UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

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

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

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To the extent possible, as a matter of consistency, this brief adopts the form of abbreviations set forth in the Government's Memorandum Of Law In Opposition To Defendant's Post-Trial Motions *(hereinafter "GB")*, e.g., *_T__ (referring to the volume number of the trial transcript followed by the page number of the trial transcript followed by the page number); GX (referring to a Government Exhibit admitted at trial).*

I. PRELIMINARY STATEMENT

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

As the government's memorandum in opposition to Mr. Bergrin's Rule 29 motions demonstrates, the government does not even attempt to meet its obligation to prove every element of the relevant statutes. Because the evidence presented at trial fails to fulfill those requirements, the Court must vacate the verdicts as to Counts Twelve, Thirteen, One (Racketeering Act Four), Three, Twenty-Six and One (Racketeering Act Eight) and enter judgments of acquittal. Likewise, in opposition to Mr. Bergrin's motion for a new trial as a result of the erroneous denial of Mr. Bergrin's requests for judicial immunity for critical defense witnesses, the government arrives at its conclusion that the proffered statements are not clearly exculpatory only by supplanting the jury's role in determining the facts. As it cannot do so, and the evidence is, on its face, clearly exculpatory, the Court should grant Mr. Bergrin's motion for a new trial pursuant to Rule 33. Finally, the government responds to Mr. Bergrin's request for a hearing pursuant to Federal Rule of Evidence 606(b) by claiming that his reasoning is too speculative and that the *Daily News* article at issue could not have prejudiced him. Of course, Mr. Bergrin's request is plainly permitted by the statute to determine whether Mr. Bergrin was,

in fact, convicted based on the evidence and not an inadmissible external influence Accordingly, the Court should *voir dire* the jury about the extent of any exposure to prejudicial information. The Court should, in particular, *voir dire* Juror Five, Mr. Hershorn because his comments in a separate news article indicate that he lied to the Court about his ability to set aside what he had previously read about the case and to render a fair and impartial verdict.

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

Mr. Bergrin seeks a judgment of acquittal pursuant to Federal Rule of Criminal Procedure 29(c) as to Counts Twelve and Thirteen, as well as on the corresponding racketeering allegations charged in Counts One (Racketeering Act Four) and Three, because there is, as a matter of law, insufficient evidence to support the verdicts that Mr. Bergrin conspired to kill, or aided and abetted the killing of Kemo McCray in violation of 18 U.S.C. § 1512(k). Because the government's arguments fail to undermine that contention, Mr. Bergrin's motion should be granted.

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

Mr. Bergrin argues that the government failed to present any evidence from which a jury could permissibly find or infer that at some time during the existence or life of an unlawful agreement to murder Mr. McCray, Mr. Bergrin knowingly and intentionally joined in that agreement. In fact, the evidence demonstrates that, according to Anthony Young, the discussion at Jamal Baskerville's house several days after Thanksgiving in which the Curry gang resolved to murder Mr. McCray did not begin until after Mr. Bergrin left and he was not made aware of that plan. *See* 9T2255. The government opposes Mr. Bergrin's motion, arguing that Mr. Bergrin's application ignores the circumstantial evidence, erroneously requiring direct evidence that the law does not demand. GB at 17. This is an incorrect and unfair characterization of Mr.

Bergrin's argument: he agrees, of course, that circumstantial evidence can suffice. *See United States v. Gibbs*, 190 F.3d 188, 197 (3d Cir. 1999). What may not suffice, however, is the kind of speculation in which the government engages to meet its burden as to this element of the conspiracy. *See, e.g., United States v. Thomas*, 114 F.3d 403, 406 (3d Cir. 1997) (conspiracy case law in the Third Circuit "forbids the upholding of a conviction on the basis of ... speculation.").

Thus, the government first contends that the evidence could show that the conspiracy began between Mr. Bergrin and William Baskerville on November 25, 2003, rather than at the Avon Street meeting at Jamal Baskerville's house that Young places several days later. GB 13, 17. According to the government, this is plausible, on the one hand, because "there was an existing conspiracy to distribute narcotics among Bergrin, Hakeem Curry, William Baskerville, Rakeem Baskerville, Anthony Young, and others," and on the other because, as an attorney for Curry and his associates, Mr. Bergrin "knew how that Organization dealt with informants." GB 10. But there is absolutely no evidence to support these contentions, and even if there were, neither would suffice to establish that the conspiracy began before the meeting on Avon Street. To begin with, there is no evidence whatsoever from which a juror could infer that Mr. Bergrin belonged to an existing conspiracy to distribute narcotics with those individuals. The evidence to which the government cites, GB 10 (citing 1T185-222; 3T698-720; 3T725-59; 7T1519-1552; 9T2215), certainly fails to provide a basis for such an inference. Specifically, 1T185-222 refers to the testimony of Lachoy Walker, who testified about the Curry drug organization generally, and, with respect to Mr. Bergrin, only that "one day [Curry and I] was in the dungeon, the stash house, and we had a brief conversation while we were separating kilos of cocaine, and just in general conversation, he just -- he blurted out, he was like, Guess who I got -- guess who I got this connect from? I'm like, Who? And he said, Paul. I'm like, Paul who? I'm like, Paul Paul? And he said, Yeah, Paul." 1T208. When asked if Curry continued to obtain kilograms of cocaine from Mr. Bergrin's connect as of February 2003, Walker replied, "Not to my

knowledge." 1T211. Thus, the only evidence that Mr. Bergrin was a member of the Curry drug conspiracy is Walker's testimony that on one occasion, Curry mentioned that he obtained a drug connection from a "Paul," who Walker understood to be Mr. Bergrin. Even assuming that this is true, introducing Mr. Curry to an individual who sells drugs on one occasion -- particularly where there is no evidence Mr. Bergrin received any compensation for doing so -- does not implicate Mr. Bergrin in the entire Curry narcotics conspiracy. *Cf. United States v. Price*, 13 F.3d 711, 726-29 (3d Cir. 1994) (reversing jury instruction that a defendant could be guilty of conspiring to distribute cocaine merely by offering to buy cocaine from a member of the conspiracy). The other evidence to which the government cites involves either testimony solely about the Curry drug organization's operations without any reference to Mr. Bergrin, *see* 3T698-720, 7T1519-1552, or testimony discussing Mr. Bergrin's legal representation of Curry, or individuals associated with him, *see* 3T725-59, 9T2215-31. Indeed, as even Young specifically testified, Curry called Mr. Bergrin when Baskerville was arrested, not because Mr. Bergrin was a member of the drug conspiracy, but because "That was his lawyer." 9T2238. Even if Mr. Bergrin was deemed a member of the Curry drug conspiracy by virtue of his providing a connect to Curry on one occasion, it is rank speculation to suggest, from this fact and without any supporting evidence, circumstantial or otherwise, that "It was determined that McCray had to be assassinated" when "Bergrin met with Baskerville before Baskerville's initial appearance." GB 11. *See Thomas*, 114 F.3d at 406; *United States v. Obialo*, 23 F.3d 69, 73 (3d Cir. 1994) (reversing denial of Rule 29 motion as to conspiracy conviction because the logical leaps urged by the government provided insufficient evidence that defendant conspired with anyone). Indeed, the government does not hazard a guess -- and guessing is what must be done to reach the conclusion at which the government arrives -- as to who made the determination to murder Mr. McCray, and, if it was Mr. Baskerville, whether he even communicated that determination to Mr. Bergrin.

Nor does Mr. Bergrin's purported knowledge of the Curry Organization's modus operandi support the theory that the conspiracy to murder McCray began on November 25, 2003. That is, the government adduced no evidence at all to suggest that Mr. Bergrin had personal knowledge that this or any other client had ever taken steps to kill an informant on or before November 25, 2003. Rather, the evidence demonstrated that Mr. Bergrin represented certain individuals associated with Mr. Curry, primarily on drug charges or weapon possession -- not witness murder, and that the clients decided whether or not to cooperate. *See* GXs 5700-5704, 5707-5709, 5711, 5713; 2T336. Moreover, the idea that Mr. Bergrin would have this information simply because he represented those individuals who, the evidence showed, were his clients, potentially exposes every criminal defense attorney who has a reason to believe his client is dangerous to criminal liability simply for discussing the client's case with him. GB 10. *See United States v. Jones*, 44 F.3d 860, 866 (10th Cir. 1995) ("Mere suspicion of illegal activity, however, is insufficient to prove participation in a conspiracy."); *see also United States v. Casper*, 956 F.2d 416, 422 (3d Cir. 1992) ("the inferences drawn must have a logical and convincing connection to the facts established").

Similarly specious is the government's contention -- for the first time in the near-decade in which it has investigated and prosecuted Mr. McCray's murder -- that Mr. Bergrin went to Avon Avenue and 17th Street on December 4, 2003, the night of Mr. Baskerville's bail hearing. GB 11. At trial, Young testified that the meeting occurred "after Thanksgiving." 9T2249. In 2007, at the Baskerville trial, Young testified that this meeting occurred "four to five days" after Baskerville's arrest. 11T2737-2738. In fact, the only evidence that the government cites for this brand new theory -- never previously presented to any Court or jury -- that it occurred specifically on December 4th is the fact that phone records show a call from Mr. Bergrin to Curry at 7:13 p.m. that evening, and that Young testified that Curry had informed him at the meeting that he knew Mr. Bergrin was "on his way." GB 12 n.2. The government argues that the jury here, which did not have the benefit of the substance of that conversation, could infer

that the 7:13 p.m. phone call indicated that Mr. Bergrin was on his way to the Avon meeting, rather than any other matter which Mr. Bergrin and Curry may have discussed in their not infrequent correspondence. But this is the essence of speculation and conjecture. Indeed, the government, which has a recording of this conversation, cannot even make such a representation in good faith.[1] As that recording reveals, Mr. Bergrin tells Curry on December 4th, not that he is "on his way," but rather that he will "speak to him tomorrow," indicating that he has no intention to see him later that night. *See* CW-000009 (provided in discovery on July 1, 2009).[2]

Thus, as the government ultimately acknowledges, the only evidence of Mr. Bergrin's involvement in the Kemo murder is Young's testimony, which Mr. Bergrin addressed in his opening brief, that Mr. Bergrin 1) mentioned the (inaccurate) name of the informant to Curry, and 2) met with Curry's associates to tell them not to let Mr. McCray testify. GB 13. And, as addressed in Mr. Bergrin's main submission, that evidence simply fails to show that Mr. Bergrin knowingly and intentionally joined in an agreement to kill the witness against William

[1] As noted in Mr. Bergrin's opening brief, the Drug Enforcement Agency had recorded Hakeem Curry pursuant to a wiretap, but these recordings were not timely sealed, and therefore, inadmissible. *See* Tr. (1/30/13) at 1384. Mr. Bergrin appropriately did not introduce that recording at trial, but it is nonetheless proper to consider it here, for purposes of determining whether the government's contention is supported by any good faith basis.

[2] Moreover, in that December 4, 2003 conversation the evening after the bail hearing, Mr. Bergrin informs Curry that he believes he can obtain a 13-year plea deal for William Baskerville. This, of course, undermines the government's reliance on Young's testimony that the Curry organization only decided to kill Mr. McCray when Mr. Bergrin told them that Baskerville "was facing life in prison for that little bit of cocaine," apparently shortly later that evening. GB 12 (citing 9T2252-52). The fact that Mr. Bergrin also tells Curry in this conversation that, "it's an impossible case" because of the evidence against Baskerville, and Curry tells him to "fight Paul" likewise proves consistent with Mr. Bergrin's defense that he would not have said "no Kemo, no case" in light of the strong surveillance and other evidence against Baskerville, and inconsistent with Young's testimony that Mr. Bergrin hinged Baskerville's freedom on preventing Kemo from testifying. 9T2253. It would be fundamentally unfair and completely inconsistent with the facts of record to permit the government to thus mischaracterize the contents of these tapes as evidence supporting Young's account, particularly where the government knows it may do so without consequence. That is, as the government has vehemently argued, *see, e.g.*, 12T3011, any challenge Mr. Bergrin makes regarding this evidence risks opening the door to the entire Curry wiretap.

Baskerville because there is no evidence that any member of the organization ever communicated any plans to kill Mr. McCray to Mr. Bergrin while he was present, and, by Young's own account, no party to the meeting is alleged to have nodded, gestured, or verbally communicated in any way, shape or form, or otherwise suggested even a tacit mutual understanding, or reciprocal willingness to take any action whatsoever, let alone commit a murder. Furthermore, the cases upon which the government relies in arguing that Mr. Bergrin's remarks alone could communicate a mutual understanding that the organization would kill Mr. McCray are inapposite. *See* GB 13 (citing *United States v. Bingham*, 653 F.3d 983, 991-92 (9th Cir. 2011); *United States v. Crawford*, 60 F. App'x 520, 534 (6th Cir. 2003). Thus, in *Bingham*, the Court's analysis of the defendant's instruction to his fellow gang members arose within the context of determining whether he had aided and abetted the subsequent murders, not whether he had joined their conspiracy to do so. *Id.* at 991. Moreover, that case featured an Aryan Brotherhood Council member who sent a coded instruction in the secret language established by his gang for announcing war to his underling in the midst of an ongoing conflict with a rival gang. *Id.* at 989. There was, then, no question but that the defendant in *Bingham*, unlike Mr. Bergrin, had conspired to kill members of the rival gang; he had been specifically assigned the responsibility of initiating violence based upon his service on the gang Council, and did so using unmistakable and previously established protocols. Likewise, in *Crawford*, 60 F. App'x at 524, which involved allegations that an attorney had conspired to kill the witness against his client, there was actual evidence, unlike here, from the testimony of the client, that the client and his attorney had "discussed 'getting rid' of" the witness. Therefore, a rational juror could easily find, in that case, that the attorney had joined the conspiracy by the time when, thereafter, he relayed the message that his client wanted the criminal associate to "TCB," *i.e.* kill the witness, and provided the witness's contact information to that associate. *Id.* There was, of course, no such evidence here.

Beyond Young's testimony, the government also relies on evidence of statements Mr. Bergrin made to third parties after the fact to demonstrate that he joined the agreement to kill Mr. McCray. GB13-16. Specifically, the government refers to the testimony of Thomas Moran that when Moran asked Mr. Bergrin about a news article implicating him in the murder, Mr. Bergrin told him that while "representing a major drug dealer by the name of William Baskerville …. Baskerville had told him the name of the informant against Baskerville … Paul told me he met with Baskerville's people and he told them the name of the informant, and that three months later, they had killed him." 23T6362. The government contends that the fact that Mr. Bergrin pointed out to Moran the difficulties that the government would have bringing such a case against him, rather than saying "I did nothing wrong" illustrates his participation in the conspiracy. GB15. But the government's straw man does not change the fact that Mr. Bergrin's statements to Moran shed absolutely no light on whether Mr. Bergrin knew and intended that the Curry Organization was planning to kill the informant prior to March 4, 2004, and joined that plot. Indeed, Mr. Bergrin's remarks, even spoken to a close confidante, omit any causal relationship between his relaying the name of the informant and the ultimate killing and reveal nothing about what Mr. Bergrin understood when he mentioned McCray's name to Curry. This evidence is in accordance with the testimony of two reporters that Mr. Bergrin admitted that "he had relayed McCray's name to Curry." GB 15. The juxtaposition of this evidence is ironic: the government contends that both Mr. Bergrin's failure to deny wrongdoing to Moran and his denial of wrongdoing when speaking to the reporters equally evidence the "consciousness of guilt" that the prosecution knows it must establish absent any other evidence of knowledge of the plot to kill Mr. McCray.[3] GB 15.

[3] The fact that Mr. Bergrin told Moran in 2007 that "Baskerville's people" killed the informant is also no basis for assuming that Mr. Bergrin lied, as the government asserts, GB 15, when he told the press in 2004 that Curry and Baskerville had no role in McCray's murder, particularly given that information the became publicly available in the interim and certainly would have increased his knowledge of the facts.

The government also relies on the testimony of Eric Dock that William Baskerville told him that Mr. Bergrin said in March 2004, "I don't care if they charge me." GB16 (citing 9T2128). As the government speculates, "If Bergrin had nothing to do with McCray's murder, he would have had no reason to expect any criminal charges." GB 16. But the government omits the context of this remark, which is that "Will came back from a visit, again it was the agents, and the agents was telling him that Paul was gonna sell him out to protect a guy named E. T. Hak, and Will said he called the lawyer, Paul, and he told Paul what the agents were saying." 9T2127. That is, it was government officials who were suggesting to Baskerville -- as was relayed to Mr. Bergrin -- that Baskerville had reason to fear Mr. Bergrin's cooperation with the government. Thus, this statement utterly fails -- either alone or in combination with the facts described above -- to demonstrate that Mr. Bergrin had a mutual understanding with Baskerville or any member of the Curry organization that Mr. McCray would be killed.

The government's reliance on the testimony of Abdul Williams that Mr. Bergrin asked his opinion about whether Baskerville would "put his name in the whole situation" related to the Kemo murder, 16T3640, fails for similar reasons. GB 14. Again, by 2007, GB14, it was obvious from the media coverage of the Baskerville case that the government had associated Mr. Bergrin with McCray's murder. Yet, the government argues that Mr. Bergrin's concern about that fact, and about whether a defendant facing the death penalty would implicate Mr. Bergrin to curry favor with the government, somehow demonstrates that he agreed to join the conspiracy in 2003. Of course, such concern is understandable whether or not one is actually guilty. *See Hickory v. United States*, 160 U.S. 408, 478 (1896) ("fear may spring from causes very different from that of conscious guilt") (quotation and citation omitted); *United States v. Kearse*, 444 F.2d 62, 64 (2d Cir. 1971) ("suspicions, even those that cause a defendant to fear conviction, are not proof"). Similarly, Mr. Bergrin's statement to Vicente Esteves that "it wasn't his first time" GB 13 (citing 21T5825) is simply too vague to serve as the sole evidence that Mr. Bergrin joined the conspiracy to kill Mr. McCray. *See Casper*, 956 F.2d at 422.

Thus, when the government finally argues, GB 16, that it had demonstrated that Mr. Bergrin "had a personal motive for preventing Kemo from testifying," relying on Walker's testimony about the "connect," it essentially admits that it lacks any evidence -- direct or circumstantial -- that Mr. Bergrin, in fact, entered into the conspiracy, resorting entirely to speculation that surely he wanted to. Indeed, the government asserts, without citing testimony, that "no one needed to manifest assent to Bergrin's December 4th advice because … everyone knew what Bergrin meant and intended and thus, knew what they had to do (*i.e.*, murder McCray)." GB 17. But the government not only fails to identify evidence that anyone besides Young took Bergrin's words to be advice to kill Mr. McCray; it also fails to identify evidence that Mr. Bergrin understood that that is how the meeting attendees interpreted his statements. Instead of "indirect evidence of [a] mere tacit understanding," GB 17 (citation omitted), the government relies solely on guesswork. Mr. Bergrin's motion must be granted.

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

Mr. Bergrin also seeks a judgment of acquittal on Count Thirteen because there is no evidence from which a jury could permissibly infer either that Mr. Bergrin knew that Mr. McCray would be murdered at the time Mr. Bergrin committed the acts alleged of him, or that his acts actually did in some way aid, assist, facilitate, or even encourage Anthony Young to kill Mr. McCray, both requisite elements for aider and abettor liability. *See United States v. Nolan*, 718 F.2d 589, 592 (3d Cir. 1983). The government, in turn, argues that "where a defendant instructs another to murder the victim and his instruction is followed, the defendant is guilty as an accomplice." GB 21. This response to the contrary notwithstanding, the government cannot, as it seeks to do, read the knowledge and causation requirements out of Section 2 liability.

Specifically, the government asserts, without further explanation, that the fact that Mr. Bergrin stated on November 25, 2003, that the informant was "Kamo," *see* 9T2243, "alone constituted 'aiding' or 'abetting.'" GB 22. This cannot be so, however, because even if this act

"in some way" aided, assisted, facilitated, or encouraged Curry to murder Mr. McCray, *see* Third Circuit Model Criminal Jury Instruction 7.02 -- which, as discussed below, the evidence is manifest it did not -- there is simply no facts of record from which one can possibly infer that Mr. Bergrin knew at that time that Curry was going to murder Mr. McCray to prevent him from testifying. As the testimony of Young, who contended that he was present for this conversation, demonstrates, when Mr. Bergrin shared this detail, Curry in no way indicated to Mr. Bergrin that he or his associates intended to kill the informant. 9T2243-44. It is not alleged that Curry thanked Mr. Bergrin for providing the name to him, or used coded language that Mr. Bergrin would understand to in any way signal the intent to murder based upon that information, or otherwise. The government implies that Mr. Bergrin *should* have known what Curry would do with this information as a result of "his role as house counsel to the Curry Organization." GB 23. Yet, as was set forth in Mr. Bergrin's main brief, were familiarity with Curry's drug operation alone sufficient to support a finding of the requisite knowledge, then the decision of any criminal defense attorney to discuss evidence with his client or his client's family might, disturbingly, suffice.[4] *See United States v. Wiley*, 846 F.2d 150, 154 (2d Cir. 1988) (general suspicion that an unlawful act may occur is not enough to establish aider/abettor liability) (quoting *United States v. Zambrano*, 776 F.2d 1091, 1097 (2d Cir. 1985)). Thus, the government fails to point to any evidence, because there is none, from which one could infer that Mr. Bergrin knew that Curry was going to kill Mr. McCray as a result of his stating that the informant was "Kamo."

[4] Indeed, ironically, even the government's actions in this case might suffice. As Mr. Bergrin has noted, the evidence at trial demonstrated that in devising the complaint against William Baskerville, the government referenced a distinctive pattern of sales that Baskerville had made only to Mr. McCray, which enabled -- or at least "assisted" -- William Baskerville to immediately identify Kemo and pass that identity on to his brother independent of Mr. Bergrin. *See* 9T2058, 2060. The government also inadvertently permitted Richard Hosten, who had also sold drugs to Mr. McCray, to be alone with William Baskerville in custody, thereby allowing Baskerville to determine the identity of the informant. 8T1833-35.

Next the government contends that the evidence that Mr. Bergrin told members of the Curry Organization a) that Baskerville was facing life in prison, 9T2253, and b) that if Mr. McCray did not testify against Baskerville, "he'll make sure he gets Will out of jail", *id.*, "presented a classic case of 'counseling, commanding, inducing or procuring' the commission of the offense by the principal." GB 22 (internal marks and quotation omitted). But rather than explain how, in view of Mr. Bergrin's argument that this evidence demonstrates that Mr. Bergrin lacked the requisite knowledge that these individuals planned to kill Mr. McCray -- which, as the government concedes, they did not even decide to do until after Mr. Bergrin left, GB 22 -- the government asserts that it need not establish "direct proof of knowledge," and that it "is not essential that the accessory know the modus operandi of the principal." GB 23 (quoting *Russell v. United States*, 222 F.2d 197, 199 (5th Cir. 1955)).[5] That may be, but when the charge is murder, the government must prove that the accessory knew that it was murder that was intended. Here, however, the government's proofs in that regard fall far short, relying on speculation that Mr. Bergrin's remarks that "if Kemo testify against Will, Will was never coming home" and "don't let ... Mr. Kemo testify against Will," 9T2253, amounted to a command to murder. *See Cartwright*, 359 F.3d at 291 ("Our case law 'forbids the upholding of a conviction on the basis of ... speculation'" in aider/abettor and conspiracy contexts) (quoting *Thomas*, 114 F.3d at 406)). Indeed, the other evidence which the government adduced in the case gives rise to at least a reasonable doubt that Mr. Bergrin might just as well have been counseling some other illegal means of preventing McCray's testimony, such as intimidation or bribery.[6] Moreover, the

[5] In *Russell*, which addressed a defendant's aider and abettor liability for orchestrating a fraudulent home loan scheme perpetrated on the Veterans Administration, there was no question that the evidence showed that the defendant knew that false statements would be filed with the Veterans Association, even if he did not know the precise wording of those statements. *Id*. at 198. By contrast, here, Mr. Bergrin argues that the evidence fails to show that he had *any* knowledge that McCray would be murdered -- not that he lacked knowledge as to how it would be accomplished. Certainly, Mr. Bergrin could not have "encouraged" an act if he did not know what he was encouraging.

[6] Thus, this case is distinct from the facts in *United States v. Ray*, 688 F.2d 250, 252 (4th Cir. 1982), upon which the government relies to argue that instructing someone to commit a crime

inferential leap that the government seeks ignores the fact that there was absolutely no evidence that Mr. Bergrin ever received any indication that his "advice" would be heeded. That is, as Mr. Bergrin has consistently argued, there was no testimony whatsoever that the group provided any information about their scheme to Mr. Bergrin at that meeting or at any time thereafter.[7]

In sum, the evidence in this case, however sufficient it may have been in other regards, was far too tendentious to support an inference that Mr. Bergrin knew that these individuals would, as a result of his remarks, determine to kill the informant, and then actually do so. Moreover, the government's contention that the bare fact of Mr. Bergrin's legal representation of these drug dealers, or even his provision of a "connect" to Curry, demonstrates the requisite knowledge fails to create a "logical and convincing connection between the facts established and the conclusion inferred," as is necessary to establish aider and abettor liability, *United States v. Mercado*, 610 F.3d 841, 845 (3d Cir. 2010) (quoting *United States v. Soto*, 539 F. 3d 191, 194 (3d Cir. 2008)). Indeed, the inference that the government seeks to draw is not only an unwarranted one, it is also dangerous and improper. Mr. Bergrin's motion for a judgment of acquittal on these counts must, then, be granted.

Likewise, as Mr. Bergrin argued in his main brief, there was insufficient proof that Mr. Bergrin's actions actually aided and abetted Mr. McCray's murder because, as the evidence unequivocally showed, McCray's murder as revenge for betraying Baskerville was a tragic inevitability, and nothing Mr. Bergrin was alleged to have done actually assisted in the formation or implementation of that plot. The government misconstrues Mr. Bergrin's argument as an assertion that his actions must have been "the but-for cause of the principal's crime" to permit

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can give rise to aider and abettor liability, GB 23, because in Ray, there was at least evidence that the principal uniformly "did what I was told to do" by the defendant.

[7] Contrary to the government's assertion, the evidence does not support the supposition that "the very point of the December 4th meeting was to instruct the group to commit that murder." GB23. Rather, as Young testified, Mr. Bergrin arrived to tell Baskerville's family and friends "what was happening with Will" and "discuss the quality of evidence that the Federal Government had," 9T2252, and not to "deliver illicit advice," GB 23.

liability pursuant to 18 U.S.C. § 2. GB 24. That is not correct. Rather, in accordance with the legal authority to which the government cites, GB 24 (citing Joshua Dressler, *Understanding Criminal Law* 468 (6th ed. 2012)), Mr. Bergrin merely argues from the well-established premise that the accessory "must help" the crime. *Accord Nolan*, 718 F.2d at 592 ("the aider must in fact render aid or assistance"). That element was not satisfied here. The government points to the fact that "only after Bergrin provided this additional information -- and made statements which Young interpreted as encouraging the murder to happen -- that Young and the other members of the Curry organization finally decided to commit the crime." GB 25 (quoting *United States v. Bergrin*, No. 09-369, 2012 WL 458426 at *5 (D.N.J. 2012)).[8] That is, the manner in which Mr. Bergrin is purported to have "helped" is by telling Curry that the informant was "Kamo," and by telling the Curry organization at a subsequent meeting that Baskerville was facing life, and that McCray should not testify. First, as Mr. Bergrin has argued, this provided no assistance because the evidence shows that the Curry organization would, in any event, have learned McCray's identity from Baskerville, who called his brother with that information one hour later. Indeed, it is illogical to argue that William Baskerville would have instructed his brother to kill the informant, 9T2060-61; 11T2734-35, but that the members would "not [have] definitively decided to carry out the plot to murder McCray that had formed the previous week, because they were unsure about William Baskerville's sentencing exposure." GB 22. Of course, as Mr. Bergrin has argued, the time Baskerville was facing was already apparent because Baskerville had been apprised of that fact at each of his hearings and passed messages about coming home directly to members of his organization from prison. 11T2734. Thus, Mr. Bergrin's stray remarks about the value of Mr. McCray's testimony cannot be said to have borne any relationship to the Curry Organization's plot to kill Mr. McCray.

[8] Although the government contends that the Curry gang's willingness to murder to avenge leaks about their illegal activities reflects on Mr. Bergrin, GB 26, there is no evidence to suggest that Mr. Bergrin knew about that proclivity at that time, particularly given the fact that the representative incident cited, that involving the plot on Young's life for discussing details of a murder with his girlfriend, 10T2509, had not yet even occurred.

At the end of the day, the government fails to cite any evidence from which a rational juror could infer that Mr. Bergrin either knew that the Curry Organization was going to kill the informant against Baskerville to prevent his testimony, or that he assisted them in that scheme. The government apparently concedes that if the Court enters a judgment of acquittal as to Counts Twelve and Thirteen, the same is appropriate for Count One (Racketeering Act Four) and Count Three as well. Since the evidence fails to demonstrate all of the elements necessary to show that Mr. Bergrin conspired in and aided and abetted the murder of Kemo McCray, the Court must enter judgments of acquittal as to these Counts, and sentence Mr. Bergrin only on the remaining counts of which he was convicted.

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

Mr. Bergrin also contends that the Court should set aside the verdicts as to Count Twenty-Six and Racketeering Act Eight, and enter a judgment of acquittal on those charges. That is because the record cannot support a finding beyond a reasonable doubt that Mr. Bergrin failed to file an IRS Form 8300 "for the purpose of evading the report requirements of section 5331 or any regulation prescribed under such section." Tr. (3/14/13) at 8928. The government asserts that it has met this burden, "arguably ... based solely on two facts that ...: (1) Bergrin (an attorney) knew of his reporting obligation, as in 2007 he belatedly filed a Form 8300 reporting $20,000 in cash supposedly[9] received from Carmen Dente, Sr., for a retainer fee ... and (2)

[9] The government asserts that "this form was false" because the $20,000 reported "had been supplied by cooperating witness Shelton Leverett ...." GB 28 n.5. But this argument ignores the fact that, as the evidence showed, 13T343; 27T7369; GX 4315, the agents also confiscated a $15,000 cash retainer paid by Carmen Dente. The government cites no reason why one should assume that, in filing the Form 8300, Mr. Bergrin attempted to deceive the New York County District Attorney's Office, as it contends, instead of that, as is much more likely, Mr. Bergrin or his assistant inadvertently confused these two deposits, mistakenly citing the wrong amount, in reporting the Dente retainer. The government is here entitled to every reasonable inference, *see Mercado*, 610 F.3d at 845, but it is not entitled to simply assume that Mr. Bergrin's every act is sinister, as it does here. *See Casper*, 956 F.2d at 422 ("the inferences drawn must have a logical and convincing connection to the facts established").

Bergrin did not file a Form 8300 reporting the $20,000 he had received from Cordova," GB 28. But, as Mr. Bergrin argued in his main brief, the mere fact that Mr. Bergrin filed a Form 8300 on one occasion but on no other, arguably demonstrates knowledge, but not the intent to evade the reporting requirements. Indeed, the government's argument would render every inadvertent failure to file criminal so long as it followed upon previous compliance with the law. *See In re Regions Morgan Keegan Secs.*, 743 F. Supp. 2d 744, 758 (W.D. Tenn. 2010) ("A court cannot infer fraudulent intent from the mere fact that a particular defendant had access to information."). In *United States v. Dichne*, 612 F.2d 632, 637 (2d Cir. 1979), upon which the government relies to assert that a defendant need only be aware of the requirement to be presumed to have willfully evaded it, GB 28, the defendant "himself, in discussing the transaction with [his co-conspirator] ... stated that 'he did not want any questions asked and did not want to be told the transaction had to be reported to the I.R.S.'"). Thus, in that case, unlike here, the co-conspirators were proved "to have conducted themselves in a highly secretive manner, and also to have shown a knowledge of, *and a desire to avoid*, reporting requirements in general." *Id.* at 638 (emphasis added).

The government also points to evidence that Mr. Bergrin had a "motive to avoid law enforcement scrutiny" and argues that this evidence suffices to satisfy its obligation to prove beyond a reasonable doubt that he "acted with the intent to evade the reporting requirement." GB 28. Specifically, the government contends that Mr. Bergrin "had ample reason to suspect that the cash he received from Cordova was narcotics proceeds," though the evidence is clear that Cordova paid this money for Vicente Esteves's defense,[10] 18T4857; 20T5296, 5330, 5347.

[10] The government argues that a jury "rationally could infer that Bergrin secretly accepted the $20,000 in cash from Cordova not just as consideration for illegal services" *i.e.*, tampering with witnesses, fabricating tax returns, hiding properties, and hiring a forensic accountant to prepare fraudulent documents, "but to prevent law enforcement from discovering those illegal services." GB 33-34. This argument is so counterintuitive as to be irrational, and far from a "reasonable inference," for it requires the Court to conclude that the hitman paid the person who ordered the hit; it is equally counterintuitive to contend, as the government does, GB 33-34, that Mr. Bergrin intended to hide monies expended for the preparation of Esteves's tax returns and the hiring of a forensic accountant, matters that he intended to introduce as evidence in Esteves's case.

The government's theory appears to be that Mr. Bergrin was "engaging in money laundering merely by accepting the money," and that his "fear[] that filing a Form 8300 reporting that cash ... would require him to admit that he had engaged in a transaction involving what he believed were the proceeds of a criminal offense," is probative of his intent to evade the Form 8300 reporting requirements. GB 29. Upon a close reading of the money laundering statutes, however, it is apparent that this theory fails to shed light on the element at issue. As an initial matter, 18 U.S.C. § 1957(f) explicitly exempts 'transactions necessary to preserve a person's right to representation as guaranteed by the sixth amendment to the Constitution," undermining any contention that Mr. Bergrin necessarily would have known that his acceptance of funds for legal services would in any way incriminate him. Moreover, section § 1956(a)(1), to which the government cites, Gov. Ltr. (6/25/13), penalizes financial transactions involving illegal proceeds conducted to promote that illegal activity or avoid one's tax obligations -- neither of which applies here -- or to disguise the illegal proceeds or avoid a transaction reporting requirement. But there was no evidence that Mr. Bergrin failed to file such a report to help disguise the illegal proceeds and it is entirely improper to engage in the circular reasoning that the government advocates: that Mr. Bergrin's intent to evade the transaction reporting requirements -- the element here at issue -- is demonstrated by the fact that he laundered money to avoid the transaction reporting requirement. That is, the government contends that the jury could and should have presumed Mr. Bergrin's actions to have been done with the intent to evade the statutory requirement, in order to show his intent to evade that statutory requirement. That, of course, it could not legally do. *See, e.g., United States v. Manbeck*, 744 F.2d 360, 390 (4th Cir. 1984) (vacating conviction where, "through circular reasoning, the presumption used to find the ultimate fact in question .... is the ultimate fact itself"); *United States v. Ouedraogo*, 837 F. Supp. 2d 720, 732 n.4 (W.D. Mich. 2011) (granting judgment of acquittal where government relied on circular reasoning to establish defendant's guilt).

Likewise, Mr. Bergrin's failure to deposit the cash he received from Cordova into his attorney trust account, GB 29, does not establish his intent in failing to file a Form 8300 because declining to deposit the cash in that account only serves as an "effort[] to conceal," GB 29 (citation omitted), if Mr. Bergrin had an obligation to so deposit it. But there was no evidence in the record to establish that Mr. Bergrin was obligated to handle the funds that way and, as the Court well knows, attorneys frequently do not deposit legal fees into their trust accounts where, for example, they have already been earned or where there is a flat fee arrangement. So the government's argument is not only speculative, but is divorced from reality, and from the applicable law.

Moreover, while Form 8300 may be "a very valuable tool to law enforcement," GB 29 (citing 24T6730), the government failed to connect its purported utility to any investigation relevant to this case; as noted in Mr. Bergrin's main brief, the government did not introduce any evidence suggesting that officers ever check such data in the course of investigating witness tampering cases, or that it did so here, in a case in which the government introduced a great deal of evidence regarding how it investigated Mr. Bergrin and why it used the techniques it did. The government's theory, thus, requires piling the inference that Mr. Bergrin was engaged in an ongoing murder plot onto the inference that he therefore feared scrutiny, onto the inference that he believed that filing the form would trigger such scrutiny, onto the inference that he therefore intended to avoid the requirement when he failed to file the form. But, while circumstantial evidence of may suffice to demonstrate the sufficiency of the evidence, *see Untied States v. Starnes*, 583 F.3d 196, 213 (3d Cir. 2009), "there are times when circumstantial evidence 'amounts to only a reasonable speculation and not to sufficient evidence.'" *Ouedroaogo*, 837 F. Supp. 2d at 724 (quoting *Newman v. Metrish*, 543 F.3d 793, 796 (6th Cir. 2008)); *see also United States v. Goyal*, 629 F.3d 912, 915-16 (9th Cir. 2010) (reversing the defendants' convictions for securities fraud because a jury finding for the government would have been based on mere speculation rather than reasonable inference); *United States v. White*, 932 F.2d 588, 590

(6th Cir. 1991) (holding that "a line must be drawn between valid circumstantial evidence, and evidence which requires a leap of faith in order to support a conviction"). *Cf. United States v. Coleman*, 811 F.2d 804, 808 (3d Cir. 1987) (conspiracy cannot be proven by "piling inference upon inference"). This is such a case.

Indeed, the government erroneously relies on *Gricco* to support the theory that mere fear of attracting investigative attention suffices to show intent to evade.[11] GB 30 (citing *United States v. Gricco*, 277 F.3d 339, 349 (3d Cir. 2002)). But in *Gricco*, which assessed the sufficiency of evidence that the defendant had conspired to impede the IRS, the defendant explicitly articulated his desire to avoid the filing of currency transaction reports; yet the Court nonetheless held that "the value of this evidence is limited" to prove the defendant's intent to obstruct the IRS in the assessment and collection of taxes. 277 F.3d at 349 ("Gricco told Million never to 'put any large sums of money in the bank, to be careful with that, especially anything over $10,000 because that would generate a report the bank would send to the IRS.'"). Here, Mr. Bergrin's purported desire to avoid scrutiny for his role in the Esteves plot fails to provide the necessary support for an inference that he intended to evade the Form 8300 reporting requirements.

The government's formalistic consideration of the pertinent standard under the statute notwithstanding, GB 31, its trial proofs simply fail to support an inference that Mr. Bergrin neglected to file a Form 8300 for the purpose of evading the applicable reporting requirements, rather than inadvertently. While, "[a]ny defendant could claim that there was a legitimate purpose for the transaction giving rise to the § 5324 prosecution," GB 33, the government

[11] The government's reliance on *United States v. Abdelbary*, 496 F. App'x 273, 277 (4th Cir. 2012) is likewise unavailing. The Court there, in evaluating whether the defendant intentionally structured his transactions, noted that there the defendant "abruptly began a new pattern of withdrawals" at precisely the time that he "encountered serious financial difficulty"; it did not simply presume that he wished to hide assets. *Id.* Of course, as Mr. Bergrin has argued, he routinely failed to file this form, so that his conduct in this case did not mark an abrupt or suspicious change in his conduct, as in *Abdelbary*.

attempts to mysteriously transform its burden to demonstrate intent into the defendant's burden to prove that the transaction is innocent. Not only is this prohibited, it would render every failure to file sufficient evidence of the defendant's intent. As the caselaw demonstrates, that will not suffice for liability.

The government inexplicably criticizes Mr. Bergrin's straightforward citation of the Court's assessment in *United States v. Seher*, 562 F.3d 1344 (11th Cir. 2009), that "the record is replete with proof that Seher had such intent for each of the transactions cited" *id.* at 1363 as "disingenuous," GB 32, because the defendants in that case conceded that the evidence was, in fact, sufficient in light of testimony (discusssed in Mr. Bergrin's main brief), that the *Seher* defendant, for example, suggested that his customer (an undercover IRS Agent) pay for a ring in installments split between three parties, and repeatedly reassured him that there would be no paperwork for a $19,000 transaction. *Id.* at 1353-54. Mr. Bergrin fails to see how the defendants' concession in that case undermines his contention that some evidence of a similar kind -- whether direct or circumstantial -- is necessary here to demonstrate the intent required by the statute. Moreover, although the government cites "circumstantial evidence which, it contends, would have been sufficient to find intent in that case, GB 32, the *Seher* Court did not hold that these facts alone demonstrated that the defendant possessed such intent, a matter which, as Mr. Bergrin has noted and the defendants there conceded, was well established by the record, but rather that they supported a finding of a conspiratorial agreement. *Id.* at 1363, 1365. In any case, neither this argument, nor any of the evidence in the record, establishes the requisite intent here, where there is not even circumstantial evidence of that element, even if one accepts the government's evidence as to the $20,000 Cordova provided to Mr. Bergrin as true. Accordingly, Mr. Bergrin's motion for a judgment of acquittal on Counts Twenty-Six and One (Racketeering Act Eight) should be granted.

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

In addition to seeking a judgment of acquittal pursuant to Federal Rule of Criminal Procedure 29, Mr. Bergrin also seeks a new trial pursuant to Federal Rule of Criminal Procedure 33, based on the erroneous denial of his request for judicial immunity for the testimony of Jamal McNeil and Jamal Baskerville. Although this error denied Mr. Bergrin a fair trial, the government opposes this motion, asserting that these witnesses' testimony, if credited, would not have exonerated Mr. Bergrin. GB 39. The government acknowledges that, notwithstanding the Court of Appeals' consideration of *United States v. Quinn*, No. 11-1733 (3d Cir. July 10, 2012), Third Circuit jurisprudence continues to recognize this Court's authority to immunize a defense witness "whose testimony is essential to an effective defense," in order to safeguard the criminal defendant's Sixth Amendment right to compulsory process and Fifth Amendment right to present exculpatory evidence as a matter of due process. *Gov't of the V.I. v. Smith*, 615 F.2d 964, 966 (3d Cir. 1980). GB 36.

Nonetheless, the government contends that the Court did not abuse its discretion in denying Mr. Bergrin's applications for such immunity because, it argues, neither McNeil's nor Baskerville's testimony was "clearly exculpatory" and "essential to the defense." GB 39, 43. To arrive at this conclusion, the government reasons that the proffered testimony that no meeting ever occurred at which Mr. Bergrin said anything akin to "no Kemo, no case" is irrelevant because, even if such a meeting had not taken place, the "act of relaying McCray's name from William Baskerville to Curry on November 25, 2003 alone was sufficient, when performed with the requisite intent, to prove Bergrin's guilt." GB 39. As the sole support for this position, the government misreads the reasoning of the Court of Appeals in the prior appeal in this case from the decision of the Honorable William J. Martini to preclude Richard Pozo's testimony pursuant to Federal Rule of Evidence 403. That is, the government contends that in maintaining that Pozo's testimony is "powerfully suggestive of Bergrin's intent in passing Kemo's identity on from Baskerville to Curry" the Court of Appeals somehow "suggested" that the mere act of

naming the informant was sufficient to find Mr. Bergrin guilty of McCray's murder. GB 39 (citing and quoting *United States v. Bergrin*, 682 F.3d 261, 280 (3d Cir. 2012)). In fact, the Court of Appeals implied nothing of the sort. Rather, the Court of Appeals simply held that Pozo's testimony was "relevant to deciding whether Bergrin uttered the words 'No Kemo, no case,' and, if he did, what he meant." *Bergrin*, 682 F.3d at 280. But in doing so, the Court obviously did not determine, or even imply, that proving this fact would be sufficient to establish Mr. Bergrin's guilt on the Kemo Murder charges. Indeed, no rational juror could find Mr. Bergrin guilty of murder conspiracy solely on the basis of evidence that Mr. Bergrin told Curry "that the person that told on William Baskerville was a guy named Kamo," 9T224-3, even in combination with the Pozo evidence, and it is unthinkable that the government would have sought a conviction on this evidence alone. The fact remains that the Kemo murder case hinged on the testimony of Young, and the proffered testimony of McNeil and Baskerville directly contradicted that account.

The government next argues that "it is not at all clear that McNeil would have testified consistently with the proffer," GB 39, because a) the Court rejected a different certification submitted for a different purpose under a different standard prior to trial, b) other defense witness testimony differed from their proffered testimony; c) "an attorney for another subpoenaed witness (Jan Ludvig) provided information to the Government suggesting that the memorandum Stephens prepared of his interview with Ludvig falsely attributed to Ludvig statements he had never made"; and d) the Court made an off the cuff remark implying that other defense witnesses who did not testify may not have helped Mr. Bergrin's defense, GB 39-40. None of these reasons undermines the exculpatory value of McNeil and Baskerville's testimony. First, the Court's decision, prior to trial, not to hold a hearing to investigate Mr. Bergrin's allegations of prosecutorial misconduct based on a sworn affidavit by Mr. Bergrin's investigator -- a ruling which has not yet been reviewed by an appellate court -- bears no relation to whether the Court abused its discretion in deciding this matter; while the prosecutorial misconduct claim is a

procedural defense, focused on the government's unlawful behavior, the Court's decision here implicates Mr. Bergrin's ability to defend the charges on the merits, in accordance with the Fifth and Sixth Amendments. *See Smith*, 615 F.3d at 966. *Cf. United States v. Morrison*, 535 F.2d 223, 229 (3d Cir. 1976) ("due process may demand that the Government request use immunity for a defendant's witness"); *Gov't of the V.I. v. Mills*, 956 F.2d 443, 446-47 (3d Cir. 1992) (reversing defendant's conviction because his Sixth Amendment right to present favorable evidence was violated when district court refused to allow witness to testify and countermand evidence that defendant was at scene of crime).

Second, in defending the Court's decision denying Mr. Bergrin the opportunity to call these critical witnesses, the government attacks their credibility, and that of Mr. Bergrin's investigator. This is its right -- at trial. But passing judgment upon the reliability of the investigator's representation or the credibility of the witnesses' statements *a priori*, impermissibly substitutes the government's views of the believability of these witnesses -- and invites the Court to substitutes its views -- for that of the jury. *See Morrison*, 535 F.2d at 228 ("where the Government has prevented the defendant's witness from testifying freely before the jury, it cannot be held that the jury would not have believed the testimony"). *Cf. Perry v. New Hampshire*, 132 S. Ct. 716, 723 (2012) (trial judges need not conduct preliminary assessments of the reliability of eyewitness identifications made under suggestive circumstances) (citing *Kansas v. Ventris*, 556 U.S. 586, 594, n. (2009) ("Our legal system ... is built on the premise that it is the province of the jury to weigh the credibility of competing witnesses."); *see also United States v. Haut*, 107 F.3d 213, 220 (3d Cir. 1997) ("a basic tenet of the jury system [is] that it is improper for a district court to substitute[ ] [its] judgment of the facts and the credibility of the witnesses for that of the jury") (citations and quotations omitted). The irony of this position, in a case in which the government sought and obtained a reversal of a prior ruling of the Court based upon its doing precisely the same thing with regard to its witness (Pozo), is palpable. *See Bergrin*, 682 F.3d at 280.

Finally, though the government asserts that it received information "suggesting that the memorandum Stephens prepared of his interview with Ludvig falsely attributed to Ludvig statements he had never made," GB 40 (citing 29T7660-63), in fact no such memorandum was ever prepared. Moreover, as the record demonstrates, 29T7660, that witness's attorney represented to the government no more than "that his client has no relevant information to offer and doesn't understand why he's being called … from what I could gather, Mr. Bergrin's investigator went to see him because he may have been housed with one of our witnesses, tried to get him to say something, you know, didn't our witness say this to you, and when the person apparently didn't give him helpful information, you know, left." There was no suggestion that that Mr. Bergrin's investigator falsely attributed statements to Ludvig, but rather that Ludvig did not want to be hailed into court. As the Court recognized, "[m]ost people don't like the idea of being subpoenaed and told they have to testify in court. So him saying he doesn't have any relevant evidence …" 29T7661. Accordingly, not only is the government mistaken as to what conclusions may be drawn from the (oral) proffers as to Ludvig's testimony, it may not use such inferences to pass upon whether witnesses with exculpatory information should be permitted to testify, despite their Fifth Amendment privilege against self-incrimination, through a judicial grant of immunity.

Nor, contrary to the government's contention, GB 40, do strong governmental interest weigh against immunizing these witnesses. Although the government argues on the one hand, that the witnesses will not say what Mr. Bergrin proffered, it argues on the other that it cannot permit the witnesses to "falsely exculpat[e] Bergrin for the same murder conspiracy in which he participated." GB 40. Yet, as Mr. Bergrin noted in his main brief, in the nearly ten years since Mr. McCray was killed, the government has never arrested or charged either Jamal McNeil or Jamal Baskerville with this conspiracy, primarily because there is no evidence to corroborate Young's account. 8T1778, 1893. The government has ceased to further investigate these individuals, or any of the alleged co-conspirators implicated by Young. As Assistant U.S.

Attorney John Gay conceded when the government successfully prevented Jamal Baskerville from testifying during the first trial, "I'm not trying to create the impression that we have scores of agents out there working on the Jamal Baskerville investigation …." Tr. (11/9/11) at 88. Thus, the only effect a grant of immunity would have would be to enable Mr. Bergrin to present exculpatory evidence and justice to be done, in a jury decision based upon all of the evidence. *See United States v. Leon*, 468 U.S. 897, 900-901 (1984) (recognizing general goal of establishing "procedures under which criminal defendants are 'acquitted or convicted on the basis of all the evidence which exposes the truth'") (quoting *Alderman v. United States*, 394 U.S. 165, 175 (1969)); *Berger v. United States*, 295 U.S. 78, 88 (1935) ("The [prosecutor] is the representative not of an ordinary party to a controversy, but of a sovereignty ... whose interest ... in a criminal prosecution is not that it shall win a case, but that justice shall be done"). Furthermore, the government's successful attempts to bar this exculpatory testimony both at the last trial, *see* Tr. (11/9/11) at 79-89, 94-100, 103, 116-117, and here, by repeatedly raising the specter of prosecution of Baskerville, in itself may constitute a denial of Mr. Bergrin's Sixth Amendment compulsory right and Fifth Amendment due process right. *See United States v. Morrison*, 535 F.2d 223, 226, 228 (3d Cir. 1976) ("where the Government has prevented the defendant's witness from testifying freely before the jury, it cannot be held that the jury would not have believed the testimony or that the error is harmless") (citing *Webb v. Texas*, 409 U.S. 95, 97-98 (1972) (due process denied where trial judge's admonition on the dangers of perjury prevented defense witness from testifying)).

Additionally, the government argues that Mr. Bergrin waived his claim for immunity as to Jamal Baskerville because the Court did not formally deny his request to immunize this witness. GB 42. But Mr. Bergrin identified for the Court the defense's wish to make such an application for Baskerville based on the proffer provided. 29T7855. True, Mr. Bergrin did not risk alienating the Court by belaboring this request after it had made clear that it would grant no

such motions.[12] *See United States v. Riggi*, 951 F.2d 1368, 1377 (3d Cir. 1991) (reversing conviction and remanding for retrial based upon district court's refusal to permit recross-examination though defendants failed to make an offer of proof in the face of the district court's ruling because "[u]nder the circumstances of this case, we can only conclude that defense counsel were reasonable in considering it futile, and indeed possibly harmful to their case, to make repeated offers of proof despite the district court's clear and unequivocal policy against permitting recross-examination. A tactical decision not to risk alienating the trial court and jury by repeatedly challenging the court's policy in the face of the district court's blanket rule did not constitute waiver in this case."). *Cf. Jacobs v. City of Philadelphia*, 212 F. App'x 68, 71 (3d Cir. 2006) (in jury instruction context, "a party has not waived the argument where it would have been futile for him to object"); *United States v. Lepore*, 304 F. Supp. 2d 183, 193 (D. Mass. 2004) (where application would be futile, defendant's collateral attack would not be barred).

The government's contentions ultimately skirt the issue that the denial of immunity for McNeil and Baskerville infringed on Mr. Bergrin's Fifth Amendment right to due process and Sixth Amendment right to compulsory process, and severely prejudiced him by forcing him to go to trial without critical witnesses on his behalf. Because Mr. Bergrin met the *Smith* factors for judicial immunity, the Court should order a new trial in accordance with Federal Rule of Criminal Procedure 33.

[12] In fact, as Mr. Bergrin noted in his main brief, there were a number of critical witnesses who made clear to standby counsel or to Mr. Bergrins' investigator that they would assert their Fifth Amendment privilege, and as to whom Mr. Bergrin would certainly have sought judicial immunity had the Court not so clearly indicated its intention to deny all such applications. These included such obviously critical witnesses as Hakeem Curry and Alejandro Barraza-Castro, who, a hearing would show, represented to standby counsel through their attorneys that they would assert their Fifth Amendment privilege.

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

Finally, Mr. Bergrin requests, pursuant to Federal Rule of Evidence 606(b) and Local Criminal Rule 24.1(g), that the Court *voir dire* the jurors, particularly Juror Five, Mr. Hershorn, to determine whether they were exposed to extraneous information or outside influence. The government opposes this motion, arguing that Mr. Bergrin has waived his right to such an inquiry and that, in any case, he has not satisfied the standard for conducting post-trial juror interviews because his claim is speculative and the likeliest source of an extraneous influence is not sufficiently prejudicial. GB 44. Because Mr. Bergrin's request is permitted under the Rules, and warranted on the basis of the facts, the Court should grant the motion.

The government first contends that Mr. Bergrin has waived his right to investigate the suspicious manner in which the jury reached its verdict because he "had time to bring the *Daily News* article to the attention of the Court before the end of trial … but Bergrin did not raise an issue with the Court until two months later." GB 45. In fact, the legal support upon which the government relies for this assertion, GB44, *see United States v. Pelullo*, 105 F.3d 117, 126 (3d Cir. 1997) (citing *United States v. Bolinger*, 837 F.2d 436, 438-39 (11th Cir. 1989)), permits the precise inquiry that Mr. Bergrin seeks. That is, the district court in *Pelullo* held the very hearing that Mr. Bergrin seeks here, for similar reasons. *Id.* at 126-27. And, as set forth in *Bolinger*, it is only "since the end of the trial" and not for "lack of diligence" that Mr. Bergrin was able to piece together the troublingly quick jury verdict and the inopportune timing of the inflammatory article. *Id.* at 438-39. That is, until the verdict was reached, the record was reviewed, and disquieting comments like those of Mr. Hershorn came to light, there was no reason for Mr. Bergrin to allege that the jury would disregard the Court's repeated instructions not to read about the case. *See, e.g.*, 1T238. In fact, Mr. Bergrin seeks a hearing to investigate these circumstances, as is appropriate, in his first post-trial filing.[13]

[13] The government stridently attacks standby counsel for Mr. Bergrin for failing to "monitor press coverage of the trial and bring any potentially prejudicial articles to this Court's attention"

The government next contends that Mr. Bergrin's request to interview jurors should be denied because it is based on "nothing more than unfounded speculation." GB 47 (quotation omitted). Firstly, the standard which the government applies, *i.e.* "[r]easonable grounds are present only when there is clear, strong, substantial and incontrovertible evidence," GB 46 (internal marks omitted) (quoting *United States v. Console*, 13 F.3d 641, 669 (3d Cir. 1993), is far higher than the caselaw actually requires. Indeed, the government's bracketed insertion of the word "only" into the standard, without legal support, turns *Console* on its head. *See Console*, 13 F.3d at 669 ("If there is a reason to believe that jurors have been exposed to prejudicial information, the trial judge is obliged to investigate the effect of that exposure on the outcome of the trial.") (quoting *United States v. Vento*, 533 F.2d 838, 869-70 (3d Cir. 1976)). Here, for the reasons set forth in Mr. Bergrin's main brief, there are strong reasons to believe that the jurors may have been exposed to external prejudicial information. Specifically, the speed with which the jurors reached a verdict the day after the *Daily News* article appeared, and after an intervening weekend, despite having requested evidence that it lacked sufficient time to review, combined with the troubling nature of comments made by Mr. Hershorn, creates a reasonable inference that over the weekend, one or more of the jurors was exposed to an improper influence or extraneous information that tainted the fairness of their deliberations. *See United States v. Lloyd*, 269 F.3d 228, 240 (3d Cir. 2001) (noting an exposure to extraneous information close in time to verdict is a significant factor in evaluating prejudice). While our judicial system assuredly "places a high value on the finality of jury verdicts" GB 46, it places an even higher value on ensuring that criminal defendants are adjudged by an impartial jury and convicted on the basis of competent evidence, and not based extraneous prejudicial information or outside influences improperly brought to bear upon the jury. *See Skilling v. United States*, 130 S. Ct.

GB 45-46. The legal authority cited, *United States v. DiCarlo*, 575 F.2d 952, 960 (1st cir. 1978), fails to discuss the responsibilities of standby counsel at all, let alone impose upon them any such duty; and, the plain language of Rule 606(b) permits post-verdict inquiries based upon just such a circumstance as occurred here, where the defense learns after the verdict that jurors may have been exposed to extraneous and prejudicial information.

2896, 2913 (2010) ("The theory of our trial system is that the conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print.") (internal marks omitted) (quoting *Patterson* v. *Colorado ex rel. Attorney General of Colo.*, 205 U.S. 454, 462 (1907)).

Finally, the government asserts that Mr. Bergrin "could not have been substantially prejudiced by the jury's alleged exposure to the *Daily News* article." GB 53 (citations omitted). To reach this conclusion, the government glosses over the article's inflammatory tone and substance, characterizing it as an article that merely "summarized the parties' contentions in closing arguments" and addressed "evidence admitted at trial." GB 54. Of course, the account, which described Mr. Bergrin as being worse than John Gotti, a "THUG IN A TIE," which included a photograph of Mr. Bergrin in prison garb alongside a photograph of that mob member, and which referenced the equally if not more inflammatory 2011 *New York* magazine story "The Baddest Lawyer in the History of New Jersey" that jurors admitted reading prior to their service, was not so anodyne as the government implies. Certainly it is more inflammatory than the mere reference to the defendant as a "gang figure" in *United States v. D'Andrea*, 495 F.2d 1170, 1172 (3d Cir. 1974), upon which the government relies, GB 55-56. The government argues that because the evidence in fact showed a connection between Mr. Bergrin and John Gotti that the article could not have prejudiced him. GB 55. Yet, it is specifically *because* the government introduced such evidence in this case that the Court should ensure that the jury was not exposed to a media report that emphasized that characterization of Mr. Bergrin. Moreover, contrary to the government's contention, and as discussed at length above, the evidence in this case, particularly as to the most serious charges, the Kemo murder counts, was not "positively overwhelming." GB 56

At the conclusion of its submission, the government attacks Mr. Bergrin's request that the Court specifically *voir dire* Mr. Hershorn in light of comments that Hershorn made to the press after the verdict suggesting that he lied to the Court when he stated, in his initial *voir dire*, that he

could put aside what he had already learned about the case. GB 58. That is, Mr. Hershorn's remarks to the media stand in marked contrast to his avowal to the Court that nothing he heard would have any bearing on his ability to be fair and impartial. GB 60 (citing Gov. Ex. D). On that basis, Mr. Bergrin can, indeed, show that Hershorn lied during jury selection. GB 58 (citing *McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548, 555 (1984)). The government contends that in demonstrating that contrast, Mr. Bergrin's brief "truncates the [*Star Ledger*] quote in a troubling way." GB 58 (quotation omitted). But, putting aside the aggressive nature of the aspersion the government casts, in fact, Mr. Bergrin shares the government's interpretation of Hershorn's remarks. That is, the defense agrees that in the selected quotation, Hershorn describes his impressions as of the time he showed up for jury duty; the ellipses were included solely to achieve brevity, so that the length of the footnote, which the government also criticizes, GB 58, was not extended further. Contrary to the government's view, GB 59, however, the quote, in full -- including the passage emphasized by the government -- clearly demonstrates that Hershorn's impressions ("What a zoo of a case" and "the real parade of people who would come through the courtroom, all the way from felons ... to the murderer of a federal witness to just some of the more innocent parties involved") were derived from his pretrial reading and not from what he learned about the case in court. This is clear because neither the juror questionnaire nor the introductory statement read by the Court to the prospective jurors -- which were carefully crafted by both parties and the Court to be neutral -- were styled as "mafia-like accusations," but Hershorn specifically describes how "[a]s he began to hear about the case he would decide -- Mafia-like accusations, witness murder, drug trafficking and a defendant acting as his own lawyer -- Hershorn realized he'd be deliberating the fate of one Paul Bergrin," about whom, Hershorn had read in the papers. Def. Ex. 7. He recognized the case before him from the media coverage and, as demonstrated by his comments, harbored prejudicial views about the defendant and what the evidence would show. Indeed, upon first learning he might be deliberating the case, he even described Young as the "murderer of a federal witness," even though Mr. Bergrin presented a defense inconsistent with that conclusion, a matter as to which he, therefore, should

have had an open mind. Without knowing the extent of this prejudice until after trial, Mr. Bergrin could hardly have been expected to "probe the matter further" during Hershorn's initial *voir dire*. GB 60. Furthermore, Mr. Bergrin can, in fact, "credibly claim that Juror 5 lied to obtain a seat on the jury, only to ask to be removed just ten days later," GB 61, because it is entirely plausible that Hershorn realized, upon finding himself sworn and realizing the magnitude of his misrepresentation about his ability to fulfill his obligation to decide the case impartially, that he should not have been selected. But Mr. Bergrin could not, until the article appeared, have known why.

In sum, the Court should grant Mr. Bergrin's request to *voir dire* the jurors because, as the record demonstrates, there is every reason to believe that the jury may have been exposed to an article that carries a high likelihood of substantially and unfairly prejudicing Mr. Bergrin and that one juror, in particular, may have lied to obscure a valid basis for a challenge for cause.

VI. CONCLUSION

For the reasons set forth above and in Mr. Bergrin's main brief, the Court should grant defendant Paul Bergrin's motions and enter a judgment of acquittal pursuant to Federal Rule of Criminal Procedure 29 as to Counts 12, 13, One (Racketeering Act Four), and Three, as well as to Counts Twenty-Six and One (Racketeering Act Eight); order a new trial pursuant to Federal Rule of Criminal Procedure 33, or hold an appropriate evidentiary hearing on which witnesses should have been granted immunity, and *voir dire* the jurors concerning any exposure to extraneous prejudicial information or outside influence prior to the delivery of the verdict.

Respectfully submitted,

GIBBONS P.C.
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