PAUL W. BERGRIN,

Movant,

v.

UNITED STATES OF AMERICA,

Respondent.

Civil No. 16-3040

(Crim. No. 09-369)

Hon. José L. Linares, Ch. U.S.D.J.

SUPPLEMENTAL MEMORANDUM OF LAW IN OPPOSITION TO PAUL BERGRIN'S MOTION TO VACATE, SET ASIDE, OR CORRECT HIS SENTENCE UNDER 28 U.S.C. § 2255

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PRLEMINARY STATEMENT

Pursuant to leave granted by this Court, HDE33,[1] Respondent, the United States of America, respectfully submits this Supplemental Memorandum of Law in opposition to Grounds 5, 6, 10 and 14 of the motion by Paul Bergrin to vacate, set aside, or correct his sentence under 28 U.S.C. § 2255.

For the reasons set forth below, those claims are either procedurally defaulted or frivolous—sometimes both. They do not warrant collateral relief.

[1] Unless otherwise defined herein, all acronyms and capitalized terms in this Supplemental Memorandum bear the meaning ascribed to them in the Government's Memorandum of Law filed November 30, 2017. *See* HDE27. As the "Table of Abbreviations" of that initial Memorandum explains, when the Government cites to the pages of a pleading filed on this Court's docket, it cites to the page number in the blue ECF legend at the top of that pleading.

ARGUMENT

V. The Claims In Ground Five Are Procedurally Defaulted, Barred By The Concurrent Sentencing Doctrine, And Are Otherwise Meritless.[2]

Ground Five of Bergrin's § 2255 motion asserts that "[t]he erroneous, prejudicial jury instructions deviated from the model jury charges; deleted sections; improperly mixed elements and lowered the burden of proofs for various offenses and aiding/abetting to negligence." HDE3 at 14. In his brief in support of that claim, Bergrin advances several sub-claims all directed at Bergrin's conviction for aiding and abetting the McCray murder (as charged in Racketeering Act 4(b) of Count 1 and Count 13). BB121–37. Many of these claims rehash the claims Bergrin raised in Ground IV, which mounted legal sufficiency challenges to the evidence supporting Bergrin's conviction for aiding and abetting the McCray murder. All of these claims are subject to procedural bars and are utterly meritless.

A. Bergrin Procedurally Defaulted His Claim.

Bergrin initially claims he raised these issues on direct appeal, HDE3 at 14 (response to question (b)(1)), but later implicitly admits that he did not by faulting appellate counsel for not raising it, *id.* at 15 (response to question 7). That admission is correct. *See* HDE27 at 42–43 (listing the legal arguments Bergrin raised on direct appeal, none of which pertain to the jury instructions). And while Bergrin has now withdrawn the ineffectiveness claim he offered to excuse his procedural default, HDE35, the procedural default remains, *see United States v. Frady*, 456 U.S. 152, 167

[2] The Government's initial Memorandum sets out the law governing § 2255 motions. *See* HDE27 at 46–49.

(1982); *see also United States v. Pelullo*, 399 F.3d 197, 221 (3d Cir. 2005) (finding claim procedurally defaulted where "there is no dispute that Pelullo failed to raise the jury charge issue in his opening brief on direct appeal"). *See generally Farmer v. United States*, 867 F.3d 837, 842 (7th Cir. 2017) ("Farmer now raises the *Rosemond* issue directly—as a challenge to the erroneous § 924(c) jury instruction—rather than indirectly as the premise for a claim of trial counsel's ineffectiveness. Framed this way, the issue is new on appeal and Farmer must overcome procedural default.") (footnote omitted).[3]

To overcome a procedural default, Bergrin must show cause and prejudice or actual innocence. *Bousley v. United States*, 523 U.S. 614, 622 (1998). Bergrin cannot make either showing. Initially, Bergrin has withdrawn the only basis he offered to show "cause" for his default, *i.e.*, ineffective assistance of appellate counsel. HDE35. And without that assertion, his brief in support of his § 2255 motion contains nothing suggesting (much less proving) that "'some objective factor external to the defense impeded [his] efforts' to raise the claim," *McCleskey v. Zant*, 499 U.S. 467, 493 (1991) (quoting *Murray v. Carrier*, 477 U.S. 478, 488), such as "'interference by officials,' [or] 'a showing that the factual or legal basis for a claim was not reasonably available to counsel,'" *Wise v. Fulcomer*, 958 F.2d 30, 34 n.9 (3d Cir. 1992) (quoting *McCleskey*, 499 U.S. at 494). With Bergrin unable to show "cause," this Court need not reach the merits of Bergrin's claims.

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[3] *Accord E.g.*, *McDuffie v. United States*, No. 16-14147, 2017 WL 6606916, at *5 (11th Cir. Oct. 31, 2017) ("McDuffie's § 2255 arguments about the aiding-and-abetting instruction are procedurally defaulted because he did not challenge any of the jury instructions during the trial, and he did not advance the arguments on direct appeal. Neither cause and actual prejudice nor a fundamental miscarriage of justice excuses the procedural default.").

Nor does Bergrin endeavor to satisfy the "actual innocence" standard that governs instructional errors. Under that standard, it is not enough for a § 2255 movant to show that the outcome of the proceeding would have been different absent the alleged error, for that is the standard that governs unpreserved instructional errors raised on direct appeal. *See* Fed. R. Crim. P. 52(b)). Rather, to show actual innocence, the movant must prove that no rational juror would have voted to convict had the instructions comported with extant law. *See United States v. Tyler*, 732 F.3d 241, 254 (3d Cir. 2013) (Shwartz, J., dissenting) ("to demonstrate 'actual innocence,' a habeas petitioner must show that, in light of all the evidence, it is more likely than not that no reasonable, properly instructed juror would have convicted him"). In other words, Supreme Court decisions "require the Court to ask what a reasonable, properly instructed juror 'would do' when considering the evidence presented." *Id.* at 255 (Shwartz, J., dissenting).[4]

As set forth below, this Court may decline to reach Bergrin's claims under the concurrent sentencing doctrine. Even if this Court reaches the merits of those claims, Bergrin fails to show that *any* error occurred, much less one that would warrant correction on collateral attack despite his having procedurally defaulted it in the trial court and on direct appeal.

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[4] *Accord Ryan v. United States*, 645 F.3d 913, 917 (7th Cir.2011) ("[The actual innocence] standard depends on the content of the trial record, not the content of the jury instructions."), *vacated on other grounds*, 132 S. Ct. 2099 (2012); *Stephens v. Herrera*, 464 F.3d 895, 899 (9th Cir.2006) ("[T]he mere fact of an improper instruction is not sufficient to meet the test for actual innocence."); *Bosley v. Cain*, 409 F.3d 657, 662 (5th Cir.2005) ("[T]he [actual innocence] standard requires the district court to 'make a probabilistic determination about what reasonable, properly instructed jurors would do.'") (citation omitted).

B. Under The Concurrent Sentencing Doctrine, This Court Need Not Reach The Merits Of Bergrin's Claims.

As explained in the Government's initial Opposition, HDE27 at 47–58, under the concurrent sentence doctrine, a court has "discretion to avoid resolution of legal issues affecting less than all counts in an indictment if at least one will survive and sentences on all counts are concurrent., *United States v. McKie*, 112 F.3d 626, 628 n.4 (3d Cir. 1997). Since "the defendant remains sentenced in any event, reviewing the concurrently sentenced counts is of no utility. The practice is eminently practical and preserves judicial resources for more pressing needs." *Jones v. Zimmerman,* 805 F.2d 1125, 1128 (3d Cir. 1986) (citations omitted).

Here, the claims in Ground Five attack the jury instructions given to the jury on the charge that Bergrin aided and abetted the McCray murder, in violation of 18 U.S.C. §§ 1512(a)(1)(A), (a)(3)(A), and 2. That murder formed the basis of Count 1, Racketeering Act 4(b), *see* A133 (¶ 158(b)), and Count 13, *see* A194.[5] Bergrin received concurrent life sentences on both Counts. A26. But Bergrin also received three additional life sentences on other counts that would not be affected by vacating the convictions and sentences. *Id.* As Bergrin would remain "sentenced [to life

[5] Bergrin seems to assume that a fatal error in the jury instructions on one sub-predicate act of racketeering necessarily would require vacating Count 1 in its entirety. Given the pattern of the verdicts and the special findings on Count 1, A10034–42, there is no legal basis for that assumption. *See United States v. Paccione*, 949 F.2d 1183, 1198 (2d Cir. 1991) (direct appeal: "Given all of these findings and verdicts, including the jury's finding that Paccione too committed predicate acts 1, 3, and 4 (plus five other validly submitted acts), we have no doubt that the jury would have convicted him on the RICO counts if predicate act 12 had not been submitted."). At any rate, since a fatal error in the aiding-and-abetting instructions could theoretically require vacating at least Count 13, the Government will base its concurrent sentencing doctrine argument on that premise.

imprisonment] in any event, reviewing the concurrently sentenced counts is of no utility." *Jones,* 805 F.2d at 1128.

Accordingly, this Court should invoke the concurrent sentencing doctrine and decline to reach Bergrin's complaints about the jury instructions on aiding-and-abetting liability.

C. Bergrin Procedurally Defaulted His Claim That The Jury Instructions On Aiding And Abetting Liability Deviated From The Model Charge. In Any Event, There Was No Deviation.

Bergrin's first two sub-headings claim that the jury instructions on the aiding-and-abetting charge (Count 1, Racketeering Act 4(b) and Count 13) materially deviated from the Third Circuit's model instruction. BB121–25. Bergrin did not raise that claim on direct appeal, *see* HDE27 at 42–43, and he fails to show actual innocence here. Indeed, as explained in the Government's response to Ground Four, HDE27 at 119–20, Bergrin's "actual innocence" arguments simply rehash the legal sufficiency of the evidence, which cannot excuse a procedural default.

At any rate, Bergrin's claim fails on the facts. In accusing Judge Cavanaugh of having given jury instructions that deviated from the Third Circuit's model instructions on aiding and abetting, Bergrin relies on the model charge that became effective in July 2014. *Compare* BB121–24 (language quoted by Bergrin), *with* 3d Cir. Model Crim. Jury Inst. 7.02 (eff. July 2014). But that was not the version in effect at the time of Bergrin's 2013 trial. To the contrary, the version in effect at the time of trial took effect in November 2010 and, but for the sentence shaded in blue below (which Bergrin does not challenge), was identical to the version Judge Cavanaugh gave:

3d Cir. Model Instruction 7.02 (Nov. 2010)	**Jury Charge As Delivered**
In deciding whether (name of defendant) had	Paul Bergrin's acts need not themselves be against

the required knowledge and intent, 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 offense, you may not find (name) guilty of the offense(s) as an aider and abetter. 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. The government needs to show some affirmative participation by (name) which at least encouraged (name of alleged principal) to commit the offense. 3d Cir. Model Crim. Jury Inst. 7.02 (Nov. 2010), attached hereto as Exhibit A.	the law. In deciding whether Mr. Bergrin had the required knowledge and intent, you may consider both direct and circumstantial evidence, including Defendant's words and actions and the other facts and circumstances. However, evidence that Mr. Bergrin 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 is not enough for you to find him guilty as an aider and abetter. If the evidence shows that the Defendant 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 his intent and purpose to aid, assist, encourage, facilitate, or otherwise associate himself with the offense, you may not find Mr. Bergrin guilty of the offense as an aider and abetter. The Government must prove beyond a reasonable doubt that the Defendant in some way participated in the murder of Kemo McCray as something Defendant wished to bring about and to make succeed. The Government needs to show some affirmative participation by Mr. Bergrin which at least encouraged another to murder Mr. McCray. A9891–92.

Thus, the entire premise of Bergrin's claim is just plain wrong.

D. Bergrin Procedurally Defaulted His Claim That The Model Instructions Created A Risk That The Jury Could Convict Him Of An Offense Different Than The One Specified In The Indictment.

Bergrin next complains that the jury instructions created a risk that the jury would convict him of aiding and abetting a murder generally, rather than the charged witness-tampering murder. BB126–28. This claim, too, is procedurally defaulted, as Bergrin did not claim on appeal that the instructions posed a risk of confusion.

Nor can Bergrin show actual innocence. Bergrin focuses on the requirement in Third Circuit law, reflected in the Model Instructions on aiding and abetting, that jury

instructions make "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. BB126 (citing *United States v. Kemp*, 500 F.3d 257, 299-300 (3d Cir. 2007)). Bergrin then points to the jury charge Judge Cavanaugh delivered, which required the Government to prove, under the third element of § 2 liability, that "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.*" A9891 (emphasis added). As Bergrin sees it, the jury might have misinterpreted the words in bolded font—"that murder" and "the murder"—to refer to some general murder, and not the § 1512(a)(1)(A) offense charged in the indictment, *i.e.*, murder committed with the specific intent to prevent a witness's testimony at an official proceeding. DB127–28. This argument is nonsensical.

In describing the elements of the aiding-and-abetting charge, Judge Cavanaugh explained that, first, the Government had to prove that someone committed the § 1512 murder offense explained previously in connection with Racketeering Act 4(a) and in Count 12. A9890. Second, Judge Cavanaugh instructed that the Government had to prove "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*." A9890. Thus, when Judge Cavanaugh referred to "that murder" and "the murder" in describing the third and fourth elements, A9891, he clearly was referring to the murder of Kemo McCray to prevent him from testifying at an official proceeding, and not to some generic murder.

Other sections of the jury charge reinforce the conclusion that the references to "that murder" and "the murder" were to the § 1512(a)(1)(A) witness-tampering murder. Specifically, in the introduction to his instructions on Racketeering Act 4(a) and Count 12 (conspiracy to murder a witness to prevent his testimony), Judge Cavanaugh made clear that the § 1512(k) offense charged a conspiracy to "murder a witness *to prevent his testimony at an official proceeding*." A9886 (emphasis added).

Similarly, in his introduction to the instructions for Racketeering Act 4(b) and Count 13 (aiding and abetting the murder of a witness to prevent his testimony), Judge Cavanaugh said that "[b]oth Racketeering Act 4(b) of Count 1 and Count 13 charge Defendant Bergrin with aiding and abetting the murder of a witness *to prevent his testimony at an official proceeding*, in violation of" § 1512(a)(1)(A), 1512(a)(3)(A) and section 2." A9889 (emphasis added). After reading the statute, Judge Cavanaugh again explained that, "[i]n 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." A9890 (emphasis added). That ensured there was no risk that the jury would convict Bergrin of aiding and abetting a murder different from the one charged in Racketeering Act 4(b) of Count 1 and Count 13.

So understood, Bergrin can advance his claim "only by reading certain sections of the jury charge out of context, which 'is not the way we review jury instructions, because a single instruction to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge.'" *Kemp*, 500 F.3d at 281 (citation omitted). Put another way, Bergrin's argument would flunk the standard of review

that applies to claims of instructional error on direct appeal. *A fortiori*, then, it is insufficient to warrant relief on collateral attack (even putting aside that the claim is procedurally defaulted).[6]

E. Bergrin Procedurally Defaulted His Claim Regarding The Modification To 3d Circuit Model Charge No. 3.12. In Any Event, The Concurrent Sentencing Doctrine Would Bar Relief For Bergrin's Claim.

Bergrin next complains about a minor deviation from the 3d Cir. Model Instruction No 3.12. That instruction requires the jury to separately consider each count and not to let a decision on one count affect its consideration of another count. In this case, the instruction was modified—without objection—to account for the fact that many of the predicate acts of racketeering charged in Count 1 duplicated substantive offenses charged in later counts of the operative indictment. A9858–59. Bergrin appears to complain that the modification was inappropriate, BB129–30, but that claim is procedurally defaulted, and meritless in any event.

In this case, sixteen of the racketeering acts charged in Count 1 (the RICO count) duplicated substantive offenses charged in later counts of the indictment:

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[6] Bergrin's next two subheadings describe the number of crimes charged in the operative indictment generally and with respect to the McCray murder specifically. BB128–29. Those subheadings contain no pertinent legal argument, so no response is required. In the following subsection, Bergrin invokes *Rosemond v. United States*, 134 S. Ct. 1240 (2014), to support his claim, BB132–24, which largely parrots a claim advanced later in Bergrin's Brief, *see* BB98–104. The Government thus incorporates by reference here its response to that claim. HDE27 at 116–20 (arguing that Bergrin raised *Rosemond* on direct appeal; that it did not change Third Circuit law in the way Bergrin contends; and that the evidence was still more than sufficient to satisfy whatever changes *Rosemond* worked).

Scheme	Count 1 Racketeering Act	Parallel Count	Crime Charged
Drug Conspiracy	1.a	5	**Conspiracy to Distribute 5 kg or more of cocaine** 21U.S.C. §§ 841(a)(1), (b)(1)(A) and 846
	1.b	8	**Maintaining drug-involved premises** 21 U.S.C. § 856(a)(2)
	1.c	9	**Maintaining drug-involved premises** 21 U.S.C. § 856(a)(1)
	1.d	10	**Maintaining drug-involved premises** 21 U.S.C. § 856(a)(1)
McCray Murder	4.a	12	**Conspiracy to murder federal witness** 18 U.S.C. § 1512(k)
	4.b	13	**Aiding/abetting murder of a federal witness** 18 U.S.C. §§ 1512(a)(1)(A), (a)(3)(A), and 2
Prostitution Business	5.a	15	**Interstate travel in aid of prostitution** 18 U.S.C. § 1952(a)(3).
	5.b	16	**Interstate travel in aid of prostitution** 18 U.S.C. § 1952(a)(3).
A. Williams Witness Bribery	6.b	18	**Interstate travel in aid of narcotics trafficking/bribery** 18 U.S.C. § 1952(a)(3).
	6.c	19	**Interstate travel in aid of narcotics trafficking/bribery** 18 U.S.C. § 1952(a)(3).
Esteves Plot	7.b	21	**Interstate travel in aid of narcotics trafficking /murder** 18 U.S.C. § 1952(a)(3), (b).
	7.c	22	**Interstate travel in aid of narcotics trafficking /murder** 18 U.S.C. § 1952(a)(3), (b).
	7.d	23	**Interstate travel in aid of narcotics trafficking /murder** 18 U.S.C. § 1952(a)(3), (b).
	7.e	24	**Interstate travel in aid of narcotics trafficking /murder** 18 U.S.C. § 1952(a)(3), (b).
	7.f	25	**Interstate travel in aid of narcotics trafficking /murder** 18 U.S.C. § 1952(a)(3), (b).
	8	26	**Failure to File Form 8300** 31 U.S.C. § 5324(b)

Because the substantive counts charged the same exact offenses the jury would consider in adjudicating Count 1, there was no rational reason for permitting the jury to reach different verdicts: a finding that Racketeering Act 1(a) was proven necessarily meant Bergrin was guilty on Count 5. Indeed, the verdict form itself connected the specific racketeering acts to the parallel substantive counts:

WE, THE JURY, UNANIMOUSLY FIND:

COUNT 1
(RICO)

NOT GUILTY ____ GUILTY ___X__

In reaching our verdict on Count 1, if the verdict is guilty, we unanimously found that the Defendant committed, caused, or aided and abetted the commission of at least two of the following Racketeering Acts:

Racketeering Act 1

a. Conspiracy to distribute a controlled substance, **as charged in Count 5:**

Not Proven ____ Proven __X__

CDE537 at 1 (emphasis added). Had the jury instruction omitted the modification Bergrin belatedly complains about, the jury might have returned inconsistent verdicts, leading to unnecessary and protracted litigation over the issue. *E.g.*, *United States v. Martinez-Maldonado*, 792 F. Supp. 2d 197, 200 (D.P.R. 2011) (where jury returned guilty verdict on count charging a conspiracy to commit three separate offenses but checked "no" next to box for each object offense, district court initially granted judgment of acquittal only to vacate it and, instead, order a new trial), *rev'd on other grounds sub nom. United States v. Fernandez*, 722 F.3d 1 (1st Cir. 2013).

Tellingly, Bergrin cites no case suggesting (much less holding) that the minor modification to Model Instruction 3.12 was erroneous. That, coupled with the fact that he procedurally defaulted his claim, is sufficient to dispose of his complaint.

F. Bergrin's Complaint About The *Mens Rea* For Accomplice Liability Is Procedurally Defaulted And Meritless.

Bergrin next complains that the jury instructions on aiding and abetting liability risked the jury's premising liability on negligence. Specifically, after complaining that the applicable mental states were defined pages after the offense elements, BB130–31,

Bergrin quotes the (otherwise-correct) instruction permitting a jury to infer that a person intends the natural and probable consequences of acts done knowingly, BB131–32. Relying solely on his own *ipse dixit,* he concludes that "[t]here is a risk that the jury found" him "guilty, because it was foreseeable that [his] negligence could have unknowingly 'in some way' 'facilitated' the [McCray] murder, even if the Petitioner, never at any time intended for a murder to occur." BB132. This claim is procedurally defaulted, and Bergrin makes no effort to overcome that default, which alone requires dismissal of his claim.

Further, Bergrin cites no case invalidating the proposition that a jury may infer that a person intends the natural and probable consequences of acts done knowingly. And no wonder: the Third Circuit in criminal cases has repeatedly affirmed the use of that very instruction. *See United States v. Sussman*, 709 F.3d 155, 178 (3d Cir. 2013) (identical instruction: "The District Court specifically instructed the jury on how to assess Sussman's state of mind, including the consideration of the likely effect of his actions."); *United States v. Johnstone*, 107 F.3d 200, 209–10 (3d Cir. 1997) (identical instruction: "We find nothing in the language of the charge that is contrary to the appropriate legal standard of § 242," which requires willfulness).

Finally, Bergrin's conclusion—that the instructions invite the jury to premise guilt on negligence— simply does not flow from his premise. Nowhere do the instructions suggest (let alone explicitly state) that the jury may convict if it concludes that Bergrin acted unreasonably. Rather, the jury could have convicted only if Bergrin commanded or counseled the McCray murder and did so with the specific intent to tamper with and kill McRay. A9889–92. And the Government in summation never

invited the jury to convict simply because Bergrin was careless with his words. Rather, the Government summarized the various pieces of circumstantial evidence bearing on Bergrin's intent and asked the jury to draw from that evidence the inference that Bergrin intended to cause McCray's death to prevent him from testifying against Baskerville. A9526–28.[7]

G. The District Judge Did Not Have to Describe What Evidence Applied To Particular Counts.

Bergrin next complains that the "jury instructions did not explain to the jury what specific evidence they should consider in deliberating on these counts." BB134–35. Again, this claim is procedurally defaulted and frivolous.

As every jury is instructed, the Judge's task is to charge the jury on the law. A9837. It is the parties' obligation to use their summation to marshal the facts. *See United States v. Pelullo*, 964 F.2d 193, 219 (3d Cir. 1992) ("The purpose of summations is for *the attorneys* to assist the jury in analyzing, evaluating and applying *the evidence*.") (first emphasis added) (quoting United States v. Morris, 568 F.2d 396, 401 (5th Cir. 1978)). No doubt, a judge has discretion to marshal the evidence, but doing so *sua sponte* is fraught with peril. *Cf. United States v. Levy*, 578 F.2d 896, 903 (2d Cir. 1978) ("We trust that, in the future, when trial judges charge on the facts, they will balance

[7] Bergrin's claim essentially mimics the argument he makes in Point IV and VII of his Brief. BB141–54 (complaining that the jury was not instructed that it had to find that Bergrin specifically intended to kill McCray, and that the instructions allowed a conviction if Young was objectively reasonable in interpreting Bergrin's statements as an instruction to murder McCray); BB141–54 (similar). To avoid further lengthening this brief, the Government incorporates by reference here its response to those Points, which quote various jury instructions putting the lie to the claim that the jury could have found Bergrin liable for the McCray murder without finding that he acted with the specific intent to kill. See HDE27 at 107–16.

the charge by referring to the evidence or to the theory of the defense. In a close case, an unbalanced charge on the evidence may require reversal. This is not such a case.").

Here, Judge Cavanaugh afforded each party 3.5 hours for their initial summations, A9420. The Government focused the jury on the evidence proving the key issue attendant to Bergrin's guilt on the Counts 12 and 13, *i.e.*, Bergrin's specific intent to kill. A9526–28. Bergrin, for his part, claimed that there was no Avon Avenue meeting in December 2004 at which he instructed the Curry crew to murder McCray. A9627–28. And, implicitly allowing for the possibility that the jury might find otherwise, Bergrin claimed he was simply acting as a legitimate defense attorney and had no intent to murder or tamper with McCray. A9626. Importantly, Bergrin never asked Judge Cavanaugh to summarize the evidence on Count 13 (or any other count). There was no need for Judge Cavanaugh to focus the jury's attention on the disputed facts bearing on Bergrin's liability under Count 13. And, even if there was, Bergrin's claim would have flunked the plain error standard on direct appeal, *see* Fed. R. Crim. P. 52(b), and so cannot be grounds for relief under § 2255, *see United States v. Addonizio*, 442 U.S. 178, 184 (1979).

H. Bergrin's Claim That Instructional Errors Warrant Relief On Collateral Attack Ignores That He Has Failed To Show Any Cause For His Default.

Bergrin finally claims that collateral relief for defaulted claims of instructional error is appropriate if "the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process." BB136 (citing *Henderson v. Kibbe*, 431 U.S. 145, 154 (1977); *Cupp v. Naughten*, 414 U.S. 141, 147 (1973)). The problem for Bergrin, however, is that he has not shown "cause" for his procedural default, and he has not identified any error that meets *Henderson*'s prejudice standard. Quibbles over the wording of the jury charge are not the stuff of collateral relief. *See Henderson*, 431 U.S. at 154 & n.13 (1977) (holding that only in the rarest of cases will an instruction to which no objection was made at trial support collateral attack, even though the same instruction might have been "plain error" on direct appeal).

Bergrin claims that the "jury clearly struggled with the evidence when considering the" McCray murder charges. BB136. Bergrin cites the questions the jury asked during deliberations, but none of those questions sought clarification on the mental state required to convict. Rather, the jury asked whether items that had been shown or referred to in open court had been introduced into evidence. BB136. Once the jury received the information it requested, it swiftly (less than two full days of deliberation) reached unanimous verdicts of guilt. *Compare* A9835 (Thursday March 14, 2013: jury retires to deliberate), *with* A10034–42 (Monday March 18, 2013: guilty verdicts). Bergrin has shown nothing warranting § 2255 relief for a procedurally defaulted claim of instructional error.

VI. The Claim In Ground Six Is Not Supported By Any Legal Argument In Bergrin's Brief. In Any Event, The Claim Is Procedurally Defaulted And Utterly Meritless.

Ground Six of Bergrin's § 2255 motion claims that "[n]o jury could have understood the complicated, contradictory and confusing instructions." HDE3 at 15. Bergrin acknowledges that he did not raise this issue on direct appeal, HDE15 at 16 (answer to question (b)(1)). Yet he has withdrawn his only effort to show cause and prejudice for his default, HDE35, and he makes no effort to do so otherwise. That alone is fatal.

Beyond that, Bergrin's brief contains a Point VI that addresses *not* Ground Six of his § 2255 motion, but Ground Seven. *Compare* BB138 ("VI. RICO IS UCONSTITUTIONAL"), *with* HDE 3 at 17 (Ground 7: same). Thus, the sole argument in support of Ground Six appears in Bergrin's form 2255 motion:

> The jury was asked to apply 160 pages of instructions to an 130 page indictment alleging 23 counts stemming from [five] plots. In count one alone, the jury was instructed on 22 different crimes. Between the predicate acts and substantive counts, the jury was asked to consider the elements of proof for 42 distinct offenses.
>
> The instructions were impossible to apply. Crimes by the same name, such as conspiracy were given different definitions, elements and burdens of proof depending upon the state law applicable (New York or New Jersey) as well as federal law. Because the jury could not understand the instructions, Petitioner was denied due process of law and his conviction cannot stand.

HDE 3 at 15. But the fact that the jury asked no questions seeking clarification on any of the legal principles it had to apply to the facts puts the lie to Bergrin's claim that the jury could not understand them. *Cf. United States v. Frega*, 179 F.3d 793, 810–11 (9th Cir. 1999) (vacating conviction in RICO conspiracy count due to botched answer to jury question posed during deliberations and explaining that, "in a case of this nature, involving a highly complex statute, multiple charges and defendants, allegations of a

conspiracy, a number of subsidiary legal issues, and highly disputed facts (as well as a second set of counts involving the application of a second federal statute), the danger of jury confusion is especially great and the district court's response responsibility to provide clarification particularly acute").

In sum, Ground Six is procedurally defaulted and frivolous.

X. The *Brady* Claims In Ground Ten Are Either Procedurally Defaulted Or Utterly Meritless, As They Depend On Frivolous Assertions That The Government Possessed And Failed To Disclose Exculpatory Information That Bergrin Has Invented For Purposes Of This Collateral Attack.

Ground Ten of Bergrin's § 2255 motion asserts that "[t]he Government violated Bergrin's Constitutional Due Process Rights by Failing to Reveal Favorable Evidence and deliberately concealing it." HDE 3 at 21. In his Brief, Bergrin devotes 83 pages to this argument, proceeding witness by witness. BB253–93.[8] None of the claims has merit.

A. Overview of Governing Legal Standards.

As the Government's initial Opposition explained, HDE27 at 82, 87, to make out a *Brady* violation "a defendant must show that: (1) evidence was suppressed; (2) the suppressed evidence was favorable to the defense; and (3) the suppressed evidence was material either to guilt or to punishment." *United States v. Pelullo*, 399 F.3d 197, 209 (3d Cir. 2005). A defendant bears the burden of proving each of these three elements. *Hollman v. Wilson,* 158 F.3d 177, 180 (3d Cir. 1998).

To establish materiality, Bergrin must prove "a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Kyles v. Whitley*, 514 U.S. 419, 433 (1995) (internal quotation marks and citation omitted). The question is whether, in the absence of the suppressed evidence, the defendant "received a fair trial, understood as a trial resulting in a

[8] As many such claims rehash arguments advanced earlier in Bergrin's § 2255 motion, the Government, where possible, will incorporate by reference the relevant arguments from its initial Opposition.

verdict worthy of confidence." *Id.* at 434. This requires more than a "mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial." *United States v. Agurs*, 427 U.S. 97, 109-10 (1976). Rather, the item must pertain to a "crucial fact," *United States v. Pelullo*, 14 F.3d 881, 887 (3d Cir. 1994), or "go to the heart of the defendant's guilt or innocence" in light of the "totality of the circumstances," and its absence must "impair the fairness of defendant's trial," *United States v. Hill*, 976 F.2d 132, 134–35 (3d Cir. 1992). Bergrin does not come close to meeting this rigorous standard.

B. Overview Of Bergrin's Claims.

The information Bergrin claims the Government suppressed falls into three general categories: (1) information the Government can prove it disclosed—most of which Bergrin actually used at trial; (2) information the Government learned about only when Bergrin used it at trial; and (3) information the Government never possessed but that Bergrin baldly asserts—without a shred of proof—the Government knew about and withheld. Bergrin has not met his burden with respect to any of his claims. Moreover, Bergrin has procedurally defaulted all of his claims in categories (1) and (2) because he actually possessed this information, used it at trial, and failed to raise a *Brady* claim on appeal. And if his direct appeal raised a *Brady* claim regarding any of the information he says was suppressed, the relitigation bar prevents Bergrin from obtaining a second bite at the apple now.

Regarding the first category, information the Government actually produced (and that Bergrin actually possessed) obviously cannot support a *Brady* claim. *See Masten v. United States*, 752 F.3d 1142, 1146 (8th Cir. 2014) (affirming rejection of *Brady* claim where "the record is clear that the government produced trial exhibit 118,

the DVD copy, a week before trial"); *United States v. King*, 577 F. App'x 701, 705 (9th Cir. 2014) ("Because a copy of the detention hearing statement with respect to the co-conspirator's supervised release was made available and Defendant acknowledged that his counsel was in possession of the transcript, there was no suppression that could support a *Brady* violation."); *United States v. Steffen*, 641 F.2d 591, 595 (6th Cir. 1981) ("Further, the reports themselves were not suppressed. Steffen received the reports before trial.").

As explained below, Bergrin falsely claims that the Government suppressed evidence. For example, Bergrin claims the Government failed to disclose that Lachoy Walker was previously convicted of kidnapping and assault. BB277. In fact, the Government timely disclosed this information, HA1236–37, and brought it out on Walker's direct testimony, A1212. Moreover, Bergrin used it to cross-examine Walker, A1329-31, and referred to it in summation, A9615–16. This claim is procedurally defaulted because Bergrin was aware of the information at trial, but his appellate counsel wisely chose not to use this already-disclosed information as the basis for a *Brady* claim on direct appeal. Further this evidence was neither suppressed nor material as Bergrin used it at trial and was nonetheless convicted.

Regarding the second category, information Bergrin himself obtained and used cannot form the basis of a *Brady* claim. The Government must disclose information in its actual or constructive possession. *United States v Joseph*, 996 F.2d 36, 39 (3d Cir. 1993). But "'the government is not obliged under *Brady* to furnish a defendant with information which he already has or, with any reasonable diligence, he can obtain himself.'" *Pelullo*, 399 F.3d at 202, *quoting United States v. Starusko*, 729 F.2d 256, 262

(3d Cir. 1984). Here the information in category two was in Bergrin's, not the Government's, possession.

For example, Bergrin claims the Government failed to disclose that Johnny Davis (McCray's step-father) said Anthony Young was not the shooter after being shown Young's photograph. BB265. But it was Bergrin's investigator, not the Government, who showed Davis a photograph of Young and obtained that statement from Davis. HA1644–49; A2463–68, A2505–06. Bergrin elicited this information while cross-examining Davis, A2501-06, and argued in summation that it proved Young lied about shooting McCray, A9657–58. Thus, this claim is both procedurally defaulted (because Bergrin was aware of the information but failed to raise a claim on appeal) and patently meritless (because the evidence was not suppressed, was used at trial, and did not prevent Bergrin's conviction, proving it was not material).

For the remainder of his claims, as detailed further below, Bergrin fabricates impeachment information, falsely claims that the Government was aware of that fabricated information, and then faults the Government for not disclosing it. In reality, the source of each of these alleged "facts" is Bergrin himself, and the Government is aware of them only because Bergrin has alleged them in his various Court filings or in connection with his defense case at trial. Bergrin cannot simply fabricate allegations from whole cloth. Rather, he must establish his factual assertions by competent evidence. *See United States v. Aiello,* 814 F.2d 109, 113–14 (2d Cir. 1987) (a § 2255 "application must contain assertions of fact that a petitioner is in a position to establish by competent evidence," such that "[a]iry generalities, conclusory assertions and hearsay statements will not suffice because none of these would be admissible

evidence at a hearing") (citing *Machibroda v. United States*, 368 U.S. 487, 495–96 (1962); *Dalli v. United States*, 491 F.2d 758, 761 (2d Cir 1974)); *see also Barry v. United States*, 528 F.2d 1094, 1101 (7th Cir. 1976) ("the petition must be accompanied by a detailed and specific affidavit which shows that the petitioner had actual proof of the allegations going beyond mere unsupported assertions") (footnotes omitted).

Even assuming the fabricated impeachment information were true, the Government cannot suppress evidence not in its possession and about which Bergrin was already aware. *Pelullo*, 399 F.3d at 202. For example, Bergrin claims the Government suppressed evidence that Jauregui would have exculpated him in drug trafficking and proven other Government witnesses who implicated him were lying. BB258–59, 273. But Jauregui actually inculpated Bergrin in drug trafficking. *See* SA2326–87. Bergrin's claims to the contrary are based upon a document he fabricated after trial that Jauregui refused to sign despite Bergrin's attempts to bribe and coerce her into doing so. HDE27 at 103–04. The Government only learned of this fabricated information when Bergrin filed a Rule 33(b)(1) motion three-plus years after trial concluded. CDE630–9 at 1–25. As Bergrin's fabricated information was in his (not the Government's) possession, there would be no *Brady* violation even if it were true (which it is not).

C. Bergrin's Claims Regarding Anthony Young Are Procedurally Defaulted And Meritless.

Bergrin concedes he failed to raise his *Brady* claims on direct appeal, HDE3 at 9, but asserts "[i]t was not ripe," *Id.* But as detailed below, Bergrin possessed the very evidence he claims was suppressed and actually used it at trial.

For example, Bergrin claims the Government failed to disclose information that Horatio Joines claimed he was not in the vicinity of South Orange Avenue and 19th Street on March 2, 2004. BB261, 269–70. Not only did the Government timely provide him with this information, HA1650–51, but Bergrin referred to it in his opening statement, A1144, used it to cross-examine witnesses, A2922–24, and referred to it in his closing argument, A9640–41.

Bergrin also claims the Government failed to disclose that Young used a fully automatic pistol when he killed McCray. BB276. But Young testified to this at Trial One, HA1658–59; SA1136–38; SA1143–44, Bergrin possessed the Trial One transcript prior to Trial Two, and Bergrin questioned both Agent Brokos, A2817–18, and Young, A3824–25 on the subject of Young's using a fully automatic weapon to murder McCray.

Bergrin similarly claims the Government failed to disclose reports of the handguns recovered during the investigation of the Curry Organization that would have impeached Young. BB276-77. But the Government timely disclosed those reports. HA1670, HA1672-73, HA1679, HA1683–84, Bergrin cross-examined witnesses about guns recovered during the investigation of the Curry Organization, A1822–24, and Bergrin used that testimony to make the same argument to the jury he makes in his current brief, A9615.

Bergrin claims the Government failed to disclose allegations that Young committed aggravated assault and arson against Rashidah Tarver. BB261. Not only did the Government timely provide this information, but Bergrin used it to

cross-examine witnesses, A2928–29, A3461–62, called Tarver to testify on this subject in his defense case, A8856–60, and referred to it in his summation, A9615–16.

Bergrin also claims that Tarver informed the Government that Young never told her about Jamal NcNeil's and Jamal Baskerville's involvement in killing a women Young referred to as "Nut's girlfriend," which (if true) meant that Young falsely testified at trial that he did discuss that with Tarver. BB270–71. But Tarver never said this to the Government. Indeed, Bergrin acknowledges as much in another portion his brief, when he faults Agent Brokos for not questioning Tarver about this topic during an interview. BB235–36. Instead, the source of this information is Tarver's testimony in Bergrin's defense case, which necessarily occurred after the Government rested its case. Thus, the record shows that Bergrin, not the Government, possessed this information. Further, the information necessarily was immaterial since the jury convicted Bergrin despite hearing it.

Similarly, the record belies Bergrin's claim that Agent Brokos confirmed with local law enforcement that Young lied about the murder of Nut's girlfriend. In fact, Agent Brokos confirmed the accuracy of Young's statement with the homicide detective who was investigating that murder. A2806. Further, the homicide file confirms both Brokos's and Young's testimonies on this point. HDE27 at 140–41.

Bergrin's claim regarding the Curry calls is utterly meritless, as they were disclosed 3½ years before trial, supported Young's testimony, and independently proved Bergrin's guilt of the McCray murder. Moreover, Bergrin could have used any calls he wished during trial, but chose not to do so because it would have opened the door to the Government's introducing other highly inculpatory calls. That Bergrin

now regrets that litigation choice does not mean he has a *Brady* claim. *See* HDE27 at 72–99.

Equally meritless is Bergrin's claim that the Government failed to disclose that Young had been instructed to tell the truth but nonetheless lied during proffer sessions with the U.S. Attorney's Office ("USAO"). Bergrin does not contest that the Government disclosed prior to trial both the proffer agreements (which offer protection in exchange for truthful information) and that Young lied during his initial proffer sessions. Moreover, Bergrin obviously knew this before Trial Two as he cross-examined Agent Brokos during Trial One and established that Young had lied during proffer session with her, the USAO, and his lawyer, Melinda Hawkins Taylor, "after being explained multiple times to Anthony Young he had to be truthful, honest and upfront." HA1688-89. Bergrin elicited similar testimony when he called Agent Brokos during his defense case at Trial Two. A9274–75. The Government timely disclosed all relevant facts and Bergrin fully exploited those facts during trial. His conviction proves those facts were not material to guilt.

Bergrin claims the Government failed to disclose information provided by Christopher Spruill relating to events that occurred the day after Young killed McCray. BB265. Not only did the Government timely disclose this information HA1698–704, but Bergrin referred to it in his opening statement, A1197, used it to cross-examine witnesses, A2231, 2257, A2803, and referred to it in his summation, A9654.

Bergrin rehashes his argument that Hassan Miller claimed (in December 2013) he had told the Government (in 2005) that Young supposedly admitted he was going

to lie about Bergrin's involvement in the McCray Murder. BB262, 267-68. But as set forth in the Government's initial Opposition, HDE27 at 105–06, that statement was in Bergrin's (not in the Government's) possession. Further, a contemporaneous 2005 recording shows Miller is wrong, and the Government learned of Miller's assertion regarding Young for the first time when Bergrin filed his Rule 33(b)(1) motion 3¼ years after trial. *See id.* Further, Bergrin was aware of Miller's December 2013 statement *before* he perfected his direct appeal.

Bergrin timely possessed all of the foregoing information, but failed to raise any of these *Brady* claims on direct appeal. Accordingly, his claims are procedurally defaulted. *Johnson v. United States*, 759 F. Supp. 2d 534, 539 (D. Del. 2011); *see Sullivan v. United States*, 587 F. App'x 935, 944 (6th Cir. 2014) ("Consequently, Sullivan has procedurally defaulted on any *Brady* claims concerning these documents because his appellate counsel, who had these documents, did not raise these claims on direct appeal."). Further, even if Bergrin had not defaulted, these claims are meritless because the information was neither suppressed nor material—Bergrin had the material, used it at trial, and was still convicted.

The remaining claim, though possibly not procedurally defaulted, is specious. Bergrin claims that the Government failed to disclose records in its possession showing Young suffered from mental illness. BB260. This assertion is fabricated from whole cloth. Despite bearing the burden to prove (among other things) that exculpatory evidence exists and was in the Government's possession, *see Hollman,* 158 F.3d at 180, Bergrin provides no support for his assertion that: Anthony Young suffered from mental illness; records exist evidencing such; or the Government

possessed records or any other information that Young suffered from mental illness. Thus, this claim fails on the facts.[9]

D. Bergrin's Claim Regarding Ben Hahn Is Procedurally Barred And Meritless.

Bergrin complains the Government did not disclose that Ben Hahn, who was a defense witness, failed a polygraph exam. BB268. But because Bergrin unsuccessfully raised this claim on direct appeal, HA73–74, he cannot re-raise it on collateral attack. *United States v. DeRewal*, 10 F.3d 100, 105 n.4 (3d Cir. 1993) (quoting *Barton v. United States*, 791 F.2d 265, 267 (2d Cir. 1986)); *see Withrow v. Williams*, 507 U.S. 680, 720-21 (1993) (Scalia, J. concurring) (collecting cases).

Even if not barred, the claim is meritless. The Government has no obligation to turn over impeachment material for persons who are not Government witnesses. *United States v. Green*, 178 F.3d 1099, 1109 (10th Cir. 1999). Further, Bergrin's claim that Hahn's polygraph failure somehow impeached Young is ludicrous. According to

[9] As Bergrin does not disclose when he learned (or fabricated) this alleged information, the Government cannot demonstrate that he procedurally defaulted this claim (*i.e.*, that Bergrin knew this "information" at the time of his direct appeal). However, the Government reserves the right to make such an argument if and when Bergrin reveals when he learned/fabricated this alleged information. This is true of many Bergrin claims that the Government suppressed fabricated impeachment material, including that: Alejandro Barazza-Castro possessed evidence that Abdul Williams was not a drug courier; Gerald Saluti told Eugene Braswell to lie; Oscar Cordova was downloading child pornography; Agent Brokos intervened in Cordova's alleged drunk driving arrest; and the Government had an undisclosed agreement with Barazza-Castro. In other instances, it is possible to infer a timeframe from the fabricated information itself. For example, if believed, Bergrin's claimed statements to Agent Hilton about Barazza-Castro's drug dealing necessarily would have occurred before Bergrin was even arrested. Consistent with this fabrication, Bergrin would have known of the statement before his direct appeal and, thus, procedurally defaulted his claim for not asserting it at that time.

Bergrin, the failed polygraph was favorable because Hahn's statements to the FBI contradicted (and presumably were more credible than) Young's testimony establishing he shot McCray. BB269. Any contradiction between Hahn and Young concerned an inconsequential point, namely the date that Young brought Hahn the murder weapon to be melted down. But putting that aside, Bergrin does not explain how Hahn's *failing* a polygraph makes his statements more credible (and thus helpful to Bergrin's defense).[10] Quite simply, this is not exculpatory under any definition.

E. Bergrin's Claims Regarding Abdul Williams Are Procedurally Defaulted And Meritless.

Bergrin claims the Government failed to disclose information about Williams's involvement a seven-kilogram cocaine deal. BB283–84. But that information was disclosed pretrial, SA2373–75, Bergrin called Agent Brokos in his defense case in an attempt to elicit that information, A9277–80, and Bergrin referred to the information in his summation, A9611.

Bergrin claims the Government failed to disclose a promised benefit to forego prosecuting Williams for crimes Bergrin claims Williams committed. Bergrin does not contest that the Government timely disclosed Williams's written plea and cooperation agreements. As the plea agreement makes clear, and consistent with regular practice,

[10] Bergrin called Hahn to testify in his defense case via video teleconference from Jamaica. However, after technical difficulties, the parties entered into a stipulation that Hahn would testify consistent with the facts contained in the FBI 302 of his FBI interview. A9253–55. Thus, Bergrin conceded that Hahn (consistent with Young's testimony) would have testified that Young and Rakeem Baskerville brought Hahn the gun to melt down. The only conflict between Hahn and Young related to the date Young brought Hahn the gun to be melted down. A9249–51. The precise date on which Young did this had no independent relevance.

it covered only the specific conduct for which the Government possessed sufficient evidence to charge Williams. Bergrin also knew from Government disclosures (and his own prior representation of Williams), that Williams had committed crimes during his lifetime that were not the subject of federal charges. From these two disclosed facts, Bergrin argues now, as he did at trial, that the Government gave Williams a benefit by not charging him with all of the crimes he committed during his lifetime.

But even assuming this were a "benefit," it was fully disclosed and Bergrin made full use of it at trial. *See* A1153 (Bergrin arguing this point during his opening statement); A5261–67 (Bergrin cross-examining Williams on the subject); and A9611 (Bergrin arguing this point during his closing statement). Thus, the Government timely disclosed all relevant facts and Bergrin had a full opportunity to exploit these facts at the trial resulting in his conviction.

Bergrin's claim that the Government failed to disclose Williams was represented by Richie Roberts is meritless. BB283. Roberts's representation was a matter of public record and Bergrin was obviously aware of this representation as he cross-examined Williams on the topic at trial. A5389–91.

Bergrin's claim that Syed Rehman and Rahoo Drew told the Government Williams lied about Bergrin's involvement in drug trafficking, BB272, 283, presents another example of Bergrin attributing to the Government information he allegedly obtained. The Government was only aware of Rehman and Drew because Bergrin provided the Government with unsigned investigator's summaries of their alleged statements as reverse Jencks Act materials in advance his defense case. The Government cannot suppress information Bergrin himself possessed. *See Pelullo*, 399

F.3d at 202. Moreover, this claim was clearly ripe when Bergrin filed his direct appeal. Indeed, Bergrin litigated issues related to Drew's and Rehman's testimony both at trial, A9289-300; CDE503; A9739–84, and on direct appeal, HA54.

Given that Bergrin possessed all of the forgoing information and either used or attempted to use it at trial, he cannot now credibly claim it was not ripe when he filed his direct appeal. Having failed to raise any of these *Brady* claims on direct appeal, he is cannot now raise them on collateral attack. *See Johnson*, 759 F. Supp. 2d at 539; *Sullivan*, 587 F. App'x at 944. Further, since Bergrin possessed all of the impeachment information and was convicted despite using much of it at the trial, the evidence was neither suppressed nor material. Finally, the impeachment information Bergrin possessed but did not actually use at trial was not material because the evidence of Bergrin's guilt on the drug conspiracy independent of Williams's testimony—which included the testimony of several other co-conspirators, numerous wiretap and other recordings of Bergrin, and the seizure of 53 kilograms of cocaine from Bergrin's restaurant—was overwhelming.

The remaining claim, though possibly not procedurally defaulted, is specious. Bergrin claims that the Government suppressed evidence from Alejandro Barazza-Castro disproving that Williams was a drug courier for Bergrin. BB273. This is yet another instance of Bergrin fabricating favorable information from whole cloth. Despite bearing the burden of proof, Bergrin does not describe this supposed exculpatory evidence, fails to identify the source of this information, and otherwise provides no factual support for his claim. The only information the Government possesses shows that Barazza-Castro implicated Bergrin in drug trafficking—a fact

Bergrin acknowledged in his motion. BB266–67. Even if true, the alleged information was neither suppressed nor material.

F. Bergrin's Claims Regarding Eugene Braswell Are Procedurally Defaulted And Meritless.

Bergrin rehashes his claim that the Government failed to disclose that Eugene Braswell was involved in a self-defense shooting. BB225. As set forth in the Government's initial Opposition, the Government timely provided Bergrin with this information, Bergrin was already aware of it, Bergrin used the information at trial, and in any event the information was not material. HDE27 at 156–57.

Bergrin also rehashes his claim that Ramon Jimenez told the Government Braswell lied about Jimenez's introducing him to Peruvian cocaine suppliers. BB274–75. As set forth in in the Government's initial Opposition, all relevant materials were timely disclosed to Bergrin, Bergrin is fabricating this alleged statement, and even if it were true, the information would not be material. *See* HDE27 at 156–57.

Bergrin's *Brady* claims relating to Braswell were ripe when he filed his direct appeal. Bergrin possessed the very evidence he claims was suppressed and actually used it at trial. Because Bergrin failed to raise any of these *Brady* claims on direct appeal, his claims are procedurally defaulted. *See Johnson*, 759 F. Supp. 2d at 539; *Sullivan*, 587 F. App'x at 944. Moreover, because Bergrin possessed all of the information and used much of it at the trial resulting in his conviction, the information was neither suppressed nor material. The information he possessed but chose not use at trial was not material given the overwhelming evidence of Bergrin's guilt independent of Braswell. *See* HDE27 at 156–57.

Bergrin's remaining claim, though possibly not procedurally defaulted, is specious. He claims the Government withheld information that Gerald Salutti told Braswell to cooperate even if he had to lie about Bergrin. BB273. This is another example of Bergrin's fabricating favorable information from whole cloth. Despite his burden, Bergrin offers no proof that Saluti made such a statement, or that (if he did) the Government knew that Saluti made such a statement. The Government was not aware of Saluti, or anyone else, making such a statement to Braswell. Finally, even if Bergrin's claim were true, the information was not material because there was overwhelming evidence of Bergrin's guilt independent of Braswell. *See* HDE27 at 156–57.

G. Bergrin's Claims Regarding Lachoy Walker Are Procedurally Defaulted And Meritless.

Bergrin rehashes claims he made earlier in his § 2255 motion, *i.e.*, that the Government failed to turn over evidence of Walker's prior criminal conduct and lease records for the Dungeon. BB275–77. As set forth in the Government's initial Opposition, the Government turned over all relevant material in its possession, and even if it had not, the evidence would not be material to guilt. *See* HDE27 at 154–55. Further, since these claims were ripe when Bergrin filed his direct appeal, he cannot raise them now on collateral attack.

H. Bergrin's Claims Regarding Thomas Moran Are Procedurally Defaulted And Meritless.

Bergrin grossly misstates Moran's trial testimony to claim that the Government knew relatives were providing Moran with internet, newspaper and other information to be used against Bergrin. BB280. The Government provided all relevant discovery, including Moran's testimony at Trial One, where Moran testified he read a *New York*

Times article about Bergrin while Moran was engaging in criminal activity with Bergrin. Moran testified that when he questioned Bergrin about the article, Bergrin made certain admissions. A7391–95. Moran testified on cross-examination that he had told the prosecutor about the *New York Times* article and surrounding events during a proffer session. At the time of the proffer, Moran could not remember the exact date of the article—a fact with no independent relevance. However, he subsequently saw the article again when a friend sent it to him in jail and then told prosecutor its exact date. A7631–33. Thus, using the discovery provided, Bergrin fully explored all relevant facts, including that Moran recalled the date of the article only after a friend sent it to him.

Bergrin also claims the Government did not inform him that Moran had been moved from Hudson County Jail to Bergen County Jail during his pre-trial detention. It is difficult to fathom, and Bergrin does not explain, how this could be considered *Giglio* material. Nevertheless, Bergrin was clearly aware of this fact prior to trial because there was a discussion in open court more than a year before trial about allegations that Bergrin and his associate were plotting to kill Moran in Bergen County Jail. *See* SA300, SA307.

Bergrin claims the Government failed to disclose it purposefully delayed sentencings in Monmouth County and Hudson County so that Moran would not have a felony conviction when he testified. BB278-80. But there was no such agreement. Moran had already been sentenced on the Monmouth County case, A7297-98, and his Hudson County case had not yet been disposed of, so there was no sentence pending,

A7362–63, A7491–92, A7495–96. Further, both of these matters were explored fully during Bergrin's cross-examination, A7502-06, and summation, A9620.

Bergrin claims the Government withheld information that Moran attempted suicide and that his psychological condition was so poor that Moran told his attorney he would say or do anything to get out of the Special Housing Unit. But despite his burden, Bergrin once again offers no proof that Moran had done any of these things, or that the Government was aware he had. Indeed the only information the Government had on this subject came from Bergrin's vague comments during a side-bar conference at Trial One.[11] To the extent any of this were true, Bergrin, not the Government, possessed the information.

Because Bergrin either used, or was aware of, all of the information he claims was suppressed when he perfected his direct appeal, he cannot now raise them on collateral attack. Further, there is no *Brady* violation because none of this information was suppressed. Finally, even if it were suppressed, it is immaterial. Bergrin was convicted despite using much of this information during the trial. Moreover, the evidence of Bergrin's guilt independent of Moran's testimony was overwhelming. For example, on the drug conspiracy, the Government presented, among other things, the testimony of multiple other coconspirators, numerous wiretap and other recorded conversations with Bergrin, and evidence of the seizure of 53 kilograms of cocaine

[11] Bergrin said, "the indication I had was that he [Moran] became suicidal being locked up 36 hours a day." However, when the Government informed Bergrin that it expected Moran, if asked, would testify that he checked himself into the SHU because he was afraid Bergrin would get someone to harm him, Bergrin refrained from cross-examining Moran on the subject. SA1230–31.

from 710 Summer Avenue. On the charges related to the Esteves Murder Plot, the Government presented, among other things, hours of recorded conversations with Bergrin, the testimony of a Government cooperator, and the testimony of another co-conspirator.

Finally, Bergrin claims that the Government failed to disclose information provided by Jauregui that Moran lied about his visit to 710 Summer Avenue. But that claim is based upon a document Bergrin fabricated post-trial that Jauregui refused to sign even after Bergrin bribed and coerced her to do so. That document is patently false, so his claim relying on it is specious.

I. Bergrin's Claims Regarding Rondre Kelly Are Procedurally Barred And Meritless.

Bergrin further claims the Government did not disclose reports of Rondre Kelly's cooperation in other districts. BB284. But the Government did make such disclosures. Indeed, the scope of the Government's disclosure obligations for those materials was fully litigated before Judge Cavanaugh, and Bergrin ultimately did not contest at trial that the Government had complied with its obligations. A4471–83, A4544, 4592–93. Bergrin also cross-examined Kelly using this information A4675–77, A4680–82, A4686–87, A4691–96. And Because Bergrin raised this claim on direct appeal, HA74-75, he cannot now re-raise it on collateral attack, *see DeRewal*, 10 F.3d at 105 n.4; *see Withrow*, 507 U.S. at 720-21. Moreover, given that the information was timely disclosed and used by Bergrin at trial, it was neither suppressed nor material.

J. Bergrin's Claims Regarding Oscar Cordova Are Procedurally Defaulted And Meritless.

Bergrin complains the Government failed to disclose that FBI informant Maria Correia became intimate with DEA informant Ocar Cordova. BB282. But the

Government turned over all materials it had relating to that subject, including recordings showing Bergrin telling Correia to arrange for one of her associates to have sex with Cordova, A10631, and Cordova and Bergrin discussing the fact that Cordova had had sex with Correia. HA1706.[12] Even if the Government had not made such a disclosure, there could be no *Brady* violation because Bergrin was already aware of this fact, having discussed it *in real time* with Correia and Cordova. *See Pelullo*, 399 F.3d at 202.

Bergrin rehashes his claim of a "clandestine unrevealed deal essentially immunizing Cordova" for his perjured testimony; his complaint about payments Cordova received, and his assertion the Government knew Cordova was not the son of "Lord Gino." But as the Government explained in its initial Opposition, HDE27 at 147–52, those claims are is completely unfounded.[13]

Bergrin's complains the Government failed to disclose Cordova's confession during a debriefing to sexual assaults, murders and drug distributions. But Bergrin admits he received the debriefing report detailing this statement. Moreover, Bergrin cross-examined Cordova about the substance of this report. A6225–28. Bergrin

[12] The Government will make this CD-ROM available to the Court upon request.

[13] Bergrin earlier raised these claims under *Napue v. Illinois*, 360 U.S. 264 (1959), alleging the Government failed to correct Cordova's perjured testimony. As the Government's initial Opposition explained, Bergrin (and the jury) knew all of the information Bergrin now claims was suppressed because either the Government or Bergrin elicited it. Thus, there was no suppression and the information was not material given that Bergrin was convicted. HDE27 at 147–52.

blindly speculates that there must have been additional documents on this subject, but he is wrong.

Because Bergrin possessed the information he claims the Government suppressed when he perfected his direct appeal, he procedurally defaulted these *Brady* claims and cannot raise them now on collateral attack. Further, there is no *Brady* violation because none of this impeachment information was suppressed. Finally, even if it were suppressed, it is not material. Bergrin used much of the information during the trial, and the evidence independent of Cordova's testimony was overwhelming. Indeed, Cordova's credibility was thoroughly impeached and the jury nevertheless convicted because every relevant fact to which he testified was contained in contemporaneous recordings and supported by the testimony of two co-conspirators. *See* CDE659 at 55–56.

The remainder of Bergrin's claims, though possibly not procedurally defaulted, are fabricated from whole cloth. Despite bearing the burden of persuasion, Bergrin utterly fails to offer any support for his claim that Cordova was downloading child pornography, that (if he were) the Government was aware of it, that Cordova was stopped for drunk driving in Illinois, or that Agent Brokos intervened in the alleged stop. Other than what it disclosed, the Government has no information about Cordova's criminal activity and Agent Brokos never intervened in any drunk driving stop. Besides, even if all of this were true, it would not be material to Bergrin's guilt, as Cordova's credibility was rendered irrelevant by the contemporaneous recordings and co-conspirator testimony.

K. Bergrin's Claims Relating Natalie McClennan and James Cortopassi Are Procedurally Defaulted And Meritless.

Bergrin claims the Government failed to disclose that Natalie McClennan's New York State charges were dismissed and that it allowed her to enter the United States to visit her family. BB291–92. But McClennan's charges were not dismissed. As the Government disclosed, she pleaded guilty to money laundering and served a 26-day jail sentence. A4274–76. Indeed, Bergrin cross-examined McClennan about her guilty plea and 26-day sentence. A4298. Similarly, although she did apply to enter the United States to visit her father, the Government authorized McClennan to enter the United States for the sole purpose of testifying at trial, A4186-87, and Bergrin cross-examined her about her then-pending application to enter the United States to visit her father, A4291.

Bergrin further claims the Government failed to disclose that James Cortopassi's New York State charges were dismissed and that the Government agreed to write a letter supporting Cortopassi's admission to the Bar. BB291. But the Government timely disclosed that his New York State charges were dismissed as a result of his cooperation with New York authorities, A4312–14, A4352, and the potential letter to the Bar was covered on both the Government's direct, A4353, and Bergrin's cross-examination, A4371.

On again, Bergrin possessed all of this information when he filed his direct appeal. Thus, he cannot raise these claims now on collateral attack. Further, there was no *Brady* violation because none of this information was suppressed. Finally, none of this information was material. Not only did Bergrin use this information at trial, but he also stipulated to the essential facts about which Cortopassi and McClennan testified establishing his guilt. SA1926.

L. Bergrin's Claims Regarding Yolanda Jauregui Are Procedurally Defaulted And Meritless

Jauregui testified at Trial One, but not at Trial Two. Bergrin nonetheless claims the Government failed to disclose that it spent money moving Jauregui's sister as part of the WitSec Program, BB257, but the Government disclosed prior to Trial One that many of Jauregui's family members were put into WitSec. *See* HA1712–13, HA1716; *see also* SA517018 (disclosures relating to Jauregui's brother Ramon Jimenez).

Bergrin rehashes claims he made elsewhere about an undisclosed agreement between the Government and Jauregui relating to certain real estate properties. But as forth in the Government's initial Opposition, HDE27 at 157–58, those claims are meritless. Bergrin's related claim of an undisclosed agreement not to prosecute Jauregui's mother and niece, BB258, is similarly meritless. The Government disclosed Jauregui's written agreements and the facts surrounding her arrest on the relevant drug charges, which occurred before she began cooperating with the Government. As is clear from the criminal complaint, before she ever began cooperating, an Assistant United States Attorney unconnected to the trial team had decided based upon the evidence gathered in the case Jauregui would be the only person charged with a crime.

Because Bergrin either used or was aware of the information in each of these claims when he filed his direct appeal, he cannot now raise them on collateral attack. Further, there is no *Brady* violation because none of this information was suppressed. Finally, even if it were suppressed, it is not material because it is solely impeachment evidence for a witness who did not testify at trial. *See Green*, 178 F.3d at 1109.

M. Bergrin's Claims Regarding Ramon Jimenez Are Procedurally Defaulted And Meritless.

Jimenez testified at Trial One, but not at Trial Two. Bergrin nonetheless claims the Government suppressed an agreement to inform the Pennsylvania State Parole Board about Jimenez's cooperation. BB259. But the Government disclosed this benefit pretrial. HA1717–28, and brought this out on Jimenez's direct testimony at Trial One, HA1363–65. Moreover, at Trial One, Bergrin cross-examined Jimenez about the amount of time he would be sentenced to on his Pennsylvania parole violation, suggested that it was part of his motivation to cooperate, HA1425–26, HA114, HA1567, and referred to it in summation, A9615–16.

Bergrin's claim, BB209–11, that Jimenez's court-appointed counsel and the Government coerced Jimenez to provide perjured testimony against Bergrin is false, HDE27 at 158–59. But even if it were true, the Government disclosed all relevant facts at Trial One and Bergrin used the information to cross-examine Jimenez at Trial One. Regardless, as Jimenez did not testify at Trial Two, the information could not have been material to guilt.

Just as he did with Williams, Bergrin claims the Government had an undisclosed agreement not to prosecute Jimenez for his prior drug trafficking. Bergrin does not contest that the Government timely disclosed Jimenez's written plea and cooperation agreements prior to Trial One. As the plea agreement made clear, it covered only the specific conduct for which the Government possessed sufficient evidence to charge Jimenez, not every crime Jimenez had committed during his lifetime. Bergrin also knew from the Government disclosures and his own prior dealings with Jimenez, that Jimenez had committed crimes during his lifetime that

were not the subject of federal charges. Accordingly, the relevant facts were fully disclosed.

Because Bergrin either used, or was aware of, the information in each of these claims when Bergrin filed his direct appeal, he cannot raise them on collateral attack. Further, there is no *Brady* violation because none of this information was suppressed. Finally, even if it were suppressed, it is not material because it is solely impeachment evidence for a witness who did not testify at trial. *See Green*, 178 F.3d at 1109.

N. Bergrin's Claims Regarding Maria Correia and Albert Castro Are Procedurally Defaulted And Meritless.

Bergrin's claims regarding Maria Correia and Albert Castro are meritless. BB212–16. First, neither Correia nor Castro were witnesses at Trial Two. Thus, any information impeaching either Correia or Castro cannot qualify as *Giglio*, let alone *Brady* material. HDE27 at 161–62. Moreover, even if it were true that Correia and Richard Roberts conspired to convince Castro to lie, Bergrin has utterly failed to establish the Government was aware of such a plot. Further, since Bergrin concedes the Government turned over jail visitation records well in advance of Trial Two, there cannot be a *Brady* violation. *See Masten*, 752 F.3d at 1146; *King*, 577 F. App'x at 705; *Steffen*, 641 F.2d at 595.

Bergrin rehashes his claim that the Government suppressed evidence from Correia that Jauregui and Bergrin knew Cordova was a cooperator. But as set forth more fully in the Government's initial Opposition, the Government timely disclosed all evidence in its possession supporting that proposition, and Bergrin called Agent Brokos to elicit, albeit improperly, that evidence. HDE27 at 100–02.

Because Bergrin either used, or was aware of, the information in each of these claims when he perfected his direct appeal, he cannot now raise them on collateral attack. Further, there is no *Brady* violation because none of this information was suppressed. Finally, even if it were suppressed, it is not material. Much of it is not material because it is solely impeachment evidence for witnesses who did not testify at trial. *Green*, 178 F.3d at 1109. Bergrin fully exploited the remainder at trial and the jury nonetheless convicted him, and so the information was not material.

O. Bergrin's Claims Regarding Alejandro Barazza-Castro Are Wholly Unsupported and Specious.

Bergrin also claims the Government failed to disclose that it agreed not to file a sentencing enhancement against codefendant Barazza-Castro if he agreed to implicate Bergrin in drug trafficking. BB266–67. Bergrin provides no support, because none exists, for his contention. But even had such an agreement existed, it would not have been *Brady* or *Gilgio* material, as Barazza-Castro was not a Government cooperator and did not testify at any trial. *Green*, 178 F.3d at 1109.

P. Bergrin's Claims Regarding Agent Gregory Hilton Are Procedurally Defaulted And Meritless.

Bergrin's claim that the Government suppressed Bergrin's cellphone records is false. BB286. The Government provided those to Bergrin in discovery between July 1, 2009 and December 4, 2009, more than three years before trial. There is no *Brady* violation when the Government timely discloses evidence to the defendant.

Bergrin fabricates from whole cloth his claim that the Government did not disclose reports memorializing Bergrin's alleged statement to Agent Hilton about Barazza-Castro's drug trafficking activity. BB287. Other than Bergrin's own assertions, the Government is unaware of Bergrin making any such statements or the

existence of any such reports. And Bergrin has produced no proof that such reports exist. To the contrary, according to the sworn declaration of Bergrin's counsel, Agent Hilton said he has no memory of Bergrin ever telling him any information about Barazza-Castro's drug trafficking activities. CDE630–18 at 3, ¶7. Even if it were true, Bergrin necessarily was aware of any statements he made to Agent Hilton. The Government cannot suppress information already known to Bergrin. *See Hubbard v. Pinchak*, 378 F.3d 333, 340 (3d Cir. 2004) ("A defendant's own late-proffered testimony is not 'new' because it was available at trial."); *see also Crowder v. McCollum*, Civil No. 17–54, 2017 WL 892734, at *2 (W.D. Okla. Feb. 21, 2017) (evidence not "new" where "[p]etitioner knew of the facts contained in this affidavit prior to his trial").

Because Bergrin was aware of the information supporting these claims when he perfected his direct appeal, he cannot now use them to support a *Brady* claim on collateral attack. Further, there is no *Brady* violation because none of this (alleged) information was suppressed. Finally, even if had been suppressed, it is not material. To the extent Bergrin claims (as he did in his Rule 33 Motion) that this impeaches Agent Hilton, he was not a witness at trial. To the extent Bergrin claims his alleged statement to Agent Hilton was proof he did not conspire to distribute drugs (putting aside questions over its admissibility, *see* Fed. R. Evid. 802), the proof of that charge was so overwhelming that this statement would have been meaningless. That Bergrin could have taken the stand and testified to this statement himself, but chose not to, demonstrates that Bergrin himself did not deem this information material at trial.

XIV. Ground Fourteen Is Procedurally Defaulted And Frivolous.

Ground Fourteen of Bergrin's § 2255 motion asserts that Bergrin's "prosecution was malicious retaliation and the result of vindictiveness." HDE3 at 27. In Point XIII of his brief, Bergrin argues that his "prosecution was malicious retaliation and the result of vindictiveness for his history of advocacy against the government." BB393. Bergrin concedes he did not raise this issue on appeal. HDE3 at 28 (answer to (b)(1), and he has withdrawn the only basis offered to show cause and prejudice, HDE35. Beyond that, nowhere in his brief in support of Ground XIV does Bergrin allege he is actually innocent. Thus, this Court need not reach the merits of the claim at all. *Strickland v. United States*, Crim. No. 10–179, 2016 WL 7675667, at *6 (E.D.N.C. Nov. 8, 2016) (holding that vindictive prosecution claim was procedurally defaulted and citing cases), *adopted*, 2017 WL 105906 (E.D.N.C. Jan. 10, 2017).

Even if Bergrin means to excuse his procedural default by implicitly relying on the actual innocence claims lodged elsewhere in his brief, those claims fail for the reasons set forth in the Government's initial Opposition. Besides, Bergrin's vindictiveness claim is patently frivolous.

The Attorney General and the United States Attorneys retain broad discretion to enforce federal criminal laws. *United States v. Armstrong*, 517 U.S. 456, 464, 116 S.Ct. 1480, 134 L.Ed.2d 687 (1996). Their prosecutorial decisions are supported by a presumption of regularity, and, absent clear evidence to the contrary, courts presume that the prosecutorial decisions are proper. *Id.* Prosecutorial vindictiveness occurs only when the government penalizes a defendant for invoking legally protected rights.

United States v. Goodwin, 457 U.S. 368, 372 (1982); *Bordenkircher v. Hayes*, 434 U.S. 357, 363 (1978); *Blackledge v. Perry*, 417 U.S. 21, 28 (1974). "There is no prosecutorial vindictiveness, however, where the prosecutor's decision to prosecute is based on the usual determinative factors." *United States v. Schoolcraft*, 879 F.2d 64, 67 (3d Cir. 1989) (citing cases). A "presumption of regularity" attends decisions to prosecute." *Id.* (quoting *Armstrong*, 517 U.S. at 464).

Here, Bergrin alleges a vast conspiracy—starting during the administration of George H.W. Bush and extending through other Republican and Democratic administrations—to punish him for (1) testifying as a character witness on behalf of two defendants prosecuted by this Office while Bergrin served as an AUSA in the early 1990s, (2) advocating forcefully for his clients generally, and (3) representing soldiers who faced military charges in connection with the Abu Ghraib matter specifically. BB393–415. The sole basis for Bergrin's claim is his own say-so.

This Court should "not further indulge these wild and unfounded accusations, except to conclude that they do not begin to carry [Bergrin's] initial burden of pointing to specific facts that demonstrate a likelihood of vindictiveness entitling the Defendant to an evidentiary hearing. *United States v. Cameron*, 658 F. Supp. 2d 241, 248 (D. Me. 2009). First, Bergrin merely assumes—without any proof—that prosecutors working in this Office necessarily were aware of his actions in the Abu Ghraib matter, which was handled by the military justice system. But even were Bergrin's assumption true, a prosecutor's "knowledge of the Defendant's First Amendment activities prior to the decision to indict [him] is nevertheless insufficient to warrant either dismissal of the indictment on vindictive prosecution grounds or even further discovery with regard to

that issue." *United States v. Crowe*, Crim. No. 10–170, 2011 WL 6310475, at *1 (D. Colo. Dec. 16, 2011). A defendant's "showing must do more than 'simply identify a potential motive for prosecutorial animus'; it must 'connect any vindictive animus to those making the challenged charging decisions in his case.'" *Id.* (quoting *United Staes v. Bucci*, 582 F.3d 108, 113 (1st Cir. 2009)).

At any rate, as the jury heard in Trial Two, the Government had explicit recordings of Bergrin ordering the murder of a cooperating witness, A10850-51; *see* A6122-25, A7463-64, among a trove of other evidence overwhelmingly proving Bergrin's commission of several federal offenses. That alone suffices to prove that the Government prosecuted Bergrin *not* because of any protected advocacy, but because he crossed the line from legitimate advocacy to blatantly criminal conduct. *See United States v. Young*, 231 F. Supp. 3d 33, 117 (M.D. La. 2017) ("[T]he primary reason that prosecutors pursued charges against the Defendant was because they had probable cause that a crime was committed, not to retaliate for a refusal to cooperate or for his exercising any First Amendment rights.").[14]

In sum, to recognize a vindictive prosecution claim based on the self-serving allegations Bergrin puts forward here would afford a get-out-of-jail-free card to anyone who first protested some Government policy and later was prosecuted for committing

[14] Indeed, Judge Martini—who made no effort to hide his disdain over the Government's use of the RICO statute to prosecute Bergrin—barred Bergrin from arguing his retaliation theory at trial because it was so patently frivolous. SA365–67. *Cf. Escarcega v Frauenheim*, No. Civil No. 14-1749, 2016 WL 9108856, at *28 (C.D. Cal. Sept. 30, 2016) ("Although petitioner's allegations might, theoretically, support a vindictive prosecution claim or a false evidence claim, there is no evidence—other than petitioner's unfounded conspiracy theories—to support either claim."), *report and recommendation adopted*, 2017 WL 2468772 (C.D. Cal. June 6, 2017).

a crime thereafter. *See United States v. Gallegos-Curiel*, 681 F.2d 1164, 1168 (9th Cir. 1982) ("The appearance of vindictiveness does not embody the *post hoc ergo propter hoc fallacy*; the link of vindictiveness cannot be inferred simply because the prosecutor's actions followed the exercise of a right[.]") (citations omitted). *See generally United States v. Stewart*, 590 F.3d 93, 123 (2d Cir. 2009) ("Put another way, it does not follow from the facts Sattar recites that the resulting charge was necessarily brought vindictively; for this reason the district court did not err in concluding otherwise.").

CONCLUSION

For the foregoing reasons, and for the reasons set forth in the Government's initial Opposition, this Court should deny Bergrin's § 2255 motion without a hearing, deny with prejudice his motions for appointment of counsel (which this Court has previously denied without prejudice), and decline to issue a certificate of appealability on any issue because Bergrin has not "made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *see* Rule 11(a) of the Rules Governing Section 2255 Proceedings ("The district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant.").

Respectfully submitted,

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Date: April 4, 2018
Newark, New Jersey

Chapter 7 Final Instructions: Additional Bases for Criminal Responsibility

7.02 Accomplice Liability: Aiding and Abetting (18 U.S.C. § 2(a))

A person may be guilty of an offense*(s)* **because** *(he) (she)* **personally committed the offense***(s) (himself) (herself)* **or because** *(he) (she)* **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 whom the accomplice aids and abets is known as the principal.**

In this case, the government alleges that *(name of defendant)* **aided and abetted** *(name of alleged principal, if known)* **in committing** *(state offense(s))* **as charged in the indictment. In order to find** *(name of defendant)* **guilty of** *(state offense(s))* **because** *(he) (she)* **aided and abetted** *(name of alleged principal)* **in committing** *(this) (these)* **offense***(s)***, you must find that the government proved beyond a reasonable doubt each of following four (4) requirements:**

First: That *(name of alleged principal)* **committed the offense***(s)* **charged by committing each of the elements of the offense***(s)* **charged, as I have explained those elements to you in these instructions.** *((Name of alleged principal) need not have been charged with or found guilty of the offense(s), however, as long as you find that the government proved beyond a reasonable doubt that (he) (she) committed the offense(s)).*

Second: That *(name of defendant)* **knew that the offense***(s)* **charged** *(was)*

(were) **going to be committed or** *(was) (were)* **being committed by** *(name of alleged principal)*, **and**

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)*, **and**

Fourth: That *(name of defendant)***'s acts did, in some way,** *[aid,] [assist,] [facilitate,] [encourage,] (name of alleged principal)* **to commit the offense***(s)*. *(Name of defendant)***'s acts need not themselves be against the law.**

In deciding whether *(name of defendant)* **had the required knowledge and intent, 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 offense, you may not find** *(name)* **guilty of the offense***(s)* **as an aider and abetter. 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. The government needs to show some affirmative participation by** *(name)* **which at least encouraged** *(name of alleged principal)* **to commit the offense.**

Comment

See 1A O'Malley et al., supra, § 18.01. For variations in other Circuits, *see* First Circuit §4.02, Fifth Circuit § 2.06, Sixth Circuit § 4.01, Eighth Circuit § 5.01, Ninth Circuit § 5.1.

18 U.S.C. § 2(a) provides:

> Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

Although some Third Circuit opinions conflate the elements of aiding and abetting liability into two or three, this instruction reflects the Third Circuit's more precise articulation of four elements in *United States v. Nolan*, 718 F.2d 589, 592 (3d Cir. 1983).

Ordinarily, where the principal is also being prosecuted for the offenses, the principal and the accomplice will be tried jointly. However, if the principal has not yet been prosecuted, or has been acquitted, or is not known, the trial judge should include the bracketed language in the *First* requirement. Also, if the alleged principal is known by name, the trial judge should use his or her name when referring to the principal in this instruction, but if the name of the alleged principal is not known, the judge should substitute "another person" or "the other person" for the name of the principal wherever that appears in this instruction. Finally, the judge should use the appropriate word(s) in describing the nature of the defendant's alleged participation (aid, assist, encourage, facilitate, etc), in accordance with the government's theory of the case.

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. The Supreme Court in *Nye & Nissen* also discussed the differences and similarities between accomplice liability and co-conspirator's liability under *Pinkerton v. United States*, 328 U.S. 640 (1946). Although a defendant may be guilty as an accomplice and also guilty of conspiracy, aiding and abetting and

conspiracy are separate theories of criminal responsibility. *See, e.g., United States v. Nolan*, 718 F.2d at 594. A defendant may aid and abet the commission of an offense without conspiring with the principal, *United States v. Krogstad*, 576 F.2d 22, 29 (3d Cir. 1978), and a jury may acquit a defendant on a conspiracy charge yet convict on an aiding and abetting theory. *See, e.g., United States v. Van Scoy*, 654 F.2d 257, 263 (3d Cir. 1981); *United States v. McCrane*, 527 F.2d 906, 912 (3d Cir. 1975).

This instruction is phrased in terms of "act(s)." A defendant may also be responsible as an accomplice (aider and abetter) based on his or her failure to act despite having a legal duty to act. When the government's theory is that the defendant was an accomplice through failure(s) to act or omission(s), the court should give Instruction 5.10 (Failure to Act, Omission).

No Need to Indict for Aiding or Abetting. A defendant need not be indicted specifically as an aider and abettor (accomplice) in order to be convicted on that theory. *United States v. Donahue*, 885 F.2d 45, 48 (3d Cir. 1989). Aiding and abetting is implied in every indictment for a substantive offense. *United States v. Frorup*, 963 F.2d 41, 52 n.1 (3d Cir. 1992) (the Third Circuit also stated, as to the requirement that the accomplice must in fact render some aid or assistance to the principal, that aiding and abetting requires "some affirmative participation which at least encourages the principal offender to commit the offense," 963 F. 2d at 43 quoting *United States v. Raper*, 676 F. 2d 841, 850 (D.C. Cir. 1982)).

Mental State Requirement for Accomplice Liability. As for the mental state element of accomplice liability, Third Circuit case law is clear that the defendant must know that the principal is committing or will commit an offense and must intend to aid the principal in some way. *See, e.g., United States v. Carbo*, 572 F.3d 112, 118 (3d Cir. 2009) ("Our conclusion is merely an application of the rule that, 'in order to convict a defendant of aiding and abetting, the government must prove that "the defendant charged with aiding and abetting that crime knew of the commission of the substantive offense and acted with the intent to facilitate it." ' " Citing *United States v. Kemp,* 500 F.3d 257, 293 (3d Cir. 2007), quoting *United States v. Dixon,* 658 F.2d 181,189 n. 17 (3d Cir. 1981)). Indeed, the Third Circuit has specifically stated that, "When the charge of aiding and abetting is submitted to the jury, the court must include in its instructions that mere knowledge of the crime is insufficient to bring about a conviction." *United States v. Bey*, 736 F.2d 891, 895-96 (3d Cir. 1984). The requirement of intentional participation means that it must be the accomplice's purpose (conscious objective) or specific intent that the principal commit the offense and that the accomplice help bring it about. *See, e.g., United States v. Soto*, 539 F. 3d 191, 194-97 (3d Cir. 2008); *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). As stated in Judge Learned Hand's oft quoted explanation in *United States v. Peoni*, 100 F. 2d 401, 402 (2d Cir. 1938), quoted in, e.g., *Nye & Nissen v. United States*, 336 U.S. 613, 618 (1949), the defendant must wish to bring about the offense and desire that it succeed. *See, e.g., United States v. Bey*, 736 F.2d at 895; *United States v. Newman*, 490 F.2d at 143.

In *United States v. Mercado*, 610 F.3d 841 (3d Cir. 2010), which the Third Circuit

admitted was a close case, the court held "that a defendant's presence on multiple occasions during critical moments of drug transactions may, when considered in light of the totality of the circumstances, support an inference of the defendant's [intentional] participation in the criminal activity," "particularly . . . because [the principal] and [the defendant] switched cars on three occasions during the day; thus, [defendant] got out of one of [principal's] cars and chose to get into another car on three separate instances to continue accompanying [the principal] at important junctures during a prolonged drug transaction. . . . in conjunction with the phone call patterns, which establish[ed] [defendant's] association with [the principal]." *Id.* at 848-49. The court explained that:

> [W]e require proof that the defendant had the specific intent to facilitate the crime. *United States v. Garth,* 188 F.3d 99, 113 (3d Cir.1999). . . . We have emphasized that "facilitation" for aiding and abetting purposes is " 'more than associat[ion] with individuals involved in the criminal venture.' " *Soto,* 539 F.3d at 194 (quoting *United States v. Dixon,* 658 F.2d 181, 189 (3d Cir.1981)). Rather, the defendant must "participate in" the criminal enterprise. *Id.* Neither mere presence at the scene of the crime nor mere knowledge of the crime is sufficient to support a conviction. *Id.* Thus, to convict for aiding and abetting, the Government must prove the defendant associated himself with the venture and sought by his actions to make it succeed. *United States v. Powell,* 113 F.3d 464, 467 (3d Cir.1997). The Government need only show some affirmative participation which, at least, encourages the principal offender to commit the offense. *United States v. Frorup,* 963 F.2d 41, 43 (3d Cir.1992). An aiding and abetting conviction can be supported solely with circumstantial evidence as long as there is a " 'logical and convincing connection between the facts established and the conclusion inferred.' " *Soto,* 539 F.3d at 194 (quoting *Cartwright,* 359 F.3d at 287).

United States v. Mercado, 610 F.3d at 846.

In *United States v. Peterson*, --- F.3d ----, 2010 WL 3817087 (3d Cir. 2010), the Third Circuit rejected the defendant's argument that, because its precedent stated that the government must prove the accomplice had the "specific intent" of facilitating the crime, the aiding and abetting instruction must contain the words "specific intent." The court reasoned that:

> [The] argument fails for two reasons. First, the district court used the Third Circuit's Model Criminal Jury Instructions § 7.02 for aiding and abetting. The district court's instruction on intent is taken verbatim from those model instructions. We have a hard time concluding that the use of our own model jury instruction can constitute error, and nothing that [defendant] says removes our doubt that use of such an instruction can constitute error. Moreover, [defendant] does not even contend that the model instruction is wrong. Second, we believe that the phrases "the defendant's intent and purpose to aid or otherwise associate himself with the offense" and "that the defendant in some way participated in the offense as something the defendant wished to bring about and make succeed" sufficiently informed the jury that it had to find that [defendant] had the specific intent to aid and abet the crime charged in the indictment.

See also United States v. Berscht, 370 Fed. Appx. 325, 329 (3d Cir. 2010) (non-precedential) (where the Third Circuit upheld an aiding and abetting instruction stated in the words of this instruction, without citing to the Model Instructions.).

The instructions also need to be clear that the accomplice must intend to aid and abet the specific offense or criminal scheme charged in the indictment. *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). In *Kemp* the Third Circuit concluded that the trial court's instructions "left no danger that [defendant] would be convicted for aiding and abetting some other scheme. Accordingly, we conclude that the instructions are consistent with *Dobson*'s teaching. . . ." The trial judge had instructed in *Kemp* that the government must prove "the defendant knowingly and deliberately associated himself or herself in some way with the crime charged and participated in it with the intent to commit the crime. . . . [T]hat the defendant: First, knew that the crime charged was to be committed or was being committed. Second, knowingly did some act for the purpose of aiding the commission of that crime. And third, acted with the intention of causing the crime charged to be committed.." *Id. See also United States v. Rawlins*, 606 F.3d 73, 80-82 (3d Cir. 2010) (evidence of the involvement of defendant (an airport baggage handler) in the cocaine conspiracy, including his tag-switching activities and serving as a lookout, supported a reasonable inference that defendant knowingly and intentionally aided and abetted possession of cocaine with intent to distribute).

Some Third Circuit opinions have also used "willfully" in describing the mental element. For example, in *United States v. Waller*, 607 F.2d 49, 51-52 (3d Cir. 1979), the Third Circuit rejected a challenge to an instruction which stated that it was "necessary that the accused willfully associate himself in some way with the criminal venture, and willfully participate in it, as he would in something he wishes to bring about; that is to say, that he willfully would seek, by some act or omission of his, to make the criminal venture successful." The defendant in *Waller* asserted that the instruction did not explicitly state that unknowing participation was insufficient, but the Third Circuit responded that, "the trial judge's charge viewed in its entirety was a correct statement of the law. Having earlier stressed the requisite willfulness and intent for an aiding and abetting conviction, the trial judge's latter explanation was neither misleading nor erroneous." *Id.* at 52. Also *see, e.g., United States v. Bey*, 736 F.2d at 895 (rejecting defendant's contention that there was plain error in the jury charge because it did not include "willfully;" without stating specifically that "willfully" was required and defining "willfully" merely as "doing a voluntary, deliberate or intentional act;" the Third Circuit reasoned that the instructions were sufficient because "the trial court's charge makes clear that Bey's mere presence and knowledge of the crime would not constitute aiding and abetting, but on the contrary, that his intentional involvement was required."); *United States v. Newman*, 490 F.2d at 143 (concluding that it was error not to charge the jury 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. Unknowing participation is not sufficient to constitute an offense under the aiding and abetting statute. Rather, the government must prove beyond a reasonable doubt that

the defendant participated in a substantive crime with the desire that the crime be accomplished.").

It is not clear, however, whether the Third Circuit used the word "willfully"in these cases simply to require a purpose or an intent to bring about the principal's commission of an offense, or also to require that the alleged accomplice must be aware that the principal's conduct was against the law and have a "bad purpose" to violate or disobey the law. *See* Baruch Weiss, *What Were They Thinking?: The Mental States of the Aider and Abettor and the Causer Under Federal Law*, 70 Ford. L. Rev. 1341, 1425 (2002) (concluding that the federal circuits have defined the mental state required for accomplice liability in several different ways, including specific intent or purpose to bring about commission of the offense and bad purpose to disobey the law (what is often called willfully); noting a distinction between the language of the aiding and abetting section,18 U.S.C.§ 2(a), which does not include an explicit mens rea, and 18 U.S.C. § 2(b), prohibiting causing another to commit a crime, which explicitly requires that the defendant "willfully cause").

This distinction may seem a fine one, and it is an issue in few cases. One consequence of the distinction is that mistake or ignorance of the law would disprove the mental state requirement if bad purpose to violate the law is required (*see* Instruction 5.05 (Willfully) and Comment), but would not disprove the mental state requirement where purpose only to bring about commission of the offense is used. The Third Circuit has recognized that, "with respect to most specific-intent crimes . . . ignorance of the law is no excuse. There is an exception to this rule, however, when intent to violate a legal duty is an element of a crime." *United States v. Carbo*, 572 F.3d 112, 116, 117-18 (3d Cir, 2009) (footnote omitted). (Holding that, "when a private citizen is charged with aiding and abetting or conspiracy to commit honest services fraud by a public official, the prosecution must prove that the defendant knew that the public official was required by law to disclose the conflict of interest. Without the knowledge that the failure to disclose the conflict of interest is illegal, we cannot be certain that the defendant formed the specific intent to defraud the public.")

In the model instruction we avoid this confusion by not using the word "willfully" and by explaining the mental state requirement in the traditional sense of specific intent or purpose.

Scope of Accomplice Responsibility for Additional Offenses. Once the government proves the defendant was an accomplice to an offense, the scope of the defendant's responsibility for additional offenses is often said to depend on application of the "natural and probable consequences doctrine." Under this doctrine, an accomplice is responsible for all crimes committed by the principal that were the "natural and probable consequence" of the crime aided and abetted. This doctrine for accomplice liability has a "close counterpart in the well-established *Pinkerton* doctrine" for co-conspirator's liability. Baruch Weiss, *What Were They Thinking?: The Mental States of the Aider and Abettor and the Causer Under Federal Law*, 70 Ford. L. Rev. 1341, 1425 (2002). Indeed, the "natural and probable consequences doctrine" and the *Pinkerton* doctrine would seem to be essentially the same. *See* Instruction 7.03 regarding the

Pinkerton doctrine.

Although the federal courts, like their state counterparts, are split on the acceptability of the "natural and probable consequences doctrine," one commentator noted that, "[m]ost of the circuits have adopted, or at least recognized the existence of" the doctrine. *Id.* In *United States v. Green*, 25 F.3d 206, 209 (3d Cir.1994), the Third Circuit only recognized the existence of the doctrine, but did not decide whether to adopt it. That was unnecessary in *Green*, because the additional offense there was not in any event the natural and probable consequence of the offense aided and abetted. *See* Weiss, *id.* at 1425, n. 388. The Third Circuit stated, "Whatever the scope of the doctrine of foreseeability in connection with aiding and abetting generally, *compare* view set out in Wayne R. LaFave & Austin W. Scott, Jr., *Substantive Criminal Law* § 6.8(b), at 157 (1986) ("accomplice liability extends to acts of the principal in the first degree which were a 'natural and probable consequence' of the criminal scheme the accomplice encouraged or aided") *with* that at *id.* at 158 (" 'natural and probable consequences' rule of accomplice liability ... is inconsistent with more fundamental principles of our system of criminal law," the view adopted by the Model Penal Code), we believe it inapplicable here." 25 F.3d at 209.

In addition to being split on the acceptability of this rule, the circuits also disagree on its meaning – what is the standard for determining natural and probable or foreseeable consequences? *See* Weiss, at 1424-36. Because the Third Circuit has not adopted the natural and probable consequences doctrine, this point is not covered in the model instruction.

(Revised 11/10)

PAUL W. BERGRIN,

Movant,

v.

UNITED STATES OF AMERICA,

Respondent.

Civil No. 16-3040

(Crim. No. 09-369)

Hon. José L. Linares, Ch. U.S.D.J.

HABEAS APPENDIX FOR THE UNITED STATES
VOLUME IV (pp. 1642–1728)

CRAIG CARPENITO
United States Attorney
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Newark, New Jersey 07102

On The Brief:

John Gay
Joseph N. Minish
Steven G. Sanders
Assistant U.S. Attorneys

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
Criminal No. 2:09-cr-00369-WJM

UNITED STATES OF AMERICA, :
: TRANSCRIPT OF PROCEEDINGS
v. : - Trial -
:
PAUL W. BERGRIN, :
:
Defendant :
- - - - - - - - - - - - - - - -x

Newark, New Jersey
October 25, 2011

B E F O R E:

THE HONORABLE WILLIAM J. MARTINI,
UNITED STATES DISTRICT JUDGE,
and a Jury

A P P E A R A N C E S:

UNITED STATES ATTORNEY'S OFFICE
BY: JOHN GAY
JOSEPH N. MINISH
STEVEN G. SANDERS
Assistant U.S. Attorneys
For the Government

PAUL W. BERGRIN, Defendant, Pro Se
- and -
GIBBONS PC
BY: LAWRENCE S. LUSTBERG, ESQ., Standby Counsel
AMANDA B. PROTESS, ESQ.
For Defendant Paul W. Bergrin

Pursuant to Section 753 Title 28 United States Code, the following transcript is certified to be an accurate record as taken stenographically in the above entitled proceedings.

S/WALTER J. PERELLI

WALTER J. PERELLI, CCR, CRR
OFFICIAL COURT REPORTER

I N D E X

E X H I B I T S

witness, Judge, but I'll explain it to you --

THE COURT: No, go ahead. Just proceed. Just go ahead.

Q Is there a blank form on the top of that exhibit, sir, that I've shown you, the very first page?

A Excuse me?

Yes.

Q It's the very first page. Is that a blank form?

A Yes, it is.

Q Did you fill anything out on that with respect to choosing anybody of that group?

A No, I did not.

Q And --

A Except -- no, I didn't fill none of this out, sir.

Q Okay. Why not?

A Because I couldn't accurately get a description of these guys.

Q Okay. All right. Now, moving forward to this calendar year, sir, were you approached by anyone with respect to discussing the day of the murder?

A At first I wasn't, couldn't find me. Then I got a call and someone came by to see me.

Q And who was that, sir?

A I don't know who these people was. These people told me a bad faced (sic) lie.

Q What did they say, sir?
A They said to me that they was -- they was civil rights lawyers for Anthony Young.
Q And could you provide a physical description of these two individuals --
A Yes, I did.
Q -- to the jury.
A One has white hair, and the other one was a blond haired girl.
Q Okay. What's the race of the individuals?
A Caucasian.
Q All right. And one was a girl. What was the other one?
A A man, old man.
Q And which individual had the blond hair?
A The young lady.
Q Do you recall the hair color of the man?
A White.
Q Sir, I'm showing the witness Government Exhibit 3525.
Do you recognize the photograph?
A Yes, I do.
Q Okay. And whose picture is in that photograph?
A The young man -- the man that came to see me.
MR. MINISH: Judge, I'd like to move that photograph into evidence.
THE COURT: What is it, 35?

THE DEPUTY CLERK: 25.
THE COURT: 3525?
MR. MINISH: It's a new exhibit, Judge.
THE COURT: All right.
MR. BERGRIN: I have no objection, Judge.
THE COURT: All right.
MR. MINISH: I cleared the screen. Here, Judge. You can have that.
THE COURT: All right. It's in evidence then.
MR. MINISH: Thank you, Judge.
(Government Exhibit 3525 is received in evidence.)
MR. MINISH: If we could publish that to the jury.
(An exhibit is published to the jury.)
MR. MINISH: Oh, I'm sorry. I apologize, Judge, I have to put it on the ELMO.
Q Is that individual the one that you spoke with on that day?
A Yes, it is.
Q Sir, did they give you -- did they question you about the murder when they interviewed you?
A They -- yes, they questioned me about Kemo's murder and they said that Anthony Young was doing 30 years for something that he did not do, and they said that the real killer got away.
Q Now, sir, do you recall the day that the statement was -- or that you met with these individuals?

Q On your neck, sir.

Now, Kemo was in about the middle of the street when he was shot, sir?

A Yes, he was. I would say he was about -- no, no, he wasn't, he was near, more closer to the beginning, because I ended up in the near -- in the middle of the street, sir.

Q And you were close to Kemo. Correct?

A Yes, we were.

Q In the street?

Now, this individual, you never saw anybody approaching you before the shooting, correct, walking towards you?

A No one at that time, at that point, no.

Q And you never saw anybody in back of you either. Correct?

A No, we didn't.

Q And you didn't see anybody with a blue Yankee hat, correct, at all on that day?

A Sir, I don't know nothing about a Yankee hat.

Q My question to you, sir, Mr. Davis, sir, is: You didn't observe anybody wearing a Yankee hat, did you?

A No, I did not, sir.

Q Now, the person that you saw -- first of all, you were very cooperative and honest with this white, old Caucasian man. Correct?

A Yes.

Q And at the time that you were cooperative with him, they treated you fairly? They didn't treat you with any disrespect. Correct?
A No. But what they did, they lied to me.
Q They said that they were from civil rights -- what did you say?
A Civil rights for Anthony Young.
Q But at the same time, whether they said that or not, you wanted to be honest, open and cooperative. Correct?
A True.
Q And up until -- when did you meet with the prosecutors, the Government to prepare for your testimony today?
A I've been -- saw them long way before that, sir.
Q Did you meet with them last week office?
A Yeah, we sat down to talk.
Q Now, you were cooperative and you weren't hostile until you met with them. Correct?
A No. No. I became hostile when I found out that they was working for you.
Q But at the time that you gave them the statement, like you said, one thing you knew is that you were open and honest with them. Correct, sir? You wouldn't lie to them?
A No, I wouldn't.
But to clear one thing up, sir, you're a man, you have a right to this: If I knew they was working for you, I

wouldn't have gave them the time of day.
Q Okay, sir. I can understand that and I can understand your feelings.
Now, one thing you have is a memory of what happened with your son, correct, and that will stay in your mind, like you said, the rest of your life?
A I'm pretty sure if it happened to you, Mr. Bergrin, it would stay in your mind, too.
Q Absolutely. And I wouldn't want to be in your shoes, sir.
Now, you saw the shooter you said with the gun, putting it into his waistband. Correct?
A Yes.
Q And you could see the shooter with his right hand reaching into his left waistband?
A I don't know if it was right or left. All I know, he took a gun, stuck it right here, got into the car and spad away.
Q When you spoke to these individuals, you told them that you saw him with the right hand reaching across the waistband to his left. Correct?
A I don't know, sir.
Q Excuse me, sir?
A I don't know, sir.
Q Well, would it refresh your memory if you were to read this statement?
A Maybe it will, sir.

FEDERAL BUREAU OF INVESTIGATION

Date of transcription 3/16/2005

HORATIO JOINES, date of birth 4/23/[redacted], social security account number [redacted], residing at [redacted], NJ, was interviewed while in custody at the Newark Federal Bureau of Investigation (FBI) Office. JOINES was furnished an "Advice of Rights" form and his rights were explained to him. JOINES stated he understood his rights and agreed to talk to the Agents but would not sign the waiver.

During the course of processing, JOINES was shown his warrant for arrest charging him with conspiracy to distribute and distribution of heroin and made the following statement, "Now I know this is bullshit because if you know Ray Ray, all Ray Ray moved was coke. That's all I've ever done. I've never messed with heroin." The Agents then explained to JOINES what a conspiracy was and the circumstances surrounding the probable cause behind the criminal complaint filed against him. JOINES then stated, "That's what I get for trying to hook a brother up."

JOINES advised that he and WILLIAM BASKERVILLE met in jail. When JOINES got out he started hanging with BASKERVILLE. They used to "smoke" all the time together. JOINES used to ride with BASKERVILLE when BASKERVILLE made his "pick-ups" and "drop-offs" and would sometimes handle the money, putting it in the glove box. JOINES advised that "DIRT" was the individual with the "muslim" beard who was in the front seat of the green Pontiac when BASKERVILLE sold to the CW on Wainwright Street. JOINES stated that just because he was with BASKERVILLE when BASKERVILLE did his "thing" it did not mean he was involved in it. JOINES claimed to do his own "thing" on his block and just hung out with BASKERVILLE to "smoke."

JOINES claimed not to know who the CW was that was murdered. When asked if he could identify the CW from a photo JOINES stated, "probably." JOINES claimed to have nothing to do with the CW being murdered. JOINES said he was not on South Orange Avenue on March 2, 2004 but was in fact at Beth Israel Hospital all day with his girlfriend. She who was having complications with a pregnancy. JOINES knew BASKERVILLE's brothers but not well. In fact when BASKERVILLE got locked up in November, word on the street

was that JOINES was a snitch because the "Feds" did not lock him up too. JOINES stated that, "Until today I thought I got a free pass."

A copy of the "Advice of Rights" form, JOINES booking information and his property receipt was placed in the 1A section of the file.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
Criminal No. 2:09-cr-00369-WJM

UNITED STATES OF AMERICA, :
: TRANSCRIPT OF PROCEEDINGS
v. : - Trial -
:
PAUL W. BERGRIN, :
:
Defendant :
- - - - - - - - - - - - - - - -x

Newark, New Jersey
October 27, 2011

B E F O R E:

THE HONORABLE WILLIAM J. MARTINI,
UNITED STATES DISTRICT JUDGE,
and a Jury

A P P E A R A N C E S:

UNITED STATES ATTORNEY'S OFFICE
BY: JOHN GAY
JOSEPH N. MINISH
STEVEN G. SANDERS
Assistant U.S. Attorneys
For the Government

PAUL W. BERGRIN, Defendant, Pro Se
- and -
GIBBONS PC
BY: LAWRENCE S. LUSTBERG, ESQ., Standby Counsel
AMANDA B. PROTESS, ESQ.
For Defendant Paul W. Bergrin

Pursuant to Section 753 Title 28 United States Code, the following transcript is certified to be an accurate record as taken stenographically in the above entitled proceedings.

S/WALTER J. PERELLI

WALTER J. PERELLI, CCR, CRR
OFFICIAL COURT REPORTER

I N D E X

E X H I B I T S

Colloquy Between Court and Counsel
(Jury not Present)

washing it, so I wipes the gun down and I wipe all the bullets off. And I reload it and put one in this chamber.

Q When you say "in the chamber," can you describe what you mean for the jury?

A Well, the chamber is the top of the gun. To put one in the slot to have it ready to fire.

Q So it doesn't have to be racked?

A That's what I'm talking about, putting one in the chamber, I'm racking it already.

Q Was this a semi-automatic, a revolver?

A Well, it's a semi-automatic, but we had it where though when we buy our guns, they -- slight "altercation" to make them fully automatic to shoot quicker.

Q You said "altercation"?

A Yes. Like they "altercate" the gun. Instead of making it shoot boom, boom, boom, it will shoot boom, boom, boom boom, real fast.

Q And how many times would you have to pull the trigger to make it shoot boom, boom, boom, boom?

A Just one time. Just pull it and it will fire. It will empty for you.

Q When does it stop?

A When the last bullet fire, and that's it.

Q What if you let your finger off the trigger?

A It would stop, yeah.

Q So this is a fully automatic weapon?
A Yes.
Q Can you describe what it looked like besides a 9 millimeter?
A Like a grayish black, which is what they call like, them call it a blue steal color, but to us we call it like grayish black. 9 millimeter that hold a ten-shot clip.
Q Now, do you recall what you were weighing that day?
A Well, I know I had my fleece jacket on because I use it as a disguise because of the neck of it. I had a baseball cap on, some gloves, I'm not positive if I had on jeans or khakis, but that's all I wear. In the hood, if I'm not going out somewhere, if I go out, then I'm dressed up. But if I'm in the hood, all I got on is either jeans or khakis. But I'm not positive if I had on khakis or jeans that day. But if I had to lean, I would say jeans.
Q How about on your feet?
A A pair of Timberlands. It was wintertime.
Q How are you so sure you had Timberlands?
A That's all I'm wearing all winter, Timberlands.
Q You said gloves a number of times.
A Yeah.
Q Can you describe the gloves, please?
A Just a pair of old baseball gloves that we wear, like, we wear them as a fashion statement. So I knew they was in my

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW JERSEY

UNITED STATES OF AMERICA	**:**	**Criminal No. 09-cr-369-WJM**
v.	**:**	
PAUL W. BERGRIN,	**:**	**TRANSCRIPT OF TRIAL PROCEEDINGS**
Defendant.	**:**	

----------x

Newark, New Jersey
November 2, 2011

BEFORE:

THE HON. WILLIAM J. MARTINI, U.S.D.J.

Reported by
CHARLES P. McGUIRE, C.C.R.
Official Court Reporter

Pursuant to Section 753, Title 28, United States Code, the following transcript is certified to be an accurate record as taken stenographically in the above entitled proceedings.

s/CHARLES P. McGUIRE, C.C.R.

APPEARANCES:

JOHN GAY, Assistant United States Attorney,
STEVEN J. SANDERS, Assistant United States Attorney
JOSEPH N. MINISH, Assistant United States Attorney
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Newark, New Jersey 07102
On behalf of the Government

PAUL W. BERGRIN, ESQUIRE
Pro se

GIBBONS, PC
One Gateway Center
Newark, New Jersey 07102
BY: LAWRENCE S. LUSTBERG, ESQ., and
AMANDA B. PROTESS, ESQ., and
JENNIFER MARA, ESQ.
Standby counsel for Defendant

Kemo was walking east on South Orange Avenue, then turned around, grabbed Kemo by the shirt on the back of the neck, spun Kemo around so that he was facing west on South Orange Avenue and shot him three times in the back of the head."

THE WITNESS: Yes.

THE COURT: All I'm asking you is, do you recall giving that account to the F.B.I. agent at the time you were interviewed on January 18th, 2005?

THE WITNESS: Yes.

THE COURT: Is that what you said?

THE WITNESS: Yes, sir.

THE COURT: That you spun Kemo around --

THE WITNESS: Not -- that I say Malsey --

THE COURT: That Malsey spun Kemo around.

THE WITNESS: Yes, sir.

THE COURT: All right.

All right. Go ahead. I just wanted to clarify to be sure, that's all.

BY MR. BERGRIN:

Q. Now, you talked about firing the gun; correct?

A. Yes, sir.

Q. When you fire a gun, you pull the trigger; correct?

A. Yes, sir.

Q. That's how you fire a gun; right?

A. Yes, sir.

Q. Now, you said that this gun had been converted or used the word "altercated" to make it a fully automatic weapon; right?

A. Altered, yes.

Q. So you only had to pull the gun -- pull the trigger, excuse me, one time to fire in this particular case; right?

A. Yes.

Q. Now, do you remember testifying in 2007 in reference to the shooting and how many times you pulled the trigger and fired?

A. No, I don't remember, but I'm pretty -- I was asked, I just don't remember.

Q. Now, you testified before this jury that you pulled the trigger one time; correct?

A. Yes, sir.

Q. And when you pulled the trigger one time, shots come out quickly in a fully automatic weapon; right?

A. Yes.

Q. And you say that you had approximately seven to 10 bullets or rounds --

A. Yes.

Q. -- in the magazine?

A. Approximately about seven.

Q. Approximately about seven?

A. Somewhere in that area.

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REPORT OF INVESTIGATION

1. Program Code	2. Cross File / Related Files	3. File No.	4. G-DEP Identifier
	☐ ☐ ☐ ☐ ☐	C3-03-0017	YGH1E
5. By: S/A Phil Streicher At: Newark, New Jersey		6. File Title CURRY, Ibn	
7. ☐ Closed ☐ Requested Action Completed ☐ Action Requested By:		8. Date Prepared 03/03/04	

9. Other Officers: see other officers paragraph

10. Report Re: Surveillance and Arrest of Atif AMIN on February 27, 2004 and the Acquisition of Exhibits 17, 18, N-46 through N-61, N-67 through N-69, N-152 and N-153

SYNOPSIS:

On February 26, 2004 information was received, as a result of an ongoing Title III wire intercept, that Atif AMIN would be purchasing two new cellular telephones the following day. Based on observations made from surveillance of AMIN during the day and evening of February 26, it was determined that AMIN would be purchasing the telephones from Z&L Discount Store located at 1002 Springfield Avenue, Irvington, New Jersey. The following are the details of the surveillance on February 27, 2004, the arrest of AMIN and all subsequent chain of events.

DETAILS:

1. Reference is made to all previous DEA-6s, Reports of Investigation, under this file title.

2. On February 27, 2004, beginning at approximately 9:00am, members of Newark DEA Task Force Group 6 and Newark Police Department established surveillance in the locations of Z&L Discount Store located at 1002 Springfield Avenue, Irvington, New Jersey; PRESIDENTIAL RECORDS located at 659 Clinton Avenue, Irvington, New Jersey; Wyman Ford located at 1713 Springfield Avenue, Maplewood, New Jersey and 416 Montague, South Orange, New Jersey.

3. At approximately 11:35am surveillance units were notified by Agents/Officers monitoring the Title III wire intercept that AMIN had

11. Distribution: Division District Other	12. Signature (Agent) S/A Philippe O. Streicher	13. Date 3-18-04
	14. Approved (Name and Title) Kevin O'Grady Group Supervisor	15. Date 3-18-04

DEA Form - 6
(Jul. 1996)

DEA SENSITIVE
Drug Enforcement Administration

pos
3 - Originating Office

Previous edition dated 8/94 may be used.

just received a telephone call from an unidentified woman stating his telephones were ready for him to pick up. AMIN stated to the woman that he had already been to the store and the phones were not ready yet.

4. At approximately 12:30pm all surveillance units were parked in the vicinity of Z&L Discount Store awaiting AMIN's arrival. At approximately 2:51pm S/A Hilton, along with TFOs Thomas, Stroud and Marczewski, observed AMIN arrive to the area of the discount store driving a white Chrysler 300M four-door bearing New York registration CJZ7853. Surveillance units observed AMIN park his vehicle on Springfield Avenue facing west just east of New Street. A few moments later, surveillance units observed AMIN exit the vehicle, walk across Springfield Avenue and enter into an electronics store located at 1025 Springfield Avenue out of view. At this same time, surveillance units observed two unknown black males exit the Chrysler, one heavy-set wearing an all-grey sweatsuit exiting the rear door and one with a beard exiting the front passenger door. It was noted that the bearded individual was the same male seen on February 26, 2004 picking up AMIN at Newark International Airport and had later been identified as Oscar LARSEN. Surveillance units observed LARSEN and the unknown black male walk along the sidewalk and enter into Z&L Discount Store out of view.

5. A few moments later surveillance units observed AMIN exit the electronics store holding a light colored shopping bag and walk across Springfield Avenue towards the trunk of the white Chrysler. AMIN was observed opening the trunk, placing the bag inside the trunk and then begin moving around the trunk's contents. Surveillance units observed AMIN close the trunk and remain standing near the rear of the vehicle momentarily until walking around the vehicle and entering the front driver's side door sitting in the driver's seat. At approximately 3:12pm surveillance units observed LARSEN and the unknown heavy set male exit Z&L Discount Store and cross Springfield Avenue towards the white Chrysler. LARSEN was seen entering the front passenger side with the unknown male entering the rear.

6. At approximately 3:15pm S/A Hilton, along with TFOs Thomas, Stroud and Marczewski, observed AMIN pull away from the curb traveling west on

Springfield Avenue. Surveillance units followed the white Chrysler to 1258-A Springfield Avenue, Irvington, New Jersey and observed AMIN park the vehicle, exit and enter into the EXQUISITE CUTS barber shop. Surveillance units then observed LARSEN exit the front passenger side door, walk around the vehicle and enter into the driver's side. At approximately 3:45pm surveillance units observed the white Chrysler, now being driven by LARSEN, depart the area traveling west on Springfield Avenue.

7. At approximately 3:57pm S/A Streicher and TFO Pavlicek observed the white Chrysler 300 enter into the parking lot area of Wyman Ford located at 1713 Springfield Avenue, Maplewood, New Jersey. S/A Streicher observed LARSEN exit the Chrysler and enter into the dealership. At this same time, S/A Streicher observed the passenger of the Chrysler wearing an all-grey sweatsuit exit the passenger side of the vehicle and enter the driver's side. S/A Streicher and TFO Pavlicek then observed the Chrysler exit the dealership parking lot traveling east on Springfield Avenue out of view. At approximately 4:10pm, S/A Hilton who had been maintaining surveillance at the EXQUISITE CUTS barber shop, observed the white Chrysler return to the area and park across the street from the barber shop. S/A Hilton then observed the unknown black exit the Chrysler, cross over Springfield Avenue and enter into the barber shop out of view. At approximately 4:15pm S/A Streicher observed LARSEN exit the dealership and walk towards the center of the parking lot area. S/A Streicher observed LARSEN enter into the driver's side door of a blue Ford Expedition. For approximately five minutes S/A Streicher observed LARSEN sitting inside the vehicle fussing with what seemed to be the radio. At approximately 4:20pm S/A Streicher observed LARSEN exit Wyman Ford traveling east on Springfield Avenue. S/A Streicher and TFO Pavlicek followed LARSEN to the Clean Way car wash located at Irvington Avenue and College Place and observed LARSEN exit the vehicle and begin waiting for the vehicle to be washed.

8. At approximately 4:40pm S/A Streicher and TFO Pavlicek observed LARSEN enter the Ford Expedition and depart the car wash traveling to 416 Montague, South Orange, New Jersey. TFO Pavlicek observed LARSEN drive the vehicle up into the driveway parking towards the rear of the

residence out of view. At approximately 4:55pm TFO Pavlicek observed LARSEN exit the driveway in the Expedition traveling east on Montague. S/A Streicher and TFO Pavlicek followed LARSEN as he traveled approximately one block, stopped and turned around traveling back the way he came. TFO Pavlicek followed LARSEN back to 416 Montague and observed the Expedition park on Montague facing west across from the 416 Montague residence. At approximately 4:45pm TFO Pavlicek observed LARSEN walking down the driveway and cross the street towards the Expedition. S/A Streicher drove past LARSEN and observed LARSEN standing outside the driver's door speaking on a cellular telephone.

9. A few moments later S/A Streicher and TFO Pavlicek observed LARSEN enter the Expedition, turn the vehicle around and begin driving east on Montague. S/A Streicher and TFO Pavlicek followed LARSEN eastbound on Springfield Avenue observing him park the vehicle on Springfield Avenue across the street from EXQUISITE CUTS barber shop and remain in the vehicle. The time was noted to be approximately 5:10pm. Immediately after the vehicle was parked S/A Hilton and TFOs Thomas, Stroud and Marczewski observed AMIN and two unidentified black males (one wearing an all-grey sweatsuit and one short in height) exit the barber shop, cross the street and enter into the Expedition. Surveillance units observed AMIN enter the front passenger door and the two unknown black males enter the rear doors. At approximately 5:15pm surveillance units observed the shorter unknown black male exit from the rear of the Expedition carrying a black plastic bag, cross the street and re-enter the barber shop. Surveillance units observed the Expedition depart the barber shop location traveling east on Springfield Avenue to Lyons Avenue making a right turn. At approximately 5:20pm S/As Streicher and Maltese and TFO Pavlicek observed the Expedition pull over to the side of the road between Stuyvesant and Nesbitt streets. At this time, S/A Streicher observed the unknown black male wearing an all-grey sweatsuit standing at the open rear passenger door of the Expedition. Moments later TFO Rue observed the unknown black male cross over Lyons Avenue and stand next to the driver's door of a blue 2-door vehicle facing north. S/A Maltese then observed the blue car pull away traveling north on Lyons.

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10. At approximately 5:23pm, S/A Streicher observed the Expedition depart the area continuing to travel south. While following the vehicle south surveillance units were able to catch up to one another. Surveillance units followed the Expedition and observed it turn right onto Bergen Street, then right on Weequahic Street, then right on Park View Terrace and right again onto Lyons Avenue making a complete squaring of the block. After squaring the block surveillance units observed the Expedition park on Bergen Street near the NUKAIR barber shop. TFOs Thomas and Stroud observed AMIN exit the passenger side of the Expedition and enter into the R.U.F. clothing store located at 1099 Bergen Street one store away from the barber shop. Approximately five minutes later TFOs Thomas and Stroud observed AMIN exit the clothing store carrying a dark colored plastic bag and enter into the barber shop. A few minutes later TFOs Thomas and Stroud observed AMIN exit the barber shop and enter the front passenger side of the Expedition.

11. TFOs Thomas and Stroud observed the Expedition depart the area traveling west on Bergen Street to Pomona Street where it made a left turn and parked behind a silver colored two-door car. TFOs Thomas and Stroud observed an unknown black male (later identified as Rashid PRYOR) exit the driver's door of the silver vehicle, walk towards the Expedition's rear passenger door and enter. Approximately one minute later TFOs Thomas and Stroud observed PRYOR exit the Expedition and lean back into the rear passenger door. PRYOR then stepped back closing the door while holding a white plastic bag close to his stomach. TFOs Thomas and Stroud observed PRYOR enter the silver vehicle sitting in the driver's seat. TFOs Thomas, Stroud and Rue and S/A Streicher observed the vehicle depart the area traveling east until making a u-turn on Pomona Street traveling west. At this same time the Expedition was observed leaving the area traveling east on Pomona Street by the remaining surveillance units.

12. S/A Streicher, along with TFOs Pavlicek and Marczewski, followed the Expedition east bound to Elizabeth Avenue where the vehicle made a right turn. S/A Streicher and TFO Pavlicek observed the Expedition make another right turn onto Bailey Street when after approximately 300 feet it parked along the curb with the occupants remaining inside.

the vehicle. At this same time TFOs Thomas, Stroud and Rue along with S/As Hilton and Maltese continued following the silver vehicle. The silver vehicle was observed making a right turn traveling north on Bergen Street until it parked along the curb across the street from the NUKAIR barber shop. TFOs Thomas, Stroud and Rue and S/As Hilton and Maltese observed PRYOR exit the silver vehicle, cross the street and enter into the barber shop. At this time S/A Hilton, along with TFOs Thomas and Rue, entered the barber shop apprehending PRYOR. S/A Maltese and TFO Stroud then approached the passenger side of the silver vehicle ordering the passenger (later identified as Calvin TALBERT) out of the vehicle. PRYOR and TALBERT were both placed under arrest and secured. A preliminary search of the silver vehicle by S/A Maltese resulted in the seizure of the white plastic bag (Exhibit N-46) seen carried by PRYOR earlier which was located in the back seat area on top of a full brown plastic garbage bag containing miscellaneous clothing. The white plastic bag contained a Sprint cellular telephone box which further contained one (1) kilogram of cocaine (Exhibit 17).

13. Simultaneously during PRYOR's and TALBERT's arrest, G/S O'Grady, S/A Streicher and TFOs Pavlicek, Marczewski, Curving and Limite surrounded the Ford Expedition ordering AMIN and LARSEN (driver) out of the vehicle. AMIN and LARSEN were placed under arrest and secured. A preliminary search of the vehicle was conducted with negative results. However, a routine pat-down of LARSEN revealed a quantity of cocaine (Exhibit 18) hidden inside LARSEN's coat pocket.

14. AMIN, LARSEN, TALBERT and PRYOR were transported to the Newark DEA office for processing. All four defendants were read their Miranda warnings by S/A Hilton as witnessed by TFO Curving. For details of their post-arrest statements see DEA 6s, Reports of Investigation, by S/A Streicher regarding their individual arrests, post-arrest statements and initial court appearances.

15. During the evening hours of February 27, 2004 TFOs Thomas and Stroud returned to the area of the EXQUISITE CUTS barber shop. TFOs Thomas and Stroud observed the white Chrysler 300M still parked in its original location across the street from the barber shop. Using the

ignition keys found on AMIN after his arrest, TFO Stroud entered the vehicle and drove it to the Newark DEA garage for inventory and processing as witnessed by TFO Thomas.

OTHER OFFICERS:

G/S Kevin O'Grady, S/As Gregory Hilton, Phil Streicher and Matthew Maltese, TFOs Brian Marczewski, Ryan Curving, Todd Rue, Bruno Pavlicek, George Snowden, Willie Thomas, Willie Stroud and Anthony Limite

DESCRIPTION AND CUSTODY OF EVIDENCE:

DRUG

EXHIBIT 17 - One (1) greenish-brown rectangular shaped package containing a compressed white powder

The above exhibit was seized on 2-27-04 by S/A Maltese from the rear seat area of the 2003 silver Infiniti being driven by Rashid PRYOR. S/A Maltese transferred custody of the exhibit to TFO Curving for safekeeping pending evidence processing.

EXHIBIT 18 - One (1) clear plastic bag containing a white chunky and powdery substance

The above exhibit was seized on 2-27-04 by TFO Pavlicek from the Oscar LARSEN's inside jacket pocket pursuant to LARSEN's arrest. TFO Pavlicek transferred custody of the exhibit to TFO Curving for safekeeping pending evidence processing.

Upon return to the Newark DEA office, TFO Curving processed Exhibits 17 and 18 as drug evidence as witnessed by TFO Snowden. Upon completion of processing the exhibits were secured in the Newark DEA evidence vault for temporary storage pending transfer to the North East Regional Laboratory for analysis and further safekeeping.

NON-DRUG

EXHIBIT N-46 - One (1) empty Sprint cellular Model SCP-5500 telephone box.

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and one (1) white plastic bag which contained Exhibit 17

EXHIBIT N-47 - One (1) DEA evidence envelope bag containing miscellaneous Infiniti vehicle paperwork in the name of Andrea PRIOR; one (1) yellow B&B Jewelry receipt and claim check for a white gold Presidential Rolex watch in the name of "Akmoon" and one (1) NJ driver's license in the name of Salome W. KIRATHI with the picture being of Rashid PRYOR and number K45906858660721

EXHIBIT N-48 - One (1) Verizon cellular telephone Model 120E, ESN# 05101083490

The above exhibits were seized on 2-27-04 by S/A Maltese pursuant to the arrest of Rashid PRYOR and the seizure of his 2003 silver Infiniti. These exhibits were seized from PRYOR's person and the silver Infiniti. S/A Maltese transported the above exhibits to the Newark DEA office for evidence processing as witnessed by S/A Streicher.

EXHIBIT N-49 - One (1) silver 2003 Infiniti G-35 two-door VIN# JNKCV54E93-M209881, NJ registration PHM34J

The above exhibit was seized on 2-27-04 by DEA pursuant to the arrest of Rashid PRYOR. The exhibit was transported to the Newark DEA office for processing and inventory pending administrative seizure and storage by the United States Marshal's Service.

EXHIBIT N-50 - One (1) empty Sprint cellular Model SCP-5500 telephone box and one (1) black plastic bag

EXHIBIT N-51 - One (1) DEA evidence envelope containing service receipts from Wyman Ford dated 2-26-04 for work performed on Ford Expedition VIN# 1FMPU18L7XLB12824 in the name of Oscar LARSEN; one (1) NJ driver's license #L06796096409771 in the name Oscar D. LARSEN; one (1) business card in the name of J&L Discount Center Jewelry.

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Exhibits N-50 and N-51 were seized on 2-27-04 by TFO Curving pursuant to the arrest of Oscar LARSEN and inventory of the 1999 Ford Expedition he was driving. TFO Curving transported the exhibits to the Newark DEA office for processing as witnessed by S/A Streicher.

EXHIBIT N-52 - One (1) DEA evidence bag containing miscellaneous paperwork, drug ledgers, receipts and business cards

EXHIBIT N-53 - One (1) Nokia 3300 Music Phone cellular phone

EXHIBIT N-54 - One (1) Motorola T-Mobile cellular phone; one (1) Motorola Boost cellular phone SN#919TDR5784; one (1) Sanyo Sprint Cellular video phone ESN#04500304051

Exhibits N-52, N-53 and N-54 were seized on 2-27-04 by TFO Curving pursuant to the arrest of Atif AMIN and inventory of the 1999 Ford Expedition he was a passenger in. The above exhibits were seized from AMIN's person. TFO Curving transported the exhibits to the Newark DEA office for processing as witnessed by S/A Streicher.

EXHIBIT N-55 - One (1) Audiovox digital cellular telephone

The above exhibit was seized on 2-27-04 by TFO Curving pursuant to the arrest of Oscar LARSEN and inventory of the 1999 Ford Expedition he was driving. TFO Curving transported the exhibit to the Newark DEA office for processing as witnessed by S/A Streicher.

EXHIBIT N-56 - One (1) 1999 blue Ford Expedition VIN# IFMPU1BL7DXLB12824, NJ temporary registration #2213245

The above exhibit was seized on 2-27-04 by DEA pursuant to the arrest of Atif AMIN and Oscar LARSEN. The exhibit was transported to the Newark DEA office for processing and inventory pending administrative seizure and storage by the United States Marshal's Service.

EXHIBIT N-57 - One (1) DEA evidence bag containing vehicle registration for a 2000 Chrysler 300M VIN#2C3HE66G8YH177502 in the name of Freddie BROWN, 2078 Vyse Ave., 1S, Bronx, NY; vehicle

vehicle insurance forms; miscellaneous Travlers Express money gram receipts in the name of Fred BROWN; miscellaneous paperwork

EXHIBIT N-58 - One (1) silver colored watch with clear stones around the Edge and a pink colored wrist band

EXHIBIT N-59 - Unknown amount United States Currency

EXHIBIT N-60 - One (1) purple plastic bag that contained Exhibit N-59

Exhibits N-57, N-58, N-59 and N-60 were seized on 2-27-04 pursuant to the seizure and inventory of the 2000 white Chrysler 300M being driven by Atif AMIN. The above exhibits were seized by TFO Thomas and then transferred to TFO Curving who processed the exhibits as evidence as witnessed by S/A Streicher.

EXHIBIT N-61 - One (1) 2000 white Chrysler 300M VIN# 2C3HE66G8YH177502, NY registration CJZ7853

The above exhibit was seized on 2-27-04 by DEA pursuant to the arrest of Atif AMIN. The exhibit was transported to the Newark DEA office for processing and inventory pending administrative seizure and storage by the United States Marshal's Service.

EXHIBIT N-67 - One (1) Sprint Video Camera cellular telephone ESN#04500-304052; one (1) Samsung Sprint cellular telephone model# SPH-A500; one (1) Motorola T-Mobile cellular telephone

EXHIBIT N-68 - One (1) Samsung T-Mobile cellular telephone SN# R4XW755217J

Exhibits N-67 and N-68 were seized on 2-27-04 by TFO Curving pursuant to the arrest of Oscar LARSEN and inventory of his personal belongings. TFO Curving transported the exhibits to the Newark DEA office for processing as witnessed by S/A Streicher.

EXHIBIT N-69 - Unknown amount of United States Currency

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Exhibit N-69 was seized on 2-27-04 by TFO Thomas pursuant to the arrest of Rashid PRYOR and inventory of his personal belongings. TFO Thomas transported the exhibit to the Newark DEA office and secured it in the evidence vault pending processing by S/A Streicher as witnessed by TFO Curving.

EXHIBIT N-152 - One (1) Cobra .45 caliber semi-automatic handgun with the serial number removed

EXHIBIT N-153 - One (1) magazine and six (6) .45 caliber bullets

Exhibits N-152 and N-153 were seized from under the driver's side front seat of AMIN's white Chrysler 300M (Exhibit N-61) by U.S. Marshal Craig Babcock on 3-10-04 during a routine vehicle inventory prior to the vehicle being placed into storage. U.S. Marshal Babcock transferred custody of the exhibits to S/A Maltese who processed the exhibits as evidence as witnessed by S/A Streicher.

Upon completion of processing the above listed non-drug exhibits, all exhibits were secured with the Newark DEA Non-Narcotic Evidence Custodian for safekeeping.

INDEXING SECTION:

1. CURRY, Ibn - NADDIS# 5510583
2. AMIN, Atif - NADDIS# 5768128
3. LARSEN, Oscar - NADDIS# 5771778
4. TALBERT, Calvin - NADDIS NEGATIVE. Previously described.
5. PRYOR, Rashid - NADDIS# 5771758
6. PRESIDENTIAL RECORDS - NADDIS# 5771584
7. EXQUISITE CUTS - NADDIS# 5541151

U.S. Department of Justice
Drug Enforcement Administration

REPORT OF INVESTIGATION

1. Program Code	2. Cross File / Related Files	3. File No.	4. G-DEP Identifier
		C3-03-0017	YGH1E
5. By: SA Gregory Hilton At: Newark Division Task Force 2, Group 6	☐ ☐ ☐ ☐ ☐	6. File Title CURRY, Ibn	
7. ☐ Closed ☐ Requested Action Completed ☐ Action Requested By:		8. Date Prepared 12/10/03	

9. Other Officers: TFO Det. George Snowden and Newark Police Det. Willie Stroud

10. Report Re: Post arrest information regarding the arrest of Justin HANNIBAL on 12/09/2003.

DETAILS

1. Reference is made to all DEA Reports of Investigation under this File Title and number.

2. On December 9, 2003 at approximately 4:45pm members of the DEA Newark Division Task Force 2 Group 6, Newark Police Department and the Essex County Bureau of Narcotics (BON) effected the arrest of Justin HANNIBAL. At the time of HANNIBAL's arrest he was in possession of one kilogram of cocaine and a fully loaded 9mm Semi-Automatic handgun with a round chambered. Following his arrest HANNIBAL was transported to the BON for processing. Upon arrest, HANNIBAL was given the Miranda Warning.

3. After giving HANNIBAL his Miranda Warnings, SA Hilton went on to ask HANNIBAL to voluntarily provide information regarding the circumstances resulting in HANNIBAL's arrest (possession of the aforementioned cocaine and handgun). HANNIBAL voluntarily stated that his name was Justin HANNIBAL, his date of birth is September 28, 1978, his social security number is 138-84-9670 and that he wanted to speak to his attorney: Paul BERGRIN before he makes any official statements. SA Hilton asked HANNIBAL why he was in possession of the handgun, HANNIBAL voluntarily stated that he did not know the handgun was in the vehicle, however if he had known it was there he would have "capped" the police at the time of his arrest.

11. Distribution:	12. Signature (Agent)	13. Date
Division	SA Gregory Hilton	12/10/03
District	14. Approved (Name and Title) Kevin O'Grady Group Supervisor	15. Date 12/10/03
Other		

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DEA SENSITIVE
Drug Enforcement Administration

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4. It should be noted that at the time of HANNIBAL's arrest, HANNIBAL was attempting to retrieve/conceal and item underneath the driver's seat of the vehicle HANNIBAL was driving. Upon examination of the aforementioned area in the vehicle, the only item found was a fully loaded 9mm Semi-Automatic handgun with a round in the chamber.

INDEXING

Justin HANNIBAL - NADDIS NEGATIVE - A.K.A. TWIN - SS# [redacted]; DOB: [redacted]; ADDRESS: [redacted]; TELEPHONE#: [redacted]; Black Male; Height: 6'2"; Weight 240 lbs.

Paul BERGRIN: Previously Indexed

REPORT OF INVESTIGATION

1. Program Code	2. Cross File / Related Files	3. File No.	4. G-DEP Identifier
	☐	C3-03-0017	YGH1E
5. By: TFO George H. Snowden At: Newark Field Division	☐	6. File Title CURRY, Ibn	
7. ☐ Closed ☐ Requested Action Completed ☐ Action Requested By:	☐	8. Date Prepared 12/11/03	

9. Other Officers: See other Officers paragraph at the end of Details section.

10. Report Re: Surveillance of PRAY, arrest of HANNIBAL, and acquisition of exhibit's 15, N-20, and N-21.

SYNOPSIS

On December 09, 2003, The DEA Task Force II, Group 6, set up surveillance in the areas of 22 McKay Street and 158 Sandford Avenue, East Orange, New Jersey. Surveillance was established based on information ascertained from a Title III authorization of cellular telephone facility 973-280-7437 utilized by Ishmael PRAY, and information ascertained during the course of this investigation. Both of the aforementioned locations are frequented by PRAY for the purpose of arranging and making narcotics transactions. As a result of this surveillance operation, Justin HANNIBAL aka "Twin" was arrested and one kilogram of cocaine, a loaded 9MM handgun and a vehicle were seized. The following are the details of this operation:

DETAILS

1. On December 09, 2003 at approximately 2:00PM, members of the DEA Task Force II, Group 6 set up surveillance in East Orange in the area of 22 McKay Street and 158 Sandford Avenue (Pennie's Restaurant).

2. At approximately 2:30PM SA Gregory Hilton and TFO George Snowden observed Lamont PRAY exit 22 McKay Street and enter a green Ford Taurus bearing NJ license plate NSR43W registered to Willis D. HESTER, [redacted] New Jersey, and then travel east on McKay Street then north on Sandford Avenue.

11. Distribution:	12. Signature (Agent)	13. Date
Division District Other	TFO George H. Snowden	12-11-2003
	14. Approved (Name and Title) Kevin F. O'Grady Group Supervisor	15. Date 12/11/03

3. At approximately 2:50PM, PRAY received an incoming call from [redacted] from a male he identifies as "SHAWNEE". "SHAWNEE" tells PRAY he needs "One" but he is a little short. PRAY tells "SHAWNEE" to meet PRAY by his Aunt's House. During the course of this investigation it has been ascertained that [redacted] is PRAY's Aunt Ricky's house. (Ms. Altericke BRINKLEY). (Reference call session #3352)

4. At approximately 2:55PM, Lamont PRAY returned to [redacted] exited the green Taurus and entered the residence. At approximately 3:00PM, Lamont PRAY exited [redacted] and entered the green Taurus and traveled east on McKay Street then north on Sandford Avenue.

5. At approximately 3:15PM, PRAY made an outgoing call to [redacted] to a male he called "MONTAGUE" and advised "MONTAGUE" to meet PRAY at "Squeaks" restaurant, (Pennie's), in 15 minutes. (Reference call session #3360)

6. At approximately 3:20PM, PRAY made an outgoing call to phone number 973-489-0331 utilized by Justin HANNIBAL aka "Twin", at which time PRAY instructs HANNIBAL to meet him in about ten minutes. (Reference call session #3361)

7. At approximately 3:35PM, SA Hilton and TFO Snowden observed Ishmael PRAY arrive at 22 McKay Street utilizing a gray Mitsubishi Lancer bearing NJ license plate NAG63G registered to Enterprise Rental Car, rented to Shanette ALEXANDER, [redacted] Seconds after a dark colored Ford Taurus bearing NJ license plate PAT40L, registered to Priscilla ROSADO, [redacted] parked behind PRAY's vehicle. An unidentified black male exited the Taurus, opened the trunk, and retrieved a white plastic bag. The unidentified male then walked over to PRAY's vehicle, briefly greeted PRAY and then placed the bag in the trunk of PRAY's vehicle. The unidentified male then entered the Taurus and departed from the location. At approximately 3:40PM, PRAY departed from the location traveling eastbound on McKay Street then northbound on Sandford Avenue.

8. At approximately 3:40PM, PRAY made an outgoing telephone call to [redacted], utilized by Justin HANNIBAL. PRAY instructed HANNIBAL to come to "Squeaks" store on Sandford Street in East Orange. (Pennie's Restaurant 158 Sanford Avenue East Orange, NJ). (Reference call session #3380)

9. At approximately 3:40PM, TFO's Willie Thomas and Willie Stroud observed a dark green Ford Explorer occupied by two black males bearing NJ license plate NWC36L registered to Mark BROWN, [redacted] park on the west side of Sandford Avenue approximately four car lengths north across the street from Pennie's Restaurant located at 158 Sandford Avenue East Orange, NJ.

10. At approximately 3:45PM, TFO's Thomas and Stroud and SA Hilton and TFO Snowden observed PRAY park his Lancer directly across the street from Pennie's Restaurant. At approximately 3:50PM, the driver of the Explorer exited his vehicle and approached and entered the front passenger side of PRAY's vehicle. Approximately one minute later, the unidentified male exited PRAY's vehicle and appeared to be holding and concealing something under his jacket. The unidentified male then entered the front driver side of the Explorer. A moment later, the unidentified male then exited the Explorer then re-entered PRAY's vehicle. In seconds both PRAY and the unidentified male exited PRAY's vehicle and entered Pennie's Restaurant. During the time of this surveillance an unidentified black male remained in the front passenger seat of the Explorer.

11. At approximately 3:51PM, the unidentified male utilizing the Explorer exited Pennie's Restaurant and entered the Explorer. At approximately 3:53,PM the same unidentified male exited the Explorer and re-entered Pennie's Restaurant.

12. At approximately 3:53PM, PRAY received an incoming call from [redacted] utilized by HANNIBAL. During this conversation, HANNIBAL advised PRAY "he is on his way to the Restaurant now." (Reference call session #3396.)

13. At approximately 4:00PM, TFO's Thomas and Stroud and SA Hilton and TFO Snowden observed a black Chrysler bearing NJ license plate PPU31C registered to Yolanda ODOM, [redacted] park on the east side of Sanford Ave in front of Pennie's Restaurant. A male identified as Justin HANNIBAL exited the Chrysler and entered Pennie's Restaurant.

14. At approximately 4:15PM, TFO's Thomas and Stroud, and SA Hilton and TFO Snowden observed PRAY and HANNIBAL exit Pennie's Restaurant and enter PRAY's vehicle. (PRAY in the front driver side and HANNIBAL in the front passenger side). At approximately 4:17PM, TFO's Thomas and Stroud observed HANNIBAL exiting PRAY's vehicle while stuffing a white bag under his jacket. PRAY then left the location traveling southbound on Sandford Avenue. HANNIBAL then walked over to his Chrysler and opened the trunk. TFO's Thomas and Stroud, and SA Hilton and TFO Snowden then observed HANNIBAL remove a white bag that was weighed down from under his jacket, place the bag into the trunk, and close the trunk and re-enter Pennie's Restaurant.

15. At approximately 4:20PM, TFO's Thomas and Stroud observed the unidentified male from the Explorer exit Pennie's Restaurant and enter the Explorer at which time the vehicle departed southbound on Sandford Avenue.

16. At approximately 4:30PM, TFO's Thomas and Stroud observed HANNIBAL exit Pennie's Restaurant and enter his Chrysler and depart northbound on Sandford Avenue. TFO's Thomas and Stroud, and SA Hilton and TFO Snowden observed HANNIBAL turn eastbound onto Edgar Street. Surveillance Units TFO's Michael Lalley, Todd Rue, Richard Myers and Ignacio Mendes followed HANNIBAL east on Edgar Street, then turn south on Halstead Street, then west on Tremont Avenue, then south on Haxtun Street, then west on Stirling Avenue, then south on Mosswood Avenue.

17. TFO's Mendes and Myers observed HANNIBAL park in front of 765 Mosswood Avenue exit his vehicle and approach the opened trunk of his vehicle. TFO Myers and Mendes then exited the police vehicle and began to approach HANNIBAL while identifying themselves as police by

word of mouth and show of badges. HANNIBAL then ran into his vehicle and began to travel southbound on Mosswood Avenue in reverse at a high rate of speed and struck TFO Lalley and Rue's police vehicle as they were approaching the location, also knocking down a street sign and striking a parked vehicle. At this time HANNIBAL's vehicle became disabled. All Officers then responded to HANNIBAL identifying themselves as police by word of mouth and show of badges. As TFO Lalley, Rue, Myers and Mendes attempted to order HANNIBAL from the locked vehicle, HANNIBAL was not complying with police instructions and TFO Lalley observed HANNIBAL remove a silver object that TFO Lalley believed to be a weapon, and attempt to conceal it under the front seat. HANNIBAL then unlocked the doors at which time HANNIBAL was removed from the vehicle by TFO's Rue and Myers, at which time TFO Lalley observed and retrieved a loaded silver 9mm handgun (Exhibit N-21) from the front driverside floor. At this time TFO Mendes placed HANNIBAL under arrest and advised HANNIBAL of his Miranda rights. TFO Lalley maintained and secured custody of the handgun pending transfer to TFO Marczewski.

18. SA Hilton and TFO Snowden and Thomas observed a white plastic bag inside of the opened trunk of HANNIBAL's vehicle, which contained a rectangular shaped brick of a suspected kilogram of cocaine, (Exhibit 15). TFO Thomas removed the suspected kilogram from the trunk. TFO Thomas maintained and secured custody of the suspected cocaine pending transfer to TFO Marczewski. HANNIBAL's vehicle (Exhibit N-20) was seized and towed.

19. Sergeant Vito D' Alessio of the Essex County Sheriff's Bureau of Narcotics was notified and responded to the scene along with Detective T. Bennett. Sergeant D' Alessio notified the Orange Police Department and Unit #123 Armenti responded to the scene and executed the motor vehicle reports.

20. All DEA personnel responded to the Sheriff's Department Bureau of Narcotics where all evidence was maintained, secured, and processed, as was HANNIBAL via the Essex County Sheriff's Department's guidelines. TFO Brian Marczewski conducted a narcotics field test on the suspected kilogram of cocaine, which resulted in a positive

reaction for cocaine. A check of NCIC revealed that there were no reports of the handgun being reported lost or stolen.

21. At approximately 5:19PM PRAY received an incoming call from telephone number [redacted] utilized by Jason HANNIBAL. During the conversation Jason HANNIBAL asked PRAY if he had seen his brother (Justin), PRAY stated that he did see him, and that he gave him "That" for ya'll. (Justin and Jason HANNIBAL). (Reference incoming call session #3452)

22. An analysis of calls from the Title III authorization of the target facility 973-280-7437 utilized by PRAY revealed an intercept of an incoming call from facility 973-489-0331 utilized by Justin HANNIBAL on December 08, 2003. During this conversation PRAY asks Justin HANNIBAL if "Ya'll" want one of them, you and your brother (Justin and Jason HANNIBAL). Justin HANNIBAL then asks PRAY to give him a number, PRAY says 24.5, Justin then said he's got that. PRAY then informed Justin HANNIBAL that it's a monster, at which time Justin HANNIBAL stated he would take it. (Reference incoming call during session #3046.)

23. Other Officers: SA Gregory Hilton, TFO's George Snowden, Ignacio Mendes, Michael Lalley, Richard Myers, Todd Rue, Willie Thomas, Willie Stroud, Brian Marczewski

CUSTODY OF EVIDENCE

1. Exhibit #15, which can be described as a white rectangular brick wrapped in clear plastic cling wrap, was maintained and secured by TFO Thomas pending transfer to TFO Marczewski, who then processed same via the Essex County Sheriff's Department guidelines.
2. Exhibit N-20, which can be described as a black 1999 Chrysler was maintained and secured by Parkway Towing Bloomfield NJ, pending transfer to Essex County Sheriff's Department.
3. Exhibit N-21, which can be described as a silver BRYCO ARMS Jennings 9mm handgun serial #1451275, with a magazine, and 13 9mm luger rounds, was maintained and secured by TFO Lalley pending transfer to

TFO Marczewski, who then processed same via the Essex County Sheriff's Department guidelines.

INDEXING

1. PRAY, Ishmael - NADDIS #5579033
2. PRAY, Lamont - NADDIS PENDING, PREVIOUSLY INDEXED [redacted] Ford Taurus, NJ- NSR43W
3. HANNIBAL, Jason - NADDIS PENDING, PREVIOUSLY INDEXED Telephone [redacted]
4. HANNIBAL, Justin - NADDIS PENDING, PREVIOUSLY INDEXED [redacted] FBI [redacted] NJ State ID [redacted] 6'2, 240lbs, black male, light complexion. Chrysler PPU31C.
5. BROWN, Mark aka Stephen JENKINS aka "MONTAGUE", "MONEY STEVE" - NADDIS NEGATIVE - [redacted] FBI [redacted] NJ State ID [redacted] SS [redacted] SS [redacted] SS [redacted] Black male, 5'7", 170lbs, [redacted] Ford Explorer NJ - NWC36L.
6. ALEXANDER, Shanette - NADDIS PENDING, PREVIOUSLY INDEXED
7. SHAWNEE - NADDIS NEGATIVE - Telephone [redacted] Ford Taurus, NJ- PAT40L.
8. ROSADO, Priscilla - NADDIS NEGATIVE - [redacted] NJ [redacted] Ford Taurus NJ - PAT40L.
9. HESTER, Willis- NADDIS NEGATIVE - [redacted] Ford Taurus NSR43W.
10. BRINKLEY, AlTericke - NADDIS NEGATIVE, [redacted] Black female.
11. ODOM, Yolanda - NADDIS NEGATIVE - [redacted] NJ [redacted]

REPORT OF INVESTIGATION *(Continuation)*	1. File No. C3-03-0017	2. G-DEP Identifier YGH1E
	3. File Title CURRY, Ibn	
4. Page 8 of 8		
5. Program Code	6. Date Prepared 12/11/03	

12. PENNIE's RESTAURANT - NADDIS NEGATIVE - [redacted]

REPORT OF INVESTIGATION

1. Program Code	2. Cross File / Related Files	3. File No.	4. G-DEP Identifier
	☐	C3-03-0017	YGH1E
5. By: TFO WILLIE THOMAS At: NEWARK	☐	6. File Title CURRY, IBN	
7. ☐ Closed ☐ Requested Action Completed ☐ Action Requested By:	☐	8. Date Prepared 03/18/04	

9. Other Officers: TFOs Corey Grubbs, George Snowden, Ignacio Mendez ,Richard Myers, SAs Gregory Hilton, Phil Streicher and GS Kevin O'Grady

10. Report Re: Arrest of Howard Norman SANDERS and Acquisition of Exhibits 24, N-81 and N-142 through N-149 on March 8, 2004

SYNOPSIS:

On March 8, 2004 at approximately 7:00AM, members of the DEA Task Force II Group 6 established surveillance at the residence of Howard Norman SANDERS located at [redacted] New Jersey. Upon SANDERS' arrival to his residence SANDERS was arrested and subsequently authorized a consensual search of his residence. The following are the details of this operation:

DETAILS:

1. At approximately 8:40AM, SANDERS was observed pulling up to this residence in a white Bonneville vehicle bearing New Jersey registration PSG-48Z. An inquiry with the New Jersey Department of Motor Vehicles revealed the vehicle is registered to [redacted] New Jersey. SANDERS was observed exiting the vehicle and proceeded up the front steps toward the front door. At this time, TFOs Willie Thomas and Corey Grubbs approached SANDERS on foot while simultaneously alerting other surveillance units. TFOs Thomas and Grubbs were able to detain SANDERS in the doorway of the first floor apartment with badges displayed and verbally announcing their police presence. At this time, the other members of the surveillance team arrived and assisted SANDERS into his residence. Once in the residence, above officers explained the reason of the police presence

11. Distribution:	12. Signature (Agent)	13. Date
Division	AOR TFO Willie Thomas	3/24/04
District	14. Approved (Name and Title) Kevin O'Grady Group Supervisor	15. Date 3/22/04
Other		

DEA Form - 6 (Jul. 1996)

3 - Originating Office

and read SANDERS his Miranda Warnings (Per DEA Form 13A) by TFO Thomas as witnessed by TFO Grubbs.

2. After SANDERS' arrest, Ms. Paula L. FORD, SANDERS' live-in girlfriend, authorized Agents/Officers a consensual search of the residence. At this time, SANDERS authorized a search of his items and signed and dated a DEA Consent to Search form (Exhibit N-145) allowing the search of his residence. As Agents/Officers began their search, SANDERS stated that there were no drugs in his residence.

3. As the search began, TFO Thomas recovered a round gold colored cardboard container (Exhibit N-149) from SANDERS' rear bedroom dresser. Located within the container were several glassine envelopes of heroin with assorted ink-stamped logos (Exhibit 24). As S/A Streicher searched the bedroom closet, S/A Streicher recovered one (1) empty yellow pocket electronic scale box and one (1) black pocket memo notebook (Exhibit N-146); a prison i.d. card with SANDERS' name and photograph and miscellaneous court papers (Exhibit N-147) and miscellaneous photographs (Exhibit N-148).

4. A search of the livingroom closet by TFO Thomas revealed a loaded H&K 40 Caliber semi-automatic handgun (Exhibit N-143) and eight hollow point bullets (Exhibit N-144) from a black flight jacket pocket. TFO Thomas also recovered an unknown amount of currency (Exhibit N-142) from SANDERS' person. Also seized was SANDERS' 1996 white Pontiac Bonneville (Exhibit N-81) bearing NJ registration PSG48Z.

5. Prior to leaving the residence, S/A Streicher provided a DEA Form 12, Property Receipt to Paula FORD recording the items seized from the residence. The residence was then secured by SANDERS' girlfriend who departed shortly after Agents/Officers exited the residence.

DESCRIPTION AND CUSTODY OF EVIDENCE:

DRUG

EXHIBIT 24 - One (1) small package wrapped in black paper containing opaque folded papers and three (3) small rubberbanded

packets of the same all containing a white powder. The packets are stamped with "Zanax" in black ink and "Dallas Cowboys" in blue

The exhibit was seized by TFO Thomas from a round gift box located on the master bedroom dresser and then transferred to S/A Streicher who transported it to the Newark DEA office securing it in the drug vault for temporary storage. The exhibit was then processed by S/A Maltese, as witnessed by S/A Streicher until being transferred to the NERL for analysis and further safekeeping.

NON-DRUG

EXHIBIT N-81 - One (1) white Pontiac Bonneville four-door VIN# 1G2HX52K3TH 211763, NJ registration PSG48Z

The above exhibit was seized by TFO Stroud who transported it to the Newark DEA office for inventory and processing by S/A Streicher pending administrative seizure and storage by the United States Marshal's Service.

EXHIBIT N-142 - Unknown amount of United States Currency

EXHIBIT N-143 - One (1) .40 caliber H&K semi-automatic handgun serial# 22-080485

EXHIBIT N-144 - One (1) magazine and eight (8) hollow-point bullets

EXHIBIT N-145 - One (1) original copy of a DEA Consent to Search form dated 3-8-04 for the premises located at 156 West End, Newark, New Jersey and signed by Howard SANDERS

Exhibits N-143, N-144 and N-145 were seized by TFO Thomas from SANDERS' residence. TFO Thomas transferred custody of the exhibits to S/A Streicher who transported them to the Newark DEA office for evidence processing as witnessed by TFO Curving. S/A Streicher then transferred custody of the exhibits to the Newark NNEC for safekeeping.

REPORT OF INVESTIGATION (Continuation)	1. File No. C3-03-0017	2. G-DEP Identifier YGH1E
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EXHIBIT N-146 - One (1) empty yellow Pocket Scale electronic scale box and one (1) black pocket note book

EXHIBIT N-147 - Municipal Court of Newark Violation Bureau forms in the name of Howard SANDERS and one (1) prison id card in the name and photo of Howard SANDERS

EXHIBIT N-148 - One (1) DEA evidence envelope containing miscellaneous photographs

Exhibits N-147 and N-148 were seized by S/A Streicher from SANDERS' residence and then transported to the Newark DEA office for evidence processing by S/A Streicher as witnessed by TFO Curving. S/A Streicher then transferred custody of the exhibits to the Newark NNEC for safekeeping.

EXHIBIT N-149 - One (1) round gold colored cardboard container with white and gold top

Exhibit N-149 was seized by TFO Thomas from SANDERS' residence. TFO Thomas transferred custody of the exhibit to S/A Streicher who transported it to the Newark DEA office for evidence processing as witnessed by TFO Curving. S/A Streicher then transferred custody of the exhibits to the Newark NNEC for safekeeping.

INDEXING SECTION:

1. CURRY, Ibn - NADDIS# 5510583
2. SANDERS, Howard Norm - NADDIS# 5754863

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
Criminal No. 2:09-cr-00369-WJM

UNITED STATES OF AMERICA, :
: TRANSCRIPT OF PROCEEDINGS
v. : - Trial -
:
PAUL W. BERGRIN, :
:
Defendant :
- - - - - - - - - - - - - - - -x

Newark, New Jersey
October 20, 2011

B E F O R E:

THE HONORABLE WILLIAM J. MARTINI,
UNITED STATES DISTRICT JUDGE,
and a Jury

A P P E A R A N C E S:

UNITED STATES ATTORNEY'S OFFICE
BY: JOHN GAY
JOSEPH N. MINISH
STEVEN G. SANDERS
Assistant U.S. Attorneys
For the Government

PAUL W. BERGRIN, Defendant, Pro Se
- and -
GIBBONS PC
BY: LAWRENCE S. LUSTBERG, ESQ., Standby Counsel
AMANDA B. PROTESS, ESQ.
For Defendant Paul W. Bergrin

Pursuant to Section 753 Title 28 United States Code, the following transcript is certified to be an accurate record as taken stenographically in the above entitled proceedings.

S/WALTER J. PERELLI

WALTER J. PERELLI, CCR, CRR
OFFICIAL COURT REPORTER

I N D E X

E X H I B I T S

Disscussions at the Sidebar

A Yes.
Q Now, you testified in reference to the proffer agreements of Mr. Young. Correct?
A Yes, I can.
Q And multiple proffer agreements were signed with Attorney Hawkins Taylor. Correct?
A I was shown one proffer agreement that was signed by her.
Q But you knew that there were multiple proffer sessions with Ms. Hawkins Taylor, correct, and Anthony Young?
A Yes. I don't know how many proffer agreements were signed but I know there were multiple proffers, yes.
Q And you were only shown one by Mr. Minish. Correct?
A Yes.
Q Now, isn't it a fact that during those proffer sessions with Ms. Hawkins Taylor, Anthony Young continued to falsely accuse Jamal McNeil, his friend, of the murder of Kemo? Correct?
A That is correct.
Q And then during the proffer session at a later time, Anthony Young denied even being at the scene or observing anything. Correct?
A Yes, that is correct.
Q And that was after being explained multiple times to Anthony Young he had to be truthful, honest and up front. Correct?

A Yes.
Q Now, you testified that Anthony Young could get life in prison. Correct?
A Yes.
Q Under his plea agreement.
A Yes.
Q Isn't it a fact that the Office of the United States Attorney is the office or the determining factor as to whether Anthony Young is telling the truth? Isn't that a fact, ma'am?
A I'm not sure I -- I understand. I know the United States Attorney's Office makes a motion on behalf of Anthony Young in that they provide the facts that he has stated, and in doing so would assume that that is the truth as to what he is saying, yes.
Q Did you ever tell Anthony Young yourself to tell the truth?
A Absolutely.
Q And you're sure about that. Right?
A I am certain about that.
Q So if Anthony Young was to say that you never told him --
MR. MINISH: Judge, again.
THE COURT: Sustained.
MR. BERGRIN: I have no further questions.
Thank you, your Honor.
Thank you, Ms. Brokos.
THE COURT: Is there any further redirect?

the Government?
A Correct.
Q I'm going to show you Exhibit 7000 and ask you if you recognize that.
A Cooperation agreement.
Q Is that the Cooperation Agreement you signed in connection with this case?
A Correct.
Q Did you have a lawyer with you when you signed this agreement?
A Correct.
Q What is your understanding of what you are supposed to do pursuant to this Cooperation Agreement?
A Tell the truth.
Q And what do you expect to get in exchange for telling the truth?
A Lesser time.
Q Lesser time on what?
A On my sentence.
Q The sentence on the charge that you pled guilty to?
A Correct.
Q That relates to the activity you just talked about?
A Correct.
Q As part of that Cooperation Agreement and Plea Agreement, did the Government also say that they would notify Pennsylvania

authorities --

MR. BERGRIN: Objection, your Honor. The witness has answered the question and all he expected was lesser time. I don't believe that's proper questioning.

MR. GAY: If we could --

MR. BERGRIN: I would ask him to ask a nonleading question.

MR. GAY: Could we have a brief sidebar on this? I think Mr. Bergrin is not going to be objecting to the question I'm going ask.

THE COURT: Yeah, go ahead. I think I know. Go ahead.

(At the sidebar.)

THE COURT: Does this have to do with the Pennsylvania parole violation?

MR. GAY: Yes. We told him that we would notify the authorities of his agreement. If he doesn't want me to bring out --

MR. BERGRIN: I thought you were going somewhere else.

THE COURT: I thought so. Okay.

MR. GAY: Fine.

(In open court.)

THE COURT: Objection is overruled.

BY MR. GAY:

Q Mr. Jimenez, let me ask you one brief question before that.

Did you at the time you signed this agreement have an outstanding parole violation in the state of Pennsylvania?
A Correct.
Q And was that for the 1992 charge that you had previously talked about?
A Correct.
Q And since you had gotten 20 year sentence, you were still on parole on that charge. Is that correct?
A Correct.
Q You had gotten arrested for another drug violation at least since you were on parole. Is that correct?
A That's correct.
Q So because of that you had an outstanding parole violation?
A Correct.
Q Did, as part of the agreement, did the Government also agree that they would notify the Pennsylvania authorities about your cooperation?
A Correct.
Q Now, as far as you understand the agreement, Mr. Jimenez, who is it that ultimately determines your sentence?
A The judge.
Q Based on your understanding of the agreement, Mr. Jimenez, what happens if you tell a lie during my questioning of you?
A There won't be no agreement.
Q And based on your understanding of the agreement, what

A I lied. I lied in the beginning, yes.
Q And you were facing a lot of time as the result of your lies. Right?
A I was facing a lot of time --
Q Yes.
A -- for the --
Q You were a career criminal and you were telling the FBI that you were moving multi-kilograms of cocaine.
A Yes, I told them that.
Q And also you had a parole sticker that you haven't even started serving your parole violation in Pennsylvania. Right?
A Right.
Q And you're going to do at least, at least six years on that. Correct?
A That's the max that I can do, six years.
Q With your record, isn't it a fact that you're going to max out most likely?
A Yes, it's a possibility.
Q So you have the state time that you have to do, you have at least the six years, five to six years in Pennsylvania. Correct?
A Correct.
Q And now you have the federal drug case. Correct?
A Correct.
Q And on the federal drug case you pled out to at least, at

least 3.5 kilograms, but a lot more, correct, that you were involved in?

A Correct.

Q So you're facing at least probably 10 to 15 years federally. Correct? Realistically.

A Correct. Maybe -- I mean -- I don't -- that's -- fairly, yes.

Q So you're facing at least another 25 years of your life. Did that kind of jog your memory in reference to what you heard?

A Yes, pretty much.

Q Now, you were visited by federal agents --

MR. BERGRIN: May I approach the witness with D-9 for identification?

THE COURT: Yes.

MR. BERGRIN: Thank you very much, Judge.

MR. GAY: Could you just let us know what "J" number it is?

MR. BERGRIN: I'm so sorry. It's J04032, please.

MR. GAY: Great, thank you.

MR. BERGRIN: Thank you.

May I approach, your Honor?

THE COURT: Yes. Is this Exhibit D-9?

MR. BERGRIN: It is, sir.

THE COURT: Thanks. Go ahead.

MR. BERGRIN: Thank you, your Honor.
Q I ask you to look at D-9 that's been marked for identification. As a matter of fact, you can keep that in front of you, Mr. Jimenez. Look, please, at the last sentence and then you can turn it over to page 2, the first paragraph. Okay?
MR. GAY: Which page were you on?
MR. BERGRIN: It's on page 2 -- page 1 the last paragraph into page 2 the top of the paper, please.
MR. GAY: Thank you.
MR. BERGRIN: Thanks, Mr. Gay.
A What you want me to look at?
Q I want you to look at -- and I'll ask you the question again: Isn't it a fact that you told the FBI that Changa was your supplier and you were moving how many kilograms did you tell the FBI per week?
A I don't see it on there. I'm lost. I mean, I use glasses to read, I mean. I said that before.
Q I'm sorry. Excuse me.
Did you tell the FBI that you were involved with Changa, last name unknown, a distant relative. Is that what you said? Can you read that?
A Yes, I see that.
Q And Changa was providing Jimenez with approximately 5 kilograms a week for Jimenez to sell in the Newark area.

A Yes. I see that.
Q When you were visited by the FBI on this date of October the 28th, 2010, did the FBI agents tell you to be honest, truthful and open?
A Correct.
Q And did you agree to do that with the FBI?
A Correct.
Q And they told you that if you lied to them, you could be charged with a federal offense. Correct?
A Correct.
Q And you understood what that meant. Right?
A Right.
Q And when the FBI came to you, they said that they are investigating me, Paul Bergrin. Correct?
A Correct.
Q And that they are there to learn about Paul Bergrin and for you to provide them information on Paul Bergrin. Correct?
A Correct.
Q So you knew when they came to you that they were looking for help from you against me. Correct?
A Correct.
Q And they also told you that you could help yourself and your charges and your cases and the time that you were facing if you helped them. Correct?
A That is correct.

Q And when you talked to them, you were looking forward, you were excited about being able to help yourself. Correct?
A At the time, yes.
Q So you wanted to give them as much information as humanly possible about Paul Bergrin so that you could get out of doing that six years that you have in State Prison in Pennsylvania. Correct?
A Actually I don't remember giving them information about you in the beginning, even when I lied.
Q Well, you gave them -- they asked you about me. Correct?
THE COURT: Mr. Bergrin, let me interrupt for a moment. I don't know how much -- you probably have some time to go. Correct?
MR. BERGRIN: Yes, sir.
THE COURT: All right. We should recess. I have a conference call on another matter at 4:30 that I need to take. So we'll recess and resume tomorrow morning, ladies and gentlemen.
Please don't discuss the case with anyone. I'm going remind you of a few things: Also, you're not to begin to develop any predecisions on anything. You haven't heard this whole case, there's a lot more to go. And I remind you also not to read the newspapers, not to listen to any media. If you hear something, put it aside. And not to do any independent research, either on the internet or anything along that line.

POLICE DEPARTMENT — INCIDENT REPORT — NEWARK, N.J.

FILL OUT COMPLETE REPORT WHEN LISTED IN CLASSIFICATION LIST AND REPORT GUIDE AS 802 (NO ASTERISK).
DO NOT FILL OUT SHADED PORTION WHEN LISTED 802 * (WITH ASTERISK).

1. VICTIM'S OR COMPLAINANT'S NAME	2. TELEPHONE NO.	17. STATUTE OF ORDINANCE	18. SECTOR	19. DISTRICT NO.	20. CENT. COMPLT. NO.
Christopher Spruill	[redacted]	2C:12-1B	417	6-5749	23530

3. RESIDENCE NUMBER (STREET)	(FLOOR OR APT.)	21. REPORTING OFFICER (NAME)	ID NO.	(COMMD)
[redacted]		R. Oliveras	7832	WD

4. SEX	5. RACE	6. AGE	7. OCCUPATION	8. INJURY	22. INCIDENT	22A. OCCURRED ON PUBLIC HOUSING PROPERTY?
M	Blk	37	Unemployed	☐ YES ☐ NO	Aggravated Assault	☐ YES XX NO

9. SOBRIETY OF VICTIM	10. CAN VICT. IDENT. OFFENDER	23. LOCATION
XX SOBER ☐ HAD BEEN DRINKING ☐ INTOXICATED	XX YES ☐ NO	So. Orange ave. & S.19th St.

11. PERSON REPORTING CRIME	12. TELEPHONE NO.
Same as #1	same #2

13. RESIDENCE OF PERSON REPORTING CRIME
Same as #3

24. TIME OF OCCURRENCE (ON OR BET.) HOUR	DAY OF WEEK	MONTH	DAY	YEAR	25. WAS FORCE USED?	26. WAS A WEAPON USED?
1130	Sat	03	06	04	☐ YES XX NO ☐ NOT KNOWN	XX YES ☐ NO ☐ NOT KNOWN

14. TIME REPT	15. MONTH	DAY	YEAR	16. OCCURRED ON VIEW	27. TYPE OF PREMISES OR PROPERTY ATTACKED
1226	03	06	04	XX YES ☐ NO	City Street

28. HOW ATTACKED	29. MEANS OF ATTACK
By Person	Handgun

30. OBJECT OF ATTACK (IF VEHICLE ANTI-THEFT DEVICE INSTALLED.)	31. MODUS OPERANDI
Aggravated Assault ☐ Yes ☐ No	Refer to narrative

32. VEHICLE INVOLVED IN CRIME	YEAR	MAKE	MODEL	LIC. NUMBER	STATE	COLOR	BODY TYPE	VEHICLE VIN NUMBERS
☐ STOLEN ☐ USED BY OFFENDER								

33. NAME OF SUSPECT	(ALIAS)	(RESIDENCE)
Mike Cassidy		[redacted]

SEX	RACE	AGE	HEIGHT	WEIGHT	COLOR OF HAIR	COLOR OF EYES	DESCRIBE CLOTHING WORN AND PECULIARITIES
M	Blk	20			Blk	Brn	Camouflage pants, Blk jacket

34. ADDITIONAL INFORMATION (DO NOT REPEAT INFORMATION LISTED IN NUMBERED BLOCKS)

Unit 412 P/O M. Cancel and the undesigned officer responded to the location of So. Orange Ave. and S.19th St. a person wanted for aggravated assault with a weapon. Upon arrival to that scene officers of unit 412 observed the actor described by the dispatcher as the person who committed the act aggravated assault with a weapon walking eastbound on So.orange Ave. towards S.18th St. At this time officers approached the actor and detained him for further investigation on this matter. Actor was transported to the robbery for questioning While at the robbery squad the victim of this incident (Christopher Spruill) positively identified the actor as the person who pulled out a handgun at him. Mr. Spruill stated that while at the location of S.19th St and So.Orange Ave. visiting a makeshift memorial for his son, the actor and another unknown

34A. STRANGER TO STRANGER CRIME	34B. OUTLAW LEN#
XX Yes ☐ No ☐ Unknown	Event# 97614

34C. REPORT SOURCE: XX 1 DISPATCH ☐ 2 PHONE ☐ 3 WALK-IN ☐ 4 OTHER

34D. VEHICLE INSURANCE COMPANY & POLICE NUMBER

35. ESTIMATED VALUE BY TYPE OF PROPERTY	A. CURRENCY	B. JEWELRY	C. FURS	D. CLOTHING	E. LOCAL AUTOS	F. MISCELLANEOUS	G. TOTAL

36. OTHER OFFICERS AT SCENE (NAME)	VEH. NO.	COMMAND	I.D NO.)	37. OTHER REPORTS SUBMITTED
RANK: P/O M. Cancel	412	West	7832	☐ DP 1:152 PROPERTY ☐ DP 1:152-1 AUTO ☐ DP 1:225A STATEMENT ☐ DP 1:800 ARREST ☐ DP 1:795 CONT.

PERSONS ARRESTED (NAME)	CENT ARR NO	39. WITNESSES (NAME AND RESIDENCE)	(TELEPHONE NO.)
Mike Cassidy	6221	None	

TELETYPE ALARM NUMBER	41. NAME OF DETECTIVE NOTIFIED	42. SIGNATURE OF REPORTING OFFICER
		R. Oliveras

STATUS OF OFFENSE				44. CLEARED BY ARREST OF (CHECK APPROPRIATE BOX OR BOXES)			
☐ UNFOUNDED	☒ CLEARED BY ARREST	☐ NOT CLEARED	☐ EXCEPTIONAL CLEARANCE	☒ ADULT	☐ JUVENILE	☐ ADULT AND JUVENILE	☐ NARCOTIC OFFENDER

STATUS OF CASE			46. CLASS	47. RE-CLASS	48. KEY PUNCHED BY	49. VERIFIED BY
☐ PENDING ACTIVE	☐ PENDING INACTIVE	☒ CLOSED	2411			

SUPERVISOR CLASSIFYING	DATE	51. TIME APPROVED	52. NUMBER OF PAGES
[signature]	3-7-04	1615	1 OF 2

1698
J-12077

POLICE DEPARTMENT **CONTINUATION REPORT** **NEWARK, N.J.**

SPECIFIC OFFENSE	DIST COMPLT NO	CENTRAL COMPLAINT NO
Aggravated Assault	W- 5949	04-23530
STATUTE OR ORDINANCE (R.S. N.J.S. REV. ORD.)	LOCATION OF OFFENSE	DATE OF OCCURRENCE
2C: 12-1B	So.orange Ave. & S.19th St.	03/06/04

Pg.2

walked up to the victim and stated to him "aint you the motherfucker that was with him the other day". refering to the deceased person. Mr. Spruill told him "no that was not me". Actor then insisted that was him and pulled out a handgun from his waistband. Mr.Spruill stated that before the actor had a chance to pull the handgun completely out of his waistband, he fled the scene. Unknown actor fled the scene to an unknown location. Actor (mike Cassidy) remained in the area where he was ultimately apprehended by officers of unit 412. The actor was transported to the robbery squad where he was slated for aggravated assault, Possession of a weapon (handgun) and possession of a weapon for unlawful purposes. Mr. Spruill was also transported to the robbery squad for a statement on the incident.

No weapon was recovered during this incident.

AMENDED PROPERTY VALUATION	A CURRENCY	B JEWELRY	C FURS	D CLOTHING	E LOCAL AUTO	F MISCELLANEOUS	G TOTALS

RANK PO — SIGNATURE OF OFFICER SUBMITTING REPORT Carl Owens — COMMAND West — BADGE NUMBER 7652

STATUS OF OFFENSE: ☐ UNFOUNDED ☒ CLEARED BY ARREST ☐ NOT CLEARED ☐ EXCEPTIONALLY CLEARED

STATUS OF CASE: ☐ PENDING ACTIVE ☐ PENDING INACTIVE ☒ CLOSED

CLEARED BY ARREST OF: ☐ JUV ☒ ADULT ☐ JUV & ADULT ☐ NARCOTIC OFFENDER

CLASSIFICATION 0410 — RECLASSIFICATION

READ, CLASSIFIED AND APPROVED BY — DATE

LIEUT. [illegible] — 04

TALLIED BY — INDEXED BY

FILED BY — PAGE NUMBER — NO. 1699

J-12078

POLICE DEPARTMENT **CONTINUATION REPORT** **NEWARK, N.J.**

SPECIFIC OFFENSE	DIST COMPLT NO	CENTRAL COMPLAINT NO
Aggravated Assault	W- 5949	04-23530
STATUTE OR ORDINANCE (R.S. N.J.S. REV ORD)	**LOCATION OF OFFENSE**	**DATE OF OCCURRENCE**
2C:12-1	S. Orange Ave. & So. 19th Street	March 6, 2004

Cont... Event #97614

The undersigned detective met with the victim, Mr. Christopher Spruill. He was transported to the Robbery Squad by Sgt. O'Connor of the West District. Mr. Spruill advised me that he was on S. Orange Avenue in the area of So. 19th Street, when an unknown Black male actor pointed a handgun at him.

At this time I was advised that the Officers of Unit #412 had detained a possible actor that matches the physical description of the actor, as well as the clothing description of the actor. I advised Unit #412 to transport the possible actor to the Robbery Squad.

Once at the Robbery Squad I met with the possible actor, he gave the name of Mike Cassidy. I took the possible actor's photos (digital photo) and showed them to the complaint. The complainant made a positive identification of this actor, as being the unknown Black male actor who pointed a handgun at him. The complainant signed and dated the shown photos. The complainant then gave a formal statement to Detective Sabur of the Newark Police Homicide Squad concerning this matter.

I then checked the actor's name in the Essex County BCI computer for identification purposes. The actor was identified as Shawn McPhall (BCI photo #C200308984 & SBI #524709C). I confronted the actor with this information. He admitted to the findings and his real name. I advised the actor that he was identified as the actor of this complainant and he will be arrested for this complaint. He was advised of his Rights and slated here at the Robbery Squad by Unit #412 (P/Os R. Oliveras & M. Cancel) for this complaint of Aggravated Assault.

This investigation is now Closed with the arrest of this actor, Mike Cassidy aka "Shawn McPhall". There was no weapon in his possession at the time of his arrest.

Arrested: Mike Cassidy aka "Shawn McPhall" CA #6221

Note: The actor was revealed to have four open warrants ACS Warrants held by the Newark Police Department. He was slated for these open warrants.

AMENDED PROPERTY VALUATION	A CURRENCY	B JEWELRY	C FURS	D CLOTHING	E LOCAL AUTO	F MISCELLANEOUS	G TOTALS

RANK	SIGNATURE OF OFFICER SUBMITTING REPORT	COMMAND	BADGE NUMBER
Detective	RICHARD WARREN II	Robbery / Homicide Section	155

STATUS OF OFFENSE: ☐ UNFOUNDED ☒ CLEARED BY ARREST ☐ NOT CLEARED ☐ EXCEPTIONALLY CLEARED

STATUS OF CASE: ☐ PENDING ACTIVE ☐ PENDING INACTIVE ☒ CLOSED

CLEARED BY ARREST OF: ☐ JUV ☒ ADULT ☐ JUV & ADULT ☐ NARCOTIC OFFENDER

CLASSIFICATION: 0410

RECLASSIFICATION:

READ, CLASSIFIED AND APPROVED BY: LIEUT.

DATE: 3-7-04

TALLIED BY:

INDEXED BY:

FILED BY:

PAGE NUMBER: 01

NO OF PAGES:

POLICE DEPARTMENT — ARREST REPORT — NEWARK, N.J.

1 PRISONER'S LAST NAME	FIRST	MIDDLE	2 TIME AND DATE OF ARREST	3 SECTOR	4 COMMAND	5 DIST COMPLT NO	6 CENT ARREST NO
CASSIDY	MICHAEL		1230 3/06/04	#416	W.D.	W-5949	#04-6221 D

7 PRISONER'S ADDRESS	8 FLR	9 APT	10 ALIASES (OR MAIDEN NAME IF FEMALE)	11 OTHER AGENCY #	12 CENT COMPLT NO
[redacted]			SHAWN MCPHALL		#04-23557

13 WHERE ARRESTED	14	15 PLACE OF BIRTH	16 AGE	17 HEIGHT	18 WEIGHT	19 HAIR	20 EYES	21 COMPLEXION
SO. ORANGE AVE/SO.18TH ST	[redacted]	NEWARK	20	5'7"	180	BLK	BRN	DARK

22 RACE	23 SEX	24 ☐ HISPANIC	25 ☐ MARRIED	26 CLOTHING	27 CDR #1 or CITY ORDINANCE
BLK	M	XX NON HISPANIC	XX SINGLE	BLK JACKET, [illegible] PANTS, & BLK BOOTS	SUM# S

28 SOC SEC NUMBER	29 DRIVERS LICENSE NO	30 STATE	31 VEH REG NO	32 SCHOOL AND GRADE OF JUVENILE	33 CDR #2
[redacted]					WAR# - W

34 OCCUPATION	35 NAME OF EMPLOYER OR GOVERNMENT AGENCY	36 SCARS, MARKS AND OTHER DESCRIPTIVE DATA	WAR# - W
UNEMPLOYED	N/A		

	37 SPECIFIC OFFENSE	STATE OR ORD NO	CLASS	JUDGE	COURT DOCKET NO	DISPOSITION	DATE OF DISPO	FINAL CHARGE
I	A.C.S. WARRANT	2C:29-7	2750					
II								
III								
IV								
V								

38 TIME AND DATE OF OCCURRENCE	39 TYPE OF PREMISES	40 PLACE OF OCCURRENCE	41 OCCURRED ON PUBLIC HOUSING PROPERTY?
3/14/03	NEWARK MUNICIPAL COURT	[redacted]	☐ YES ☐ NO

42 VICTIM OR COMPLAINANT'S NAME	43 VICTIM OR COMPLAINANT'S ADDRESS	44 COMPLTS TEL NO'S HOME & BUSINESS
NEWARK MAGISTRATE	SAME AS BOX #40	

45. DETAILS OF ARREST

EVENT #97830

THE ABOVE SUSPECT WAS FOUND TO HAVE AN OUTSTANDING WARRANT

WARRANT #;W-2002-026455

D.O.I. ; 03/04/2003

BAIL ; $500.00

OFFENSE ; 2C:17-3A(1)

S.B.I. #;524709 C

46. STRANGER TO STRANGER CRIME	47 CHECK REPORTS SUB
☐ YES ☐ NO ☐ UNKNOWN	DP 1:802
	DP 1:795
	NJTR-1
	NP 1:1001
	DP 1:1517
	DP 1:152
	DP 1:152:1
	DP 1:225A
	CDR XXX 1755

PRISONER PROPERTY #N 227421

48. OTHER PERSON ARRESTED (NAME)	49 CENT ARREST NO	50 OTHER PERSON ARRESTED (NAME)	51 CENT ARREST NO

52 RECORD CHECK BY	53 RESULTS OF RECORD CHECK	54 IS PRISONER WANTED?	55 IF WANTED BY WHOM?	56 WHO WAS NOTIFIED?	57 DET NOTIFIED	58 PARENTS OF JUV NOTIFIED BY:	59 INTAKE OFFICER
WALTON	XX RECORD ☐ NO RECORD	YES	NEWARK				

60 JUV RELEASED TO / RELATIONSHIP	61 ADDRESS PERSON RELEASED TO	62 HOME TELEPHONE NUMBER	63 BUSINESS TELEPHONE	64 JUVENILE DETAINED AT

65 PRISONER TO BE FINGERPRINTED	66 PRISONER TO BE PHOTOGRAPHED	67 PRISONER SEARCHED BY	68 MONEY IN PRISONER'S POSSESSION	69 RESTRICTIONS	70 RESERVED
XX YES ☐ NO	XX YES ☐ NO	R. OLIVERAS	$135.00	☐ YES ☐ NO	

71 SIGNATURE OF ARRESTING OFFICER / COMMAND / I.D NO / TOUR OF DUTY	72 READ, CLASSIFIED AND APPROVED BY
P/O R. OLIVERAS 1ST DISTRICT #7832 0700-1500	LIEUT. C701

73 INVESTIGATION ASSIGNED TO	74 INVESTIGATION COMPLETED (SIGNATURE OF INVESTIGATOR)	75 ARRAIGNMENT (DATE)	76 COURT	77 AMOUNT OF BAIL	78 BAIL SET OR PAROLED BY

79 SIGNATURE OF PERSON PAROLED TO	80 LIEUTENANT ACCEPTING BAIL OR PAROLING PRISONER	81 COMMITTED IN DEFAULT OF BAIL ☐ YES ☐ NO	COMMITTED WITHOUT BAIL ☐ YES ☐ NO	DIRECTLY TO ARRAIGNMENT ☐ YES ☐ NO

82 OFFICER IN CHARGE OF PRISONER	83 SENT TO CELL BLOCK BY	84 RECEIVED AT CELL BLOCK BY	85 TIME & DATE REC	86 CELL NO

87 TIME AND DATE TO COURT	OFFICER	88 POSTPONED TO	/
89 TIME AND DATE FROM COURT	OFFICER	90 PREVIOUS ARRESTS FOR BAIL DETERMINATION	
91 TIME AND DATE OF JAIL	OFFICER	92 RESERVED	93 F P NO / GAL NO
[illegible]	95 MUG PHOTOGRAPH [illegible]	97 FINGERPRINTED [illegible] PHOTOGRAPHED BY	98 S B NO #524709 1701 / F B I NO

TO BE FORWARDED TO THE MUNICIPAL [illegible] IS COMPLETED TO BE CHARGED TO [illegible]

J-12080

POLICE DEPARTMENT — ARREST REPORT — NEWARK, N.J.

PRISONER'S LAST NAME	FIRST	MIDDLE	2 TIME AND DATE OF ARREST	3 SECTOR	4 COMMAND	5 DIST COMPLT NO	6 CENT ARREST NO
CASSIDY	MICHAEL		1230 3/06/04	#416	W.D.	W-5949	6221 B5

PRISONER'S ADDRESS	8 FLR	9 APT	10 ALIASES (OR MAIDEN NAME IF FEMALE)	11 OTHER AGENCY #	12 CENT COMPLT NO
[redacted]			SHAWN MCPHALL / Sean Cassidy		04-23555

13 WHERE ARRESTED	14 DATE OF BIRTH	15 PLACE OF BIRTH	16 AGE	17 HEIGHT	18 WEIGHT	19 HAIR	20 EYES	21 COMPLEXION
[illegible] AVE/SO. 18TH ST	[redacted]	NEWARK	20	5'7"	180	BLK	BRN	DARK

22 RACE	23 SEX	24 ☐ HISPANIC	25 ☐ MARRIED	26 CLOTHING	27 CDR #1 or CITY ORDINANCE
BLK	M	XX NON HISPANIC	XX SINGLE	BLK JACKET, WHITE SHIRT, [illegible] PANTS, & BLK BOOTS	SUM# S

28 SOC SEC NUMBER	29 DRIVERS LICENSE NO	30 STATE	31 VEH REG NO	32 SCHOOL AND GRADE OF JUVENILE	33 CDR #2
[redacted]	N/A	N/A	N/A	N/A	WAR# - W WAR# - W

34 OCCUPATION	35 NAME OF EMPLOYER OR GOVERNMENT AGENCY	36 SCARS, MARKS AND OTHER DESCRIPTIVE DATA
UNEMPLOYED	N/A	None visible

	37. SPECIFIC OFFENSE	STATE OR ORD NO	CLASS	JUDGE	COURT DOCKET NO	DISPOSITION	DATE OF DISPO	FINAL CHARGE
I	A.C.S. WARRANT	2C:29-7	2750					
II								
III								
IV								
V								

38 TIME AND DATE OF OCCURRENCE	39 TYPE OF PREMISES	40 PLACE OF OCCURRENCE	41. OCCURRED ON PUBLIC HOUSING PROPERTY?
Prior 9/26/03	NEWARK MUNICIPAL COURT	[redacted]	☐ YES ☐ NO

42. VICTIM OR COMPLAINANT'S NAME	43 VICTIM OR COMPLAINANT'S ADDRESS	44 COMPLTS TEL NO'S. HOME & BUSINESS
NEWARK MAGISTRATE	SAME AS BOX #40	[redacted]

45 DETAILS OF ARREST:

EVENT # 97828
THE ABOVE SUSPECT WAS FOUND TO HAVE AN OUTSTANDING WARRANT
WARRANT #; W 2001 043258
D.O.I. ; 09/26/03
BAIL ; $250.00
OFFENSE ; 2C:36-2
S.B.I. #;524709 C
Held By Newark,NJ.

46 STRA[illegible] ☐ YES ☐ NO ☐ UNKNOWN

47. CHECK REPORTS SUB

	DP 1:802
	DP 1:795
	NJTR-1
	NP 1:1001
	DP 1:1517
	DP 1:152
	DP 1:152:1
	DP 1:225A
	CDR

PRISONER PROPERTY #N 227421 XX 1755

48. OTHER PERSON ARRESTED (NAME)	49 CENT ARREST NO	50 OTHER PERSON ARRESTED (NAME)	51. CENT. ARREST NO

52 RECORD CHECK BY	53 RESULTS OF RECORD CHECK	54 IS PRISONER WANTED?	55 IF WANTED BY WHOM?	56 WHO WAS NOTIFIED?	57 DET NOTIFIED	58 PARENTS OF JUV NOTIFIED BY.	59 INTAKE OFFICER
WALTON	XX RECORD ☐ NO RECORD	YES	NEWARK				

60 JUV RELEASED TO / RELATIONSHIP	61 ADDRESS PERSON RELEASED TO	62 HOME TELEPHONE NUMBER	63 BUSINESS TELEPHONE	64 JUVENILE DETAINED AT

65 PRISONER TO BE FINGERPRINTED	66 PRISONER TO BE PHOTOGRAPHED	67 PRISONER SEARCHED BY	68 MONEY IN PRISONER'S POSSESSION	69 RESTRICTIONS	70 RESERVED
XX ☐ YES ☐ NO	XX ☐ YES ☐ NO	R. OLIVERAS	$135.00 ☐ YES ☐ NO		

71 SIGNATURE OF ARRESTING OFFICER / COMMAND	ID NO / TOUR OF DUTY	72 READ, CLASSIFIED AND APPROVED BY
P/O R. OLIVERAS WEST DISTRICT	#1832 0700-1500	LIEUT

73 INVESTIGATION ASSIGNED TO	74 INVESTIGATION COMPLETED (SIGNATURE OF INVESTIGATOR)	75 ARRAIGNMENT (DATE)	76 COURT	77 AMOUNT OF BAIL	78 BAIL SET OR PAROLED BY

79 SIGNATURE OF PERSON PAROLED TO	80 LIEUTENANT ACCEPTING BAIL OR PAROLING PRISONER	81 COMMITTED IN DEFAULT OF BAIL ☐ YES ☐ NO	COMMITTED WITHOUT BAIL ☐ YES ☐ NO	DIRECTLY TO ARRAIGNMENT ☐ YES ☐ NO

82 OFFICER IN CHARGE OF PRISONER	83 SENT TO CELL BLOCK BY	84 RECEIVED AT CELL BLOCK BY	85 TIME & DATE REC	86 CELL NO

87 TIME AND DATE TO COURT / OFFICER	88 POSTPONED TO
	/ /

89 TIME AND DATE FROM COURT / OFFICER	90 PREVIOUS ARRESTS FOR BAIL DETERMINATION

91 TIME AND DATE OF JAIL / OFFICER	92 RESERVED	93 F.P. NO / GAL NO

[illegible] BY	95 MUGSHOT PROCESS[illegible] RECEIVED	97 FINGERPRINTS [illegible] PHOTOGRAPHED BY	98 S.B. NO #524709 1702 / F.B.I. NO

J-12081

TO BE FORWARDED [illegible] THE MUNICIPAL [illegible] IS COMPLETED TO BE FORWARDED [illegible]

POLICE DEPARTMENT — ARREST REPORT — NEWARK, N.J.

PRISONER'S LAST NAME	FIRST	MIDDLE	2 TIME AND DATE OF ARREST	3 SECTOR	4 COMMAND	5 DIST COMPLT NO	6 CENT ARREST NO
[redacted]	MICHAEL		1230 3/06/04	416	W.D.	W-5949	#04-6221(A)

PRISONER'S ADDRESS	8 FLR	9 APT	10 ALIASES (OR MAIDEN NAME IF FEMALE)	11 OTHER AGENCY #	12 CENT COMPLT NO
[redacted]			SHAWN MCPHALL (Street)		#04-23530

13 WHERE ARRESTED	14 DATE OF BIRTH	15 PLACE OF BIRTH	16 AGE	17 HEIGHT	18 WEIGHT	19 HAIR	20 EYES	21 COMPLEXION
[redacted] ORANGE AVE/SO. 18TH ST.	[redacted]	NEWARK	20	5'7"	180	BLK	BRN	DARK

22 RACE	23 SEX	24 HISPANIC	25 MARRIED	26 CLOTHING	27 CDR #1 or CITY ORDINANCE
BLK	M	XX NON HISPANIC	XX SINGLE	BLK JACKET, [illegible] SWEATSHIRT, BLK PANTS, & BLK BOOTS	

28 SOC SEC NUMBER	29 DRIVERS LICENSE NO	30 STATE	31 VEH REG NO	32 SCHOOL AND GRADE OF JUVENILE	SUM# S
[redacted]					

34 OCCUPATION	35 NAME OF EMPLOYER OR GOVERNMENT AGENCY	36 SCARS, MARKS AND OTHER DESCRIPTIVE DATA	33 CDR #2
UNEMPLOYED	N/A		WAR# - W 008291 WAR# - W

	37 SPECIFIC OFFENSE	STATE OR ORD NO	CLASS	JUDGE	COURT DOCKET NO	DISPOSITION	DATE OF DISPO	FINAL CHARGE
I	AGG. ASSAULT	2C:12-1B	0420					
II	POSS. OF A WEAPON (HANDGUN)	2C:39-5B	1502					
III	POSS. FOR AN UNLAWFUL PURPOSE	2C:39-4A	1501					
IV								
V								

38 TIME AND DATE OF OCCURRENCE	39 TYPE OF PREMISES	40 PLACE OF OCCURRENCE	41 OCCURRED ON PUBLIC HOUSING PROPERTY?
1130 3/6/04	CITY SIDEWALK	SO. ORANGE AVE/SO. 19TH ST.	☐YES ☐NO

42 VICTIM OR COMPLAINANT'S NAME	43 VICTIM OR COMPLAINANT'S ADDRESS	44 COMPLTS TEL NO'S HOME & BUSINESS
CHRISTOPHER SPRUILL	[redacted]	[redacted]

45 DETAILS OF ARREST:

EVENT #97614

THE ABOVE ACTOR WAS POSITIVELY IDENTIFIED AS THE SUSPECT WHO POINTED A HANDGUN AT HIM ON THIS DATE.

PROPERTY BAG#N 227421

46 STRANGER TO STRANGER CRIME ☐YES ☐NO ☐UNKNOWN

47 CHECK REPORTS SUB

- ☐ DP 1:802
- ☐ DP 1:795
- ☐ NJTR-1
- ☐ NP 1:1001
- ☐ DP 1:1517
- ☐ DP 1:152
- ☐ DP 1:152:1
- ☐ DP 1:225A
- ☐ CDR

XXX 1755

48 OTHER PERSON ARRESTED (NAME)	49 CENT ARREST NO	50 OTHER PERSON ARRESTED (NAME)	51 CENT. ARREST NO

52 RECORD CHECK BY:	53 RESULTS OF RECORD CHECK	54 IS PRISONER WANTED?	55 IF WANTED BY WHOM?	56 WHO WAS NOTIFIED?	57 DET NOTIFIED	58 PARENTS OF JUV NOTIFIED BY:	59 INTAKE OFFICER
WALTON	XX RECORD ☐NO RECORD	YES	Nork				

60 JUV RELEASED TO / RELATIONSHIP	61 ADDRESS PERSON RELEASED TO	62 HOME TELEPHONE NUMBER	63 BUSINESS TELEPHONE	64 JUVENILE DETAINED AT

65 PRISONER TO BE FINGERPRINTED	66 PRISONER TO BE PHOTOGRAPHED	67 PRISONER SEARCHED BY	68 MONEY IN PRISONER'S POSSESSION	69 RESTRICTIONS	70 RESERVED
XX YES ☐NO	XX YES ☐NO	R. OLIVERAS	$135.00	☐YES ☐NO	

71 SIGNATURE OF ARRESTING OFFICER / COMMAND / ID NO / TOUR OF DUTY	72 READ, CLASSIFIED AND APPROVED BY
P/O MANUEL A. CANCEL II WEST DISTRICT #7832 0700-1500	LIEUT [signature]

73 INVESTIGATION ASSIGNED TO	74 INVESTIGATION COMPLETED (SIGNATURE OF INVESTIGATOR)	75 ARRAIGNMENT (DATE)	76 COURT	77 AMOUNT OF BAIL	78 BAIL SET OR PAROLED BY

79 SIGNATURE OF PERSON PAROLED TO	80 LIEUTENANT ACCEPTING BAIL OR PAROLING PRISONER	81 COMMITTED IN DEFAULT OF BAIL ☐YES ☐NO	COMMITTED WITHOUT BAIL ☐YES ☐NO	DIRECTLY TO ARRAIGNMENT ☐YES ☐NO

82 OFFICER IN CHARGE OF PRISONER	83 SENT TO CELL BLOCK BY	84 RECEIVED AT CELL BLOCK BY	85 TIME & DATE REC	86 CELL NO

87 TIME AND DATE TO COURT	OFFICER	88 POSTPONED TO / /
89 TIME AND DATE FROM COURT	OFFICER	90 PREVIOUS ARRESTS FOR BAIL DETERMINATION
91 TIME AND DATE OF JAIL	OFFICER	92 RESERVED

93 F.P. NO

GAL NO

RELEASED BY	[illegible]	TIME RELEASED	FINGERPRINTED BY	PHOTOGRAPHED BY	SB NO #524703	FBI NO

1703

J-12082

TO BE FORWARDED TO THE [illegible] IS COMPLETED [illegible]

OLICE DEPARTMENT — ARREST REPORT

PRISONER'S LAST NAME	FIRST	MIDDLE	2 TIME AND DATE OF ARREST	3 SECTOR	4 COMMAND	5 DIST COMPLT NO	6 CENT ARREST NO
CASSIDY	MICHAEL		1230 3/06/04	416	W.D.	W-5949	6221 ES

PRISONER'S ADDRESS	8 FLR	9 APT	10 ALIASES (OR MAIDEN NAME IF FEMALE)	11 OTHER AGENCY #	12 CENT COMPLT NO
[redacted]			SHAWN MCPHALL/Sean Green		04-23558

WHERE ARRESTED	14 DATE OF BIRTH	15 PLACE OF BIRTH	16 AGE	17 HEIGHT	18 WEIGHT	19 HAIR	20 EYES	21 COMPLEXION
[illegible] AVE/SO.18TH ST.	[redacted]	NEWARK	20	5'7"	180	BLK	BRN	DARK

RACE	23 SEX	24 ☐ HISPANIC	25 ☐ MARRIED	
BLK	M	XX NON HISPANIC	XX SINGLE	WHITE SHIRT, CAMOUFLAGE PANTS, & BLK BOOTS

27 CDR #1 or CITY ORDINANCE	SUM # S
	SUM # C

28 SOC. SEC. NUMBER	29 DRIVERS LICENSE NO	30 STATE	31 VEH. REG. NO	32 SCHOOL AND GRADE OF JUVENILE	33 CDR #2
[redacted]					WAR# - W. WAR# - W.

34 OCCUPATION	35 NAME OF EMPLOYER OR GOVERNMENT AGENCY	36 SCARS, MARKS AND OTHER DESCRIPTIVE DATA
UNEMPLOYED	N/A	

	37 SPECIFIC OFFENSE	STATE OR ORD NO	CLASS	JUDGE	COURT DOCKET NO	DISPOSITION	DATE OF DISPO	FINAL CHARGE
I	A.C.S. WARRANT	2C:29-7	2750					
II								
III								
IV								
V								

38 TIME AND DATE OF OCCURRENCE	39 TYPE OF PREMISES	40 PLACE OF OCCURRENCE	41 OCCURRED ON PUBLIC HOUSING PROPERTY?
Prior 3/14/03	NEWARK MUNICIPAL COURT	[redacted]	☐ YES ☐ NO

42 VICTIM OR COMPLAINANT'S NAME	43 VICTIM OR COMPLAINANT'S ADDRESS	44 COMPLTS TEL. NO'S. HOME & BUSINESS
NEWARK MAGISTRATE	SAME AS BOX #40	[redacted]

45 DETAILS OF ARREST:

EVENT # 97831
THE ABOVE SUSPECT WAS FOUND TO HAVE AN OUTSTANDING WARRANT
WARRANT #; CO 2002 103934
D.O.I. ; 3/14/03
BAIL ; $500.00
OFFENSE ; CO1727B
S.B.I. #;524709 C
Held By Newark

PRISONER PROPERTY #N 227421

46 STRANGER TO STRANGER CRIME ☐ YES ☐ NO ☐ UNKNOWN

47 CHECK REPORTS SUB.

- ☐ DP 1:802
- ☐ DP 1:795
- ☐ NJTR-1
- ☐ NP 1:1001
- ☐ DP 1:1517
- ☐ DP 1:152
- ☐ DP 1:152:1
- ☐ DP 1:225A
- ☐ CDR XXX 1755

48 OTHER PERSON ARRESTED (NAME)	49 CENT ARREST NO	50 OTHER PERSON ARRESTED (NAME)	51 CENT ARREST NO
N/A	N/A	N/A	N/A

52 RECORD CHECK BY	53 RESULTS OF RECORD CHECK	54 IS PRISONER WANTED?	55 IF WANTED BY WHOM?	56 WHO WAS NOTIFIED?	57 DET NOTIFIED	58 PARENTS OF JUV NOTIFIED BY:	59 INTAKE OFFICER
WALTON	XX RECORD ☐ NO RECORD	YES	NEWARK				

60 JUV. RELEASED TO / RELATIONSHIP	61 ADDRESS PERSON RELEASED TO	62 HOME TELEPHONE NUMBER	63 BUSINESS TELEPHONE	64 JUVENILE DETAINED AT

65 PRISONER TO BE FINGERPRINTED	66 PRISONER TO BE PHOTOGRAPHED	67 PRISONER SEARCHED BY	68 MONEY IN PRISONER'S POSSESSION	69 RESTRICTIONS	70 RESERVED
☐ YES ☐ NO	XX ☐ YES ☐ NO	R. OLIVERAS	$135.00	☐ YES ☐ NO	

71 SIGNATURE OF ARRESTING OFFICER / COMMAND	ID NO / TOUR OF DUTY	72 READ, CLASSIFIED AND APPROVED BY
P/O R. OLIVERAS WEST DISTRICT	7635 ~~7832~~ 0700-1500	LIEUT.

73 INVESTIGATION ASSIGNED TO	74 INVESTIGATION COMPLETED (SIGNATURE OF INVESTIGATOR)	75 ARRAIGNMENT (DATE)	76 COURT	77 AMOUNT OF BAIL	78 BAIL SET OR PAROLED BY

79 SIGNATURE OF PERSON PAROLED TO	80 LIEUTENANT ACCEPTING BAIL OR PAROLING PRISONER	81 COMMITTED IN DEFAULT OF BAIL ☐ YES ☐ NO	COMMITTED WITHOUT BAIL ☐ YES ☐ NO	DIRECTLY TO ARRAIGNMENT ☐ YES ☐ NO

82 OFFICER IN CHARGE OF PRISONER	83 SENT TO CELL BLOCK BY	84 RECEIVED AT CELL BLOCK BY	85 TIME & DATE REC	86 CELL NO

87 TIME AND DATE TO COURT	OFFICER	88 POSTPONED TO	/ /
89 TIME AND DATE FROM COURT	OFFICER	90 PREVIOUS ARRESTS FOR BAIL DETERMINATION	
91 TIME AND DATE OF JAIL	OFFICER	92 RESERVED	93 F.P. NO / GAL NO

94 INDEXED BY	95 MICRO	96 RESERVED	97 FINGERPRINTED / PHOTOGRAPHED BY	98 S.B. NO #524709 C / F.B.I. NO

1704

TO BE FORWARDED TO THE JU... WHEN DOC IS COMPLETED TO BE FO... R AND THREAD

2083

U.S. Department of Justice

United States Attorney
District of New Jersey

970 Broad Street, Suite 700 *973/645-2700*
Newark, NJ 07102

July 1, 2009

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Newark, NJ 07102

Miles Feinstein, Esq.
1135 Clifton Avenue
Clifton, NJ 07013

Re: United States v. Paul Bergrin, Yolanda Jauregui, Thomas Moran, Vicente Esteves and Sundiata Koontz
Crim. No. 09-369 (WJM)

Dear Messrs. Martir, Ruhnke, Adams, Meringolo, McGovern and Feinstein:

This letter supplements the government's letter of June 15, 2009, regarding discovery in the above captioned case. Pursuant to an agreement between the government and the defendants, the

government is providing the below listed materials to Document Technologies, Inc. at 60 Park Place, Newark, NJ 07102. Please contact Senior Account Manager Christopher Henry at (973) 622-6111 to make arrangements to receive copies of these materials.

a. 3 compact discs containing discoverable materials related to the murder of Kemo Deshawn McCray (Bask-CD-1, Bask CD-2 and Bask 000001-000948).

b. 22 compact discs containing audio recordings of consensually monitored conversations relating to the plot to kill witnesses against Vicente Esteves in the Monmouth County Case (CW1-000001 through CW1-000016 and CW1-000018 through CW1-000023).

c. 9 compact discs containing bank records, records of real estate transactions and other discoverable documents. (PBWACH-CD-1, PBWACH-CD-2, PBWACH-CD-3, PBVERIZ-31/2-1, ISABELA-CD-1, PBVERIZ-CD-2, PBSURV-CD-1, PBSURVCD-2 and BOX 1-5)

d. 4 compact discs containing audio recordings related to the wire fraud transactions contained in the indictment (CW2-000001, CW2-000003, CW2-000004 and CW2-000007).

e. 1 computer hard drive containing discoverable materials related to the Vicente Esteves Monmouth County Case.

f. 14 compact discs containing audio recordings of approximately 40,000 intercepted telephone conversations (CW-000001 through CW-000014).

The government will provide additional discoverable materials to Document Technologies, Inc. in the near future. Any of the materials set forth in the government’s June 15, 2009 letter that have not yet been given to Document Technologies, Inc. are currently available for your review and inspection. Please contact me at (973) 297-2018 to arrange for a mutually convenient time for you to inspect these materials.

Please contact me at your earliest convenience should you have any questions or wish to discuss any matters relating to discovery.

Very truly yours,

RALPH J. MARRA JR.
Acting United States Attorney

s/John Gay
By: John Gay
Assistant U.S. Attorney

cc: Honorable William J. Martini
Christopher Henry

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
Criminal No. 2:09-cr-00369-WJM

UNITED STATES OF AMERICA, :
: TRANSCRIPT OF PROCEEDINGS
v. : - Trial -
:
PAUL W. BERGRIN, :
:
Defendant. :
- - - - - - - - - - - - - - - -x

Newark, New Jersey
October 21, 2011

B E F O R E:

THE HONORABLE WILLIAM J. MARTINI,
UNITED STATES DISTRICT JUDGE,
And a Jury

Pursuant to Section 753 Title 28 United States Code, the following transcript is certified to be an accurate record as taken stenographically in the above entitled proceedings.

A P P E A R A N C E S:

UNITED STATES ATTORNEY'S OFFICE
BY: JOHN GAY
JOSEPH N. MINISH
STEVEN G. SANDERS
Assistant U. S. Attorneys
For the Government

PAUL W. BERGRIN, Defendant, Pro se
- and -
GBBONS, PC
BY: LAWRENCE S. LUSTBERG, ESQ., Standby Counsel
AMANDA B. PROTESS, ESQ.
for the Defendant

Pursuant to Section 753 Title 28 United States Code, the following transcript is certified to be an accurate record as taken stenographically in the above entitled proceedings.

S/WALTER J. PERELLI
WALTER J. PERELLI, CCR, CRR
Official Court Reporter

I N D E X

E X H I B I T S

Sidebar Discussions

Colloquy Between Court and Counsel
Jury Not Present

THE COURT: Yeah.

Q You had a weapons conviction also, correct, in New York State?

A Correct.

Q And you had a hindering apprehension conviction. Correct?

A Correct.

Q And you had a major narcotic case where you did 10 years behind the wall. Correct?

A That is correct.

Q A maximum security prison. Right?

A That is correct.

Q And you had the six years, at least, you had six years of parole hanging over your head at the time that you talked to these agents. Right?

A That is correct.

Q And you knew that you had been involved in more narcotic dealing at the time that you dealt -- that you talked with the agents that you hadn't been charged with. Correct?

A That is correct.

Q So isn't it a fact, sir, that you wanted to give them as much information to save yourself from being charged and potentially getting more time than you're doing presently?

A That is correct.

Q Now, Mr. Jimenez, Mr. Gay asked you yesterday about some of the -- the fact that you've used her names. Correct?

Q And they make sure that their witnesses are well protected. Correct?
A Correct.
Q And that they'll stand by you a hundred percent. Correct?
Correct?
A Yes.
Q And they gave you the impression that you didn't have to worry about the Pennsylvania parole, right, that they were going to help you out with it and help your sister out? That's the impression that you got in your mind. Correct?
A Yes, yes.
Q Now, when you were appointed the attorney, John Azzarello, did he ever interrogate you or intimidate you?
A At one point I felt like he was interrogating me.
Q As a matter of fact, you told the Ethics Committee that on April of 2011, that John Azzarello was intimidating you and questioned you for over 30 minutes back-and-forth in the presence of the Assistant U.S. Attorney, John Gay. Correct?
A Correct.
Q And that he kept asking you the same questions over and over and over again. Right?
A Let me re -- let me rephrase that.
Q But can you --
MR. BERGRIN: Your Honor, can you please just instruct him to answer the question?

MR. GAY: Well, Judge, here's the thing now --
THE COURT: What's that?
MR. GAY: Mr. Bergrin has made -- has had extensive cross-examination about a number of topics, including one topic which he's opened the door to, in my opinion, is for us to be able to discuss with Mr. Jimenez that one of his concerns was the safety of his family. And that's part of the reason why he filed this letter with the grievance committee. Because again, his whole -- he had two concerns. The first was --
THE COURT: He just filed this letter.
MR. GAY: I understand that, Judge. But again, you have to understand what the time --
THE COURT: His family has been in witness protection --
MR. GAY: No, no, no.
THE COURT: They're still not?
MR. GAY: No.
THE COURT: Nobody is?
MR. GAY: No. His family is a large family, I will say that. There are portions of his family that were put into witness protection with respect to Yolanda, there are other members of the family, his immediate family, his wife and children, who were not people that went into WITSEC. They didn't ask for it. We didn't put them in. Once he came on board and decided he wanted to give information, we explained

to him, if you want us to go to WITSEC, we will. And as I said yesterday, the problem is that he has a daughter whose immigration status is not clear.

THE COURT: You told me.

MR. GAY: And that was the whole position. So he was on board, he was ready to go.

He had the May 12th meeting in which he came clean except for -- I know Mr. Bergrin -- he's not charged with a crime until after that. After he's charged with a crime he still comes on board and is cooperating. And then it's not until he learns that his daughter is not going to get into WITSEC or that we can't guarantee the daughter is going to get into WITSEC, that's when Mr. Azzarello informs him of that. He says, forget about this.

THE COURT: That was a week ago?

MR. GAY: No, it was whatever the -- right before the 28th.

MR. LUSTBERG: September 28th.

THE COURT: Okay. A few weeks ago before the trial?

MR. GAY: A few weeks ago, yeah.

So then he says to Mr. Azzarello: I do not want to do this anymore.

THE COURT: All right.

MR. GAY: I don't want to cooperate anymore. I'm just going to to take my time because my family is at risk, and I'm

IN THE UNITED STATES DISTRICT COURT
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UNITED STATES OF AMERICA, :
: TRANSCRIPT OF PROCEEDINGS
v. : - Trial -
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PAUL W. BERGRIN, :
:
Defendant :
- - - - - - - - - - - - - - - -x

Newark, New Jersey
October 24, 2011

B E F O R E:

THE HONORABLE WILLIAM J. MARTINI,
UNITED STATES DISTRICT JUDGE,
and a Jury

A P P E A R A N C E S:

UNITED STATES ATTORNEY'S OFFICE
BY: JOHN GAY
JOSEPH N. MINISH
STEVEN G. SANDERS
Assistant U.S. Attorneys
For the Government

PAUL W. BERGRIN, Defendant, Pro Se
- and -
GIBBONS PC
BY: LAWRENCE S. LUSTBERG, ESQ., Standby Counsel
AMANDA B. PROTESS, ESQ.
For Defendant Paul W. Bergrin

Pursuant to Section 753 Title 28 United States Code, the following transcript is certified to be an accurate record as taken stenographically in the above entitled proceedings.

S/WALTER J. PERELLI

WALTER J. PERELLI, CCR, CRR
OFFICIAL COURT REPORTER

I N D E X

E X H I B I T S

Disscussions at the Sidebar

Colloquy Between Court and Counsel
(Jury not Present)

October 24, 2011

(Trial resumes - Jury not present.)

THE COURT: Good morning.

MR. LUSTBERG: Good morning, your Honor.

MR. BERGRIN: Good morning.

MR. GAY: Good morning.

THE COURT: Be seated, everyone, please.

Mr. Minish, I understand you have something?

MR. MINISH: Just a couple of things briefly, Judge.

THE COURT: Okay.

MR. MINISH: The next witness is Yolanda Jauregui. And I've had discussions with Mr. Lustberg about a couple of areas and I just want to put a couple of things on the record and then bring one issue to the Court's attention.

The witness has been moved into the Witness Security Program and there have been similar benefits given to family members. It is our understanding that the Defendant is not going to go into that area, and therefore the Government is not going to go into that area in its direct.

MR. LUSTBERG: That's correct, Judge.

THE COURT: How about the witness protection, period?

MR. LUSTBERG: We're not going into it.

THE COURT: Hers or the family's?

MR. LUSTBERG: That's correct.

THE COURT: Okay.

U.S. Department of Justice

United States Attorney
District of New Jersey

970 Broad Street, Suite 700
Newark, NJ 07102

973/645-2700

JG/JNM/PL AGR

October 6, 2011

John A. Azzarello
Arseneault, Whipple, Fassett & Azzarello, LLP
560 Main Street
Chatham, NJ 07928

Re: Plea Agreement with Ramon Jimenez

Dear Mr. Azzarello:

This letter sets forth the plea agreement between your client, Ramon Jimenez, and the United States Attorney for the District of New Jersey ("this Office").

Charge

Conditioned on the understandings specified below, this Office will accept a guilty plea from Ramon Jimenez to a one count information, which charges Ramon Jimenez with being a member of a cocaine trafficking conspiracy, contrary to 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(B), in violation of 21 U.S.C. § 846. If Ramon Jimenez enters a guilty plea and is sentenced on this charge, and otherwise fully complies with all of the terms of this agreement, this Office will not initiate any further criminal charges against Ramon Jimenez for his trafficking in excess of 500 grams of cocaine through a cocaine trafficking conspiracy from in or about 2003 through in or about October 2007 in Essex County, New Jersey. However, in the event that a guilty plea in this matter is not entered for any reason or the judgment of conviction entered as a result of this guilty plea does not remain in full force and effect, defendant agrees that any dismissed charges and any other charges that are not time-barred by the applicable statute of limitations on the date this agreement is signed by Ramon Jimenez may be commenced against him, notwithstanding the expiration of the limitations period after Ramon Jimenez signs the agreement.

Sentencing

The violation of 21 U.S.C. § 846 to which Ramon Jimenez

agrees to plead guilty carries a statutory minimum sentence of 5 years and a maximum prison sentence of 40 years and a statutory maximum fine equal to the greatest of: (1) $2,000,000 or (2) twice the gross profits or other proceeds to Ramon Jimenez. Fines imposed by the sentencing judge may be subject to the payment of interest.

The sentence to be imposed upon Ramon Jimenez is within the sole discretion of the sentencing judge, subject to the provisions of the Sentencing Reform Act, 18 U.S.C. § 3551-3742, and the sentencing judge's consideration of the United States Sentencing Guidelines. The United States Sentencing Guidelines are advisory, not mandatory. The sentencing judge may impose any reasonable sentence up to and including the statutory maximum term of imprisonment and the maximum statutory fine. This Office cannot and does not make any representation or promise as to what guideline range may be found by the sentencing judge, or as to what sentence Ramon Jimenez ultimately will receive.

Further, in addition to imposing any other penalty on Ramon Jimenez, the sentencing judge: (1) will order Ramon Jimenez to pay an assessment of $100 pursuant to 18 U.S.C. § 3013, which assessment must be paid by the date of sentencing; (2) may order Ramon Jimenez to pay restitution pursuant to 21 U.S.C. § 841; (3) must order forfeiture, pursuant to 21 U.S.C. § 853; (4) may deny Ramon Jimenez certain statutorily defined benefits, pursuant to 21 U.S.C. §§ 862 and 862a; and (5) pursuant to 21 U.S.C. § 841, must require Ramon Jimenez to serve a term of supervised release of at least 4 years, which will begin at the expiration of any term of imprisonment imposed. Should Ramon Jimenez be placed on a term of supervised release and subsequently violate any of the conditions of supervised release before the expiration of its term, Ramon Jimenez may be sentenced to not more than 3 years' imprisonment in addition to any prison term previously imposed, regardless of the statutory maximum term of imprisonment set forth above and without credit for time previously served on post-release supervision, and may be sentenced to an additional term of supervised release.

Rights of This Office Regarding Sentencing

Except as otherwise provided in this agreement, this Office reserves its right to take any position with respect to the appropriate sentence to be imposed on Ramon Jimenez by the sentencing judge, to correct any misstatements relating to the sentencing proceedings, and to provide the sentencing judge and the United States Probation Office all law and information relevant to sentencing, favorable or otherwise. In addition,

this Office may inform the sentencing judge and the United States Probation Office of: (1) this agreement; and (2) the full nature and extent of Ramon Jimenez's activities and relevant conduct with respect to this case.

Stipulations

This Office and Ramon Jimenez agree to stipulate at sentencing to the statements set forth in the attached Schedule A, which hereby is made a part of this plea agreement. This agreement to stipulate, however, cannot and does not bind the sentencing judge, who may make independent factual findings and may reject any or all of the stipulations entered into by the parties. To the extent that the parties do not stipulate to a particular fact or legal conclusion, each reserves the right to argue the existence of and the effect of any such fact or conclusion upon the sentence. Moreover, this agreement to stipulate on the part of this Office is based on the information and evidence that this Office possesses as of the date of this agreement. Thus, if this Office obtains or receives additional evidence or information prior to sentencing that it determines to be credible and to be materially in conflict with any stipulation in the attached Schedule A, this Office shall not be bound by any such stipulation. A determination that any stipulation is not binding shall not release either this Office or Ramon Jimenez from any other portion of this agreement, including any other stipulation. If the sentencing court rejects a stipulation, both parties reserve the right to argue on appeal or at post-sentencing proceedings that the sentencing court was within its discretion and authority to do so. These stipulations do not restrict the Government's right to respond to questions from the Court and to correct misinformation that has been provided to the Court.

Waiver of Appeal and Post-Sentencing Rights

As set forth in Schedule A, this Office and Ramon Jimenez waive certain rights to file an appeal, collateral attack, writ, or motion after sentencing, including but not limited to an appeal under 18 U.S.C. § 3742 or a motion under 28 U.S.C. § 2255.

Immigration Consequences

The defendant understands that, if he is not a citizen of the United States, his guilty plea to the charged offense will likely result in his being subject to immigration proceedings and removed from the United States by making him deportable,

excludable, or inadmissible, or ending his naturalization. The defendant understands that the immigration consequences of this plea will be imposed in a separate proceeding before the immigration authorities. The defendant wants and agrees to plead guilty to the charged offense(s) regardless of any immigration consequences of this plea, even if this plea will cause his removal from the United States. The defendant understands that he is bound by his guilty plea regardless of any immigration consequences of the plea. Accordingly, the defendant waives any and all challenges to his guilty plea and to his sentence based on any immigration consequences, and agrees not to seek to withdraw his guilty plea, or to file a direct appeal or any kind of collateral attack challenging his guilty plea, conviction, or sentence, based on any immigration consequences of his guilty plea.

Other Provisions

This agreement is limited to the United States Attorney's Office for the District of New Jersey and cannot bind other federal, state, or local authorities. However, this Office will bring this agreement to the attention of other prosecuting offices, if requested to do so.

This agreement was reached without regard to any civil or administrative matters that may be pending or commenced in the future against Ramon Jimenez. This agreement does not prohibit the United States, any agency thereof (including the Internal Revenue Service and Immigration and Customs Enforcement, or any third party from initiating or prosecuting any civil or administrative proceeding against Ramon Jimenez.

No Other Promises

This agreement constitutes the plea agreement between Ramon Jimenez and this Office and supersedes any previous agreements between them. No additional promises, agreements, or conditions have been made or will be made unless set forth in writing and signed by the parties.

Very truly yours,

PAUL J. FISHMAN
United States Attorney

By: Joseph N. Minish
Assistant U.S. Attorney

APPROVED:

David E. Malagold
Unit Chief, Criminal Division

I have received this letter from my attorney, John A. Azzarello, Esq. I have read it. My attorney and I have discussed it and all of its provisions, including those addressing the charge, sentencing, stipulations, waiver, forfeiture, and immigration consequences. I understand this letter fully. I hereby accept its terms and conditions and acknowledge that it constitutes the plea agreement between the parties. I understand that no additional promises, agreements, or conditions have been made or will be made unless set forth in writing and signed by the parties. I want to plead guilty pursuant to this plea agreement.

AGREED AND ACCEPTED:

Ramon Jimenez Date: 10/6/11

I have discussed with my client this plea agreement and all of its provisions, including those addressing the charge, sentencing, stipulations, waiver, forfeiture, and immigration consequences. My client understands this plea agreement fully and wants to plead guilty pursuant to it.

John A. Azzarello, Esq. Date: 10/6/11

Plea Agreement With Ramon Jimenez

Schedule A

1. This Office and Ramon Jimenez recognize that the United States Sentencing Guidelines are not binding upon the Court. This Office and Ramon Jimenez nevertheless agree to the stipulations set forth herein, and agree that the Court should sentence Ramon Jimenez within the Guidelines range that results from the total Guidelines offense level set forth below. This Office and Ramon Jimenez further agree that neither party will argue for the imposition of a sentence outside the Guidelines range that results from the agreed total Guidelines offense level.

2. The version of the United States Sentencing Guidelines effective November 1, 2010 applies in this case. The applicable guideline is U.S.S.G. § 2D1.1.

3. The offense involved at least 3.5 kilograms. This results in a Base Offense Level of 30. See U.S.S.G. § 2D1.1(c)(5).

4. As of the date of this letter, Ramon Jimenez has clearly demonstrated a recognition and affirmative acceptance of personal responsibility for the offense charged. Therefore, a downward adjustment of 2 levels for acceptance of responsibility is appropriate if Ramon Jimenez's acceptance of responsibility continues through the date of sentencing. See U.S.S.G. § 3E1.1(a).

5. As of the date of this letter, Ramon Jimenez has assisted authorities in the investigation or prosecution of his own misconduct by timely notifying authorities of his intention to enter a plea of guilty, thereby permitting the government to avoid preparing for trial and permitting the government and the court to allocate their resources efficiently. If Ramon Jimenez enters a plea pursuant to this agreement and qualifies for a 2-point reduction for acceptance of responsibility pursuant to U.S.S.G. § 3E1.1(a), and if in addition Ramon Jimenez's offense level under the Guidelines prior to the operation of § 3E1.1(a) is 16 or greater, Ramon Jimenez will be entitled to a further 1-point reduction in his offense level pursuant to U.S.S.G. § 3E1.1(b).

6. In accordance with the above, the parties agree that, in the absence of the defendant being found to be a career offender pursuant to U.S.S.G. § 4B1.1, the total Guidelines

offense level applicable to the defendant is level 27. The parties further agree that if the defendant is found to be a career offender pursuant to U.S.S.G. § 4B1.1, the total Guidelines offense level applicable to the defendant is level 31 (those Guidelines offense levels are hereafter collectively referred to as the "agreed total Guidelines offense levels.")

7. The parties agree not to seek or argue for any upward or downward departure, adjustment or variance not set forth herein. The parties further agree that, in the absence of the defendant being found to be a career offender pursuant to U.S.S.G. § 4B1.1, a sentence within the Guidelines range that results from the agreed total Guidelines offense level of 27 is reasonable. The parties further agree that, if the defendant is found to be a career offender pursuant to U.S.S.G. § 4B1.1, a sentence within the agreed total Guidelines offense level of 31 is reasonable.

8. Ramon Jimenez knows that he has and, except as noted below in this paragraph, voluntarily waives, the right to file any appeal, any collateral attack, or any other writ or motion, including but not limited to an appeal under 18 U.S.C. § 3742 or a motion under 28 U.S.C. § 2255, which challenges the sentence imposed by the sentencing court if that sentence falls within or below the Guidelines range that results from the agreed total Guidelines offense level of 27. This Office will not file any appeal, motion or writ which challenges the sentence imposed by the sentencing court if that sentence falls within or above the Guidelines range that results from the agreed total Guidelines offense level of 31. The parties reserve any right they may have under 18 U.S.C. § 3742 to appeal the sentencing court's determination of the criminal history category. The provisions of this paragraph are binding on the parties even if the Court employs a Guidelines analysis different from that stipulated to herein. Furthermore, if the sentencing court accepts a stipulation, both parties waive the right to file an appeal, collateral attack, writ, or motion claiming that the sentencing court erred in doing so.

9. Both parties reserve the right to oppose or move to dismiss any appeal, collateral attack, writ, or motion barred by the preceding paragraph and to file or to oppose any appeal, collateral attack, writ or motion not barred by the preceding paragraph.

U.S. Department of Justice

United States Attorney
District of New Jersey

970 Broad Street, Suite 700
Newark, NJ 07102

973/645-2700

JG/JNM/COOP.AGR
USAO #

CONFIDENTIAL - NOT TO BE FILED WITH THE CLERK'S OFFICE

October 6, 2011

John A. Azzarello
Arseneault, Whipple, Fassett & Azzarello, LLP
560 Main Street
Chatham, NJ 07928

Re: Cooperation Agreement with Ramon Jimenez

Dear Mr. Azzarello:

This letter sets forth the understandings between your client, Ramon Jimenez, and the United States Attorney for the District of New Jersey ("this Office") concerning Ramon Jimenez's cooperation with this Office. This cooperation agreement supplements the plea agreement dated October 6, 2011 between the same parties, which will be filed in open court (the "plea agreement"). The plea agreement and this cooperation agreement together constitute the full and complete agreement between the parties.

Ramon Jimenez and this Office agree that this cooperation agreement will be disclosed to the Court but not filed with the Clerk's Office. Ramon Jimenez further agrees not to reveal his cooperation, or any information derived therefrom, to any third party (other than the Court) without prior consent of this Office.

Ramon Jimenez and this Office further agree that this cooperation agreement is contingent upon the entry of a guilty plea by Ramon Jimenez pursuant to the provisions of the plea agreement. In the event that Ramon Jimenez does not enter a guilty plea pursuant to the provisions of the plea agreement, this Office will be released from its obligations under this cooperation agreement.

Scope of Cooperation

Ramon Jimenez shall cooperate fully with this Office.

As part of that obligation, Ramon Jimenez shall truthfully disclose all information concerning all matters about which this Office and other Government agencies designated by this Office may inquire and shall not commit or attempt to commit any additional crimes. Ramon Jimenez also agrees to be available at all reasonable times requested by representatives of the Government and shall truthfully testify in all proceedings, including grand jury and trial proceedings, as to any subject about which he is questioned. Furthermore, Ramon Jimenez agrees to provide to this Office, upon request, all documents and other materials relating to matters about which this Office inquires.

Full cooperation includes participating, if requested, in affirmative investigative techniques, such as making telephone calls, tape recording conversations, and introducing law enforcement officials to other individuals. All such activity by Ramon Jimenez must be conducted only at the express direction and under the supervision of this Office and federal law enforcement personnel.

If as part of this obligation to cooperate, Ramon Jimenez provides self-incriminating statements, the statements shall be subject to the protections, terms, and conditions set forth in U.S.S.G. § 1B1.8 (a) & (b). Nothing, however, shall prevent the use of such statements in a prosecution for false statements, perjury, or obstruction of justice, or prevent the derivative use of such statements.

Informing the Court About Cooperation

The determination whether Ramon Jimenez has fully complied with this agreement and provided substantial assistance to the Government rests solely in the discretion of this Office. If this Office determines in its sole discretion that Ramon Jimenez has fully complied with this agreement and has provided substantial assistance in the investigation or prosecution of one or more persons who have committed offenses, this Office: (1) will move the sentencing judge, pursuant to Section 5K1.1 of the Sentencing Guidelines, to depart from the otherwise applicable guideline range; and (2) will move the sentencing judge, pursuant to 18 U.S.C. § 3553(e), to depart from any applicable statutory minimum sentence. The determination whether to move under § 3553(e) rests solely in the discretion of this Office, and may be based not only on whether Ramon Jimenez has fully complied with this agreement and provided substantial assistance but also on the factors set forth in 18 U.S.C. § 3553(a). Whether the sentencing judge does in fact impose a sentence below the otherwise applicable guideline range or

statutory minimum sentence is a matter committed solely to the discretion of the sentencing judge. Ramon Jimenez may not withdraw his plea if this Office determines that Ramon Jimenez has not rendered substantial assistance or has not fully complied with the terms of this agreement, or if the Court refuses to grant in whole or in part the Government's motion for a downward departure.

Other Provisions

This cooperation agreement is limited to the United States Attorney's Office for the District of New Jersey and cannot bind other federal, state, or local authorities. However, this Office will bring this agreement and Ramon Jimenez's cooperation to the attention of other prosecuting offices, if requested to do so.

Breach of Agreement

Should Ramon Jimenez withdraw from or violate any provision of this cooperation agreement or the plea agreement, or commit or attempt to commit any additional federal, state, or local crimes, or intentionally give materially false, incomplete, or misleading testimony or information, this Office will be released from its obligations under this agreement and the plea agreement, including any obligation to file a motion under U.S.S.G. § 5K1.1 and 18 U.S.C. § 3553(e), but Ramon Jimenez may not withdraw the guilty plea entered into pursuant to the plea agreement. In addition, Ramon Jimenez shall thereafter be subject to prosecution for any federal criminal violation of which this Office has knowledge, including, but not limited to, perjury and obstruction of justice. Any such prosecution may be premised upon any information provided, or statements made, by Ramon Jimenez, and all such information, statements, and leads therefrom may be used against Ramon Jimenez. Any such prosecution that is not time-barred by the applicable statute of limitations on the date this agreement is signed by Ramon Jimenez may be commenced, notwithstanding the expiration of the limitations period after Ramon Jimenez signs the agreement. Ramon Jimenez agrees to waive any statute of limitations with respect to any crime that would otherwise expire after Ramon Jimenez signs the agreement. With respect to any prosecution referred to in this agreement, Ramon Jimenez further waives any right to claim that statements made by him before or after the execution of this agreement, including any statements made pursuant to any prior agreement between Ramon Jimenez and this Office, or any leads from Ramon Jimenez's statements, should be suppressed under that prior agreement or under Fed. R. Evid. 410, Fed. R. Crim. P. 11(f), U.S.S.G. § 1B1.8, or otherwise.

No Other Promises

Ramon Jimenez acknowledges that no additional promises, agreements or conditions have been made other than those set forth in this cooperation agreement and in the plea agreement, and none will be made unless set forth in writing and signed by the parties.

Very truly yours,

PAUL J. FISHMAN
United States Attorney

By: Joseph N. Minish
Assistant U.S. Attorney

APPROVED:

David E. Malagold
Unit Chief, Criminal Division

I have received this cooperation agreement from my attorney, John A. Azzarello, Esq. I have read it, and I understand it fully. I hereby accept the terms and conditions set forth in this cooperation agreement and acknowledge that the plea agreement and this cooperation agreement together constitute the full and complete agreement between the parties. I understand that no additional promises, agreements, or conditions have been made or will be made unless set forth in writing and signed by the parties.

AGREED AND ACCEPTED:

Ramon Jimenez Date: 10/6/11

John A. Azzarello, Esq. Date: 10/6/11