who would kill Kemo if he was located, (Tr. at 4362-63), but in 2011 he testified that it was he who decided to kill Kemo after meeting with Bergrin, four to five days after Will's arrest. (Tr. At 147).

In 2007, Young swore that Bergrin told a group of people, including McNeil and J.B., that "if Kemo was dead, that Will Baskerville would definitely come home from jail [,] " (Tr. at 4361), in 2011 Young admitted Bergrin never said, "If Kemo was dead." In fact Young emphasized that Bergrin "didn't say 'dead' at all." (Tr. at 175-179).

There was an inordinate amount of inconsistencies and when defense could factually prove through objective evidence and records Young was being deceptive, his testimony mysteriously changed; especially after government preparation sessions. McNeil and JB were essential witnesses to this proceeding and against Young. Their testimony would have proven that the

exclusive government witness against Bergrin, in the Kemo case, was fabricating his testimony.

2. The Government Blocks the Defense's Only Witness from Testifying who Would Have Refuted Young's Claims.

Bergrin subpoenaed J.B. and McNeil to his trials; especially in 2013 when it was evident that neither of these individuals would ever be charged or tried in the Kemo case and that Young's testimony was unreliable. Furthermore, any evidence of their drug dealing was beyond the statute of limitations and the investigation into Kemo's murder closed.

The government went through great lengths to intimidate and coerce J.B. to assert his Fifth Amendment right and not testify. In 2011, at Bergrin trial one, and while J.B. and his family were seated in court, Assistant United States Attorney, John Gay vehemently demanded that J.B. be provided counsel and informed of his rights against self-incrimination; even though no active investigation was pending against him and it had been 8 (eight) years since Kemo's murder.

Instead of requesting J.B. leave the courtroom, and/or a side bar, Gay argued that the government may still indict J.B. for murder and that he must be given his rights and a counsel appointed to represent him. This was despite J.B. being placed under oath, while agreeing to testify and vociferously asserting

he did nothing wrong, was innocent and had nothing to hide. He ardently swore he knew nothing about Kemo's murder. The government had also been provided a sworn statement from J.B. exculpating Bergrin, denying there was any meeting wherein Bergrin made the statements Young swore and, as a matter of fact, J.B. denied ever meeting or speaking to Bergrin. Subsequent to Gay's statement, and appointment of counsel, J.B. declined to testify. He took the same position in 2013.

B. The Government Continues to Block the Defenses' Witnesses.

During Bergrin's trial in 2013, the Court, after vigorous objections by defense as to any defense witness having a Fifth Amendment Right, and Bergrin unequivocally and categorically imploring that the subpoenaed witnesses testify, the Court appointed Criminal Justice Act attorney's for every defense witness. Most importantly, the government had pleaded with the Court to appoint counsel, instruct the witnesses of their rights against self-incrimination under the Fifth Amendment and falsely proffered how each of the witnesses may still be prosecuted.

In spite of vehement defense objections, the court not only appointed counsel for J.B., McNeil and Jose Bracero, but also for Michael Lopez, Jason Nieves and Edward Peoples. The court never even questioned these critical witnesses, had them sworn and determined if they had Fifth Amendment rights. Most

appallingly the court ex-parte and sua sponte spoke to appointed counsel in chambers out of defense presence and merely delineated on the record that these witnesses will not be testifying but asserting their Fifth Amendment privileges; thereby stunning the defense, destroying any chance to present exculpatory evidence vindicating Bergrin and trampling important constitutional rights.

Not only would J.B. and McNeil (who had only given a detailed and signed sworn statement denying ever meeting Bergrin and being involved in the Kemo murder); but Lopez, Nieves, People's and Bracero were all interviewed by defense and would have exculpated Bergrin on the remaining material charges. (See tr. 7652-8314).

Defense was so adamant in its position that none of these witnesses had a right to the self-incrimination privilege that it argued: "The government is saying that they think that there's a theory by which they're incriminating themselves. You know we don't- that's not our view based upon the facts…We believe that they're people who have relevant evidence and they should provide it. You know, the Court can, based upon the testimony that they give, stop the proceedings if it wishes and advise them of their Fifth Amendment rights. But until you hear what they have to say, for Mr. Gay to just say that he thinks they have, you know, concerns regarding." (Tr. 7653-7654).

It was apparent that those witnesses would detrimentally affect the government's case and the prosecution fought vigorously to stymie their testimony. It is apparent that Gay was making meritless assertions, as not one defense witness was ever charged with any wrongdoing.

Bergrin personally pleaded and cried out to the court as to the importance of all these witnesses and how their testimony was crucial to him receiving a fair trial." Judge, the prosecution obviously wants to keep witnesses off the stand- no, please let me finish, ok?

Obviously they're trying to chill these proceedings and keep the truth from coming out and keep people from on the stand…

And all these witnesses have come forth with extremely vital material evidence, your honor." (Tr. 7656). All the arguments were to no avail as the government had to keep the witnesses from testifying at all costs.

C. The Court Denies Bergrin's Request for a Continuance as the Marshall's are in Route Transporting Witnesses Who Would have Refuted Abdul Williams' Testimony.

Bergrin was indicted for drug trafficking and one of the most critical witnesses for the government was cooperator Abdul Mutallic Williams. Williams, a career criminal, was facing life

in prison on his charges. Devoid of Williams's testimony, Bergrin avers he would have been acquitted of all drug charges. The government also attempted to use Williams' testimony, in accord with Fed. R. Evid. 404(b), in the Kemo murder case.

Bergrin had two crucial witnesses, Syed Rehman and Drew Rahoo. Both were intimately close with Williams and were interviewed by defense investigators.

Both these witnesses, whom have absolutely no relationship to or with Bergrin, would have testified that Williams schemed, connived and planned with them his cooperation and collectively schemed the fabrication of testimony against Bergrin; in order for Williams to receive the benefits of a cooperating plea agreement.

Both witnesses would have testified that Bergrin is innocent of drug trafficking and that Williams testimony was false, contrived and schemed. These witnesses had absolutely no right to assert any testimonial privilege, as they were serving sentences in federal prison and their cases concluded. Without any hearings, testimony being taken, questioning and over vehement defense objection, the court speculated that Rehman and Rahoo may assert their privilege against self-incrimination, refuse to testify and, consequently the Judge precluded them as witnesses.

The issue also considered by the Court was whether a one-day delay, for the Marshall's to procure the witnesses appearances was necessary. No hearings were held, the substance of the witnesses' testimony never taken and the magnitude of the exculpatory nature of their testimony ignored.

Moreover, both witnesses would have testified as to the wrongful influences attorney Richard Roberts had on Williams' cooperating, as Roberts was retained by Williams and consulted and advised him extensively.

Bergrin's investigator, a retired and former agent for the FBI, had interviewed both witnesses and assured their willingness to testify. (See Tr. 8308). Despite all these delineated and espoused facts, the Court trampled upon Bergrin's rights to due process and this prejudiced and influenced the case inordinately. The court and government were both aware of how vital Rehman and Rahoo were to the interests of justice, but this was ignored.

D. The Allegations in the Esteves' Case

Lastly, Bergrin was indicted for the conspiracy and attempted murder of a government witness, travel act violations and received an extraordinary sentence due to this fact. The government clearly accentuated those facts of the case, opened

with it and relied upon the recordings to prejudice Bergrin. There were recorded conversations with key witness Oscar Cordova and the words, without explanation, were very damaging to Bergrin.

There existed evidence that the recordings were tampered with by an eminent expert, James Reames, which the court disallowed.

Most importantly, the government used a cooperating witness named Maria Correia to develop their investigation. During the course of the investigation, the FBI learned that Correia had stolen informant funds, approximately $20,000 provided to her and that she was engaging in an intimate sexual relationship with Cordova.

Despite these extraordinary circumstances and the fervent exculpatory evidence Correia also developed, that Cordova was concealing, destroying and unjustifiably removing exculpatory evidence against Bergrin; which would have severely damaged the government's case against Bergrin and destroyed these allegations against him. Correia knew that Cordova had failed to reveal evidence of Bergrin's knowledge that Cordova was a government informant, thereby proving Bergrin would not commit crimes with the "known" informant. Additionally, Correia had first-hand knowledge Bergrin was innocent of any drug trafficking, that Cordova had destroyed exculpatory recordings

and of rampant and blatant government misconduct. Bergrin had provided a synopsis of Correia's testimony to both the court and the government.

The court and government also know that Correia, along with attorney Richard Roberts, had coached a witness, Albert Castro, to commit perjury against Bergrin and to falsely cooperate. This evidence would have crippled the integrity of the government's case and Bergrin had subpoenaed Correia to testify, through the Marshall's service; as the government had changed Correia's name to Grace Cruz and hidden her in New Orleans, Louisiana.

What is also indisputable is that Correia had committed additional crimes of credit card, identity and bank fraud, while acting as an informant for the government and that the prosecution held these charges open, as leverage against Correia now revealing the truth and she remained unsentenced; even though she was no longer a cooperator and had been discharged as a cooperating witness for almost two years.

As Correia travelled from Louisiana to Bergrin's trial in Newark, New Jersey and was within 48 hours of testimony, defense was informed by Correia's attorney that she would be exercising her privilege against self-incrimination and refusing to testify. No hearings were held, no query whatsoever and the court made it clear to an absolute certainty that it would

neither grant immunity nor compel the government to grant any witness "use immunity". Furthermore, and most importantly, the government profusely fought the testimony of every witness espoused infra and would not grant immunity to any defense witness. They were charged with winning at any and all costs, and justice, the truth seeking process and the constitution never considered, as part of the equation.

ARGUMENT

Pursuant to statutory authority, the prosecution may compel a witness to testify by granting "use immunity". (See 18 U.S.C. § 6002-6003 (2006)), authorizing grants of immunity to compel testimony before federal courts, grand juries, US agencies and Congress. Use immunity prevents the prosecution from using any direct testimony or evidence derived against the witness in a subsequent prosecution. Kastigar v. U.S., 406 U.S. 441, 462(1972). Prosecutor's grant of use immunity leaves the witness and the government in substantially the same position, as if the witness had claimed the 5th Amendment right, U.S. v. Hubbell, 530 U.S. 27, 37 (2000).

Henceforth, the government's lame excuse that they are not granting immunity because they want to preserve the option of prosecuting these parties in the future is baseless. There existed no viable justification for trampling upon Bergrin's due

process rights and the constitution. It was inequitable, wrong and for this reason alone, the case requires reversal.

The prosecution must as a matter of law grant immunity as broadly as a witness asserts their 5th Amendment right. U.S. v. Balsys, 524 U.S. 666, 682 (1998), Peiffer v. Lebanon School District, 848 F. 2d 44, 46-47 (3d Cir. 1988).

This honorable court must be extremely concerned as to why the government refused, in each circumstance. Only one conclusion can be objectively reached and that is because the testimony would have evinced the incredulousness of their witnesses, case and clearly established rampant misconduct. The government's position is further rendered meritless and constitutionally frivolous, as not one witness when they refused "use immunity" has ever been charged with any crimes.

The court must also consider this inordinate prejudice inured to Bergrin through the courts' inaction. The Judge had an opportunity to order the government to grant immunity and seek justice, but failed to act.

A trial judge may order the government to grant immunity, if a defendant's case would be severely prejudiced without the witness' testimony and when such a witness' testimony would be material or exculpatory, otherwise unavailable, or when the prosecution has engaged in overreaching or misconduct. U.S. v. Thomas, 357 F. 3d 357, 365(3d Cir. 2004). The government should

grant immunity to a defense witness if the witness is available, testimony clearly exculpatory and essential, and no strong government interests oppose immunity.

Bergrin has categorically and unequivocally proffered facts which prove that each and every defense witness, whom was lost as a result of the assertion of their privilege, could have affected the verdicts against Bergrin. He has brought forth credible, logical and believable averments that there was no rational basis for excluding even a single witness and, especially in the Kemo murder case, where the government decided to proceed with one witness; Bergrin should have had the right to have his witnesses granted "use immunity" and ordered to testify. The exclusion of these witnesses was appalling and a clear violation of Bergrin's constitutional rights; especially the tacit nature as to how the court did it. See Tr. 7652-7654.

The government's argument regarding immunity fails to recognize its constitutional duty not to subvert the truth finding process and wholly ignores Bergrin's constitutional right to a fair trial. In these circumstances, the Government's refusal to grant defense immunity is an impermissible due process and Sixth Amendment violation, as recognized in U.S. v. Morrison, 535 F.2d 223 (3d Cir. 1976) and the Supreme Court's holding in Web v. Texas, 409 U.S. 95, 93 S. Ct. 351, 341. Ed. 2d 330 (1972). These cases analyzed the Government's refusal to

grant defense witnesses immunity from a due process perspective, finding that the Government, not the court, abused its discretion by failing to grant immunity. A new trial must be granted as this error substantially prejudiced every count in the trial.

Our highest court has consistently held that "the right to offer the testimony of witnesses and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury, so the jury can decide the truth. Just as an accused has the right to confront prosecutor's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law. Washington v. Texas 388 U.S. 14 at 19, 87 S. Ct. 1920, 1923, 18 L. Ed. 2d 1019, 1023 (1967). This right is found specifically in the Sixth Amendment right to compulsory process.

In U.S. v. Morrison, the Court held that: Due process demands that the Government request use immunity for a defendant's witness. See dicta in U.S. v. Leonard, 161 U.S. App D.C. 36, 494 F.2d 955, 985 n. 79 (1974) and C.F. Earl v. U.S. 124 U.S. App. D.C. 77, 361 F. 2d 531, 534 n.1 (1966)(Burger, J.). These circumstances were created in this case when prosecutorial coercion and intimidation caused vital witnesses,

Jamal McNeil and Baskerville, principal witnesses, whom would have vindicated Bergrin completely of the Kemo murder, to withhold testimony out of fear of prosecution.

In Morrison, the Court ordered a judgment of acquittal when a material witness invoked her Fifth Amendment right not to testify and the government refused "use immunity." 535 F. 2d 223. Factually, similar to the case *sub judice*, the Morrison court found a significant due process violation as to defendant's right to a fair trial where a defense witness, (like Baskerville) appeared at trial and the judge provided the witness a lengthy warning about testifying; after the federal prosecutor's tirade and 8 warnings of potential prosecution. The Morrison Court even went so far as to hold that the trial Judge's warnings were the cause of the witnesses exercising the Fifth Amendment was irrelevant to this inquiry. The Court stated that the "…good faith of the Assistant United States Attorney would be relevant if he were charged with violations of 18 U.S.C.§ 1503 which makes the intimidation of a federal witness a criminal offense. It is not, however relevant into whether a defendant was denied his constitutional right…"

The Morrison Court found Web v. Texas controlling, 409 U.S. 95, 93 S. Ct. 351, 34 L.Ed. 2d 330 (1972). In Webb, the Supreme Court reversed the Texas Court of Criminal Appeals and found the defendant's right to due process of law violated after a witness

refused to testify following warnings by the Court. Jamal Baskerville was coerced against testifying after prosecutor Gay's ardent statement about prosecuting him and potential risks of testifying for Bergrin. Gay assured that J.B. was intimidated and these 2011 warnings carried forward to 2013, when he again refused to testify. A scrutiny of Gay's underhanded tactics against J.B. also caused McNeil's 2013 refusal, as they are close associates and in communication with one another. Gay, instead of requesting a side-bar or asking for J.B. to leave the courtroom, emphatically and painstakingly advised J.B. in the presence of his family, that if he was to testify there's a good chance he will be prosecuted for Kemo's murder, drug trafficking and other serious felony. This had a profound and chilling effect on the witness's decision to testify and that is exactly what the government intended. Their nefarious motive is espoused in their failure to ever even charge another witness with any criminal offense. The government's ploy upon the Court was disingenuous. More than a decade has passed since the Kemo murder when Gay went into his dissertation for appointment of counsel for all the witnesses and their rights invocation. At the time of Bergrin's trial, in 2013, the Kemo case was closed and no investigation undertaken for years. There has been no reasonable justification espoused to preclude two exculpatory witnesses to testify. Witnesses whom

would have proven Bergrin's innocence of the charges that prejudiced him most and took forefront in the case. **The additional preclusion of material witnesses interfered with any ability Bergrin may have had to present a defense case and any chance to present direct evidence discrediting Young**. The Government infringed on Bergrin's Sixth Amendment right and all charges wherein this occurred must be dismissed. Gay's purposeful in-court broadcast, in J.B.'s presence is exactly the same as the impermissible conduct in Morrison.

This Honorable Court must meticulously scrutinize the government's conduct in blocking the testimony of witnesses, as it is indicative of the misconduct which laden this case. It proved the government's propensity to win this case at all costs, even the ignorance of seminal statutory and constitutional rights and rules of professional conduct.

During a Judge Martini-Gay colloquy in the 2011 Bergrin trial, Gay stated that Young's uncorroborated testimony was insufficient evidence to prove its case against Bergrin, J.B. and McNeil. In the 2011 case against Bergrin, the government used the coached, perjured and contrived testimony of Albert Castro, whom was never re-called as a witness in Bergrin's 2013 trial. Consequently, the government had no reason to exclude and not grant "use immunity" to J.B. and McNeil, as their idle threats of prosecution could not be achieved; as their existed

no other witness except the incredulous and uncorroborated Young.

In Bergrin's case, the testimony of Maria Correia would have established that no other evidence of Kemo's murder, except Young ever existed and thus Castro was created by an agent and informant of the government.

Gay to Judge Martini, in 2011, "I'll address that Judge. We have not charged Baskerville yet. That's absolutely correct and true: But that's the exact reason why, if he were to take the witness stand and say something that can be interpreted as inculpatory, he could be charged…I'm not going to give the impression that we have scores of agents out there working on the investigation…"

Jamal Baskerville was then sworn and examined by the court, to which he replied, "I don't think I am incriminating myself because I didn't do nothing. I had nothing to do with that."

The point is that all these witnesses, individually and cumulative, would have changed and effected the entire tenure, fact finding and disposition of the essential facts in the case. The testimony was immeasurably important and due process demanded their immunization and presentment. This Honorable Court must ensure the protection of critical constitutional rights and when Bergrin was denied these witnesses, fundamental

fairness in the proceedings evaporated. This case must be reversed.

This Honorable Court must ensure the protection of critical constitutional rights and when Bergrin was denied these witnesses, fundamental fairness in the trial proceedings evaporated. This case must be reversed.

II. BERGRIN'S CONSTITUTIONAL RIGHTS TO DUE PROCESS OF LAW AND A FAIR TRIAL WERE INFRINGED THROUGH THE GOVERNMENT'S USE OF CORRUPT, CONFLICTED AND COMPROMISED ATTORNEY'S AS THEIR *DE-FACTO* AGENTS, THROUGH UNIMPEDED CONFLICTED ATTORNEY REPRESENTATIONS AND BY THE GOVERNMENT'S MISCONDUCT.

It was virtually impossible for Bergrin to receive a fair trial with the extraordinary and nefarious use of corrupt, compromised and conflicted attorney's, whom the government had actual knowledge of and whom were encouraged and enticed to act on behalf of the government's interests; and in clear contravention of the United States Constitution, Statutes and Rules of Professional Responsibility.

This issue was raised by Bergrin in 2013, but completely ignored. It is substantive, meritorious and usurps any indicia of propriety.

The government was clearly cognizant that New Jersey attorney, Richard Roberts, represented multiple and conflicted cooperating witnesses and alleged Bergrin coconspirators. Most importantly, they knew that Roberts evaded federal income taxes for over ten (10) years, was committing tax fraud and had laundered a significant amount of dollars. That Roberts was indebted in excess of a half million dollars, had multiple Court ordered liens and judgments against him and was pending disbarment by the New Jersey Ethics Committee.

Bergrin acknowledges that neither Roberts nor the other corrupt attorney's represented him. He also confirms that the witnesses represented by the conflicted, unethical and *de-facto* agent attorneys did not obtain any statements from him, subsequent to their representation or involvement with the government. What is paramount and magnanimous is the government's rampant and incessant misconduct, their involvement in coercing witnesses through their attorneys to contrive, fabricate and manufacture evidence against Bergrin, their concealment of non-waivable conflicts of interest, by attorney's they were related to, the solicitation and presentment of factually inaccurate evidence and their extraordinary violation of Bergrin's constitutional rights, to a fair trial.

The theory behind Massiah v. United States, 377 U.S 201 (1964) was the Supreme Court's ardent position that once an individual is represented by counsel, which Bergrin was, then it is a 6th Amendment violation when individuals used by law enforcement officials gain information. The government's improprieties are nothing but an extension of this position.

In Maine v. Moulton, 474 U.S. 159 (1985), the Court found a 6th Amendment violation when evidence was obtained upon police request, upon a defendant whom was represented by counsel. See also, U.S. v. Henry, 447 U.S. 264, 274-275 (1980), U.S. v. Bender, 221 F. 3d 265 (1sr Cir. 2000), U.S. v. Lentz, 524 F. 3d

501, (4th Cir. 2008). It would be disingenuous to argue that the government was not actively involved in the obtainment of incriminating evidence against Bergrin, using misconduct and improprieties, subsequent to him being represented by counsel. See synopsis on Albert Castro, Maria Correia, Rondre Kelly, Abdul Williams, Syed Rehman, Drew Rahoo, Eugene Braswell, Anthony Young, Yolanda Jauregui, Ramon Jiminez and others, contained infra.

The government's wrongful and unlawful inducement of attorney's to compel their clients to cooperate against Bergrin, along with the failure to vent conflicts of interest, is analogous to using evidence against Bergrin or any other defendant from an expert that never advised the client the report would be sent to the government. See Powell v. Texas, 492 U.S. 686 (1989), (6th Amendment violation when psychiatric examination of the defendant at the prosecutor's request was conducted without notice to the defense counsel. See also Satterwhite v. Texas, 486 U.S. 249, 255-256 (1988). The government created situations which were likely to induce incriminating and fabricated evidence. Henry, 447 U.S. at 272, 274 (1980).

A. Richard Roberts

Supervisory Assistant United States Attorney Grady O'Malley, a Newark, New Jersey federal prosecutor and one of Roberts' closest friends, was well aware of Roberts' problems. Despite known criminal and professional responsibility woes against Roberts, O'Malley accompanied Roberts to the movie premiere of the "American Gangster" movie, a movie based on a case Roberts had worked on as an attorney and was fictionalized by cinema professionals. The movie showing was attended by limited invitation only and "Hollywood's" dignitaries.

Roberts' incessant, unethical, unprofessional and criminal activities dated back to 1993, wherein he received a disciplinary reprimand for failing to provide his client with a written retainer agreement, failing to file a new complaint as he was paid for, failing to apprise his client of the case status and refusing to provide ethics investigators with subpoenaed information. In Re Roberts, DRB 93-342.

The government also knew that Roberts unprofessionalism continued into 2002, where he was admonished again for failing to provide a written retainer agreement, (DRB 02-148), and in 2009, he was adjudicated guilty another two times, in two separate but consolidated disciplinary cases. These two cases addressed FOUR separate matters (In Re Roberts, 299 N.J. 307 (2009), and resulted in two published opinions. Roberts was adjudicated guilty of gross negligence, lacking diligence,

failing to communicate with clients on two matters, engaging in a conflict of interest deleterious to his client's interests and making misrepresentations to a trial tribunal; additionally, he was found guilty of failure to take responsibility for his misconduct by blaming others and fabricating evidence, to a tribunal. {*emphasis added*}

In 2009, Roberts received additional censures from the ethics authority and was placed on attorney probation and ordered to practice under the supervision of an Office of Attorney Ethics approved attorney, for two years. (In Re Roberts, 200 N.J. 226 (2009). Henceforth his abhorrent professional misconduct was known by federal prosecutors and his potential suspension from the practice of law and disbarment possible. What is mind boggling is that during the pendency of his representation of cooperating witnesses and potential witnesses, in the Bergrin case, he had open and pending serious disciplinary allegations which the government assisted him on getting adjourned, until the completion of Bergrin's trials. None of these facts were ever made known to any parties involved in Bergrin's cases; especially the district court.

Roberts was compelled to ingratiate himself with federal prosecutors and the government, or be held responsible for his criminal and ethical misconduct and violations. Defense vociferously submits that these factors created a grave

appearance of impropriety and caused Roberts to suborn perjury, convince witnesses to cooperate with the government and use his client representation for financial and commercial benefits.

The disciplinary complaint resulting from Roberts receipt of large cash payments and failure to perform retained legal duties alone subjected him to criminality and disbarment. It must be accentuated that the ethics charges originated in 2007 and were not resolved until 2015. Through deception and manipulation, Roberts was successful in delaying their resolution. He was finally adjudicated guilty of serious breaches of misconduct, by blaming others falsely for his own conduct and suspended from the practice of law. All this under the watchful eye of Bergrin's federal prosecutors.

Bergrin's law practice was located at The Robert Treat Center, 50 Park Place, Newark, New Jersey on the 10th floor. It remained there until May, 2009 when Bergrin was arrested and detained in federal custody.

Upon Bergrin's arrest, Roberts imminently leased Bergrin's office space and sent out letters to his former clients, offering and soliciting them, through fee discounts. Roberts unlawfully obtained a list of Bergrin's former clients and forged a partnership with now disbarred attorney, Gerald Saluti. Saluti had been an associate with Bergrin and was terminated for stealing funds in 2009.

Roberts had gained notoriety nationally through being portrayed in "The American Gangster" movie. He obtained this acclamation and attention by befriending New York Magazine author, Marc Jacobson. They were very close friends for many years and a piece Jacobson authored got the attention of Hollywood screen writers whom consulted Roberts.

Roberts used the Jacobson relationship to convince his friend to write an article on Bergrin, entitled, "The Baddest Lawyer in New Jersey". The writing excoriated Bergrin as a person and attorney and Roberts was the undisclosed source of the information. Coincidentally, the article was published a close date proximity to Bergrin's jury selection in 2011 and was well publicized. Roberts and Jacobson used their media contacts to try and convict Bergrin and the motive was a second movie deal for Roberts; depicting Bergrin's life.

Roberts planned on replicating his success in "The American Gangster" movie and he had to ensure Bergrin's convictions; to corroborate the portrayal of Bergrin in the magazine article, to remain at the sites of the law office, to continue being retained by Bergrin's old clients and for profit. To this end, Roberts unethically, unprofessionally and criminally, visited and consulted with Yolanda Jauregui, at the Hudson County Jail, Kearny, New Jersey.

Jauregui was Bergrin's live in girlfriend whom was represented by counsel (Chris Adams, of Walder, Haydon, and Roseland, New Jersey) and was indicted for serious felonies: narcotic trafficking, racketeering, violent crimes in aid of racketeering, fraud, etc.…. Roberts contacted and consulted Jauregui without the knowledge or consent of her counsel and implored her to cooperate against Bergrin. He advised her about her pending charges, spoke harshly about Bergrin and offered her a book and movie deal, if she was to cooperate. Additionally, Roberts promised her a lucrative contract and terrified her about prospects of employment for a convicted felon. The government ascertained and learned of Roberts' misconduct and criminal behavior, but never brought this to the attention of either the court or the defense. Roberts continued to be intricately involved in building the prosecution against Bergrin and cooperating witnesses for the government.

Roberts made his commercial ambitions well known to his office staff and another important attorney on Bergrin's case; Henry Klingeman. His ulterior and criminal motives surpassed his ethics, professional and moral responsibilities and he acted as a de-facto agent for the government. Both Roberts and Klingeman collaborated on writing, sponsoring and starring in a Discovery Channel episode and Bergrin's case. Although it was planned during their respective representation of critical

cooperating witnesses against Bergrin, the television show did not air until 2015.

Maria Correia, a cooperating government witness, whom recorded Bergrin on behalf of the prosecution in both 2008 and 2009, befriended Roberts in 2009. Jointly they schemed to terminate Bergrin's representation of career criminal, Albert "Albie" Castro, and have him retain Roberts. Their plan was to convince Castro to contrive and fabricate evidence against Bergin, related to the Kemo murder case, proffer with government prosecutors, testify falsely and seek a reduced state sentence; as a reward for his cooperation and testimony. To successfully achieve this objective, Correia requested and received informant funds from the government, falsely alleging she needed the money to pay Bergrin for criminal acts. Correia used the stolen FBI funds to retain Roberts to represent Castro and she consulted Castro, at the Essex County Jail, Newark, New Jersey. Castro was coached by Correia for his government proffer session and what to say to inculpate Bergrin. Castro and Roberts informed the government that Bergrin had offered him $10,000 to kill Kemo and the government bought it; 'hook, line and sinker." As incredulous as Castro was and, while pending sentencing for major narcotic offenses, weapons charges and aggravated assault on Newark police officers, Castro and Roberts were able to reach a cooperating plea agreement with federal prosecutors. What is

paramount about this relationship is the fact that Castro swore while testifying in 2011, that the government and Roberts convinced him to perjure himself and falsely swear to New Jersey Superior Court Judge, Steven Bernstein, whom presided over the Castro case. Correia's theft was divulged and her use as a government witness terminated. She swears the government and Roberts were cognizant that Castro's testimony was false and she personally informed them of this fact, prior to the testimony. The Honorable Judge William Martini, Judge, United State District Court, New Jersey, opined on the record that Castro was perjuring himself and chided the government to scrutinize it. Castro did not testify at Bergrin's retrial in 2013, never received the benefits of his cooperation and Correia, (according to her) was forced into witness protection, her name changed to Grace Cruz and warned against revealing what she knows.

What is extremely important in this court's consideration of collusion and impropriety between the government and Roberts, on this incident, is this fact: prior to Castro's testimony in 2011, the government possessed Essex County Jail visitation records delineating the fact Correia and her live-in boyfriend Carlos Taveras were associated and visited Castro, multiple times prior to his proffer session and cooperation. Those records were mysteriously and coincidentally misplaced by

prosecutors and not revealed nor turned over until after the 2011 Bergrin trial.

Bergrin attempted to call Correia as a witness at his trial in 2013, but because the government held serious bank and fraud charges open against her, she declined testifying and would have taken the Fifth Amendment and remained silent. These charges were open and pending for years with the government refusing to dispose or resolve them.

The government failed to disclose Roberts' unethical and criminal association with Correia and Castro, and only through investigation and vigorous cross examination did it become known.

During the course of Bergrin's case and prior to trial in 2011, the government interviewed two important associate attorney's, employed or doing work for Bergrin at his firm. The attorney's Dana Scarillo and Brooke Barnett, both consulted Roberts, and Roberts was present as the government interviewed Barnett. Both these attorney's refused or declined to be interviewed by Bergrin investigators nor to testify at his trial. Bergrin submits they would have offered exculpatory evidence.

Cooperating witness, Rondre "Dre" Kelly and Abdul "Mutallic" Williams, were both represented by ROBERTS. These two violent and career criminals both decided to cooperate

against Bergrin, coincidentally, after consulting and retaining Roberts. This was the very first time, in lengthy careers of crime, they cooperated.

What was devious concerning their cooperation against Bergrin are the efforts the government and Roberts took to conceal his representation of them. Kelly actually perjured himself about Roberts' involvement in his cooperation and only after a lengthy and aggressive cross-examination did he finally admit it and Williams statements, FBI 302 reports and proffer session reports, were devoid of mentioning Roberts. The government and Roberts were fully aware of blatant conflict issues in this representation and the evisceration of Bergrin's ability to receive a fair trial. Bergrin was only able to learn of Roberts' trial involvement in Williams' cooperation through admissions Williams made to jail-house cronies, Syed Rehman and Drew Rahoo. Both witnesses whom were willing to truthfully reveal how Roberts, the government and Williams schemed and suborned Williams' false testimony. Rehman was so acutely aware of Williams' connection to Roberts that he even informed defense' investigators of the fact that Williams paid Roberts by check, a $5000 retainer and which bank it was drawn upon--facts only someone with intimate knowledge of the case could know. Unfortunately, the district court suppressed any witnesses' mention of Roberts and precluded these witnesses from

testifying; since the Marshall's were late one day in their arrival for court.

Through Jencks reports, Bergrin became cognizant that Roberts arranged, planned and travelled to the Alleghany County Jail, Pittsburgh, Pennsylvania to proffer Kelly, with New Jersey federal prosecutors. Moreover, that Roberts worked out the details of Kelly's cooperation.

All these factors clarify why the government so arduously argued for all defense witnesses to be provided counsel, that they be advised of their Fifth Amendment rights to remain silent and why all criminal charges remained open; until after the Bergrin case even for non-testifying witnesses. The government also fought strenuously against any witness receiving "use immunity."

The government was provided proffers and multiple statements for defense witnesses and, despite knowing witnesses would offer materially exculpatory evidence, fought to preclude their testimony.

During the 2013 trial of Bergrin, Kelly was cross-examined concerning his representation by Roberts. Kelly testified on direct examination, which the government had to know was false, that Roberts refused to represent him if he cooperated against Bergrin. Tr. (2013), 3466-3467. Testimony clearly coached and perjured. Kelly was also forced to admit that Roberts was

conflicted against representing him because of ethical issues with his license to practice law and because Roberts represented multiple party defendant's in the Pittsburgh federal case. Despite these facts, the government failed to notice defense no motion the court for Roberts' recusal. (Tr. 3466).

Under questioning by prosecutor Minish, Kelly swore that Roberts would not represent him, because Roberts does not represent cooperating witnesses. Tr. 3468.

Minish permitted and condoned Kelly's perjury, knowing Roberts' involvement and representation of Kelly, Williams' attempts at Jauregui and Castro. Despite this obvious perjury and wrongfully coached testimony, Kelly received a 5k1.1, substantial assistance motion, and although he was facing life in prison, was recommended by the government and received time served.

The cross-examination of Kelly proved he was in cohorts with the government and Roberts; and the government knew of the wrongfulness of Roberts' representation of Kelly: Tr. 3646-3647.

Q. You said that Richard Roberts wouldn't represent you because you're cooperating, correct?
A. Yes, against you, yes.
Q. Now isn't it a fact that it was Roberts who set up the meeting when you spoke to the FBI on July 30, 2009 … and you gave evidence against Bergrin in a proffer session in Pittsburgh, Pennsylvania.
A. I believe so.
Q. Now that's a meeting where you are cooperating, right, and giving information against Paul Bergrin.

A. Yes.
Q. And, that's a meeting- who's present? What attorneys are present?
A. Richie's there. (Tr. 3647) Richie Roberts. (3648).
Q. And your attorney had to drive and travel from Newark, New Jersey to Pittsburgh, Pennsylvania, right?
A. Yes. (Tr. 3648).

Not only was Roberts suborning Kelly's perjury in collaboration with the government, but all parties knew that Kelly and Castro were both cooperators, with both giving significant incriminating evidence against each other.

Albert Castro was a friend of Kelly and received hundreds of kilograms of cocaine and heroin, for sale, from Kelly. Facts all parties knew. Kelly not only supplied Castro with life sentence quantities of serious narcotics, but Kelly gave him automobiles with secret trap compartment. Tr. 3667-3669

This honorable court must scrutinize and comprehend why such blatant conflicts were permitted to exist and encouraged by the government. The only logical conclusion is the fact that the prosecution needed de facto agent Roberts as the nexus, for all this to succeed. He was the connection between all parties discussed, on behalf of the government.

In the Williams' controversy, not a scintilla of written materials existed, revealing that Roberts had any contact with Williams. The government even concealed this fact during direct examination of Williams. This is why Bergrin pleaded for witnesses Rehman and Rahoo to testify. They would prove to an

absolute certainty the allegations contained herein. Tr. 8310-8311.

Only under vigorous cross-examination did Williams acknowledge that he personally contacted Roberts, while incarcerated at the Hudson County Jail, Kearny, New Jersey. Williams contacted Roberts for legal representation at a time when Roberts was actively involved with the government, the federal prosecutors of Bergrin and yet, he continued to consult Williams at the jail, until he was formally retained. All under the watchful eye of Bergrin's prosecutors, as Roberts' mission was to consult Williams and convince him to cooperate against Bergrin.

During cross-examination, it was disclosed for the first time that Roberts received a $5000 check from Williams, as an initial retainer and for the time he spent consulting and advising him. None of this was ever revealed to any of the case parties, nor court. It is submitted that only because of this paper trail, did the attorney-client relationship cease. (Tr. 3778-3779). But, Williams had been molded and conformed to the government's puppet and Raheem and Rahoo would have so testified.

The government's theory for the motive of Kemo's death was Bergrin's alleged connection to the Curry Drug Organization and loyalty to its members. The government spent excruciating time

and effort, in an attempt to establish the members of the Curry Organization, its hierarchy and Bergrin's commitment. Moreover, they had multiple witnesses, including agents of law enforcement establish that both Curry and Alquan Loyal, known as the Sheik, were at the highest levels of command in the organization and that Bergrin was their partner.

To further exacerbate the Roberts conflict dilemma, the government was cognizant that Loyal was represented by Roberts, in multiple serious, violent felony cases. They were attorney-client related. Yet, despite this awareness; Williams, Kelly, Castro, Jauregui and Roberts conflicted representations with these individuals and Loyal, they concealed these facts from the court. All the individuals Roberts either wrongfully contacted or represented were cooperators whom were connected to Loyal and gave incriminatory evidence against him. Bergrin learned for the first time that Roberts never revealed his connections to Loyal and the Curry Organization during trial and New Jersey PROMIS GAVEL computer generated information, about Loyal's indictment numbers 96-06-01958 and 94-10-03492; which lists Roberts as Loyal's legal representative. The government and Roberts permitted these witnesses to incriminate, proffer and testify against each other and apathetic to any conflicts or appearances of impropriety. They just never cared about rules, regulations, the Constitution, laws nor the pursuit of justice.

Conflicts, trampling of constitutional rights and prosecutorial misconduct did not end with Loyal.

1. Roberts Attempts to Convince Former Bergrin Clients to Falsely Implicate Bergrin.

Roberts substituted, as attorney of record, for Bergrin, in multiple serious Middlesex County indictments; in the cases of State of New Jersey v. Lamont Love. Love was eventually convicted at trial and sentenced to New Jersey State prison, Northern State prison, Newark, New Jersey. While imprisoned Roberts and case agents in the Bergrin prosecution confronted Love, in an attempt to obtain his cooperation against Bergrin. Love was intimidated and vehemently pressured to fabricate evidence against Bergrin and was promised a sentence reduction. When Love advised the government that he has no information that Bergrin committed any illegal acts nor wrongdoing, he was excoriated and threatened by Bergrin's case agents and Roberts. He was warned to change his position and "play ball" with them by contriving evidence of criminality against Bergrin or suffer the consequences. Like Ramon Jimenez, Love filed ethics complaints. He named Roberts in the complaints and testified at Bergrin's trial. The court prohibited Love from mentioning anything about Roberts' or the government's misconduct, after federal prosecutors objected profusely. The government sought

to protect Roberts and the lack of integrity in their investigation. They had to usurp the truth from disclosure and the door to Roberts' misconduct, criminality and unprofessionalism being revealed.

The government knew that Roberts' representation of Love was also in conflict with his connection to the Curry Organization and Love's alleged cocaine suppliers.

B. Henry Klingeman

Anthony Young was the sole and exclusive witness against Bergrin, in the "Kemo" murder prosecution. There was a plethora of inconsistencies, intentional lies and credibility issues, surrounding Young.

Henry Klingeman, a former Assistant United States Attorney, in the Newark, New Jersey office, and a very close friend and associate to the prosecuting attorneys in Bergrin's case. His loyalty was clearly to prosecutors Gay, Minish, Saunders and his old office and not to zealous representation of Young. This was evident by Klingeman's collaboration with Roberts and the government on writing, producing and filming a documentary on Bergrin; which was done in connection with the DISCOVERY NETWORK and channel aired in documentary form early in 2015.

Klingeman represented Young at the time of this controversial relationship on the documentary with Roberts and DISCOVERY. Just as importantly:

1. Ramon Jiminez

Ramon Jiminez was a cooperating government witness, whom testified on behalf of the government, in 2011. His testimony was opined by the Honorable Judge William Martini, Judge, United States District Court who presided over the case, as incredulous, contrived and fabricated. He was not called by the government as a witness in 2013, Bergrin's second trial, because his proffer statements and testimony was wholly dichotomous to witnesses Abdul Williams, Rondre Kelly and one Eugene Braswell. Furthermore, Jiminez had filed an ethics complaint and sent a formal letter to the New Jersey State Bar naming Prosecutor Gay and Jiminez' attorney, John Azzarello as movants whom attempted to suggest, coach, coerce and intimidate him to lie against Bergrin. Jiminez wrote that Gay and Azzarello used illegal and improper means in an attempt to induce him to perjure himself against Bergrin; "They asked the same questions 100 different ways until I agreed with their answer." Azzarello, like Klingeman was appointed pursuant to The Criminal Justices Act (CJA), to represent a government cooperator; he was also a

former Assistant United States District Attorney, Newark, New Jersey and best of friends with prosecutor Gay.

Klingeman was a conflicted attorney too.

Jiminez had been indicted for the armed robbery of "Planet Chicken", a Newark fast food restaurant, in downtown Newark, New Jersey. Bergrin was his attorney and one of his co-conspirators or co-defendants, in the robbery was one Jose Bracero. Bracero was represented by Klingeman and made the decision to cooperate against Jiminez; especially with Klingeman's strong inducement. Jiminez was facing an extended term of prison for the robbery and the case was assigned to the Honorable Judge Hector DeSoto, Judge, Essex County Superior Court, Newark, New Jersey.

While preparing for Bracero's testimony at trial, Bergrin sent one of his law firm associates to Bordertown State Prison, to interview Bracero. During this meeting, Bracero recanted his inculpation of Jiminez, alleged he fabricated the sworn statement he gave against Jiminez and was coerced as to what to say, to incriminate him. Additionally, Bracero now refused to testify against Jiminez.

As the result of these actions, the State of New Jersey decided to withdraw their cooperating plea agreement with Bracero, prosecute him along with Jiminez and Klingeman, was fit to be tied. He was infuriated and made strong allegations to the Superior Court and the Essex County Prosecutor's office that

Bergrin was unethical, that he breached his responsibilities under the Rules of Professional Responsibility and filed legal motions before Judge DeSoto demanding Bergrin's misconduct be prosecuted; and that his client Bracero not suffer any penalties nor consequences. The State prosecution against Jiminez was dismissed, as no other witness existed to identify him.

Although Jiminez was an important government cooperating witness and co-conspirator, co-defendant of Bracero, Klingeman's conflict was never asserted nor brought to the attention of the Court. Moreover, during recorded conversations with government cooperating witness Oscar Cordova, Bergrin allegedly threatened the life of Jose Bracero. The situation arose when Cordova posed as a Latin King who knew Bracero. According to the government, Bergrin attempted to influence Bracero, in the Jiminez State case to testify falsely and for Cordova to intimidate him against cooperating against Jiminez. The Jiminez case was open and pending, obviously at this time.

2. Klingeman Advises Jose Bracero

Bergrin subpoenaed Bracero to testify on his behalf in 2013 and a Writ of Attestificandum was issued for him to be brought up from New Jersey State Prison, where he was serving his sentence. Bergrin proffered that Bracero would exculpate him of any wrongdoing. Subsequent to consultation with Klingeman,

Bracero declined to testify and through counsel asserted his Fifth Amendment right of self-incrimination.

The government used Klingeman also as their *de facto* agent and had him induced, enticed and acting in concert with Roberts.

C. Christopher Adams Represents Jauregui while his Firm Represents Hakeem Curry.

Attorney Christopher Adams was employed at the Law Firm of Walder, Hayden et al., Roseland, New Jersey and appointed to represent seminal cooperating witness Yolanda Jauregui; who was the sister of Jiminez and Bergrin's live-in girlfriend. She was also an indicted co-conspirator of Bergrin's facing serious and multiple felony violations.

Curry, the alleged motivator of the Kemo murder, an unindicted co-conspirator of Jauregui and Bergrin and allegedly wholly connected to both their cases, was represented at his trial by Adams' firm. The government, cognizant of this critical fact, never brought this to anyone's attention or any party of the court; despite fifty proffer sessions and meetings with Jauregui, wherein she was asked to copiously relate and even testify as to her knowledge of Curry. She incriminated him extensively in narcotic trafficking and in the presence of Adams.

Adams coerced Jauregui to plead guilty to racketeering and violent crimes in aid of racketeering counts of the indictment

and to enter a cooperating plea agreement; this was despite the fact that there was no credible evidence to prove Jauregui's criminality for these charges. This was also consistent with Roberts' pleas to her about pleading guilty cooperating and doing and saying anything she had to, to bury and convict Bergrin.

This Honorable Court must scrutinize all this conflict evidence and infer or deduce Bergrin's due process rights were violated; and the only thing the government sought was victory at all costs.

D. Vincent Nuzzi's Representation of Hakeem Curry

For approximately three years and up to the eve of the trail, Attorney Vincent Nuzzi was the retained trial attorney, along with Adams, for Hakeem Curry.

On the eve of the commencement of Curry's trial, Nuzzi was judicially removed as counsel by the district court and on government motion. The Honorable Faith Hochberg, Judge, United States District Court, District of New Jersey considered federal prosecutor Gay's legal arguments and excoriated Nuzzi for unprofessional conduct. She found that Nuzzi had an "actual" and unwaivable conflict of interest, simply because he represented a Curry underling, Jarius Webb, in the past. That Nuzzi was derelict in his professional duties and

responsibilities and that this conflict should have been brought to the court's attention years before. Gay was aggressive in his argument against Nuzzi remaining on Curry's case, so he is well aware of this vital issue. Gay, in a letter to Hochberg, sought Nuzzi's removal, also accusing him of being one of Curry's "house counsel" by hiring attorneys for members of the Curry Organization and at the same time representing close Curry associates. Both Gay and Hochberg insinuated and inferred that Nuzzi was irresponsible and unethical.

E. Nuzzi Represents Cooperating Witness Eugene Braswell after Roberts & Bergrin's Former Associate Consult with him.

Eugene Braswell was a New Jersey States Corrections Officer assigned to the Northern State Prison, Newark, New Jersey. He was also a major drug dealer using his position as an officer to make narcotic deals, meet connections for his source of supply and other nefarious purposes. Braswell was arrested importing and transporting multiple kilograms of cocaine from Texas to New Jersey and indicted on these charges. He was charged as a drug kingpin and facing 25 years to life in prison. Bergrin knew Braswell as he represented him on an off-duty shooting where a death occurred.

While out on bail for the state charges, Braswell was arrested on federal drug charges. He was released pursuant to

The Bail Reform Act and re-arrested on new, independent and additional federal narcotic charges. He retained Nuzzi for representation on his state and federal charges and decided to cooperate against Bergrin. Coincidentally, while charged federally and prior to cooperation, he was placed on the same tier and unit as Williams at the Hudson County Jail, Kearny, New Jersey. Williams and Braswell schemed their cooperation against Bergrin.

Braswell colluded with members of the Curry Organization while actively involved in his drug business. He also gave evidence incriminating Curry in drug dealing.

The government was obviously fully aware of Nuzzi's conflicted representations in the Curry case, of being one of Curry's house lawyers, and Braswell nexus to Curry. The government used Roberts, Nuzzi and Williams to coerce Braswell to cooperate so they would never investigate Nuzzi's conflicts.

F. Honorable Dennis Cavanaugh's Bias Close Relationships with Roberts and Nuzzi.

In a tenuous and very sensitive situation that this Court must consider: the District Court Judge assigned to Bergrin's case, The Honorable Dennis J. Cavanaugh, was a very close friend of both Nuzzi and Roberts. They all grew up professionally together, attended Seton Hall Law School with one another and

Nuzzi and Cavanaugh worked with one another for years at the Essex County Public Defender's Office, Newark, New Jersey; while Roberts continued to forge his relationship with them and their camaraderie in the Prosecutor's Office of the County. They were all exceptionally close allies and friends for over 30 years at the time of the Bergrin case; this included a multitude of times where they all socialized together.

Most importantly, Cavanaugh dated, and eventually married, Linda Lordi. She was the daughter of renowned attorney and Essex County Prosecutor, Joseph Lordi. Roberts was a supervisor in the Essex Prosecutor's Office working closely with Lordi.

As a matter of fact, Lordi and Roberts were so close that Roberts considered him a surrogate father. Roberts was fatherless and loved Lordi. He made his emotions well known when he credited Lordi for his successes in a proclamation of his achievements in the "The American Gangster" case and movie; and called him his "real" father. Linda Lordi was like a sister in relationship to Roberts and they were well acquainted and associated with each other.

Cavanaugh suspiciously suppressed any and all evidence of Roberts' misconduct. He admonished counsel to not elicit it from the testimonies of Love, Rehman, Rahoo and Correia; although they could have established volatile issues of

improprieties by the government and its criminality which the government squashed and concealed.

Both individually and collectively, the uncontroverted facts delineated, categorically evince an emaciation of Bergrin's due process rights. They also contravene Bergrin's quest for justice.

LAW

A pattern of prosecutorial misconduct infects the integrity of the proceedings. It compromises the search for the truth, seeking justice and will influence the verdict of the fact finder. Brecht v. Abrahamson, 507 U.S. 619, 635 n. 9, 113, S.Ct. 1710, 12: L.Ed. 2d 353 (1993).

In the case sub judice, the attorney and prosecution misconduct violated Bergrin's due process and precluded any viable chance he had of a fair trial. It immeasurably prejudiced him and the inordinate amount of false, fabricated and contrived evidence had to have had a deleterious impact on the guilty verdicts. The government's failure to disclose these acts of misconduct, entice and sponsor them and cannot be tolerated and this case implores reversal.

Bergrin further pleads that this Court find that the government's use of Roberts , Klingeman, Adams and Nuzzi, were tantamount to creating de facto agents; for attorney's whom

representations were supposed to be conflict free, in the best interests of their clients, void of governmental influence-interference and clear of creating inculpatory evidence against Bergrin and for the attorney's benefit. It violated due process of law and it was prosecutorial misconduct to an egregious magnitude.

The prosecutor's actions, solicitations and contributions to the blatant misconduct "so infected the trial with unfairness as to make the resulting conviction a denial of due process." Donnelly v. DeChristafaro, 416 U.S. 637, 643, 94 S. Ct. 1868, 40 L. Ed 431 (1974); Darden v. Wainwright, 477 U.S. 168, 181, 106 S. Ct. 2464, 91 L. Ed. 2d 144 (1986). It denied Bergrin a fair trial and reversal of the convictions must follow; especially the cumulative effects of the misconduct. See Pursell v. Horn, 187 F. Supp. 2d 260, 352 (M.D. Pa. 2002).

The conflicts of interest, as espoused supra, results from counsel representing conflicting interests, such as their own criminal or ethical problems and/or considerations of financial gain, due to their representations. These conflicts adversely affected their performance as they induced and advised their clients to admit to crimes they had not committed (attorney Chris Adams coercing Jauregui to plead guilty to racketeering, violent crimes in aid of racketeering), Roberts (encouraging and

advising clients to commit perjury), as also Nuzzi, Klingeman and others.

There is no meritorious position that any of the attorney's delineated and/or the government can raise, that quashes the obvious enumerated conflicts. The only issue is whether Bergrin has established that these conflicts prejudiced him. It is the effect on Bergrin's constitutional right to due process of law, that this court must focus on; nothing more, nor less.

In Cuyler v. Sullivan, the seminal Supreme Court case, the Supreme Court ruled that a defendant can demonstrate a 6th Amendment violation through conflicts of interest. 446 U.S. 335 (1980). Bergrin raised the conflict issue, but the court simply ignored it. In Holloway v. Ark, 435 U.S. 475, 484-485 (1978), the court's failure to inquire into potential conflicts of interest violated defendant's due process rights and resulted in reversal. In Salt v. Epps, 676. F. 3d 468, 481-483 (5th Cir. 2012), the Circuit Court found automatic reversal when the court refused inquiry. See also McFarland v. Yukins, 356 F. 3d 688, 700 (6th Cir. 2004). The issue in the case at hand is exacerbated by the government's treacherous and nefarious involvement in both concealing the conflicts, using them to their strategic and tactical advantage and contributing to the creation of extreme prejudice and adverse acts against Bergrin's rights.

The government's actions created *de facto* agents and prosecutors of counsel. Their actions affected fundamental fairness to Bergrin and infected the fairness of the trial. Darden v. Wanwright, 477 U.S. 168, 180-181, 106 S. Ct. 2464, 91 L. Ed. 20 144 (1986), quoting Donnelly v. DeChristofaso, 416 U.S. 637, 643, 94 S. Ct. 1868, 40 L. Ed.20 431 (1974).

While the Supreme Court has not formally defined the term "government agent" for 6th Amendment purposes, the Court of Appeals for the Third Circuit held that the answer depends on the facts and circumstances of each case. Matteo v. Superintendent, SCI Albion, 171 F. 3d 877, 892 (3d Cir. 1999). Specifically, there must be some evidence that an agreement, express or implied, between the individual and a governmental official took place. ID. See also, Wallace v. Price, 265 F. Supp. 2d 545, 565-566 (W.D. Pa. 2003), aff'd. 243 Fed. App y 710 (3d Cir. 2077).

It would insult our intelligence if the government was to argue against these attorneys acting as agents, especially Roberts, to assist the government, while also benefitting. Roberts, who had committed tax fraud, tax evasion, money laundering and substantial ethics violations, invites a supervisory prosecutor to a grand opening of a major movie production. He accepts stolen funds from an informant, coaches Castro to lie and, it is revealed by Correia to the government.

Castro commits perjury at trial in 2011, against Bergrin and swears falsely, to Judge Bernstein, in Superior Court; all with Roberts and governmental influence and assistance. Roberts violates the law and consults Jauregui, to which the government becomes cognizant of; he also advises Williams to perjure himself and cooperate, as he does Kelly. All under the watchful eye of the government and with their consent and involvement.

Adams obtains inside information against his client Curry and is clearly conflicted out; yet he convinces Jauregui to cooperate with the government, so he could earn hundreds of thousands of dollars in Criminal Justice Act funds. The government agrees to remain silent.

Nuzzi is in jeopardy of serious ethical violations in, again, the Curry case. He also ingratiates himself with and to the government with Eugene Braswell and never faces ethics violations.

The picture is clear and unequivocal and all to the evisceration of Bergrin's due process rights. Bergrin submits that the government's conduct was also "conscious shocking" and so offensive that it did not comport with traditional ideas of fair play and decency. Breithaupt v. Abram, 352 U.S. 432, 435, 77 S. Ct. 408, 1 L. Ed. 2d 448 (1957), Whitley v. Albert, 475 U.S. 312, 327, 106 S. Ct. 1078, 89, L. Ed. 2d 251 (1986).

III. THE GOVERNMENT'S FAILURE TO DELINEATE RECORDED CONVERSATIONS PROVING BERGRIN'S "ACTUAL INNOCENCE" AND EVISCERATING ANTHONY YOUNG'S CREDIBILITY VIOLATED THE HOLDING IN BRADY V. MARYLAND, GIGLIO V. UNITED STATES AND BERGRIN'S CONSTITUTIONAL RIGHTS.

A. The Government Failed To Disclose Crucial Exculpatory Evidence Which Would Have Affected The Verdict Against Bergrin.

All facts contained in prior points are incorporated by reference herein.

During pre-trial discovery proceedings, the government provided Bergrin with multiple CD discs containing approximately 40,000 Title III intercepted conversations, in their investigation against Hakeem Curry and Ishmael Pray. They never provided any content summaries, table of contents, indexes, nor delineated that the recordings contained exculpatory evidence which would not only have proven Bergrin's "actual innocence" of the Kemo murder, but also prove their exclusive and sole witness against Bergrin was incredulous and had fabricated, contrived and simply manufactured incriminating evidence.

The government was remiss in their statutory obligations to properly seal wiretap recordings, in United States v. Curry, et al thereby resulting in a multitude of inadmissible recorded conversations. Despite the inadmissibility of the recordings the government was fully cognizant of their substance; yet they

knowingly and purposefully admitted diametrically opposed and inconsistent evidence. Most importantly, they condoned and admitted false evidence and testimony to the jury and argued that wrongful and improper inferences be adduced and drawn from this inadmissible evidence; which clearly resulted in violation of Bergrin's essential due process rights.

This Court must be cognizant of the fact that in order to use the CD's and listen to recordings, Bergrin had to open the CD, go to each conversation individually and one at a time; and the time consumption was immeasurable. They were formatted in such a burdensome way that it would have taken a minimum of 20,000 hours to listen to them. Additionally, at the same time as providing these CD's they turned over 20,000 pages and pieces of discovery and these extremely exculpatory recordings were buried, concealed and hidden within; which was tantamount to never providing them.

Instead of meeting their inescapable duty to make this exculpatory evidence known, the government issued a statement that, because they violated the Title III sealing requirements, they would not be using any of these recorded conversations and, the only reason they are providing them is to meet their Jenks Act obligations. Thereby obfuscating the seminal nature of the recordings.

Moreover, the government was cognizant of the fact Bergrin was a *Pro Se* litigant, when they had three full time federal prosecutors assigned to the prosecution, a media expert, and multiple federal case agents. While held in pre-trial detention, at the Metropolitan Detention Center, (MDC), Brooklyn, New York, Bergrin was held in a unit consisting of approximately 100 pre-trial detainees; all whom were provided with CD's of their discovery and there was only one discovery computer to review recordings and discovery; thus Bergrin had only about one hour per day to review his complex discovery materials and without the government specifying this crucial Brady material or even classifying it as Brady of Giglio evidence, it was virtually impossible for him to receive a fair trial. It could not be done.

Henceforth, the "true meaning" and spirits of Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963) and Giglio v. United States, 405 U.S. 150, 92 S. Ct. 763, 31 L. Ed. 2d 104 (1972) were trampled upon. As a matter of fact, when demanded, the government denied possession of any Brady evidence. Bergrin had the statutory and constitutional right to be informed by the government that there is not only Brady material contained in a plethora of recordings, but that they also significantly impeach Young's credibility.

During the trial of William Baskerville, in 2007, and continuing for approximately seven years, it was both Young's and the government's ardent position, that Young and Rakeem Baskerville were seated in Curry's Range Rover automobile, on the morning of November 25, 2003 and after a meeting at the Baskerville residence. At this time a purported telephone conversation occurred between Bergrin and Curry, wherein Rakeem and Young determined that the informant in Will's case was Deshawn "Kemo" McCray. Moreover, that until Curry, Young, Rakeem and Jamal Baskerville and Jamal McNeil met with Bergrin, none of them had any clue Will faced life in prison. Young also swore that none of them were aware of any case facts. This was his proffered statements and sworn trial testimony in 2007 and 2011.

During all of Young's proffer sessions and in trial preparation with the government for United States v. Baskerville, in 2007, as well as the actual trial testimony, and at Bergrin's 2011 trial, Young had emphatically and vociferously swore that: Bergrin appeared at a street meeting, at approximately 9:00pm, at Avon Avenue and S. 15th Street, Newark, New Jersey, four to five days subsequent to Will's arrest and for the first time made them aware that Will was facing life in prison, that if Kemo would testify Will would go free and that

Bergrin stated, "No Kemo, no case." T. 4349, L. 16-19 T. 4363, L.15, T. 4364, L. 1-12, T. 4365, L. 15-18.

During the trials of Bergrin, in both 2011 and 2013, the government vehemently argued that no meeting occurred with Bergrin until December 4, 2003, and they wrongfully and deceptively argued that they had an intercepted telephone conversation between Bergrin and Curry proving this fact.

In summation, prosecutor Joseph Minish, contravening the substance of known recorded conversations argued that: "the event of significance that happens after Thanksgiving, is the detention hearing on December 4, 2003. This was the first time that Mr. Bergrin and William Baskerville are told he's facing life...And on that day there were phone calls between Bergrin and Curry, three calls." T3-8504:24. Minish even used demonstrative evidence to emphasize this date and the fact of Bergrin advising the group, Will faced life in prison.

Minish absolutely and pointedly asked the jury to conclude that the date of the meeting was December 4, 2003, knowing Young had fabricated his testimony and that the recordings proved this was untrue. He implored the jury to find that "the date of the detention hearing at which Mr. Bergrin had told the Curry gang that you got to kill Kemo." T. 8536:23-8538:7; What is troubling is the fact that he made this argument knowing that this date was a fiction and that Young had finally admitted in 2011, that

Bergrin NEVER informed anyone to "kill" Kemo. T. 175-190; although Young swore in 2007, at the Baskerville trial that Bergrin told the group to kill Kemo. Minish also fervently argued to the jury in 2013 that, "NO ONE IS GOING TO KILL KEMO MCCRAY IF WILL BASKERVEILLE WAS DOING TEN YEARS. IT WAS NOT GOING TO HAPPEN." T. 8504. Again, all this time having in-depth knowledge that recordings existed which evidenced these sworn facts to be false.

The government was fully cognizant of their Brady and Giglio obligations, and knew that if Bergrin became cognizant of the intercepted conversations it would exculpate him from Kemo's murder and prove Young's deception. They knew that their (Young's) alleged motive or theory for the murder of Kemo was fabricated in that this alleged group did not learn at this alleged Bergrin meeting, that Will faced life in prison. They also knew that Young contrived the fact that Bergrin informed the group that without Kemo, Will would go free; but if he was to appear at trial, Will would get life; and that without Kemo, the government had no case. The Brady and Giglio recordings contravene all this testimony to an absolute certainty.

The paramount point is that the recordings contained absolute proof that on November 25, 2003, Young and Curry were informed that Will faced life in prison as Bergrin read them the facts contained in the Criminal Complaint, that Bergrin let it

be known that the evidence against Will was overwhelming, independent of Kemo and between November 25 to December 9, no street meetings ever occurred with this group and Bergrin; and most importantly that Bergrin had clearly informed Curry that he could get a deal for Will for about 10 years. (The recordings will be discussed with specificity, infra).

In essence: the recordings were crucial to a determination of the truth seeking process and Bergrin's ability to receive a fair trial. The government sought to win at all costs, even if it meant falsifying facts and evidence and this was espoused by their arguing the December 4, 2003, date for the Bergrin meeting, knowing recording 135, 475, dated December 4, proved this fact false. They even went so far as to wrongfully send a memo to the Court, authored by prosecutor Steven Saunders, that "this was the date Bergrin met with this alleged group and advised them, no Kemo no case." See Saunders memo attached hereto. The government's constitutional violations of Bergrin's due process and equal protection rights resulted in a grave miscarriage of justice.

Lastly, and prior to review of the actual recordings: Bergrin did NOT receive operable CD recordings until trial commenced; thereby further trampling his due process rights and any reasonable opportunity to listen to them. He complained on the record of this fact and eventually received new copies of

the 40,000 conversations. In any event, based upon the government's misleading representations about not possessing any Brady or Giglio material, and the government not intending to use the recordings; they would not have been listened to.

B. The Recordings

Enclosed are excerpts of recordings contained within the 40,000 CD's. It does not include all Brady and Giglio evidence which the government wrongfully failed to disclose.

1. November 25, 2003, call 1, 339, 406 at 13:22:12

Curry informs the caller (unidentified male), that he was going to a concert in New York City tonight and then leaving tomorrow (Nov. 26), for Thanksgiving in North Carolina. That he intends to be away at least 3-4 days and will be unavailable.

This recording should have made the government aware that Young's proffer statements, as well as his 2007 Baskerville trial testimony and 2011 Bergrin testimony pertaining to the street meeting with Bergrin, Curry and others was not truthful. Young never equivocated as to this time period nor ever state that this date was inaccurate until 2011 when he testified in

Bergrin's first trial and was confronted with the fact he was lying.

2. November 25, 2003, call 711475 at 13:31:26

Hamid Baskerville calls Curry to notify him that his brother Will was arrested this morning at Will's house. This call occurs at 1:30 p.m.

Curry sounds completely surprised and had no idea about this. This conversation is in complete contrast to Young's sworn trial testimony and proffer statements, that Young, Curry, Hanif and others met at 10:00, that morning to discuss and strategize about Will's arrest and that Curry, in his presence, telephoned Bergrin.

3. November 25, 2003, call 986, 037 at 14:40:21

Bergrin called Curry this afternoon to let him know that he had just received a telephone call from Will's wife, Deidre Baskerville, advising him that her husband had been arrested this morning. (Curry was the first cousin of Will and had been raised along with Will and Rakeem by their grandmother). Curry informed Bergrin that he knew nothing concerning the arrest of his cousin. It disproves Young's testimony in 2007 and 2011

about the early morning meeting between Curry, Deidre, the Baskerville's and Bergrin being notified by Curry to represent Will.

4. November 25, 2003 (17:01 hours)

Bergrin called Curry to let him know the substance of Will's criminal complaint. That Will was accused of making five hand to hand sales, of small quantities of crack cocaine, to a confidential FBI witness, Will said named "Kemo;" that there were recordings and video surveillance; that the case agent was Shawn Mason, FBI; and any quantity over 50 grams carries a statutory maximum of LIFE in prison. This is a critical call as it proves Curry and Young knew the statutory maximum was life and the quantity of evidence, independent of Kemo.

5. November 25, 2003, call 346671 at 17:05:00

Curry is intercepted contacting Rakeem Baskerville to ask him "who is some guy named 'Kemo.'" This call was made within minutes of Bergrin conversing with Curry about the Rule 5 Initial Appearance, before the United States Magistrate, about Curry learning the contents of the Criminal Complaint and whom Will advised Bergrin was the FBI witness.

This recording is vital in that it proves Rakeem Baskerville was never in Curry's Range Rover vehicle with Curry and Young when Bergrin called; Young swore and testified to this lie repeatedly in both 2007 and 2011. Further it proves Young and Curry knew Will was facing life in prison and it was Curry, by repeating what Bergrin was informing him telephonically, who advised Young that Will faced life in prison; and not Bergrin for the first time at some street level meeting, 4-5 days after Will's arrest, or on December 4, or any date thereafter.

Rakeem responded to Curry, "I don't know him; I think he's from Irvington." This also proves Young was untruthful when he testified it was he and Rakeem, while seated in Curry's Range Rover (when Bergrin called), that figured out the informant was Kemo. It also proves Young lied at William Baskerville's 2007 trial when he testified that on November 25, 2003, while seated in Curry's vehicle with Rakeem, when they figured out the confidential informant was Kemo, Young made the decision to get rid of Kemo, because he crossed a Baskerville. It eviscerates the accusation that Kemo was murdered because he was an informant. It proves the motivation was retaliation.

6. November 25, 2003, call 4461206, at 17:34:44

Curry calls Will's brother Al Hamid Baskerville (Curry's first cousin) immediately after speaking to Rakeem Baskerville

on the telephone and asks him, "Who the fuck is Kemo or some shit."

This conversation is important because it depicts that Young perjured himself, when he testified in Baskerville 2007 and Bergrin 2011, that Young and Rakeem determined whom "Kemo" the informant was, while seated together in Curry's Range Rover.

During the Al Hamid call, Curry also states, "I ain't seen nor talked to you." Again, when Young repeatedly proffered to the government and testified in 2007, 2011 and 2013, that he met with Curry and Al Hamid the morning of Will's arrest (November 25, 2003), the government knew he was being untruthful.

The perjured testimony of Young is even further exacerbated and evinced by the recordings:

7. November 25, 2003 4:24:46

Curry contacts Hamid Baskerville, another brother of Will and another first cousin of Curry, to advise him that Will's charges carry LIFE in prison. This is also a call and conversation in Young's presence, according to Young.

These recordings would have destroyed the magnitude of Young's perjured testimony wherein he described to the jury how shocked everyone was when Bergrin informed them, during this street meeting, that Will faced life; and that none of them had

any clue as to the consequences of the charges before this meeting in December. Tr. 10/28/11, 138-141.

This Honorable Court must be further informed out of the approximately 40,000 intercepted conversations not a single one contains even a hint of this Young contrived meeting with Bergrin. There does not even exist any chatter of such a meeting, it being planned, any parties advising the other, nor any words about it, subsequent to its alleged occurrence. Most importantly, the government cannot aver that the parties did not speak openly and freely on the telephone.

8. November 26, 2003, call 231475 at 16:29:45

Curry calls Al Hamid Baskerville and tells him, "He is going to see Paul at his office to find out what the fuck is going.

This is less than 24 hours after Will's arrest and is indicative that Bergrin did not hold any street meetings with Curry, nor anyone else as Young testified.

9. November 26, 2003, call 127781, 15:00:24

Bergrin calls Curry to advise him that he will be in his office in 15 minutes to meet with Curry.

This is significant to prove that Bergrin met Curry in his office, the day subsequent to Will's arrest and that, one could infer there was no street meeting; as Young testified.

10. November 26, 2003, call 995926 at 17:38:38

This is a very vital conversation and extremely exculpatory.

Curry calls his confidant, and unindicted co-conspirator, Jarvis Webb. The subject witness (Webb) whom caused attorney Vincent Nuzzi to be judicially conflicted, as trial attorney in United States v. Curry, and kicked off Curry's case.

Curry converses with Webb and states: "he just came from Bergrin's office and that Curry asked Bergin what kind of time Will was facing. Bergrin said 20 years and Curry responded, what is he really facing- Bergrin responded about 12 years. Bergrin said he sold about 100 grams of crack cocaine." Webb then advised Curry, "on 12 he does 10:

This conversation would have conclusively proven to the jury, as Minish argued in summation; that Bergrin and Curry would not have killed Kemo if they believed he was only facing 10 years. Words that completely eviscerate the government's entire theory of Bergrin's culpability and the motive to kill Kemo.

Its powerful impact not only proves Bergrin never held a street meeting wherein he discussed Will's case; but the fact that by indisputable evidence and Bergrin's own words, no one ever believed Will would get life if Kemo was a witness and the fact that he was only looking at about 10 years. Furthermore, that Bergrin never advised Young, Curry, etc. that Will was going to get life and Bergrin never contemplated a trial.

THERE CAN BE NO EVIDENCE STRONGER THAN THE WORDS IN THESE CONVERSATIONS AND THEY SHOULD NOT HAVE BEEN BURIED AMONGST 40,000 OTHER INTERCEPTIONS.

11. November 26, 2003 call 244,900 at 18:56:5

Curry confirms he is about to leave Newark, New Jersey for North Carolina, to spend the Thanksgiving holidays there.

With these recordings the government should have scrutinized Young's accusations copiously and never suborned perjury by permitting him to testify in 2007, at the Baskerville trial, that he met with Bergrin, Curry, etc.… at around 9:00pm, on Avon Avenue, Newark, New Jersey, 4-5 days after Will's arrest; and the rest of what he falsely swore to.

12. December 4, 2003, 1913 hours

Bergrin telephones Curry to advise him that earlier today he attended Will's detention hearing. He is further intercepted informing Curry that he believed he could get Will bail, that the government's evidence is very strong and the most Will is realistically looking at is a plea for 13 years;

This call is extraordinarily significant for three reasons:

1) It is the second intercepted conversation since Will's arrest, wherein Bergrin is informing Curry that Will is only facing about 10 years. (That's about all he would do on 13 years). That Bergrin would never make this representation to the leader of the Curry drug organization, unless it was a reliable and valid statement;

2) That it would be absurd to suggest Bergrin would hold a street meeting, in the middle of the drug infested hood, Avon Avenue at 15th Street, Newark, New Jersey with Curry and the Baskerville's, Young and McNeil, when Curry has repeatedly come to his office and; and

3) That Bergrin never informed anyone he can win the case without Kemo and Will would get life, if Kemo testified. It completely disproves every lie that Young advanced and the government propounded.

What is also very instrumental to this Brady, Giglio, due process and equal protection motion, is the fact that Bergrin advised Curry that he "would do his best" and Curry stated,

"Fight for him." Again, no discussion about Kemo, getting rid of witnesses, trial nor holding any meetings. As a matter of fact, Bergrin ends the call by telling Curry that he will call him tomorrow. This is December 4, 2003, the date the government and Young falsely asked the Bergrin jury in 2013, to accept as the date of the street meeting with Bergrin.

When Bergrin tells Curry that he will speak to him tomorrow, which is December 5, 2003, evidence cannot be stronger that there was no meeting on December 4; the date of Will's detention hearing. With this intercepted conversation, this Court must ponder as to why Minish, Saunders and the government would intentionally deceive the Court and vociferously argue; that this was the date Bergrin had that street meeting with Young. This Court must conclude it was to defer attention away from the government's intentionally concealing these recordings and attempting to divert the fact such substance exists. It also confirms their, win at all costs attitude; even if perjury is suborned, evidence contrived and fabricated and important constitutional rights eviscerated.

13. December 7, 2003

Three days later, Curry is intercepted conversing with Rakeem Baskerville. Rakeem is very upset with Bergrin and calls him a "dumb mother fucker." Rakeem accused Bergrin of

permitting someone to read his file and tells Curry, "I am not dealing with Bergrin anymore and he is finding himself a new lawyer."

This interception is extremely critical because it evinces distrust in Bergrin and alienation. Words and actions inconsistent with an alleged co-conspirator complicit in the planned murder of a government witness. It would not happen. Since it has been proven that up until December 4, 2003, there's no meetings with Bergrin. (Call 1261893 at 13:36:12 is Curry informing an unidentified black male that he has not been outdoors for several days.

Bergrin should have had the benefit of this call to also prove the fact there was no street level, confidential meeting.

14. February 18, 2004, call 1032806, 13:26:31

This call occurred approximately two weeks preceding the murder of Kemo. Curry is overheard further alienating Bergrin by advising a female not to use Bergrin as her attorney.

15. February 18, 2004, call 1143277, at 22:06:44

Curry advises a black male that "HE AIN'T FUCKING WITH PAUL ANYMORE. I DON'T RECOMMEND THAT GUY."

Again, this is a conversation approximately two weeks prior to Kemo's murder.

There can only be one logical way to interpret this call and the chronology leading up to it. That Bergrin is not a trusted person within the Curry Organization, wherein they would ever risk him having knowledge of a murder. Additionally, Curry would not do anything to alienate, upset nor anger Bergrin, if Bergrin was complicit.

16. February 20, 2004, call 1203305, at 16:34:13

This call is the icing on the cake in proving Bergrin's innocence. Curry is discussing Bergrin and informs the unidentified black male: "PAUL IS ABOUT COPPING OUT. TAKING MONEY AND PLEADING GUILTY. CURRY WANTS PAUL OFF WILL'S CASE."

If Bergrin had anything to do with Kemo's murder, he would be contemplating litigating Will's case; not pleading him out. Bergrin would be fighting Will's case and believe that the intended killing of Kemo would have an effect on the defense of the case; not be guiding, recommending and aggressively seeking a plea of guilt, as this conversation depicts. Moreover, if Bergrin was involved with Kemo's murder there would be no talk of getting him off the case. Bergrin would be an intricate part of the case.

This conversation is clearly dichotomous and exculpatory to Bergrin's involvement in the Kemo murder.

In sum: the government has a statutory and constituted obligation to ensure Bergrin was cognizant that exculpatory and case altering impeachment evidence, both existed and was contained in the recordings. Instead they usurped their professional, legal and moral responsibilities and hid them within a massive mountain of discovery and intercepted conversations. They buried these recording in a plethora of immaterial, irrelevant and useless evidence. The government was aware that the burdensome and cumbersome manner by which they handed over the recordings and formatted the CD's to even attempt to listen to them, was tantamount to never receiving them.

As aforementioned, the government's case against Bergrin for Kemo's murder was contingent on the jury believing Young. His veracity would have been destroyed by the recorded evidence and the Government knew that.

What is repulsive and disheartening, is that the government interviewed Young for an extended period of time and on an immeasurable number of occasions. They knew that Young had falsely incriminated Jamal McNeil, as the shooter and murderer of Kemo and that Young was even willing to testify to this fabrication, even if it meant McNeil being put to death. If they were to achieve their objective of obtaining a guilty

verdict at all costs and under any conditions, they had to obfuscate material, exculpatory and impeachment evidence.

Hassan Miller was incarcerated at the Hudson County Jail, Kearny, New Jersey and shared a cell with Young. He was Young's closest friend and ally at the institution and a government cooperator himself. He was known to the government as an informant and they had vouched for his credibility and integrity in the past. During governmental interviews with Miller, he alleged that Young had incriminated himself and was willing to wear a concealed recording device at the jail. This was approved by the Department of Justice and Department of Corrections. What is of paramount importance is that Miller informed the government that he had Young's confidence and that Miller was informed, by Young, that Bergrin was innocent. That Young had revealed to him that he falsely incriminated Bergrin to benefit himself and be approved as a cooperating witness.

This exculpatory fact was never revealed to Bergrin. It could have persuaded the triers of fact to acquit Bergrin; and the Kemo murder was the driving force that prejudiced the indictment, and all the other charges.

C. Additional Brady and Giglio Evidence, never disclosed

1. Maria Correia

Maria Correia, a cooperating government witness whom secretly recorded Bergrin, in hopes of incriminating him, had objective evidence that Bergrin knew Oscar Cordova, was an informant; within a short period of time of Bergrin meeting him. This extraordinary fact would have positively influenced the jury to acquit Bergrin of attempting to hire Cordova to kill a witness. The government accentuated recorded inflammatory statements, Bergrin made to Cordova and used it in their opening statement to prejudice the jury against Bergrin and make him appear devious. Correia's testimony of this concealed fact was never disclosed by the government whom refused to grant her "use immunity". Thus, Bergrin could never have learned this and bring it to the jury's attention.

2. Yolanda Jauregui

Yolanda Jauregui, a cooperating government witness, informed the government that Bergrin:

1) Never used Abdul Mutallic Williams as a "taxi-driver-courier," to deliver drugs for either her or Bergrin, to their clients. That this was absolutely false and perjurious.
2) That Bergrin never had anything to do with Rondre Kelly's drug trafficking and that Kelly's accusations against Bergrin being any kind of leader or organizer of a drug organization was perjurious. That Bergrin never set prices, solved problems, had

anything to do with drug deliveries nor did anything as Kelly alleged, thereby falsely alleging Bergrin was a drug Kingpin.

3) That Bergrin never sold kilograms of drugs to Eugene Braswell, as he alleged.

4) Also, that she was offered a new home, money and other undisclosed benefits, if she testified against Bergrin.

None of this was disclosed to Bergrin.

3. Ramon Jiminez

Ramon Jiminez, also a cooperating government witness exculpated Bergrin against Kelly's allegation; that Jiminez delivered multiple kilograms of drugs to Kelly, on behalf of Bergrin and at the Law Office of Pope and Bergrin, 572 Market Street, Newark, New Jersey. Jiminez knew that this evidence was fabricated. He also told the government facts which would have impeached Eugene Braswell's testimony against Bergrin; especially when Braswell contrived evidence of Bergrin-Jiminez introducing him to a Peruvian connection and Braswell being provided multi-kilograms of cocaine. Further, Jiminez was aware that Bergrin had nothing whatsoever to do with Abdul Williams and drug trafficking.

Despite all of this Brady/Giglio evidence being revealed to the government, by their own cooperators, it was never disclosed to the defense.

LAW

The United States Constitution requires a fair trial, and one essential element of fairness is the prosecutions obligations to turn over exculpatory evidence- United States v. Bagley, 473 U.S. 667, 674-675, 105 S. Ct. 3375, 87 L. Ed. 2d 481 (1985); Giglio v. United States, 405 U.S. 150, 92 S. Ct. 763, 31 L. Ed. 2d 104 (1972). This requirement exists even if the defendant has not made a specific request. Strickler v. Greene, 527 U.S. 263, 280, 119 S. Ct. 1936, 144 L. Ed. 2d 286 (1999); United States v. Agurs, 427 U.S. 97, 107, 96 S. Ct. 2392, 49 L.Ed. 2d 342 (1976).

By the government dumping 40,000 intercepted conversations, contained in multiple CD's, devoid of any summaries or substance descriptions, along with over 20,000 pages of other materials on Bergrin; while he was incarcerated pre-trial and extremely limited in any kind of mechanism to play the recordings and decipher materiality or relevance; they engaged in egregious Brady misconduct. It was a blatant denial of Bergrin's constitutional due process. To hold otherwise would be a misnomer and travesty of justice. Donnelly v. DeChristafoso, 416 U.S. 637, 647, 94 S. Ct. 1868, 40 L. Ed. 2d 431 (1974).

The government knew the limitations of their case and went through great lengths to conceal exculpatory recordings. They

were also fully cognizant of their obligations to disclose impeachment evidence and the recordings contained a plethora of this. The Kemo case was wholly contingent and dependent on Young being believed and the recordings established he lied. Giglio, 405 U.S. at 151, 154. What is extraordinarily crucial is the fact that the recordings corroborate Bergrin's innocence and prove that the chief evidence was contrived. The Kemo murder case was the vehicle that drove the jury's perception of Bergrin, along with other withheld evidence. If Bergrin was never charged with Kemo, then he would not have suffered the inordinate portrayal of being violent and being prejudiced to the point of a guilty verdict.

If this exculpatory evidence and evidence of impeachment was presented to the jury, the court would have granted Bergrin's Rule 29, Fed. R. Crim. P. motion. It was the prosecutor's duty to learn of any favorable evidence known to law enforcement and to make sure Bergrin had reasonable notice. Kyles v. Whitley, 514 U.S. 419, 437-438, 115 S. Ct. 1555, 131 L. Ed. 2d 490 (1995). What happened here is more akin to active concealment. The government must concede the evidence was favorable, that they should have placed Bergrin on notice of it and it would insult this Court's intelligence, for them to argue, Bergrin was not prejudiced. See Strickler, 527 U.S. at 281-282.

Due process imposes an "inescapable" duty on the prosecutor "to disclose known, favorable evidence rising to a material level of importance." Kyles v. Whitley, 514 U.S. 419, 438 (1995). Favorable evidence includes both exculpatory and impeachment material that is relevant either to guilt or punishment. See Bagley, 473 U.S. at 674-676; Giglio, 405 U.S. at 154. These recordings prove Young fabricated the following facts:

1) That Rakeem Baskerville was in the front seat of Curry's vehicle, when Curry spoke to Bergrin on November 25, 2003;
2) That Young and Rakeem Baskerville, while in this vehicle, determined the informant was Kemo, and that Rakeem knew Kemo;
3) That Bergrin shocked the group at a street meeting, 4-5 days after Will's arrest, or on December 4, 2003, by informing them Will would get life in prison if Kemo testified;
4) That there was a strategy session with Curry and the Baskerville's on the morning of November 25, 2003;
5) That Bergrin believed Will would be sentenced to more than 10-12 years;
6) That Bergrin intended to proceed to trial in the case instead of pleading Will guilty; (Curry and Bergrin believed and knew the evidence was overwhelming against Will independent of Kemo.

Consequently, it would have been ludicrous to kill Kemo and assert that his demise would win the case.

The recordings eviscerate the government's entire theory, motive and factual evidence on the Kemo case. They also prove Bergrin was innocent of drug trafficking and the conspiracy to murder witnesses.

Any evidence that would tend to call the government's case into doubt is favorable for Brady. See Strickler, 527 U.S. at 290. These are the most serious crimes known to humanity and Bergrin's constitutional due process rights were trampled upon.

The credibility of Young, Williams, Kelly, Cordova and Braswell were instrumental to the government's proofs and Bergrin's punishment. These witnesses caused Bergrin to be sentenced to spend the rest of his natural life in prison for crimes he did not commit.

Both willful and inadvertent failure of the prosecution to disclose evidence, favorable to the defendant, requires reversal of the conviction; especially when the prejudice suffered is as extraordinary as in the case sub judice. See Strickler, 527 U.S. at 281-282, Giglio, 405 U.S. at 154. It is Bergrin's ardent position that the manner of the recordings being given to him was exactly the same as never disclosing them.

Where a defendant does not have enough information to find the Brady material with reasonable diligence, the government's

failure to produce the evidence is analogous to suppression. In the case of Milke v. Ryan, 711 F. 3d 998, 2013 U.S. App. LEXIS 5102, No. 07-99001, (9th Cir. 2013), the Circuit Court held that Brady was clearly violated when evidence took 7000 hours to discover. It would have taken Bergrin over 20,000 hours to review the intercepted conversations, recordings and under the circumstances and conditions of Bergrin's pre-trial detention, any significant time to discover was impossible. A reasonably diligent defendant, as Bergrin was, could not have been expected to discover these recordings in time for trial.

To find prejudice under Brady and Giglio, it is not necessary to find that the jury verdict would have come out differently, although Bergrin strenuously submits, it would have. Kyles, 514 U.S. at 434. It suffices that there only be a "reasonable probability of a different result" as to either guilt or penalty. Id. The government's conduct undermined the wrongful outcome of the trial. No civilized system of justice should have to depend on such a tainted trial, laden with dishonesty and over-zealousness. Bergrin must be bestowed with all reasonable and favorable instances of his innocence; which he has never equivocated upon.

Bergrin is abundantly aware of the law pertaining to disclosure and that the fact that by the prosecution dumping 40,000 conversations, with dysfunctional discs, amidst another

20-30,000 pieces of discovery, they will allege they met the requisites of Brady, Giglio and their progeny of cases. What distinguishes the case at hand, is the government's blatant and flagrant deceit and misrepresentations that the recordings are devoid of Brady-Giglio evidence.

Model Rules of Professional Conduct, R. 3.8 (1983), states that a prosecutor violates his responsibilities when he intentionally fails to disclose exculpatory evidence to the defense; and the government is aware of the existence of this evidence which tends to negate guilt.

The government would be ingenious and incredulous, if they argued that the recordings would not have altered the juries' judgment of Young's credibility. Young was the sole, uncorroborated career criminal who gave conflicting and contradictory testimony of the Kemo murder and of Bergrin allegedly giving advice to the effect of "no Kemo, no case." Higgs, 713 F. 2d at 42. The Court must grant a new trial when conduct, such as occurred in Bergrin's case, affects his right to a fair trial. The Due Process Clause of the 6th and 14th Amendments and Equal Protection Clause of the Fifth Amendment to the Constitution mandates this action.

The government's failure to meet the spirit of Brady with their method of providing malfunctioning CD's, vociferous assertions that there is "no" Brady evidence and that the

recordings are devoid of both impeachment and exculpatory evidence, and their innate understanding of Bergrin's time consuming restrictions, was reprehensible. These actions must be condemned.

United States v. Shaffer, 789 F. 2d 682, 690 (9th Cir. 1986) is a case analogous to Bergrin's. The Court reversed the Shaffer's conviction because they found due process constitutional violations of the government's Brady requirements, when the prosecution represented that "the recordings would be of no value to the defense." The Court held that, the Government's lack of good faith appears clearly in their reaction upon finding out that the defense had obtained the trial transcript. That reaction was to deny that anything in the transcript constituted a prior inconsistent statement, "Thus the government clouded the issues by arguing that they provided the discovery, the manuals containing Brady or Giglio materials, resulted in a mistrial. Additionally, the Court found Brady violations, when the government turned over mountains of documents, as they did in Bergrin's case; and contained within this mountainous pile of discovery was exculpatory documents. This excoriates Brady's spirit and is unfair. Hughes v. Hopper, 629 F. 2d 1036, 1039 (5th Cir. 1980). The Court firmly asserted "that defense counsel's knowledge of the evidence is effectively nullified when the prosecution

misleads the defense into believing the evidence will not be favorable to the defendant."

Furthermore, since Bergrin had no knowledge that the recordings contained exculpatory or favorable information and had no objective or "reasonable" way to ascertain their contents, he should not be penalized. Most importantly and especially; since the government made specific, articulable assurances, to the Court and Bergrin that the recordings contain no Brady or Giglio evidence and are unfavorable to Bergrin they should now suffer the consequences. United States v. Gaston, 608 F. 2d 607 (5th Cir. 1979); Freeman v. State of Georgia, 599 F. 2d 65, 72 (5th Cir. 1979), cert denied, 444 U.S. 1013, 100 S. Ct. 661, 62 L. Ed. 2d 641.

For the aforementioned reasons, this Court must reverse Bergrin's convictions.

IV. NO RATIONAL JURY COULD HAVE FOUND PETITIONER AIDED AND ABETTED THE KEMO MURDER BECAUSE THE GOVERNMENT OFFERED NO EVIDENCE OF THE REQUISITE *MENS REA* AND *ACTUS REA* ELEMENTS.

Petitioner incorporates by reference all facts and legal arguments averred in other sections of this brief as if delineated in their entirety.

Racketeering Act 4(b) of Count 1 and Count 13 of the Indictment charged Petitioner with aiding and abetting the murder of a witness (Kemo Deshawn McCray "Kemo") with intent to prevent his testimony at an official proceeding in violation of 18 U.S.C. §1512 (a)(1)(A) and 18 U.S.C. §2.

18 U.S.C. §1512 (a)(1)(A) states in relevant part: "Whoever kills. . .another person, with intent to. . . prevent the attendance or testimony of any person in an official proceeding is guilty of a crime against the United States."

18 U.S.C. §2, provides: "(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal; (b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

A. The Evidence Offered Against Petitioner

The sole "evidence" the government offered for the aiding and abetting charges was the uncorroborated, conflicting and wholly incredulous testimony of one witness: career criminal Anthony Young.[1]

Through Young, the government elicited testimony that would serve as the *only* basis of the aiding and abetting. According to Young, those facts, which are unequivocally denied by Petitioner, are that:

(1) On the day of William Baskerville's November 25, 2003, arrest, that Young was present in the car when Petitioner called Hakeem Curry, William Baskerville's cousin, and

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[1] Contrary to the claims and insinuations which have been propagated for more than twelve years, there is not--nor has there ever been in existence--a recording (sealed or improperly sealed) in which Petitioner says the now infamous, Hollywood-movie worthy and fictitious phrase "No Kemo, No case." No such evidence exists or has ever existed.

In 2003, the FBI was conducting an investigation into William Baskerville's narcotics distribution activities. During that same time period, the DEA also was conducting a separate investigation involving Hakeem Curry. In the DEA's investigation, there were more than forty-thousand wiretap recordings. Those recordings spanned from 2003 and are claimed to have ended "on or about" March 1, 2004, the day before the Kemo murder.

The court and the public have been led to believe that a "sealing issue" precluded introduction and admission into evidence of recordings in which Petitioner allegedly made such a damning statement or similar statements implicating himself in Kemo's murder as well as being involved in a drug conspiracy with Hakeem Curry. In fact, the recordings prove otherwise. As documented in other sections of this brief, the recordings refute Young's claims and prove he lied when implicating Petitioner. The recordings also prove there was no drug trafficking conspiracy between Petitioner and Hakeem Curry. Indeed, the recordings prove Curry's and Rakeem Baskerville's mistrust and animosity toward Petitioner; that Curry referred cases to other criminal defense attorneys including Vincent Nuzzi, Esq.; and that he directed his underlings not to deal with Petitioner.

overheard Petitioner say to Curry, "Will said it was some guy—K-amo;"

(2) That a few days, a week or two weeks later (depending on which of Young's version is alleged), Petitioner met with Young, Hakeem Curry, Rakeem Baskerville, Jamal Baskerville, and Jemal McNeil on Avon Street in Newark one winter evening and said:

(a) Will Baskerville was facing life imprisonment;

(b) That if Kemo didn't testify, that Will would win his case and come home;

(c) But, that if Kemo testified, Will would spend the rest of his life in jail.

The government does not allege that Petitioner knew anything or did anything once he left this alleged meeting. This point is not disputed. Young's testimony is clear: ALL decisions, plans and acts occurred AFTER Petitioner left. No one informed Petitioner after he left this alleged meeting that a decision was made to murder Kemo.

More than 3 (three) months after this alleged meeting, Kemo was shot and killed.

B. Even Accepting the Government's Proof as True, They are Insufficient to Prove Aiding and Abetting 18 U.S.C. §1512 (a)(1)(A).

Even if what Young claimed actually occurred--that Petitioner stated that, if "Kemo" testified, William Baskerville will go to jail for life; but without Kemo's testimony, Baskerville would get bail and win the case--there still is insufficient proof to establish the *mens rea* or *actus rea* of aiding and abetting the specific substantive offense in 18 U.S.C. §1512 (A)1(a). The statements attributed to Petitioner simply are not enough.

1. The Supreme Court's Analysis of Crimes Based on Speech Set forth in Elonis v. U.S.

In Elonis v. United States, the Supreme Court reversed a conviction for terroristic threats against the defendant for his very disturbing and violent posts on Facebook which appeared to be directed toward his estranged wife. Elonis v. United States 135 S. Ct. 2001, 192 L. Ed. 1, 2015 U.S. LEXIS 3719, 83, U.S.L.W 4360, No. 13-983 (2015). The defendant also made alarming threats to harm children. Id. Elonis argued that the posts were quotes from a rap song.

In considering if the posted threats were sufficient to uphold Elonis' conviction, the Court employed a First Amendment analysis. The Court found it improper to base a criminal conviction upon an "objective standard" of how a reasonable person would interpret Elonis' statements instead of *proof of*

Elonis' intent in posting the statements. The court reversed the conviction, finding that another person's perception of Elonis' intent could not sustain his conviction. Id. Rather, the Court held subjective evidence of Elonis' intent must be proven beyond a reasonable doubt. Id.

"Objective tests tend to focus on the reaction of a reasonable recipient of the statement." An objective "reasonable person" interpretation would impose criminal liability for the foreseeable (and unforeseeable) consequences one's statement had on his or her listeners. See also Morissette v. United States, 342 U.S. 246 (1952); Rogers v. United States, 422 U.S. 35, 47 (1975).

Moreover, "[a]n objective test reduces culpability on the all important element of criminal intent to negligence." Such a test is "inconsistent with "norms for construing criminal statutes," which "presume that intent is the required *mens rea* in criminal laws." An "objective construction" "would create a substantial risk" of one being charged criminally for "negligently misjudging how others would construe a person's words," without proof of criminal intent. Rogers, 422 U.S. at 43-44.

A standard of subjective intent acts as a safeguard against potentially arbitrary enforcement. Accordingly, a "reasonable

person's" interpretation of a speaker's words, as (allegedly) was the case here, is insufficient to prove intent under Elonis.

2. The Alleged Statements were Vague, Subject to Various Interpretations and Insufficient to Prove Petitioner Intended to Aid and Abet Young to Commit the Specific Crime of Murder of a Witness.

Petitioner denies making the statements Young alleged. But even if the statements actually were said, they do not prove Petitioner had the *intent* to commit the specific act of murder to prevent a witness' testimony, as opposed to some another nonspecific act, crime or nothing at all. The words attributed to Petitioner by Young are subject to multiple interpretations such as:

(a) Contact Kemo and pay him not to testify;

(b) Convince Kemo to leave the jurisdiction and not show up at court to testify;

(c) Threaten, coerce, intimidate and influence Kemo not to testify;

(d) Restrain Kemo from appearing in court; or

(e) Meant nothing at all--it was an attorney explaining to his client's family (Baskervilles' brothers Jamal and Rakeem and his cousin Hakeem Curry) the case against Baskerville.

In the case sub judice, Petitioner is not charged with felony murder or involuntary manslaughter. He is not charged

with a crime because of negligent acts. Petitioner is charged with deliberately aiding and abetting Young to commit a very specific crime for the very specific purpose set forth in 18 U.S.C. §1512 (a)(1)(A), *to wit*, the crime of murder with the intent to prevent a witness' testimony.

3. Proof That Young Perceived Petitioner's Words to Mean Murder is Legally Insufficient to Prove that Petitioner Actually Intended the Act of Murder.

Petitioner's conviction stand on evidence that Petitioner may have in "some way" unknowingly or inadvertently contributed to Kemo's murder, regardless of the fact there was no proof offered this is what Petitioner intended. There must be evidence offered to prove Petitioner shared the specific intent: (1) that Young commit murder (and not some other crime); and (2) that the murder was intended to prevent a witness' testimony as required by 18 U.S.C. §1512 (a)(1)(A).

The words Young alleged Petitioner uttered are not enough to prove what the Petitioner's specific intent was, or if Petitioner had any intent other than stating the facts of the case. While the alleged statements could have been interpreted by the listener to encourage commission of some unlawful act,

they certainly do not prove a shared intent to commit the very specific and ultimate act of murder. [2]

It is not Young's interpretation of what he believed Petitioner intended by his words which controls. Rather, the evidence must prove beyond a reasonable doubt that *Petitioner intended* to aid and abet the specific crime of murder a witness with the intent to prevent his testimony.

C. The *Mens Rea* and *Actus Rea* Elements of Aiding and Abetting the Specific Substantive Offense the Principal Committed Must be Found beyond a Reasonable Doubt.

The Due Process Clause protects the criminally accused against conviction "'except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.'" Jackson v. Virginia, 443 U.S. 307, 315 (1979)[3] (citations omitted). "[S]ufficient proof" is "defined as evidence necessary to convince a trier of fact beyond a reasonable doubt of the *existence of every element of the offense*." Id. (emphasis added).

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[2] As explained in other sections of this brief, if the jury was actually able to apply the incomprehensible instructions, there is a grave danger that they returned a verdict based upon a vague belief that Petitioner's words themselves were "some act" which "somehow" resulted in Kemo's murder, regardless of whether Petitioner acted unknowingly and without intent to aid and abet the specific crime in 18 U.SC. §1512 (A)1(a) or any crime.

[3] "[P]roof beyond a reasonable doubt has traditionally been regarded as the decisive difference between criminal culpability and civil liability" which "operates to give 'concrete substance' to the presumption of innocence, to ensure against unjust convictions, and to reduce the risk of factual error in a criminal proceeding." Jackson, supra at 352-362. (citations omitted).

"[A] conviction based upon a record wholly devoid of any relevant evidence of a crucial element of the offense charged is constitutionally infirm." Id.(citations omitted).

1. Proving Aiding and Abetting in the Third Circuit

When a defendant is charged with aiding and abetting, the Government must prove beyond a reasonable doubt each and every one of the required *mens rea* and *actus rea* elements of aiding and abetting the *specific substantive offense*. United States v. Rosemond, 134 S. Ct. 1243, 188 L. Ed. 2d HR 1, 2. 134 S. Ct. 1240, 188 L. Ed. 248, 2014 U.S. LEXIS 1787 (2014).

In the Third Circuit, the elements the government must prove beyond a reasonable doubt include: [4]

(1) That the defendant knew in advance the specific substantive offense that the principal intended to commit; United States v. Carbo, 572 F.3d 112, 118 (3d Cir. 2009); See also U.S. v. Rosemond, supra.[5]

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[4] In Nye & Nissen v. United States, 336 U.S. 613 (1949), the Supreme Court explained: "In order to aid and abet another to commit a crime it is necessary that a defendant 'in some sort associate himself with the venture, that he participate in it as in something that he wished to bring about, that he seek by his action to make it succeed.' L. Hand, J., in United States v. Peoni, 100 F.2d 401, 402." 336 U.S. at 618. The Third Circuit has called this the "classic definition" of accomplice liability. United States v. Nolan, 718 F.2d at 591.

[5] Citing United States v. Kemp, 500 F.3d 257, 293 (3d Cir. 2007), quoting United States v. Dixon, 658 F.2d 181,189 n. 17 (3d Cir. 1981).

(2) That the defendant shared the principal's intent and that it was the defendant's intentional purpose, conscious objective and "specific intent to facilitate" to aid the principal in committing that specific crime; United States v. Mercado, 610 F.3d 841, 848-849 (3d Cir. 2010);[6] Carbo, supra at 118 (emphasis added);

(3) That the principal actually committed the specific crime for which the defendant is charged to have aided and abetted; and

(4) That the defendant performed an affirmative act, with full knowledge and intent, that his affirmative act would help and, in fact, did help the principal successfully commit that specific crime. United States v. Soto, 539 F. 3d 191, 194-97 (3d Cir. 2008).

"Unknowing participation" is not sufficient proof to establish aiding and abetting. United States v. Newman, 490 F.2d at 143. The defendant must wish to bring about the specific crime and desire that it succeed. United States v. Peoni, 100 F. 2d 401, 402 (2d Cir. 1938).[7]

"[M]ere presence" at a crime scene or "mere knowledge" of the crime to be committed is insufficient to support an aiding

[6] United States v. Garth, 188 F.3d 99, 113 (3d Cir.1999

[7] See also Nye & Nissen v. United States, 336 U.S. 613, 618 (1949); United States v. Bey, 736 F.2d at 895; United States v. Newman, 490 F.2d at 143.

and abetting conviction. United States v. Soto, 539 F. 3d 191, 194-97 (3d Cir. 2008).[8]

Furthermore, "facilitation" for aiding and abetting purposes is "'more than associat[ion] with individuals involved in the criminal venture.'" Soto, supra at 194 (quoting United States v. Dixon, 658 F.2d 181, 189 (3d Cir.1981)).

"The government must prove beyond a reasonable doubt that the defendant [sic] [intentionally] participated in "a substantive crime with the desire that the crime be accomplished." United States v. Newman, 490 F.2d 139, 143 (3d Cir. 1974). To prove intentional participation, the government must prove beyond a reasonable doubt that it was the accomplice's purpose (conscious objective) or specific intent to help bring about the specific substantive crime the principal actually committed. United States v. Soto, 539 F. 3d 191, 194-97 (3d Cir. 2008)[9]

The Government also must prove that the defendant "participate[d] in" Id., and "associated himself with the venture and sought by his actions to make it succeed." United States v. Powell, 113 F.3d 464, 467 (3d Cir.1997).

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[8] See also United States v. Bey, 736 F.2d 891, 895-96 (3d Cir. 1984) (aiding and abetting must include instructions that mere knowledge of the crime is insufficient).

[9] See also United States v. Wexler, 838 F.2d 88, 92 (3d Cir. 1988); United States v. Bey, 736 F.2d at 895; United States v. Newman, 490 F.2d 139, 143 (3d Cir. 1974).

The evidence must be clear that the accomplice "must intend to aid and abet the *specific offense* or criminal scheme charged in the indictment" and not some other scheme. See, e.g., United States v. Kemp, 500 F.3d 257, 299-300 (3d Cir. 2007); United States v. Dobson, 419 F.3d 231, 236 (3d Cir.2005). (emphasis added).

There can be "no danger" that a defendant "would be convicted for aiding and abetting some other scheme" than the specific substantive offense in the indictment for which he is charged to have aided and abetted. Kemp, supra at 299-300. (emphasis added) See also United States v. Newman, 490 F.2d 139, 143 (3d Cir. 1974).[10].

D. The Supreme Court's holding in United States v. Rosemond Leaves No Doubt:

> **Proof of Intent to Aid and Abet is Only Satisfied by Evidence that a Defendant obtained Advance Knowledge that the Principal was Going to Commit a Specific Crime, Shared an Intent for it to Occur, Knew when it was to Occur and AND Knowingly Performed an Act to Aid the Principal in Successfully Committing that Specific Crime.**

In the Supreme Court's 2014 decision of United States v. Rosemond, the Court analyzed the law of aiding and abetting in

[10]See also United States v. Newman, 490 F.2d at 143, (error not to include in charge that aiding and abetting required willful participation, where, "Consistent with the court's instructions, the jury might have convicted Garca on the basis of a conclusion that the defendant participated in the activities charged without knowing of their criminal objective.")

determining whether the lower court's charges adequately instructed the jury on the elements of aiding and abetting. United States v. Rosemond, 134 S. Ct. 1243, 188 L. Ed. 2d HR 1, 2. 134 S. Ct. 1240, 188 L. Ed. 248, 2014 U.S. LEXIS 1787 (2014);

The defendant in Rosemond had participated in an attempted sale of marijuana to two buyers. After the buyers took the marijuana and ran, shots were fired. The defendant was charged with using a gun in connection with a drug trafficking crime, in violation of 18 U.S.C. § 924(a) or, in the alternative, with aiding and abetting that offense under 18 U.S.C.S. §2.

The district court instructed the jury that they could find defendant guilty of violating 18 U.S.C. §924(c) as an aider and abettor if the evidence showed that he knowingly and actively participated in a drug trafficking crime. The court did not direct the jury, however, to consider if the defendant knew about the gun before the drug deal. The jury found the defendant guilty of violating 18 U.S.C. §924(c).

On appeal, the Supreme Court found that the district court's instructions to the jury -- the very same instructions as those given in Petitioner's case -- were erroneous because they failed to require proof that defendant **knew in advance** that one of his cohorts would be armed. In telling the jury to consider merely whether defendant knew his cohort used a firearm, the district court did not direct the jury to determine

when defendant obtained the requisite knowledge, i.e. to decide whether defendant knew about the gun in sufficient time to withdraw from the crime. Rosemond, 134 S. Ct. 1243, 188 L. Ed. 2d HR 1, 2. 134 S. Ct. 1240, 188 L. Ed. 248, 2014 U.S. LEXIS 1787 (2014). (emphasis added).

The Court in Rosemond specifically held that, when an accomplice knows nothing of a gun until after it appears at the scene, he may have already completed his acts of assistance; or even if not, be now at that late point have no realistic opportunity to quit the crime. And when that is so, the defendant has NOT been shown the requisite intent to assist a crime involving a gun.

The Court held that the **intent requirement** necessary to prove aiding and abetting **can only be satisfied** when a person **actively participates** in a criminal venture **with full knowledge** of the circumstances constituting the offense. Rosemond, 134 S. Ct. 1249. (emphasis added). A defendant must **know in advance when the specific substantive offense** is going to be committed and the defendant **also must intend** that the principal commit **that very specific offense**. (emphasis added)

The aiding and abetting analysis in Rosemond applies to all aiding and abetting cases, not just those involving the statute at issue in Rosemond. In fact, the Third Circuit's Model Jury

Charges cites Rosemond in its commentary of aiding and abetting all crimes, not just the statute at issue in Rosemond.

E. No Rational Jury Could Have Found Proof Petitioner Knew In Advance that Young Intended to Commit the Specific Crime of Murder to Prevent Kemo's Testimony, Shared that Intent, Knew When it Would Occur or Knowingly Performed an Act which Actually Helped Young Successfully Commit the Murder.

Petitioner unequivocally and categorically denies that he ever met with Anthony Young, Hakeem Curry, Rakeem Baskerville, Jemal McNeil and Jamal Baskerville as Young testified and fabricated.[11] Under no circumstances nor at any time did Petitioner:

1. Inform anyone that Will Baskerville would receive life in prison;
2. Advise that, if "Kemo" testified that Will Baskerville will go to jail for life; but that, without Kemo's testimony, Will would get bail and Petitioner would win the case;
3. State that the government has no case without Kemo as a witness; or
4. Make the statement "No Kemo, No Case" or utter any similar statement.

[11]As more fully detailed in Point 1, supra, individuals Young claims were at this alleged meetings deny in sworn affidavits such a meeting occurred. Petitioner was blocked from having his testimony, which clearly would have refuted Young's claims, from being heard at trial.

In the three months from the date of this alleged street meeting to the day of the murder, there was not an iota of evidence offered to prove Petitioner knew in advance, shared the intent that the specific crime of murder to prevent a witness' testimony be committed or performed an act which helped Young carry out the murder successfully. Not a scintilla of evidence[12] exists that Petitioner had any involvement whatsoever.

This Court is respectfully implored to consider the following uncontroverted facts. There is no evidence Petitioner ever:

1. Met with any of the alleged co-conspirators to follow up, counsel or give any advice on the William Baskerville case after the alleged Avon Street meeting;
2. Was present when the parties made the alleged decision to search for "Kemo;"
3. Was present when any of the alleged parties made any decisions pertaining to Kemo;
4. Was present when any party made the determination to harm "Kemo" by any means;

[12]In fact, the wiretap recordings in the DEA's investigation of Hakeem Curry show Curry's and Rakeem Baskerville's mistrust and animosity toward Petitioner; that Curry hired other criminal defense attorneys and directed his underlings not to deal with Petitioner. There were more than forty-thousand wiretaps which were recorded during the Curry investigation by the DEA. During that same period, the FBI was conducting a separate investigation into William Baskerville. The DEA's recordings span from October of 2003 and ended on March 1, 2004, the day before the Kemo murder.

5. Knew that any party possessed a handgun nor any weapon after this the alleged meeting;
6. Knew that any party had allegedly located Kemo at any time;
7. Knew that any party was actually searching or looking for Kemo to do anything to him;
8. Was Informed that Anthony Young or anyone else had been hired or paid in any manner whatsoever to harm Kemo;
9. Knew that there was a plan to kill Kemo;
10. Knew that Kemo had been located on March 2, 2004, in Newark, New Jersey;
11. Knew that Kemo was going to be shot on March 2, 2004;
12. Knew that any member or participant in this alleged group possessed any weapons on March 2, 2004;
13. Knew that Kemo had in fact been shot on March 2, 2004, in Newark, New Jersey;
14. Knew how any of the parties planned to make their "get away" after shooting Kemo;
15. Was informed by anyone that Kemo had, in fact, been shot;
16. Discussed with Will Baskerville, nor anyone else, what would occur if "Kemo" was not a witness. In fact, the testimony against Baskerville at his 2007 trial by cooperating witnesses Troy Bell and Eric Dock was that Baskerville sought advice from another inmate, named Joey Merlino, on the

consequences of Kemo not testifying; there is no evidence that Baskerville ever sought this advice from Petitioner;

17. Filed legal motions after March 2, 2004, or made any arguments which attempted to use Kemo's death to obtain a legal, tactical or strategic advantage on behalf of Baskerville;

18. Filed a bail motion on behalf of Baskerville after March 2, 2004; in fact, Petitioner continued to implore Baskerville to enter a plea of guilty; or

19. Ever filed a motion to dismiss charges against Will Baskerville because Kemo "was no longer a witness."

It is undisputed that, ONLY AFTER Petitioner left this alleged-phantom meeting (on some unspecified date and time that is repeatedly changed), did all the plans, searching, locating, decisions and events occur. The murder happened more than three (3) months later.

F. There was No Proof Offered Petitioner Aided and Abetted Kemo's Murder "With Intent to Prevent" his testimony as Required by 18 U.S.C. §1512 (a)(1)(A).

Implicit in the *mens* rea and *actus rea* elements of proof necessary to establish aiding and abetting 18 U.S.C. §1512 (a)(1)(A), evidence must be offered to prove the following facts:

(1) That Petitioner knew ahead of time:

a. That Anthony Young was going to murder Kemo;

b. That Young was going to murder Kemo with the intent of preventing his testimony;

c. That Young was going to commit the murder imminently or within a known time frame;

d. That Young committed the murder;

(2) That Petitioner shared the same intent as Young, *to wit*, murder with the purpose and intention of preventing Kemo's testimony; and

(3) That Petitioner knowingly took some action to help Young successfully murder Kemo on March 2, 2004.

Throughout the years, Young gave different reasons why he murdered Kemo including:

(1) He did it for money;

(2) He was ordered to do it;

(3) It was a demand made of him;

(4) Because this was what happened when you "crossed a Baskerville;"

(5) To punish a "snitch," as is known to be one of the reasons behind gang-related murders; (See article reporting how widespread witness retaliation and intimidation was on the streets of Newark and the resulting number of cases which were dismissed or not prosecuted in Essex County each year);

(6) So Baskerville could get bail and come home; and

(7) To prevent Kemo's testimony at Baskerville's trial.

Despite the various reasons Young gave for Kemo's murder, the government used Young's testimony to establish its allegation that Kemo was murdered to prevent his testimony in Baskerville's trial.

The government, however, did not offer any evidence to prove Petitioner knew, in advance or at any time, that Young planned to murder Kemo on March 2, 2004, to prevent his testimony (1 above). Nor was evidence offered to prove Petitioner knew or shared the intent to aid and abet the specific act of murder of a witness, as opposed to another act such as bribery, threats, assault, etc., to prevent testimony. Nor did the government offer evidence to prove Petitioner took some or any action which helped Young successfully murder Kemo on Mach 2, 2004.

1. The Jury Never Heard Evidence of Actual and Factual Innocence Buried Among the 40,000 Wiretap Recordings from the DEA's Investigation of Curry which Proved Petitioner Intended to Plead Baskerville due to the Overwhelming Evidence against Him.

During the same period that the FBI was conducting its investigation of William Baskerville, the DEA was conducting a separate investigation of William Baskerville's cousin, Hakeem

Curry. During the DEA's investigation, Curry and numerous individuals' phones were wiretapped. It is estimated that more than 40,000 (forty thousand) calls were recorded between October of 2003 and March 1, 2004. The government claims that the recordings stopped on or about March 1, 2004, the day before Kemo's murder.

As noted in other sections of this brief, the government assured the defense that it would not use these recordings at trial because they were inadmissible due to a sealing issue. But, buried among those 40,000 recordings, was irrefutable proof Young perjured himself and testified falsely about Petitioner.[13]

In particular, the recordings prove that, within days of Baskerville's wife Deidre Baskerville retaining him,[14] Petitioner made it clear he never intended for Baskerville's case to go trial; that he intended to have Baskerville plead; and estimated that Baskerville would likely serve 13 (thirteen) years, not life in jail. Id. In light of the recordings, the government knew or should have known that the Petitioner never believed the case would proceed to trial and that Young had lied.

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[13] As documented in other sections of this brief, Petitioner was unaware that this exculpatory evidence was buried among the 44,000 recordings in the United States v. Hakeem Curry case. The government did not disclose that the recordings had *Brady* material. Instead, the government represented that, due to an. as yet, unexplained and unspecified "sealing issue," the recordings would not be used in Petitioner's trial.

[14] William Baskerville's wife Deidre Baskerville retained Petitioner and paid the retainer by check. She later filed a complaint against Petitioner with the Fee Arbitration Committee seeking return of the legal fees she paid to Petitioner.

And, if Petitioner always knew the case would not procced to trial, then it logically follows Petitioner could not have aided and abetted in Kemo's murder "with intent to prevent his testimony." Since there was zero proof offered of Petitioner's specific intent for this *mens rea* element of the crime, there is insufficient proof as a matter of law.

G. The Government Has Never Proven when this Alleged Meeting Occurred, When Petitioner Obtained Advance Knowledge that the Murder was to Occur or When the Crime would be Committed.

To prove virtually any crime, the date or approximate date it is alleged to have occurred must be proven beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307 (1979).

As explained in other sections of Petitioner's brief, Young and the government kept changing the date of when this alleged meeting occurred. Initially, the meeting was claimed to be four to five days after Baskerville's November 25, 2003, arrest; then it changed to the date of William Baskerville's detention hearing; then, during its 2013 summations and in opposing the judgment of acquittal, the government claimed the meeting occurred on December 4, 2003.

Each time Petitioner provided irrefutable evidence that the meeting couldn't have happened on or about the date claimed, Young or the government offered a new date.

After the verdict, Petitioner provided evidence from the Curry recordings which proved this December 4th date also was inaccurate. After the brief was submitted, the government withdrew the claim the meeting occurred on this date. **As of this writing, it is unclear when the government is claiming that this alleged meeting occurred**.

The ever-changing date markedly prejudiced Petitioner's ability to defend and confront the evidence against him. He is unable to explore if there is potential alibi evidence to refute the date of this alleged meeting. Procedural due process required that the Petitioner have sufficient notice to effectively prepare a defense

The lack of a date under these circumstances is also substantively fatal to the government's proof, particularly under Rosemond. The government must prove approximately when Petitioner learned of the plan to murder Kemo and when it was planned to happen.

Accordingly, the Court must find this evidence insufficient as a matter of law.

H. The Government Did Not and Could Not Offer Facts to Prove All Elements of Aiding and Abetting because Petitioner is Actually and Factually Innocent.

The government offered no factual evidence from which a rational jury could find all of the elements needed to prove

aiding and abetting the murder of a witness AT ALL, let alone proof beyond a reasonable doubt.

Petitioner never, under any circumstances, aligned himself with the illegal scheme either partially or "in its entirety," and obviously, did not know of the use of a firearm. Rosemond, supra at 1251. Like the defendant in Rosemond, there was absolutely no factual evidence offered to prove Petitioner intended or manifested an intent to bring about Kemo's murder to prevent his testimony. Id. Nor was factual evidence offered to prove that Petitioner had "foreknowledge" or advance knowledge of the murder or that it would occur more than three months after this alleged December meeting.

There was no proof offered that Petitioner knowingly intended to "participate" in the specific crime of murder of a witness to prevent his testimony as if it were something that he wished to bring about and seek by his own action to make succeed. Nye & Nissen v. United States, 336, U.S. 613, 617, 69 S. Ct. 766, 93 L. Ed. 919 (1949). Nor was proof offered that Petitioner knowingly and intentionally performed an act to further Young's success in murdering Kemo on March 2, 2004.

All are necessary to prove aiding and abetting. See Rosemond, 188 L. Ed. 2d, at 264-265 LED. H.R. (15), 134 S. Ct. 1250.

Rhetorically, if Petitioner NEVER was told, did not know of anything which had been planned, intended or done, how does the government prove, in accordance with Rosemond and Third Circuit case law, that he aided and abetted ANYTHING let along the murder of a federal witness?

The government cannot, in good conscience, argue that Petitioner's words conveyed a clear knowledge and intent of a murder he wished to bring about as there is simply no evidence from which to do so. .

But, if this Court should find that there was some proof from which a jury could find that Petitioner knew of and intended to help the murder be committed, the *actus rea* element still is not met. The government did not offer (nor could they ever offer) evidence that Petitioner performed an affirmative act that helped Young successfully murder Kemo on March 2, 2004.

In accordance with *United States v. Rosemond* and Third Circuit precedent, no rational jury--applying the facts from the actual evidence offered as well as the lack of evidence offered to the law--could have found beyond a reasonable doubt that Petitioner aided and abetted in the Kemo murder.

I. No Rationale Jury could have Found Petitioner was involved in a Drug Trafficking Conspiracy with Hakeem Curry or that Petitioner Had Any Motive to Aid and Abet in Kemo's Murder.

Petitioner had absolutely no motive to aid and abet in Kemo's murder. There was no evidence at trial, nor has there

even been evidence, that Petitioner conspired with Hakeem Curry in drug trafficking.

Not one of the 40, 000+ wiretap recordings in the DEA's Curry investigation implicate Petitioner in the Kemo murder or a narcotics conspiracy with Hakeem Curry; to the contrary, the recordings show Curry and the gang's growing contempt and distrust of Petitioner. Hakeem Curry, in particular, expressed his frustration and hostility toward Petitioner on the recordings. He was angry that Petitioner was not doing what Curry wanted.

In addition to proving Curry's and Rakeem Baskerville's disdain and distrust of Petitioner, Curry is heard telling other gangmembers not to hire Petitioner as an attorney. Instead, Curry refers them to other lawyers including Vincent Nuzzi, Esq. And, as explained further below, the lack of evidence that Petitioner was involved in drug trafficking with Curry also proves that the Kemo charges were not part of a RICO conspiracy.

Because there simply was no evidence offered to prove all of the elements of aiding and abetting the murder of a witness to prevent his testimony, there was insufficient evidence as a matter of law. Racketeering Act 4(b) of Count 1 and Count13 and should never have been included the indictment.

J. The Government Charged Petitioner with Involvement in the Kemo Murder as a Strategy to Bolster its RICO Case and Inflame the Jury's Passion.

The government charged Petitioner with aiding and abetting the Kemo Murder when there was no evidence upon which to do so. Most troubling is that the government charged Petitioner with crimes relating to the Kemo murder when the government knew, from the DEA wiretap recordings, that Petitioner was not involved. The government knew or should have known, when the recordings contradicted Young's claims and disproved Curry and Petitioner were involved in a conspiracy, that it was basing the charges against Petitioner upon blatant perjury.

During the trial of *United States v. William Baskerville*, AUSA John Gay testified that Petitioner and other co-conspirators were not charged because the Government did not ". . . feel we can prove the case beyond a reasonable doubt at trial." (May 8, 2007, transcript pages 6277:1 to 6277:25).

Moreover, AUSA Minish's comments in summations during the U.S. v. Baskerville belie any claim that other evidence existed of Petitioner's involvement aside from Young's uncorroborated and perjured testimony. AUSA Minish stated:

> ***...Let's put an end to this Paul Bergrin thing***. Defense counsel's argument, taken to its logical conclusion, is this: Paul Bergrin gave him [William Baskerville] bad legal advice, that if you kill this guy, somehow or another you'll get off so, therefore, the fact that he actually did it should be excused; that because he

> made a decision, which ***by the way, we have no idea if that was the advice, there is zero testimony to say that was even advised prior to giving up the name, prior to the defendant making a call to Rakeem Baskerville***, but somehow or another, having bad legal advice is to excuse this act? Or the fact these other men have not been charged yet...***This is a full three years after the crime was committed***...while John Gay is my boss, I can tell you right now, it doesn't matter a whole heck of a lot whether or not he's convinced what he believed…whether back in his office he believes or in his personal opinion he believes people are involved does not get you a conviction. {***emphasis added***}.

(May 10, 2007, *United States v. William Baskerville*, 6707:17-6709:3).

Moreover, AUSU Robert Frazer noted:

> [O]thers responsible for contributing to the death of Kemo have not been charged with murder or any other crimes associated with this murder…John Gay told you why. Because we only charge people that we can prove - - where we can prove the case beyond a reasonable doubt…***Anthony Young told us about the other co-conspirators and the whole plan and their roles, but Anthony Young by himself, by himself does not equal beyond a reasonable doubt***. If we had come in here without Eric Dock, Rick Hosten and Eddie Williams and all the others, just put Anthony Young up there, could we have expected you to vote this case beyond a reasonable doubt based on Anthony young's lone testimony? No….***We're not going to put one person up there without corroboration***. {emphasis added}.

(May 10, 2007, *United States v. William Baskerville*, 6660:16-6661:10)

1. **No Rational Jury Could Have Compartmentalized the Evidence in a RICO Mega Trial.**

The government included the legally and factually baseless charges in the RICO indictment despite the utter lack of evidence offered to prove these charges. The charges were brought into a Rico mega-trial which charged numerous inflammatory and sensationalized crimes. As a result, the jury's and the court's ability to view the evidence--or more accurately, the lack of evidence -- offered to prove the Kemo charges was clouded.

The jury instructions further muddied the waters. They did not explain what factual evidence the government offered to prove each element of aiding and abetting. But even if they did, no jury would have been able to distinguish the lack of evidence offered to prove the Kemo from the evidence offered to prove the other charges. The inability to compartmentalize the evidence offered to prove the Kemo related charges resulted in spillover prejudice.

The resulting spillover-prejudice subverted the truth seeking function of the jury and misled the court. It relieved the government from its obligation to prove each and every element of every charge in the indictment and undermined confidence in the jury's verdict. And it caused the jury to convict Petitioner of the most serious charges in the indictment when there was no factual or legal basis for them.

2. This Court is in a Position to Render a Decision based upon a Dispassionate and Objective Review of the Evidence, not the Highly Sensationalized Allegations in the Indictment.

Early in the case, the court had to decide numerous motions. Included among them were motions to dismiss the RICO counts and a motion to sever the Kemo charges from the rest of the indictment. Petitioner incorporates the arguments offered by his attorneys in support of those motions herein. At the time the trial court and Third Circuit considered these motions, all it had before it were the highly sensationalized allegations in the indictment which it had to accept as true.

3. A Mere Elements Analysis Renders the Charges related to the Kemo Counts in the Indictment hollow.

With all the government's proofs now known, as well as the information offered in this motion, the court is now in a position to consider the evidence offered with a dispassionate and objective view. And, an elements analysis--applying the actual proof offered to the legal elements required to prove each charge --shows that a prima facie case has not been proven for any of the Kemo related counts.

a. The Kemo Related Charges Should Never have Been Charged at all; as a Predicate Act of a RICO Conspiracy; as a VCAR; Brought in the Same Indictment; or Tried before the Same Jury.

Now, with the government's evidence--and lack thereof--revealed, the following is abundantly clear:

1) the government should never have charged Petitioner with the Kemo Related counts;
2) the government should never have charged the Kemo murder as a predicate act of RICO, a RICO Conspiracy, a Violent Crime in Aid of RICO or any other conspiracy in the indictment;
3) the government should not have included the Kemo related charges in the same indictment as the RICO charges because there was no nexus between the two; and
4) the government should never have tried the Kemo counts in the same trial as RICO and the other unrelated charges.

Petitioner is factually, actually and legally innocent. It would be a manifest injustice for his conviction to stand. Petitioner cannot be condemned to serve multiple life sentences for crimes he did not commit. Accordingly, Petitioner respectfully petitions this Court to grant Petitioner's motion to vacate the judgment of conviction and set aside the sentence.

V. THE AIDING AND ABETTING INSTRUCTIONS DEVIATED FROM THE MODEL CHARGES AND MISLED THE JURY THAT THEY COULD FIND PETITIONER GUILTY IF THE MURDER WAS A FORESEEABLE ACT OF NEGLIGENCE.

Bergin incorporates by reference all facts and legal arguments averred in this brief as if delineated in their entirety.

Racketeering Act 4(b) of Count 1 and Count 13 of the Indictment charged Petitioner with 18 U.S.C.§2[15], aiding and abetting the offense in 18 U.S.C. §1512 (a)(1)(A).

18 U.S.C. §1512 (a)(1)(A) provides that: "Whoever kills…another person, with intent to. …prevent the attendance or testimony of any person in an official proceeding is guilty of a crime against the United States."

A. The Aiding and Abetting Instructions Given to the Jury

In charging the jury on the aiding and abetting counts, the court instructed the jury:

"The aiding and abetting statute, Title 18 United States Code §2, provides:

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or

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[15] The aiding and abetting statute, Title 18 U.S.C. §2, provides:
(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal. (b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

***

A person may be guilty of an offense because he personally committed the offense himself or because he aided and abetted another person in committing the offense. A person who has aided and abetted another person in committing an offense is often called an accomplice. The person who the accomplice aided and abetted is known as the principal.

In this case, the Government alleges that Defendant Paul Bergrin aided and abetted others in murdering a witness with the intent to prevent his testimony, as charged in Racketeering Act 4(b) and in Count 13 of the Indictment. In order to find Defendant guilty as an aider and abettor of this offense you must find that the Government proved beyond a reasonable doubt each of the following four (4) requirements:

First: That someone committed each of the elements of the murder as I have explained those elements to you earlier in these instructions. That person need not have been charged with or found guilty of the offense, however, as long as you find that the Government proved beyond a reasonable doubt that someone committed the offense;

Second: That Mr. Bergrin knew that someone was committing or was going to commit murder of Kemo McCray to prevent him from testifying at an official proceeding;

Third: That Mr. Bergrin knowingly did some act for the purpose of aiding, assisting, soliciting, facilitating

> or encouraging another in committing that murder and with the intent that the murder be carried out; and
>
> Fourth: That Mr. Bergrin's acts did, in some way, aid, assist, facilitate, encourage someone in murdering Kemo McCray. T.8886.87

Instruction No. 36B, Page 67-70 of Jury Instructions. (T885)

B. The Jury Instructions Deviated from the Third Circuit's Model Jury Charges on Aiding and Abetting in 7.02.

The aiding and abetting instruction given to the jury deviated from the Third Circuit's aiding and abetting Model Jury Charge.

Specifically, the third and fourth elements of the Third Circuit's Model Jury Charges describe the *actus rea* elements a jury must find beyond a reasonable doubt to convict a defendant of aiding and abetting. 7.02 states:

The Fourth Element of the Model Jury Charge on Accomplice Liability (7.02) states:

> Fourth, the (defendant) performed an act in furtherance of (the offense charged)
>
> ***
>
> To show that (name of defendant) performed an act(s) in furtherance of the offense(s) charged, to satisfy the fourth requirement, the government needs to show some affirmative participation by (name) which at least encouraged (name of alleged principal) to commit the offense. That is, you must find that (name of defendant) s act(s) did, in some way, [aid,] [assist,] [facilitate,] [encourage,] (name of alleged principal) to commit the offense(s). (Name of defendant) s act(s) need not further [aid,] [assist,] [facilitate,]

> [encourage,] every part or phase (or element) of the offense(s) charged; it is enough if (name of defendant) s act(s) further [aid,] [assist,] [facilitate,] [encourage,] only one (or some) part(s) or phase(s) (elements) of the offense(s). Also, (name of defendant)'s acts need not themselves be against the law. {emphasis added}

In Petitioner's case, the above standard instructions were replaced by the following two sentences:

> "Fourth: That Mr. Bergrin's acts, did, in some way aid, assist, facilitate, or encourage someone in murdering Kemo McCray. Defendant Paul Petitioner s acts need not themselves be against the law."

It is evident that the omissions to the standard instructions substantially lowered the burden of proof to satisfy the fourth element.

The modifications made to the model charges in Petitioner's case also was misleading on the differences between the Third and Fourth Elements. The instructions given deleted language from the Model Jury Charges. The words deleted from the instruction were "To satisfy the third requirement…" and "To show that (name of defendant) performed an act(s) in furtherance of the offense(s) charged, to satisfy the fourth requirement, the government needs to show some affirmative participation..."

This framing language in the model jury charges is significant because it explains to the jury that there are differences between the third and fourth elements. By deleting these words, the instructions molded the two different elements'

analyses together. In doing so, the instructions failed to distinguish between what the jury must find to satisfy the third element as distinct from the fourth element of aiding and abetting.

This made the deletion of the entire paragraph from the fourth element even more prejudicial. There is no way to tell if the jury used the same evidence to find both the third and fourth elements.

Viewed as a whole, the omission of this language is significant because it changes the meaning of the instruction on the most contested issue legal and factual issue in the case --- whether words without action enough to prove Petitioner aided and abetted in the murder.[16]

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[16] The following is the Third Circuit's Model Jury Charge in Aiding and Abetting. The language which was **DELETED** in the charge given in Petitioner's case is **BOLDED AND ALL CAPPED**.

Third: That (name of defendant) knowingly did some act for the purpose of [aiding] [assisting] [soliciting] [facilitating] [encouraging] (name of alleged principal) in committing the specific offense(s) charged and with the intent that (name of alleged principal) commit that [those] specific offense(s)

Fourth: **THAT (NAME OF DEFENDANT) PERFORMED AN ACT(S) IN FURTHERANCE OF THE OFFENSE(S) CHARGED.**

In deciding whether (name of defendant) had the required knowledge and intent **TO SATISFY THE THIRD REQUIREMENT** for aiding and abetting, you may consider both direct and circumstantial evidence including (name of defendant)'s words and actions and the other facts and circumstances. However, evidence that (name) merely associated with persons involved in a criminal venture or was merely present or was merely a knowing spectator during the commission of the offense(s) is not enough for you to find (name) guilty as an aider and abetter. If the evidence shows that (name) knew that the offense was being committed or was about to be committed, but does not also prove beyond a reasonable doubt that it was (name)'s intent and purpose to [aid] [assist] [encourage] [facilitate] or otherwise associate (himself) (herself) with the

C. The Instructions left a "danger" that Petitioner could be Convicted of Aiding and Abetting a Different Crime.

The Third Circuit is emphatic that the jury instructions for aiding and abetting "need to be clear that the accomplice must intend to aid and abet the *specific offense* or criminal scheme charged in the indictment" and not some other offense. See, e.g., United States v. Kemp, 500 F.3d 257, 299-300 (3d Cir. 2007); United States v. Dobson, 419 F.3d 231, 236 (3d Cir.2005)." (*emphasis added*). The court's instructions absolutely must leave "no danger" that a defendant "would be convicted for aiding and abetting some other scheme" than the specific substantive offense which he is charged to have aided and abetted. Kemp, supra at 299-300.[17]. (emphasis added)[18].

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offense, you may not find (name) guilty of the offense(s) as an aider and abettor. The government must prove beyond a reasonable doubt that (name) in some way participated in the offense committed by (name of alleged principal) as something (name of defendant) wished to bring about and to make succeed. **TO SHOW THAT (NAME OF DEFENDANT) PERFORMED AN ACT(S) IN FURTHERANCE OF THE OFFENSE(S) CHARGED, TO SATISFY THE FOURTH REQUIREMENT, THE GOVERNMENT NEEDS TO SHOW SOME AFFIRMATIVE PARTICIPATION BY (NAME) WHICH AT LEAST ENCOURAGED (NAME OF ALLEGED PRINCIPAL) TO COMMIT THE OFFENSE. THAT IS, YOU MUST FIND THAT (NAME OF DEFENDANT)'S ACT(S) DID, IN SOME WAY, [AID,] [ASSIST,] [FACILITATE,] [ENCOURAGE,] (NAME OF ALLEGED PRINCIPAL) TO COMMIT THE OFFENSE(S). (NAME OF DEFENDANT)'S ACT(S) NEED NOT FURTHER [AID,] [ASSIST,] [FACILITATE,] [ENCOURAGE,] EVERY PART OR PHASE (OR ELEMENT) OF THE OFFENSE(S) CHARGED; IT IS ENOUGH IF (NAME OF DEFENDANT)'S ACT(S) FURTHER [AID,] [ASSIST,] [FACILITATE,] [ENCOURAGE,] ONLY ONE (OR SOME) PART(S) OR PHASE(S) (ELEMENTS) OF THE OFFENSE(S). Also, (name of defendant)'s acts need not themselves be against the law.**

[17]See also United States v. Newman, 490 F.2d at 143, (error not to include in charge that aiding and abetting required willful participation, where, "Consistent with the court's instructions, the jury might have convicted Garca on the basis of a conclusion that the defendant participated in the activities charged without knowing of their criminal objective.")

[18]See also United States v. Newman, 490 F.2d at 143, (error not to include in charge that aiding and abetting required willful participation, where,

United States v. Bey, 736 F.2d 891, 895-96 (3d Cir. 1984) (aiding and abetting must include instructions that mere knowledge of the crime is insufficient). The recent Supreme Court decision in Rosemond v. United States reinforces the correctness of the Third Circuit's view:

> **1. The Changes to the Third Element of the Model Charges on Aiding and Abetting.**
>
> The language of the model jury charge for the third element of aiding and abetting states:
>
> > Third: That (name of defendant) knowingly did some act for the purpose of [aiding] [assisting] [soliciting] [facilitating] [encouraging] (name of alleged principal) in committing **the specific offense(s) charged and with the intent that (name of alleged principal) commit that [those] specific offense**(s)
>
> (emphasis added). Below is the instruction given in Petitioner's case:
>
> > Third: That Mr. Bergrin knowingly did some act for the purpose of aiding, assisting, soliciting, facilitating or encouraging another in committing **that murder and with the intent that the murder be carried out.**
>
> (Emphasis added).
>
> Murder is not the specific crime Petitioner is charged with aiding and abetting. Petitioner is charged with murder *with the intent* to prevent a witness from testifying as set forth in 18

"Consistent with the court's instructions, the jury might have convicted Garca on the basis of a conclusion that the defendant participated in the activities charged without knowing of their criminal objective.")

U.S.C. §1512 (a)(1)(A). ("Whoever kills…another person, with intent to. …prevent the attendance or testimony of any person in an official proceeding is guilty of a crime against the United States."

And, as explained below, because of the varied and numerous charges and predicate acts relating to the Kemo murder in the indictment and jury charges, the fact that the substantive offense was unclear is one of several fatal flaws.

D. The Jury is Instructed on the Elements of 42 Different Crimes arising out of 5 Different Plots

Twenty-three Counts of the indictment were submitted to the jury. Although the charges related to 5 separate plots, the jury was given instructions on 42 separate criminal offenses.

In Racketeering Count One, the jury was instructed on the elements of twenty-two (22) different crimes. (See pages 33-115 of jury instructions). For the same conduct, instructions were given on the elements needed to find a violation of federal law or a violation of state law (state conspiracy and state aiding and abetting). The charges directed the jury to consider different burdens of proof and different elements.

E. The numerous instructions to the Jury Arising out of the Kemo murder.

The instructions in the indictment charge Petitioner with crimes breaking at least 8 laws arising out of the Kemo murder.

1. Count 1, Racketeering, Predicate Acts 4a, 4b, 4c and 4d

   4a. Conspiracy to commit murder under 18 U.S.C. 1512

   4b. Aiding and abetting the murder of witness 18 U.S.C. 1512

   4c. Conspiracy

   4d. Aiding and abetting Murder N.J.S.A. 2C:2-6

2. Count 2 Racketeering Conspiracy
3. Count 3 Violence Crimes in Aid of Racketeering
4. Count 12 Conspiracy to Murder a witness
5. Count 13 Aiding and Abetting the murder of a witness

The instructions for Racketeering Act 4(d) of Count One charged Petitioner with aiding and abetting a murder under New Jersey state law. N.J.S.A. 2C:2-6 and Murder N.J.S.A. 2C:11-3a(1)

F. Instruction to Give a Defendant Charged with Multiple Offenses Separate Consideration is Erroneous and Deviates from the Model Jury Charges.

Instruction No. 25 instructs the jury that it "must separately consider the evidence that relates to each offense, and you must return a separate verdict for each offense." The language of the instruction parrots the language of the model jury charge until the last paragraph.

The model jury charge instructs that, "Your decision on one offense, whether guilty or not guilty, should not influence your decision on any other offense charged."

The instruction given in Petitioner's case added the clause underlined and bolded below:

"**With the exception of those racketeering acts that duplicate other crimes charged in the indictment**, your decision on one offense, whether guilty or not guilty, should not influence your decision on any other offense charged."

This instruction informs the jury that it should apply the same law on the substantive counts which they were instructed to apply in considering the RICO predicate acts.

G. The *Mens Rea* Instructions for Aiding and Abetting Adopt a Negligence Standard of Proof.

The instructions were completely disjointed. The jury was instructed to consider all of the Racketeering Predicate Acts in Count One BEFORE the jury is instructed on the substantive offenses which correlate to the predicate acts.

The instructions also direct the jury to jump to different parts of the 160 page of instructions between the racketeering acts and the substantive offense to determine the totality of the instructions and what they must consider.[19]

[19]The Honorable William Martini anticipated these concerns in Petitioner case.

The third Element of the aiding and abetting charge in Count 13 uses the term "knowingly." On page 51, Instruction 35A, Racketeering Act 1, the court informs the jury that all *mens rea* terms, i.e., knowingly, intent, purpose, etc., will be given at the end. ("Also, many of the terms "knowingly," intentionally" or "willfully," I will define those terms later.")

Those terms do not get defined until pages 150-152 of the instructions. The Instruction given to the jury in 5.01 "Proof of Required State of Mind-Intentionally, Knowingly, Willfully." The instruction states:

> You may also consider the natural and probable results or consequence of any acts (name) knowingly did, and whether it is reasonable to conclude that (name) intended those results or consequences. You may find, but you are not required to find, that (name) knew and intended the natural and probable consequences or results of the acts (he)(she) knowingly did. This means that if you find that an ordinary person in (name's) situation would have naturally realized that certain consequences would result from (his)(her) actions, then you may find, but are not required to

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The differences between these RICO predicates are not merely a pleading concern. Thinking through to the practicalities of trial, it concerns the Court that evidence of these different alleged criminal acts likely would pose evidentiary problems. For example, the Court would be sensitive to the admission of the Kemo murder evidence in conjunction with the Monmouth County hitman case, which involved different defendants, save Bergrin, and occurred four years later. To the extent that the hitman evidence would be used to demonstrate motive in the Kemo trial, this clearly would be inappropriate. Further, the spillover prejudice from the introduction of each witness murder case in a trial of the other would give the Court serious pause. Beyond this, the Government would introduce its mortgage fraud case and prostitution cases during the same megatrial. The many and complex limiting instructions that would have to be employed as to the counts and defendants would confound the Court, let alone the jurors." See April 21, 2010, opinion dismissing RICO for lack of pattern and continuity

find, that (name) did know and did intend that those consequences would result from (his)(her) actions.

The jury was given the instructions that it could find Petitioner guilty of aiding and abetting if the murder was the "natural and probable cause" of the murder. Under these instructions, there is a risk that the jury found that Petitioner guilty, because it was foreseeable that Petitioner's negligence could have unknowingly "in some way" "facilitated" the murder, even if the Petitioner, never at any time intended for a murder to occur.

This would be no different than applying the Pinkerton doctrine used in law of conspiracy. But the Pinkerton doctrine does not apply to aiding and abetting.

The result of this instruction is that the jury applied a civil standard of proof than what is required to prove aiding and abetting. There is a substantial risk that the jury convicted Petitioner on this charge based on a negligence and foreseeability standard.

H. In United States v. Rosemond, the Supreme Court rejected the same jury charges as those given in Petitioner's case.

There can be no doubt that the jury instructions MUST ensure that the jury instructions are clear that a defendant is charged with aiding and abetting THE SPECIFIC SUBSANTIVE CRIME

charged in the indictment as opposed to some other offense after the Supreme Court's 2014 decision in Rosemond v. United States.

Here, the specific substantive offense which Petitioner was charged with aiding and abetting was the murder of witness with intent to prevent his testimony. But the numerous charges of different laws in the predicate acts and different elements of proof throughout the indictment muddied the waters.

In Rosemond, the Supreme Court found that the district court's instructions to the jury -- the very same instructions as those given in Petitioner's case -- were erroneous because they failed to require proof that defendant knew in advance that one of his cohorts would be armed. In telling the jury to consider merely whether defendant knew his cohort used a firearm, the district court did not direct the jury to determine when defendant obtained the requisite knowledge, i.e. to decide whether defendant knew about the gun in sufficient time to withdraw from the crime. Rosemond, 134 S. Ct. 1243, 188 L. Ed. 2d HR 1, 2. 134 S. Ct. 1240, 188 L. Ed. 248, 2014 U.S. LEXIS 1787 (2014). (emphasis added).

The intent requirement of aiding and abetting *can only be satisfied* when a person actively participates in a criminal venture with full knowledge of the circumstances constituting the offense. Rosemond, 134 S. Ct. 1249. *(emphasis added)*.

The jury should have been instructed that the government be required to prove *beyond a reasonable doubt*, that Petitioner had "foreknowledge" of the killing. Rosemond, supra at 1251. Petitioner must have been proven to "participate" in the crime of murder of a witness to prevent his testimony as if it were something that he wished to bring about and seek by his own action to make succeed. Nye & Nissen v. United States, 336, U.S. 613, 617, 69 S. Ct. 766, 93 L. Ed. 919 (1949).

In accordance with *United States v. Rosemond* and Third Circuit precedent, the jury instructions were erroneous because they did not instruct the jury that it had to find beyond a reasonable doubt that Petitioner had the requisite "intent," advance knowledge, and performed an affirmative act which furthered the successful commission of the specific crime he is alleged to have aided and abetted. _____-_____, 188 L. Ed. 2d, at 264-265.

The Third Circuit's Model Jury aiding and abetting charges cite Rosemond for crimes aiding and abetting in all crimes, not just the statute at issue in Rosemond.

I. The Jury Instructions did not Explain to the Jury what Factual Evidence the Government Presented would Make Petitioner Guilty of Aiding and Abetting

The jury instructions did not explain to the jury what specific evidence they should consider in deliberating on these

counts. Petitioner submits that no reasonable person, attorney or judge could create an elements analysis from the jury instructions or apply the facts averred in the 130 page indictment to the instructions and the evidence presented.

Tailoring the instructions to explain the specific proofs the government claims establishes the elements of the aiding and abetting count was crucial because the jury was unable to compartmentalize the Kemo facts from the rest of the evidence offered at trial.

And, as explained earlier in this point, the instructions provided in Petitioner's case posed a "grave danger" that the jury's verdict was based on a belief that Petitioner "somehow" inadvertently may have aided and abetted some act which resulted in Kemo's murder.

In accordance with *United States v. Rosemond* and Third Circuit precedent, the jury instructions were erroneous because the jury was not instructed that the government was required to prove *beyond a reasonable doubt*, that Petitioner had "foreknowledge" of the killing. Rosemond, supra at 1251.

Petitioner must have been proven to "participate" in the crime of murder of a witness to prevent his testimony as if it were something that he wished to bring about and seek by his own action to make succeed. Nye & Nissen v. United States, 336, U.S. 613, 617, 69 S. Ct. 766, 93 L. Ed. 919 (1949).

J. The Errors in the Jury Charge so Infected the Entire Trial that the Resulting Conviction Violates Due Process.

To obtain collateral relief for errors in the jury charge, the degree of prejudice which must be shown is "'whether the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process." Henderson v. Kibbe, 431 U.S., at 154, 97 S.Ct. at 1736 (quoting Cupp v. Naughten, 414 U.S. 141, 147, 146, 94 S.Ct. 396, 400, 38 L.Ed.2d 368 (1973)). Here, that burden has been met.

Petitioner was extraordinarily prejudiced by the erroneous aiding and abetting jury instruction. The jury clearly struggled with the evidence when considering the charges relating to the Kemo murder. During deliberations, the only questions asked by the jury involved the Kemo murder. Specifically:

1) "We request help finding exhibits (audio) of conversations between Hakeem Curry and Paul Bergrin;"
2) "We request testimony be read back from Anthony Young's testimony from Monday 2/4;" and
3) "If Eric Dock's prison log is in evidence, can we review it."

P5810- P5810

In light of the foregoing, the instructions were an unconstitutional deprivation of due process of law. The jury

was instructed to apply a civil negligence standard. Petitioner's conviction cannot stand on the basis that murder may have been a foreseeable consequence of how others might have erroneously interpreted his statements (assuming these statements were made).

For the aforementioned reasons, Petitioner's conviction must be vacated and his conviction set aside.

VI. RICO IS UNCONSTITUTIONAL

Petitioner submits that the RICO statute is unconstitutional

The Fifth Amendment provides that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law. The Government violates this guarantee by taking away someone's life, liberty, or property under a criminal law so vague that it fails to give ordinary people fair notice of the conduct it punishes, or it is so standardless that it invites arbitrary enforcement. Kolender v. Lawson, 461 U. S. 352, 357-358.

A fundamental element of due process is that a law "must give fair notice of conduct that is forbidden or required." FCC v. Fox Television Stations, Inc., ___ U.S. ___, ___, 132 S.Ct. 2307, 2317, 183 L.Ed.2d 234, 245 (2012).

A statute that criminalizes conduct "in terms so vague that [persons] of common intelligence must necessarily guess at its meaning ... violates the first essential of due process of law." Lanzetta v. New Jersey, 306 U.S. 451, 453, 59 S.Ct. 618, 619, 83 L.Ed. 888, 890 (1939)

A. The RICO Statute is Unconstitutional.

First, RICO is vague because a "person of ordinary intelligence" is unable to understand RICO's true meaning.

Second, RICO is unconstitutionally vague because the statute delegates excessive enforcement discretion to the Executive Branch. The statute provides too great an opportunity for prosecution to exercise its powers arbitrarily and abusively.

Third, the statute violates separation of powers issues. Courts are required to do more than interpret RICO. Courts are required to legislate from the bench, in particular with regard to jury instructions. In doing so, Courts are being made to substitute as a quasi-legislative department of government.

Fourth, RICO is overly broad. Petitioner recognizes that the overbreadth doctrine is an analysis which normally applies to challenges of statutes on First Amendment grounds. The doctrine, however, is applicable to a constitutional analysis of RICO because the statute gives the executive branch too much discretion over who it will chose to prosecute in a RICO case for what and by when.

RICO casts its net too broadly. The statute permits the government to charge conduct in one indictment that it would not otherwise be able to charge but for RICO's massive and broad reach, i.e., crimes that are beyond the statute of limitations; crimes that fit a pattern; or charging attenuated criminal conspiracies and actors under one indictment.

Petitioner specifically challenges the pattern requirement for being unconstitutionally vague because the predicate acts,

or the "continuity plus relationship" test either: (1) fails to give prospective notice and fair warning to defendants, or (2) places arbitrary or discriminatory discretion in the hands of prosecutors, judges or the jury.

B. RICO is Unconstitutional As Applied to Petitioner's Case.

RICO is unconstitutional as applied to Petitioner's case. No rational jury could comprehend the instructions in this RICO mega-trial. The length of the jury charges, conflicting elements and differing burdens of proof for federal and state laws made it virtually impossible to create or apply an elements analysis.

The judge and jury were unable to apply precise standards to guide in ascertaining the offense. The jury could not reasonably be expected to apply the law of RICO to the evidence in this case. This is made abundantly clear from the unworkable and unwieldy jury charges.

Petitioner requests that the court permit the parties to submit legal briefs on this issue. There are several organizations that may seek to submit *amicus* briefs to the court.

VII. THE COURT ERRONEOUSLY AND PREJUDICIALLY FAILED TO INSTRUCT THE JURY THAT PETITIONER'S SUBJECTIVE INTENT MUST BE PROVEN BEYOND A REASONABLE DOUBT.

All facts delineated in this motion are incorporated by reference herein as if contained here in their entirety.

A. The Kemo Case was Improperly Based on what Young Perceived Petitioner to Mean without any Proof of what Petitioner Actually Intended.

The government used cooperating witness Anthony Young to testify as to alleged statements Young claimed Petitioner made during a meeting on the streets of Newark one evening. Young claimed that Petitioner met with him and at least five other gang members associated with Curry either four to five days after Will Baskerville's November 25, 2003, arrest; or on December 4, 2003, the date of the detention hearing; or any date thereafter (whichever version Young swore to and the Government falsely presented). While there are too many fabricated time sequences to decipher an accurate date, this meeting is alleged to have occurred sometime in or about 2003.

At this alleged street meeting, Young testified that Petitioner uttered words to the effect of: "Will Baskerville is facing life in prison for his sales of crack cocaine; that Will will receive a life sentence and never come home if Kemo were to testify so don't let that boy testify; that if Kemo does not

testify, Will will get bail and come home and Petitioner will win the case. No Kemo, no case."

Petitioner then left the meeting. After Petitioner left, the gang discussed Will and Kemo and made the decision to kill him. Young gave several other versions, but essentially, that was its essence.

More than three months after this alleged meeting, Kemo was shot and killed on the streets of Newark. There is absolutely no claim, allegation or evidence that Petitioner had any involvement whatsoever in the Kemo murder other than what Young claims occurred at this alleged meeting. That fact is not in dispute. The uncorroborated claims of this one and only witness is the basis upon which the government charged Petitioner with aiding and abetting and conspiracy to commit murder of a witness to prevent his testimony.

Petitioner profusely and vehemently denies that any meeting between him, Young, Curry, McNeil, and the Baskervilles ever occurred. Petitioner further denies that he ever uttered the words alleged by Young. From the facts enunciated herein; Petitioner is confident that this Court is well aware Young is incredulous and fabricated the meeting and statements. Nonetheless, for purposes of the argument espoused in this Point, Petitioner asks this Court to credit and consider what Young testified to as the truth.

B. The Esteves Case was Improperly Based on what Petitioner was *Perceived* to Mean without any Proof of what Petitioner Actually Meant.

Oscar Cordova was a paid government informant hired specifically to infiltrate the legal defense of Petitioner's client Vincent Esteves. The government's strategy was to put Cordova in a position to meet and entrap Petitioner. For six months, Cordova kept coming around and strung Petitioner along with false promises that he would pay for Esteves' legal fees and investigation expenses.[20] At virtually every meeting, Cordova pushed for Petitioner to commit criminal acts.

1. Oscar Cordova: A Pathological Lying "Hit Man" without a Gun who Pays Petitioner.

From the outset of meeting Cordova, it was obvious to everyone that Cordova was a pathological lying "poser" with serious psychological and substance abuse problems. He was caught by Petitioner and others in a multitude of obvious and absurd lies. Among those lies were that:

1) Cordova's father was "Lord Gino," leader of the Latin Kings, and that Lord Gino controlled the organization from the Supermax ADX

[20] As explained in other points in this brief, one of the reasons why joinder in this case was so prejudicial was because Petitioner could not testify in defense of some counts without being forced to give up his Fifth Amendment Right other counts.

Prison in Florence, Colorado through the use of Government telephones and his own illegal cell phone--an absurd and unbelievable claim given the well-known constant monitoring of inmates at the most secure facility in the country;[21]

2) That Cordova knew the Esteves' witnesses and related people, which was obviously false since Cordova had no clue what the witness looked like, where they were located and who their bosses were; and

3) That Cordova, a supposed high-ranking leader of the Latin Kings and the son of Lord Gino himself, needed to be provided with a gun to commit the murder(s) Cordova kept saying he wanted to commit, which Petitioner refused to supply.

Cordova told these and many, many more outlandish lies not just when he met Petitioner but when he testified. For example, Cordova was allowed to testify before the jury that he was afraid to testify in Petitioner's trial because he had received death threats---clearly leading the jury and everyone to believe that Petitioner was behind these threats. The government made no attempt to investigate Cordova's claim before he was placed on the stand.

After testifying, the Marshalls looked at Cordova's phone and immediately determined that Cordova had called the death

[21]If the government claims continued ignorance of this blatant lie, Petitioner asks this court to compel the government to produce Cordova's birth certificated and compel the testimony of Cordova's mother's as well as Gustavo Colon, Inmate Reg. No. 07984-4424, who remains in federal custody at the ADMAX USP in Florence, CO. serving a life sentence.

threats in on himself. Only after the Marshalls called this to the attention of the AUSAs trying the case did Cordova's lie get exposed. But by the time, the seed had been planted and the damage had been done. Despite the alarm, wasted law enforcement resources and immutable prejudice caused by Cordova and the government's failure to investigate, Cordova was never prosecuted for this crime. And the court did not declare a mistrial.

In addition to eliciting this reprehensible testimony from Cordova, the government still, to this day, has not corrected Cordova's perjured testimony that he was the son of Lord Gin, a claim which lent credence to the government's theory that Cordova was perceived as an actual "hitman" from anyone.[22]

For six months, Cordova kept putting off giving Petitioner the needed legal fees for Esteves' case so he could have a reason to continue reaching out to Petitioner. While Cordova kept promising to pay for Esteves' legal fees, Cordova repeatedly suggested to Petitioner that witnesses be killed and that Petitioner purchase narcotics. None of these events ever

[22]Nor has the government disclosed the ongoing payments the government regularly paid to Cordova him; his history of psychological problems and pathological lying; psychiatric medications Cordova was taking; the other cases in which he testified; the cases in which there also were claims of Cordova manipulating recording devices by such using his own recording device, editing the recordings and then replaying them into his government recorder; the fact that his failure to make child support payments was overlooked; the crimes the government allowed Cordova to commit which were not part of his assigned operation; and the times the government interceded to prevent Cordova from being charged by local law enforcement.

occurred; nor can it be argued that they were ever attempted; nor were they even close to happening.

There always were conditions placed on each request made by Cordova which Petitioner refused to meet. For instance, Cordova pleaded for a description, photo and location of witnesses; none was never provided. And, despite Cordova's constant urging, Petitioner never took action to provide Cordova with a gun. None of the conditions precedent ever were fulfilled to assist Cordova or further his scheme.

C. The Jury was Erroneously Instructed to Consider Others' Perception of Petitioner's Words as Proof of his Intent.

Throughout the trial, the government argued vehemently to the jury that they should use "*objective*" reasoning to determine Petitioner's state of mind to prove his specific intent. The court and government implored the jury to use their "*common sense*" and what a "*reasonable person*" would believe by Petitioner's statements.

The only evidence the government relied upon to prove intent was Young's testimony --*Young's belief*-- of what he thought Petitioner meant when the statements allegedly were made at this meeting one winter evening on the streets of Newark.

The government also used cooperating witnesses Pozo, Moran, and Williams to attempt to prove intent by having these

criminals interpret what they believed Petitioner's statements to mean. The government did the same with the Cordova case.

D. In Elonis v. United States, the Supreme Court Rejected an "Objective" or "Reasonable Person" Interpretation Standard to Prove Criminal Intent.

In the Supreme Court's recent decision of Elonis v. United States, the Court held that it was reversible error for the court to instruct the jury that the government only needed to prove how a "reasonable person" would interpret the defendant's statements. 135 S. Ct. 2001, 192 L. Ed. 1, 2015 U.S. LEXIS 3719, 83, U.S.L.W 4360, No. 13-983 (2015),

In Elonis, the defendant was convicted of "threatening communications." He posted degrading and violent remarks on Facebook about his ex-wife and others. He wrote that "he wanted to kill his wife;" that someone should kill his wife; that someone should fire a mortar launcher at her house; that the judge in his matrimonial case deserves a bullet; and that "hell hath no fury like a crazy man in a kindergarten class." He further posted his intent to slit his ex-wife's jugular and use explosives. The communications were disturbing, alarming, and, if viewed objectively, undoubtedly threatening.

At trial, the court in Elonis, like the one in Petitioner's case, instructed the jury to use their judgment as to what a "reasonable person" would understand from Petitioner's words and