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.

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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"A"	refers to the Joint Appendix submitted in connection with Defendant Paul Bergrin's direct appeal from his convictions and sentence in *United States v. Bergrin*, 599 F. App'x 439 (3d Cir. 2014), *cert. denied*, 135 S. Ct. 2370 (2015).*
"BB"	refers to the Brief submitted by Defendant Paul Bergrin in support of his motion under 28 U.S.C. § 2255.
"CDE"	refers to a docket entry in *United States v. Bergrin*, D.N.J. Crim. No. 09-369. (Cites to a specific page of a filed pleading, if not included in the Appendix or Supplemental Appendix, are to the page numbers in the ECF legend at the top of that pleading.)
"HDE"	refers to a docket entry in this *habeas* case. (Again, cites to a specific page of a filed pleading, if not included in the Appendix or Supplemental Appendix, are to the page numbers in the ECF legend at the top of that pleading.)
"SA"	refers to the Supplemental Appendix submitted by the United States in opposition to Defendant Paul Bergrin's motion for a new trial under Federal Rule of Criminal Procedure 33. *See* CDE659-1–6.
"HA"	refers to the Habeas Appendix accompanying this Brief.

* In support of his § 2255 motion, Defendant Paul Bergrin submitted an Appendix spanning some 4,000 pages, which Bergrin's supporting brief rarely cites. For the sake of convenience and consistency, the United States here cites to the materials already submitted to this Court in connection with Bergrin's pending Rule 33 motion. Any additional materials are contained in the Habeas Appendix accompanying this Response.

PRLEMINARY STATEMENT

Respondent, the United States of America, respectfully submits this Memorandum of Law in opposition to the motion by Paul Bergrin to vacate, set aside, or correct his sentence under 28 U.S.C. § 2255.

"[T]he general rule is that the writ of habeas corpus will not be allowed to do service for an appeal." *Sunal v. Large*, 332 U.S. 174, 178 (1947). "If the claim was raised and rejected on direct review, the habeas court will not readjudicate it absent countervailing equitable considerations; if the claim was not raised, it is procedurally defaulted and the habeas court will not adjudicate it absent counter-vailing equitable considerations (*e.g.*, actual innocence or cause and prejudice)." *Withrow v. Williams*, 507 U.S. 680, 721 (1993) (Scalia, J. concurring).

Bergrin honors *Sunal* and *Withrow* in the breach. He litters his § 2255 motion with claims that are either subject to the relitigation bar (because they were raised on direct appeal and rejected) or procedurally defaulted (because they should have been but were not). And Bergrin's bald assertions of actual innocence ring even hollower now than when the jury rejected them over four years ago.

Procedural bars notwithstanding, Bergrin's claims are patently frivolous. Take his claim—raised multiple times and in multiple ways—that the Government violated its *Brady* obligations by suppressing the favorable content of wiretap recordings it produced to Bergrin in discovery *3½ years before his January 2013 trial*. Ironically, the Government must quote Bergrin to refute his claim: "when people are facing potentially spending the rest of their natural life in jail . . . they will say and they will do anything to gain their release." SA368. Settled precedent—if not basic common sense—forecloses Bergrin's claim.

Bergrin also claims that *McDonnell v. United States*, 136 S. Ct. 2355 (2016), which construed "official act" under 18 U.S.C. § 201(a)(3), undermines his conviction for the Kemo McCray murder under § 1512(a)(1) & (k). But *McDonnell* has no bearing at all on the scope of § 1512. Similarly, Bergrin claims that *Johnson v. United States*, 135 S. Ct. 2551 (2015), which construed the Armed Career Criminal Act ("ACCA"), mandates a new sentencing hearing. But Bergrin was not sentenced under ACCA. So *Johnson* is just as irrelevant as *McDonnell*.

For the reasons set forth herein, this Court should deny Bergrin's § 2255 motion without a hearing and decline to issue a certificate of appealability.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

I. INTRODUCTION.

As explained elsewhere, CDE659 at 1–2, this case has a lengthy procedural history, including two Government appeals, *United States v. Bergrin*, 650 F.3d 257 (3d Cir. 2011) ["*Bergrin I*"]; *United States v. Bergrin*, 682 F.3d 261 (3d Cir. 2012) ["*Bergrin II*"]; and one by Bergrin following his convictions, *United States v. Bergrin*, 599 F. App'x 439 (3d Cir. 2014), *cert. denied*, 135 S. Ct. 2370 (2015) ["*Bergrin III*"]. Also pending before this Court is Bergrin's counseled motion for a new trial. CDE630.

II. THE SECOND TRIAL.

In January 2013, Bergrin—who represented himself—stood trial on all of the 23 racketeering, witness tampering and drug-trafficking charges pled in indictment. Although that trial last seven weeks, the jury took less than two days to convict Bergrin on every count. No wonder: there was overwhelming evidence of guilt; Bergrin's numerous missteps at trial manifested his untrustworthiness; and his defense case collapsed under cross-examination.

A. The Government's Case Was Overwhelming.

The Government's case included 52 witnesses, many hours of inculpatory recorded conversations, scores of documents, and other physical evidence. That evidence overwhelmingly proved that, through his law firm, Bergrin ran a complex criminal enterprise that: (1) tampered with witnesses and otherwise corrupted the criminal justice system; (2) sold large quantities of cocaine; and (3) took control of and operated his client's criminal business after the client was in jail.

1. Bergrin Regularly Tampered with Witnesses and Corrupted the Criminal Justice System.

The evidence at trial established beyond cavil that Bergrin would do anything he believed would help him win a case, including, lie to the court, fabricate evidence out of whole cloth, and intimidate and even kill witnesses to prevent their testimony. As standard practice, Bergrin developed a defense strategy based on not the facts, but rather a fiction he believed would put him in the best position to win the case. Thereafter, he eliminated the evidence that countered his defense (by tampering with prosecution witnesses) and manufactured evidence that supported his defense, by among other things, suborning perjury, presenting perjured testimony, manufacturing false documents, and presenting false documents to tribunals.

For example, one of Bergrin's clients was Norberto Velez, who had tried to murder his estranged wife with a knife. To secure Velez's acquittal, A1563, A2031, A2101, Bergrin manipulated and coerced the couple's nine-year-old daughter to commit perjury, A1550–52, A1628–29, A1950–64, A2155, A1991–95, A1999–203, A2111–12, A2136, first at a suppression hearing, A1507–11, A1537, A1545–48, A1555–56, A1623–25, A1634, A1644, A1964–67, A1979–82, and later at a jury trial, A1561–63, A1622–23, A1638, A2003–28. Bergrin also lied to the trial judge about

being ill so that he could obtain a continuance because he needed additional time to procure the daughter's perjured testimony. A1558–61, A1646–47.

Another Bergrin client was Edward Peoples, who Bergrin knew had murdered Rahman Jenkins. A6352. To defend Peoples, Bergrin purposefully suborned and presented perjured testimony of one witness, George McCloud, A5594–96, A7383–89, and suborned the perjured testimony of a second, A5743–49, who later decided to cooperate rather than commit perjury, A5766–67. Bergrin also advised Peoples to have his girlfriend, who had been subpoenaed by the prosecution, flee immediately before she was scheduled to testify. A5581–87, A7389–90; SA755–56.

Likewise, in defending Abdul Williams against a firearms charge, Bergrin encouraged Jamal Muhammed to claim that he possessed the firearm that Williams actually had possessed. As part of that scheme: Bergrin produced a document memorializing Muhammed's false confession; Muhammed procured a police report containing that same false confession; and Bergrin knowingly presented both false documents to the New Jersey Parole Board ("Parole") to gain an acquittal at Williams's parole violation hearing. A5247, A5247–48, A5477–79, A5538–40, A5548–53; SA1803, SA1810–12, SA1819, SA1835–40.

Bergrin used similar tactics while representing Jason Itzler so that Itzler could continue operating a prostitution business in New York ("New York Confidential"). Itzler had travel and curfew restrictions as a condition of parole that prevented him from running New York Confidential. A4190–99, A4202–04, A4266, A4283, A4301–03, A4325–27, A4337, A4399–402, A4417, A4427–31. Bergrin accordingly devised a scheme to trick Parole into modifying Itzler's travel and curfew restrictions.

To make it appear as if Itzler was engaging in legitimate employment when he was actually running the prostitution business, Bergrin produced and submitted to Parole:

- a letter falsely claiming that Itzler was working as a paralegal for Bergrin, A4432–34; SA1769;
- a check falsely claiming that Bergrin had paid Itzler $2000 for his work as a paralegal, A4434–35; *see* A4329–31, A4436–37; SA1771–72; and
- a second letter falsely claiming that Itzler was a paralegal in Bergrin's New York office — which office did not actually exist, A4333–36, A4442.

SA1778. As a result, Parole relaxed Itzler's curfew restrictions. A4438. Itzler did no paralegal work, spent all his time at New York Confidential, and never deposited or cashed the check. A4267–68, A4293; A4329, A4335–36, A4379, A8601–03; SA1927.

Similarly, in defending Vicente Esteves, a high–volume cocaine dealer, Bergrin: (a) coerced an accountant to create tax returns falsely claiming that Esteves earned his living through legitimate means; (b) submitted those false tax returns in support of a bail application; and (c) planned to submit those false tax returns at trial to show that Esteves was a legitimate businessman. A6805–08, A6847–51, A7413–18, SA1690–751. Bergrin also engaged in a series of sham transactions to transfer to himself millions of dollars in real properties that Esteves had purchased with drug proceeds in an effort to thwart the seizure of those properties. A7062–67, A7440–45; SA1649–670. Bergrin had coconspirator (and lawyer associate) Thomas Moran prepare and file with the Monmouth County Clerk deeds evidencing these sham transactions, A7443, which created an official record of them, SA1649–67.

Bergrin's contempt for the rules of the criminal justice system matched his disregard for human life. According to his erstwhile law partner and coconspirator, Thomas Moran, Bergrin's standard method of defending a criminal case was to use

discovery to determine the identity of the prosecution witnesses, and then "by either threatening them, by physical force, by intimidation, forcing them to either not come to court or to give a statement recanting their former statement." A7320; *see* A7312–22, A7373–81. If Bergrin believed threats and physical force would not be effective, he would have the witness killed.

For example, for William Baskerville (and to protect his own drug dealing activity with Baskerville's boss Hakeem Curry[2]), Bergrin advocated and helped execute a plan to kill Kemo McCray ("Kemo"), the confidential informant who had purchased crack-cocaine from Baskerville. Bergrin learned Kemo's identity from Baskerville during an attorney-client visit and passed that information to Curry in a telephone call. A3087–88, A3130–31, A3172–74, A3187, A3215–16, A3272–73, A3756, A7393; *see* A2601, A3215, A3225, A4030–34, A7393, A8609–14. Later, at a meeting on Avon Avenue in Newark, Bergrin advised Curry and members of Curry's gang (including Anthony Young) that if they did not kill Kemo, Baskerville would spend the rest of his life in jail, but if they did kill Kemo, Bergrin would win the case and Baskerville would go free. A3278–80, A3282–87, A3513, A3568, A3576, A3623. Following Bergrin's instructions, Curry's gang searched for and ultimately located Kemo. Young shot Kemo in the head and neck in broad daylight, killing him, to

[2] Government witness Lachoy Walker testified that between the summer of 2002 and February 2003, he assisted Curry in distributing hundreds of kilograms of cocaine, which Curry said came from Bergrin's "connect,"*i.e.*, his supplier. A1234–39. Curry was supplying cocaine to William Baskerville, A3257–60, and Baskerville sold crack cocaine to Kemo, A2557–83. Thus, Bergrin had a strong motive to ensure that Baskerville, who faced a life imprisonment sentence, would not cooperate against others above him, which ultimately would lead to Bergrin himself.

prevent him from testifying against Baskerville. A2434–39, A2483, A3344–46, A3356–57, A3367–80, A3864–65; *see* A2260–79, A2444–58, A2490–96, A3031–62.

At nearly the same time, Bergrin devised and advocated a similar defense strategy for another client charged with a federal drug offense, Richard Pozo. Pedro Ramos, Pozo's former coconspirator, was cooperating with the Government. In an attorney-client meeting, Bergrin asked Pozo if he knew where Ramos lived "because if you know where he lives, we can take him out and all this headache will go away." Pozo responded, "Are you nuts? ... I am not involved in murdering people." Shortly thereafter, Pozo fired Bergrin and got a new lawyer. A4083–87.

The first jury never heard this damning evidence because the originally assigned Judge severed the two Kemo-murder substantive counts, ordered that they be tried first, and excluded evidence of Bergrin's advice to other clients to kill cooperating witnesses, *Bergrin II*, 682 F.3d at 278–81, even though that evidence was "highly probative of Bergrin's guilt;" "powerfully suggestive of Bergrin's intent in passing Kemo's identity on from Baskerville to Curry" and "relevant to deciding whether Bergrin uttered the words "No Kemo, no case," *id.* at 280 (citation omitted).

Likewise, Bergrin devised, advocated, and attempted to execute a plan to kill prosecution witnesses against Esteves—about which the first jury heard nothing. *See Bergrin II*, 682 F.3d at 281–82 n.25, 284. When explaining that he would handle the killing of the witnesses, Bergrin told Esteves, "it wasn't his first time [killing a witness]"—plainly referring to Kemo, *see Bergrin III*, 599 F. App'x at 441, and "if there's no witness there's no case," A6853–56. Esteves and Bergrin enlisted the assistance of Oscar Cordova, who they believed was a Latin King hitman but in fact

was a confidential informant, to kill those prosecution witnesses. During the next six months, Bergrin engaged in recorded conversations in which he:

- Explained how he used discovery materials to identify the prosecution witnesses (in Bergrin's words, the "f*cking rat"), SA335; A11051–55; *see* A6070–85, A7745–53;
- Told the hitman to "kill" a witness, A10617–20; *see* A5924–28; and
- Instructed the hitman "to make it [murdering the witness] look like a home invasion robbery" because "[i]t cannot under any circumstances look like a hit," assuring the hitman that if he followed Bergrin's instructions "[t]hey'll [law enforcement will] never figure it out," A10850–51; *see* A6122–25, A7463–64.

For yet another client, Eugene Braswell, Bergrin devised and attempted to execute a plan to forcibly collect money from and kill Muhammadu Tunkarad, a person who allegedly had stolen $500,000 in drug money from Braswell. A8148, A8151–58. In a series of recorded conversations, Bergrin enlisted Cordova to forcibly collect the money and kill Tunkarad, and Bergrin gave Cordova identifying information for locating Tunkarad. A6036–42, A7896–900. (The first jury never heard this damning evidence against Bergrin, either.)

Bergrin even tried to obstruct justice in this very prosecution. To prevent witness tampering, many of the Government's witnesses entered the Witness Security Program. While this thankfully proved effective, the Government uncovered evidence that a Bergrin associate, Abdul Jenkins, was plotting to kill Thomas Moran for cooperating against Bergrin. *See* SA300, SA307. Abdul Jenkins was also a spectator during the Trial One jury selection. The U.S. Marshals Service seized from him notes that he had taken as part of an apparent effort to determine the identity of the jurors, who were anonymous. Jenkins admitted that he intended to give the notes to Bergrin's investigators. SA299–303, SA318–20. Similarly, during Trial Two,

Hakeem Curry's brother followed one of the jurors as she left the courthouse, approached her, and asked her name and neighborhood. Alarmed, the juror brought this approach to the Court's attention, and the Court dismissed the juror from service (over Bergrin's objection). A6544–73.

2. Bergrin Trafficked Hundreds of Kilograms of Cocaine.

The evidence at trial also proved beyond cavil Bergrin's active involvement in distributing hundreds of kilograms of cocaine. Bergrin brokered the sales of kilograms of cocaine between clients of his law practice and international drug supplier Alejandro Barraza-Castro. Among other things, Bergrin:

- Supplied kilograms of cocaine to Rondre Kelly, A4475, A4432–42, A4528–33, A4605–12, A4620–28, A4653–55, A4730–31, A4769, Eugene Braswell, A8161–201, and Hakeem Curry, A1234–39;
- Enlisted Abdul Williams to deliver kilograms of cocaine to Bergrin's other drug customers, A5165–81, A5170–208, A5204–06, A5249–50;
- Sold kilograms of cocaine out of his law office, A4432–42, A4730–31, A8174–84; and
- Maintained a stash house in a building he owned from which Drug Enforcement Administration agents seized 53 kilograms of cocaine, A7485–87, A8483–93, A8499–507, A8599–600; SA1645, SA1923–24.

3. Bergrin Took Over His Clients' Businesses While They Were Jailed.

The evidence at trial also proved beyond cavil that Bergrin continued his clients' criminal enterprises while they were in jail. For example, after Jason Itzler lost his bid for bail pending trial of his New York charges for operating New York Confidential as a prostitution business, A8604, Bergrin took over that business. Bergrin went to New York, met with the remaining New York Confidential employees, told them that he was taking over, and installed Hiram Ortiz to supervise

the daily operations. A4344–46, A7401–02. New York Confidential shut down only when the New York County District Attorney's Office charged Bergrin with operating a prostitution business and related offenses.

Similarly, after Vicente Esteves lost his bid for bail pending trial, Bergrin tried to take over Esteves's drug trafficking business. As part of securing Bergrin's assistance in killing witnesses, Esteves agreed to introduce Bergrin to his Colombian supplier, who would sell Bergrin kilograms of cocaine at cheap prices. A7071–81. Bergrin planned to go into business with Esteves and Cordova distributing kilograms of cocaine in, among other places, areas controlled by the Latin Kings. A5901–03, A5935–38, A5943–46, A5952–55, A6112–14, A6127–32, A6140–46, A6191–92.

B. Bergrin's Ineffectual Defense at Trial.

Bergrin's *pro se* defense at trial was ill conceived and poorly executed. He claimed to be the victim of an elaborate Government frame-up supported by lying witnesses. But Bergrin could not explain away many incontrovertible facts belying his claim. Thus, Bergrin had no choice but to make arguments that defied common sense or were logically inconsistent. *See Bergrin III*, 599 F. App'x at 441 (finding that Bergrin was "an obstreperous *pro se* Defendant who did whatever he could to: (1) delay the trial, (2) gratuitously attempt to plant the seeds of error, and (3) unfairly prejudice the jury by repeatedly offering inadmissible evidence despite the Court's perpetual warnings not to do so").

For example, to defend against the Kemo murder charges, Bergrin claimed that Young (who shot and killed Kemo) falsely implicated himself in that murder. According to Bergrin, Young did this in an effort to reduce his sentence on an unrelated gun possession case. A9616–17. That proposition was not just contrary to

the evidence, but also defied common sense. To accept Bergrin's defense, the jury would have had to believe that despite being innocent, Young falsely confessed and (on advice of counsel) pled guilty to a murder that carried a mandatory life sentence (and that could have carried a death sentence had Young not confessed and pled guilty).

Bergrin's defense of the charges stemming from his plot to kill witnesses for Esteves was even more ridiculous. Bergrin claimed that he knew all along that Cordova was an informant. A1167–75, A1179–81, A9670, A9674, A9684–85, A9688. To accept that, a juror would have to believe that, although Bergrin knew the Government was investigating his role in the Kemo murder, he nonetheless made many damning (and recorded) statements to a person he knew was an informant about murdering witnesses, fabricating evidence, tampering with witnesses, killing a person who owed a drug debt, and distributing kilograms of cocaine. Yet Bergrin also claimed (without support) that he purposefully withheld information from Cordova so that Cordova could not actually locate and kill any of the Esteves witnesses or Tunkarad. A9669–70, A9683–84. Of course, if Bergrin truly knew that Cordova was an informant, then Bergrin could not have believed that Cordova would kill anyone. In fact, the evidence demonstrated that Bergrin not only believed that Cordova was a hitman but also provided Cordova with all information he had to assist Cordova in locating and killing witnesses and Tunkarad.

Bergrin's execution of his ill-conceived defense was equally flawed. For example, in his opening statement, Bergrin managed to implicate himself in the charged witness tampering/bribery of Jamal Muhammed. While arguing that he

provided only legal advice to Abdul Williams, Bergrin stated that he would have used the phrase "take the weight" in his dealings with Williams if he had known Muhammed falsely confessed to possessing the gun that Williams actually possessed. A1155. (According to Bergrin, being "willing to take the weight for" someone meant being "willing to lie for" that person. A1155.) Sure enough, the Government played for the jury a recording of Bergrin using that exact phrase when discussing Muhammed's false confession. A5236.

Bergrin's cross-examination of Government witnesses fared no better. He spent inordinate amounts of time either intentionally misquoting prior statements (by adding or omitting words to manufacture inconsistencies), reading perfectly consistent prior testimony as if it were inconsistent with the witness's in-court testimony, or trying to establish utterly irrelevant contradictions. For example:

- When cross–examining a Newark detective about the description of the shooter that a witness had provided, Bergrin purported to quote the witness's "exact words" that the witness was "sure" that Malik Lattimore had shot Kemo, when the witness had said only that Lattimore "resembled" the shooter. A2228–29.
- When cross–examining Young, Bergrin represented that Young had admitted in his 2011 testimony that he used Bergrin's name to get the FBI's attention in 2005, when in fact Young merely testified that Bergrin was one of the people he mentioned in his first, brief call to the FBI. A3547–50.
- When cross–examining Pozo, Bergrin represented that Pozo previously had testified that "you [Pozo] believed that I [Bergrin] had lied to you," when in fact Pozo never gave such testimony. A4160–62.[3]

[3] The trial transcripts abound with other examples. A1319–20, A1446–49, A1458–63, A1475, A2222–23, A3128, A3144–46, A3490–91, A3504, A3543, A3548–49, A3630–31, A3637–38, A3672–73, A3676, A3690–91, A3721–22, A3791–93, A3809, A3862–63, A4715–18, A4759–61, A4764–66, A5544–46, A5687–88, A5797–99, A5812, A5852, A6241–45, A6735–36, A7195, A7513–14, A7523–24, A7539, A7651, A8259–60, A8291–92, A8449–50.

This sort of misconduct recurred so frequently, *e.g.*, A3490–91, A3638, A3752–53, A6243–45, that Judge Cavanaugh forcefully admonished Bergrin out of the jury's presence less than halfway through trial:

> This is the last time I'm meeting at sidebar on this issue. Mr. Bergrin, we went over this when Young was testifying for two days. On a number of occasions, I pointed out to you doing exactly what you just did here — that is, going after someone as if it's an inconsistent statement, reading from the transcript, which is totally improper when there's no inconsistent statement. I just read this entire section that you talked about. It doesn't mention anything near that which you just said. You're doing the same thing again. We are wasting time. I will not tolerate it.

A4164.

Even worse for Bergrin, despite ample warning of the consequences, his attempts to mislead the jury during cross-examination opened the door to an otherwise inadmissible telephone call that corroborated Young's testimony about critical telephone conversations between Bergrin and Curry on November 25, 2003 relating to the Kemo murder. A4034–35, A4039–48.

Bergrin's affirmative defense case fared no better. Many of his witnesses provided demonstrably false testimony; others provided testimony favorable to the Government's case; and the remainder provided testimony about uncontested or marginally relevant points. If anything, Bergrin's affirmative defense case helped secure his conviction.

For example, to support his preposterous claim that the Government suborned perjury to frame him, Bergrin called his longtime client, Lemont Love. A9388–89, A9395–97. Love testified that he had no incriminating information about Bergrin, and that FBI agents tried to convince him to give false testimony against Bergrin, but he refused to do so. A9392–93. On cross–examination, however, the Government

played for the jury a recording of a telephone call that occurred shortly after Love met with the FBI. During that call, Love bragged that he had information that could "bury" Bergrin, but was not going to tell the FBI because he was not a snitch and because he believed that if he helped Bergrin win Bergrin's case, then Bergrin would help win Love's case. A9388–89, A9397–402.

Bergrin also called former client Rasheem King in an effort to rebut the Government's evidence demonstrating that Bergrin used King to assist him in finding a person, George McCloud, who would testify falsely in the Edward Peoples homicide case. King testified on direct examination that Bergrin never asked him to look for a witness, that King never came up with a witness for Bergrin in the Edward Peoples case, and that the only person he spoke to about the case was an older woman whose name he did not know. A8937. However, on cross–examination, King admitted that he spoke to McCloud about the Peoples case, told McCloud that Bergrin wanted to talk to McCloud, and understood that McCloud thereafter was "supposed to have" spoken to Bergrin. A8947–49.

Similarly, Bergrin's defense against the Kemo murder charges hinged on his claim that Young falsely implicated himself and Bergrin in that murder because Young wanted to get out of jail on a separate gun charge. The Government's evidence rebutted that claim, by among other things, showing that Young had told law enforcement about Bergrin's involvement in the murder *before* he was in jail on that separate gun charge. Similarly, on her direct testimony as a defense witness, Rashidah Tarver (Young's former girlfriend) confirmed that Young told her Bergrin was involved in the murder *before* Young was in jail. A8861–62, A8866.

Bergrin even elicited false testimony from his own daughter. Substantial evidence showed that he flew to Chicago on Tuesday, August 5, 2008 to meet with Cordova and discuss (in a recorded conversation) their plot to kill witnesses for Esteves. Bergrin contended that he traveled to Chicago merely to visit his daughter, who testified that:

- Bergrin came to Chicago to visit her for a long weekend; she picked him up on Saturday morning from his hotel;
- she and Bergrin went to various landmarks in Chicago; Bergrin spent at least one night at her house; and
- Bergrin left Chicago either Sunday or Monday. A8847.

But the combination of the airline records, hotel records and Cordova recordings conclusively established that:

- Bergrin flew from Newark airport on Tuesday, August 5, 2008, at 4:45 p.m., SA1911;
- Cordova picked Bergrin up upon his arrival at the airport in Chicago;
- Bergrin spent the next several hours that night with Cordova before returning to his hotel room, A6010–31; SA1908; and
- On Wednesday August 6, 2008, at 6:10 p.m., Bergrin flew back to New Jersey, SA1911.

When confronted with these travel and hotel records, Bergrin's daughter insisted that they were incorrect and that she had picked Bergrin up from his hotel on Saturday (August 9), that he spent the night at her house, and that he left either Sunday or Monday (August 10 or 11). A8849–51. Since she eliminated the possibility that she was mistaken, the jury could only have inferred was that she was lying. Thus, in his effort to establish what at best would have been a marginally relevant fact, Bergrin demonstrated, once again, that he was attempting to mislead the jury.

C. The Jury's Across-The-Board Guilty Verdict.

On March 18th, the jury found Bergrin guilty on all 23 counts, including all six racketeering acts (and sub-predicate acts), charged in Count 1. A10034–42.

III. THE POST-TRIAL MOTIONS.

On May 16, 2013, Bergrin—through standby counsel[4]—filed motions for a judgment of acquittal and for a new trial. A10221. In support of those motions, Bergrin for the first time relied on otherwise-inadmissible wiretap recordings produced to him in 2009, contending that they contradicted the Government's theory of the Kemo murder generally and Anthony Young's testimony specifically. A10404–05 & nn. 1–2; SA2055. Judge Cavanaugh denied the post-trial motions. A2.

Bergrin then filed a *pro se* motion for reconsideration, relying again on the inadmissible wiretap recordings. SA2080–82. He also sought Judge Cavanaugh's recusal because of his supposedly close relationship with attorneys Bergrin had accused of misconduct before and during trial, and argued prejudicial pre-indictment delay. Judge Cavanaugh denied that motion, too. SA2092.

IV. THE SENTENCING.

Bergrin faced mandatory life on Counts 3, 12, and 13 and a maximum of life on Counts 1, 2, and 5. A11173, ¶ 306. Before sentencing, Bergrin argued that a life sentence for murdering a witness would be cruel and unusual, A11263–68, and that the trial evidence was too unreliable to resolve disputed Guidelines enhancements, A11239, A11259–61, A11268–77. Judge Cavanaugh rejected both arguments. A10072–121. He imposed the following concurrent sentences of imprisonment:

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[4] *See* CDE659 at 10 (describing numerous attorneys who represented Bergrin and the extraordinary form of hybrid representation he enjoyed).

- life on Counts 1, 2, 3, 5, 12, and 13;
- twenty years on Count 4;
- ten years on Counts 8, 9, 10, 21, 22, 23, 24, and 25; and
- five years on Counts 14 through 20 and 26.

A26, A10164–65. Judgment was entered on September 25, 2013, CDE577; A25, and Bergrin filed his notice of appeal that day, CDE578; A1.

V. THE DIRECT APPEAL.

Again represented by the Gibbons firm, Bergrin filed his opening brief with the Third Circuit on May 30, 2014, raising the following claims:

I. THE TRIAL COURT ERRONEOUSLY DENIED BERGRIN'S MOTION FOR A JUDGMENT OF ACQUITTAL ON THE MCCRAY MURDER CASE COUNTS

A. Standard of Review

B. Argument

1. Insufficient Evidence of Conspiracy To Murder A Witness

2. Insufficient Evidence Of Aiding And Abetting The Murder Of A Witness

II. THE TRIAL COURT DENIED BERGRIN'S FUNDAMENTAL RIGHT TO A FAIR TRIAL

A. Repeated Unfairly Prejudicial Rulings Denied Defendant His Sixth Amendment Right to Present a Defense

1. Standard of Review

2. Argument

a. Failure to Order Continuances for Illness

b. Judicial Interference During Bergrin's Jury Addresses

c. Denial of Funds for Transcripts

d. Preclusion of Defense Witnesses

HA2–3.

On December 18, 2014, the Third Circuit affirmed Bergrin's conviction and sentence. *Bergrin III*, 599 F. App'x at 439–44. After finding ample evidence to support the Kemo murder counts, the Third Circuit catalogued and rejected the litany of claims Bergrin had asserted in Point II of his brief:

> The lion's share of Bergrin's brief is devoted to his second argument, which asserts that the District Court denied him a fair trial. Under that

> general heading, Bergrin offers a congeries of objections to the manner in which the trial was conducted, including: (1) prejudicial rulings denying him a continuance, interfering with his opening and closing statements and witness examinations, denying funding for transcripts, and precluding defense witnesses; (2) preventing him from challenging the Government's case by authorizing the Government to make speaking objections, vouching for Government witnesses, denying him an opportunity to review key Government evidence, denying him access to exculpatory evidence, and curtailing his cross-examination of Government witnesses; and (3) erroneous evidentiary rulings.

Id. at 441. The Third Circuit's "review of the extensive record" led it "to conclude that Bergrin's scattershot arguments are exceedingly weak," *id.*, as "the record demonstrates that Bergrin received a fair trial," *id.* at 442. The court praised Judge Cavanaugh for having "conducted this lengthy trial with great skill, patience, and fairness" despite "an obstreperous pro se Defendant who did whatever he could to: (1) delay the trial, (2) gratuitously attempt to plant the seeds of error, and (3) unfairly prejudice the jury by repeatedly offering inadmissible evidence despite the Court's perpetual warnings not to do so." *Id.* at 441. Bergrin's petition for rehearing *en banc* was denied on January 21, 2015.

Bergrin timely filed a petition for a *writ of certiorari* raising two issues:

> Whether an appellate court may rely on the number of issues raised to decline to consider the cumulative effect of any errors on the fairness of a criminal trial.
>
> Whether the commonplace actions of a criminal defense attorney may serve as the sole evidence that the attorney knew of, assisted, and agreed to join a conspiracy.

HA269. The Supreme Court denied review on May 26, 2015.

VI. THE INSTANT SECTION 2255 MOTION.

On May 25, 2016, Bergrin timely filed a motion under 28 U.S.C. § 2255, HDE1, which he refiled using a form supplied by the Clerk, HDE3. As filed,

Bergrin's motion advanced 15 grounds for relief, although Bergrin has since announced his intent to withdraw Grounds 5, 6, 10, and 14. Bergrin has twice amended his § 2255 motion—first to add a claim based on *McDonnell v. United States*, 136 S. Ct. 2355 (2016), HDE6, and then to add a claim based on *Johnson v. United States*, 135 S. Ct. 2551 (2015), HDE18.

VII. THE RULE 33 MOTION.

On June 27, 2016, Bergrin filed a counseled motion for a new trial under Federal Rule of Criminal Procedure 33(b)(1) based on supposedly newly discovered evidence. CDE630. As the Government's Rule 33(b)(1) opposition explains, the allegedly "newly discovered evidence" falls into four categories: (1) recordings of intercepted phone calls to or from Hakeem Curry and toll records for Bergrin's own telephones; (2) declarations from or hearsay statements attributed to several of his codefendants and coconspirators, including Curry, Rakim Baskerville, Yolanda Jauregui and Jose Jimenez; (3) a declaration from or hearsay statements attributed to witnesses whom he could have called at trial (Hassan Miller, Deidre Baskerville, Loriann Ortiz, Sonia Erickson) or did call at trial (Robert Vannoy); (4) incredible hearsay statements attributed to the purported former girlfriend of Oscar Cordova (Savina Suaseda); equally incredible declarations from two convicted felons (Charles Madison and Amin Sharif); and his efforts to suborn perjury from Yolanda Jauregui (and her brother, Ramon Jimenez).

The Government filed its brief in opposition to that motion on April 28, 2017, CDE659, and Bergrin's reply brief is presently due to be filed on December 4, 2017, CDE666.

ARGUMENT

THIS COURT SHOULD DENY BERGRIN'S SECTION 2255 MOTION WITHOUT A HEARING AND DECLINE TO ISSUE A CERTIFICATE OF APPEABILITY.

"A prisoner in custody . . . claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States . . . or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence." 28 U.S.C. § 2255(a). The grounds for collateral attack under § 2255 are limited. *See United States v. Addonizio*, 442 U.S. 178, 184 (1979). Section 2255 "is not designed for collateral review of errors of law committed by the trial court," such as "the existence of any evidence to support the conviction . . . and other errors in trial procedure." *Sunal v. Large*, 332 U.S. 174, 179 (1947) (footnotes omitted). Rather, a § 2255 motion will be granted only for "a fundamental defect which inherently results in a complete miscarriage of justice." *Hill v. United States*, 368 U.S. 424, 428 (1962).

There are five important limitations on § 2255. *First*, § 2255 "generally 'may not be employed to relitigate questions which were raised and considered on direct appeal.'" *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).

Second, § 2255 relief is not a substitute for a direct appeal. *See United States v. Frady*, 456 U.S. 152, 165 (1982); *see also Bousley v. United States*, 523 U.S. 614, 621–22 (1998). *See generally Sunal*, 332 U.S. at 178 ("So far as convictions obtained in the federal courts are concerned, the general rule is that the writ of habeas corpus will not be allowed to do service for an appeal."). Accordingly, a defendant whose § 2255

motion raises a claim he failed to raise on appeal must show both "cause" for that failure and "actual prejudice" resulting from the claimed error. *Frady*, 456 U.S. at 167–68; *see United States v. Essig*, 10 F.3d 968, 979 (3d Cir. 1993). Alternatively, "proof of actual innocence may provide a gateway for federal habeas review of procedurally defaulted . . . claims of constitutional error." *Bruce v. Warden Lewisburg USP*, 868 F.3d 170, 183 (3d Cir. 2017) (citing *McQuiggin v. Perkins*, 133 S. Ct. 1924, 1931–32 (2013)). But "tenable actual-innocence gateway pleas are rare," *McQuiggin*, 133 S. Ct. at 1928, requiring "new reliable evidence . . . that was not presented at trial," *Schlup v. Delo*, 513 U.S. 298, 324 (1995). The *Schlup* standard is "demanding," *House v. Bell*, 547 U.S. 518, 537–38 (2006), balancing as it does "the societal interests in finality ... and conservation of scarce judicial resources with the individual interest in justice that arises in the extraordinary case," *Schlup,* 513 U.S. at 324.

Third, subject to two narrow exceptions, § 2255 motions may not be used to seek the retroactive benefit of a new rule of constitutional criminal procedure. *See Chaidez v. United States*, 568 U.S. 342, 344 (2013) (citing *Teague v. Lane*, 489 U.S. 288 (1989)). "Retroactivity is properly treated as a threshold question," *Teague*, 489 U.S. at 300, requiring a federal court to decide whether "a habeas claim would require the announcement of a new rule," *Groen v. Busby*, 886 F. Supp. 2d 1150, 1158 (C.D. Cal. 2012); *see Saffle v. Parks*, 494 U.S. 484, 487–88 (1990) ("As [the petitioner] is before us on collateral review, we must first determine whether the relief sought would create a new rule under ... *Teague*"). If it does, the claim cannot be considered.

Fourth, 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).

Fifth, the Third Circuit has "repeatedly emphasized that 'bald assertions and conclusory allegations do not afford a sufficient ground for an evidentiary hearing' on a habeas petition." *Palmer v. Hendricks*, 592 F.3d 386, 395 (3d Cir. 2010) (citations omitted).

The vast majority of Bergrin's § 2255 claims[5] are either procedurally defaulted or barred by the relitigation doctrine. And while Bergrin repeatedly claims he is "innocent"—especially of the Kemo murder—he falls woefully short of meeting the "actual innocence" standard. Indeed, he repeatedly relies on and rehashes evidence that was fully available to him at the time of trial, which is patently insufficient to meet his burden. *See United States v. Schwartz*, 925 F. Supp. 2d 663, 691 (E.D. Pa. 2013) ("Schwartz . . . merely attempts to rehash the 'legal insufficiency' arguments that he raised . . . to our Court of Appeals—arguments that are inadequate as a matter of law to prevail on an actual innocence claim.") (citations omitted).

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[5] The Government responds to each of the grounds for relief identified in Bergrin's formal § 2255 motion, HDE3, as amended, HDE6, HDE18, and as supported by Bergrin's 428-page brief. Bergrin's arguments routinely stray from the topic of the point heading in question, such that buried within the argument section for one point heading are arguments that either are germane to (or a wholesale reprisal of) a different point heading or not germane at all. As an "experienced defense attorney," A6117, Bergrin "may not claim the special consideration . . . customarily grant[ed] to *pro se* parties," *Holtz v. Rockefeller & Co., Inc.*, 258 F.3d 62, 82 n.4 (2d Cir. 2001).

Alternatively, Bergrin repeatedly claims that the result of his trial would have been different but for the errors he now raises. But that is a direct-appeal standard, inappropriate even for non-defaulted § 2255 claims, because federal habeas is not a do-over of the direct appeal. *See Addonizio*, 442 U.S. at 184. And that direct-appeal standard is even more inappropriate for procedurally defaulted claims. *See Bousley*, 523 U.S. at 623 ("'actual innocence' means factual innocence, not mere legal insufficiency.").

Finally, the few claims that are not procedurally barred fall somewhere on the spectrum between meritless and frivolous. Each claim is based on either a false legal premise or a false factual assumption—often both. That is reminiscent of Bergrin's conduct both at trial and on direct appeal, and it explains why Judge Cavanaugh grew impatient with Bergrin's antics and why the Third Circuit summarily affirmed his conviction without oral argument.[6]

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[6] The Government notes that Bergrin filed his § 2255 motion before he filed his counseled Rule 33 motion. But that was only because Bergrin sought and received a three-month extension of the Rule 33(b)(1) deadline. CDE626. It would conserve judicial and attorney resources for this Court to consider and resolve the Rule 33 motion *before* the § 2255 motion. Several claims in the former motion overlap with claims raised in the latter motion. *Compare* CDE630-1 at 11–17 (claiming that the Curry wiretap recordings constitute "newly discovered evidence"), *with* HDE3 at 9 (claiming that "[t]he government's failure to delineate recordings" from the Hakeem Curry wiretap "proving 'actual innocence' violated" Bergrin's rights under *Brady v. Maryland*, 373 U.S. 83 (1963). Rejecting the Rule 33 claims would have preclusion consequences for the identical claims raised in the § 2255 motion. *See LoCascio v. United States*, 267 F. Supp. 2d 306, 310 (E.D.N.Y. 2003) (applying law-of-the-case principles to deny already-rejected claims); *see also Quinones v. United States*, Civil No. 12–6000, 2014 WL 5141551, at *5 (E.D.N.Y. Oct. 14, 2014) ("Because the Court already rejected this [*Brady*] argument when Quinones raised it in his motion for a new trial, the Court finds no need to address it again here.") (citation omitted), *vacated and remanded on other grounds,* 637 F. App'x 42 (2d Cir. 2016).

I. The Claims In Ground One Are Barred By The Relitigation Doctrine, Procedurally Defaulted, And Patently Meritless.

Ground One of Bergrin's motion asserts that "[t]he Government's denial of 'use immunity' to material witnesses who would have exculpated Petitioner and provided seminal impeachment of the prosecutor's case violated Due Process of Law." HDE3 at 6. Included with that claim are additional claims about the conduct of the trial. S*ee* BB3–26. Several of those claims were raised on direct appeal. Others could have been but were not. All lack merit.

A. Compelled Immunity.

1. The Relitigation Doctrine Bars Bergrin's Claims About Baskerville, Peoples, and McNeil.

Bergrin claims that the Government (or Judge Cavanaugh) should have immunized Jamal Baskerville, Jamal McNeil, and Edward Peoples. BB3–14. But Bergrin admits that he raised this claim on direct appeal, HDE1 at 6, adding that "[i]t was collaterally raised as dicta and part of another issue," *id.* at 7. Indeed, Bergrin complained that Judge Cavanaugh had rejected his claim of compelled immunity for Baskerville, McNeil, and Peoples. HA57 n.21. The Third Circuit necessarily rejected that claim in affirming Bergrin's conviction. *Bergrin III*, 599 F. App'x at 441–42. Thus, the re-litigation doctrine bars its reconsideration. *See Forbes v. United States*, Civil No. 09–806, 2014 WL 799002, at *4 (D. Conn. Feb. 27, 2014) (rejecting compelled immunity claim under relitigation doctrine).

2. Bergrin Procedurally Defaulted His Claim Regarding Correia, Bracero, Lopez, And Nieves.

Bergrin names four additional defense witnesses—Maria Correia, Jose Bracero, Michael Lopez, and Jason Nieves whom he claims also should have

received immunity. But the only defense witnesses named in Bergrin's Third Circuit brief were Baskerville, McNeil, and Peoples. *See* HA57 n.21. By not specifically identifying the other witnesses whom he claims should have received immunity, Bergrin procedurally defaulted his claim. *See* A20 (rejecting Bergrin's argument that the denial of his request as to McNeil obviated the need to make specific requests as to his other witnesses). Indeed, Bergrin is subject to a double procedural default because he chose not to call Corriea, HA925, and never asked Judge Cavanaugh (or the Government) to immunize Bracero, Lopez, or Jason Nieves. *See* A9291–9301; *see also* A9603 (listing names the jury heard who were not called as witnesses).

3. To The Extent Bergrin Claims He Is Actually Innocent, His Claim Is Meritless.

As set forth above, this Court may overlook a procedural bar only if the defendant meets the stringent "actual innocence" showing. If he does, the court may then review the claim on the merits. Here, Bergrin's self-serving assertions about what the witnesses would have said and their testimony's likely effect on the verdict fall woefully short of satisfying the stringent standard for actual innocence claims, much less the standard for compelling immunity. *See Duncan v. Morton*, 256 F.3d 189, 201–02 (3d Cir. 2001) (refusing prisoner's invitation "to speculate both as to whether Sherman would in fact have testified on his behalf and as to what Sherman's testimony would have been."); *see also Forbes*, 2014 WL 799002, at *5 ("Bell's refusal to provide an affidavit in support of Forbes's motion for discovery and to even speak with Forbes's attorneys makes it clear that Forbes's contention as to the testimony that Bell would give is based on speculation and that all Forbes has provided the

court is mere conclusory allegations asserted by counsel which the court does not accept as facts.").[7]

B. The Relitigation Doctrine Bars Bergrin's Complaints About Syed Rahman and Drew Rahoo.

Bergrin complains that Judge Cavanaugh refused to delay the trial so that two subpoenaed witnesses—Syed Rahman and Drew Rahoo—who were in U.S. Marshal's custody and in transit could arrive and testify. BB13–15. But Bergrin's direct appeal raised precisely that claim, HA54 ("the trial court nonetheless refused to postpone the trial for even two to seven days, so that these witnesses could testify," identifying "fact witnesses like Syed Rehman and Drew Rahoo"). The Third Circuit necessarily rejected that claim in affirming Bergrin's conviction. *Bergrin III*, 599 F. App'x at 441–42. Thus, the re-litigation doctrine bars its reconsideration.

At any rate, as the Government explained to the Third Circuit, Bergrin waited too long to apply for the proper writs and submit them to the Marshals to secure the appearance of these out-of-state witnesses. He cannot blame Judge Cavanaugh for his own deficiency. *See* HA190–91 & n.13. And without sworn declarations from these witnesses, Bergrin improperly relies on pure speculation to claim they would have testified favorably to him had the trial been delayed. *See Duncan*, 256 F.3d at

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[7] Bergrin suggests that the Government (or the trial judge) automatically must confer statutory use immunity on any defense witness who invokes his or her Fifth Amendment privilege regardless of whether the defendant specifically requested such immunity. *E.g.*, BB191 ("The Judge had an opportunity to order the Government to grant immunity and seek justice but failed to act."). But accepting that legal claim would mark such a radical departure from existing precedent, *e.g.*, *United States v. Quinn*, 728 F.3d 243, 257 (3d Cir. 2013) (*en banc*), that it would create a new rule of constitutional criminal procedure that could not be applied retroactively on collateral attack, *see Groen*, 886 F. Supp. 2d at 1158 (citing *Saffle*, 494 U.S. at 487–88).

201–02 (refusing prisoner's invitation "to speculate both as to whether Sherman would in fact have testified on his behalf and as to what Sherman's testimony would have been."); *see also Forbes*, 2014 WL 799002, at *5.

Besides, further impeachment of Williams' general credibility would have changed nothing because Bergrin forcefully cross-examined Williams at trial—especially on his motive to fabricate (as he conceded he expected to receive time-served for cooperating), *see* A4529-31; A5260-66, A5277-78, A5290-91, A5416-19; *see also* A9278-81, and because there was overwhelming evidence of Bergrin's guilt, *see United States v. Fountain*, 768 F.2d 790, 796-97 (7th Cir. 1985).

C. The Relitigation Doctrine Bars Bergrin's Claim About Defense Witness Privilege Invocations.

Bergrin also complains that Judge Cavanaugh simply accepted subpoenaed defense witnesses' invocations of their Fifth Amendment privileges without adequate probing. *E.g.*, BB11 ("The court never even questioned these critical witnesses, had them sworn and determined if they had Fifth Amendment rights."). But that claim, too, was raised on direct appeal, HA57–58, and rejected by the Third Circuit, *Bergrin III*, 599 F. App'x at 441–42, barring its reconsideration here.

At any rate, for many of the witnesses, Judge Cavanaugh observed that, for Bergrin, "it might have been just as well that they took the Fifth," A9285. And Bergrin's speculation that these witnesses would have testified (and would have done so in a way that would have altered the outcome of the trial) had Judge Cavanaugh taken a different approach to their privilege-invocations is woefully insufficient to meet his burden on collateral attack. *See Forbes*, 2014 WL 799002, at *5; *see also*

United States v. Gibbs, 182 F.3d 408, 432 (6th Cir. 1999) (conclusory assertions failed to meet prejudice prong of plain error test on direct appeal).

D. Bergrin Procedurally Defaulted His Compulsory Process Claims, Which Are Meritless In Any Event.

Bergrin also complains that Judge Cavanaugh and the Government somehow dissuaded his witnesses from testifying, thus interfering with his right to compulsory process. *See* BB21–26; *see also id.* at 10 ("The Government went through great lengths to intimidate and coerce [Jamal Baskerville] to assert his Fifth Amendment right and not testify."). But despite raising several claims about how defense witnesses were handled, Bergrin never lodged that complaint in Point II of his Third Circuit Brief. *See* HA43–81. Thus, this claim too is procedurally defaulted. S*ee Frady*, 456 U.S. at 167-68; *Essig*, 10 F.3d at 979.

In any event, the claim is frivolous. The only witness whom Bergrin describes in any detail is Jamal Baskerville. But Bergrin relies on interaction among Baskerville, Judge Martini, and the Government at the October 2011 trial, which ended in a mistrial. BB22–23. To the extent Bergrin complains that the October 2011 interaction led Baskerville to invoke his Fifth Amendment rights at the second trial in January 2013, Bergrin relies on pure speculation, as he consciously chose to release Baskerville from his subpoena rather than call him to the stand and ask Judge Cavanaugh to probe his privilege invocation. *See* A19 (Judge Cavanaugh notes "there is no record of a formal application or denial of immunity for Jamal Baskerville" and that "when discussing a list of remaining defense witnesses, stand-by counsel for Bergrin acknowledged that Baskerville would invoke his Fifth

Amendment rights") (citing A9298); *see also Wilkes v. United States*, 419 F.2d 684, 686 (D.C. Cir. 1969).

At any rate, as is true of all the supposed witnesses Bergrin now claims would have helped his cause, Bergrin has no sworn affidavit from those witnesses about the content of their testimony. This Court should not accept the unsworn assertions of Bergrin (or his private investigator) as to what those witnesses would have said. *See Duncan*, 256 F.3d at 201–02; *see also Forbes*, 2014 WL 799002, at *5.

II. Ground Two Is Procedurally Defaulted And Frivolous.

Ground Two of Bergrin's § 2255 motion claims that his "constitutional rights to due process of law [and] a fair trial were infringed upon by conflicted and compromised attorneys who acted as *de facto* agents for the government." HDE3 at 7; *see* BB27–58. Bergrin acknowledges that he did not raise this issue on direct appeal, HDE3 at 7, but offers as an excuse that "[t]he issue was not fully known nor developed at the time of the appeal," *id.* at 8. That is false. Bergrin raised aspects of this very claim both before and after his 2013 trial, but chose not to appeal the orders rejecting it. His claim is thus procedurally defaulted and patently frivolous.

A. The Claim Is Procedurally Defaulted.

On August 21, 2012, Bergrin filed a motion seeking an evidentiary hearing to support a claim of outrageous government conduct. HA333–39. He alleged that the Government had suppressed the supposedly exculpatory "fact" that attorney Richard Roberts (who at one time or another represented various individuals who cooperated against Bergrin) had convinced them to fabricate testimony inculpating Bergrin:

> Castro fired Mr. Bergrin as his attorney in April 2009 and hired Richard Roberts to represent him, a fact also not revealed to the defense. Stephens Cert. ¶¶ 74-76. Mr. Bergrin's investigation reveals that, as he did with other government witnesses, *see* Stephens Cert. ¶¶ 58-112, Mr. Roberts acted as a *de facto* government agent conveying government threats to his clients (some of whom, like Rondre Kelly, were adverse to others, like Albert Castro – conflicts which the government did not assert), most of whom in fact turned on Mr. Bergrin as a result.

HA336 n.17. Judge Cavanagh denied the motion, HA342, holding that Bergrin had the information in advance of the second trial and could make whatever use of it he wanted. HA356. Bergrin broached the subject during trial, e.g., A4697–99, A5389–

91, A8695–96, A9391–92, but did not advert to it once in summation, A9590–717, perhaps realizing that his theory was entirely bereft of factual support.

After trial, Bergrin claimed in a *pro se* motion that Judge Cavanaugh should recuse himself because of his close personal relationships with attorneys (including Richard Roberts and Vince Nuzzi) whom Bergrin supposedly had accused of misconduct before and during trial:

> The Certification [of private investigator Louis Stephens], the additional supplemental submission (Bergrin Supplement dated July 15, 2013), as well as trial testimony clearly named specific attorneys in this case such as Richard Roberts, Vincent Nuzzi, John Azzarella and Christopher Adams. These attorneys represented seminal cooperating witnesses such as Rondre Kelly, Albert Castro, Abdul Williams, Eugene Braswell, Ramon Jimenez and Yolanda Jauregui; and the information provided to the Court specifically detailed how these attorneys, with the Government's assistance and at times at the Government's behest, breached their obligations pursuant to the Rules of Professional Responsibility and acted outside the bounds of the law.

SA2083. Judge Cavanaugh denied that motion as untimely and meritless. SA2094–97. On direct appeal, Bergrin did not challenge the order denying his pretrial motion or his *pro se* post-trial motion for reconsideration. HA21–85.

Thus, Bergrin has procedurally defaulted his claim. And his current assertion—that the facts giving rise to Ground Two of his § 2255 were not available to him at the time of his appeal—are plainly belied by the text of Bergrin's *pro se* post-trial motion. Indeed, even with respect to attorneys whom Bergrin did not name in his two motions on the subject, the so-called facts that supposedly showed a conflict were fully available to Bergrin long before his direct appeal. *See Schwartz*, 925 F. Supp. 2d at 691 (noting that Schwartz litigated Government misconduct claims at

trial and on appeal and adding that "to the extent Schwartz attempts to raise any arguments for the first time in his § 2255 motion, they are procedurally defaulted").[8]

As Bergrin makes no effort to show cause and prejudice for his failure to raise this claim on direct appeal (and does not argue actual innocence), this Court need not address its merits.

B. The Claim Is Arguably Barred By *Teague* And Is Patently Frivolous In Any Event.

At any rate, Bergrin's claim is frivolous because it relies on false legal and factual premises.

First, the false legal premises. Bergrin claims that it would have violated his constitutional rights if the attorneys in question labored under the conflicts he alleges. BB27–29. But Bergrin cites no case so holding. The cases he cites involve government efforts to intrude into a defendant's attorney-client relationship. For example, Bergrin says *Massiah v. United States*, 377 U.S 201 (1964), stands for the proposition "that once an individual is represented by counsel, which Bergrin was, then it is a 6th Amendment violation when individuals used by law enforcement officials gain information" from the represented individual. BB28. He adds that "[t]he government's improprieties are nothing but an extension of this position." *Id.* But Bergrin does not allege that the Government used conflicted attorneys to intrude into *his* attorney-client relationship. He admits they did not. BB22 ("Bergrin acknowledges that neither Roberts nor the other attorneys represented him" and "did not obtain any statements from him . . . ."). Rather, he claims that the Government

[8] Moreover, it is debatable whether Bergrin has standing to complain that an attorney for a non-party cooperating witness labors under a conflict.

allowed lawyers laboring under conflicts to represent *others* who became witnesses against Bergrin. Thus, he is not seeking an "extension" of *Massiah*, but a new rule of constitutional criminal procedure barred by *Teague*. *See Saffle*, 494 U.S. at 487–88.

Another false legal assumption plagues Bergrin's entire argument—that the attorneys he names had disqualifying conflicts. They did not. For example, Bergrin claims that because Richard Roberts, Esq. came under federal investigation, he felt compelled to coerce various witnesses to inculpate Bergrin. While it is true that Roberts entered a guilty plea to tax evasion in April 2017, *see United States v. Roberts*, Crim. No. 17–240, ECF Nos. 3–5, the investigation that led to that guilty plea started in November 2013—two months *after* Bergrin's sentencing, HA1101. Thus, Bergrin's motive theory falls flat.

Similarly, Bergrin claims that because the Walder, Hayden firm represented Hakeem Curry at his 2006 trial, former partner Christopher Adams, Esq., acted unethically by negotiating a plea and cooperation agreement for Yolanda Jauregui—who inculpated Bergrin and Curry in narcotics trafficking—in 2010. BB49–50. But the Walder, Hayden firm's representation of Curry ended when he was sentenced to life imprisonment in February 2007, *see United States v. Dorch*, Crim. No. 04–240, ECF No. 558 (notice of appeal filed by Gibbons PC), whereas Jauregui's cooperation began several years later, SA2189, SA2326.[9] Bergrin also asserts that "Adams

[9] Further, because Curry claimed that Walder, Hayden provided him with deficient representation, *Curry v. United States*, Civil No. 11–5800, ECF. No. 1 at 6–28, there was no risk the Walder, Hayden firm would ever simultaneously represent adverse parties. And Bergrin's complaint about Mr. Adams' having represented Jauregui comes with a healthy dose of ill grace, as Bergrin retained Lawrence S. Lustberg, Esq. while Mr. Lustberg still was representing Curry on direct appeal, forcing the Government to note a far more serious potential conflict. CDE69–70.

coerced Jauregui to plead guilty . . . and to enter a cooperating agreement" despite "the fact that there was no credible evidence to prove Jauregui's criminality of these charges." BB49–50. But Jauregui swore that her guilty plea was knowing and voluntary, HA937–76, and she has never sought to withdraw her plea. Further, there was a mountain of evidence (including video and audio) of Jauregui's crimes. *Compare* SA2326–85, *with* HA909–24, HA987, *and*, HA995–96. Finally, Jauregui did not testify against Bergrin at the second trial, and so he cannot possibly show prejudice from any supposed ethical misconduct by Adams or Roberts.

As for the false factual assumptions, Bergrin simply assumes that all of the attorneys he names coached their clients "to contrive, fabricate and manufacture evidence against Bergrin." BB28. While that claim at least rests on existing precedent, *see Napue v. Illinois*, 360 U.S. 264 (1959), it fails. To establish a *Napue* violation, Bergrin must prove (and not merely allege) that "(1) [the witnesses in question] committed perjury; (2) the Government knew or should have known that [the witnesses] committed perjury but failed to correct his testimony; and (3) there is a reasonable likelihood that the false testimony could have affected the verdict." *United States v. Stadtmauer*, 620 F.3d 238, 267 (3d Cir. 2010) (citation omitted). Mere speculation regarding these factors is insufficient. *United States v. Aichele*, 941 F.2d 761, 766 (9th Cir. 1991).

Bergrin's claim fails at steps one and two. "His assertions amount to nothing more than self-serving, conclusory speculation that the testimony or evidence was false and that the prosecutor knew or should have known it was false." *McCray v. Caldwell*, Civil No. 15–1912, 2016 WL 8737477, at *9 (E.D. La. Aug. 24, 2016). That

is, Bergrin "does not clearly identify what testimony, if any, he believes was perjured other than to suggest that the perjury was committed by" all of the witnesses he names. *Lynch v. New Jersey*, Civil No. 14–4470, 2017 WL 3317415, at *12 (D.N.J. Aug. 2, 2017) (Linares, J.). That is fatal. *See Tawalbeh v. United States*, Civil No. 00–00858, 2001 WL 1274562, at *4 (W.D. Va. Oct. 19, 2001) ("Tawalbeh has no admissible evidence that Witt committed perjury, and no evidence whatsoever that the government knowingly used perjured testimony."); *accord Lisko v. Melman*, Civil No. 15–972, 2016 WL 7053178, at *5 (E.D. Wis. Dec. 5, 2016) ("Lisko's arguments that the State knew the testimony to be false is nothing more than speculation.").

Indeed, while insisting that Roberts coached Jauregui and Abdul Williams to lie (to further a lucrative movie deal), Bergrin must ignore the fact that those witnesses met with the Government and inculpated Bergrin *before* Roberts ever met with them. *Compare* SA2326 (Jauregui: first proffer April 28, 2010), *and* HA981 (Williams met with Government six times between November 10 and December 20, 2010), *with* HA980 (Roberts visited Williams in January 2011). *See generally* HA1265, ¶¶ 6–8 (under-oath denial by Adams that any Government official "pressured, coerced, and encouraged Ms. Jauregui to testify falsely against or otherwise 'make things up' about Mr. Bergrin and 'put words in her mouth'").

Simply put, this Court is not required to indulge "speculation in the valley of dreams," *United States v. Strozier*, 981 F.2d 281, 285 (7th Cir. 1992), and "baseless allegations of prosecutorial misconduct are not helpful to either the defendants or the profession," *United States v. Caballero*, 277 F.3d 1235, 1250 (10th Cir. 2002).

III. Ground Three Is Procedurally Defaulted And Utterly Meritless, Except For Two Specific Claims, Which Are Frivolous.

Ground Three complains that "[t]he government's failure to delineate recordings" from the Hakeem Curry wiretap "proving 'actual innocence' violated" Bergrin's rights under *Brady v. Maryland*, 373 U.S. 83 (1963). HDE3 at 9. That claim mirrors Point II.A.4 of Bergrin's Rule 33(b)(1) motion. CDE630-1 at 11–17. It is procedurally defaulted and utterly meritless. Bergrin also claims the Government suppressed favorable information relayed to it by four cooperating witnesses. BB79–81. For two of the four witnesses, the claim is both procedurally defaulted and meritless because Bergrin had the allegedly suppressed information before trial and used some of it. For the other two, the claims are frivolous.

A. Bergrin Procedurally Defaulted His Claim Regarding The Curry Wiretap Calls. And He Cannot Show Actual Innocence Because None Of The Calls Was Suppressed And Because They Are Neither Favorable Nor Material To Guilt.

Bergrin claims that the Government suppressed the favorable content of nine or ten Curry wiretap recordings, all of which he received in discovery in June 2009. Bergrin further claims that the jury would have acquitted him on the Kemo murder counts had the Government singled out the supposedly favorable calls because they contradicted Anthony Young. BB59–89. Bergrin procedurally defaulted this claim by not raising it on direct appeal. And he cannot show suppression—much less actual innocence—because, as Judge Cavanaugh already concluded, Bergrin deliberately chose not to use the recordings at trial. Further, introducing the calls at trial would have changed nothing.

1. Factual Background.[10]

While investigating Curry and his drug-trafficking organization, the DEA wiretapped various cellphones used by Curry and two of his coconspirators. A2413. Unfortunately, the Government mistakenly delayed sealing some of the recordings from those wiretaps. *Id.* Although the recorded calls contained inculpatory evidence against Curry and his coconspirators, including Bergrin, the Government decided not to use the calls rather than litigate the sealing issue. *Id.* The Government did that in its separate prosecutions of Curry, William Baskerville, and Bergrin. *E.g. United States v. Baskerville*, 339 F. App'x 176, 178 (3d Cir. 2009) (the Government "stated that it would not use any of the Unused Calls for any purpose, and was ordered by the District Court not to use any of the Unused Calls" at trial).

The unused Curry calls included two calls between Bergrin and Curry on November 25, 2003, the date of William Baskerville's arrest. During a call that occurred at approximately 2:26 p.m. (the "First Call"), Bergrin, among other things, recited the facts from Baskerville's criminal complaint and told Curry he was going to go to federal court at 3:30 p.m. that day to represent Baskerville at his initial appearance. SA2228–30. During a call that occurred at approximately 4:01 p.m., after Baskerville's initial appearance in Federal Court (the "Second Call"), Bergrin told Curry that he had met with Baskerville, who said "the informant is a guy by the name of Kamo," SA2231–33, mispronouncing the name "Kemo"—the FBI informant who had purchased crack from Baskerville. The Government provided

[10] The Government assumes this Court's familiarity with the evidence supporting the Kemo murder counts, which is described at length in the Government's Rule 33 Opposition. *See* CDE659 at 60–66.

Bergrin draft transcripts of these two calls when it successfully moved to disqualify Bergrin from representing William Baskerville. *United States v. Baskerville*, Crim. No. 03–836, ECF Nos. 22, 30, 32.

As Bergrin now admits, BB59, and as his standby counsel admitted in October 2011, A506, the Government produced all of the wiretapped calls, including the unused ones (collectively, the "Curry Calls"), as part of its Rule 16 discovery on June 15, 2009—nearly 3½ years prior to Trial Two, *see* SA2449–50 (item "i"). The Government produced the Curry Calls on compact disks in a well- organized format that provided easy access to the recordings through a series of icons that opened up successive windows containing data. Each call on a disk had its own icon, and those icons appeared in chronological order with an identified date, time and sequentially designated call number. Indeed, the December 4th calls Bergrin now claims he only discovered after Trial Two are grouped together consecutively and are readily discernible merely by opening the CD-ROM containing them:

862-205-9273 Sprint **2003-12-04** 00-47-25 10460 0 File folder 5/14/2004 1:40 PM
862-205-9273 Sprint **2003-12-04** 00-50-43 10461 0 File folder 5/14/2004 1:40 PM
862-205-9273 Sprint **2003-12-04** 00-50-59 10462 0 File folder 5/14/2004 1:40 PM
862-205-9273 Sprint **2003-12-04** 01-22-29 10463 0 File folder 5/14/2004 1:40 PM
862-205-9273 Sprint **2003-12-04** 01-25-19 10464 0 File folder 5/14/2004 1:40 PM
862-205-9273 Sprint **2003-12-04** 02-35-37 10465 0 File folder 5/14/2004 1:40 PM
862-205-9273 Sprint **2003-12-04** 05-50-05 10466 0 File folder 5/14/2004 1:40 PM
862-205-9273 Sprint **2003-12-04** 09-27-12 10467 0 File folder 5/14/2004 1:40 PM
862-205-9273 Sprint **2003-12-04** 11-03-00 10468 0 File folder 5/14/2004 1:40 PM
862-205-9273 Sprint **2003-12-04** 11-08-27 10469 0 File folder 5/14/2004 1:40 PM
862-205-9273 Sprint **2003-12-04** 11-41-20 10470 0 File folder 5/14/2004 1:40 PM
862-205-9273 Sprint **2003-12-04** 11-53-38 10471 0 File folder 5/14/2004 1:40 PM
862-205-9273 Sprint **2003-12-04** 13-06-31 10472 0 File folder 5/14/2004 1:40 PM
862-205-9273 Sprint **2003-12-04** 13-12-01 10473 0 File folder 5/14/2004 1:40 PM
862-205-9273 Sprint **2003-12-04** 13-12-44 10474 0 File folder 5/14/2004 1:40 PM
862-205-9273 Sprint **2003-12-04** 13-13-45 10475 0 File folder 5/14/2004 1:40 PM
862-205-9273 Sprint **2003-12-04** 13-14-28 10476 0 File folder 5/14/2004 1:40 PM
862-205-9273 Sprint **2003-12-04** 13-15-09 10477 0 File folder 5/14/2004 1:40 PM
862-205-9273 Sprint **2003-12-04** 13-15-46 10478 0 File folder 5/14/2004 1:40 PM
862-205-9273 Sprint **2003-12-04** 13-16-21 10479 0 File folder 5/14/2004 1:40 PM
862-205-9273 Sprint **2003-12-04** 13-17-33 10485 0 File folder 5/14/2004 1:40 PM
862-205-9273 Sprint **2003-12-04** 13-18-21 10486 0 File folder 5/14/2004 1:40 PM
862-205-9273 Sprint **2003-12-04** 13-19-05 10487 0 File folder 5/14/2004 1:40 PM

862-205-9273 Sprint **2003-12-04** 13-19-43 10488 0 File folder 5/14/2004 1:40 PM
862-205-9273 Sprint **2003-12-04** 13-52-31 10490 0 File folder 5/14/2004 1:40 PM
862-205-9273 Sprint **2003-12-04** 14-08-05 10491 0 File folder 5/14/2004 1:40 PM
862-205-9273 Sprint **2003-12-04** 15-18-28 10492 0 File folder 5/14/2004 1:40 PM
862-205-9273 Sprint **2003-12-04** 15-45-40 10493 0 File folder 5/14/2004 1:40 PM
862-205-9273 Sprint **2003-12-04** 15-56-17 10495 0 File folder 5/14/2004 1:40 PM
862-205-9273 Sprint **2003-12-04** 16-20-50 10496 0 File folder 5/14/2004 1:40 PM
862-205-9273 Sprint **2003-12-04** 16-25-10 10497 0 File folder 5/14/2004 1:40 PM
862-205-9273 Sprint **2003-12-04** 16-25-11 10498 0 File folder 5/14/2004 1:40 PM
862-205-9273 Sprint **2003-12-04** 16-47-29 10499 0 File folder 5/14/2004 1:40 PM
862-205-9273 Sprint **2003-12-04** 16-57-09 10500 0 File folder 5/14/2004 1:40 PM
862-205-9273 Sprint **2003-12-04** 16-57-09 10501 0 File folder 5/14/2004 1:40 PM
862-205-9273 Sprint **2003-12-04** 17-24-56 10502 0 File folder 5/14/2004 1:40 PM
862-205-9273 Sprint **2003-12-04** 17-24-58 10503 0 File folder 5/14/2004 1:40 PM
862-205-9273 Sprint **2003-12-04** 17-27-54 10504 0 File folder 5/14/2004 1:40 PM
862-205-9273 Sprint **2003-12-04** 17-27-58 10505 0 File folder 5/14/2004 1:40 PM
862-205-9273 Sprint **2003-12-04** 17-29-10 10506 0 File folder 5/14/2004 1:40 PM
862-205-9273 Sprint **2003-12-04** 17-35-40 10507 0 File folder 5/14/2004 1:40 PM
862-205-9273 Sprint **2003-12-04** 17-35-42 10508 0 File folder 5/14/2004 1:40 PM
862-205-9273 Sprint **2003-12-04** 17-48-32 10509 0 File folder 5/14/2004 1:40 PM
862-205-9273 Sprint **2003-12-04** 17-48-32 10510 0 File folder 5/14/2004 1:40 PM
862-205-9273 Sprint **2003-12-04** 17-49-15 10511 0 File folder 5/14/2004 1:40 PM
862-205-9273 Sprint **2003-12-04** 17-49-15 10512 0 File folder 5/14/2004 1:40 PM
862-205-9273 Sprint **2003-12-04** 17-53-47 10513 0 File folder 5/14/2004 1:40 PM
862-205-9273 Sprint **2003-12-04** 17-53-47 10514 0 File folder 5/14/2004 1:40 PM
862-205-9273 Sprint **2003-12-04** 18-44-37 10515 0 File folder 5/14/2004 1:40 PM
862-205-9273 Sprint **2003-12-04** 18-44-43 10516 0 File folder 5/14/2004 1:40 PM
862-205-9273 Sprint **2003-12-04** 18-53-13 10517 0 File folder 5/14/2004 1:40 PM
862-205-9273 Sprint **2003-12-04** 18-53-13 10518 0 File folder 5/14/2004 1:40 PM
862-205-9273 Sprint **2003-12-04** 19-13-04 10519 0 File folder 5/14/2004 1:40 PM
862-205-9273 Sprint **2003-12-04** 19-13-05 10520 0 File folder 5/14/2004 1:40 PM
862-205-9273 Sprint **2003-12-04** 19-26-39 10521 0 File folder 5/14/2004 1:40 PM
862-205-9273 Sprint **2003-12-04** 19-26-40 10522 0 File folder 5/14/2004 1:40 PM
862-205-9273 Sprint **2003-12-04** 19-27-25 10523 0 File folder 5/14/2004 1:40 PM
862-205-9273 Sprint **2003-12-04** 19-27-26 10524 0 File folder 5/14/2004 1:40 PM
862-205-9273 Sprint **2003-12-04** 19-28-06 10525 0 File folder 5/14/2004 1:40 PM
862-205-9273 Sprint **2003-12-04** 19-28-06 10526 0 File folder 5/14/2004 1:40 PM
862-205-9273 Sprint **2003-12-04** 19-28-48 10527 0 File folder 5/14/2004 1:40 PM
862-205-9273 Sprint **2003-12-04** 19-28-52 10528 0 File folder 5/14/2004 1:40 PM
862-205-9273 Sprint **2003-12-04** 19-31-11 10529 0 File folder 5/14/2004 1:40 PM
862-205-9273 Sprint **2003-12-04** 19-33-01 10530 0 File folder 5/14/2004 1:40 PM
862-205-9273 Sprint **2003-12-04** 19-33-47 10531 0 File folder 5/14/2004 1:40 PM
862-205-9273 Sprint **2003-12-04** 19-38-41 10532 0 File folder 5/14/2004 1:40 PM
862-205-9273 Sprint **2003-12-04** 19-40-11 10533 0 File folder 5/14/2004 1:40 PM
862-205-9273 Sprint **2003-12-04** 19-43-29 10534 0 File folder 5/14/2004 1:40 PM
862-205-9273 Sprint **2003-12-04** 19-47-33 10535 0 File folder 5/14/2004 1:40 PM
862-205-9273 Sprint **2003-12-04** 19-53-45 10536 0 File folder 5/14/2004 1:40 PM
862-205-9273 Sprint **2003-12-04** 20-00-48 10537 0 File folder 5/14/2004 1:40 PM
862-205-9273 Sprint **2003-12-04** 20-02-18 10538 0 File folder 5/14/2004 1:40 PM
862-205-9273 Sprint **2003-12-04** 20-13-26 10539 0 File folder 5/14/2004 1:40 PM
862-205-9273 Sprint **2003-12-04** 20-16-42 10540 0 File folder 5/14/2004 1:40 PM
862-205-9273 Sprint **2003-12-04** 20-23-04 10541 0 File folder 5/14/2004 1:40 PM
862-205-9273 Sprint **2003-12-04** 20-33-00 10542 0 File folder 5/14/2004 1:40 PM
862-205-9273 Sprint **2003-12-04** 20-37-23 10544 0 File folder 5/14/2004 1:40 PM
862-205-9273 Sprint **2003-12-04** 21-25-03 10545 0 File folder 5/14/2004 1:40 PM
862-205-9273 Sprint **2003-12-04** 21-29-29 10546 0 File folder 5/14/2004 1:40 PM
862-205-9273 Sprint **2003-12-04** 21-29-31 10547 0 File folder 5/14/2004 1:40 PM
862-205-9273 Sprint **2003-12-04** 21-37-57 10548 0 File folder 5/14/2004 1:40 PM

862-205-9273 Sprint **2003-12-04** 21-37-59 10549 0 File folder 5/14/2004 1:40 PM
862-205-9273 Sprint **2003-12-04** 21-50-20 10550 0 File folder 5/14/2004 1:40 PM
862-205-9273 Sprint **2003-12-04** 21-50-21 10551 0 File folder 5/14/2004 1:40 PM
862-205-9273 Sprint **2003-12-04** 21-55-28 10552 0 File folder 5/14/2004 1:40 PM
862-205-9273 Sprint **2003-12-04** 21-57-48 10553 0 File folder 5/14/2004 1:40 PM
862-205-9273 Sprint **2003-12-04** 21-57-49 10554 0 File folder 5/14/2004 1:40 PM
862-205-9273 Sprint **2003-12-04** 22-15-59 10555 0 File folder 5/14/2004 1:40 PM
862-205-9273 Sprint **2003-12-04** 22-16-05 10556 0 File folder 5/14/2004 1:40 PM
862-205-9273 Sprint **2003-12-04** 22-25-25 10557 0 File folder 5/14/2004 1:40 PM
862-205-9273 Sprint **2003-12-04** 22-28-19 10558 0 File folder 5/14/2004 1:40 PM
862-205-9273 Sprint **2003-12-04** 22-47-14 10559 0 File folder 5/14/2004 1:40 PM
862-205-9273 Sprint **2003-12-04** 22-47-16 10560 0 File folder 5/14/2004 1:40 PM
862-205-9273 Sprint **2003-12-04** 22-58-00 10561 0 File folder 5/14/2004 1:40 PM
862-205-9273 Sprint **2003-12-04** 22-58-18 10562 0 File folder 5/14/2004 1:40 PM
862-205-9273 Sprint **2003-12-04** 23-26-11 10563 0 File folder 5/14/2004 1:40 PM
862-205-9273 Sprint **2003-12-04** 23-26-47 10564 0 File folder 5/14/2004 1:40 PM
862-205-9273 Sprint **2003-12-04** 23-26-57 10565 0 File folder 5/14/2004 1:40 PM
862-205-9273 Sprint **2003-12-04** 23-27-37 10566 0 File folder 5/14/2004 1:40 PM
862-205-9273 Sprint **2003-12-04** 23-30-13 10567 0 File folder 5/14/2004 1:40 PM
862-205-9273 Sprint **2003-12-04** 23-32-17 10568 0 File folder 5/14/2004 1:40 PM
862-205-9273 Sprint **2003-12-04** 23-32-47 10569 0 File folder 5/14/2004 1:40 PM
862-205-9273 Sprint **2003-12-04** 23-32-47 10570 0 File folder 5/14/2004 1:40 PM
862-205-9273 Sprint **2003-12-04** 23-35-29 10571 0 File folder 5/14/2004 1:40 PM

HA396–98.

Significantly, neither Bergrin nor his counsel ever complained about any inability to open and play certain calls. *Cf.* SA506 (standby counsel in 2011: "Judge, let me be clear. Mr. Gay is correct, we've had the tapes. I don't believe I have the transcripts."). To the contrary, within four months of the Government's having produced them to the defense, Bergrin's counsel, in a letter urging the Government not to seek the death penalty, asserted that "the electronic surveillance never picked up any hint of the meeting" to which Anthony Young had testified at William Baskerville's 2007 trial. SA2114 n.10. And by September 2011, Bergrin told Judge Martini that he had all of the CD-ROMs, SA117, and that he had virtually unlimited access to the computers needed to review the recordings, SA240–45; *see* HA357–58.

Fast-forwarding to Trial Two, Anthony Young testified in February 2013 (as he had twice before) that he was present with Curry on November 25, 2003 when the First Call and Second Call occurred and described their substance, including

(significantly) Bergrin's having mispronounced Kemo's name. A3269–73. Of course, the Government's decision not to use the improperly sealed calls meant that it could not offer the jury powerful corroboration of Young's testimony—*i.e.*, the actual, intercepted phone calls themselves. Young also testified (as he had before) that sometime after Thanksgiving, A3278, Bergrin came to a meeting at Avon Avenue and effectively instructed Curry, Young, and several others to kill Kemo to prevent him from testifying against Baskerville, A3278–83.

Bergrin understandably chose not to use the inadmissible Curry calls to impeach Young's credibility. At Trial One in October 2011, Bergrin misled the jury by using his *pro se* opening statement to put in issue the content of the inadmissible Curry calls. SA371, SA389–90. That forced the Government to warn Bergrin that such conduct would open the door to the admission of other damaging calls, including the two November 25th calls, to rebut the misleading impression Bergrin had created. *See* SA501–09, SA652–54; *see also* HA413. (That warning fell on deaf ears, however, as Bergrin's summation again put the calls in issue. SA1400.) The Government had to renew this warning at Trial Two, *see* A2413–15; *accord* A2917, when Bergrin's opening statement, A1191, and cross-examination questions, *e.g.* A2916, again misused the Curry calls. (Ultimately, Bergrin opened the door to the First Call by misleadingly questioning a witness. A4034–48.)

Bergrin's choice not to use the inadmissible Curry calls left him numerous alternative avenues to impeach Young's credibility. Bergrin cross-examined Young extensively about numerous perceived prior inconsistent statements across multiple meetings with the FBI and testimony at two separate trials. Many such questions

were aimed at the timing of (and what was said at) the Avon Avenue meeting, including that there was nothing to corroborate Young's testimony that such a meeting had even occurred. A3776–95; *see* A2912 (eliciting same information from lead FBI Agent). Bergrin also hammered that point in summation. A9627–28 ("But they don't have one witness, even witnesses that aren't charged, to ever come forth and say that there was a meeting. . . . Because it never occurred"). Indeed, his summation again referred to the substance of the inadmissible Curry calls, even though they were not in evidence: "why do you think that there's no chatter setting up this meeting, any meeting at all with Paul Bergrin?" A9627–28.[11]

The jury convicted Bergrin despite his having effectively testified through his jury addresses that the Curry Calls did not corroborate Young's testimony about the Avon Avenue meeting, and despite his having asserted that the Kemo murder counts turned solely on the credibility of a career criminal (Young).

After trial, Bergrin (through stand-by counsel) argued in a post-trial motion that no rational jury could have found that he conspired to murder Kemo or that he aided and abetted Kemo's murder. That motion, of course, assumed the jury had credited Young's testimony about the Avon Avenue meeting. A10236–63.

The Government responded by meticulously describing the evidence showing Bergrin's guilt, including Anthony Young's testimony. A10323–41. In so doing, the Government added that the Avon Avenue meeting, which Young had testified

[11] Not once before or during the 2013 trial did Bergrin complain that he had any difficulty opening or playing the CD-ROMs containing the Curry Calls. And if Bergrin or his counsel had difficulties with other CD-ROMs (as they did with two of the six CDs containing recordings made by Shelton Leverett), they spoke up and immediately received new copies. *E.g.*, HA417–18.

occurred sometime after Thanksgiving, likely occurred on the evening of December 4, 2003 (after William Baskerville's bail hearing). In making that assertion, the Government relied in part on the fact that admitted phone records showed three calls between Bergrin and Curry that day and on Young's testimony that Curry, after speaking on his cell phone, said "My man on his way." A10327 & n.2. (To be clear, *Young* never testified that the meeting occurred on December 4th; rather, *the Government* argued after trial that the evidence permitted such an inference.)

Bergrin took issue with that specific assertion. Through standby counsel, he claimed that the substance of a December 4, 2003, 7:13 p.m. call between Curry and Bergrin—which was among the inadmissible Curry calls produced to Bergrin in June 2009—showed that no meeting had occurred on December 4th. A10404–05. Bergrin added that it would be "improper to allow the Government to mischaracterize the content of the tape knowing that Bergrin—at trial—could not use the recordings without risking opening the door to others." A10405 n.2. Significantly, standby counsel never suggested that they (or Bergrin) had only just discovered the content of a wiretap call that had been in their possession since June 2009—and to which Bergrin himself was a party. Nor did standby counsel argue that the December 4th call proved that Young had lied about the post-Thanksgiving meeting.

In response, the Government filed a letter correcting its assertion that the pattern of phone activity confirmed the date of the Avon Avenue meeting. A10431. But the Government maintained that the meeting likely occurred on or after December 4th based on Young's testimony and based on the fact that the bail hearing for Baskerville had occurred on December 4th, at which time Baskerville and

Bergrin learned that Baskerville was facing life imprisonment. A10431–32. Standby counsel responded with yet another letter citing additional Curry calls and claiming (inaccurately) that they undermined the Government's theory of guilt. A10433.

Bergrin also filed a *pro se* letter containing many of the assertions that now appear in his § 2255 motion. SA2051. That letter accused the Government of having engaged in prosecutorial misconducted by sponsoring Young's testimony about the Avon Avenue meeting and making arguments in summation and post-trial briefing that supposedly were contradicted by the inadmissible Curry calls. SA2051–55. Bergrin then offered a variety of excuses for his failure to use these supposedly game-changing recordings at trial: (1) technical issues—and his *pro se* status—prevented him from listening to the recordings before trial; (2) he did not receive operable recordings until trial started; (3) he relied on a report by Curry's investigator stating that the recordings were unhelpful; and (4) the Government had "intimidated" him into believing that using inadmissible calls helpful to him would open the door for the introduction of inadmissible calls helpful to the Government. SA2055. As Bergrin saw it, Judge Cavanaugh had to "accept the fact that the content of these recordings are exculpatory and delineate the extent of false, misleading and perjured testimony presented to the [j]ury." *Id.*

Judge Cavanaugh did not see it that way. A2. Initially, he agreed with the Government that a rational jury could have credited Young's testimony generally and about the Avon Avenue meeting specifically, both of which sufficiently supported the Kemo murder counts. A7–8. Judge Cavanaugh also rejected Bergrin's effort to rely on inadmissible wiretap calls to undermine the jury's verdict, implicitly

finding that Bergrin knew (or should have known) the contents of the Curry wiretap calls but deliberately chose not to use (or listen to) them:

> The Court . . . is not persuaded by Bergrin's countervailing argument that he opted not to use the recordings during trial because he "was intimidated by the Government attempting to deceive the jury, as they did anyway." The Court recognizes that, had Bergrin selected a sampling of the 33,000 intercepted calls, he would have exposed himself to admission of others. Bergrin may not now, post-trial, seek the benefits of suppressible calls that he claims may be exculpatory while avoiding the content of many others that may have promoted a countervailing viewpoint.

A9 n.3 (citations omitted).

Bergrin then filed a *pro se* motion for reconsideration. Again relying on inadmissible Curry calls, this time he argued that he was actually innocent of the Kemo murder and that the Government had knowingly sponsored false testimony by Young. SA2080. Bergrin repeated his excuses for having not used the recordings at trial, but did not separately allege that the Government had suppressed the recordings in violation of its *Brady* obligations. SA2082.

Judge Cavanaugh denied that motion as well. SA2092. He rejected Bergrin's claim that the Government knowingly sponsored false testimony by Young and that the wiretap recordings proved his innocence:

> Bergrin asserts that reconsideration is necessary to prevent a manifest injustice as he asserts the tapes present proof of his own innocence in orchestrating the McCray murder. . . . This Court recognized that a rational jury could have found that Young's testimony was credible and could have rejected Bergrin's claim that he was untruthful. This Court does not agree with Bergrin's contention the Government knew or should have known that Young testified falsely and disagrees with Berg[r]in's contention that a manifest injustice would be result if this Court were not to reconsider its denial of motion for judgment of acquittal.

SA2098 (citations omitted).

On direct appeal, Bergrin alluded to the post-trial dispute over the timing of the Avon Avenue meeting, HA27 n.5, but did not raise a *Brady* claim arguing that the Government had suppressed the favorable content of the Curry wiretap calls.

2. Bergrin Procedurally Defaulted His Claim.

Bergrin concedes that he failed to raise his *Brady* claim on direct appeal, HDE3 at 9, but asserts "[i]t was not ripe," *id.* To the contrary, he actually possessed the very calls he now claims were suppressed and used them to support his post-trial motions, *see* A10405 & nn.1–2; A10433; *see also* SA2055; SA2080. And on direct appeal he used the Curry calls to attack Judge Cavanaugh's Rule 29 opinion, HA27 n.5. Given that Bergrin raised other *Brady* claims on direct appeal, *see* HA64 n.23, HA78 n.24, HA74, he has no excuse for waiting until collateral attack to raise a *Brady* claim premised on the Curry calls, *see United States v. Clay*, 720 F.3d 1021, 1025 n.2 (8th Cir. 2013) ("Clay's opportunity to develop evidence about McCuien's false testimony at the hearing on his motion for a new trial, premised on a claim of ineffective assistance of counsel for failure to develop impeachment evidence, arguably procedurally defaulted this habeas claim that his conviction was based on the use of perjured testimony in violation of his right to due process."); *see also United States v. Cisneros*, 456 F. Supp. 2d 826, 855 (S.D. Tex. 2006) (holding that "there was no new information regarding Garza's inconsistent testimony that would have triggered Cisneros to raise this issue for the first time in a motion to vacate, that could not have been raised on appeal," and observing that "[a]ll the grounds that Cisneros lists in her motion to vacate which support her due process argument, existed at the time of her appeal").

In sum, as "[Bergrin] did not present his two *Brady* claims to the Third Circuit on direct appeal," 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.").

3. Bergrin Cannot Show "Actual Innocence" Because The Curry Calls Are Not "Newly Discovered" And Do Not Affect His Guilt.

A "§ 2255 movant may overcome procedural default by showing that a constitutional error 'has probably resulted in the conviction of one who is actually innocent.'" *United States v. Jordan*, 461 F. App'x 771, 777–78 (10th Cir. 2012) (quoting *Murray v. Carrier*, 477 U.S. 478, 496 (1986)). To do that, the movant must come forward with (1) "***new*** reliable evidence . . . not presented at trial" that (2) "persuades the district court that, in light of the new evidence, no juror, acting reasonably, would have voted to find him guilty beyond a reasonable doubt." *Schlup*, 513 U.S. at 324, 329 (emphasis added). Bergrin cannot meet this onerous standard because the record shows beyond any doubt that Bergrin knew the content of the recordings before trial and strategically chose not to introduce them.

a. The Curry Wiretap Recordings Are Not "New."

As is clear from Point I.A.1 above, the unused Curry calls flunk the first part of *Schlup*'s actual-innocence test because they are the antithesis of "new."

Justice O'Connor, who provided the crucial fifth vote in *Schlup*, emphasized that the majority's test requires "newly discovered evidence." *Id.* at 332 (O'Connor,

J., concurring). Thus, "[e]vidence is not 'new' if it was available at trial, but a petitioner 'merely chose not to present it to the jury.'" *Goldblum v. Klem*, 510 F.3d 204, 226 n.14 (3d Cir. 2007) (quoting *Hubbard v. Pinchak*, 378 F.3d 333, 340 (3d Cir. 2004)). Put another way, "evidence is new only if it was not available at trial and could not have been discovered earlier through the exercise of due diligence." *Amrine v. Bowersox,* 128 F.3d 1222, 1230 (8th Cir. 1997) (*en banc*).

The Government's Rule 33 Opposition proves that the Curry calls were "available at trial, but [Bergrin] merely chose not to present [them] to the jury." That brief marshals a host of facts showing that Bergrin either actually knew the contents of the Curry calls prior to the second trial or made a strategic decision not to listen to them. CDE659 at 25–32. Those facts eviscerate Bergrin's current claim that he learned of the exculpatory content of the Curry calls only in June 2013.

If this Court holds that the Curry wiretap calls are not "newly discovered evidence" under Rule 33(b)(1), then *a fortiori* Bergrin cannot pass through the actual innocence gateway, which requires the same showing. *See United States v. Lawrence*, Crim. No 11–052, 2016 WL 3212161, at *2 (E.D. Ky. June 9, 2016) (finding that "Lawrence's actual innocence claim based on his CPA's affidavit is also procedurally barred" where "[t]his Court has already considered and rejected those claims in its Order denying his Rule 33 motion"); *compare Goldblum*, 510 F.3d at 226 (denying habeas petition and noting that "[e]vidence is not 'new' if it was available at trial, but a petitioner 'merely chose not to present it to the jury'") (citation omitted), *with United States v. Diaz-Albertini*, 772 F.2d 654, 657 (10th Cir. 1985) (denying Rule 33 motion and adding that "[t]he litigant cannot transform a tactical decision to

withhold the information from the court's attention into a trump card to be played only if it becomes expedient").

The Government will not lengthen this brief by rehashing here all of the arguments it advanced in its Rule 33(b)(1) opposition. Rather, it will augment those arguments with several discrete points that reinforce the inescapable conclusion that Bergrin actually or constructively knew the content of the inadmissible Curry recordings long before the start of the 2013 trial.

i. Judge Cavanaugh Already Rejected The Central Premise Of Bergrin's *Brady* Claim.

First, Judge Cavanaugh found—in July 2013—that Bergrin made a tactical choice not to use the Curry calls in his defense because he knew that doing so would open the door to other, more damaging calls. A9 n.3 ("had Bergrin selected a sampling of the 33,000 intercepted calls, he would have exposed himself to admission of others"). In so holding, Judge Cavanaugh necessarily rejected the litany of other excuses Bergrin offered then (and renews now) for his not having found and used the calls at trial—including those that belatedly tried to blame the Government for his own calculated inaction. *See* SA2055 (claiming that the Government "provided discovery to Stand By Counsel but never to Bergrin directly;" that "a multitude of the CD's containing recordings were dysfunctional, could not be opened nor played," and "that Bergrin did not receive operable recordings until trial commenced," by which time "it was too late to even attempt to listen to them").[12]

[12] Judge Cavanaugh scoffed at Bergrin's assertion, during trial, that he had not read a particular transcript from William Baskerville's 2007 trial. A3786 ("I've got to tell you, that surprises me, Mr. Bergrin, that you haven't read something in any of these cases, because it seems like you have.").

Judge Cavanaugh's finding, which Bergrin never appealed and offers no reason to disturb now, itself bars Bergrin from proceeding through the "actual innocence" gateway. *See Hubbard*, 378 F.3d at 340 ("A defendant's own late-proffered testimony is not 'new' because it was available at trial. Hubbard merely chose not to present it to the jury. That choice does not open the gateway."); *Nooner v. Hobbs*, 689 F.3d 921, 935 (8th Cir. 2012) (rejecting actual innocence claim where "there is nothing to suggest Nooner's failure to present some form of height evidence at trial is attributable to anything other than trial strategy or a lack of diligence"). *See generally Boumediene v. Bush*, 553 U.S. 723, 782 (2008) (noting that "considerable deference is owed to the court that ordered confinement" in a habeas case).

ii. Standby Counsel Admitted That Bergrin Chose Not To Use The Curry Calls At Trial.

Second, Bergrin's standby counsel essentially conceded that the Curry calls were known by and fully available to Bergrin at the 2013 trial. In response to the Government's Rule 29 argument—that the pattern of calling activity helped show that the Avon Avenue meeting likely occurred on December 4, 2003—standby counsel cited the substance of the last December 4th call; but rather than assert that Bergrin only recently had discovered that call, standby counsel added that "Mr. Bergrin appropriately did not introduce that recording at trial" due to the sealing error described above. A10405 n.1. Thus, stand-by counsel essentially admitted that Bergrin knew of and could have used the December 4th call (and all of the other calls he now cites), but consciously chose not to do so. Again, that is fatal. *See Goldblum*, 510 F.3d at 226 (denying habeas petition and noting that "[e]vidence is not 'new' if it was available at trial, but a petitioner 'merely chose not to present it to the jury'")

(citation omitted); *see also Tyson v. Kelly*, Civil No. 09–1754, 2010 WL 743735, at *2 (N.D. Ohio Feb. 25, 2010) (videotapes not "new" where "Tyson admits to having access to these tapes during the trial").[13]

iii. Bergrin Has Admitted That His Motive to Scrutinize the Recordings Arose, At The Very Latest, By November 2011.

Third, Bergrin more recently has admitted—albeit inadvertently—that his motive to scrutinize the recordings arose, at the very latest, in November 2011.

Bergrin's Rule 33 motion footnoted that he did not appreciate the exculpatory significance of the inadmissible Curry calls until the Government's post-trial Rule 29 brief relied on the pattern of telephone calls to assert that the Avon Avenue meeting occurred on December 4, 2003. CDE630-1 at 17 n.10. He thus implied that the Government never before had advanced such an argument. But Bergrin understood the Government's November 2011 summation, *see* HA502–04, as having argued just that, because Bergrin's summation responded that "[t]he prosecution comes before

[13] Even beyond that admission, this Court cannot ignore that a host of attorneys formally represented Bergrin between his May 2009 indictment and his September 2011 decision to waive counsel. Putting aside that Bergrin was a party to some of the very calls he now cites and obviously knew their contents, if any of his attorneys knew the content of the Curry calls—and there is every reason to believe they did, *e.g.*, SA2114 n.10, then Bergrin is chargeable with that knowledge, *see In re Kensington Int'l. Ltd.*, 368 F.3d 289, 315 (3d Cir. 2004) ("A person has notice of a fact if his agent has knowledge of the fact") (quoting Restatement (Second) of Agency § 9(3) (1958)). Although a hearing is unnecessary to resolve Bergrin's *Brady* claim, it would be inequitable to permit Bergrin to invoke the attorney-client privilege to bar an inquiry into what he knew and when. *See Conkling v. Turner*, 883 F.2d 431, 435 (5th Cir. 1989) (holding that when plaintiff put in issue when he knew or should have known falsity of defendant's statements, defendants were authorized to depose plaintiff's attorneys about information relevant to client's knowledge and adding that "[t]o the extent that the questions require the attorneys to disclose confidential communications from Conkling, the attorney-client privilege has been waived").

you, and . . . eight years later, for the first time argues that this alleged meeting, this phantom meeting on Avon Avenue with Paul Bergrin takes place on December the 4th," SA1400.

Thus, even were this Court to find that Bergrin lacked actual knowledge of the contents of the recordings, the record fatally undermines *the key premise* of Bergrin's newly discovered evidence claim, *i.e.*, that the Government's June 2013 assertion about the timing of the Avon Avenue meeting was the game-changing event that first motivated Bergrin to listen to calls he had possessed since June 2009.

iv. As A Matter Of Law, Calls Involving Bergrin Himself Cannot Qualify As "Newly Discovered."

Fourth, Bergrin relies on several calls that captured his own conversations with Curry. BB73–75. But settled precedent holds that a defendant cannot premise a claim of "newly discovered evidence"—much less "suppression" in the *Brady* context—on information he himself knew at the time of trial. *See Hubbard*, 378 F.3d at 340 ("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"). S*ee generally United States v. Guibilo*, 336 F. App'x 126, 129 (3d Cir. 2009) ("the manuscript's belated disclosure did not lead to the discovery of any new evidence; as the manuscript's author, Guibilo had knowledge of its existence and its contents").

In sum, the unused Curry calls cannot qualify as "newly discovered evidence" as a matter of Third Circuit law.

b. The Curry Calls Do Not Come Close To Showing That, More Probably Than Not, No Reasonable Juror Would Have Convicted Bergrin.

Beyond the fact that the Curry calls are not "new," they do not remotely "show that it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence."

The actual innocence standard requires "a stronger showing than that needed to establish prejudice" for an ineffectiveness claim. *Schlup*, 513 U.S. at 327. Actual innocence means "factual innocence, not mere legal insufficiency." *Bousley*, 523 U.S. at 623. The newly discovered evidence must be such that it "thoroughly undermines the evidence supporting the jury's verdict." *Rivas v. Fischer*, 687 F.3d 514, 543 (2d Cir. 2012). New evidence that merely impeaches a witness is insufficient. *See Hussmann v. Vaughn*, 67 F. App'x 667, 669 (3d Cir. 2003) ("these unreliable statements do not demonstrate Hussmann's actual innocence but merely impeach Smith's credibility"); *Clayton v. Gibson*, 199 F.3d 1162, 1180 (10th Cir. 1999) ("The evidence which he asserts as newly discovered evidence barely aids his case and is merely impeaching evidence that would not cause a rational person to doubt Clayton's guilt.").

Further, this Court "is not bound by the rules of admissibility that would govern at trial." Instead, "the emphasis on 'actual innocence' allows the reviewing tribunal also to consider the probative force of relevant evidence that was either excluded or unavailable at trial." *Schlup*, 513 U.S. at 327–28. That means this Court may consider other unsealed Curry calls along with the supposedly "new" evidence to determine whether, in light of the evidence the Government mustered at trial, "no reasonable juror would have convicted [Bergrin] in the light of the new evidence." *Id.*

at 327; *accord Bousley*, 523 U.S. at 624 ("The Government should be permitted to present any admissible evidence of petitioner's guilt").

Actual innocence cases are extremely rare. *E.g.*, *House*, 547 U.S. at 540 ("in direct contradiction of evidence presented at trial, DNA testing has established that the semen on Mrs. Muncey's nightgown and panties came from her husband, Mr. Muncey, not from House"). Bergrin offers nothing like the exonerating DNA evidence described in *House*. Instead, his *Brady* claim rehashes *the very same argument* he advanced at trial, *i.e.*, Young must have lied about the Avon Avenue meeting because no evidence corroborates his account of it. *Compare* BB65 (recordings supposedly show that "no street meetings ever occurred with this group and Bergrin"), *with* A9627–28 (March 2013 summation: asking "why . . . there's no chatter setting up this meeting, any meeting at all with Paul Bergrin?," why "there's no chatter about anything having occurred at the meeting, after the meeting, during the meeting?," and why "nobody, nobody, except for Anthony Young, says that there was a meeting? That's not observed by anybody.").

So understood, Bergrin's primary defense—that Young fabricated the post-Thanksgiving meeting—stands on exactly the same footing now as it did in 2013; the only difference is that Bergrin now claims the Curry calls help impeach Young's account and, thus, show reasonable doubt. That claim is not true; but even if it were, it would fall woefully short of establishing actual innocence. *See Schwartz*, 925 F. Supp. 2d at 694 ("Schwartz makes no serious effort to allege his factual innocence. He merely attempts to rehash the 'legal insufficiency' arguments that he raised . . . to our Court of Appeals—arguments that are inadequate as a matter of law to prevail

on an actual innocence claim.") (citations omitted); *accord United States v. Storm*, Crim. No. 13–048, 2017 WL 1324131, at *12 (D. Ore. Apr. 6, 2017) ("Storm presents no evidence that affirmatively proves his probable innocence, such as a newly discovered alibi witness or the confession of another person. Instead, Storm merely rehashes the defense theories he presented at trial.").

Beyond that, the Government's Rule 33 Opposition shows why the unused Curry calls do not meet the onerous standard for actual innocence. "Newly discovered evidence would only warrant a new trial if it was 'of such nature' that it would probably produce an acquittal." CDE659 at 40 (quoting *United States v. Whiteford*, 676 F.3d 348, 361 (3d Cir. 2012)) (internal quotation marks and other citations omitted). The Government forcefully explained why the Curry wiretap calls on which Bergrin now relies utterly flunk the *Whiteford* standard. *See* CDE659 at 60–77. The Government incorporates those arguments by reference here to avoid lengthening this brief. *See* Point I.A.3.b *infra*.

If this Court agrees with the Government that Bergrin's "newly discovered evidence" is insufficient to justify a new trial under Rule 33, that holding would have preclusive consequences here. After all, *Whiteford*'s "probably produce an acquittal" standard is arguably lower (and certainly no higher) than *Schlup*'s requirement that the prisoner prove by a preponderance of the evidence that "no reasonable juror would have convicted him in the light of the new evidence." 513 U.S. at 327. If Bergrin cannot show that the supposed newly discovered evidence meets the Rule 33(b)(1) standard, then *a fortiori* he cannot show that it meets the *Schlup* standard. *See Lawrence*, 2016 WL 3212161, at *2.

4. The *Brady* Claim Is Frivolous.

In any event, Bergrin's *Brady* claim is frivolous for the same reasons he cannot meet the actual innocence test. The Curry calls were not suppressed, are not favorable, and are hardly "material."

a. The Government Cannot Suppress Information It Actually Produced Long Before Trial.

The Government did not suppress the content of the Curry wiretap calls for the same reasons that those calls are not "newly discovered."

Under *Brady*, "[t]he government must disclose all favorable evidence." *Dennis v. Sec'y, Pennsylvania Dep't of Corr.*, 834 F.3d 263, 292 (3d Cir. 2016) (*en banc*). But "evidence is not 'suppressed' if the defendant knows about it and has it in her possession." *Lambert v. Blackwell*, 387 F.3d 210, 265 (3d Cir. 2004). Thus, where the Government actually produces the information to the defendant before trial, the defendant cannot credibly claim the Government suppressed it. *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 above, Bergrin's counsel received the Curry wiretap calls in discovery in June 2009. *See* BB59; *see also* SA505–06, SA2449–50. And by September

2011, when Bergrin chose to represent himself, he acknowledged that he physically possessed all the CDs that were produced to him, SA117, and assured the Court that he had unlimited access to the computers necessary to review them, SA240–45; *see* HA357–58. And as also explained above, all Bergrin had to do (assuming that his counsel had not already done it for him) is insert a CD-ROM into the computer, open calls relating to the period of the Kemo murder (November 25, 2003 and after), and listen to them. He had 3½ years to do that.

Thus, Bergrin cannot credibly contend that the Government suppressed the Curry wiretap calls. *See Lambert*, 387 F.3d at 265 ("evidence is not 'suppressed' if the defendant knows about it and has it in her possession"); *see also Storm*, 2017 WL 1324131, at *8 (denying § 2255 motion where "Storm's multiple claims of *Brady* violations are refuted by the record," because "[n]o evidence was suppressed, and all the evidence Storm now references in his petition was available for use in his defense either before or during trial"); *United States v. Bansal*, Crim. No. 05–193, 2006 WL 2246203, at *9–*13 (E.D. Pa. Aug. 1, 2006) (denying motion for new trial based on newly discovered evidence and *Brady* violations where the Government produced to defendants the very information on which they premised their claims), *aff'd*, 663 F.3d 634, 670 (3d Cir. 2011) (affirming that finding under clear error standard).

Bergrin nonetheless complains that the Government "never provided any content summaries, table of contents, indexes nor delineated that the recordings contained exculpatory evidence which would . . . have proven Bergrin's 'actual innocence' of the Kemo murder." HDE1–1 at 71. He adds that, "at the same time as providing these CD's [the Government] turned over 20,000 pages and pieces of

discovery and these extremely exculpatory recordings were buried, concealed and hidden within; which was tantamount to never providing them." *Id.* at 72. That claim is meritless several times over.

First, as set forth above, Judge Cavanaugh implicitly rejected this argument by finding that Bergrin deliberately chose not to introduce helpful calls at trial to avoid opening the door to harmful ones. A9 n.3. Judge Cavanagh would not have said that had he agreed that Bergrin was unable to review the Curry wiretap calls prior to trial. And while Bergrin now claims that he complained on the record about problems with the Curry calls, BB77–78, the record shows no such complaint.

Second, Bergrin grossly exaggerates the number of calls relevant to his defense of the Kemo murder charge. *E.g.*, BB82; *id.* at 86 (referring to 40,000 calls that supposedly would take 20,000 hours to review). While 40,000 or more calls were intercepted during the Curry investigation, the only calls of significance to Bergrin were those that occurred on November 25, 2003 (the date of William Baskerville's arrest) and after. As explained above, Bergrin easily could have zeroed in on those calls and listened to them, *see* CDE659 at 27, 30–31, as his counsel did in 2009, SA2114 n.10, and as Bergrin appears to have done by making broad assertions to the jury in 2011 and again in 2013 that none of the calls supported Young's account of the Avon Avenue meeting, SA1400, A1191, A9627–28.

Third, "the government is not 'obliged to sift fastidiously' through millions of pages (whether paper or electronic)." *United States v. Gray*, 648 F.3d 562, 567 (6th Cir. 2011) (quoting *United States v. Warshak*, 631 F.3d 266, 297 (6th Cir. 2010)). Nor is it under a "duty to direct a defendant to exculpatory evidence within a larger mass

of disclosed evidence." *United States v. Skilling*, 554 F.3d 529, 576 (5th Cir. 2009), *vacated in part on other grounds*, 561 U.S. 358 (2010). Bergrin "contends that the government should have scoured the open file in search of exculpatory information to provide to him. Yet the government was in no better position to locate any potentially exculpatory evidence than was" Bergrin, *id.* at 577, especially for those calls to which Bergrin himself was a party. And if Bergrin is asking this Court to adopt and give him the benefit of a new constitutional rule of criminal procedure—that the Government must single out potentially favorable information among the discovery the defendant physically possesses—it would be barred by *Teague*'s non-retroactivity doctrine. *See Saffle*, 494 U.S. at 487–88.

Finally, Bergrin now asserts that the Government affirmatively misled him by informing him that the Curry wiretap calls contained no favorable information. *Id.* 99–100 (referring to "vociferous assertions that there is 'no' *Brady* evidence and that the recordings are devoid of both impeachment and exculpatory evidence"); *id.* at 101 (alleging that the Government "made specific, articulable assurances, to the Court and Bergrin that the recordings contain no *Brady* or *Giglio* evidence and are unfavorable to Bergrin"). Not surprisingly, Bergrin fails to cite a single document or transcript supporting that assertion. The reason for that is simple: the Government never made a global representation about *the content* of the Curry calls.[14]

[14] To the extent Bergrin relies on the Government's representation that it had complied with its *Brady* obligations, *e.g.*, BB61 ("when demanded, the government denied possession of *any Brady* evidence), that was undoubtedly true. The AUSAs *had* produced to Bergrin all favorable information known to them; they did not have to take the additional step of sifting through the Rule 16 material produced to Bergrin 3½ years earlier to highlight specific items Bergrin might find particularly helpful.

Bergrin may be referring to the Government's warning that, if Bergrin selectively misused otherwise-inadmissible calls to mislead the jury regarding Young's credibility, the Government would offer other such calls that corroborated Young to rehabilitate him. A2413–15; *see* A2917; SA501-06; HA413. If so, that hardly qualifies as a blanket assertion that the calls contain no exculpatory information. Rather, it was a candid warning that, even if some calls taken in isolation helped Bergrin, using them would allow the Government to offer others that hurt him. If Bergrin is telling this Court that he chose not to listen to the calls because of a legally accurate warning issued for the first time two years *after* he received the calls in discovery, *see* BB66 (claiming the calls "would not have been listened to" even had Bergrin been able to locate them), he cannot blame the Government for his own calculated inaction, *see Commonwealth v. Hudson*, No. 1565 WDA 2015, 2016 WL 1395335, at *3 (Pa. Super. Ct. Apr. 8, 2016) ("Appellant's decision not to review the trial court notes and documents until nearly four years after his sentencing does not transform those notes into newly discovered evidence."); *see also United States v. O'Grady*, 280 F. App'x 124, 131 (3d Cir. 2008) ("To the extent, if at all, O'Grady limited his cross-examination due to concern for [the witness's] mental health, this decision was self-imposed and not judicial error."). Besides, "defense knowledge of, or access to, purportedly exculpatory material is potentially fatal to a *Brady* claim, even where there might be some showing of governmental impropriety." *United States v. Pelullo*, 399 F.3d 197, 215 (3d Cir. 2005).

In sum, the record gives every indication that Bergrin actually listened to the relevant Curry calls prior to Trial Two, if not Trial One. But if Bergrin—an

experienced defense attorney—declined to do so because he knew that offering certain calls would open the door to others (or because he decided it was an unproductive use of his time), he cannot now blame the Government for his choice.

b. The Calls Are Neither Favorable Nor Material.

Even if Bergrin could show that the Government suppressed calls it provided to him 3½ years before trial, he cannot establish that the calls were material.

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 verdict worthy of confidence." *Id.* at 434. This standard is not met by the "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 even come close to meeting this rigorous standard.

Here, the "totality of the circumstances" includes three things: (1) the evidence supporting the Kemo murder, described at length in the Government's Rule 33 Opposition, *see* CDE659 at 60–66; (2) the subset of the Curry calls that Bergrin cites ("Bergrin's Calls"); and (3) other highly inculpatory Curry calls ("Inculpatory Calls") that would have become admissible to rebut any misleading impression created by

the introduction of Bergrin's Calls at trial. But for the sealing issue discussed above, the Government would have introduced the Inculpatory Calls to prove Bergrin's guilt. And because none of the Curry calls contains independent evidence of innocence, the damage to Bergrin's case from the Inculaptory Calls far outweighs whatever impeachment value Bergrin's Calls may have offered. Indeed, Bergrin made that same determination because he chose not to use the calls at trial.

The Government's theory of guilt for the Kemo murder relied primarily on three actions Bergrin took: (1) on November 25, 2003, Bergrin met with Baskerville and obtained the name of the confidential informant; (2) immediately thereafter, Bergrin called Curry (Baskerville's boss) on the telephone and told Curry that the informant in Baskerville's case was a guy named "Kamo" (mispronouncing the name Kemo); and (3) sometime later, Bergrin met face-to-face with Curry and Curry's associates, including Young, and told them that if Kemo testified Baskerville would spend the rest of his life in jail, but if they killed Kemo, Bergrin would win the case and Baskerville would go free. A1070-73. As detailed below, on balance, the Curry Calls would have substantially helped the Government prove its case.

i. The November 25, 2003 Calls Are Independent Proof Of Bergrin's Guilt And Demonstrate That Young Testified Truthfully And Accurately.

Because the November 25, 2003 calls between Bergrin and Curry were captured on a wiretap, there is direct, incontrovertible proof that Bergrin obtained the identity of the confidential informant from Baskerville and immediately thereafter relayed that information to Curry. SA2231-33 ("I got a chance to speak to William and he said the informant is a guy by the name of Kamo"). Significantly, Young

testified that he was present when that call took place and described its substance, including Bergrin's mispronunciation of Kemo's name. A3269–73. Although Young had never heard the wiretap recording, he was able to describe both the First Call and the Second Call accurately, including details that only a percipient witness would have known. *See* CDE659 at 70–71.

Tacitly conceding that the Inculpatory Calls support Young's account of the First Call and the Second Call, Bergrin is left to claim that other calls contradict Young's account of such things as: who besides Curry was present for the First Call and the Second Call; what vehicle Curry was in when each call took place; and what time Curry arrived on Avon Avenue prior to having the First Call with Bergrin. But even if those calls somehow suggest Young was wrong about those collateral subjects, the Inculpatory Calls conclusively establish that Young was correct about the facts that actually proved Bergrin's guilt. As the Government's Rule 33 Opposition explains, CDE659 at 69–75, the Curry Calls both corroborate Young on every important aspect of his testimony and independently prove Bergrin's guilt.

Not only do the Curry Calls corroborate the essential facts of Young's testimony, they also corroborate many of the supporting facts. For example, as detailed further in the Rule 33 Opposition:

- Young testified that Curry arrived on Avon Avenue to meet with Rakeem, Young and others before the First Call between Bergrin and Curry. Intercepted calls between Curry and Rakeem, and between Curry and an unidentified woman, indicated that Curry agreed to meet Rakeem "on Avon" prior to the First Call. CDE659 at 69–70.

- Young testified that Rakeem felt partially responsible for Baskerville's arrest because he sent Kemo to buy crack from Baskerville. Calls intercepted that day, demonstrating that Rakeem was concerned about his own liability stemming from William's interactions with Kemo, support

Young's testimony that Rakeem introduced Kemo to Baskerville as a supplier of crack cocaine. CDE659 at 71–73.

- Young testified that when he heard Curry say the name "Kamo" during the Second Call, he thought Curry and Bergrin must have been talking about "Kemo" and told Curry just that. A3272. Minutes later, in an intercepted call at approximately 4:05 p.m., Curry correctly referred to the informant as "Kemo." SA2234-35. CDE659 at 71.

Faced with all of this, Bergrin must exaggerate the impeachment value of the calls he cites. But most of those calls corroborate Young's testimony. CDE659 at 70–75. And Bergrin must fabricate conversations and otherwise misrepresent what the parties said on the calls (or misstate Young's testimony) in order to manufacture even minimal impeachment value.

For example, Bergrin claims that on "November 25, 2003, call 986, 037 at 14:40:21," he called Curry and informed Curry that he "had just received a call from Will's wife, Deidre Baskerville advising him that her husband had been arrested this morning." BB67. According to Bergrin, this proves that, contrary to Young's testimony, she could not have attended a meeting earlier that morning on Avon Avenue. BB67–68. But there is no call bearing that number; Bergrin is not a party to either of the two calls at 14:40 on that date; and Bergrin never uttered those or any similar words in any of his intercepted calls with Curry that day. Even were it true that at 2:20 p.m. Bergrin reported he "had just received a telephone call from . . . Deidre Baskerville," that in no way would contradict Young's testimony that he and others met with Deidre earlier that morning.

Similarly, Bergrin claims a call intercepted on November 25, 2003 at 17:05:00[15] shows that when asked about Kemo, Rakeem told Curry, "I don't know him; it think he's from Irvington." BB69. According to Bergrin, this proves Rakeem did not even know Kemo and, thus, Young alone made a decision to get rid of Kemo. *Id.* But Rakeem did not utter those words. Instead, he indicated he knew Kemo by responding, "that's a nigga from Irvington I think." SA2235. At any rate, Bergrin's assertion that Young alone decided to kill Kemo contradicts his defense at trial (and assertions elsewhere in his Brief) that Young did not murder Kemo but nevertheless falsely confessed and pleaded guilty to get a better deal on a pending gun-possession charge.

ii. Calls Intercepted After November 25, 2003, Neither Impeach Young's Testimony Nor Disprove Bergrin's Guilt.

Bergrin claims that calls occurring after November 25, 2003, disprove Young's testimony about the Avon Avenue meeting between Bergrin, Curry, and certain Curry associates, including Young. To be clear, unlike the direct evidence contained in the First Call and Second Call, none of the intercepted calls confirm the existence of that meeting. As Bergrin (improperly) argued to the jury at Trial Two, the Curry calls contain no "chatter setting up . . . any meeting with Paul Bergrin" or "about anything having occurred at the meeting, after the meeting, [or] during the meeting."

[15] As noted in the Government's Rule 33 Opposition, CDE659 at 72–73 n.28, there was no call intercepted at 5:05 p.m. on November 25, 2003 and no call numbered 3496671. Based upon the substance of what Bergrin claims was spoken during this call, Bergrin must be referring to call number 09352, which occurred one hour earlier that day.

A9627–28. Thus, Bergrin must now attack collateral aspects of Young's testimony and argue far-fetched inferences from insignificant facts.

Specifically, Bergrin advances four baseless arguments: (1) no face-to-face meeting ever occurred because certain calls suggest Young was wrong about its date; (2) calls in which Curry and his associates speculate about theoretical plea deals prove Baskerville was not facing life imprisonment; (3) no murder plot existed because Bergrin and Curry did not explicitly discuss details of the murder plot over the telephone on December 4, 2003; and (4) calls in which Curry and his associates complain about legal services Bergrin rendered to persons unrelated to William's case prove Bergrin was not a part of the murder conspiracy.

The Calls Are Consistent With Young's Testimony About the Timing of the Avon Avenue Meeting, And Its Precise Date Had No Independent Relevance.

Bergrin claims that calls suggesting the face-to-face meeting could not have taken place over Thanksgiving weekend or on December 4, 2003 prove Young lied about the meeting taking place at all. **But Young never testified that the meeting occurred on any of those days.** Rather, Young testified that he did not remember the exact date, but recalled that the meeting occurred sometime after Thanksgiving. A3278–79, A3336. Indeed, Young consistently said he did not recall the exact date despite Bergrin's pressing him to provide one. A3576–68, A3623.[16] These calls are not inconsistent with Young's testimony about the timing of the meeting, let alone

[16] That was consistent with Young's Trial One testimony. *See* HA783–84 (direct); *see also* SA1033–34 (cross). The calls Bergrin cites, indicating that Curry traveled over Thanksgiving weekend, corroborate Young's testimony that the meeting occurred sometime after Thanksgiving weekend.

proof that he intentionally lied about the meeting having occurred at all. And Bergrin's claim in that regard depends on the Curry calls eliminating not just Thanksgiving weekend and December 4, 2003, but every other possible date the meeting could have occurred. They do not.

Further, Bergrin must mischaracterize what the Government argued to the Trial Two jury in summation in order to make the unsealed Curry calls seem material. According to Bergrin, the Government argued that the Avon Avenue meeting occurred on December 4, 2003, despite knowing that the unsealed Curry calls contradicted that assertion. BB63. But the transcript belies that accusation:

> Now, what event of significance happens after Thanksgiving, after the weekend, in the world of William Baskerville? A detention hearing on December 4th, 2003, the first time that Mr. Bergrin and William Baskerville are told he's facing life. You will have the transcripts to review in the back. And you will see where Mr. Gay says on the record that's what he's facing. What does Anthony Young tell you? **Well, that Paul Bergrin came to us one night, again, after the weekend, after Thanksgiving,** and told us, Will Baskerville is facing life. That's the first time we heard about it. But you know what else? It's the first time he heard about it, too. Read the transcripts. And on that day, were there phone calls between Mr. Bergrin and Hakeem Curry? Yeah. Three calls. Can you put that up? We don't have this one in as nice a chart, but if you look at the records there. You can see on December 4th three calls, three connections from -- or between, I should say, two phones, Hakeem Curry's and Paul Bergrin's phone the day of the detention hearing, when Mr. Baskerville was told, you are not getting out of jail, no bail for you, and you are facing life. You can look at the dates. You can match the date on there with the front page of the transcript. Same date. What else does Anthony Young tell you? Well, at the meeting, [Bergrin] shows up in a dark-colored Mercedes-Benz. Well, we don't have photographs of that day, but we do have a photograph of Paul Bergrin's Mercedes-Benz that was grabbed by or captured by an E-ZPass I think it was two months prior to the meeting, maybe even three months prior to the meeting.

A9509–10 (emphasis added). Not once did the Government explicitly argue that the Avon Avenue meeting occurred on December 4th—indeed, the date of the meeting simply was not important. Thus, Bergrin has erected a straw man.[17]

Finally, the verdict would have been exactly the same even had the Government explicitly argued to the Trial Two jury that the Avon Avenue meeting occurred on December 4th, and even had Bergrin used the December 4th call to rebut that argument. As already explained, the precise date of the meeting was immaterial to Bergrin's guilt. Whether Bergrin advised Curry and his associates to kill Kemo on December 4, 2003, or some other day before they killed Kemo was of no consequence. What mattered was the other significant evidence corroborating Young's testimony, which the December 4th calls do not affect.

Curry's, Bergrin's, And Other Associates' Speculation About Hypothetical Plea Bargains Does Not Change The Fact That Bergrin and Curry Knew William Baskerville Faced Life Imprisonment.

Bergrin claims that two calls prove Baskerville was facing only ten years' imprisonment, not life imprisonment, if convicted: (1) a November 26, 2003 call

[17] To be sure, the Government's Trial One summation, SA492, and its opposition to Bergrin's Trial Two Rule 29 motion, A10327 & n.2., relied on records of December 4th calls (not their substance) to suggest that the Avon Avenue meeting occurred on that date. Rather than object at Trial One, Bergrin used that assertion to his advantage in his own summation. SA1400. And when Bergrin brought the substance of the last of the three calls to the Government's attention after Trial Two, A10404–05 & n.2, the Government responsibly withdrew its assertion about the calls and apologized for making it, A10431–32. Bergrin treats that withdrawal as the tug on the string that unravels all of Young's testimony; but as set forth in text, Young never testified that the meeting occurred on December 4th. So understood, Bergrin is relying on an otherwise-inadmissible call to impeach an assertion withdrawn from a post-trial brief. BB75. Bergrin cites no case holding that *Brady*'s materiality inquiry turns on a prosecutor's mistaken characterization of the evidence after trial instead of the evidence actually elicited at trial.

which Curry and an associate speculated that Baskerville was facing either 20, 12 or 10 years' imprisonment; and (2) the December 4th Call in which Bergrin told Curry that, with a "plea bargain he probably get it down to about 13 years." BB72–74 (citing SA2242). But it is beyond dispute that Bergrin knew Baskerville—a Career Offender—was facing life imprisonment if convicted: the statute was clear; the then-mandatory sentencing guidelines were clear; the Government explicitly told Bergrin and Baskerville in open court that Baskerville was facing 360 months to life imprisonment, SA1872; and Bergrin acknowledged in open court that Baskerville was "facing extended period of incarceration," SA1875. Moreover, had Bergrin introduced the December 4th Call, the Government would have been able to introduce an otherwise-inadmissible call in which Bergrin explicitly told Curry that Baskerville was facing life imprisonment if convicted. SA2231-33. As for any potential plea-bargain, Bergrin never sought, and the Government never offered, a plea-bargained disposition of Baskerville's case.

Further, in support of his argument that the December 4th call is exculpatory, Bergrin claims that he "would never make this representation [regarding a 13-year sentence] to the leader of the Curry drug organization unless it was a reliable and valid statement." BB74. Thus, perhaps without realizing it, Bergrin has admitted he understood Curry was acting as a drug organization leader when he spoke to Bergrin about Baskerville's case. That makes the call inculpatory, not exculpatory. After all, at trial, Bergrin conceded, as he had to, that he learned the identity of the confidential informant from Baskerville and soon thereafter called Curry and relayed to him the name of the informant. A9624–25. This concession went a long way

toward proving the Government's theory that Bergrin, as house counsel to the Curry organization, passed the informant's name from an arrested organization underling (Baskerville) to the organization's boss (Curry). A1066, A1070–72. The only contested fact relating to this issue was Bergrin's unsworn, first-person assertion that he spoke to Curry about Baskerville's case because Curry was a concerned family member (not a concerned drug boss). A9623–26. As Bergrin now concedes that he knew Curry was a concerned drug boss, the December 4th Call not only undermines his trial defense but also affirmatively proves his guilt.

That Bergrin And Curry Refrained From Explicitly Discussing Details Of The Murder Plot In A Telephone Call Hardly Proves That The Murder Plot Did Not Exist

Bergrin also argues that no conspiracy existed (and the Avon Avenue meeting never happened) because neither he nor Curry discussed specific details of the murder plot during the December 4, 2003 call. BB74–75. But it is hardly remarkable that coconspirators in a murder plot would refrain from discussing details of the conspiracy over the phone. Moreover, whatever limited exculpatory value this call may have, it is far outweighed by the inculpatory value of the calls the Government would have been able to introduce demonstrating that both Bergrin and Curry were so concerned about law enforcement wiretapping their phones that they arranged to speak in person to avoid being overheard.

Specifically, in a call intercepted on December 10, 2003 at approximately 2:42 p.m., Bergrin told Curry, "I'll talk to you when I see you in person, but be very, very leery of the telephones, okay," and Curry replied "yeah." Bergrin then said, "from what I've been told there are several new wires that went up," and Curry replied,

"okay." Bergrin continued, "in the city of Newark, you know what I mean?" and Curry replied, "okay." Bergrin then said, "so I don't know who they're targeting, but be very, very fucking careful." HA890. This call also supports the conclusion that Bergrin preferred to speak to Curry "in person" rather than over the phone about matters relating to Curry's criminal business. Moreover, in another intercepted call shortly after Curry learned of Baskerville's arrest, Curry warned a coconspirator to change the phone the coconspirator was using. SA2238-39.

Finally, Bergrin made an even stronger claim to the jury—that none of the calls intercepted during the Curry investigation contained "chatter setting up this meeting, any meeting at all with Paul Bergrin" or "chatter about anything having occurred at the meeting, after the meeting, during the meeting." A9627-28; *accord* A1191 (similar assertions in Bergrin's opening statement). Although those assertions likely opened the door to both November 25th calls (and the other inculpatory calls discussed in this section) to corroborate Young, the Government pulled its punches. And even though the Government allowed to stand unrebutted Bergrin's assertions about the substance of these inadmissible calls, the jury nonetheless convicted him. The December 4th call is, therefore, plainly immaterial.

Calls in which Curry Complains About Bergrin's Legal Representation in Unrelated Cases Do Not Rebut Proof that The Conspiracy Existed, And Bergrin Must Fabricate Conversations To Support his Point.

Bergrin greatly exaggerates the import of the December 7, 2003 and February 18, 2004 calls. He claims these calls prove he was "not a trusted person in the Curry Organization, wherein they would ever risk him having knowledge of a murder." BB77. But all these calls show is that Curry and some of his associates complained

about the legal services Bergrin provided to persons unrelated to Baskerville's case. Nothing Bergrin cites in these calls suggests Curry believed Bergrin was an untrustworthy coconspirator, or that Bergrin would alert law enforcement to their criminal activity. Besides, it was not an ongoing legitimate business relationship that ensured trust, it was the mutual understanding that a coconspirator would have to inculpate himself in order to inculpate others. As Bergrin told Abdul Williams when considering whether Baskerville would cooperate against Bergrin on the Kemo murder: "he (referring to Baskerville) would be stupid [to flip on Bergrin], he'd be incriminating himself." A5252. Moreover, at Trial Two the Jury convicted Bergrin even though he introduced similar calls[18] and made the same argument he makes here. A9655.

Further, Bergrin appears to have fabricated from whole cloth the "icing on the cake" call he claims took place between Curry and an unnamed associate on "February 20, 2004, call 1203305 at 14:34:13." BB77. As the Government's Rule 33 Opposition explains: (a) there is no intercepted call designated call number 1203305; (b) in the call that took place at that date and time, there is no discussion of Bergrin or Baskerville's case, and the words Curry purportedly spoke, which Bergrin puts in quotation marks, are not contained in the call; and (c) a search of calls intercepted on February 20, 2004 and surrounding dates revealed no recording in which Curry

[18] Bergrin introduced transcripts of three calls (one occurring on February 18, 2004 and two occurring on February 24, 2004) in which Curry told various coconspirators to hire a lawyer other than Bergrin for representation on criminal charges. A1828–33. It is difficult to square his introduction of those calls at Trial Two with his current claim that he was unaware of calls on the same subject matter that he claims occurred on or around the same date.

spoke those words, discussed removing Bergrin from Baskerville's case, or otherwise expressed displeasure with Bergrin's handling of that case. CDE659 at 73.

Even if there were a call in which Curry had talked about replacing Bergrin, he never did. Bergrin remained on the case until at least January 3, 2005, *see United States v William Baskerville*, D.N.J. Crim. No. 03–836, ECF No. 32, and reluctantly withdrew only after the Government filed a motion to disqualify him for a conflict of interest arising from his and his client's roles in the Kemo murder conspiracy. Using Bergrin's logic, his remaining on Baskerville's case until approximately ten months after Kemo was murdered proves he was part of the conspiracy.

In short, the Curry Calls support every important aspect of Young's testimony and provide independent proof of Bergrin's guilt. They are simply not material under the *Brady* standard, and fall well short of showing the "actual innocence" necessary to overcome Bergrin's procedural default. *See Evenstad v. Carlson*, 470 F.3d 777, 785 (8th Cir. 2006) ("Based on the weak impeachment value of the evidence and the limited impact the evidence could have had on the case against Evenstad, we determine such evidence is not material under *Brady.*"); *see also Clayton*, 199 F.3d at 1180 ("The evidence . . . barely aids his case and is merely impeaching evidence that would not cause a rational person to doubt Clayton's guilt.").

B. Bergrin Procedurally Defaulted His *Brady* Claims As To Maria Correia And Ramon Jimenez.

Ground Three of Bergrin's Motion also alleges that the Government suppressed favorable information provided to it by cooperating witnesses Maria Correia and Ramon Jimenez. BB79–81. Bergrin's claim is both procedurally

defaulted and meritless because his *Brady* claim derives from information disclosed to and used by him *at trial*.

1. Maria Correia.

Bergrin claims the Government suppressed evidence from Correia supposedly proving that Bergrin knew Oscar Cordova was an informant. BB80. But the Government turned over all evidence it possessed supporting that proposition well in advance of trial.

On June 15, 2009, the Government disclosed a recorded conversation between Correia and Bergrin's coconspirator (and eventual Government cooperator) Yolanda Jauregui that occurred on August 18, 2008 (the "August 18th Recording"). SA2449. In that recording Jauregui told Correia that she was concerned Cordova was taking so long to kill the witnesses, that she had suspicions Cordova could be a cooperator, and that if they discovered he was a cooperator Cordova would be "boxed and sent home [meaning killed]." HA919.

On November 10, 2009, the Government's First Superseding Indictment explicitly pled the substance of that conversation in paragraph 12. CDE92 at 7, ¶ 12. On December 20, 2012, the Government disclosed text messages Correia sent to FBI agent Shawn Brokos on the same day she made the recording. In those text messages, Correia informed Agent Brokos that Yolanda came to Correia's house unexpectedly "with some guy from Chicago to see who I was because [they're] checking out Oscar" and that Correia was "scared to death." HA901–04. On January 28, 2013, the Government disclosed a draft transcript of the August 18th Recording. HA907–24.

Given all of these disclosures, Bergrin obviously was aware of the information he now claims the Government suppressed. Indeed, at Trial Two, he called Special Agent Brokos to testify during his defense case and asked, "During August of 2008, did you receive a text message from Maria Correia telling you that Yolanda [Jauregui] had informed her that Paul said that Oscar's a cooperating witness or cooperating – a cooperating witness, an informant?" A9275–76. The Government allowed Agent Brokos to respond affirmatively even though the question contained multiple levels of hearsay and a partially false factual premise. *Id.*[19]

In an effort to manufacture prejudice, Bergrin fabricates his claim that the Government prevented Correia from testifying on his behalf by failing to grant her use immunity. BB80. Bergrin initially said he would call Correia as a witness. A9297. But he never asked the Government to immunize her, and subsequently decided not to call her as a witness, HA925. Although Bergrin gave no reason for changing his mind, he was aware from the discovery the Government had provided him 3½ years earlier that Correia would have implicated him in multiple crimes, including money laundering, witness tampering, and the Kemo murder. *E.g.*, HA1632–41. Indeed, discovery, Jencks, and *Giglio* material produced to Bergrin about Corriea was quite voluminous. As a confidential human source who maintained both a business and personal relationship with Bergrin, Correia provided information about important parties in the case, due to her ties with the Latin Kings

[19] Although Bergrin's question asserted that the text message showed *he* was the person who told Jauregui that Oscar was an informant, the recording and text messages contained no such information, *see* HA901–04, proving once again that Bergrin would stop at nothing to mislead the jury.

and other clients of the defendant. This information, including but not limited to over 100 hours of audio/video recordings, Title III phone calls, and contacts with attorneys and case agents, is documented in FBI reports too voluminous to include in the Appendix accompanying this Brief. Suffice it to say that the bulk of this material, including in over 100 CDs, was produced to Bergrin years before trial in most cases and otherwise as it became available.

Simply put, having had in his possession all exculpatory evidence, and having used it at trial, Bergrin's *Brady* claim is frivolous. *See Storm*, 2017 WL 1324131, at *8 (denying § 2255 motion where "Storm's multiple claims of *Brady* violations are refuted by the record," because "[n]o evidence was suppressed, and all the evidence Storm now references in his petition was available for use in his defense either before or during trial"); *Bansal*, 2006 WL 2246203, at *9–*13 (rejecting *Brady* claims where the Government produced to defendants the very information on which they premised their claims).

2. Ramon Jimenez.

Bergrin's *Brady* claim as to Ramon Jimenez fares no better.

All of the information in the Government's possession that possibly could have related to Bergrin's claims was disclosed in FBI agent reports provided to Bergrin both prior to Trial One and Trial Two. HA1267–81. Contrary to his current claims, however, Bergrin was well aware that Jimenez inculpated him in both drug trafficking and the Kemo murder. *See id.*; *see also* HA1286–1620. If Bergrin believed, as he now suggests, that Jimenez would have impeached the testimony of other witnesses, he would have called Jimenez as a defense witness. He did not. Thus, if

the jury did not hear this supposedly exculpatory information, it was only because Bergrin consciously chose not to present it. *See United States v. Caro*, 102 F. Supp. 3d 813, 850 n.12 (W.D. Va. 2015) (noting that supposedly new evidence supporting previously raised *Brady* claim "was not made part of the trial record only because Caro did not then make the effort to do so"); *see also United States v. Ramos-Gonzalez*, 775 F.3d 483, 493 (1st Cir. 2015) ("In addition, as the district court recognized, any prejudice arising from the failure to disclose Vélez's conflicting reports did not recur at the second trial because the government did not call her as a witness. Nonetheless, Vélez remained available, and if Ramos's counsel had thought it useful to reveal the inconsistencies in her statements, she could have been called as a defense witness.").[20]

C. Bergrin's *Brady* Claim Regarding Yolanda Jauregui—Based As It Is On A Perjurious Affidavit That Bergrin Drafted But That Jauregui Refused To Sign—Is Frivolous.

Bergrin claims the Government failed to disclose that Yolanda Jauregui said that certain aspects of Abdul Williams's, Rondre Kelly's, and Eugene Braswell's accounts of Bergrin's involvement in drug trafficking were "false and perjurious." BB80-81. But Jauregui never made such a statement to the Government.

The Government disclosed prior to trial all information it obtained from Jauregui. *See, e.g.*, SA2326; HA907, HA929. As those discovery materials made clear, Jauregui inculpated Bergrin in drug trafficking and numerous other crimes.

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[20] Beyond the frivolity of the claim, Bergrin made arguments at sentencing, A10057, A10076–77, proving that he had all the information he needed to raise a *Brady* claim on direct appeal. He procedurally defaulted his claim by not doing so. As Bergrin does not argue cause and prejudice or actual innocence, this Court can reject his claim for that reason alone.

SA2326. Had Bergrin believed, as he now suggests, that Jauregui would have established Williams's, Kelly's and Braswell's testimonies were "false and perjurious," he would have called Jauregui as a defense witness. He did not. *See* A9303 (Judge Cavanaugh tells Bergrin to "[c]all Yolanda" if he wanted to elicit the substance of statements she supposedly made to the FBI); *see also See Ramos-Gonzalez*, 775 F.3d at 493 ("Nonetheless, Vélez remained available, and if Ramos's counsel had thought it useful to reveal the inconsistencies in her statements, she could have been called as a defense witness.").

Presumably, Bergrin is relying on an unsigned document he fabricated in connection with his Rule 33(b)(1) motion to support his *Brady* claim in this motion. *See* CDE630-9. As explained in the Government's Rule 33 Opposition, Bergrin created a false exculpatory affidavit, attempted to bribe and coerce Jauregui to sign it, and fabricated more lies to explain why Jauregui had refused to sign the false affidavit. Bergrin then cited the unsigned false affidavit as supposedly "newly discovered evidence" in his Rule 33(b)(1) motion. *See* CDE659 at 57–59. The Court should disregard this sham document and reject Bergrin's frivolous *Brady* claim. *See generally Ralston v. Prelesnik*, Civil No. 13–4, 2016 WL 4646222, at *9 (W.D. Mich. Sept. 7, 2016) ("Because Petitioner was the original source of the allegedly suppressed evidence, his first claim of prosecutorial misconduct is frivolous."); *cf. Thornton v. Butler*, Civil No. 03-755, 2009 WL 2246790, at *7 (E.D. Cal. July 28, 2009) (allowing petitioner leave to amend after determining that he played no part in submission of a fraudulent affidavit on which he had premised a claim of actual innocence), *report and recommendation adopted,* 2009 WL 5203125 (Dec. 24, 2009).

D. Bergrin's Claims Concerning Hassan Miller Are Frivolous.

Finally, although Bergrin does not devote a separate subheading to this argument, he renews a complaint made in his Rule 33(b)(1) motion, *see* CDE630-1 at 13–14, that Hassan Miller told the Government Young confessed to having falsely incriminated Bergrin, BB79. Although Bergrin cites no support for this assertion, he presumably is relying on a purported transcript of an interview his investigators had with Miller on December 3, 2013, three months after Bergrin was sentenced. *See* CDE630-3 at 2.[21]

Bergrin's claim fails. Bergrin apparently does not contest that the Government timely produced the reports and recording in its possession relating to Hassan Miller's interactions with Young. *E.g.*, HA1111. Thus, the only thing he alleges the Government failed to turn over was a statement Hassan Miller made to Bergrin's investigators on December 2, 2013—several months after trial concluded. But that statement was not—indeed could not have been—in the Government's possession. In fact, the Government only learned of this statement because Bergrin attached a transcript of it to the Rule 33 Motion he filed three years after trial. *Ralston*, 2016 WL 4646222, at *9 ("Because Petitioner was the original source of the allegedly suppressed evidence, his first claim of prosecutorial misconduct is frivolous.").

Even if Bergrin could show that the substance of the statement was in the Government's possession (and he cannot), it is plainly immaterial. The crux of Miller's interactions with Young were captured on a recording Miller made of his

[21] Bergrin has not provided the Government with a copy of the recording, so the Government has no way of determining the accuracy of anything contained in the transcript. So the Government will respond to Bergrin's claim by assuming the transcript is accurate without conceding that it is.

conversation with Young on August 3, 2005 while they were both detained in the Hudson County Jail. HA1111–43. Bergrin made full use of that recording at trial. A2720–22, A2740–72, A3463–69, A3473–76, A3486–513. According to the transcript of Miller's interview with Bergrin's investigators on December 3, 2013, that recording contains "the truth" about what Anthony Young told Miller while they were detained together in Hudson County Jail, CDE630-2 at 36–37. But contrary to Miller's current interpretation of the recording, the recording contains no admission by Young that he falsely inculpated Bergrin—much less that the lead prosecutor knew that. CDE659 at 46–48. Bergrin cites to nothing in the August 2005 recording, because there is nothing, showing that Young said he falsely incriminated Bergrin or anything else to that effect. Quite simply, the recording conclusively proves Miller is wrong.

IV. Much Of Ground Four Is Barred By The Relitigation Doctrine. The Remainder Is Procedurally Defaulted And Meritless.

Ground Four of Bergrin's § 2255 motion asserts that Bergrin "is actually, factually and legally innocent of aiding and abetting in the Kemo murder." HDE3 at 10. Over more than 30 pages of briefing, Bergrin advances a mish-mash of arguments contesting the legal sufficiency of Count 4 (and Racketeering Act 4(b)), which charged Bergrin with aiding and abetting Kemo's murder, in violation of 18 U.S.C. § 1512(a)(1)(a) and 2. BB90–120. (Some of Bergrin's Ground Eight arguments deal with this claim, *see* BB146–54 and are addressed here.) Most of those arguments are barred by the relitigation doctrine, as they simply rehash the legal sufficiency challenge that Bergrin unsuccessfully pressed on direct appeal. But many others are procedurally defaulted, as they rely on arguments that were available to Bergrin on direct appeal. Additionally, all are meritless.

A. The Relitigation Doctrine Bars Much Of Ground Four.

Throughout his brief in support of Ground Four, Bergrin repeatedly contests the sufficiency of the evidence used to convict him. Indeed, his second major sub-heading asserts that "Even Accepting the Government's Proof as True, They are Insufficient to Prove Aiding and Abetting[.]" BB92; *accord* BB93 ("Even if what Young claimed actually occurred . . . there still is insufficient proof to establish the mens rea or actus rea of aiding and abetting the specific substantive offense in" §1512(A)(1)(a)); BB95 ("The words attributed to Petitioner by Young are subject to multiple interpretations."); BB104 ("No rational jury could have found proof that Petitioner knew . . ."); BB107 ("There was No Proof Offered Petitioner Aided and Abetted Kemo's Murder 'With Intent to Prevent' his testimony[.]").

Unfortunately for Bergrin, he raised this very issue on direct appeal. As set forth above, Point I of Bergrin's Third Circuit brief argued that "The Trial Court Erroneously Denied Bergrin's Motion For A Judgment Of Acquittal On The McCray Murder Case Counts," HA21, dedicating an entire seven-page subheading to his claim that there was "Insufficient Evidence Of Aiding And Abetting The Murder Of A Witness," HA35–42. The Third Circuit addressed this claim in its opinion, described the evidence in detail, *Bergrin III*, 599 F. App'x at 440–41, and found that Bergrin fell "well short of carrying his 'very heavy burden' of establishing his right to a judgment of acquittal, *id.* at 441 (quoting *United States v. Anderson*, 108 F.3d 478, 481 (3d Cir. 1997)).

In sum, Bergrin may not use his § 2255 motion to recycle legal sufficiency arguments that he unsuccessfully raised on direct appeal. *See DeRewal*, 10 F.3d at 105 n.4; *see also Schwartz*, 925 F. Supp. 2d at 691 ("Schwartz . . . merely attempts to rehash the 'legal insufficiency' arguments that he raised . . . to our Court of Appeals[.]") (citations omitted). This Court need proceed no further.

B. Bergrin Procedurally Defaulted Claims Premised Upon *Elonis v. United States*. In Any Event, Those Claims Are Meritless.

In an effort to avoid the relitigation bar, Bergrin claims the law has changed in his favor since the Third Circuit ruled. For example, Bergrin invokes *Elonis v. United States*, 135 S. Ct. 2001 (2015), which involves an entirely different criminal statute, to claim that the Government improperly premised his guilt on how Anthony Young perceived Bergrin's words, rather than on Bergrin's own subjective intent. BB81–85; BB146–54. This claim is procedurally defaulted and utterly meritless.

1. Bergrin Procedurally Defaulted His *Elonis* Claim.

Bergrin claims he could not have relied on *Elonis* on direct appeal because it "had not been decided by the Supreme Court." HDE3 at 11. That is irrelevant, as Bergrin could have advanced the same legal arguments Elonis did.

The Third Circuit issued its decision in *Elonis before* Judge Cavanaugh sentenced Bergrin. *United States v. Elonis*, 730 F.3d 321 (3d Cir. 2013). The Supreme Court granted *certiorari* on June 16, 2014, *Elonis v. United States*, 134 S. Ct. 2819 (2014), just two weeks after Bergrin had filed his opening brief in the Third Circuit, *see* HA85 (dated May 30, 2014). Had Bergrin thought the arguments made by the petitioner in *Elonis* were germane to his § 1512 conviction, he easily could have raised those arguments in a Supplemental Brief or in his Reply Brief. After all, "[e]very circuit . . . accepts supplemental or substitute briefs as a matter of course when this Court issues a decision that upsets precedent relevant to a pending case and thereby provides an appellant with a new theory or claim." *Joseph v. United States*, 135 S. Ct. 705, 706 (2014) (Statement of Kagan, J., respecting denial of *certiorari*) (citing, *inter alia*, *United States v. Blair*, 734 F.3d 218, 223 (3d Cir. 2013)). But Bergrin chose not to bring the grant of *certiorari* in *Elonis* to the attention of the Third Circuit, effectively conceding its lack of relevance to his case.

Furthermore, *Elonis* was pending before the Supreme Court when Bergrin filed his petition for *certiorari*. HA300. Once again, if Bergrin truly believed that *Elonis* had any bearing on his § 1512 conviction, he could have asked the Supreme Court to hold his petition pending the decision in *Elonis* so that the Supreme Court could consider its impact on Bergrin's petition for *certiorari*. *See, e.g.*, Petition for *Certiorari*, *Evolutionary Intelligence LLC v. Sprint Nextel Corp.*, 2017 WL 4805403, at *35 ("The

Courts should hold this petition pending its decision in *Oil States* and then, depending on how the issues presented there are resolved, grant a writ of certiorari on Question 2[.]"). He did not do that either.

Bergrin thus has procedurally defaulted his claim that *Elonis* bears on his § 1512 conviction. It makes no difference that *Elonis* had not yet been decided, because "[n]othing prevented [Bergrin] from making the arguments that [Elonis] did." *Ryan v. United States*, 645 F.3d 913, 916 (7th Cir. 2011), *cert. granted and judgment vacated on other grounds*, 132 S. Ct. 2099 (2012); *accord Parkin v. United States*, 565 F. App'x 149, 152 (3d Cir. 2014) (habeas movant procedurally defaulted his *Skilling* claim because "[t]he claim raised in *Skilling* was not novel at the time of Parkin's appeal").

2. In Any Event, *Elonis* Has No Bearing On Bergrin's § 1512 Conviction.

Putting aside Bergrin's procedural default, his claim is frivolous because *Elonis* has no bearing whatsoever on his offense of conviction.

In *Elonis*, the defendant was charged under 18 U.S.C. § 875(c)[22] for posting on Facebook poems and songs that his coworkers and ex-wife construed as a threat of violence towards them. 135 S. Ct. at 2004–05. The statute contained no explicit *mens rea*, and the jury instructions allowed for a conviction if the jury found that Elonis "communicated what a reasonable person would regard as a threat." *Id.* at 2004. The Supreme Court granted certiorari to consider whether § 875(c) "requires that the

[22] Section 875(c) makes it a federal offense to "transmit[] in interstate or foreign commerce any communication containing ... any threat to injure the person of another[.]" 18 U.S.C. § 875(c).

defendant be aware of the threatening nature of the communication, and—if not—whether the First Amendment requires such a showing." *Id.*

The Supreme Court found that, as written, § 875(c) required a jury to find only that the defendant transmitted a threatening communication, without specifying the *mens rea*. *Id.* at 2008. But "'the mere omission from a criminal enactment of any mention of criminal intent' should not be read 'as dispensing with it.'" *Id.* at 2009 (quoting *Morissette v. United States*, 342 U.S. 246, 250 (1952)). Adhering to its rule that it would read into the statute only that mens rea which is necessary to separate wrongful conduct from otherwise innocent conduct," i*d.* at 2010, the *Elonis* Court concluded that a defendant could be convicted under § 875(c) only if he transmitted "a communication for the purpose of issuing a threat, or with knowledge that the communication will be viewed as a threat," *id.* at 2012.

Bergrin, of course, was not convicted under § 875(c). Rather, he was convicted under § 1512(a)(1)(A) and § 2 (the aiding and abetting statute). Unlike § 875(c), which criminalizes pure speech without specifying any mens rea, § 1512 criminalizes conduct and plainly specifies a *mens rea*: "[w]hoever kills . . . another person, *with intent to . . . prevent the attendance or testimony of any person in an official proceeding*" is guilty of a crime against the United States. 18 U.S.C. § 1512(a)(1)(C) (emphasis added). Thus, *Elonis* has no bearing on Bergrin's conviction for aiding and abetting the Kemo murder. *See Shah v. United States*, Civil No. 15–7542, 2017 WL 3168425, at *6 (S.D.W. Va. July 26, 2017) (denying § 2255 where "the *Elonis* decision does not apply to either statute under which the Petitioner was convicted"). *See generally United States v. Harrison*, Crim. No. 15–385, 2017 WL 3301220, at *5 (N.D. Ga. June

13, 2017) (denying pretrial motion to dismiss § 924(c) charge based on *Elonis* and explaining that "[t]his line of cases involving § 875(c) simply has no bearing here, where the Indictment tracked statutory language that, as a matter of law, necessarily meant intentional conduct").

Bergrin also repeatedly complains that the jury was not instructed to find that he acted with specific intent to kill. *E.g.*, BB153. That is nonsensical:

- The instructions on Racketeering Act 4(a) (and Count 12) required the jury to find both premeditation and malice aforethought *beyond* specific intent to tamper, A9886–88;

- The instructions on Racketeering Act 4(b) (and Count 13) required the jury to find both that someone else (*i.e.*, Young) committed all the elements of premediated murder and 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); and

- The instructions for Racketeering Acts 4(c) and (d), which charged murder under New Jersey law, required the jury to find that Bergrin "purposely and knowingly" caused McCray's death, meaning that it was his "conscious object to cause death or serious bodily injury resulting in death," or that Bergrin was "aware that it is practically certain that his conduct will cause death or serious bodily injury resulting in death," A9894–95.

Beyond all of that, the jury later was instructed on how to find that Bergrin acted "intentionally." The jury had to find either that it was Bergrin's "conscious desire or purpose to act in a certain way or to cause a certain result," or that Bergrin "knew that he was acting in that way or would be practically certain to cause that result in order to find that he acted intentionally." A9960. The foregoing instructions put the lie to Bergrin's claim that the jury was not instructed to find that he subjectively intended to murder Kemo.

Undaunted, Bergrin argues that the jury instructions and the Government's arguments improperly allowed the jury to infer intent based on what an objective person would have understood Bergrin's words to mean. BB146–54. For example, without ever quoting the relevant jury instructions, Bergrin claims that the Judge Cavanaugh "*consistently and improperly* directed the jury to use their 'common sense,' and **'objective reasoning'** in their understanding of the facts and to and what a **'reasonable person'** would believe by Petitioner's statements on the Kemo and Cordova-Esteves' cases." BB151–52.

By placing quotation marks around the two phrases in boldfaced font, Bergrin would have this Court believe that those phrases appeared throughout the jury instructions. Although the words "common sense" did appear several times (without objection), A9842–43, A9847, the phrase "objective reasoning" never did, whereas the phrase "reasonable person" appeared once (again without objection)—in the instruction on reasonable doubt, A9856 ("It is a doubt that an ordinary reasonable person has after carefully weighing all of the evidence, and is a doubt of the sort that would cause him or her to hesitate to act in matters of importance in his or her own life."). That hardly supports Bergrin's claim that the jury was permitted (much less instructed) to infer specific intent based solely on what a Government witness objectively understood Bergrin to mean.

Besides, there would have been no error even had the jury been instructed exactly as Bergrin claims it was. Taken verbatim from the Model Third Circuit Criminal Jury instructions on *mens rea*, *see* CDE488 at 138 & n.76 (proposed jury instructions), the final instructions told the jury that:

> Often the state of mind with which a person acts at any given time - intentionally, knowingly and willfully - cannot be proved directly, because one cannot read another person's mind and tell what he or she is thinking. However, Defendant's Paul Bergrin's state of mind can be proved indirectly from the surrounding circumstances. **Thus, to determine what the Defendant intended or knew at a particular time, you may consider evidence about what the Defendant said, what he did and failed to do, how he acted, and all the other facts and circumstances shown by the evidence that may prove what was in Defendant's mind at that time**. It is entirely up to you to decide what the evidence presented during this trial proves, or fails to prove, about Mr. Bergrin's state of mind.

A9960–61 (emphasis added). That instruction, to which Bergrin did not object, stated hornbook law. *See* O'Malley, Grenig, and Lee, 1A FED. JURY PRAC. & INSTR. § 17:07 (6th ed. Aug. 2017). Significantly, moreover, the Third Circuit has not modified its pattern instruction since *Elonis* issued, *See* 3d Cir. Model Crim. Instruction § 5.01 at 5,[23] fatally undermining his nonsensical claim that *Elonis* was a watershed decision that barred juries from using a defendant's words to infer intent.

Even beyond the general instructions about inferring intent from all the relevant circumstances (including Bergrin's words and actions), the jury was instructed that it could infer Bergrin's intent from the various pieces of Rule 404(b) evidence the Government had introduced:

> Specifically, you may consider the testimony of Pozo in determining whether Defendant Paul Bergrin acted with the specific intent to tamper with or kill a Federal witness, or to travel in aid of a drug trafficking business. . . .You also heard testify from Oscar Cordova, Vicente Esteves, and Thomas Moran about events that occurred in 2008. . . . You may also consider that evidence for a limited purpose when considering Counts 12 and 13. Specifically, you may consider the testimony of Cordova, Esteves, and Moran as to those events in determining whether Defendant Bergrin acted with the specific intent to tamper with or kill a Federal witness.

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[23] Available at: www.ca3.uscourts.gov/sites/ca3/files/Chapter%205%20Rev%20April%202015.pdf.

A9963-64. That was perfectly consistent with settled Supreme Court precedent. *See Huddleston v. United States*, 485 U.S. 681, 685 (1988) ("extrinsic acts evidence may be critical to the establishment of the truth as to a disputed issue, especially when that issue involves the actor's state of mind and the only means of ascertaining that mental state is by drawing inferences from conduct"). The Government paraphrased this instruction in summation, asking the jury to consider Bergrin's statements to Pozo, and his statements and actions towards Moran, Esteves, and Cordova, to infer that Bergrin specifically intended to tamper with and kill Kemo. A9526–28. And the Third Circuit relied on this evidence to affirm Judge Cavanaugh's conclusion that there was legally sufficient evidence. *See Bergrin III*, 599 F. App'x at 441.

All of this destroys the two key premises of Bergrin's procedurally defaulted claim: (a) *Elonis* forbids a jury from relying on a defendant's words to infer his intent, and (b) the Government premised its proof of Bergrin's specific intent solely on whether it was objectively reasonable for Anthony Young to interpret Bergrin's statements at the Avon Avenue meeting as an instruction to kill Kemo. *See generally United States v. White*, 654 F. App'x 956, 967 (11th Cir. 2016) (noting that "*Elonis* involved a violation of § 875(c), which does not require any mental state on a defendant's part, not § 875(b), which requires the mental state of an 'intent to extort'") (citation omitted).

At bottom, Bergrin seems to claim that the First Amendment mandates the principle he invokes. BB93, BB150. But it would be very odd, to say the least, if prosecutors could rely on a defendant's words to prove that he "counsel[ed]" or "command[ed]" the commission of a federal offense, 18 U.S.C. § 2(a), but the First

Amendment prohibited the jury from considering the those very words (and their effect on others) in determining whether the defendant acted with the specific intent required for § 2 liability. Fortunately, courts have rejected that very argument. *See Nat'l Org. for Women v. Operation Rescue*, 37 F.3d 646, 656 (D.C. Cir. 1994) ("That 'aiding and abetting' of an illegal act may be carried out through speech is no bar to its illegality."); *United States v. Barnett*, 667 F.2d 835, 842 (9th Cir. 1982) ("The first amendment does not provide a defense to a criminal charge simply because the actor uses words to carry out his illegal purpose. Crimes, including that of aiding and abetting, frequently involve the use of speech[.]"); *United States v. Buttorff*, 572 F.2d 619 (8th Cir 1978) (upholding conviction for "aiding and abetting" the filing of false income tax returns by giving specific instructions at a large public gathering). Put simply, "[s]pecific criminal acts are not protected speech even if speech is the means for their commission." *Packingham v. North Carolina*, 137 S. Ct. 1730, 1737 (2017) (citing *Brandenburg v. Ohio*, 395 U.S. 444, 447–449 (1969) (per curiam)).

C. The Relitigation Doctrine Bars Bergrin's Reliance On *Rosemond v. United States*.

Bergrin also invokes *Rosemond v. United States*, 134 S. Ct. 1240 (2014), which dealt with the *mens rea* required to convict a defendant of aiding and abetting a violation of 18 U.S.C. § 924(c). Bergrin claims that *Rosemond* helps his argument that there was insufficient proof he knew in advance that someone would murder Kemo, BB101–07, adding that *Rosemond* was unavailable to him on direct appeal, HDE3 at 12. Both claims are demonstrably false.

Rosemond was decided on March 14, 2014. 134 S. Ct. at 1240. That was *three months before* Bergrin perfected his direct appeal. HA1 (filed May 30, 2014). In fact,

Bergrin's direct-appeal brief actually cited *Rosemond* to support the very argument he makes now. *See* HA41–42; *see also id.* at 42 (claiming "the evidence shows that Bergrin was unaware that murder was planned at all"). Thus, the relitigation doctrine bars Bergrin from relying on *Rosemond* to rehash arguments the Third Circuit already considered and rejected. *See DeRewal*, 10 F.3d at 105 n.4; *see also Schwartz*, 925 F. Supp. 2d at 691 ("Schwartz . . . merely attempts to rehash the 'legal insufficiency' arguments that he raised . . . to our Court of Appeals—arguments that are inadequate as a matter of law to prevail on an actual innocence claim.") (citations omitted).

Bergrin emphasizes that *Rosemond* is discussed in the commentary to the Third Circuit's model jury instruction on aiding and abetting liability, instead in the instructions on § 924(c) offenses. BB103–04. But the new paragraphs this Court added to the model instruction on aiding-and-abetting liability in 2014 are specifically targeted at the very same "compound crime" that *Rosemond* addressed, *i.e.*, a § 924(c) offense. That is clear from the boldfaced heading that prefaces those new paragraphs: "**Accomplice Liability (Aiding and Abetting) Instructions in Cases Charging 18 U.S.C. §924(c) Offenses.**" 3d Cir. Model Crim. Jury Instruction § 7.02 at 13–15.[24] It is even clearer from this Court's instruction that, "[w]here the government asserts an aiding and abetting theory for a § 924(c) charge, the trial judge should make the following three modifications, *specific to the § 924(c) context*, in this accomplice liability (aiding and abetting) instruction." *Id.* at 14 (emphasis added).

[24] Available at: www.ca3.uscourts.gov/sites/ca3/files/Chap%207%20July%202014%20Rev.pdf.

Contrary to Bergrin's claim, then, *Rosemond* worked no substantive change in the Third Circuit's standard for aiding and abetting liability in non-§ 924(c) cases. *See United States v. Robinson*, 634 F. App'x 363, 366 (3d Cir. 2015) ("Unlike the defendant in *Rosemond*, Robinson was never charged with aiding and abetting the use or carrying of a firearm in relation to a crime of violence or drug-trafficking offense, in violation of § 924(c)."); *see also United States v. Nix*, 694 F. App'x 287, 288–89 (5th Cir. 2017) (affirming denial of § 2255 motion and explaining that, "[e]ven if *Rosemond* applies retroactively, Nix has not shown that it applies to his offenses of conviction," where "*Rosemond* discussed the intent required to support a conviction for aiding and abetting a § 924(c) firearms offense"); *Nix v. Daniels*, No. 16-2605, 2016 WL 9406711, at *1 (7th Cir. Nov. 23, 2016) ("*Rosemond* does not apply to either set of convictions because neither case charged Nix with any type of § 924(c) offense").

But even if *Rosemond* somehow clarified the law on aiding and abetting liability generally, Bergrin could have argued the legal principles announced in *Rosemond* to the district court and to the Third Circuit on direct appeal. *See United States v. Banks*, 665 F. App'x 138, 139 (3d Cir. 2016) ("Even if *Rosemond* might have applied to Banks' convictions, nothing in the record indicates, and Banks does not show, that Banks was unable to make arguments concerning accomplice liability during his trial."). Because he failed to do so, he has procedurally defaulted his claim. S*ee Frady*, 456 U.S. at 167-68; *Essig*, 10 F.3d at 979.

D. Bergrin's Actual Innocence Argument Fails As A Matter Of Law To Satisfy The *Schlup* Standard.

Bergrin's remaining legal arguments merely rehash the legal sufficiency arguments he raised on direct appeal, which Bergrin tries to reinforce with the unused Curry recordings he cited in Ground 3. BB107–20. As explained above, however, the Curry recordings are neither "newly discovered" nor of such a nature that "no rational jury would have voted to convict." *See* Point III.A.3–4 above. More importantly, Bergrin's real claim is that the recordings impeach Young and, thus, help him show reasonable doubt. But that fails to meet his burden to show actual innocence. *See Bousley*, 523 U.S. at 623 (actual innocence means "factual innocence, not mere legal insufficiency"); *accord Schwartz*, 925 F. Supp. 2d at 691 ("Schwartz . . . merely attempts to rehash the 'legal insufficiency' arguments that he raised . . . [on appeal]—arguments that are inadequate as a matter of law to prevail on an actual innocence claim.") (citations omitted).

Besides, Bergrin's assertions do not withstand scrutiny. For example:

- Bergrin claims the Government offered insufficient evidence to prove that he intended to tamper with Kemo through the act of murder, as opposed to some other means. BB108–09. But as set forth above, the Government offered ample evidence of his intent to kill. All of that evidence was summarized in: the Government's post-trial Rule 29 brief, A10321–41; in its Brief for Appellee on direct appeal, HA168–76, and in the Government's Rule 33 Opposition, CDE659 at 60–66, and will not be repeated here.

- Bergrin claims that "it is unclear when the Government is claiming that [the Avon Avenue meeting] occurred," complaining that not knowing a date certain prejudiced his ability to defend against the charges. BB112. Young consistently testified that the meeting occurred sometime after Thanksgiving 2003, A3278-79, A3336, A3576–68, A3623, and the Government maintained that it occurred a few days after Baskerville's November 25, 2003 arrest, most likely after the December 4th detention hearing, *e.g.*, SA336 (2011 Opening); A1072 (2013 Opening); A9509–10 (2013 summation); HA152 (Third Circuit

brief).[25] Given Bergrin's defense that Young fabricated the meeting and his summation assertions that none of the Curry wiretap calls corroborated Young's testimony about the meeting, A9627–28, Bergrin obviously suffered no prejudice from the absence of a more precise date.

- Bergrin claims that the Government failed to prove that he knew that Curry's associates (including Young) would murder Kemo. BB113–14. That claim, already rejected by the Third Circuit, is meritless: Bergrin, as "house counsel" to a violent drug gang, advised that getting rid of an informant would get their fellow gang member freed from custody. While circumstantial, that evidence was sufficient to prove Bergrin's guilty knowledge. *E.g.*, *United States v. Mercado*, 610 F.3d 841, 846 (3d Cir. 2010) ("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.'") (quoting *United States v. Soto*, 539 F.3d 191, 195 (3d Cir. 2008)) (citation omitted); *United States v. Ray*, 688 F.2d 250, 252–54 (4th Cir. 1982).

- Finally, Bergrin claims that the Government used the RICO statute in bad faith, charging the Kemo murder along with the other racketeering predicates to inflame the passions of the jury and prevent a reliable determination of his guilt on those other predicates. BB116–19. That claim is waived and procedurally defaulted, having never been raised in a pretrial motion. Fed. R. Crim. P. 12(c)(3). It is also meritless, given the Third Circuit's definitive holding that "presenting the witness-tampering allegations as part of a related pattern of racketeering activity is exactly what the Indictment and RICO allow." *Bergrin II*, 682 F.3d at 284.

In sum, Bergrin's Ground Four arguments are barred by the relitigation doctrine and frivolous.

[25] *But see supra* n.17.

V. Ground Five Has Been Or Will Be Withdrawn.

The Government has been informed that Bergrin intends to withdraw Ground Five of his § 2255 motion. If he does not do so, the Government reserves its right to supplement its response.

VI. Ground Six Has Been Or Will Be Withdrawn.

The Government has been informed that Bergrin intends to withdraw Ground Six of his § 2255 motion. If he does not do so, the Government reserves its right to supplement its response.

VII. Bergrin Procedurally Defaulted His Claim That The RICO Statute Is Unconstitutionally Vague. In Any Event, His Claim Is Meritless.

Ground Seven of Bergrin's § 2255 motion argues that "the RICO statute is unconstitutional" (presumably on its face) and "as applied to Petitioner's case." HDE3 at 17. That claim—relying as it does on due process precedent decided before Bergrin was indicted—is procedurally defaulted and patently meritless.

A. Bergrin Procedurally Defaulted His Vagueness Claim.

Bergrin acknowledges that he did not raise this claim on direct appeal, but alleges that "it was not ripe." HDE3 at 17. To the contrary. Bergrin could have but failed to attack the indictment on vagueness grounds in his pretrial motions, which would have preserved the claim for direct appeal. Thus, Bergrin is subject to a double procedural default.

A claim that a statute is facially unconstitutional alleges either a "defect in instituting the prosecution," or "a defect in the indictment," both of which "must be raised by pretrial motion." Fed. R. Crim. P. 12(b)(3)(A), (B). *See generally United States v. Stevens*, 130 S. Ct. 1577, 1583 (2010) (entertaining facial challenge to statute that was raised in a pretrial motion to dismiss the indictment). Failure timely to raise such a claim, absent a showing of good cause, waives it. Fed. R. Crim. P. 12(c)(3); *see United States v. Vella*, 414 F. App'x 400, 408 n.3 (3d Cir. 2011) (citing *Sacred Heart Hosp. v. Dep't of Pub. Welfare*, 133 F.3d 237, 241 n. 6 (3d Cir. 1998)); *see also United States v. Layne*, 43 F.3d 127, 135 (5th Cir. 1995); *United States v. Mebane*, 839 F.2d 230, 232 (4th Cir. 1988). Here, Bergrin had *three rounds* of pretrial motions due to two Government appeals, but at no point did Bergrin challenge the RICO statute as void for vagueness, either on its face or as applied. *See* HA571–82.

Having waived his void-for-vagueness claim in the District Court, it is hardly a surprise that Bergrin did not try to raise it on direct appeal. He would have had to show good cause for that failure, and there was none. Having waived the claim in the district court, and having not raised the claim on direct appeal, the vagueness claim is procedurally defaulted. *See United States v. Rude*, 201 F.3d 445 (9th Cir. 1999) (table) (claim that "the money laundering statute is void for vagueness . . . was not raised on direct appeal" and would not be considered because movants failed to show the "cause" and "prejudice" necessary to overcome their default).

Bergrin nonetheless claims that the vagueness claim was not ripe. HDE3 at 17. But that is hard to square with Bergrin's current brief, which cites three Supreme Court vagueness decisions that were available to him at the time of his direct appeal. *See* HDE1-1 at 150 (citing *Kolender v. Lawson*, 461 U. S. 352 (1983); *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239 (2012), and *Lanzetta v. New Jersey*, 306 U.S. 451 (1939)). Thus, nothing stopped Bergrin from challenging the RICO statute on direct appeal. Indeed, others had done so long before Bergrin was indicted. *E.g.*, *United States v. Woods*, 915 F.2d 854, 863 (3d Cir. 1990) (rejecting facial attack on RICO); *United States v. Pungitore*, 910 F.2d 1084, 1104 (3d Cir. 1990) (same).

B. The Claim Is Meritless.

Bergrin makes no effort to argue cause and prejudice or to show actual innocence, and so there is no need for this Court to address the claim on the merits. If it does, however, this Court may dispose of it quickly.

A criminal statute is void for vagueness only if it "fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it

authorizes or encourages seriously discriminatory enforcement." *United States v. Williams*, 553 U.S. 285, 304 (2008). The RICO statute does not suffer from either vice.

Initially, Bergrin's effort to raise a facial challenge to the statute fails, as he does not contend that the statute implicates First Amendment values. *See Woods*, 915 F.2d at 862 ("inasmuch as [defendants] have not demonstrated that as applied to them RICO implicates values protected by the First Amendment, they are confined to a challenge that the statute is unconstitutional in its application to their specific conduct") (citing *Pungitore*, 910 F.2d at 1103–04).

Bergrin—who was a former federal prosecutor and a licensed attorney—is as poorly situated as one can be in claiming that he reasonably could not have understood that it would violate federal law to operate his law office so as to tamper with and murder witnesses, deal large quantities of drugs, and operate a brothel. *See Woods*, 915 F.2d at 8642 ("The application of RICO to the activities of these defendants should not have come as a surprise to them. Whatever might be true in other cases, 18 U.S.C. § 1962(c) is not unconstitutional when applied in this ongoing, hardcore political corruption case."); *see also Pungitore*, 910 F.2d at 1105 ("the application of RICO to the activities of the Scarfo crime family could not have come as a surprise to the members of the family"). "Every circuit which has addressed the void-for-vagueness issue following the Supreme Court's decision in *H.J. Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 239 (1989), has held the RICO statute is not unconstitutionally vague." *United States v. Keltner*, 147 F.3d 662, 667 (8th Cir. 1998) (footnote omitted).

VIII. The Claims In Ground Eight Are Barred By The Relitigation Doctrine, Procedurally Defaulted, And Utterly Meritless.

Ground Eight asserts that "Petitioner lacked the requisite mental state, *mens rea* and scienter to be convicted of the Kemo Deshawn McCray murder, the attempted murder of witnesses, witness tampering and related offenses." HDE3 at 18. In his brief, Bergrin argues that "The Court Erroneously And Prejudicially Failed To Instruct The Jury That Petitioner's Subjective Intent Must Be Proven Beyond A Reasonable Doubt." BB141. The Government has responded to these claims in Point IV above. Bergrin also claims that the Government violated its *Brady* obligations regarding, and knowingly sponsored false testimony from, Oscar Cordova. BB143–46. That mirrors a claim raised in Ground Nine of Bergrin's motion and will be addressed in Point IX.C.2 below.

IX. Ground Nine Is Procedurally Defaulted And Utterly Meritless.

Ground Nine of Bergrin's § 2255 Motion asserts that "[t]he government, to an absolute certainty, obstructed justice, committed outrageous misconduct, suborned perjury and eviscerated the Constitution's Due Process Clause." HDE3 at 20. His brief spans nearly 100 pages, largely retreading already-covered ground and retrying his case on the papers, but with even more *ad hominem* attacks. BB155–252. Bergrin's prosecutorial misconduct claim is procedurally defaulted and frivolous.

A. Bergrin Procedurally Defaulted His Claims.

Bergrin concedes that "[t]he recordings, theories and enormous prosecutorial misconduct was not argued on appeal," HDE3 at 20, even though his "defense at trial was that the government's witnesses misrepresented his lawful attorney services as criminal activities, often fabricating testimony against him." HA43. Indeed, his Ground Nine claims rely on the very same documents and information he used at trial in his unsuccessful attempt to discredit the witnesses he now claims lied.

With respect to the Kemo murder, BB156–203, Bergrin had the Curry recordings long before trial and, in fact, used some of them in his post-trial motions to press a *Napue* claim with respect to Anthony Young, SA2055, SA2080, and in his legal sufficiency challenge on appeal, HA27 n.5. Bergrin also had Young's testimony from the 2007 Baskerville trial and the 2011 Bergrin trial, along with Young's prior statements to the FBI, and he cross-examined Young extensively with these materials. *E.g.*, A3465–66 (2011 trial testimony); A3677 (2007 trial testimony); A3743 (FBI 302); A3775 (same). Yet he never argued on appeal (as he does now) that the Government knowingly sponsored false testimony. *E.g., Stadtmauer*, 620 F.3d at 267–68 (affirming this Court's rejection of a *Napue* violation raised at trial).

For the remainder of the witnesses Bergrin names, including some who never even testified at Trial Two, BB204–55, Bergrin had all of the information on which he now relies and could have raised his claims on appeal. In fact, Bergrin actually did raise some of his claims previously. For example, prior to Trial Two, Bergrin raised an outrageous government conduct claim, alleging that the Government had engaged in misconduct with respect to Alberto Castro, Ramon Jimenez, and Yolanda Jauregui. HA334–35. Judge Cavanaugh denied that motion, HA354–55, and Bergrin did not appeal, HA2–3.

Bergrin has thus procedurally defaulted his claims. And his failure to argue cause and prejudice, much less show "actual innocence," means that this Court may reject his claims on procedural grounds alone. *See Schwartz*, 925 F. Supp. 2d at 693 (refusing to consider procedurally defaulted prosecutorial misconduct claims by *pro se* defendant that were based on events that occurred at or before trial and that were or could have been considered on appeal). Beyond that, Bergrin's Ground Nine arguments rely on conclusory assertions and often cite to the Trial One transcript, even though his § 2255 motion attacks the judgment entered after Trial Two. As "[d]istrict judges have no obligation to act as counsel or paralegal to *pro se* litigants," *Pliler v. Ford*, 542 U.S. 225, 231–32 (2004), "[it] is not the role of the district court to scour the petitioner's trial transcript to find support for the arguments in his habeas corpus petition," *Wenglikowski v. Jones*, 306 F. Supp. 2d 688, 695 (E.D. Mich. 2006). At any rate, Bergrin's claims are frivolous, often blatantly misstating the record to suit his litigation posture.

B. The Kemo Murder.

Largely parroting many of his Ground Three claims, Bergrin argues that the Government misconducted itself by: (1) sponsoring Anthony Young's testimony despite knowing it was inconsistent with prior statements/testimony, at odds with the content of the unsealed Curry calls, and based on information that came from newspaper accounts; (2) coaching Young to testify that the Avon Avenue meeting occurred on December 4, 2003 and relying on that testimony in summation; and (3) pursuing a motive theory that supposedly conflicted with the Government's motive theory in the 2007 Baskerville trial. BB156–204, BB225–52. These claims are frivolous.

1. The Government Properly Sponsored Anthony Young's Trial Testimony.

The Due Process Clause forbids prosecutors from knowingly sponsoring false testimony and requires prosecutors promptly to correct testimony they know is false even if they did not intentionally elicit it. *See Napue*, 360 U.S. at 268. To establish a *Napue* violation, Bergrin must prove that "(1) [Young] committed perjury; (2) the Government knew or should have known that [Young] committed perjury but failed to correct his testimony; and (3) there is a reasonable likelihood that the false testimony could have affected the verdict." *Stadtmauer*, 620 F.3d at 267 (citation omitted). Mere speculation regarding these factors is insufficient, *Aichele*, 941 F.2d at 766, and courts have found them satisfied in only "the most extraordinary circumstances," *United States v. Zichettello*, 208 F.3d 72, 102 (2d Cir. 2000).

Stadtmauer arose from a complex tax fraud trial over which this Court presided. The defendant claimed that the Government knowingly sponsored false

testimony at trial because its cooperating witness repeatedly denied or could not recall having made certain exculpatory statements that an FBI-302 attributed to the witness. 620 F.3d at 267–68. Recognizing that the defendant had the opportunity to confront the witness with the prior inconsistent statements, the Third Circuit affirmed this Court's rejection that claim. *Id.* at 268–69 ("Here, there was no way for the prosecutor to know whether Zecher was giving false testimony when he denied—or could not recall—making certain statements during the 2005 interviews.").

It is well-settled, then, that "[c]ontradictions and changes in a witness's testimony alone do not constitute perjury and do not create an inference, let alone prove, that the prosecution knowingly presented perjured testimony." *Tapia v. Tansy*, 926 F.2d 1554, 1563 (10th Cir. 1991).[26] Yet Bergrin devotes page after page after page to describing statements of Young he claims were inconsistent with his own prior statements or statements of other witnesses. For example, Bergrin claims Young testified that Curry put on speakerphone the First Call with Bergrin (on November 25, 2003). BB160–61. In fact, Young never testified that Curry put the call on speakerphone. A3269–72. Rather, an FBI-302 authored by Special Agent Brokos

[26] *Accord United States v. Bingham*, 653 F.3d 983, 995 (9th Cir. 2011) ("Certainly Miller made inconsistent statements, but that is not enough for a *Napue* violation."); *Coe v. Bell*, 161 F.3d 320, 343 (6th Cir. 1998) ("'mere inconsistencies in testimony by government witnesses do not establish knowing use of false testimony'") (citation omitted). *United States v. Tanner*, 61 F.3d 231, 236 (4th Cir. 1995) ("[T]hat Lam remembered at the 1994 sentencing hearing that it was Tanner who made the police report does not prove he lied at the 1993 trial when he stated he didn't recall who made the call."); *United States v. Nelson*, 970 F.2d 439, 443 (8th Cir. 1992) (district court did not abuse its discretion in not holding evidentiary hearing because "mere inconsistency" does not establish perjury); *United States v. Verser*, 916 F.2d 1268, 1271 (7th Cir. 1990) (inconsistencies of a witness who testified almost a year apart and endured extensive cross-examination did not constitute perjury).

attributed that statement to Young. Bergrin confronted both Young and Agent Brokos about this. A2825, A3743, A3773, A9295–60. Since Young testified that Curry repeated aloud what he learned over the phone from Bergrin, A3269–72, and since Young testified that he told Brokos he could hear, a rational person would infer that Brokos assumed (incorrectly, it turns out) that Bergrin was on speakerphone. To Bergrin, however, this represents an intentional fabrication that the Government knowingly sponsored, even though Young's testimony about what Bergrin said during the call was fully corroborated by the wiretap recording of the First Call.

Similarly, in his statements to the FBI and at the 2007 Baskerville trial, Young testified that he was sitting with Rakeem in Curry's Range Rover when Bergrin mispronounced the name "Kamo" during the Second Call. By the time of Bergrin's 2011 trial, Young realized that he was mistaken about who was next to him and so corrected his testimony. *See* A367–69. Bergrin, of course, treats Young's original statement as an intentional lie and attributes his correction to improper Government coaching. BB161–63, 189; *accord* SA892–906 (Trial One); A3577–79 (Trial Two). Yet Young denied he was showed any documents (including phone records) or coached to change his testimony when asked by Judge Martini at Trial One. SA905–06. And Young's testimony about what Bergrin told Curry (and what Curry relayed to the group) never wavered, and was confirmed by the recording of the Second Call.

Bergrin also notes that Young initially told the FBI three different versions about his role in the Kemo murder before finally coming clean. BB178. But Young admitted during direct and cross-examination that he initially lied to the FBI, A3437–53 (direct), A3711–12 (cross). Yet Bergrin insists the Government engaged in

prosecutorial misconduct by sponsoring Young as a witness, BB178, citing nothing other than his own indignant *ipse dixit*. Bergrin's argument is littered with similar such claims, and the Government will not address each one.[27]

From these inconsistencies, Bergrin asks this Court to find that the Government "illegally coached Young to lie." BB157; *see also* BB176 ("coaching"); BB187 ("coached"); BB197 (same); BB198 (witnesses were "coached and coerced to testify falsely"). But Bergrin has utterly failed to establish the first two prongs of his *Napue* claim, much less proven that any "coaching" occurred. Not only did Young repeatedly deny he was told how to testify, A3945–46, or shown any evidence related to the Kemo murder, SA905–06, but the Government affirmatively took steps to correct testimony where necessary. It immediately recalled another witness (Cordova) to correct his false testimony before the jury, A7270–82, which puts the lie to Bergrin's claim that this prosecution was a massive conspiracy to obstruct justice. "All of the allegations constitute [Bergrin's] subjective interpretations of statements and events, and his assignment to each of unlawful or vindictive motivations." *Bellamy v. United States*, Civil No. 03–24, 2009 WL 10648881, at *4 (E.D.N.C. Feb. 3, 2009), *appeal dismissed*, 349 F. App'x 830 (4th Cir. 2009). The contradictions Bergrin cites fall woefully short of supporting the serious charge he now levels. *See Caballero*, 277 F.3d at 1250 ("baseless allegations of prosecutorial misconduct are not helpful to either the defendants or the profession").

[27] The Government's Brief opposing William Baskerville's § 2255 motion responds to a *Napue* claim premised upon many of the same alleged inconsistencies. *See Baskerville v. United States*, Civil No. 13–5881, ECF No. 16 at 50–66.

2. The Government Properly Argued That Young Was Credible Because He Knew Details That Only An Insider Would Have Known.

Bergrin also claims that the Government misconducted itself by telling the jury that Young was credible because he knew details of the murder only an insider could have known. BB164–65 (presumably citing A9506). Bergrin claims the Government knew this was false because all "these facts appeared in the newspaper, which Young admitted he had read." BB164. But that assertion is demonstrably false.

To be sure, the press covered the Government's November 2004 motion to disqualify Bergrin from representing William Baskerville, which revealed that Bergrin had been recorded on a wiretap mispronouncing the name "Kamo." HA927–28. But Young emphatically denied having read *that* article:

> Q. Now, before you went to the F.B.I. for the first time, isn't it a fact that you read multiple newspaper articles in The Star-Ledger about Mr. McCray's case? Correct?
>
> A. No, I read it one time. That was the next day, after I killed McCray.
>
> Q. You're telling us that you didn't read an article also in approximately November of 2004?
>
> . . .
>
> A. No. I read one article about Mr. McCray, and that was the next day after the murder.

A3925–26; *accord* A3400. Further, although the Government introduced admissions Bergrin made to the reporters who covered the hearing on the disqualification motion, A3208–16, A3219–26, Bergrin chose not to introduce the articles for the non-hearsay purpose of showing that the information they reported was in the public domain by the time Young approached the FBI, A3216–19, A3226–27. Thus,

Bergrin's allegation—that Young learned the details of the Second Call from the newspaper, much less that the Government knew he did—is "rank speculation." *Morris v. United States*, Civil No. 13–240, 2015 WL 5735649, at *4 (M.D. Ala. Sept. 30, 2015).

The truth is that when Young approached the FBI in January 2005, he knew numerous details about the Kemo murder (including the substance of the First Call and Second Call) that only an insider could have known. *Compare* CDE659 at 65–66 (detailing numerous such facts), *with* A8020–23 (testimony about the very limited information was in the public domain between March 2004 and April 2006). The Government was perfectly entitled to argue that Young knew details of the Kemo murder that only an insider would have known. *See United States v. Lee*, 612 F.3d 170, 194 (3d Cir. 2010) (The Third Circuit has "repeatedly held that a 'prosecutor is entitled to considerable latitude in summation to argue the evidence and any reasonable inferences that can be drawn from that evidence.'") (quoting *United States v. Werme*, 939 F.2d 108, 117 (3d Cir. 1991)).

3. Johnny Davis's Testimony Hardly Suggests, Much Less Proves, That Young Lied.

Bergrin also claims that the Government knew or should have known Young lied about having murdered Kemo because Johnny Davis, Kemo's step-father, identified Malik Lattimore as Kemo's murderer, even though he did not resemble Young. *See* BB237–39; *see also* BB190–91. Bergrin thus claims that the Government should have rejected the sworn admissions of the person who approached the FBI and ultimately confessed to a capital offense. This rehashes Bergrin's zany trial defense—that Young falsely confessed to a capital offense because he expected to

trade his cooperation for a lower sentence on a state gun-possession offense. As the Government argued in summation:

> [Bergrin] wants you to believe for some reason, I should say, that Newark police and the F.B.I. both had the right guy, Malik Lattimore, and for whatever reason just decided not to charge him, despite, presumably, wanting to close the murder case, so they just let him go. And taking that theory to the logical conclusion, I guess the only way that would work out is if somehow in their crystal ball they could see that nine months later, a random guy was going to randomly show up voluntarily at the F.B.I. and claim responsibility for a murder that he did not commit. Try that God-given common sense that Mr. Bergrin asked you to use in his opening statement on those.

A9483. *See generally United States v. Jackson-Randolph*, 282 F.3d 369 (6th Cir. 2002) ("Jackson-Randolph's theory posits that the witness would create a story admitting his involvement in a money-laundering scheme in order to avoid prosecution for failure to file income tax returns. This does not make sense.").

At any rate, all Bergrin relies on is the testimony of Johnny Davis, who: did not previously know either Young or Lattimore; testified he had his back to Kemo and the shooter and turned around only when he heard the shots were fired, A2451–52; testified that he was only able to observe the man who shot Kemo for the amount of time it took the man to tuck the gun in his side and jump into a silver car, A2453, that was stopped nearby (next to a green mailbox), A2456–58; HA1233–34; testified he could not see the face of the man who shot Kemo, A2454, A2458; said he only saw the man's side appearance [from the rear] as the man ran away from him, A2454; said he "couldn't have picked this guy [the man who shot Kemo] out from a can of paint," A2461; said 4½ months after the murder that a photograph of Lattimore "resembled" the man who shot Kemo, A2181, A2219–22, but that he was not sure because "I only seen the corner of his face," "I couldn't pick that man out,"

"I don't know him. I never saw him. It would be impossible to do that [identify the shooter]," A2478.

Further, Davis's identification of Lattimore, prompted by Bergrin's shady investigators seven years after the murder, is completely unreliable. A2463–68; *see* A2505–06. Davis clearly could not identify the shooter at the time of the murder. There is no reason to believe he could reliably do so seven years later. That Bergrin's investigators lied to Davis about their identities in order to secure the identification Bergrin used at trial and trumpets now, A2463–68, further undermines its reliability.

Moreover, Davis testified that he identified Lattimore because he resembled someone who confronted Davis one day after the murder; Davis assumed that person must have been the shooter. A2506-11. Even so, Davis said he identified Lattimore based on "a gut feeling about a situation." A2511. In short, Davis's identification of Lattimore as the shooter was clearly mistaken, the Jury understood that, and Bergrin's claim the Government engaged in prosecutorial misconduct by sponsoring Young's testimony is frivolous. *See United States v. White,* 724 F.2d 714, 717 (8th Cir. 1984) (per curiam) ("[A] challenge to evidence through another witness or prior inconsistent statements [is] insufficient to establish prosecutorial use of false testimony."); *United States v. Nelson*, 970 F.2d 439, 443 (8th Cir. 1992) (rejecting *Napue* claim where "[t]he only showing made by Nelson is that Miller's statement may have been contradicted by another witness"). *See generally United States v. Doherty*, 867 F.2d 47, 70 (1st Cir. 1989) ("Neither *Napue* nor any other decision prohibits a prosecutor from calling witnesses who will present conflicting stories.").

Bergrin also claims, without support, that the Government "concealed that fact that they had shown Davis a photograph of Young; and he swore that Young was not the shooter." BB238. But the Government never showed Davis a photograph of Young—only Bergrin's investigators did seven years after the murder under the false pretense that they were civil rights investigators acting on behalf of Anthony Young. Thus, to the extent Bergrin implicitly alleges a *Brady* violation, it too is frivolous. *See Ralston*, 2016 WL 4646222, at *9 ("Because Petitioner was the original source of the allegedly suppressed evidence, his first claim of prosecutorial misconduct is frivolous.").

4. The Curry Calls Corroborate Young's Testimony.

Bergrin devotes numerous pages to reprising his claim that the content of the Curry recordings contradict Young's testimony. BB172–87. The Government has already explained why that claim is false. *See supra* Point III.A.4.b; *see also* CDE659 at 69–76. It will not repeat those arguments here.

5. Anthony Young Never Testified That The Post-Thanksgiving Meeting Occurred On December 4th And The Government Did Not Argue That In Summation.

Bergrin claims the Government improperly coached Young to testify that the Avon Avenue meeting occurred on December 4, 2003 and argued in summation that evidence known to the Government but not to the jury (*i.e.*, the unsealed Curry calls) supported Young on that score. BB174–76. Bergrin claims that the Government acknowledged its misconduct by withdrawing from its brief opposing Bergrin's Trial Two Rule 29 motion its assertion that the meeting occurred on December 4th.

BB176. This argument reprises Bergrin's *Brady* claim about the December 4, 2003 Curry calls. *See supra* Point III.A.4.b. It is just as meritless.

Initially, the major premise of Bergrin's argument is demonstrably false: Young never testified that the Avon Avenue meeting occurred on December 4th. As explained in Point III.A.4.b.ii above, Young testified that the meeting occurred sometime after Thanksgiving 2003, resisting Bergrin's efforts to pin him to a specific date. A3278-79, A3336, A3576–68, A3623.[28] The minor premise of Bergrin's argument is also false: the Government did not explicitly argue to the Trial Two jury that the Avon Avenue meeting occurred on December 4th; nor did it imply that the December 4th calls showed Curry and Bergrin setting up the meeting. *See* A9509–11.

Just as false is Bergrin's claim that the Government's brief opposing Bergrin's Trial Two Rule 29 motion withdrew the claim that the meeting occurred on December 4th and somehow admitted that the Government's summation argument was improper. BB176. In fact, all the Government did was withdraw (and apologize for) the claim—made only in its post-trial brief—that *the pattern of calls* between Curry and Bergrin helped show that the meeting occurred December 4th. A10431–32. The meeting about which Young testified could have occurred on December 4th or days before or after. What mattered to the jury is what Bergrin said at that meeting.

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[28] To be sure, Young testified in 2007 that the meeting occurred four or five days after Baskerville's arrest, HA1068, but when confronted at Trial Two about the fact he no longer adhered to that four-to-five day period, Young made clear that he did not know the actual date of Baskerville's arrest until Bergrin informed him of it during Trial One; only then did Young know that his estimate of four-to-five days was inaccurate because it would have put the meeting on Thanksgiving weekend, whereas Young knew it occurred later, on a weekday. A3766–69; *accord* A3623. That hardly establishes that the Government coached Young to change his testimony.

Finally, it bears noting that a highly experienced Third Circuit practitioner, Lawrence S. Lustberg, Esq.,[29] represented Bergrin on direct appeal. Yet despite raising numerous complaints about different aspects of Bergrin's trial, *see* HA2–3, Mr. Lustberg did not claim that the Government had engaged in prosecutorial misconduct by arguing inferences to the jury that were contradicted by the Curry calls. That speaks volumes: either Mr. Lustberg saw no misconduct in Young's testimony and the Government's summation argument based on that testimony, or he too concluded that the date of the Avon Avenue meeting was immaterial to the jury's determination of Bergrin's guilt. Either way, Mr. Lustberg's decision not to raise such a claim severely undermines Bergrin's accusation that the Government sponsored false testimony from Young and improperly bolstered his credibility by supposedly referring to inadmissible evidence.

6. The Government Corroborated Young's Statement About The Events That Led To His Contacting The FBI In January 2005.

Young testified at Trial Two that he approached the FBI in January 2005 partly because Jamal Baskerville had threatened him for sharing with his then-girlfriend (Rashidah Tarver) that Jamal McNeil had accidentally killed a woman Young referred to as "Nut's girlfriend" on Springfield Avenue in Newark—a murder Young testified occurred shortly before his May 2003 release from prison. A3410–11, A3422–25, A3527–29, A3531–32. While cross-examining Agent Brokos (who testified before Young took the stand), Bergrin elicited that Young had told her the

[29] https://www.gibbonslaw.com/lawrencelustberg/

murder took place on South 20th Street and Springfield Avenue. A2806.[30] When Bergrin asked Agent Brokos what she did to confirm that information, she testified that she spoke to the Essex County Prosecutor's Office homicide detective who was handling the investigation. *Id.*

Bergrin now claims that the Government knew or should have known that Young's testimony was false, arguing that a cursory investigation would have proven that Jamal McNeil and Jamal Baskerville were not involved in any murder, and thus had no reason to threaten Young. BB234. Indeed, Bergrin's Rule 33(b)(1) motion claims "there is absolutely no evidence to suggest that such a murder ever took place." CDE630-1 at 13 n.5. To the contrary, records from the Essex County Prosecutor's Office's investigation of that murder—independent of Young—corroborate Young's account. Among other things, those records show that:

- a woman named Stephanie Kelley was shot in the head and killed in a drive-by shooting on March 8, 2003 on the corner of Springfield Avenue and South 20th Street, in Newark, New Jersey;
- two black males were observed in the car from which the shots were fired;
- the victim was referred to as "Nut's girlfriend;" and Jamal McNeil was identified as the shooter.[31]

Thus contrary to Bergrin's claim, the Government diligently confirmed the truth and accuracy of Young's information. That the Essex County Prosecutor's Office

[30] Bergrin's question asserted that shooting took place in Irvington, A2806, but Springfield Avenue and South 20th Street is actually in Newark.

[31] Because this is an open murder investigation, and due to concerns for witness safety, the Government will provide the relevant documents to this Court *ex parte* for *in camera* inspection upon request.

ultimately believed there was insufficient evidence to prove the case against McNeil beyond a reasonable doubt in no way shows Young lied.

7. There Is No Merit To Bergrin's Claim That The Government Argued Inconsistent Motive Theories.

Bergrin complains the Government engaged in prosecutorial misconduct by arguing at Trial Two a motive for the Kemo murder that differed from its theory at Baskerville's 2007 trial. BB179, BB197–200, BB250–52. That claim, too, is false.

a. The Claim Is Procedurally Defaulted And Barred By *Teague*.

As with many of his other claims, Bergrin could have objected at trial and raised this claim on direct appeal. Because he did not, the claim is procedurally defaulted and this Court need not consider its merits.

Beyond that, Bergrin cites no Supreme Court or Third Circuit case decided at the time of his direct appeal holding that pursuing different motive theories violates the Due Process Clause. In fact, the Supreme Court reversed a grant of habeas relief where the state had pursued inconsistent theories as to which of two defendants actually murdered the victim. *Bradshaw v. Stumpf*, 545 U.S. 175 (2005). In so doing, the Supreme Court noted that the State had waived its *Teague* defense. *Id.* at 182. Justice Thomas noted, however, that the Supreme Court "has never hinted, much less held, that the Due Process Clause prevents a State from prosecuting defendants based on inconsistent theories." *Id.* at 190 (Thomas, J. concurring).

On remand, the *en banc* Sixth Circuit held that "[a] criminal defendant . . . does not have the right to prevent a prosecutor from arguing a justifiable inference from a complete evidentiary record, even if the prosecutor has argued for a different inference from the then-complete evidentiary record in another case. The

prosecutor's allegedly inconsistent arguments do not violate the Due Process Clause." *Stumpf v. Robinson*, 722 F.3d 739, 751 (6th Cir. 2013) (*en banc*).

The Supreme Court in *Stumpf* did not adopt the new rule Bergrin now attempts to invoke. Thus, the *Teague* defense is available to the Government here. *See Davis v. Sec'y Dep't of Corr.*, Civil No. 08–1842, 2009 WL 3336043, at *18 (M.D. Fla. Oct. 15, 2009) ("Given the language in *Stumpf,* any finding of a due process violation based on changing prosecutorial theories would amount to a new rule, unavailable for consideration in this habeas case."); *see also Littlejohn v. Trammell*, 704 F.3d 817, 852 (10th Cir . 2013) ("Like the district court, we conclude that Mr. Littlejohn's inconsistent-theories argument fails at the threshold because it is not based on clearly established federal law."); *accord Fotopoulos v. Sec'y, Dept, of Corr.*, 516 F.3d 229, 1235 (11th Cir. 2008);[32] *cf. United States v. Gravley*, 587 F. App'x 899, 913 (6th Cir. 2014) (stating on direct appeal that "[w]hether the use of inconsistent theories of prosecution amounts to a denial of Due Process has not been settled").

b. The Claim Is Groundless.

At any rate, Bergrin's accusation is groundless. In its 2007 summation during the guilt phase of William Baskerville's trial, the Government countered any

[32] While some of these cases rely on 28 U.S.C. § 2254(d)(1), that provision effectively codifies the *Teague* standard by authorizing habeas relief only when a state court decision "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." Since that law had to be "clearly established" at the time the state court ruled, a habeas claim invoking a new rule will be barred by both § 2254(d)(1) and *Teague*. *See Williams v. Taylor*, 529 U.S. 362, 380 (2000) ("It is perfectly clear that AEDPA codifies *Teague* to the extent that *Teague* requires federal habeas courts to deny relief that is contingent upon a rule of law not clearly established at the time the state conviction became final.").

suggestion that Baskerville was the unwitting beneficiary of a murder conspiracy carried out by others. It did so by arguing that Young, Curry and Rakeem Baskerville did not have their own independent motive to kill Kemo; rather, they shared William Baskerville's motive to retaliate against Kemo and to prevent him from testifying. HA1073–74. In so doing, the Government stressed Young's testimony that Young and his associates were not concerned about Baskerville cooperating. HA1074. Nearly six years later, the Government argued at Trial Two that Bergrin had his own personal motive for eliminating Kemo: a concern that Baskerville might turn on Curry, who in turn might turn on Bergrin. A9540–43.

Bergrin's intent—to prevent Kemo from testifying—was the same as that of William Baskerville and his associates. Yet Bergrin sees the Government's slight variation in its theory of motive as a 180-degree U-turn that amounts to prosecutorial misconduct. BB197–200. He is wrong. After Baskerville's 2007 trial, the Government continued actively investigating Bergrin and his association with Curry. A significant development in that investigation occurred in or after 2010, when Abdul Williams, Yolanda Jauregui, and Ramon Jimenez began cooperating and separately corroborated Lachoy Walker's testimony that Bergrin had secured a lucrative cocaine connection for Curry. A1237. That gave Bergrin his own personal motive to ensure that Baskerville would not cooperate against Curry, who in turn could cooperate against Bergrin. HA446–61 (Trial One summation); A9540–43 (Trial Two Summation).

Further, Bergrin's argument falsely assumes that the Government was required to accept as fact Young's opinion that Baskerville would never cooperate

and try its case as if Bergrin had the same opinion. But Special Agent Brokos testified that Baskerville initially considered cooperating but changed his mind only after speaking to Bergrin. A2594–96. Further, Young testified that everyone believed Curry was "soft" and would cooperate if arrested. A3938–39. Finally, Bergrin, a defense attorney and former prosecutor, had seen many cases in which underlings agreed to cooperate. That *Young* believed Baskerville would not cooperate did not require the Government to assume that *Bergrin* harbored the same belief in November and December 2003.

So understood, the Government was perfectly entitled to argue in 2013 that Bergrin had his own motive for wanting to help eliminate Kemo, even if Young had testified in 2007 and again in 2013 that he and his associates believed there was no real concern Baskerville would cooperate. A3286–87. And if Bergrin believed that real-world events contradicted the Government's motive theory, he was free to argue that to the jury. *See* A9622–24. At any rate, because no due process violation occurs when a prosecutor takes inconsistent positions on something as critical as who actually murdered the victim (an essential element of the offense), *see Stumpf*, 722 F.3d at 751, there can be no due process violation where, as here, there is a slight variation in the motives ascribed to different actors for a murder (not an essential element of the offense), *cf. Smith v. Groose,* 205 F.3d 1045, 1052 (8th Cir. 2000) (due process violation would require proving an inconsistency that "exist[s] *at the core* of the prosecutor's cases against defendants for the same crime") (emphasis added).

In sum, the Government has consistently alleged—and proved—that there was a conspiracy to murder Kemo to prevent him from testifying against William

Baskerville, and that Baskerville, Bergrin, and Young (among others) were members of that conspiracy. *See Haynes v. Cupp*, 827 F.2d 435, 439 (9th Cir. 1987) (Kennedy, J.) ("It is true that the trials differed in emphasis. However, the underlying theory of the case, that all three defendants were equally culpable, remained consistent throughout. In view of this underlying consistency, the variations in emphasis are not cause for reversal."); *accord Sifrit v. Nero*, Civil No. 12–910, 2014 WL 5140329, at *29 (D. Md. Oct. 10, 2014) ("inconsistent emphasis or inferences will not amount to a due process violation"). That different players might have had different motives for that murder—and that the Government presented those motives to two different juries six years apart—does not violate due process.

C. Bergrin's Claims Regarding Other Witnesses Who Testified At Trial Two Are Frivolous.

Bergrin raises a host of prosecutorial misconduct claims regarding witnesses who testified at Trial Two. Each is frivolous.

1. Thomas Moran.

Bergrin claims that the Government sponsored false testimony by Thomas Moran. BB207–09. That claim is false.

To advance his claim, Bergrin ignores Moran's principal testimony, which was corroborated by among other things highly inculpatory recordings of Bergrin himself. Instead, Bergrin focuses on two minor points. First, when explaining how he learned Alejandro Castro lived at 710 Summer Avenue, Moran said:

> Paul was planning on turning, converting this restaurant into a Subway restaurant, one of those fast-food, you know, heros that they make, restaurant. So we had visited the restaurant with a couple of construction workers who were going to evaluate the building, see what needed to be done to approximate a cost to, you know, turn this, convert it into a

> suitable location and place for this Subway restaurant. When we went to the -- to the building, we had to get into the cellar of the building. They wanted to see what was underneath, the foundation and whatnot, and when we -- there was a lock on the door and Paul didn't have a key to the lock, so we had to go upstairs and knock on the door, and Alejandro came out and came down with the key and unlocked the door to go down into the basement of the restaurant.

A7486–87. Bergrin now claims "the Government knew that Moran was completely fabricating this fact because Yolanda [Jauregui] had informed them Moran was lying." BB208. But Jauregui never said that to the Government. Bergrin instead relies on the affidavit he fabricated long after trial, which Jauregui refused to sign. *See supra* Point III.C; *see also* CDE659 at 57–59. That hardly supports a *Napue* claim.

Bergrin also suggests that "Subway's Franchise Management" would have proven false Moran's testimony about visiting 710 Summer Avenue. But Moran never testified that Bergrin had contacted anyone at Subway regarding his plan. Further, Moran did not testify they unlocked the door so "the building could be inspected, *by a Subway Franchise representative*," as Bergrin now misleadingly claims. BB208 (emphasis added). Even if Subway had no records relating to Bergrin or 710 Summer Avenue, that would hardly contradict Moran's testimony.

Finally, Moran's testimony about this visit to 710 Summer Avenue was at best a minor piece of the Government's proof establishing Bergrin's control over that location. Bergrin's control over 710 Summer Avenue was established by, among other things: records demonstrating his ownership of the building, A8599–600; SA1645; records showing the utilities were in Bergrin's name, A8502-07; testimony about Bergrin's involvement in drug activity at the building, A4611–13, A5165–81; and Bergrin's admission to Moran (independent of Moran's and his visit to 710

Summer Avenue) that Alejandro Castro paid Bergrin $2500 per month to store cocaine in the building, A7485–87.

Bergrin also claims that the Government allowed Moran to falsely testify that Bergrin wanted Moran to become his law partner despite the Government's having developed evidence that Bergrin was in the process of terminating his relationship with Moran. BB209. Bergrin provides no support for this claim because the Government in fact had developed no such evidence. Moreover, this issue had no independent relevance to Bergrin's guilt. Rather, it became an issue only because Bergrin attempted to establish this so-called "fact" during his Trial Two defense case, A9114–15, A9120, in support of his "false in one, therefore false in all" argument about Moran's testimony, A9616, A9691, A9694–95. But Bergrin's witness was thoroughly discredited on cross-examination, A9120–34, and the jury obviously rejected Bergrin's defense by finding him guilty.

2. Oscar Cordova.

Bergrin raises a litany of complaints about Cordova. He contends that the Government failed timely to disclose that Cordova (1) was undergoing mental health treatment, (2) had received payments in connection with his cooperation, and (3) had phoned in a false death threat on his own life. *See* BB143–45 & nn. 21–22. He also claims the Government misconducted itself by continuing to rely on Cordova's testimony despite recalling Cordova to the witness stand to admit that he had lied in response to a question by Bergrin. BB216–18. These claims are frivolous.

a. There Was No *Brady* Violation.

Bergrin's *Brady* claim is frivolous because he had—and in some cases used at trial—all of the information he now complains about.

As for lack of suppression, the Government immediately disclosed the information to Bergrin as soon as it learned of it. *See* A6316–18 (treatment), A6256–57 (false death threat), A7049–51 (payment).[33] With respect to one such piece of information (the mental health treatment), Bergrin affirmatively chose not to cross-examine Cordova on that subject. A6641–42. Thus, he cannot credibly complain on collateral attack that the mid-trial revelation somehow prejudiced his defense. *Cf. United States v. Walsh*, 75 F.3d 1, 8-9 (1st Cir. 1996) (finding no prejudice from delayed disclosure of impeachment material where defendant made minimal use of it when prosecution witness was recalled to the witness stand).

Bergrin *did* cross-examine Cordova about the other two pieces of information. *See* A7282–89; *see also* A6256–57, A6229–30. Yet the jury convicted Bergrin despite that cross-examination and despite Cordova's having to retake the witness stand to admit that he had perjured himself by denying that he was the source of the death threat. That proves that the information was not material to guilt. *See United States v. Kaplan*, 554 F.2d 577, 580 (3d Cir. 1977) ("If exculpatory evidence can be effectively presented at trial and the defendant is not prevented by lack of time to make needed investigation, there is no reversible prosecutorial conduct in ill-timed presentation."); *Guibilo*, 336 F. App'x at 129 (manuscript belatedly disclosed during trial was not material where defendant used it to his advantage and still was convicted). S*ee generally Strickler v. Greene*, 527 U.S. 263, 281-82 (1999) ("there is never a real 'Brady

[33] Bergrin also claims that the Government did not investigate the death threat until after Cordova left the stand. BB144. In fact, the U.S. Marshals already were investigating the threat *before* Cordova testified, a point Bergrin himself brought out by getting Cordova to admit that he had lied about it to the lead prosecutor during trial preparation. A7283.

violation' unless [any] nondisclosure was so serious that there is a reasonable probability that the suppressed evidence would have produced a different verdict").

Bergrin now complains that Cordova was allowed to testify that he phoned in the false death threat on himself due to threats on his life. BB144, BB217. In fact, Judge Cavanaugh ruled that Cordova could not testify that he was afraid of Bergrin, A7047–48, but Bergrin nonetheless asked Cordova why he was behind the phony death threat, prompting Cordova to say that he was scared, but not because of any conduct by Bergrin, A7275–77. Thus, having himself elicited that Cordova was scared, Bergrin cannot credibly complain now that Cordova' direct testimony "clearly [led] the jury and everyone to believe that [Bergrin] was behind these threats." BB144; *accord* BB217.

b. The *Napue* Claim Is Frivolous.

Bergrin claims that the Government violated its obligations under *Napue* by sponsoring Cordova's testimony that he is the son of Gustavo Colon (or "Lord Gino"), the founder of the Latin Kings gang. BB143–44. Bergrin procedurally defaulted this claim by not raising it on direct appeal. And he makes no effort to show cause or prejudice. *See United States v. Bass*, Crim. No. 09- 230, 2013 WL 12216506, at *3 (D. Colo. Dec. 6, 2013) (as Bass "failed to raise the issue on direct appeal or argue cause and prejudice in front of this Court," those "failures resulted in procedural default and are sufficient to dismiss [his] *Napue* claim").

At any rate, the *Napue* claim is deficient on its face. Bergrin must prove that "(1) [Cordova] committed perjury; (2) the Government knew or should have known that [Cordova] committed perjury but failed to correct his testimony; and (3) there is a reasonable likelihood that the false testimony could have affected the verdict."

Stadtmauer, 620 F.3d at 267 (citation omitted). Bergrin, as the one who is seeking to overturn an otherwise-final judgment on collateral attack, bears the burden to prove all three elements. Mere speculation regarding these factors is insufficient to meet his burden. *Aichele*, 941 F.2d at 766.

Although Bergrin does not cite to it, he presumably seeks to satisfy *Napue*'s first prong with an affidavit from a private investigator submitted in support of his pending Rule 33(b)(1) motion. That affidavit recounts a statement the investigator supposedly took from Cordova's former girlfriend, Savina Sauseda, who claims that Cordova admitted he lied about being Lord Gino's son. CDE630-8 at 4, ¶ 11.

Whether that hearsay is sufficient to meet Bergrin's burden on the first prong is doubtful. *See Herrera v. Collins*, 506 U.S. 390, 417 (1993) (noting that affidavits submitted in habeas action were "particularly suspect" because they were based on hearsay); *Neill v. Gibson*, 278 F.3d 1044, 1056 (10th Cir. 2001) (holding that district court did not abuse its discretion in disregarding inadmissible hearsay investigator affidavits presented to support habeas petition). Indeed, as the Government's Rule 33 Opposition explains, the reliability of Sauseda's entire statement is in serious doubt given her claim that she listened to recordings on a "Hawk" device she supposedly found in her couch. CDE630-8 at 3, ¶ 6. That claim is provably false: the owner of the company that manufactures the Hawk device testified at trial that it has no playback capability. CDE659 at 53 (citations omitted). Sauseda thus fabricated part—and most likely all—of her statement, and likely did so at Bergrin's behest.

At any rate, Bergrin's *Napue* claim fails at step two even if the investigator's double hearsay is sufficient to establish that Cordova falsely testified at trial that he

was Lord Gino's son. That is because Bergrin has submitted nothing to show that the Government knew that testimony was false during trial. Indeed, the Third Circuit has rejected a claim that the Government knew a witness's testimony was false even when the prosecutors had in their possession a statement that contradicted the witness's trial testimony. *See Stadtmauer*, 620 F.3d 268–69; *accord United States v. Hoffecker*, 530 F.3d 137, 183 (3d Cir. 2008).[34]

To the extent Bergrin implicitly complains the Government should have fact-checked that specific aspect of Cordova's testimony, decisional law applying *Napue* imposes no such requirement. *See United States v. Rovetuso*, 768 F.2d 809, 818 (7th Cir. 1985) ("The defendants' argument at best is little more than a criticism of the government for failing to do an investigation which could have provided information for impeachment.") (quoting *Ruiz v. Cady,* 710 F.2d 1214, 1218 (7th Cir. 1983)); *accord United States v. Houston*, 648 F.3d 806, 815 (9th Cir. 2011). And the Government did not know until trial that Bergrin intended to make Cordova's lineage a focal point of his defense.

Finally, there is zero chance that any false testimony by Cordova about the identity of his father affected the verdict. First, all of the facts material to Bergrin's guilt on the charges arising from the Esteves Plot were recorded and played for the jury. Thus, the jury did not need to find Cordova credible to convict. Second, Bergrin not only relentlessly cross-examined Cordova about the Lord Gino issue (among

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[34] Bergrin invites this Court to order discovery to prove what he suspects is true. BB144 & n.21. But that is insufficient to warrant discovery. *See Williams v. Beard*, 637 F.3d 195, 210–11 (3d Cir. 2011) ("Ultimately, Williams' request amounts to an entreaty to engage in a fishing expedition. The law is clear, however, that such speculative discovery requests should be rejected.").

numerous other issues), he called a defense witness who testified she told Bergrin in 2008 that the Latin Kings had disavowed Lord Gino and that Oscar was not Lord Gino's son. A9084–87. Bergrin hammered this testimony on summation, mentioning Lord Gino numerous times. A9612 , A9613, A9670, A9672, A9673, A9677, A9684. Third, the jury convicted Bergrin on all the counts related to the Esteves Plot despite Cordova's admission to having perjured himself about the death threat, and despite a defense witness's testimony that she warned Bergrin Cordova might be an informant.

Thus, it would not have made a dime's worth of difference had the Trial Two jury been informed that Cordova was not Lord Gino's son. What mattered to the jury is that *Bergrin* plainly believed that Cordova was a Latin King gang member despite Bergrin's repeated, first-person protestations that he knew Cordova was an informant. *See Hoffecker*, 530 F.3d at 183 ("[W]e are surprised that Hoffecker has raised these rather inconsequential matters as a basis for a reversal here inasmuch as when Swarn's allegedly false testimony is considered within the context of the entire case we see no chance at all that, even if false, it could have affected the verdict."); *accord United States v. Antone*, 603 F.2d 566, 570 (5th Cir. 1979) (trial court properly concluded that false testimony "pale into total insignificance as impeachment when considered against the backdrop of all the other impeaching evidence the jury had before it") (citing *United States v. Minichiello*, 510 F.2d 576, 578 (5th Cir. 1975)); *cf. United States v. Wallach*, 935 F.2d 445, 458 (2d Cir. 1991) (false testimony must address matter "essential to the government's case").

3. Rondre Kelly.

Bergrin's complaints about Kelly largely rehash claims he makes elsewhere.

Bergrin claims that Yolanda Jauregui and Ramon Jimenez provided the Government with "conclusive evidence that Kelly was fabricating evidence of Bergrin's drug trafficking." BB212. But if Bergrin believed that, he would have called Jauregui and Jimenez to testify on his behalf. He did not. Further, to the extent Bergrin relies on the "affidavit" that he fabricated after trial and that Jauregui refused to sign, *see supra* Point III.C, his claim is plainly baseless.

Bergrin also notes that Richard Roberts set up Kelly's initial proffer session with the Government. BB211–12. It is unclear what Bergrin is arguing here. If he means to suggest that Kelly must have fabricated evidence against Bergrin because Roberts (at the Government's behest) induced him to do so, that claim is baseless for the reasons explained in Point II.B, above. If Bergrin is arguing that the Government knowingly sponsored Kelly's false testimony that Roberts was uncomfortable representing Kelly while he cooperated against Bergrin, A4495–96, his claim is equally baseless. *First*, the fact that Roberts set up and attended Kelly's initial proffer session hardly proves that Kelly lied, much less that the Government knew he did, when he testified that Roberts told him he was uncomfortable representing a cooperator against Bergrin. *Second*, contrary to Bergrin's insinuation that the Government attempted to hide Roberts' attendance at the initial proffer session, the Government disclosed to Bergrin the FBI report documenting that fact, HA1235, which Bergrin used to cross-examine Kelley on this subject, A4675–77. *Third*, whether Roberts set up the first proffer session and why he stopped representing Kelly was, like most of the issues Bergrin raised on cross-examination, a side-show,

utterly immaterial to Kelly's credibility or the Government's powerful evidence of Bergrin's drug-trafficking.

4. Lachoy Walker.

Bergrin claims the Government suppressed various impeachment materials for Walker. BB221–23. Those claims are demonstrably false.

The Government provided Bergrin with all of the impeachment material the Government possessed about Walker, including multiple DEA reports, his criminal history report, and the 817 pages of transcripts of Walker's approximately five days of testimony (direct and cross examination) in the Curry trial. Those documents covered, among other things, Walker's role in the Curry Organization, his own history in drug trafficking, his other criminal history, and information relating to the Essex County murder in which Bergrin claims he played a role.

Bergrin nonetheless claims the Government never disclosed that Walker had been convicted of kidnapping and aggravated assault. BB223. But the Government timely disclosed this information, HA1236–37, and brought it out on Walker's direct testimony, A1212. Moreover, Bergrin used that information to cross-examine Walker, A1329–31, and referred to it in his closing argument, A9615-16, putting the lie to his claims of suppression and materiality.

Bergrin also claims that the Government suppressed records about a lease executed by Walker for "the Dungeon," which was a stash-house for the Curry Organization and which was located at 353 South Center Street in Orange, New Jersey. BB223. Bergrin cites to nothing and the Government is unaware of any such records. In fact, the Government's investigation into Curry showed that the

Dungeon was put in the name of Curry's cousin, Aquila Suber. HA1239–55, HA1261–63.

Finally, whether Walker was the leaseholder for or lived at the Dungeon has no independent relevance to Bergrin's guilt—it was merely the location where a conversation took place between Walker and Curry. Bergrin does not, because he cannot, contest that both Walker and Curry had access to the Dungeon at the time of the conversation. Simply put, even if it were true and the Government suppressed it, that information would not be material.

5. Eugene Braswell.

Bergrin claims that the Government failed to disclose information relating to Braswell's involvement in a self-defense shooting. BB225. Like most of Bergrin's other claims, that claim is false.

The Government timely provided Bergrin with information in its possession, HA1621, and brought the facts of the shooting out during Braswell's direct examination, A8135–40. Moreover, Bergrin already knew the information he claims the Government suppressed. Bergrin admits he represented Braswell in connection with the shooting. BB225. And trial testimony established that Bergrin was present when law enforcement interviewed Braswell about the shooting. A8139, A8234. Thus, Bergrin was well aware of the facts of the shooting, that law enforcement had investigated it, and that Braswell was never charged with any crimes stemming from it. *See Pelullo*, 399 F.3d at 202 (it is a "well-established principle that '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'") (quoting *United States*

v. Starusko, 729 F.2d 256, 262 (3d Cir. 1984)). Bergrin also cross-examined Braswell extensively about the shooting and Bergrin's claim that the shooting was related to drug trafficking. A8234–37. Finally, the shooting had no independent relevance to Bergrin's guilt, and thus is not material.

Equally meritless is Bergrin's claim that the Government knew but failed to disclose that Ramon Jimenez "profusely denied" introducing Braswell to Peruvian cocaine suppliers. BB224–25. Bergrin provides no proof Jimenez made such a statement, much less that the Government was aware of it. Bergrin's failure to provide competent support for either proposition is fatal. *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). Here, Bergrin necessarily could not have firsthand knowledge of what the Government learned from any of its witnesses. He does not even reveal the alleged source of this claimed information. His vague and conclusory allegations may be disposed of summarily without further investigation by the court. *United States v. Thomas*, 221 F.3d 430, 437 (3d Cir. 2000).

Finally, even giving Bergrin the benefit of every doubt (that Jimenez had made that statement, that the Government had suppressed it, and that the statement completely undermined the entirety of Braswell's testimony), it still would be legally immaterial. Braswell's testimony was not essential to any of the charges for which Bergrin was convicted. Even if a jury completely rejected Braswell's testimony, the evidence of Bergrin's guilt independent of Braswell—which included the testimony of multiple other coconspirators, wiretap evidence, hours of recorded conversations with Bergrin from two different sources, and the seizure of 53 kilograms of cocaine from 710 Summer Avenue—was overwhelming.

D. Bergrin's Claims Regarding Cooperating Witnesses Who Never Testified At Trial Two Are Equally Frivolous.

Bergrin raises claims of prosecutorial misconduct with respect to three witnesses who cooperated with the Government, testified at Trial One, but did not testify at Trial Two. Given that Bergrin's § 2255 motion attacks the judgment arising from Trial Two, this Court can reject these claims on lack-of-prejudice grounds alone. *See Ramos-Gonzalez*, 775 F.3d at 493 ("In addition, as the district court recognized, any prejudice arising from the failure to disclose Vélez's conflicting reports did not recur at the second trial because the government did not call her as a witness. Nonetheless, Vélez remained available, and if Ramos's counsel had thought it useful to reveal the inconsistencies in her statements, she could have been called as a defense witness."). At any rate, his claims are frivolous.

1. Yolanda Jauregui.

In a rehash of his *Brady* claim, *see supra* Point III.C, Bergrin claims that the Government misconducted itself regarding Jauregui. He is wrong.

Bergrin claims that Jauregui would have testified that other witnesses (Williams, Kelly, and Moran) lied about Bergrin's involvement in drug trafficking. But that claim relies on the false, unsigned affidavit Bergrin fabricated after trial. *See supra* Point III.C (citing CDE659 at 57–59). Similarly, Bergrin's claim—that the Government made undisclosed promises to Jauregui of "a new home, money and cars in exchange for her cooperation," BB204—relies upon that same false affidavit, and thus is likewise meritless. Finally, Bergrin's speculation that there was a secret, unwritten agreement that Jauregui would not forfeit her interest in 710 Summer Avenue and 346 Little Street is baseless. Even had there been undisclosed promises to or secret agreements with Jauregui, Bergrin could not show prejudice because Jauregui did not testify at Trial Two. *See Ramos-Gonzalez*, 775 F.3d at 493 ("any prejudice arising from the failure to disclose Vélez's conflicting reports did not recur at the second trial because the government did not call her as a witness").

2. Ramon Jimenez.

Bergrin claims that Ramon Jimenez's court-appointed lawyer conspired with the Government to intimidate, coerce, and coach Jimenez to fabricate evidence incriminating Bergrin. BB210. That is demonstrably false.

Initially, Jimenez did not testify at Trial Two. Thus, Bergrin cannot credibly claim that Jimenez's evidence infected the Trial Two verdict. That alone is sufficient to defeat Bergrin's claim. At any rate, to the extent Bergrin claims Jimenez's testimony would have helped him at Trial Two, he is wrong. As Bergrin was well aware from pre-trial discovery and Jimenez's testimony at Trial One, Jimenez would

have inculpated Bergrin in drug trafficking, prostitution, and the Kemo murder. HA1267–81, HA1289–1337, HA1338–77).

Bergrin blithely claims that he attempted to call Jimenez but was informed that Jimenez would invoke his Fifth Amendment right against self-incrimination if called to testify. BB211. That claim is specious: Jimenez had no Fifth Amendment right; would have violated his cooperation agreement had he tried to invoke it, HA1282, and actually testified at Trial One, HA1288. Had Bergrin informed the Government or the Court that he wanted to call Jimenez, the Government would have made him available and Jimenez would have testified. But Bergrin never made any such request. So to the extent Bergrin now implies that he was prevented from calling Jimenez as a witness, he is once again prevaricating.

Bergrin obviously made a strategic decision not to call Jimenez. And for good reason. Had Bergrin called Jimenez at Trial Two, Jimenez would not have testified that the Government or his lawyer "intimidated, coerced and coached him to fabricate evidence incriminating Bergrin." BB210. In arguing to the contrary, Bergrin relies on an ethics complaint Jimenez filed against his court-appointed lawyer. But he filed that complaint because he believed—incorrectly—that his proffer-protected statement was being used to prosecute him, HA1630, and because he thought his daughter was not going to be accepted into the Witness Security Program, HA1580–86, HA1608. But the ethics complaint never alleged that his lawyer or the Government had intimidated, coerced, or coached Jimenez to fabricate evidence incriminating Bergrin. HA1627. No doubt, Jimenez complained about the manner in which his lawyer questioned him during a proffer session. HA1631. However,

Jimenez never said that his lawyer or the Government did anything to suggest he fabricate evidence incriminating Bergrin. Indeed, he specifically said he "gave a truthful statement." HA1631.

Moreover, Bergrin thoroughly cross-examined Jimenez about his ethics complaint during Trial One. Jimenez never testified that the Government or his lawyer indicated that he should fabricate evidence against Bergrin or otherwise be untruthful. HA1547–70. Indeed, he testified (consistent with what he alleged in the ethics complaint) that the Government never gave him any facts about Bergrin, that they only asked him to tell them "everything that you know," HA1587, and that he understood he would only get the benefit of the cooperation agreement if he told the truth, HA1609.

Equally specious is Bergrin's claim that Jimenez implicated him only after Jimenez met with his lawyer on May 12, 2011. In an interview with the FBI on November 16, 2010, Jimenez discussed Bergrin's involvement in drug trafficking with Curry. HA1267–68, HA1589–96. Jimenez further elaborated on Bergrin's involvement in drug trafficking with Curry during the May 12, 2011 proffer session attended by his lawyer. HA1277–81.

3. Albert Castro.

Bergrin claims that the Government suborned perjury from Albert Castro by urging him to go forward with a state court guilty plea despite Castro's protestation that he was innocent of the charge. BB214. He claims the Government so badly wanted Castro's testimony against Bergrin that it did not care if Castro pleaded guilty to a crime he did not commit. But Bergrin attempted to perpetrate a massive fraud on

Castro, the Trial One jury, and Judge Martini—a fraud the Government exposed. Yet Bergrin attempts to perpetrate the very same fraud in his § 2255 motion.

Specifically, Bergrin's cross-examination questions during Trial One accused Castro of having falsely sworn, in pleading guilty to a weapons-possession offense, that he had pointed a gun **at** a police officer. SA1187–91. But the tape and transcript of the plea hearing, which the Government introduced through a subsequent witness, showed that Castro had denied having pointed a gun "at" a police officer, and admitted only to having pointed a gun "in the direction of" an officer, just as he testified during cross-examination, HA1214–19. Bergrin's line of questioning was particularly reprehensible because he was Castro's defense attorney at the time and, thus, had personal knowledge of what occurred at the state court guilty-plea hearing (meaning Bergrin had intentionally premised his cross-examination questions on a factual assertion he knew was false). Far from showing that the Government encouraged Castro to go forward with a guilty plea to a crime he supposedly did not commit in order to gain his testimony against Bergrin, the Castro episode shows only that Bergrin was and remains willing to mislead a tribunal at the drop of a hat.

Similarly false is Bergrin's claim that the Government colluded with Richard Roberts and Maria Correia[35] to fabricate evidence, suborn perjury and otherwise commit misconduct. He claims that Correia has now admitted that she and Roberts coached Castro to fabricate evidence against Bergrin. BB212–14. But Bergrin cites

[35] Correia proactively cooperated with the Government, but violated her cooperation agreement by, among other things, stealing money the FBI had given her to use in an undercover operation. As a result, the Government did not file a U.S.S.G. § 5K1.1 motion on her behalf at sentencing.

nothing—not even an unsigned, fabricated affidavit—to support his claim. And the Government is unaware of any such admission. Even if it were true that Roberts and Correia did these things, the Government was unaware of it. Indeed Bergrin does not allege the Government had such knowledge. Finally, since Castro did not testify at Trial Two, Bergrin cannot show prejudice. *See Ramos-Gonzalez*, 775 F.3d at 493.

E. The Relitigation Doctrine Bars Bergrin's Claim That The Government Misstated Esteves' Testimony In Summation.

Bergrin claims the Government "knowingly and deliberately lied to the jury" in arguing that Bergrin had not yet received full discovery on Vicente Esteves' case when he got involved in the murder plot with Oscar Cordova. BB220. Bergrin refers to the Government's rebuttal summation, but the Government did not make any such assertion about Esteves there. Bergrin may be referring to his own summation, when the Government objected that he was misstating the evidence. A9674–75. If so, then the Third Circuit has already considered and rejected his claim.

Bergrin argued in summation that he could not have been guilty of working with Esteves and Cordova to eliminate witnesses in Esteves' drug case because of what he had learned about the case:

> I knew and any defense lawyer would know that Vincent Esteves has no connections left. One of the first things that you're given is the confession or the statement by your client. Vincent Esteves completely confessed on the day of his arrest on May 29 --

A9674. When the Government objected that there was no evidence to support Bergrin's argument (because Moran had testified that Bergrin did not receive discovery in Esteves' drug case until January 26, 2009), Bergrin said that Esteves had testified that he told Bergrin about his confession. A9674. Judge Cavanaugh told the jurors that their recollection of the evidence would control. A9675.

On appeal, Bergrin cited this specific interruption as a false assertion about the trial evidence that Judge Cavanaugh erroneously refused to correct. HA48. The Government acknowledged that its assertion was partially mistaken. HA185 & n.10. While Moran testified that they had received no discovery in Esteves's case prior to January 26, 2009 (except for "piecemeal evidence produced via their response to the bail application motion that Paul had filed"), A7470–72, Esteves had testified on cross-examination that he had informed Bergrin of his confession at the outset, A7158. The Government added that any prejudice from its partially mistaken assertion during Bergrin's summation was cured by Judge Cavanaugh's instruction at that time, A9675, and again in the final jury charge, A9844, that the jurors' recollections would control, HA185 n.10. The Third Circuit rejected this claim in the course of affirming Bergrin's conviction. *Bergrin III*, 599 F. App'x at 441. Thus, Bergrin's effort to raise it as prosecutorial misconduct claim here must fail.

At any rate, Bergrin's claim fails in multiple respects. First, Bergrin simply assumes—without a shred of proof—that the Government "intentionally lied." The Government conceded on appeal that its recollection of Esteves' testimony was mistaken, and Bergrin's Reply Brief did not contest that assertion. HA262. Second, Bergrin is hard-pressed to show prejudice from the Government's mistaken interruption—much less the sort of grave miscarriage of justice necessary to overcome the relitigation bar. In fact, given the overwhelming evidence of Bergrin's guilt, the notion that this single interruption affected the outcome of the trial is laughable: Bergrin premised his entire defense to the Esteves-related charges on the assertion that he knew Oscar was an informant and on his unsworn first-person

assertions that he was only "bluffing" or "role-playing" when he discussed murdering witnesses and securing a lucrative cocaine connection through Esteves' Colombian associates. *See* A9669–74; *accord* A1171, A1174–75, A1179.[36] The jury plainly rejected that defense in convicting him. If the Government's interruption did not justify a remedy on direct appeal, then *a fortiori* it cannot justify one on collateral attack.

[36] As noted in the Factual Background and Procedural History section above, Bergrin fatally wounded his already-moribund defense when he told the jury in summation that no one was ever in any jeopardy because Bergrin controlled the information that Cordova received. A9669. Of course, if Bergrin knew Cordova was an informant, then Bergrin would not have been concerned about harm to anyone, a point the Government stressed in rebuttal. A9820–21.

X. Ground Ten Has Been Or Will Be Withdrawn.

The Government has been informed that Bergrin intends to withdraw Ground Ten of his § 2255 motion. If he does not do so, the Government reserves its right to supplement its response.

XI. The Claims In Ground Eleven Are Barred By *Teague*'s Non-Retroactivity Doctrine And Are Patently Meritless.

Ground Eleven of Bergrin's § 2255 motion asserts that Bergrin "would have been vindicated if he had effective assistance of his investigator." HDE3 at 23. But no Supreme Court case holds that the Sixth Amendment guarantees the right to an effective investigator. Thus, Bergrin seeks a new rule of constitutional criminal procedure, in violation of *Teague*'s non-retroactivity doctrine. In any event, Bergrin's speculative and conclusory assertions fall well short of showing that any deficient performance by his investigator affected the outcome of the trial.

A. Background.

Bergrin hired private investigator Louis Stephens sometime before March 2011. *See* HA597, ¶ 12; *compare* SA402 (Bergrin tells jury in October 2011 that he sent Stephens to take a statement from Johnny Davis), *with* A2469 (Davis agrees he gave that statement in March 2011). At that time, Bergrin was represented by privately retained counsel, *i.e.*, Lawrence S. Lustberg, Esq., of the Gibbons firm. *See* SA126–26 (Bergrin waives counsel on September 12, 2011).[37]

On March 20, 2012, Judge Martini entered a sealed order allowing Bergrin to tap CJA funds to pay Stephens retroactive to September 12, 2011. HA593. That was the same date on which Bergrin waived his Sixth Amendment right to counsel and opted to proceed *pro se*, SA126–27, and on which Judge Martini authorized the use

[37] Although the Government is not privy to the original retention agreement, Stephens likely was retained directly by Gibbons in order to protect his efforts under the attorney-client privileges and work-product doctrines. *E.g.*, *O'Connor v. Boeing N. Am., Inc.*, 216 F.R.D. 640, 652-53 (C.D. Cal. 2003).

of CJA funds to compensate Mr. Lustberg, whom Judge Martini had ordered to serve as standby counsel for Bergrin, C.D.E.234, 237; *see* SA96–97.

In an August 2012 Certification, Stephens described himself as follows:

> I have been an investigator for more than forty (40) years. I am also a former Special Agent of the Federal Bureau of Investigation (hereinafter "FBI" or "the Bureau") where I worked for 18 years, beginning in 1971. During my service with the Bureau, I investigated and/or supervised a wide range of criminal investigations including charges involving federal organized crime; money laundering; international terrorism; and counter-intelligence investigations and operations primarily focused on detecting acts of espionage, arms smuggling and identifying, assessing and responding to threats against the President of the United States. In 1989, I founded my own private investigation firm, L.F. Stephens, Inc. For more than twenty years, the firm has provided investigative services to a wide spectrum of clientele in diverse areas. Most of the firm's investigators and the network of investigators who service the firm's clients are retired FBI agents. Based upon my decades of experience working with the Bureau and as a private investigator, I am familiar with standard protocols, guidelines and procedures that federal law enforcement agents are expected and/or are required to follow in undertaking investigations as outlined in the FBI's Manual of Investigative Operations and Guidelines[.]

HA569–97, ¶¶ 6–1).

In September 2012, standby counsel for Bergrin requested authorization to hire additional investigators under the CJA, but did not identify any concerns with Stephens' performance thus far:

> Third, mindful of the Court's admonition that Mr. Bergrin should be prepared to go forward on October 1, 20 l2, and though it may not be necessary given Judge Martini's prior Order of March 20, 2012 authorizing payment for the investigative services rendered by L.F. Stephens, Inc., out of an abundance of caution, the proposed Order authorizes L.F. Stephens to hire and utilize additional investigative staff to complete Mr. Bergrin's investigation of this matter. This is absolutely necessary. For example, just this week, Mr. Bergrin listed over ninety (90) persons or entities whom he wishes subpoenaed for the trial of this matter (some for documents, others for testimony). Mr. Stephens cannot serve all

> of those subpoenas himself, and needs additional help beyond the one independent contractor who has assisted him to date. The Order would expressly authorize him to obtain that help, though obviously, the Court will have the opportunity to review Mr. Stephens' invoices prior to payment; we will assure that those are provided monthly so that the Court can exercise its approval authority meaningfully.

A1070. Judge Cavanaugh granted that request. HA594.

From then until the time Bergrin filed his § 2255 motion, Bergrin never once complained about Stephens' performance. Rather, during the 2013 trial, he told Judge Cavanaugh that Stephens and his assistants were out trying to subpoena witnesses to come to court. *E.g.*, SA402; A9284 ("I'm relying upon investigators, I'm relying upon the Marshal Service to serve subpoenas, Judge."); A9285 (putative dense witnesses "were talked to and gave statements, though, Judge"); A9288 ("there's multiple witnesses" and "I'll have my investigators out this weekend, you know, letting them know that they have to be here"); A9385 ("My investigator spoke to [Lemont Love], but I haven't spoke[n] to him, Judge. I mean, obviously you know I can't speak to him.").[38]

B. *Teague*'s Non-Retroactivity Principle Bars Bergrin's Claim.

As set forth above, a prisoner may not use a § 2255 motion to seek the retroactive benefit of a new rule of constitutional criminal procedure. *See Chaidez*, 568 U.S. at 344 (citing *Teague*, 489 U.S. at 288). "Retroactivity is properly treated as a threshold question," *Teague*, 489 U.S. at 300, requiring a federal court to decide whether "a habeas claim would require the announcement of a new rule," *Groen*, 886 F. Supp. 2d at 1158; *see Saffle*, 494 U.S. at 487–88 ("As [the petitioner] is before us on

[38] To be sure, Bergrin called to testify at least one witness whom investigators had spoken to just before he took the stand. But Bergrin put that witness on the stand despite knowing he had nothing helpful to say. *E.g.*, A9364.

collateral review, we must first determine whether the relief sought would create a new rule under … *Teague*").

"[A] case announces a new rule when it breaks new ground or imposes a new obligation" on the government. *Teague*, 489 U.S., at 301. "To put it differently, a case announces a new rule if the result was not dictated by precedent existing at the time the defendant's conviction became final." *Id.* "And a holding is not so dictated, we later stated, unless it would have been 'apparent to all reasonable jurists.'" *Chaidez*, 568 U.S. at 347 (2013) (citation omitted).

In *Chaidez*, the Supreme Court granted *certiorari* to decide whether the holding in *Padilla v. Kentucky*, 559 U.S. 356 (2010), applied retroactively on collateral review. *Padilla* "held that the Sixth Amendment requires an attorney for a criminal defendant to provide advice about the risk of deportation arising from a guilty plea." 559 U.S. at 344. *Padilla*'s holding could apply retroactively only if it was "dictated by precedent existing at the time the defendant's conviction became final." The Supreme Court held it was not. "[W]e answered a question about the Sixth Amendment's reach that we had left open, in a way that altered the law of most jurisdictions—and our reasoning reflected that we were doing as much." *Id.* at 352; *see id.* ("If that does not count as 'break[ing] new ground' or 'impos[ing] a new obligation,' we are hard pressed to know what would.") (citation omitted).

The *Teague* analysis in *Chaidez* applies with equal force here. Bergrin's conviction became final on May 26, 2015. *Bergrin v. United States*, 135 S. Ct. 2370 (2015); *see Clay v. United States*, 537 U.S. 522, 527 (2003) ("Finality attaches when this Court . . . denies a petition for a writ of certiorari[.]"). As of May 26, 2015, and

even now, no Supreme Court or lower-court decision interpreted the Sixth Amendment to guarantee the right to an effective investigator—even to a defendant represented by counsel. *See Wallace v. Polk*, Civil No. 05–464, 2008 WL 1995297, at *23 (W.D.N.C. May 5, 2008) ("Wallace has failed to cite, and this Court is unaware of, any U.S. Supreme Court precedent establishing that the Sixth Amendment entitlement to effective assistance of counsel extends to other professionals assisting a criminal defendant."), *aff'd on other grounds*, 354 F. App'x 807 (4th Cir. 2009).

Thus, "to hold that a defense investigator rendered ineffective assistance under the Sixth Amendment would require this Court to announce a new rule of constitutional criminal procedure on habeas review in violation of *Teague*." *Id.* at *24; *accord Waye v. Murray*, 884 F.2d 765, 767 (4th Cir. 1989) ("To inaugurate a constitutional or procedural rule of an ineffective expert witness in lieu of the constitutional standard of an ineffective attorney, we think, is going further than the federal procedural demands of a fair trial and the constitution require. There must be some finality to litigation, and the final stage has been reached in this case.").

Bergrin attempts to elide this by noting that deficient investigation often forms the basis for claims of ineffective assistance of counsel under the Sixth Amendment. BB314 (citing, *e.g.*, *Grant v. Lockett*, 709 F.3d 224 (3d Cir. 2013)). But in those cases the deficient investigation is attributable to counsel, who retains the ultimate responsibility to supervise investigators. Here, Bergrin knowingly and voluntarily waived his right to counsel, SA126–27, and thus "assumed the obligation to conduct an adequate investigation, including the responsibility for making sure his investigator was doing his job." *Olic v. Knipp*, Civil No. 13–1194, 2015 WL

10438925, at *7 (C.D. Cal. Dec. 15, 2015), *report and recommendation adopted*, 2016 WL 1032766 (Mar. 9, 2016); *accord Sigouin v. United States*, Civ. No. 08–323, 2008 WL 4862515, at *5 (D. Haw. Nov. 10, 2008) (finding defendant who chose to represent himself "accepted the responsibility for his full defense"). Having assumed control of his defense (including the duty to supervise investigators), Bergrin may not now complain about his own ineffectiveness. *Faretta v. California*, 422 U.S. 806, 834–35 n.46 ("[A] defendant who elects to represent himself cannot thereafter complain that the quality of his own defense amounted to a denial of 'effective assistance of counsel.'").

Bergrin's *pro se* status only reinforces the conclusion that he asking this Court to announce a new rule. For just as there is no Supreme Court case holding that the term "counsel" extends to investigators hired to assist counsel, *Wallace*, 2008 WL 1995297, at *23, "[n]othing in *Faretta* or subsequent Supreme Court authority qualifies the right to self-representation with a parallel right to effective assistance from a court-appointed investigator," *Thompson v. Lewis*, Civil No. 01-3697, 2003 WL 715900, at *3–*4 (N.D. Cal. Feb. 24, 2003); *accord Brown v. Carey*, Civil No. 06-0264, 2011 WL 5444251, at *9 (N.D. Cal. Nov. 9, 2011) ("there is no Supreme Court authority establishing or recognizing a constitutional right to effective assistance from an investigator").[39]

In sum, Bergrin's claim plainly invokes a new rule of constitutional criminal procedure and, thus, is *Teague*-barred.

[39] *See supra* n.32.

C. Bergrin's Claims Are So Speculative and Conclusory That They Do Not Even Warrant A Hearing, Much Less Relief.

Even were this Court to test the allegations in Bergrin's § 2255 motion against the two-pronged test of *Strickland v. Washington*, 466 U.S. 668 (1984), they would flunk the prejudice prong because they are entirely speculative and conclusory.

To establish a violation of that Sixth Amendment right, Bergrin has to make two distinct showings: (1) deficient performance, and (2) prejudice. *See Strickland*, 466 U.S. at 687; *see also Smith v. Robbins*, 528 U.S. 259, 285 (2000). The deficient performance prong requires a showing that the conduct in question fell below an "objective standard of reasonableness." *Strickland*, 466 U.S. at 688–89. The prejudice prong requires a showing that the allegedly deficient performance "prejudiced the defense" with proof of a "reasonable probability" that, but for the unprofessional errors, "the result of the proceeding would have been different." *Id.* at 687, 694. And "[i]f it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed." *Id.* at 697.

Here, this Court need not decide whether Stephens' alleged conduct fell below an "objective standard of reasonableness." *Strickland*, 466 U.S. at 688–89. But it strains credulity that Bergrin—an experienced attorney who was not shy about airing all sorts of grievances—would have allowed a whole series of supposed defalcations by Stephens to occur without complaining to Judge Cavanaugh. That is especially so given that Judge Cavanaugh authorized the expenditure of CJA funds when Bergrin demonstrated that such funds were necessary to assist Bergrin's efforts to represent himself, *see* HA593 (authorizing additional investigators at Government expense);

HA635–37, and even intervened with the U.S. Marshals to try to expedite the arrival of out-of-state witnesses Bergrin had subpoenaed, A8375–77, A8736, A9297.

At any rate, this Court can reject Bergrin's claim under *Strickland*'s second prong. A habeas motion is insufficient, and no evidentiary hearing need be held, if the allegations of prejudice are insufficient to justify relief. *Palmer v. Hendricks*, 592 F.3d 386, 393 (3d Cir. 2010). Moreover, "'bald assertions and conclusory allegations do not afford a sufficient ground for an evidentiary hearing' on a habeas petition." *Id.* at 395 (citations omitted).

Additionally, "even if the factual allegations in the habeas petition are sufficient to make out a *prima facie* claim for habeas relief, a district court may decline to convene an evidentiary hearing if the factual allegations are 'contravened by the existing record.'" *Id*; *see also Watson v. Marshall,* 784 F.2d 722, 726 (6th Cir. 1986) ("In analyzing prejudicial effect under *Strickland,* it is necessary to examine the record in its entirety."). Here, the Government will not address each specific instance Bergrin identifies in his brief. Rather, the Government will address a few of them to show why Bergrin's claim flunks the *Strickland* test for prejudice.[40]

For example, Bergrin complains that Stephens interviewed Stacey Webb Williams, who witnessed the Kemo murder, and obtained a statement in which Willams supposedly said he lied to the FBI about the appearance of Kemo's murderer and told the FBI that Young was not the shooter. BB297–98. Bergrin further claims that, by the time Stephens returned to obtain a sworn statement from

[40] The Government reserves it right to supplement its arguments if this Court orders an evidentiary hearing over the Government's objection. Indeed, Stephens has not yet been afforded the opportunity to review and rebut Bergrin's assertions.

Williams, Williams had died. *Id.* (According to Bergrin, Williams died in 2013. HA2087). Bergrin alleges in conclusory fashion that "[i]f Stevens had done his job effectively, Bergrin may have been able to use this crucial evidence." BB298. But Bergrin fails to explain how that is so.

In fact, had Bergrin attempted to introduce a sworn statement at trial, the Government would have objected on hearsay grounds. *See* Fed. R. Evid. 802. Besides, Williams was alive and available to testify at the 2011 trial, and yet Bergrin did not call him as a witness then. HA373 (making that point in opposition to Bergrin's preindictment delay claim). Had he done so, Williams's testimony would have been admissible at the 2013 trial under Rule 804(b)(1). Further, at the 2013 trial Bergrin managed to elicit Williams' out-of-court statements while cross-examining Detective Sabur, A2201–07, and he got Agent Brokos to admit that Williams' description of the getaway car differed from Young's, and that Williams could not identify the shooter when Brokos interviewed him in 2005, A2771, A2802, A2837–38. And putting all of that to one side, to the extent Bergrin sought to use Williams to further his ridiculous defense theory that Young falsely confessed to murdering Kemo, Bergrin was convicted despite eliciting sworn testimony from Johnny Davis, Kemo's step-father, that Young was not the shooter. A2505–06.

Similarly, Bergrin complains that Stephens supposedly failed to subpoena Newark Police Officer Antonio Badim, who in 2004 responded to Bergrin's law office and retrieved an answering machine tape containing a message—which Bergrin attributed to the Latin Kings—threatening Bergrin and his family. BB309–10. Although Badim came to Court without the tape and with no real recollection of

what had occurred in 2004, Bergrin nonetheless put him on the stand. A9352–56. Bergrin now complains that Stephens' deficiency in this regard "made Bergrin appear as a liar before the jury and crippled his defense." BB310. That is hardly sufficient to meet Bergrin's burden to show prejudice.

First, Bergrin knew or should have known that Badim's testimony would be unhelpful and, thus, he cannot blame anyone but himself for putting Badim on the stand. *Cf.* A9384–85 (Bergrin secures permission to interview Lemont Love before putting him on the stand, even though Bergrin's investigators spoke to Love previously). *Second*, Bergrin makes no effort to show that subpoenaing Badim earlier would have produced a report or even the tape containing the threat. Indeed, Bergrin told Judge Cavanaugh that he had "instructed . . . investigators well over a month ago to subpoena this witness," including the "recording that he seized as well as his police report." A9357–58. Given that four years have elapsed since the trial and Bergrin still has not been able to unearth the 2004 report or tape, it is highly unlikely that serving the subpoena four weeks earlier would have produced either one. *Third*, Bergrin sought to elicit this testimony to further his specious claim that he knew Cordova was an informant—the theory being that in 2008 Bergrin would have known that a Latin King from Chicago was an informant because in 2004 Latin Kings in New Jersey supposedly threatened Bergrin. BB309–10.[41] But that is hardly a plausible inference, much less one so compelling as to satisfy *Strickland*'s reasonable probability standard. At any rate, Bergrin elicited evidence from another witness who

[41] Presumably, whoever called and threatened Bergrin did not announce that he was a Latin King, and so there would have been a gaping hole in the chain of inferences leading to the conclusion Bergrin hoped to have the jury draw.

claimed she warned Bergrin that Cordova was an informant, and the jury nonetheless convicted Bergrin of the counts arising from the Esteves Plot.

Finally, Bergrin claims that for a whole swath of supposed witnesses, Stephens failed to interview and subpoena them for trial. He then claims each would have provided testimony helpful to his defense. BB298–312. Yet if Stephens did not interview any of them, then Bergrin must be speculating about the content of their testimony or relaying hearsay from some unidentified source. That is woefully insufficient to prove prejudice. *See Duncan v. Morton*, 256 F.3d 189, 201–02 (3d Cir. 2001) ("Duncan asks this court to speculate both as to whether Sherman would in fact have testified on his behalf and as to what Sherman's testimony would have been. . . . In light of Duncan's failure to present any sworn testimony by Sherman, he has failed to establish prejudice as a result of Roberts' alleged failure to interview Sherman."); *Zettlemoyer v. Fulcomer*, 923 F.2d 284, 298 (3d Cir. 1991) (rejecting ineffectiveness claim "based on [these] vague and conclusory allegations that some unspecified and speculative testimony might have established his defense"); *accord United States v. Turcotte*, 405 F.3d 515, 537 (7th Cir. 2005) ("[U]nsubstantiated and largely conclusory statements" are insufficient to carry a petitioner's burden as to the two prongs of the Strickland test."). *See generally* S*ayre v. Anderson,* 238 F.3d 631, 635 (5th Cir. 2001) ("Sayre's self-serving conclusory statement that his testimony would have resulted in an acquittal, standing alone, falls far short of satisfying *Strickland*'s prejudice element.").

XII. Ground Twelve Is Barred By The Relitigation Doctrine And Entirely Meritless.

Ground Twelve asserts that "Petitioner was blocked from presenting a defense and the government and court created jury bias." HDE 3 at 24. Bergrin devotes 52 pages of his brief to recycling complaints he unsuccessfully raised on direct appeal. BB320–72. These claims are barred by the relitigation doctrine. HDE3 at 25 (acknowledging that the claim was raised on direct appeal). They are also meritless.

A. The Relitigation Doctrine Bars Bergrin's Complaints.

In the introduction to his legal argument, Bergrin frames his claim as follows:

> The trial judge prevented Petitioner from challenging the government's evidence at trial by permitting the government to make improper speaking objections, curtailing Petitioner's cross-examination, and vouching for the credibility and integrity of every government witness. Incredibly, the trial judge alone interfered, interrupted and interjected, sua sponte more than 300 times while Petitioner was presenting his case. And the prosecution did so *400 times* more.

BB320. But the most cursory review of Bergrin's Third Circuit brief shows that his current complaints merely recycle and rehash arguments Bergrin made on direct appeal. Specifically, Point II of Bergrin's Third Circuit brief raised a catch-all claim asserting that "The Trial Court Denied Bergrin's Fundamental Right To A Fair Trial," HA43. Under that general heading, Bergrin complained, among other things, about "Judicial Interference During Bergrin's Jury Addresses," "Speaking Objections," "Curtailed Cross-Examination of Government Witnesses," and "Vouching for Government Witness Credibility." HA44–76.

The gravamen of Bergrin's complaint on direct appeal was that Judge Cavanaugh "crippled Bergrin's ability to challenge the government's case and to present his own, in myriad ways, including . . . comments undermining his

credibility before the jury." HA43. According to Bergrin, Judge Cavanaugh's "obviously caustic attitude towards [him] deprived him of his constitutional rights to a fair trial and a meaningful opportunity to present a complete defense." *Id.* (citation omitted); *accord* HA46 ("Throughout trial, the court repeatedly interrupted Bergrin and pressured him to rush through witness examinations, permeating the entire proceeding with an atmosphere of judicial bias against the defendant."); HA47 ("Moreover, the court's remarks signaled real hostility towards the defendant. . . . Amidst these interruptions, hostilely delivered, the court's message to the jury from the inception of the trial was clear: the defendant could not be trusted and the defense case did not merit the jury's consideration."); HA49 ("Here, the trial court's repeated interventions signaled, from the start of the case, its belief in Bergrin's guilt, thus denying him a fair trial."); HA59 ("The government repeatedly seized upon this opportunity [not to discuss issues at sidebar] to make unfairly prejudicial arguments through improper speaking objections.").

The Third Circuit was underwhelmed by these arguments. Its "review of the extensive record" led it "to conclude that Bergrin's scattershot arguments are exceedingly weak," *Bergrin III*, 599 F. App'x at 441, as "the record demonstrates that Bergrin received a fair trial," *id.* at 442. The court praised Judge Cavanaugh for having "conducted this lengthy trial with great skill, patience, and fairness" despite "an obstreperous pro se Defendant who did whatever he could to: (1) delay the trial, (2) gratuitously attempt to plant the seeds of error, and (3) unfairly prejudice the jury by repeatedly offering inadmissible evidence despite the Court's perpetual warnings not to do so." *Id.* at 441.

Nothing has changed since the Third Circuit ruled. Yet unencumbered by any word or page limit, Bergrin has simply recycled here the same complaints that the Third Circuit emphatically rejected. His claim is therefore barred by the relitigation doctrine. *See DeRewal*, 10 F.3d at 105 n.4; *see also United States v. Orejuela*, 639 F.2d 1055, 1057 (3d Cir.1981) (per curiam) ("Once a legal argument has been litigated and decided adversely to a criminal defendant at his trial and on direct appeal, it is within the discretion of the district court to decline to reconsider those arguments if raised again in collateral proceedings under 28 U.S.C. [§] 2255.").

Bergrin's claim is reminiscent of one advanced on § 2255 by a defendant who, like Bergrin, waived his right to counsel and then proceeded *pro se* at trial. That defendant re-invoked his right to counsel on direct appeal, and (after the direct appeal failed) filed a *pro se* motion to vacate sentence under § 2255:

> Schwartz's § 2255 motion presses the same trial court and Government abuse arguments that he and his appellate counsel raised on direct appeal. Our Court of Appeals rejected these arguments. The Supreme Court elected not to disturb them. All three levels of the Article III judiciary—aided at times by the Solicitor General—have expressly or implicitly found no merit in any of Schwartz's arguments. Schwartz offers no explanation for why we should revisit these issues again, nor can we find any. . . . It risks understatement to note that we are intimately familiar with the facts of this case and its more than 444 docket entries filling four records boxes. . . . We cannot find any 'countervailing considerations' to re-ignite debate on these well-settled and much-deliberated matters.

Schwartz, 925 F. Supp. 2d at 692–93 (citation omitted). As the District Judge did in *Schwartz*, this Court should invoke the relitigation doctrine to reject Bergrin's claims.

B. Bergrin's Claims Are Meritless.

Even should this Court choose to address Bergrin's claims, the Government's Brief for Appellee in the Third Circuit set forth in detail how Bergrin's own conduct

before Judge Cavanaugh and the jury led to most of the supposedly unfairly prejudicial rulings about which he now complains. The Government will not lengthen this already-long brief by repeating those arguments here, but instead incorporates them here by reference. *See* HA177–216; *see also* Section II.B of the "Factual Background and Procedural History" section above. Suffice it to say that Bergrin repeatedly tried to mislead the jury and elicit otherwise-inadmissible evidence, prompting the Government to object and leading Judge Cavanaugh to step in.[42] Bergrin cannot now seize upon the very interruptions he invited to claim that his trial was unfair. *See United States v. Carson*, 455 F.3d 336, 354-60 (D.C. Cir. 2006); *United States v. Robinson*, 635 F.2d 981, 984 (2d Cir. 1980).

[42] Because Bergrin's conviction is final, it is not enough for him to show error and shift to the Government the burden to disprove prejudice. Rather, as the movant on § 2255, he must prove that the errors he complains of had a "substantial and injurious effect or influence in determining the jury's verdict." *Brecht v. Abrahamson*, 507 U.S. 619, 623 (1993). He cannot meet that burden given the overwhelming evidence of guilt. *Cf. United States v. Ottaviano*, 738 F.3d 586, 597–98 (3d Cir. 2013) (rejecting judicial bias claim on direct appeal due to lack of prejudice).

XIII. Ground Thirteen Is Procedurally Defaulted And Frivolous.

Ground Thirteen alleges that "[t]he indictment was inexcusably and wrongfully delayed in order to achieve tactical and strategic advantage." HDE3 at 25. The claim is procedurally defaulted and frivolous.

A. The Claim Is Procedurally Defaulted.

Bergrin acknowledges that he did not raise this claim on direct appeal. HDE3 at 25 ("no"). He nonetheless claims that he "did not realize the enormity of the issue until researching for this motion and . . . did not have all the necessary facts to delineate." *Id.* That is demonstrably false, and on three fronts.

First, Bergrin raised precisely this argument in his *pro se* motion for reconsideration, which he filed in August 2013:

> THE GOVERNMENT'S INTENTIONAL AND DELIBERATE DELAY AND COLLUSIVE MANNER IN BRINGING THE INDICTMENT WAS ORCHESTRATED TO ACHIEVE A TACTICAL ADVANTAGE WHICH ACTUALLY AND SUBSTANTIALLY PREJUDICED BERGRIN'S DEFENSE AND VIOLATED HIS DUE PROCESS RIGHTS.

SA2085. Following that point heading was a three-page legal argument from which Bergrin's current claim has been lifted with modifications and additions. *Compare* SA2085–88, *with* BB373–92. Judge Cavanaugh rejected that claim as procedurally improper, because Bergrin had not raised a preindictment delay claim in his counseled post-trial motion. SA2099.

Second, in his first round of pretrial motions (*i.e.*, when Bergrin still was represented by counsel), Bergrin argued that "The Court Should Suppress Statements Made By Mr. Bergrin Because The Government Violated *Massiah v. United States*." HA574–77. Judge Martini initially did not rule on the motion because he granted

Bergrin's motion to dismiss the RICO and VICAR counts. *United States v. Bergrin*, 707 F. Supp. 2d 503 (D.N.J. 2010). After the Third Circuit reversed that dismissal, *Bergrin I*, 650 F.3d at 257, Bergrin renewed his *Massiah* claim in the second round of pretrial motions, *see* HA579 (Point IV). Judge Martini rejected it:

> Despite Bergrin's creative attempts, *Matteo* and *Massiah* simply do not stretch wide enough to cover his particular situation prior to his formal indictment. First, the right to counsel is offense specific, and provides no protection from elicitation of statements about uncharged conduct. Thus, Bergrin's Sixth Amendment right to counsel that attached in connection with the New York state case is limited to statements regarding those charges and does not extend to statements regarding the K.D.M. Murder for which he was not yet charged. Second, the fact that Bergrin obtained counsel to represent him in possible future criminal charges does not mean that his right to counsel under *Massiah* attached; it is the conduct of the Government, not the suspect, that drives the determination. If it were otherwise, an individual could commit a crime and then immediately insulate himself from undercover investigation by merely signing a retainer agreement regardless of whether law enforcement had begun any formal proceedings or was even aware of the crime. Finally, the right to counsel does not attach merely because an individual is the object of an investigation – public or otherwise – where the individual has not been charged. Thus, the fact that United States Attorney Christie and persons in his employ made statements alleging Bergrin's possible involvement in the K.D.M. Murder is insufficient to trigger his Sixth Amendment rights.

HA586. And Bergrin further preserved this issue for appeal by re-raising it prior to the Trial Two, after Judge Cavanaugh had been assigned to the case. HA582; *see* SA1623–24.

Third, Bergrin's current claim plainly relies on information that he supposedly learned in May 2009, BB376–77, undermining his current assertion that he only recently learned of the facts necessary to pursue this claim.

Despite having raised and preserved this claim in his pretrial motion, and despite having had all the information needed to advance it, Bergrin chose not to

raise it on appeal. HA2–3. He thus procedurally defaulted the claim. S*ee Frady*, 456 U.S. at 167-68; *see also Coleman v. United States*, Crim. No. 11–276, 2013 WL 3730119, at *3 (W.D. Mich. July 15, 2013) (finding procedurally defaulted a pre-indictment claim that was not raised on direct appeal).

B. Bergrin Makes No Effort To Excuse His Procedural Default. In Any Event, His Claim Is Frivolous.

Bergrin makes no effort to show cause or prejudice from the default. Nor does he argue that he is actually innocent. Thus, this Court need not address the merits of the claim. *See Andrade v. United States*, Civil No. 14-0229, 2016 WL 3749699, at *3 (D.N.J. July 13, 2016) ("Petitioner does not argue he is actually innocent of the charges to which he pled guilty, and nothing in the motion sufficiently demonstrates cause and prejudice. This claim is therefore barred."). At any rate Bergrin's claim is frivolous.

The statute of limitations is the "primary guarantee against bringing overly stale criminal charges," but it "does not fully define the [defendant's] rights with respect to the events occurring prior to indictment." *United States v. Marion*, 404 U.S. 307, 322, 324 (1971). Pre-indictment delay may violate the Due Process Clause, but *only* if the defendant can prove both "(1) that the government intentionally delayed bringing the indictment in order to gain some advantage over him, and that (2) this intentional delay caused the defendant actual prejudice." *United States v. Ismaili*, 828 F.2d 153, 169 (3d Cir. 1987) (citing *Marion*, 404 U.S. at 325).

"The prosecution," however, "has wide discretion in deciding to delay the securing of an indictment in order to gather additional evidence against an individual." *United States v. Lovasco*, 431 U.S. 783, 790 (1977). "Investigative delay is

fundamentally unlike delay undertaken by the Government solely 'to gain tactical advantage over the accused,'" and does not deprive a defendant of due process even if he is "somewhat prejudiced by the lapse of time." *Id.* (citations omitted). Thus, no deviation from "fundamental conceptions of justice" is evidenced when a prosecutor "refuses to seek indictments until he is completely satisfied that he should prosecute and will be able promptly to establish guilt beyond a reasonable doubt." *Id.* at 790.[43]

The lesson from *Lovasco* is clear. The accumulation of evidence that occurs from investigating further instead of bringing charges is no more unfair than is introducing relevant evidence at trial that helps a party prove its case. *See United States v. Cruz-Garcia*, 344 F.3d 951, 956 (9th Cir. 2003) ("That evidence may decimate an opponent's case is no ground for its exclusion under 403.").

Here, Bergrin does not claim that the supposed delay in indicting him somehow resulted in the loss of exculpatory evidence. Rather, his claim of prejudice relies almost exclusively on the additional evidence he claims the Government was able to gather by not arresting him in 2005, when it arrested William Baskerville for his role in the Kemo murder. *E.g.*, BB383 (the Government "delayed indicting both Bergrin and Jauregui in order for them to obtain a state conviction for one racketeering act, thereby making it simple to convict Bergrin of a RICO offense."); *accord* BB388 (complaining about seizure of drugs on May 21, 2009 and that "the government used the cocaine seized . . . against Bergrin," which "severely prejudiced

[43] To the extent Bergrin invokes *Massiah*, *see* BB386–87, Judge Martini's opinion correctly rejected his claim of a Sixth Amendment violation, HA585–86.

him and tainted the jury's perception of the evidence"); BB390–92 (complaining that the Government's case on the prostitution allegations grew stronger).[44]

Those are not a proper bases for sustaining a claim of preindictment delay, much less dismissing an indictment where, as here, an already-final conviction is challenged on collateral attack. *See United States v. Beckett*, 208 F.3d 140, 151 (3d Cir. 2000) ("We see no evidence of improper delay while the federal government was building its case against Beckett regarding the robbery of the Home Unity Bank, an armed robbery not charged by the state authorities."); *United States v. Crooks*, 766 F.2d 7, 11 (1st Cir. 1985) ("The government states, without contradiction from Crooks, that any delay resulted from its efforts to discover all those who participated in the conspiracy and to try them together. And, this reason, in context, provides a legitimate explanation."). Indeed, even when delay resulted in loss of exculpatory evidence (which Bergrin does not allege), that still would not provide a basis for a remedy so long as the delay was attributable to the Government's legitimate desire to build its case. *Snyder v. Klem*, 438 F. App'x 139, 142 (3d Cir. 2011) ("the state courts correctly observed that apart from a demonstration of actual prejudice, the applicable caselaw likewise requires that the delay be motivated by an intent to gain an unfair tactical advantage over the defendant").

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[44] The Government gained very little by having Bergrin's New York guilty plea to the prostitution charges as evidence supporting the federal charges arising from his involvement in New York Confidential. The evidence proving those charges was very strong even without Bergrin's admissions. *See supra* pp. 10–11; *see also United States v. Martinez*, 77 F.3d 332, 335-36 (9th Cir. 1996) (delay that resulted in entry of state-court conviction against defendant not prejudicial simply because federal prosecutor could have used it for impeachment purposes under Rule 609).

Bergrin also appears to complain that by delaying the filing of charges against Jauregui, Jauregui herself committed additional crimes, which allowed the Government greater leverage over her, thus inducing her to cooperate against Bergrin. BB383. But Bergrin fails to explain how he has standing to raise any alleged violation of Jauregui's rights. *See generally Alderman v. United States*, 394 U.S. 165, 171-72 (1969). And he fails to explain how he was prejudiced where Jauregui—despite having entered into a cooperation agreement with the Government—did not testify against Bergrin at the Second Trial.[45]

Finally, Bergrin finds cognizable "prejudice" in the supposed fact that the Government, by delaying indicting him until 2009, was able to bolster Young's credibility with the host of other crimes that formed the pattern of racketeering activity. BB387–88. Bergrin alleges the Government did this through its argument that "Bergrin had to be guilty of Kemo's murder, if he committed all the other charged offenses. . . . [The Government] clearly and improperly used the propensity argument[.]"). This claim is nonsensical.

As an initial matter, Bergrin is attempting to smuggle into his preindictment delay claim a severance motion that he made and lost before Trial Two, *compare* HA582 (Point II), *with* SA160 (ruling), and did not raise on direct appeal, HA2–3. Second, the Government hewed to letter and spirit of Judge Cavanaugh's Rule 404(b) rulings, CDE392-1 at 4–9, when marshaling the "other acts" evidence in summation and discussing its bearing on Bergrin's intent to tamper with and murder

[45] And Bergrin could have called Jauregui to testify in his behalf but chose not to do so, despite the Government's having made her available.

Kemo, A9526–28. Finally, Judge Cavanaugh instructed jurors during trial, A4181–83, A7268–69, and again in his final charge, A9963–64, about how to use the other acts evidence, cautioning them *against* drawing the very propensity inference Bergrin now argues benefitted the Government. Judge Cavanaugh also instructed the jurors to consider each count separately and not to be influenced by the number of offenses, and not to allow evidence for one count influence their consideration of another count. A9859–59. This Court must presume the jury followed its instructions. *See Richardson v. Marsh*, 481 U.S. 200, 206 (1987).

Beyond the fact that Bergrin does not allege cognizable prejudice, his claims of wrongdoing are wholly speculative and conclusory. Bergrin notes the timing of his guilty plea in New York and the return of the indictment in the District of New Jersey, and adds a host of unsworn assertions and unsupported speculation of wrongdoing. *E.g.*, BB376–77 (relaying what a New York detective supposedly said about conversations with lead FBI Agent Shawn Brokos);[46] BB379–80 (making wild assertions about the timing of narcotics charges against Yolanda Jauregui, who did not testify against Bergrin). That is wholly insufficient to garner a hearing, much less to justify dismissal of the indictment. *See Machibroda v. United States*, 368 U.S. 487, 495 (1962) (court need not accept allegations that are "vague, conclusory, or palpably incredible," rather than "detailed and specific"); *United States v. Radue*, 707 F.2d 493, 495–96 (11th Cir. 1983).

In sum, Bergrin's claim is frivolous.

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[46] As it has previously, *see* CDE570 at 13, the Government categorically denies Bergrin's allegation that it colluded with New York authorities—an allegation Bergrin fabricated for the specific purposes of supporting of his claim.

XIV. Ground Fourteen Has Been Or Will Be Withdrawn.

The Government has been informed that Bergrin intends to withdraw Ground Fourteen of his § 2255 motion. If he does not do so, the Government reserves its right to supplement its response.

XV. Ground Fifteen Is Mostly Barred By The Relitigation Doctrine, Need Not Be Reached Under The Concurrent Sentencing Doctrine, Is Not Cognizable On Federal Habeas, And Is Frivolous In Any Event.

Ground Fifteen argues that "[i]mposing six life sentences without a fact-finding hearing violated due process and the guidelines." HDE3 at 29. That claim is barred by the relitigation doctrine. If not, this Court need not reach it under the concurrent sentence doctrine. In any event, the claim is not cognizable on federal habeas. And even if it is, the claim is frivolous.

A. The Relitigation Doctrine Bars Bergrin's Claim.

Bergrin raised this very claim on direct appeal. Specifically, in Point III of his Third Circuit brief, Bergrin argued that "The District Court Relied Upon Facts Lacking A Sufficient Indicia Of Reliability In Calculating And Imposing The Sentence." HA81. Bergrin specifically argued that Judge Cavanaugh denied "Bergrin his constitutional right to due process, and violating the Sentencing Guidelines, *see* USSG § 6A(1)(3), by refusing to hold a hearing to resolve disputed facts upon which it relied in determining that the appropriate Guideline Offense Level was 48, as calculated by the government, and not below Level 43, as Bergrin contended." HA83, devoting three pages to that argument, HA83–85.

The Third Circuit considered and rejected the claim. It held that "[t]he District Court rightly refused to hold an evidentiary hearing because it was a thinly veiled attempt to retry the case. Having presided over this lengthy trial, Judge Cavanaugh was not required to conduct an evidentiary hearing that would have been superfluous." *Bergrin III*, 599 F. App'x at 442–43 (citation omitted). Thus, Bergrin's claim is barred by the relitigation doctrine. *See DeRewal*, 10 F.3d at 105 n.4

B. This Court May Invoke The Concurrent Sentencing Doctrine To Avoid Addressing This Claim.

This Court need not reach Bergrin's sentencing claim for a reason independent of the relitigation bar. Bergrin received mandatory minimum sentences of life imprisonment (concurrently) on Counts 3, 12, and 13. A26. Because Congress mandated those sentences, holding a sentencing hearing to determine the applicability of various enhancements or reductions under the Guidelines would have been futile. The Government made that very point to the Third Circuit:

> any procedural error is plainly harmless if this Court affirms on Counts 3, 12, and 13 and rejects Bergrin's Eighth Amendment claim. Because those counts mandate life imprisonment, and because Bergrin received concurrent sentences on all counts, "'the sentencing Guidelines range did not affect the sentence actually imposed,'" making this "a prototypical example of harmless error."

A219 (citations omitted). The Government footnoted that:

> Any error was harmless even without the mandatory minimum sentences. The final offense level for all grouped counts derived from the highest offense level for any single group. Because the final offense level would have been at least 43 (life) based solely on the McCray murder, changing the offense level for any other counts cannot affect the advisory Guidelines range.

A219 n.27 (citations omitted).

That same reasoning supports this Court's invoking the concurrent sentencing doctrine to dismiss Bergrin's claim. As set forth above, 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." *McKie*, 112 F.3d at 628. 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,* 805 F.2d at 1128.

The concurrent sentencing doctrine applies here. Assuming this Court leaves intact Counts 3, 12, and 13 (all of which carry mandatory life imprisonment), there is no need for this Court to determine whether Bergrin ought to have received a hearing on disputed Guidelines enhancements or reductions. Bergrin received life sentences on three other counts, and concurrent sentences of 20 years or less on the remaining counts. Simply put, changing the Guidelines range for those other counts would not affect Bergrin's sentences of life imprisonment. *See Hall v. United States*, Civil No. 15–7312, 2015 WL 9304546, at *3 (D.N.J. Dec. 21, 2015) ("And since Petitioner received equal sentences for both Count I and Count II, no relief that the Court can grant, with respect to Count I only, would change Petitioner's total time of incarceration.") (citation omitted); *Lewis v. United States*, Civil No. 13–1453, 2015 WL 3651721, at *8 (D.N.J. June 11, 2015) (concurrent sentence doctrine precluded prisoner's challenge to a life sentence, when he was subject to another life sentence on a different count that would remain unchanged by his habeas claim).

C. Ordinary Challenges To The Determination Of The Advisory Guidelines Range Are Not Cognizable Under § 2255.

Even were this Court to decline to invoke the concurrent sentencing doctrine, Bergrin's claim is not cognizable under § 2255.

To be cognizable on federal habeas, a prisoner must plead and prove that his "sentence was imposed in violation of the Constitution or laws of the United States." 28 U.S.C. § 2255(a). In *United States v. Doe*, 810 F.3d 132 (3d Cir. 2015), the Third Circuit held that "misapplication of the mandatory career-offender Guideline, when such a misapplication prejudices the Defendant, results in a sentence substantively not authorized by law and is therefore subject to attack on collateral review where

the claim is not defaulted"). *Id.* at 160. The mandatory Guidelines, the Third Circuit held, were sufficiently like "laws" to come within the literal text of § 2255(a), even though the ultimate sentence was within the statutory maximum. *Id.*

Here, Bergrin's claim—already reviewed and rejected on direct appeal—is far different than the one in *Doe*. Bergrin claims that he was denied an evidentiary hearing on contested sentencing enhancements that affected only his advisory Guidelines range. BB421.While Bergrin attempts to frame his claim as one arising under the Due Process Clause, BB424, that Clause does not mandate an *evidentiary* hearing to resolve contested Guidelines issues. *United States v. Kluger*, 722 F.3d 549, 562 (3d Cir. 2013) ("The sentencing guidelines and Federal Rules of Criminal Procedure do not require that a district court conduct an evidentiary hearing in addition to a sentencing hearing at which the parties can be heard."). Rather, a defendant is entitled to notice and opportunity to be heard. *See* Fed. R. Crim. P. 32(i); U.S.S.G. § 6A1.3(b). Bergrin got that and more. *See* A11112–363 (PSR and sentencing submissions); *see also* A10047–168 (sentencing hearing).

In sum, all Bergrin complains about is an alleged non-compliance with Rule 32(i) and Guideline § 6A.13(b) that, as set forth in Section C above, caused him no prejudice. Therefore, his claim is not cognizable under § 2255.

D. Bergrin's Claim Is Frivolous.

In any event, Bergrin's claim is frivolous.

As set forth in the previous section, Bergrin was entitled to notice and an opportunity to be heard. Bergrin received just that. He received the PSR two months before sentencing, A11112, and was permitted to submit evidence and arguments

contesting the PSR's findings, A11235–362, all of which Judge Cavanaugh considered at the September 23, 2013 sentencing hearing, A10047–168. Bergrin thus "received adequate notice of the facts in dispute at the sentencing hearing and was given the opportunity to contest these facts in written objections and at the sentencing hearing. That is all § 6A1.3 and Rule 32 require." *See United States v. Clark*, Civil No. 96–6013, 1996 WL 729812, at *10 (E.D. Pa. Dec. 19, 1996).

Contrary to Bergrin's claim, he was not entitled to an evidentiary hearing at which to relitigate issues addressed by the 9,000-plus-page trial record. *See Kluger*, 722 F.3d at 562 ("The sentencing guidelines and Federal Rules of Criminal Procedure do not require that a district court conduct an evidentiary hearing in addition to a sentencing hearing at which the parties can be heard."). As the Third Circuit held in rejecting Bergrin's claim, "the District Court rightly refused to hold an evidentiary hearing because it was a thinly veiled attempt to retry the case. Having presided over this lengthy trial, Judge Cavanaugh was not required to conduct an evidentiary hearing that would have been superfluous." *Bergrin III*, 599 F. App'x at 442–43 (citation omitted).

Finally, Bergrin cites *Alleyne v. United States*, 133 S. Ct. 2151 (2013), BB421, BB427–28, as if that case bears on his sentencing claim. It does not. *Alleyne* held that a jury (not a judge) must find facts triggering a mandatory-minimum sentence under the reasonable doubt burden (rather than under the preponderance standard). *Id.* at 2155 ("Any fact that, by law, increases the penalty for a crime is an 'element' that must be submitted to the jury and found beyond a reasonable doubt. Mandatory minimum sentences increase the penalty for a crime. It follows, then, that any fact

that increases the mandatory minimum is an 'element' that must be submitted to the jury.") (citation omitted).

Here, only four of the 23 crimes charged in the indictment carried mandatory minimum sentences. First, Counts 3, 12, and 13 (arising out of the Kemo murder) carried mandatory minimum terms of life imprisonment. *Compare* A172, A189–94, *with* A11173–74 (¶ 306) (citing the pertinent statutory provision). But for each of these three counts, the jury instructions required beyond-a-reasonable-doubt findings on the fact that triggered the mandatory minimum, *i.e.*, a murder:

Count	Statutory Language	Jury Instructions
3	"a) Whoever, as consideration for the receipt of, or as consideration for a promise or agreement to pay, anything of pecuniary value from an enterprise engaged in racketeering activity, or for the purpose of gaining entrance to or maintaining or increasing position in an enterprise engaged in racketeering activity, murders. . . shall be punished-- (1) for murder, by death or life imprisonment[.]" 18 U.S.C. §1959(a)(1).	"Four, that for the purposes of Count 3, Defendant Bergrin conspired to murder, or aided and abetted in the murder, of Kemo McCray. For purposes of Count 4, Defendant Bergrin conspired to commit murder. . . . I also provided you with detailed instructions regarding the New Jersey law governing murder, aiding and abetting a murder, and conspiracy to commit murder when I instructed you on Racketeering Acts 4(c), 4(d), and 7(a) of Count 1." A9943.
12–13	"(a)(1) Whoever kills . . . another person, with intent to . . .prevent the attendance or testimony of any person in an official proceeding . . . shall be punished as provided in paragraph (3). . . . (3) The punishment for an offense under this subsection is . . . in the case of a killing, the punishment provided in sections 1111 [.] 18 U.S.C. § 1512(a)(1)(A), (3)(A). "Whoever is guilty of murder in the first degree shall be punished by death or by imprisonment for life." 18 U.S.C.A. § 1111(b)	"The Government must prove beyond a reasonable doubt that the object of the illegal agreement charged in Racketeering Act 4(a) and in Count 12 was to murder Kemo McCray, with the specific intent of preventing his testimony at an official proceeding. Murder is defined in Title 18, section 1111(a), and requires the Government to prove that the murder was both premeditated and committed with malice aforethought." A9887. "In this case, the Government alleges that Defendant Paul Bergrin aided and abetted others in murdering a witness with the intent to prevent his testimony, as charged in Racketeering Act 4(b) and in Count 13 of the Indictment. In order to find Defendant guilty

		as an aider and abettor of this offense, you must find that the Government proved beyond a reasonable doubt . . . that someone committed each of the elements of the murder offense, as I have explained those elements to you earlier in these instructions . . . 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 . . . that Mr. Bergrin knowingly did some act for the purpose of aiding, assisting, soliciting, facilitating, or encouraging another in committing that murder and with the intent that the murder be carried out . . . [and] that Mr. Bergrin's acts did, in some way, aid, assist, facilitate, encourage, someone in murdering Kemo McCray." A9890–91.

By finding Bergrin guilty of participating in the murder of Kemo McCray, *e.g.*, A10036, A10039–40, the jury necessarily found beyond a reasonable doubt the fact that triggered the mandatory minimum punishment of life imprisonment. Thus, there was no *Alleyne* error. *United States v. Young*, 561 F. App'x 85, 96 (2d Cir. 2014) ("The argument fails because these defendants' § 924 convictions, which triggered mandatory minimum, consecutive sentences of 25 years for the Bergmann murder and the use of a firearm during the Payton robbery, were found by the jury, not the district court.") (citation omitted).

Second, Count 5 (cocaine trafficking conspiracy) carried a mandatory minimum of ten years' imprisonment. *Compare* A176–82, *with* A11173 (¶ 306) (citing 21 U.S.C. § 841(b)(1)(A)(ii)). Once again, however, the jury was specifically instructed to return special findings on the drug quantities triggering that ten-year mandatory minimum:

> You will see from the verdict form, which we'll get to later, that if you find that the Government has proven Racketeering Act 1(a) beyond a

> reasonable doubt, you will be asked to answer several additional questions regarding the type and quantity of the controlled substance involved in the conspiracy. Your answers to these questions must be unanimous, and in order to find that the offense involved a certain weight or quantity of controlled substance, you must all be satisfied that the Government proved the weight or quantity beyond a reasonable doubt. . . . The first question asks whether you unanimously find beyond a reasonable doubt that the weight or quantity of cocaine which was involved in the conspiracy was five kilograms or more. . . .
>
> . . .
>
> Count 5 of the Indictment alleges that from at least in or about January 2003 through on or about May 21, 2009, Paul Bergrin conspired with others to distribute, and to possess and distribute, five or more kilograms of a controlled substance, in violation of section 841 and 846 of Title 21 of the U.S. Code. This is the same offense that is alleged in Racketeering Act 1(a) of Count One. Since I already gave you detailed instructions regarding that offense, I will not repeat them here.

A9982, A9946. And in returning its verdict, the jury specifically found that the cocaine-trafficking conspiracy involved five or more kilograms:

> THE COURT CLERK: Okay. You can remain seated while we record the verdict.
>
> We, the jury, unanimously find the Defendant, Paul Bergrin, as to Count One:
>
> Not guilty, or guilty?
>
> THE FOREPERSON: Guilty.
>
> THE COURT CLERK: Racketeering Act 1a, conspiracy to distribute a controlled substance as charged in Count 5:
>
> Not proven, or proven?
>
> THE FOREPERSON: Proven.
>
> THE COURT CLERK: Did the United States prove beyond a reasonable doubt that the Defendant conspired to distribute five or more kilograms of cocaine:

No, or yes?

THE FOREPERSON: Yes.

A10035; *see also* CDE537 at 1. Thus, there was no *Alleyne* error because the jury found beyond a reasonable doubt the fact that triggered the mandatory minimum sentence on Count 5. *See United States v. Powell*, 847 F.3d 760, 782 (6th Cir. 2017) ("Here, the drug quantities that increased the statutory penalties for Powell's drug-conspiracy conviction to a term of imprisonment of not less than ten years or more than life were charged in the indictment, submitted to the jury, and found beyond a reasonable doubt.") (citation omitted), *cert. denied*, No. 16-1477, 2017 WL 2537742 (U.S. Oct. 2, 2017).

XVI. Ground Sixteen Is Procedurally Defaulted And Patently Frivolous.

Ground Sixteen of Bergrin's motion asserts that "[b]ased on *McDonnell" v. United States*, 136 S. Ct. 2355 (2016), "Petitioner respectfully seeks vacation of his conviction." HDE6 at 11. Bergrin procedurally defaulted his *McDonnell* claim. At any rate, *McDonnell* has no bearing on any crime for which Bergrin was convicted.

A. The Claim Is Procedurally Defaulted.

Bergrin acknowledges that he did not raise a *McDonnell* claim on direct appeal, but argues that "[i]t was not ripe as *McDonnell* was not decided until June 27, 2016." HDE6a t 12. But just as with his arguments premised upon *Elonis* and *Rosemond*, *see supra* Point IV, Bergrin could have raised the same arguments McDonnell did on direct appeal and in his petition for *certiorari*. That is, Bergrin did not need the Supreme Court opinion in *McDonnell* to press the arguments that produced that opinion. *See Ryan*, 645 F.3d at 916 ("Nothing prevented [Bergrin] from making the arguments that [Elonis] did."); *accord Parkin*, 565 F. App'x at 152 (habeas movant procedurally defaulted his *Skilling* claim because "[t]he claim raised in *Skilling* was not novel at the time of Parkin's appeal"). Accordingly, Bergrin procedurally defaulted his claim. *See Frady*, 456 U.S. at 167-68; *Edmondson v. United States*, No. Crim. No. 15-118, 2017 WL 2210255, at *3 (E.D.N.C. May 18, 2017) (finding *McDonnell* claim procedurally defaulted even for a defendant who was convicted under 18 U.S.C. § 201).

B. The *McDonnell* Claim Is Patently Frivolous.

In any event, *McDonnell* is irrelevant to Bergrin's convictions. *McDonnell* interpreted the meaning of the term "official act" as it is used in 18 U.S.C. § 201(b)(1)(A) and (b)(2)(A), the federal bribery statute. The term "official act" is

defined in § 201(a)(3) as "any decision or action on any question, matter, cause, suit, proceeding or controversy, which may at any time be pending, or which may by law be brought before any public official, in such official's official capacity, or in such official's place of trust or profit."

The Supreme Court "granted review to clarify the meaning of 'official act.'" *McDonnell*, 136 S. Ct. at 2361. It held that "a typical meeting, telephone call, or event arranged by a public official does not qualify as a 'cause, suit, proceeding or controversy.'" *Id.* at 2368. Nor do those things "qualify as a 'question" or "matter' under § 201(a)(3)." *Id.* at 2369. Finally, the Court held that "'[p]ending' and 'may by law be brought' suggest something that is relatively circumscribed—the kind of thing that can be put on an agenda, tracked for progress, and then checked off as complete." *Id.* The Court then reversed the Fourth Circuit's judgment affirming *McDonnell*'s convictions because the jury instructions allowed for a conviction on bases broader than those set out in the Supreme Court's opinion. *Id.* at 2374-75.

Bergrin was not—and could not have been—charged with bribery under § 201(a). Yet he is "convinced to an absolute certainty that the magnitude and impact of Chief Justice Roberts' opinion will require this Honorable Court's reversal of his case." HDE6-1 at 1. He insists that the principles in *McDonnell* somehow bear on his convictions under § 1512(a)(1)(A), (k) and § 2 for participating in the murder of a federal informant. But *McDonnell* had and has nothing to say about the scope of § 1512(a)(1)(A) any more than *Elonis* did. *See Edmondson*, 2017 WL 2210255, at *3 (finding *McDonnell* inapplicable to defendant convicted under § 201(b)(1)(***B***), where *McDonnell* address only § 201(b)(1)(***A***)); *see also United States v. Fattah*, 224 F. Supp. 3d

443, 448 (E.D. Pa. 2016) ("The Supreme Court's definition of "official act" in *McDonnell* has no bearing on the evidence or law applicable to" thirteen listed counts, including "Count One (conspiracy to commit racketeering), Count Two (conspiracy to commit wire fraud), Count Four (conspiracy to commit mail fraud), Counts Five, Six, Seven, Nine, and Ten (mail fraud), and Counts Eleven through Fifteen (falsification of records)."

Bergrin's *McDonnell* claim should be dismissed.

XVII. Ground Seventeen Is Untimely, Procedurally Defaulted, And Frivolous.

Ground Seventeen of Bergrin's motion asserts that that *Johnson v. United States*, 135 S. Ct. 2551 (2015), which construed the Armed Career Criminal Act ("ACCA"), mandates a new sentencing hearing. HDE18 at 1–4. *Johnson* was decided just after Bergrin filed his § 2255 motion, yet Bergrin waited over a year to amend his motion to add his *Johnson* claim. Beyond that, Bergrin procedurally defaulted his claim, which is frivolous in any event.

A. The *Johnson* Claim Is Barred By The Statute Of Limitations.

Congress has prescribed a one-year statute of limitations for § 2255 motions. 28 U.S.C. § 2255(f). That one-year period runs from any of four possible dates. The most common one, the one originally invoked by Bergrin, is the date on which the conviction became final. 28 U.S.C. § 2255(f)(1). The Supreme Court denied Bergrin's petition for *certiorari* on May 26, 2015, and Bergrin filed his § 2255 motion on May 25, 2016. Thus, his initial § 2255 motion was timely filed.

Bergrin's originally filed motion did not contain a *Johnson* claim. He therefore must rely on a different provision of § 2255(f) to render his *Johnson* claim timely. Section 2255(f)(3) deems a motion timely if it is filed within one year of the date a right has been recognized by the Supreme Court and made retroactively applicable to cases on collateral review. 28 U.S.C. § 2255(f)(3).[47] Thus, if a prisoner has a § 2255 pending before the district court and the Supreme Court announces a new rule, the

[47] *Johnson* was made retroactively applicable to cases on collateral review, *see Welch v. United States*, 136 S. Ct. 1257 (2016), but the one-year period specified in § 2255(f)(3) begins to run on "the date on which the right asserted was initially recognized by the Supreme Court," *Dodd v. United States*, 545 U.S. 353, 357 (2005), not when it is later made retroactive.

prisoner may amend his § 2255 motion to include a claim based on the new rule. But that amendment must occur within one year of the date on which the Supreme Court announces the new rule.

Here, the Supreme Court decided *Johnson* on June 26, 2015. 135 S. Ct. at 2551. Thus, Bergrin had until June 26, 2016 to file any *Johnson*-based claim. He waited until late December 2016, however, to seek leave to amend his motion to include the *Johnson* claim. HDE18 at 1. That makes the *Johnson* claim untimely. *Person-Robinson v. United States*, Crim. No. 13-0663, 2017 WL 1389127, at *4 (D. Md. Apr. 17, 2017) ("Therefore, Petitioner had one year from the *Johnson* decision, which occurred on June 26, 2015, to present this argument to the Court. The Amended Motion to Vacate was filed on August 1, 2016.") (citation omitted).

To be sure, the Federal Rules of Civil Procedure allow a pleading to be amended to raise an otherwise time-barred claim if it "relates back" to a claim in the original, timely filed pleading. Fed. R. Civ. P. 15(c)(1)(B). In the § 2255 context, a new claim relates back to the filing of the original motion only where the new claim and the timely raised claims are "tied to a common core of operative facts." *Hodge v. United States*, 554 F.3d 372, 378 (3d Cir. 2009) (quoting *Mayle v. Felix*, 545 U.S. 644, 664 (2005)). Such a common core cannot simply focus, at a general level, on a movant's trial, conviction, and sentence, but must arise out of a set of facts related in time and place. *See Mayle*, 545 U.S. at 660. "[T]his rule does not save [Bergrin's] *Johnson* claim because" his § 2255 motion raised "no argument pertaining to *Johnson*." *Person-Robinson*, 2017 WL 1389127, at *4. *See* HDE3; *see also* BB1–428. Thus, this Court must dismiss the *Johnson* claim on statute-of-limitations grounds.

B. Bergrin's *Johnson* Claim Is Procedurally Defaulted.

Beyond the fact that it is time-barred, Bergrin's *Johnson* claim is also procedurally defaulted, as Bergrin did not raise any *Johnson*-based claim on direct appeal. S*ee Frady*, 456 U.S. at 167-68.

C. The *Johnson* Claim Is Frivolous.

At any rate, the *Johnson* claim is frivolous. *Johnson* facially invalidated, on vagueness grounds, a discrete provision of the Armed Career Criminal Act ("ACCA")—the provision defining a "violent felony" to include a crime that "otherwise involves conduct that presents a serious potential risk of physical injury to another." 18 U.S.C. § 924(e)(2)(B)(ii). *See Johnson*, 135 S. Ct. at 2558. Bergrin, however, was neither charged nor sentenced under the ACCA. *Compare* A98–235 (indictment), *with* A24–25 (judgment). Thus, *Johnson* has no bearing on Bergrin's convictions or sentences. *See Devero v. United States*, Crim. No. 13-12, 2017 WL 2840670, at *3 (M.D. Fla. July 3, 2017) (denying as "futile" motion to amend a § 2255 motion to add a *Johnson* claim where Petitioner "was never sentenced under the Armed Career Criminal Act (ACCA), and as such, *Johnson* has no bearing on Petitioner's case."); *see also United States v. Estell*, 622 F. App'x 599, 600 (8th Cir. 2015) ("Counsel has also filed a letter . . . citing *Johnson*. . . . We conclude that the *Johnson* decision has no bearing on Estell's convictions or sentence.").

In sum, Bergrin's *Johnson* claim is untimely, procedurally defaulted, and frivolous.

CONCLUSION

For the foregoing reasons, 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.").[48]

Respectfully submitted,

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Date: November 30, 2017
Newark, New Jersey

[48] The Government denies any assertion by Bergrin not specifically addressed by the preceding arguments.

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 I (pp. 1–614)

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IN THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Docket No. 13-3934

UNITED STATES OF AMERICA,

Appellee,

v.

PAUL BERGRIN,

Appellant.

On Appeal From: The United States District Court for the District of New Jersey
Sat Below: The Honorable Dennis M. Cavanaugh, United States District Judge

BRIEF OF APPELLANT PAUL BERGRIN
AND APPENDIX VOLUME I

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JURISDICTIONAL STATEMENT

Defendant Bergrin appeals from a final judgment of conviction and sentence entered on September 23, 2013, following a jury trial in the United States District Court for the District of New Jersey. Bergrin filed a timely notice of appeal on September 25, 2013. A1. *See* Fed. R. App. P. 4(b)(1)(A). The district court had jurisdiction pursuant to 18 U.S.C. § 3231; this Court has jurisdiction pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742.

STATEMENT OF THE ISSUES PRESENTED

1. Was Bergrin entitled to a judgment of acquittal as to Counts One (Racketeering Act Four), Three, Twelve and Thirteen, where the government failed to prove that Bergrin joined or aided the conspiracy to murder Kemo McCray? A8743, A10221-10440; A2-23.

2. Is reversal required because the district court violated Bergrin's constitutional rights to a fair trial and to present a defense by:

allowing proceedings to continue when Bergrin was ill;

unduly interfering with Bergrin's jury addresses;

denying Bergrin access to expert services and transcripts necessary to his defense;

precluding defense witnesses by denying requests for continuances to secure their presence, refusing to inquire into witnesses' invocation of the Fifth Amendment privilege against self-incrimination, and limiting defense witness testimony;

permitting improper and unfairly prejudicial prosecutorial comments and interjecting hostile judicial commentary towards Bergrin;

unnecessarily limiting cross-examination of government witnesses and vouching for government witnesses' credibility;

denying defendant a fair opportunity to review late-disclosed government evidence; and

admitting unfairly prejudicial evidence with minimal relevance?

3. Was the sentence imposed both unconstitutionally disproportionate to the offense and procedurally unreasonable because it was premised upon disputed facts as to which the trial court was required to hold a hearing? A11201-11421, A24-29; A10065-68; A10161-65.

STATEMENT OF RELATED CASES AND PROCEEDINGS

Previously, this Court reversed the district court's order dismissing counts, *United States v. Bergrin*, 650 F.3d 257 (3d Cir. 2011); in a subsequent government appeal, this Court reassigned the case to a different district judge and vacated an evidentiary ruling of the court, *United States v. Bergrin*, 682 F.3d 261 (3d Cir. 2012). The Court has affirmed William Baskerville's conviction for the murder of Kemo McCray, *United States v. Baskerville*, 448 F.App'x 243 (3d Cir. 2011). Bergrin's seven co-defendants in Docket 09-369, Yolanda Jauregui, Thomas Moran, Alejandro Barraza-Castro, Alonso Barraza-Castro, Vicente Esteves, Jose Jimenez, and Sundiata Koontz, have pled guilty, and all except Moran and Esteves

have been sentenced. D.E. 171, 174, 179, 202, 231, 441, 451, 550, 594, 596; D.N.J. Crim. No. 10-298 D.E. 7, 9, 17, 19.

STATEMENT OF THE FACTS AND CASE

Following an initial remand from this Court, *Bergrin*, 650 F.3d 257, on June 2, 2011, a federal grand jury returned a 33-count Second Superseding Indictment, of which thirty counts pertained to Bergrin, alleging schemes related to murder conspiracy, drug trafficking conspiracy, murder-for-hire conspiracy, aiding prostitution, and evading financial reporting requirements. A98-A236. A first trial before the Honorable William J. Martini on the murder case alone, *i.e.*, Counts Twelve and Thirteen, resulted in a hung jury. The government then appealed from rulings on severance and exclusion of evidence, and sought, successfully, reassignment of this matter. *See Bergrin*, 682 F.3d 261. On remand, the newly assigned district judge denied Bergrin's pretrial motions to sever and for other relief. Beginning with jury selection on January 7, 2013, an approximately eight-week trial followed on most remaining charges (all but several tax counts).

The government sought to prove, first, that Bergrin tampered with a witness against his client Norberto Velez by coercing Velez's daughter Carolyn to falsely exculpate her father in the stabbing of her mother, Marilu Bruno; second, that Bergrin conspired in and aided and abetted the murder of a witness, Kemo McCray, against his client, William Baskerville; third, that he offered to launder

drug proceeds and provide a drug buyer for his client Richard Pozo, and later counseled Pozo to kill a witness in Pozo's case; fourth, that Bergrin assisted his client Jason Itzler in running a prostitution business by falsifying Parole documents, enabling Itzler to travel and run the business, and by managing the business himself when Itzler was incarcerated; fifth that Bergrin assisted his client Abdul Williams in bribing a witness to falsely exculpate Williams of possession of a firearm so that Williams could continue participating in Bergrin's purported drug trafficking activities; sixth, that Bergrin assisted his client Edward Peoples in bribing a witness to falsely exculpate Peoples of homicide; seventh, that Bergrin conspired to murder witnesses against his client Vicente Esteves in Esteves's Monmouth County drug case; eighth, that Bergrin conspired with others, including primarily clients Rondre Kelly,[1] Alejandro Barraza-Castro, and Abdul Williams, to operate a cocaine trafficking business; and, ninth, that Bergrin failed to report to the Internal Revenue Service $20,000 in cash he received from government informant Oscar Cordova. A98-A236.

At the conclusion of the government's case, Bergrin moved for a judgment of acquittal under Federal Rule of Criminal Procedure 29(a); the district court reserved decision. A8743. On March 18, 2013, the jury returned a verdict of

[1] The government also alleged that Bergrin helped Kelly launder Kelly's drug trafficking proceeds through a fraudulent real estate transaction. A109.

guilty on all counts. A10034-43. After trial, the district court denied Bergrin's renewed motion for a judgment of acquittal under Rule 29(c) and his motion for a new trial under Rule 33. A2-23. On August 7, 2013, Bergrin filed a *pro se* motion for reconsideration of the denial of his Rule 29 motion and, among other relief, sought the trial court's recusal. The trial court denied this application before Bergrin filed his reply to the government opposition.

On September 23, 2013, the district court denied Bergrin's request for an evidentiary hearing on various factual issues affecting sentencing, and sentenced Bergrin to six life terms of imprisonment, to run concurrent with 17 terms of imprisonment amounting to 210 years. A10065-68; A10161-65. The court granted the government's motion to dismiss the remaining tax counts.

SUMMARY OF THE ARGUMENTS

First, the district court erroneously denied Bergrin's motion for a judgment of acquittal on the McCray murder case counts because the government failed to adduce by proof essential elements of either murder conspiracy or aiding and abetting murder. Specifically, there was no evidence that Bergrin ever joined the agreement to murder McCray, which agreement was not formed until after Bergrin left the individuals who established it, that Bergrin was informed of the agreement, or that he thereafter took any action with regard to it. Likewise, there is no evidence that Bergrin either knew of or in some way aided or assisted in McCray's

murder. Rather, the evidence demonstrated that McCray would have been killed without Bergrin's involvement, and that the information he purportedly provided to William Baskerville's criminal associates — that McCray was the informant and that Baskerville faced life in prison — was well known to those individuals. Accordingly, this Court should reverse the denial of Bergrin's motion for a judgment of acquittal, and vacate Bergrin's convictions on Counts Twelve and Thirteen, and Counts One (Racketeering Act Four) and Three.

Second, the district court denied Bergrin a fair trial and the right to present a defense in violation of his constitutional rights through numerous rulings and comments that infected the entire proceeding with an anti-defendant bias. Accordingly, this Court should reverse Bergrin's convictions and remand for a new trial.

Third, the district court erred and violated Bergrin's constitutional rights by denying Bergrin's request for a hearing to determine various contested issues of fact upon which the district court relied in imposing sentence. Accordingly, this Court should vacate Bergrin's sentence.

ARGUMENT

I. THE TRIAL COURT ERRONEOUSLY DENIED BERGRIN'S MOTION FOR A JUDGMENT OF ACQUITTAL ON THE MCCRAY MURDER CASE COUNTS.

A. Standard of Review

This Court reviews, *de novo*, a district court's refusal to grant a judgment of acquittal, applying the same standard as the district court: whether, after viewing the evidence in the light most favorable to the government, a rational trier of fact could find the essential elements of the crime beyond a reasonable doubt. *United States v. Mercado*, 610 F.3d 841, 845 & n.4 (3d Cir. 2010); *United States v. Brodie*, 403 F.3d 123, 133 (3d Cir. 2005).

B. Argument

Even under the onerous standard applicable to defendants challenging conviction, the jury's verdict must be supported by substantial evidence demonstrating beyond a reasonable doubt that the government proved all the elements of the charged offense. *See United States v. Gambone*, 314 F.3d 163, 169-70 (3d Cir. 2003); *United States v. Dent*, 149 F.3d 180, 188 (3d Cir. 1998). Where the evidence is insufficient, this Court will overturn the verdict. *E.g.*, *United States v. Hannigan*, 27 F.3d 890, 895 (3d Cir. 1994); *United States v. Burks*, 867 F.2d 795 (3d Cir. 1989); *United States v. Pearlstein*, 576 F.2d 531 (3d Cir. 1978).

Proof beyond a reasonable doubt may not be based upon mere speculation, suspicion, innuendo, or surmise. *See United States v. Pace*, 922 F.2d 451, 453 (8th Cir. 1990); *United States v. Sullivan*, 919 F.2d 1403, 1433 (10th Cir. 1990); *e.g.*, *United States v. Cartwright*, 359 F.3d 281, 291 (3d Cir. 2004); *United States v. Obialo*, 23 F.3d 69, 73 (3d Cir. 1994) (logical leaps urged by government provided insufficient evidence that defendant conspired with anyone); *United States v. Ofchinick*, 883 F.2d 1172, 1180 (3d Cir. 1989); *United States v. Heithaus*, 391 F.2d 810, 811 (3d Cir. 1968); *United States v. Lynch*, 366 F.2d 829, 831 (3d Cir. 1966).

Here, a judgment of acquittal should have been entered because the government did not adduce sufficient evidence to support the verdicts on Counts Twelve and Thirteen, and on the corresponding racketeering allegations charged in Counts One and Three. Specifically, the evidence was legally insufficient to show that Bergrin ever joined an unlawful agreement to kill McCray, or that he knew that someone was going to commit the murder, and in some way aided or abetted it. Accordingly, these convictions must be vacated.

1. Insufficient Evidence of Conspiracy To Murder A Witness

Count Twelve charged Bergrin with conspiring to kill McCray in violation of 18 U.S.C. § 1512(k), which requires proving an unlawful agreement to murder McCray with the intent to prevent his attendance at an official proceeding, and that Bergrin intentionally joined that agreement. *See* Third Circuit Model Criminal

Jury Instruction 6.18.371C (citing, *e.g.*, *Iannelli v. United States*, 420 U.S. 770, 777 n. 10 (1975); *United States v. Kelly*, 892 F.2d 255, 258 (3d Cir. 1989)). Specifically, the government had to prove that Bergrin knew the agreement's objective and voluntarily joined it, intending to work together with the other alleged conspirators to achieve that objective. *See* Third Circuit Model Criminal Jury Instruction 6.18.371D[2] (citing *United States v. Cooper*, 567 F.2d 252, 255 (3d Cir. 1977)); *United States v. Robinson*, 167 F.3d 824, 829 (3d Cir. 1999).

Conspiracy "cannot be proven ... by piling inference upon inference." *United States v. Coleman*, 811 F.2d 804, 808 (3d Cir. 1987). Moreover, "inferences drawn must have a logical and convincing connection to the facts established." *United States v. Casper*, 956 F.2d 416, 422 (3d Cir. 1992). *See also United States v. Tyson*, 653 F.3d 192, 206 (3d Cir. 2011) ("When a conspiracy conviction is at issue, we must closely scrutinize the sufficiency of the evidence."). Accordingly, appellate courts, including this one, regularly reverse convictions when evidence of membership is lacking. *See, e.g.*, *United States v. Clanton*, No. 12-11002, 2013 U.S. App. LEXIS 6836, at *12-13 (11th Cir. April 4, 2013);

[2] This Court has rejected the argument that only "slight evidence" is required to demonstrate a defendant's connection to an established conspiracy. *See Coleman*, 811 F.2d at 808; *United States v. Samuels*, 741 F.2d 570, 575 (3d Cir. 1984); *Cooper*, 567 F.2d at 255. Rather, each defendant's agreement must be proven beyond a reasonable doubt. *See* Third Circuit Model Criminal Jury Instruction 6.18.371D cmt. ("slight evidence" analysis "would dilute the government's burden of pro[of]" as to each defendant).

United States v. Davis, 458 F.App'x 152, 159-60 (3d Cir. 2012); *United States v. Dellosantos*, 649 F.3d 109, 126 (1st Cir. 2011); *United States v. Shull*, 349 F.App'x 18, 20 (6th Cir. 2009); *United States v. Rodriguez*, 392 F.3d 539, 548 (2d Cir. 2004); *United States v. Alston*, 77 F.3d 713, 721 (3d Cir. 1995); *Obialo*, 23 F.3d at 73.

Here, Anthony Young, the alleged shooter, provided the only testimony linking Bergrin to the charged conspiracy to murder McCray. That is, Young alone[3] testified to the three conversations — two between Bergrin and William Baskerville's cousin Hakeem Curry on the afternoon of Baskerville's arrest and one in which Bergrin allegedly advised Curry, Young, Jamal Baskerville, Jamal McNeil, and Rakeem Baskerville that William Baskerville was facing life in prison and purportedly uttered the phrase "no Kemo, no case" — which provided the only evidence of Bergrin joining the conspiracy. More specifically, the evidence connecting Bergrin to the Curry organization's conspiracy to murder McCray was that: a) in an initial phone conversation with Curry on November 25, 2003, Bergrin described the crack sales with which Baskerville was charged, A3271; b) later that evening, in a second phone conversation, Bergrin informed Curry that Baskerville

[3] Government witness Special Agent Stephen Cline was permitted to testify as to the contents of an otherwise inadmissible telephone conversation between Bergrin and Curry on November 25, 2003. As Agent Cline testified, however, Bergrin merely informed Curry that William Baskerville had been arrested, described the complaint, and explained the legal process that would follow. A4044-48.

had said the informant's name was "Kamo,"[4] A3272; and c) on some evening the following week, Bergrin met Curry, Young, and others at Jamal Baskerville's house, A3278-79, told them that the federal authorities "got audio and video of Will making these crack sales, that Will was facing life in prison," A3282, and said "if Kemo testify against Will, Will was never coming home. He said, telling us, don't let ... Mr. Kemo testify against Will, and if he don't testify, he'll make sure he gets Will out of jail," and "he said if no Kemo, no case." *Id.* Finally, Young testified that on parting, Bergrin "said, remember what I said, he said, No Kemo, no case" and made a finger pointing hand motion. A3283.

Assuming, as the Court must, that all of this is true, it fails to establish, as a matter of law, that Bergrin joined a conspiracy during its existence or that he worked together with the other alleged co-conspirators toward the conspiracy's goal. Rather, based upon the government's own evidence, Bergrin's actions predated the formation of the conspiracy to kill McCray, while no evidence whatsoever even suggests that Bergrin took any actions after its formation. Indeed, only *after* Bergrin left did the individuals present at Jamal Baskerville's house begin discussing "how we was gonna go about looking for Kemo ... who was gonna kill Kemo." A3284. It is thus, undisputed that the conspiracy did not begin

[4] The government conceded that William Baskerville identified McCray as the witness before Bergrin mentioned the name to Curry. A9476.

until Bergrin had left. Nor did any evidence whatsoever indicate that anyone communicated to Bergrin any plans to kill McCray. By Young's own account, no party to that meeting is alleged to have nodded, gestured, or verbally communicated any reciprocal willingness to take any action suggesting even a tacit mutual understanding. *See, e.g.*, *Tyson*, 653 F.3d at 211 (insufficient evidence of tacit agreement); *United States v. Rosario-Diaz*, 202 F.3d 54, 64 (1st Cir. 2000) (no reasonable jury could find meeting of minds on conspiracy's object). The record is therefore clear that the only evidence indicating that *anyone* ever arrived at a mutual understanding or agreement to kill McCray, was Young's testimony that he and the parties at Baskerville's house discussed killing McCray after Bergrin's departure. Moreover, there was no evidence of any prior or subsequent conversations, meetings or other interactions from which it could reasonably be inferred that Bergrin was apprised of the Curry organization's plan.

In denying Bergrin's motion for a judgment of acquittal, the trial court held that "Young's testimony alone allowed a rational jury to conclude that an illegal agreement to murder McCray was formed on November 25, 2003 between Baskerville and Bergrin, and that on December 4, Bergrin joined with members of the Curry organization to further the objectives of that agreement." A8. But there

is absolutely no evidence that Bergrin formed an illegal agreement to murder McCray on November 25, 2003.[5]

Though "illegal agreements are rarely, if ever, reduced to writing or verbalized with the precision that is characteristic of a written contract," A7 (quotation omitted), and conspiracies "often may be established only by indirect and circumstantial evidence," A7, the existence of an agreement cannot "be predicated only on a foundation based on the piling of inference upon inference derived from facts that in the aggregate do not support those inferences," *Davis*, 458 F.App'x at 160-61. Here, where the sole evidence of Bergrin and Baskerville's contact on November 25, 2003 is that Bergrin visited Baskerville as his attorney after arrest, beyond a chain of inferences, one must invent a narrative from whole cloth to surmise that the two men formed an agreement to commit murder. Indeed, the trial court did not describe the circumstantial evidence upon which it relied upon to so speculate. Certainly William Baskerville provided no testimony, and Bergrin's telephone conversations with Curry from that day contain no indication of such an agreement.

[5] Moreover, the trial court's troubling conjecture that the meeting to which Young testified occurred on December 4, 2003 demonstrates the extent to which the opinion was contrary to the evidence, for even the government withdrew this claim in light of surveillance disproving that Bergrin planned to meet Curry on that date. *See* A10431; A8.

Instead, the trial court concluded that "the jury was presented with evidence that, on November 25, 2003, Bergrin, Hakeem Curry, William Baskerville, Rakeem Baskerville, and Anthony Young were involved in a conspiracy to distribute narcotics and that violent acts were undertaken in furtherance of that objective." A7 (citing A1214-52; A1727-49; A1754-88; A2548-81, A3244-60, A3090-3102). This conclusion ignored that the sole evidence of Bergrin's involvement in such a conspiracy consisted of the testimony of government witness Lachoy Walker, that on one occasion — but certainly not as of November 2003, A1240 — Curry mentioned that he obtained a drug connection from a "Paul," whom Walker understood to be Bergrin.[6] A1237. Even if this is true, introducing Curry to a supplier on one occasion — particularly where there is no evidence Bergrin received any compensation for doing so — does not implicate Bergrin in the entire Curry narcotics conspiracy. *Cf. United States v. Price*, 13 F.3d 711, 726-29 (3d Cir. 1994) (reversing due to jury instruction that defendant could be guilty of cocaine distribution conspiracy merely by offering to buy cocaine from a conspiracy member). Most significantly, that single transaction, assuming it occurred, fails to support an inference that Bergrin agreed to kill McCray, particularly since Bergrin is not accused of involvement in the "violent

[6] Until this case, Walker, who had provided extensive prior cooperation against Curry, never mentioned to law enforcement that Bergrin had provided Curry with a drug connection, A1336-37.

acts" referenced by the trial court. As even Young testified, Curry called Bergrin when Baskerville was arrested, not because Bergrin was a member of the drug conspiracy, but because "[t]hat was his lawyer." A3267. The remaining evidence cited by the trial court involves either testimony solely about the Curry organization's operations without any reference to Bergrin, A1727-49, A2548-81, or testimony discussing Bergrin's legal representation of Curry and individuals associated with him, A1754-88, A3244-60. Of course, Bergrin's legal representation of these individuals, including Baskerville, does not suggest, let alone prove, that Bergrin formed an agreement to kill McCray; otherwise, every criminal defense attorney with reason to believe his client is dangerous would be exposed to criminal liability for discussing the client's case with him, or, as in this case, his family.

Finally, the trial court relied on evidence of conversations Bergrin had with third parties long after the murder to "reinforce" its finding that Bergrin joined a conspiracy with Baskerville on November 25 and joined other Curry organization members on December 4 to further the objective of that conspiracy. A8-9. But Bergrin's candid disclosure to third parties that he gave McCray's name to Curry, A7393, does not show that, prior to March 4, 2004, Bergrin knew that the Curry organization was planning to kill McCray, and joined that plot. Likewise, the testimony of Abdul Williams that Bergrin asked him whether Baskerville would

"put his name in the whole [McCray] situation," given that the government had informed Baskerville, facing life, that it was seeking to implicate Bergrin, A5251, A3156, sheds no light on any mutual understanding between Bergrin and William Baskerville that McCray would be killed.

Moreover, beyond the government's failure to prove that Bergrin knew of any agreement — or even that there was one — when he allegedly took the actions to which Young testified, there was also no evidence that Bergrin "intend[ed] to … work together with the other alleged conspirators toward th[e] goals or objectives" of the conspiracy. A9875. *See United States v. Boria*, 592 F.3d 476, 481 (3d Cir. 2010). There was no evidence that Bergrin was to take any action in furtherance of any agreement. And, while Young testified that he took Bergrin's statements to mean that Young should kill McCray, he never discussed his understanding with Bergrin, A3788, and there was no evidence that anyone besides Young interpreted Bergrin's words as advice to kill McCray. In fact, no evidence indicated that Bergrin was even aware that a murder was planned; thus, there was no evidence that anyone informed Bergrin that the conspiracy's object was accomplished. In sum, Bergrin's sparse comments before the formation of the conspiracy do not provide legally sufficient evidence to establish his membership in the conspiracy.

While the government presented no evidence of any action that Bergrin took with respect to McCray's murder after the meeting, in accordance with Federal

Rule of Evidence 404(b), the jury was permitted to consider the testimony of Richard Pozo as to events in 2004, as well as of Oscar Cordova, Vicente Esteves, and Thomas Moran as to events in 2008, with regard to the McCray murder. The Pozo evidence was that in 2004 Bergrin told Pozo that "if you know where [the witness against Pozo] lives, we can take him out, and all this headache will go away." A4086. Evidence of the Esteves murder-for-hire plot included his remark that "if there's no witness, there's no case" A6854. But, as the trial court instructed, that evidence was only to be considered for the limited purpose of determining whether Bergrin acted with "the specific intent to tamper with or kill a Federal witness," A9963-64. Accordingly, even assuming that the jury credited this evidence, at most it established Bergrin's hope that those who heard his remarks would kill McCray; it did not prove the agreement necessary to establish a conspiracy conviction, an agreement that was not reached until *after* Bergrin left the purported meeting.[7] *See United States v. Lechuga*, 994 F.2d 346, 349 (7th Cir.

[7] If anything, Pozo's testimony underscores the lack of evidence of a mutual understanding with regard to the Kemo murder. According to Pozo, Bergrin asked Pozo to provide information about the witness's location and stated "*we* can take him out," to make Pozo's "headache go away." But that account, including Bergrin's use of the first person plural and solicitation of information to further the conspiracy's goal can, unlike the version of events related by Young, arguably be read to establish that Bergrin was attempting to form an unlawful agreement. Likewise, when Bergrin purportedly told Esteves "if there's no witness, there's no case," he also "said he was going take care of everything." A6854. By contrast, no such exchange of ideas ever took place between Bergrin and the Curry gang.

1993) (*en banc*) (providing weapon knowing recipient will use it for murder does not demonstrate an agreement). Similarly, Bergrin's statement to Esteves that "it wasn't his first time," A6855, is simply too vague to serve as the sole evidence that Bergrin joined the conspiracy to kill McCray, as opposed to some other such conspiracy. *See United States v. Jones*, 713 F.3d 336, 350 (7th Cir. 2013) (affirming judgment of acquittal where "a possible interpretation or over-interpretation of an ambiguous statement is being used with little support to show guilt beyond a reasonable doubt").

In lieu of any evidence that Bergrin joined the conspiracy during its existence, or worked together with the alleged conspirators to kill McCray, the government instead sought to pile impermissible "inference upon inference" to establish Bergrin's culpability. For example, even if a reasonable juror could somehow infer that Bergrin knew the Curry organization planned to kill McCray, mere knowledge of the conspiracy is insufficient to infer that he joined it. *United States v. Provenzano*, 620 F.2d 985, 999 (3d Cir. 1980). Likewise, a defendant's presence is an insufficient basis to infer that he joined that conspiracy. *Tyson*, 653 F.3d at 210 (presence at scene "is simply too slim a reed upon which to hang a criminal conspiracy conviction"); *United States v. Abdunafi*, 301 F.App'x 146, 148 (3d Cir. 2008). Nor may a jury permissibly infer that a defendant intentionally joined a conspiracy based upon his association with its members. *Cooper*, 567

F.2d at 255 ("One may not be convicted of conspiracy solely for keeping bad company."). Finally, even Bergrin's approval of what was happening would be insufficient. Third Circuit Model Criminal Jury Instruction 6.18.371D. Thus, even if Bergrin (a) knew that William Baskerville's associates had or likely would agree to kill McCray; (b) was present at the "meeting" at Jamal Baskerville's house; and (c) was associated with Baskerville and other Curry associates as counsel, all fail to provide sufficient evidence from which a trier of fact could permissibly conclude that Bergrin intentionally joined in a conspiracy to murder McCray.

Beyond these prohibited inferences, the government is left only with unreasonable ones from which to surmise that Bergrin was involved in the conspiracy. Thus, on summation, the government argued:

> … Bergrin's legal advice … wrote Kemo Deshawn McCray's death warrant. The legal analysis from a trusted advisor, from their lawyer, from their gang's house counsel, when Paul Bergrin said, if Kemo testifies against Will, Will was never coming home, when Paul Bergrin said, don't let Mr. Kemo testify against Will, when Paul Bergrin said, if he don't testify, he'll make sure he gets Will out of jail, what their counsel had told the gang was that the only way William Baskerville was ever going to come home was if Kemo Deshawn McCray didn't get on a witness stand. The only option that left the group with was to kill him, to get rid of him. The die was cast. … The evidence shows that beyond a reasonable doubt that Paul Bergrin was a member of that conspiracy that led directly to Kemo Deshawn McCray's murder.

A9476. Not only are these claims directly contrary to the evidence; they also belie common sense. For one thing, there is no evidence that Bergrin performed any "legal analysis"; indeed, Baskerville's exposure — life imprisonment — was disclosed at his bail hearing, A9510, and was well known to Young and his coconspirators, A3280, A4970-71; A9511. Moreover, the notion that Bergrin said not to let Kemo testify was a "winning strategy," is preposterous given that Bergrin and the others were aware that there was independent evidence in the form of audio and video recordings and FBI surveillance, documenting the hand-to-hand sales that Baskerville made to McCray. A3282. Indeed, the remark, "no Kemo, no case" appears to be less an opinion about the strength of Baskerville's federal drug case than an accurate historical statement reflecting the fact that McCray's cooperation was the catalyst for the government's case against Baskerville. Either way, the government's conclusion that Bergrin's remarks stood for the proposition that the "only option … was to kill [Kemo]," is an unreasonable one. Certainly, it cannot justify an inference that Bergrin joined in an agreement formed after his departure.

In sum, the government's case requires inferences that are contrary both to the evidence presented and to common sense; were such evidence sufficient, then the remarks of criminal defense attorneys discussing cases would routinely subject them to criminal exposure. But that is not the law. Even accepting the

government's evidence in full, a trier of fact simply could not, as a matter of law, on this record, infer that Bergrin intentionally joined the conspiracy to murder McCray. Bergrin's conviction on Count Twelve must be vacated.

2. Insufficient Evidence Of Aiding And Abetting The Murder Of A Witness.

There was also legally insufficient evidence to permit an inference that Bergrin knew that McCray would be murdered when he committed the acts alleged or that his acts in some way aided, assisted, facilitated, or encouraged Young to kill McCray. On Count Thirteen, the government was required to prove, first that someone committed the murder; second that Bergrin knew that someone would murder McCray to prevent him from testifying; third, that Bergrin knowingly and intentionally took some action to aid, assist, solicit, facilitate, or encourage another in committing that murder, and fourth that his acts did, in some way, aid, assist, facilitate, or encourage someone in murdering McCray. Third Circuit Model Criminal Jury Instruction 7.02 (citing *United States v. Nolan*, 718 F.2d 589, 592 (3d Cir. 1983)); *Mercado*, 610 F.3d at 846; *United States v. Carbo*, 572 F.3d 112, 118 (3d Cir. 2009)).

As this Court has emphasized, "facilitation" for aiding and abetting purposes is "'more than associat[ion] with individuals involved in the criminal venture.'" *United States v. Soto*, 539 F.3d 191, 194 (3d Cir. 2008). Rather, the defendant must "participate in" the criminal enterprise. *Id.* Neither mere presence (even

under "extremely suspicious circumstances") nor mere knowledge of the crime is sufficient. *Mercado*, 610 F.3d at 849 (quoting *Soto*, 539 F.3d at 194); *United States v. Bey*, 736 F.2d 891, 895-96 (3d Cir. 1984) *see, e.g.*, *United States v. Jenkins*, 90 F.3d 814, 816, 821 (3d Cir. 1996) (defendant's presence at scene of crime, close proximity to drugs and firearms, and acquaintance with principal offender insufficient to prove participation in distribution scheme). There must be some evidence of affirmative participation which in some way contributes to the unlawful scheme. *United States v. Frorup*, 963 F.2d 41, 43 (3d Cir. 1992).

Here, the government did not present any evidence that proved or from which it could be inferred that Bergrin knew that one of Curry's associates was going to murder McCray. For example, as Young's testimony demonstrates, when Bergrin mentioned the informant's name to Curry, Curry in no way indicated to Bergrin that he or his associates intended to kill the informant. A3272-73. Likewise, there was no testimony that the group provided any information about their scheme to Bergrin at the subsequent meeting, or thereafter. Instead, Young testified that he and the scheme's other participants began discussing their plan to murder McCray only *after* Bergrin left. A3283. In fact, there was no evidence that Bergrin ever learned of the Curry organization's plot to murder McCray until McCray's killing appeared in the media.

Nor did the government explain how it satisfied this element of aiding and abetting. It suggested that the Pozo and Esteves evidence demonstrated the requisite knowledge:

> Rely on his statements Paul Bergrin made to Mr. Pozo, on his statements that he told Vinny Esteves, if there is no witnesses, there is no case. Does that sound familiar? In deciding whether or not he had the intent to kill Kemo Deshawn McCray when he relayed the name Kemo to … Curry on November 25th, and when he said those words, No Kemo, no case a week or so later, I submit to you that when … Mr. Bergrin urged Mr. Pozo to get to, to take out Pedro Ramos, when he told Vinny Esteves he needed to kill Junior the Panamanian, when he told Oscar Cordova that they had to make it look like a home invasion robbery, not a hit, that that is something in accordance with the Judge's instructions you can use when trying to determine what was in Mr. Bergrin's head, not just the evidence of the William Baskerville case.

A9527-28.

But this argument establishes the difference between the McCray murder case and the Esteves case; only in the latter, did the government showed how the second prong was met. A9574 ("Paul Bergrin knew the purpose of the conspiracy when he joined it and assisted in the furthering of it. Vinny Esteves made that clear to Paul Bergrin that he wanted Junior killed and the truck driver killed. Paul Bergrin made the same thing clear to Vinny Esteves. Oscar Cordova made it clear and you heard it in the recordings … Paul Bergrin made it clear to Oscar that he knew Oscar was going to kill them."). By contrast, there was no evidence that

William Baskerville ever communicated to Bergrin that he wanted McCray killed; rather Baskerville communicated that message to his brother. A3089. Nor did Young, or anyone else, ever tell Bergrin that they were going to act on what Bergrin told them by killing McCray. And evidence regarding other witness tampering plots was insufficient to establish that Bergrin knew how Curry and his associates would respond to his remarks. Rather, Pozo (also a major drug trafficker) *rejected* Bergrin's suggestion to "take out" the witness in his case, A4086; thus it cannot show that Bergrin would have known what Curry's associates would do, especially given their silence in the face of his statement that McCray should not testify. And, while the government offered evidence that Bergrin represented Curry and members of Curry's organization in criminal cases and that he was involved in drug activity with Curry, A9540-41, it requires a legally impermissible mental leap to demonstrate, from that evidence, Bergrin's knowledge that these individuals would, as a result of his statement, kill the informant. Such a leap fails to provide the "logical and convincing connection between the facts established and the conclusion inferred," necessary to permit aider and abettor liability, *Mercado*, 610 F.3d at 849 (quoting *Soto*, 539 F.3d at 194). *See United States v. Wiley*, 846 F.2d 150, 154 (2d Cir. 1988) (general suspicion that an unlawful act may occur is insufficient to establish aider/abettor

liability). *See generally Cartwright* 359 F.3d at 291 ("Our case law 'forbids the upholding of a conviction on the basis of ... speculation'").

Nor, as in the conspiracy context, is it permissible to infer aiding and abetting liability based on Bergrin's association with members of the Curry organization. *See United States v. Rufai*, 732 F.3d 1175, 1192 (10th Cir. 2013) ("association with someone who is unquestionably guilty … alone would not be sufficient" to suggest defendant knew of the scheme); *Mercado*, 610 F.3d at 846 ("'facilitation' for aiding and abetting purposes is 'more than associat[ion] with individuals involved in the criminal venture.'"); *United States v. Medina-Roman*, 376 F.3d 1, 4 (1st Cir. 2004) ("[M]ere association with the principal, or mere presence at the scene of a crime, even when combined with knowledge that a crime will be committed, is not sufficient to establish aiding and abetting liability.").

But even if one were to deduce from Young's account that Bergrin knew of the Curry organization's unlawful scheme, there was absolutely no evidence that Bergrin's acts *in fact* aided or assisted someone to murder McCray, as required for aider and abettor liability. *See Nolan*, 718 F.2d at 592 ("the aider must in fact render aid or assistance"). To the contrary, it was tragically clear that McCray's murder was an absolute inevitability, with or without the actions of Bergrin. *See, e.g.*, *United States v. Cuevas-Reyes*, 572 F.3d 119, 122-23 (3d Cir. 2009) (evidence did not support charge that defendant helped); *United States v. Labat*, 905 F.2d 18,

23 (2d Cir. 1990) (no evidence showed that defendant's efforts "made any contribution whatever" to venture's success). As Young has repeatedly testified, "when somebody cross us, our first thing in our mind, we gonna — we gonna get rid of them." A3581. The evidence at trial fit this chilling scenario — regardless of Bergrin's statements.

The government argued that the trial evidence indicated that Bergrin facilitated the murder in two ways: first, he identified the informant, and second, he told Curry's associates that Baskerville was facing life imprisonment. A9476-73, A9482. But it is obvious that neither action provided any aid or assistance whatsoever to the Curry organization. In fact, as Baskerville's cellmate Eric Dock and criminal associate Richard Hosten each testified, Baskerville learned the informant's identity when he received the criminal complaint and conferred with Hosten in a holding cell the day he was arrested; he thereafter passed that information to his brother Rakim. A3174; A3087, A3089-90. Thus, whether or not Bergrin ever stated that the informant was "Kamo," Curry's associates knew his identity. And, as Young specifically testified, the order to kill McCray came from William Baskerville, not Bergrin. A3764. There is absolutely no evidence that Baskerville's order was predicated on Bergrin's advice or assistance.

The Curry organization also knew, without Bergrin's assistance, the time that Baskerville was facing. As of November 25, 2003, Baskerville was aware,

from the colloquy at his initial appearance, that he faced forty years. A2602. At the subsequent detention hearing on December 4, 2003, Baskerville learned that he was facing life. A2606. Of course, Baskerville passed messages directly to his associates from prison. A3763.

The trial court thus erroneously concluded, relying on a distinguishable, nearly 60-year-old out-of-circuit case, that notwithstanding insufficient evidence as to these elements of aider/abettor liability, Bergrin was nonetheless liable because "it is not essential that the accessory know the modus operandi of the principal." A11 (quoting *Russell v. United States*, 222 F.2d 197, 199 (5th Cir. 1955)). But a court cannot simply omit as an element that the accessory knew that murder was intended. *Russell*, 222 F.2d at 199 ("There must exist a community of unlawful intent between the accessory and the perpetrator of the crime"). As the United States Supreme Court recently made plain, in the aider/abettor context, the intent element is only satisfied "when a person actively participates in a criminal venture with full knowledge of the circumstances constituting the charged offense." *Rosemond v. United States*, 134 S. Ct. 1240, 1248 (2014).

The trial court, moreover, erroneously concluded that because Bergrin "advised the members of the Curry organization that McCray's murder was necessary to secure the release of Baskerville," Bergrin "cannot assert that he was unaware of the particularities of the mode and method of the murder itself to

warrant acquittal." A11. But the government was required to prove that Bergrin "actively participate[d] in a criminal scheme knowing its extent and character," *Rosemond*, 134 S. Ct. at 1249. Here, the evidence shows that Bergrin was unaware that murder was planned at all. Moreover, the trial court's conclusion that "Bergrin's representation of and association with members of a known drug organization made it rational for the jury to infer that Bergrin was aware of the consequences of advising members of the Curry organization that an informant's absence would avoid a lengthy prison sentence for a key member of that organization," A12, is disturbing indeed: leaving aside its implications for criminal defense attorneys based upon discussions of the evidence and of potential sentences with their clients and their clients' family, it also runs afoul of the principle that one cannot be convicted for aiding/abetting for mere association with criminals. *See Mercado*, 610 F.3d at 846; *Medina-Roman*, 376 F.3d at 4.

In sum, as a matter of law, fact, and plain common sense, the statements attributed to Bergrin, identifying the informant, setting forth Baskerville's sentencing exposure, and even stating "no Kemo, no case," did not assist Baskerville, Curry, Young or the other alleged coconspirators in McCray's murder because that murder would have occurred whether or not Bergrin made those statements. Accordingly, this Court should vacate Bergrin's conviction on Count Thirteen.

II. THE TRIAL COURT DENIED BERGRIN'S FUNDAMENTAL RIGHT TO A FAIR TRIAL.

Bergrin's defense at trial was that the government's witnesses misrepresented his lawful attorney services as criminal activities, often fabricating testimony against him. Throughout the proceedings, however, the trial judge crippled Bergrin's ability to challenge the government's case and to present his own, in myriad ways, including rulings favoring the government, denying Bergrin essential resources, and comments undermining his credibility before the jury. The judge's repeated prejudicial errors and its obviously caustic attitude towards Bergrin deprived him of his constitutional rights to a fair trial and "a meaningful opportunity to present a complete defense." *United States v. Quinn*, 728 F.3d 243, 252 (3d Cir. 2013) (quoting *Crane v. Kentucky*, 476 U.S. 683, 690 (1986)). *See also California v. Trombetta*, 467 U.S. 479, 485 (1984); *Washington v. Texas*, 388 U.S. 14, 19 (1967).

A. Repeated Unfairly Prejudicial Rulings Denied Defendant His Sixth Amendment Right to Present a Defense

1. Standard of Review

The legal issues arising from the conduct of the trial included: a) failure to order a continuance (abuse of discretion,[8] though plenary where bearing upon

[8] *United States v. Irizarry*, 341 F.3d 273, 305 (3d Cir. 2003).

defendant's Sixth Amendment right to self-representation[9]); b) judicial interference with Bergrin's presentation (abuse of discretion)[10]; c) denial of requests for CJA funds (abuse of discretion)[11]; and d) improper exclusion of defense witnesses and evidence (abuse of discretion,[12] though plenary where rulings "are based on a legal interpretation of Federal Rules of Evidence"[13]).

2. Argument

a. Failure to Order Continuances for Illness

The district court precluded Bergrin from presenting his defense through repeated rulings that infected the proceedings. To begin, Bergrin was unable to effectively participate in jury selection because he was ill with influenza and running a fever. A501, A640, A757, A834, A945, A962-63, A964, A967-68, A994. After jury selection was completed, the court agreed to delay opening statements until the following Monday, but it should have delayed jury selection until Bergrin recovered, to assure his actual presence during that critical stage of trial. *See Faretta v. California*, 422 U.S. 806, 816 (1975) (defendant has

[9] *United States v. Ottaviano,* 738 F.3d 586, 598 (3d Cir. 2013).

[10] *McMillan v. Castro*, 405 F.3d 405, 409 (6th Cir. 2005).

[11] *United States v. Roman*, 121 F.3d 136, 143 (3d Cir. 1997).

[12] *United States v. Starnes*, 583 F.3d 196, 213-14 (3d Cir. 2009); *Irizarry*, 341 F.3d at 305.

[13] *United States v. Green*, 617 F.3d. 233, 239 (3d Cir. 2010) (citing *Complaint of Consolidation Coal Co.*, 123 F.3d 126, 131 (3d Cir. 1997)).

"constitutional right to be present at stages of the trial where fundamental fairness might be thwarted by his absence."); *United States v. Alessandrello*, 637 F.2d 131, 138 (3d Cir. 1980) (defendants have "explicit, unqualified right" under Fed. R. Crim. P. 43 to be present during jury selection).[14] Similiarly, just prior to the testimony in the prostitution case and that of Rondre Kelly in the drug case, Bergrin began bleeding rectally and grew dizzy and nauseous, but the trial court forced him to continue, threatening that standby counsel would take over. A4259. And the judge proceeded during Thomas Moran's testimony, though Bergrin reported that he was suffering from a stomach virus. A7370-70. As a result, Bergrin could not participate effectively on these occasions, infringing Bergrin's constitutional right to be present at critical stages of trial and to represent himself. *See Faretta*, 422 U.S. at 816. *See also Gaspar v. Kassm*, 493 F.2d 964, 969 (3d Cir. 1974) (reversing civil judgment where judge denied continuance to defendant too ill to testify); *Smith-Weik Mach. Corp. v. Murdock Mach. & Eng'g Co.*, 423

[14] These errors obviously were not harmless, *see Alessandrello*, 637 F.2d at 138, as a juror who served later revealed to the press that he disobeyed the district court's instructions to consider the evidence on each charge separately, and harbored prejudice against defendants who represented themselves. A10285. Had Bergrin been able to participate effectively in jury selection, he might have discerned this bias and struck the juror. The district court compounded the problem by erroneously denying Bergrin's post-trial motion to *voir dire* the jury. Meanwhile, the judge dismissed, over Bergrin's objection, the only sworn black female juror. A7854-87.

F.2d 842, 844-45 (5th Cir. 1970) (denial of continuance where counsel is ill constitutes reversible error).

b. Judicial Interference During Bergrin's Jury Addresses

Throughout trial, the court repeatedly interrupted Bergrin and pressured him to rush through witness examinations, permeating the entire proceeding with an atmosphere of judicial bias against the defendant. *See Ottaviano*, 738 F.3d at 595 (judges' conduct especially persuasive to jury); *United States v. Jerde*, 841 F.2d 818, 823 (8th Cir. 1988) ("Unfairness to the defendant can result where the trial court … tends to accentuate and emphasize the prosecution's case.").

The trial court set the tone during Bergrin's opening statement, when it interrupted him six times — often unprompted by government objection. *See, e.g.*, A1134, A1175, A1181, 1184-85.[15] *See United States v. Carreon*, 572 F.2d 683 (9th Cir. 1978) (defendant deprived of fair trial where court repeatedly interrupted defense counsel's jury addresses, demonstrating its low opinion of the defense); *United States v. Frazier*, 580 F.2d 229 (6th Cir. 1978) (court's interruptions of defense opening statement warranted new trial); *United States v. Persico*, 305 F.2d

[15] The trial court also prevented Bergrin from opening on his representation of soldiers while in private practice, A1134; A9449-50, disparaging its relevance, though it showed Bergrin's frequent absences from the country during the period when, the government contended, he managed his client's prostitution business. A4364. Such ruling, accompanied by hostile remarks, "reinforce[d] … a growing perception by the jury that he was not looking favorably on defendant's case." *United States v. Van Dyke*, 14 F.3d 415, 420 (8th Cir. 1994).

534, 537 (2d Cir. 1962) (judge's "wholly unnecessary series of interruptions" limiting defense counsel's opening statement required reversal). *See generally United States v. Young*, 470 U.S. 1, 113 (1984) ("interruptions of arguments, either by an opposing counsel or the presiding judge, are matters to be approached cautiously").

Moreover, the court's remarks signaled real hostility towards the defendant. *See, e.g.*, A1187 (threatening "either bring this to a close, or I'll bring it to a close."), A1193-94, A1196 (admonishing Bergrin for "totally improper" opening, shouting, "Now, Mr. Bergrin, I've warned you. I've given you wide latitude. I am directing you to listen to me and to conclude in a reasonable time."). During a break, the court warned Bergrin that his opening was too detailed, invited the government to object, and threatened to cut Bergrin off before the jury. A1176. The court did not similarly comment on the government's lengthy and detailed opening, spanning approximately 73 pages, as compared with Bergrin's 78-page opening, which included multiple interruptions and objections. Ultimately, the judge stridently ordered Bergrin to finish his opening. A1178. Amidst these interruptions, hostilely delivered, the court's message to the jury from the inception of the trial was clear: the defendant could not be trusted and the defense case did not merit the jury's consideration.

For closing arguments, the court limited summations to 3.5 hours each. A9420. But it permitted prosecutors to interrupt Bergrin's limited time, A9674-75, allowing Assistant U.S. Attorney Gay to effectively testify as to a disputed fact in the Esteves murder-for-hire plot. Specifically, the government objected, arguing that Bergrin did not receive Esteves's discovery until January 2009, contrary to Bergrin's argument that he knew that his client had confessed to drug trafficking in around May 2008, established on cross-examination of Esteves, A7158; this was critical to Bergrin's defense that he had no motive to harm the witnesses against Esteves. Instead of admonishing the government for interrupting Bergrin's summation with (erroneous) statements, the judge admonished *the defendant* for exceeding the bounds of the presented facts; it later denied Bergin's request for a curative instruction on the issue. A10018-19. The defense was not similarly afforded the opportunity to interrupt the prosecution's closing remarks, even to correct factual inaccuracies. *E.g.*, A9826. These actions constituted reversible error. *United States v. Cassiagnol*, 420 F.2d 868, 878 (4th Cir. 1970) (finding prejudicial error where court interrupted defendant's direct examination and summation with "sharp," "critical," and "chiding" comments). Notwithstanding his broad discretion to manage proceedings, "a trial judge occupies a position of preeminence and special persuasiveness in the eyes of the jury and must thus ensure that 'his participation during trial … never reaches the point at which it

appears clear to the jury that the court believes the accused is guilty.'" *United States v. Ecklin*, 528 F.App'x 357, 362 (4th Cir. 2013) (quoting *United States v. Parodi*, 703 F.2d 768, 775 (4th Cir. 1983)). Here, the trial court's repeated interventions signaled, from the start of the case, its belief in Bergrin's guilt, thus denying him a fair trial.

c. Denial of Funds for Transcripts

Bergrin's indigence necessitated the authorization of funds pursuant to the Criminal Justice Act, 18 U.S.C. 3006A, to provide him with the "basic tools of an adequate defense," as Due Process requires. *Ake v. Oklahoma*, 470 U.S. 68, 76-7 (1985). In particular, Bergrin sought funds to transcribe certain exculpatory recordings, to obtain transcripts of pertinent prior proceedings, and for a ballistics expert. A10208-10. The trial court erroneously denied Bergrin's application. A10211-13. *See* 18 U.S.C. § 3006A(e)(1); *United States v. Pulido*, 879 F.2d 1255, 1256-57 (5th Cir. 1989); *United States v. Johnson*, 584 F.2d 148, 157 (6th Cir. 1978). This ruling, which included no explanation, prevented Bergrin from obtaining transcripts of recordings that, he proffered, contained evidence showing that he did not intend to harm the witnesses against Esteves.[16]

[16] Bergrin initially sought to transcribe all of the Cordova body wire recordings, A10174, 10178-82, but the court held that because Bergrin did not dispute that he appeared on the recordings, his defense that they exhibited signs of tampering to omit exculpatory portions of his conversations with Cordova was not plausible. A10183-89. The court further held the requests were "entirely speculative"

As a result, because Bergrin had access to transcripts containing only those portions of the recordings that were favorable to the government, his cross-examination of the Esteves case witnesses was ineffective, making him appear at best confused about what the recording contained and at worst, a liar. *See, e.g.*, A6685-86; A7247. The resulting prejudice was exacerbated by the prosecution's comment before the jury that, "Mr. Bergrin has had these conversations for a long time. If he wanted to generate a transcript, he certainly could have," A6431-32, and the court's comment that the transcriptions were "complete." A6691.

The district court also erroneously refused to authorize funds to obtain Bergrin's summation in *State v. Jeffrey Castro*, which showed that he knew that Cordova's claims about his position in the Latin Kings could not be believed based upon his experience with that organization. The court reasoned that "Bergrin

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because there was no evidence that exculpatory statements "*were, in fact, made.*" A10187. In response, Bergrin explained his defense, proffered the exculpatory statements that he believed, from memory and other evidence, had been excised, and limited his request to six of the dozens of recordings in the case containing "the most significant concentration of anomalies, suggesting tampering … includ[ing] omitted statements and conversations, stops and pauses, and more frequent notations of 'unintelligible.'" A10190-95. Nevertheless, the trial court erroneously refused to authorize funds for these transcripts, or for expert review of the recordings for signs of tampering. *See United States v. Bass*, 477 F.2d 723 (9th Cir. 1973) ("Where expert services are necessary to an adequate defense the court must authorize them."); *Bradford v. United States*, 413 F.2d 467 (5th Cir. 1969) (denial of a defense expert constituted reversible error); *United States v. Patterson*, 724 F.2d 1128, 1131 (5th Cir. 1984) (same); *United States v. Durant*, 545 F.2d 823, 828-29 (2d Cir. 1976) (same).

should have in his possession a record of his own summation … Bergrin had the opportunity to request such a transcript at a prior date [and] … statements, arguments, and questions are not evidence under the Federal Rules of Evidence." But it was untrue and unfair to presume that Bergrin, who had been incarcerated for nearly four years, would possess a 10-year-old transcript from a proceeding in which he did not handle the appeal. Moreover, the court wrongly concluded that requesting this evidence several days before presentation of the Esteves case was not "timely" under the CJA. *See United States v. Paczan*, 229 F.App'x 100, 104 (3d Cir. 2007). Finally, while legal arguments are not evidence, a legal argument may demonstrate, as Bergrin proffered with respect to this transcript, the speaker's knowledge or state of mind. In fact, throughout trial, the court permitted the government to introduce evidence of legal argument at underlying proceedings to demonstrate Bergrin's intent. *See, e.g.* A1980-81 (admitting entire transcripts from the motion to suppress proceeding in Norberto Velez's underlying case).

Likewise, the trial court denied Bergrin's request for transcripts from the Norberto Velez attempted murder case, specifically, testimony of Norberto's mother Ophelia Velez, who was unavailable at this trial, and of Velez and his neighbor Julio Izquierdo, who both testified as defense witnesses here. The trial court reasoned that Bergrin "has not stated with specificity why such transcripts are necessary for his adequate representation or what purpose they will serve,

asserting only generally that they will 'enable him to conduct thorough cross-examination' and 'contain denials of misconduct.'" A10213; *accord* A8791, A8897-98. But, as the defense predicted, this ruling prevented Bergrin from impeaching Bruno on whether she obtained her husband's knife from his home the day before she claimed he attacked her with it, or from refreshing Izquierdo's recollection on this point. A8902. Nor could Bergrin introduce evidence that Ophelia Velez had testified that she witnessed Bruno remove the knife from Velez's kitchen. Accordingly, the trial court's ruling prevented Bergrin from demonstrating that his interviews with Carolyn were based upon his honest belief that his client was innocent, rather than an attempt to fabricate exculpatory evidence.

Finally, the trial court denied Bergrin's request for transcriptions of four conversations recorded by government informants containing contemporaneous denials of misconduct by Bergrin concerning the McCray murder case. Though standby counsel had transcribed these recordings for the 2011 trial, Bergrin sought to correct the transcripts to reflect the actual identity and dialogue between speakers. A10209. The trial court again found that Bergrin failed to adequately assert necessity. A10213. The court's ruling prevented these exculpatory statements from coming to light. Likewise, Bergrin was unable to obtain transcripts from the underlying Edward Peoples proceedings, and was,

accordingly, unable to prove that Peoples had denied that Bergrin ever instructed him to have Anyea Williams flee, or to impeach Assistant Prosecutor Roger Imhoff's testimony as to that matter. These denials infringed Bergrin's right to a fair trial, and to present a defense, warranting reversal.

d. Preclusion of Defense Witnesses

The district court also denied Bergrin his constitutional right to present a defense through numerous rulings that foreclosed or limited defense witness testimony, including expert testimony. *See Washington*, 388 U.S. at 19 ("The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies … is a fundamental element of due process of law."); *Gov't of the Virgin Islands v. Mills*, 956 F.2d 443, 446 (3d Cir. 1992) ("the fundamental right of an accused to present witnesses in his own defense is an essential attribute of our adversary system of justice") (citing *Taylor v. Illinois*, 484 U.S. 400, 408 (1988); *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973)). *See also Pennsylvania v. Ritchie*, 480 U.S. 39, 56 (1987).

Conspicuously, before a single defense witness testified, the prosecution and the trial court had already begun discussing how to preclude these witnesses.

A8878-88.[17] Then, when notwithstanding the best efforts of the Marshals Service and standby counsel, certain incarcerated defense witnesses whose presence had been ordered pursuant to writs of habeas corpus were not immediately available, the trial court nonetheless refused to postpone the trial for even two to seven days, so that these witnesses could testify.[18] Fact witnesses like Syed Rehman and Drew Rahoo, who knew Abdul Williams was fabricating evidence against Bergrin to save his family from prosecution for drug trafficking, like Jan Ludvik, in whom Esteves confided that Bergrin never intended to harm witnesses, and like Maria Correia, who knew that Cordova and other witnesses were fabricating evidence against Bergrin, all could have provided critical links in Bergrin's defense. A9291-9300, A9320-24, A 9379-85. Such evidence undermining the credibility of the government's key witnesses was clearly critical to Bergrin's defense, as, indeed "evidence concerning a witness's credibility is always relevant … especially when

[17] For example, the court ultimately excluded key testimony from one such witness as to an order that Yolanda Jauregui gave him not to tell Bergrin about her drug dealing with Alejandro Castro, even though this statement was clearly admissible as a verbal command, *see* Fed. R. Evid. 801(c); *United States v. Reilly*, 33 F.3d 1396, 1410-11 (3d Cir. 1994). A9202-06, A9310-11. This was error. *See Mills*, 956 F.2d at 447 ("Exclusion of relevant exculpatory evidence infringes upon the fundamental right of an accused to present witnesses in his own defense.") (quotation omitted).

[18] The trial court likewise refused to secure the presence of out-of-state witnesses. *See* A9284-85, A9295-96.

the witness is testifying for the government in a criminal trial." *United States v. Green*, 617 F.3d. 233, 251 (3d Cir. 2010).

Nonetheless, the judge held that Bergrin was not diligent in endeavoring to secure the witnesses' presence, A9383-84, even though Bergrin had sought such writs as of February 26, 2013.[19] Nor should the court have precluded Bergrin from calling witnesses based on the possibility that they might assert a Fifth Amendment right not to testify. A9384. *See United States v. Emuegbunam*, 268 F.3d 377, 400 (6th Cir. 2001) ("prosecutorial and judicial actions aimed at discouraging defense witnesses from testifying deprive a defendant of [his due process] right."). Finally, the court concluded that it was "not persuaded that the materiality of the witnesses requires such a continuance," A9384, thus preventing Bergrin from adducing "exculpatory evidence … to contradict the Government's evidence against the accused," *Quinn*, 728 F.3d at 262-63.

The court's preclusion of these witnesses requires reversal of the convictions and a new trial. *See, e.g.*, *United States v. Kohan*, 806 F.2d 18, 22 (2d Cir. 1986) (reversing conviction where trial court excluded defense witness testimony);

[19] Standby counsel was in continuous contact with the U.S. Marshals Service on the appropriate process for subpoenaing incarcerated defense witnesses. As soon as the Marshals Service alerted counsel that it required habeas corpus writs to obtain their presence, the defense requested such writs, a full week before the government closed its case, which occurred sooner than anticipated. Moreover, for security reasons, Bergrin could request the presence of only two incarcerated witnesses each day.

Bennett v. Scroggy, 793 F.2d 772, 776-767 (6th Cir. 1986) (Compulsory Process clause violated when court refused to grant overnight continuance to allow defendant to secure favorable witness); *United States v. Harris*, 733 F.2d 994, 1005 (2d Cir. 1984). The court's error was exacerbated when the government argued on summation that "[a]ny witnesses that would be available to the Government to call are equally available to the Defense to call. Just as the Government has subpoena power, so does the Defense," A9800-01, though the court had limited the defense's subpoena power and which, of course, failed to mention that the government, unlike the defense, had the power to immunize witnesses, *see Quinn*, 728 F.3d at 247, thus preventing them from refusing to testify on Fifth Amendment grounds.[20] Nor did the trial judge conduct any meaningful inquiry as to whether certain proposed defense witnesses were in fact entitled to invoke their Fifth Amendment privilege against self-incrimination. *See Hoffman v. United States*, 341 U.S. 479, 486 (1951) ("the witness is not exonerated from answering merely because he declares that in doing so he would incriminate himself …. It is for the court to say whether his silence is justified."); *Rogers v. United States*, 340 U.S. 367, 374 (1951) (the "hazards of incrimination" must be "substantial and 'real,' and not merely trifling or imaginary."). Generally, the law "requires that a particularized inquiry into the reasons for the assertion of the

[20] In fact, the government provided just such immunity to Cordova. *See* A7045-49.

privilege be made." *United States v. Pratt*, 913 F.2d 982, 990 (1st Cir. 1990) (citing *United States v. Pierce*, 561 F.2d 735, 741 (9th Cir. 1977) ("blanket refusal to answer any question is unacceptable"). *See In re Special Federal Grand Jury Empanelled Oct. 31, 1985*, 819 F.2d 56, 59 (3d Cir. 1987) (remanding so court could make finding of fact as to whether grand jury witness's act of production might tend to incriminate him)

Yet, the trial court here failed to conduct any inquiry into whether defense witnesses who invoked their Fifth Amendment right were actually eligible to assert the privilege, even as it actively sought to ensure such witnesses would invoke that right. *See* A8724-29. The trial court did not ask the witnesses or their appointed counsel any questions as to the basis for the privilege, nor seek to determine whether Bergrin's questions were likely to result in injurious disclosure. A8723-28; A9206-07; A9294-97, A9300.[21] *See Hoffman*, 341 U.S. at 486; *Rogers*, 340 U.S. at 374. Instead, the judge accepted blanket refusals to testify that were not

[21] The trial court also denied Bergrin's post-trial motion for a new trial based on the government's refusal to immunize Jamal Baskerville, Jamal McNeil, and Edward Peoples, who each invoked the Fifth Amendment right not to testify. A8723-28, A8909-13, A8924-27; A9298. As this Court recently clarified in *Quinn*, 728 F.3d at 259, although trial courts are not empowered to grant defense witness immunity, if the defendant can show that his right to due process was denied because the government failed to grant use immunity to a witness whose "testimony is available, clearly exculpatory, and essential — in effect showing that the prosecutor's actions have impaired the ability to present an effective defense," the Court should grant a new trial, at which "the Government can elect to exercise its statutory authority to obtain a grant of immunity for the witness."

even asserted in person. *In re U.S. Hoffman Can Corp.*, 373 F.2d 622, 628 (3d Cir. 1967) ("the invocation of the privilege should be made in the presence of the trial judge"). This error, in combination with those discussed above, denied Bergrin his right to compulsory process and, more generally, to present a defense.

B. The Trial Court Prevented Bergrin From Challenging The Government's Case

1. Standard of Review

The rulings discussed below implicated the court's trial management, and are subject to review for abuse of discretion. *United States v. Higdon*, 493 F.App'x 261, 263 (3d Cir. 2012); *United States v. Silveus*, 542 F.3d 993, 1005 (3d Cir. 2008).

2. Argument

The trial judge prevented Bergrin from challenging the government's evidence at trial by permitting the government to make improper speaking objections, curtailing Bergrin's cross-examinations, vouching for government witnesses' credibility, and denying Bergrin a fair opportunity to review key government evidence or access to potentially exculpatory material. These errors deprived Bergrin of his constitutional right to "a fair opportunity to defend against the [government's] accusations," *Chambers v. Mississippi*, 410 U.S. 284, 294 (1973), and warrant reversal. *See Mills*, 956 F.2d at 445 ("The Compulsory Process clause protects the presentation of the defendant's case from unwarranted

interference by the government, be it in the form of an unnecessary evidentiary rule, a prosecutor's misconduct, or an arbitrary ruling by the trial judge.").

a. Speaking Objections

Throughout trial, the court refused Bergrin's requests for sidebar conferences when sensitive legal issues arose, thereby forcing the parties to air their grievances before the jury. *See, e.g.*, A1193-94. The government repeatedly seized upon this opportunity to make unfairly prejudicial arguments through improper speaking objections. For example, the government argued, before the jury, that a statement Bergrin made to Moran about the McCray murder constituted a "classic admission." A7393. It informed the jury that there would be "plenty of evidence" to prove a contested point, A5949, and that a particular transcript was "evidence of the actual crime, Judge. It is better evidence than [the witness's] memory"), A1953. *See also* A1968-69; A4877; A5906; A6258, A6265, A6704; A6732-34, 6739; A7745-46; A7971, A7973-74; A8549-50; A9038-39. Indeed, the government frequently commented on whether Bergrin's questions, or witnesses' answers were accurate.[22] *See, e.g.*, A2048 ("that's incorrect, and it's factually inaccurate"); A2124 ("It's absolutely mischaracterizing."); A2148 ("That's

[22] In doing so, the government often misrepresented the facts. *See, e.g.*, A5771-72 (incorrectly asserting witness met with investigators multiple times, when in fact he only did so once); A5849 (inaccurately stating that "Mr. Bergrin again is messing with the timeline here" when testimony showed he was not); A6250-51 (asserting "[t]hat's not what the document says at all, Judge[,]" when the document contained the statement referenced by Bergrin).

factually inaccurate"); A4384 (accusing Bergrin of lying before jury); A4704 ("Mr. Bergrin's question would be a misrepresentation of the facts."); A7529-30 ("Objection. Not anywhere close to what Vicente Esteves testified to this jury."); A8236-37 ("That's baloney. He was never charged. He was investigated and he was cleared. Mr. Bergrin was his lawyer at that time. So Mr. Bergrin knows full well exactly what happened."). *See also* A3549; A3734; A3758 ; A5801; A5872-73; A5716-17; A7100. At times, the prosecution stepped into the trial court's role. *See, e.g.*, A6776-77 ("We're wasting everyone's time. That's why I want this to stop, Mr. Bergrin.").

Such constant disruptions not only hampered Bergrin's ability to cross-examine witnesses effectively, *see, e.g.*, A7101, but also allowed the government to suggest answers to prosecution witnesses. For example, in response to a question Bergrin posed to Anthony Young about the implications of a criminal charge Young against him, the prosecution objected: "Mr. Bergrin knows the law, and that is absolutely not the case. There is no such thing as career offender for Trigger Lock cases, period … for [state charges] either." A3523-24. Young was then able to answer, "I know it's no such thing of a career offender in the state." A3524. *See also* A1265; A2104; A2137; A3656; A4713, A4716; A4981; A6421; A6713-14; A7647.

Disturbingly, the prosecution's repeated improper speaking objections routinely met not only the acquiescence but the encouragement of the trial court. *See, e.g.*, A2048 (commenting, in response to government speaking objection, "[w]hat does it have to do with anything anyway? Move on"); A3731 ("MR. BERGRIN: I would appreciate the Court requesting that Mr. Minish, if he wants to keep something from the jury, not make statements and elaborate like that. THE COURT: Well, I don't think he said anything that's problematic."); A8291-92 ("MR. GAY: Objection, Judge. He never said anything like that. MR. BERGRIN: It's the jury's recollection, not Mr. Gay's. THE COURT: Well, it's the jury's recollection, but we have to have a proper basis. I don't remember that either, Mr. Bergrin"). *See also* A1255; A1440; A3574; A5818; A6718; A8274; A8450; A5797-99; A5851-54. The trial court's tolerance for the government's improper speaking objections enabled the government to pursue a course of "overzealous advocacy that distort[ed] the factfinding function of a criminal trial." *Quinn*, 728 F.3d at 260. This was error.

b. Curtailed Cross-Examination of Government Witnesses

The right to present a complete defense encompasses the right to rebut the government's evidence through cross-examination. *See Alexander v. Shannon*, 163 F.App'x 167, 174 (3d Cir. 2006) (citing *Webb v. Texas*, 409 U.S. 95 (1972)). The trial court's frequent interference with Bergrin's cross-examination of

government witnesses here interfered with that right. *See, e.g.*, *United States v. Filani*, 74 F.3d 378, 385-87 (2d Cir. 1996) (reversing conviction when judge's repeated interference with defense counsel's cross-examination left "a powerful impression that the district court agreed with the government that the defendant was guilty"); *United States v. Hickman*, 592 F.2d 931 (6th Cir. 1979) (reversing convictions because judge interjected himself into the proceedings over 250 times, limited cross-examination, and exhibited anti-defendant attitude); *United States v. Harris*, 501 F.2d 1, 9 (9th Cir. 1974) ("the trial judge overstepped the bounds of judicial propriety by excessively interjecting himself into the proceedings below"); *Blumberg v. United States*, 222 F.2d 496, 501 (5th Cir. 1955) (judge interrupted too often).

Here, the trial court repeatedly interrupted Bergrin to curtail his cross-examinations, rush him through questioning, and cast aspersions on his approach; it thereby "'significantly inhibited [the] effective exercise of h[is] right to inquire into [the] witness's 'motivation in testifying,'" and to impeach government witnesses. *Silveus*, 542 F.3d at 1006 (quoting *United States v. Chandler*, 326 F.3d 210, 219 (3d Cir. 2003)). These interferences, moreover, exceeded the "reasonable limits" that a trial court may establish, *id.*, because they left the jury "with insufficient information to determine a witness' motives or bias" or other lack of credibility. *Williams v. Virgin Islands*, 271 F.Supp.2d 696, 707 (D.V.I. 2003)

(quoting *United States v. Casoni*, 950 F.2d 893, 902 (3d Cir. 1991)). *See also Ritchie*, 480 U.S. at 51-52 ("The right to cross-examination includes the opportunity to show that a witness is biased, or that the testimony is exaggerated or unbelievable."); *Douglas v. Owens*, 50 F.3d 1226, 1230 & n.6 (3d Cir. 1995) ("To properly evaluate a witness, a jury must have sufficient information to make a discriminating appraisal of a witness's motives and bias…. It is an abuse of discretion for a district judge to cut off cross-examination if the opportunity to present this information is not afforded.") (citing *United States v. Abel*, 469 U.S. 45, 52 (1984)).

In particular, the trial court frequently cut Bergrin off from further questioning on issues critical to the defense. *See, e.g.*, A3119; A4386-87; A6713-14; A7143-44; A7187; A7515-18; A7686; A7749-50; A7755. Thus, although the court allowed the government to elicit evidence that Bergrin was "house counsel" to the Curry organization, A9476, A9512, A9543-44, A9586, it curtailed Bergrin's ability to establish that he represented mainly low-level members of this organization, and only in a small fraction of arrests. A1803-04, A1807. The court also, *sua sponte*, interrupted Bergrin's cross-examination of Abdul Williams, to preclude questioning regarding domestic violence incidents, though the government had brought out this evidence on direct. A5387-88. That was but one of many occasions when the judge curtailed cross-examination on a matter

pertaining directly to the witness's credibility and motivation for testifying against Bergrin. *See, e.g.*, A1403; A2926-27; A4765-66; A6231; A6339-43; A8236-37. Indeed, the trial court even prevented Bergrin from cross-examining Oscar Cordova, the government's main witness in the murder-for-hire plot, about his mental fitness, even when the government withdrew any objection to this line of questioning after it came to light that Cordova was on medication and receiving treatment for mental health issues. A6313-14; A6316-18; A6640-41.[23]

Critically, the trial court prevented Bergrin from cross-examining Special Agent Afanasewicz about where Cordova kept the recording device, thus preventing Bergrin from demonstrating that Cordova could have tampered with the recordings, even after the government had opened the door to this issue by eliciting testimony, over strenuous objections, that these kinds of recordings could not be manipulated. A2725-28; A7800-01; A7973-74. Likewise, the trial court prevented Bergrin from asking Cordova leading questions about what occurred during pauses and "UI"s on the recordings and from impeaching Cordova using the recordings. A6662-68; A6713-14. These errors were compounded by the unfair prejudice to Bergrin from the trial court's decisions to limit CJA funds for a defense recording

[23] Cordova's mental health problems should have been disclosed to the defense well in advance of his testimony as they pertained directly to his credibility. *See Brady v. Maryland*, 373 U.S. 83, 87 (1963); *Slutzker v. Johnson*, 393 F.3d 373, 387 (3d Cir. 2004); A6642-43.

expert and to preclude Bergrin's expert from testifying about anomalies and sound dropouts he observed. A7974; A8990-93. Bergrin was thus denied his right to present the jury with sufficient information to make a discriminating appraisal of the government's evidence.

Moreover, from the outset, the judge commenced a course of rushing Bergrin's cross-examinations. In particular, with regard to the allegation that Bergrin coerced Carolyn Velez to falsely exculpate her father of stabbing her mother, the court hurried Bergrin, preventing him from questioning witnesses about areas that supported his theory of defense, *i.e.* that he was merely advocating zealously, fully believing in his client's innocence. As a result, the trial court's message to the jury from the outset was clear: the defense case is a waste of your time. *See, e.g.*, A1441; A1444-45 ("I'm not wasting everybody's time on this."); A1456-57 ("What does any of this have to do with what we're talking about? … Listen, I'm not trying the case about her getting stabbed here. I don't care about that … Now, get to the point, or we're getting this witness off the stand."); A1450; A1471; A1473 ("MR. BERGRIN: I have a right to cross-examine, with due respect, Your Honor — THE COURT: And I have a duty to move this case along at an appropriate pace …. Now, get to the point, or I'm ending this witness and she's getting off the stand."); A1493 (limiting Bergrin to one more question of Bruno); A2133, ("this is taking too long … I can't continue like this for the next

several months."); A2133 ("THE COURT: How much longer are we going to be, Mr. Bergrin? MR. BERGRIN: A little while longer. We can take a break, Judge. THE COURT: I'm not looking to take a break. I'm looking to have this end."); A2145-46 (trial court limited Bergrin to one more question of Carolyn Velez at ten-minute cap, angrily stating "Let's go."); A2149-51 (enforcing cap on questioning).

The trial court continued to rush Bergrin through his cross-examinations of other witnesses as well. *See, e.g.*, A2899-2905 (urging Bergrin to rush his cross-examination of Special Agent Brokos, inviting the government to object, and threatening to put time limits on all cross-examinations); A3874 ("It's almost time for the jury to go home for the day … There comes a time when we've got to stop this."); A4999-5001. At one point, when Bergrin estimated that it would take him approximately two hours to finish cross-examining Anthony Young — after the government had questioned Young for a day and a half on direct examination — the trial court admonished him:

> I've got to tell you, I believe that we are spinning a lot of wheels and wasting a lot of time here ... we are taking an inordinate amount of time between questions, looking at notes, trying to find transcripts. We're in the United States District Court. When you come in here and say we're ready to go to trial, we should be ready to go to trial. I can't sit here and have a jury sitting there while we're going through papers and going through documents. We've got to move this along.

A3751. *See also* A2928, A2831. Meanwhile, the court told the jury that the "Government is moving its witnesses quickly." A7895.

Still other times, the trial court interrupted cross-examination to disparage Bergrin's performance. For example, the trial court repeatedly criticized Bergrin in front of the jury for failing to cue up recordings correctly, even though Bergrin was preparing for trial from his prison cell and even though the trial court had denied Bergrin the benefit of transcriptions of these tapes or expert review to analyze and enhance the quality of the recordings. *See, e.g.*, A6657 ("That just wasted all of our time just now"); A6684 ("I'm clueless as to what that was all about. I couldn't hear it"); A1400; A1440, A1444; A2798; A3643; A3723; A3733; A6734. In doing so, the court unmistakably telegraphed that it "agreed with the government that the defendant was guilty of the crime charged," and denied Bergrin a fair trial. *Filani*, 74 F.3d at 387. *See also United States v. Beaty*, 722 F.2d 1090, 1093 (3d Cir. 1983) ("The judge's participation must never reach the point where 'it appears clear to the jury that the court believes the accused is guilty.'") (quoting *United States v. Nobel*, 696 F.2d 231, 237 (3d Cir. 1982)).

c. Vouching for Government Witness Credibility

The trial court also exceeded the bounds of its discretion by repeatedly commenting on testimony in a manner that vouched for the credibility of government witnesses. *See Ottaviano*, 738 F.3d at 595 ("a judge must not

'abandon his proper role and assume that of an advocate'") (quoting *United States v. Adedoyin*, 369 F.3d 337, 342 (3d Cir. 2004)); *see, e.g.*, *Quercia v. United States*, 289 U.S. 466, 468-470 (1933) (reversing conviction where trial court commented on testimony in biased manner); *Van Dyke*, 14 F.3d at 423 (reversing conviction where "excessive interplay between the district court and witnesses" gave "rise to a perception that the judge favored the prosecution's case"); *United States v. Singer*, 710 F.2d 431 (8th Cir. 1983) (*en banc*) (reversing conviction where district court's comments and questions to witnesses gave jury the impression that it favored the prosecution).

Specifically, time and again, the trial court explained to the jury that it believed that various government witnesses were being truthful despite discrepancies in their testimony brought out by Bergrin. *See, e.g.*, A1439; A1441, A1451 ("That doesn't mean that her statements are unfounded. I know of people that have been found not guilty when they were guilty or guilty when they weren't."); A1448-50; A1463 ("Apparently in your view because she didn't mention every ... single abuse that ever occurred to her that she's not being truthful in this one. And I just disagree with that premise, and I think you're being unfair to this witness."); A1475-76 ("You're taking it out of context. You're reading it like she said something that she didn't say when she explains it. This was something that happened 10 years ago. Now, are you finished yet, Mr. Bergrin?");

A2222 ("THE COURT: Okay. We've gone over this time and again. MR. BERGRIN: No, Judge, he hasn't answered the question, with all due respect. THE COURT: Oh, I think he has. MR. BERGRIN: No, he hasn't, Judge. THE COURT: I think he has, and the first thing that you handed him said exactly what he said, he said it resembles, and he keeps on saying it, and you keep on trying to get him to say it in a different way."); A2742 ("I don't think that this witness has gone astray. I think she's clarifying the point."); A4157 (telling jury that the fact that law enforcement failed to act on Pozo's accusations does not render them false); A4162 ("He's being totally consistent with what he just testified to. What you're saying is not contained in here."); A4760; A4761; A7125; A7646; A8309.

The trial court even bolstered the testimony of a witness as critical as Anthony Young. *See* A3549; A3637; A3670; A3673; A3676; A3735; A3863. When standby counsel raised a concern about speaking objections during cross-examination of Young, the trial court responded that the witness was being consistent, that he was not difficult, and that Bergrin was to blame for asking the same question in different ways and wasting time. A3751-54.

By contrast, the trial court consistently undermined the credibility of defense witnesses. *See, e.g.*, A8798-99; A8802, A8805; A8808-09 (repeatedly interrupting Bergrin's first witness, often *sua sponte*, to order him to stop volunteering information); A9116 ("THE WITNESS: Oh. He asked me a question. I'm trying

to give the answer, Judge. THE COURT: Well, that's debatable."); A9119-20 (THE WITNESS: And I'll shut up after that. THE COURT: Yes, that would be good."); A9400-01; A9409. This was error, and extremely unfair. *See Ottaviano* 738 F.3d at 595 ("'[A] judge's apparent disbelief of a witness is potentially fatal to the witness's credibility.'" (quoting *United States v. Godwin*, 272 F.3d 659, 678 (4th Cir. 2001))). In doing so, the court created an "appearance of partiality by continued intervention on the side of one of the parties" and "undermine[d] the effective functioning of [*pro se*] counsel through repeated interruption of the examination of witnesses." *United States v. Castner*, 50 F.3d 1267, 1272 (4th Cir. 1995). The trial court's continual remarks favoring the government, combined with its disparaging remarks aimed at the defendant's cross-examination strategy and his witnesses unleveled the playing field even more and require reversal and a new trial.

d. Rulings Preventing Bergrin From a Fair Opportunity to Review Government Evidence

The trial court also deprived Bergrin of a fair opportunity to review evidence that the defense received during trial, thus preventing him from effectively challenging the government's evidence. Specifically, the trial court never addressed Bergrin's motion for additional time to review over 700 pages of poorly indexed material pertaining to Yolanda Jauregui's drug trafficking activities that the government produced during trial, along with 37 never-disclosed trial exhibits

that the defense sought to preclude as a result of their late disclosure. A1901-08. Those materials were consistent with Bergrin's defense theory that Jauregui ran the drug trafficking organization on her own without his knowledge. A1903-04. Yet, as a result of the need to prepare for each day's witnesses, Bergrin lacked a sufficient opportunity to effectively use this material to cross-examine Special Agent Afanasewicz about his investigation of Jauregui's drug trafficking activities and Bergrin's non-involvement. *See United States v. Gil*, 297 F.3d 93, 106 (2d Cir. 2002) (disclosure of poorly-indexed, voluminous Jencks Act material one business day before trial was untimely, because defense counsel was unable to assimilate critical information into its case); *United States v. Holmes*, 722 F.2d 37, 41 (4th Cir. 1983) (reversing conviction based upon the district court's failure to grant the defense sufficient time to review voluminous materials received the day before trial).

Similarly, the trial court provided Bergrin with only 24-hours, and denied Bergrin's request for additional time, to prepare to cross-examine Eugene Braswell after he received a critical 6-page FBI Report detailing Braswell's drug activities on the Tuesday evening before the Thursday that Braswell testified. A8011-15; A8088-8100. Though the trial court first considered precluding the witness if further investigation was necessary, A8015, ultimately, the trial court denied Bergrin's request for additional time to establish, based upon the late-disclosed

material, that Braswell did not need Bergrin to supply him with drug connections, and that he had the opportunity to collude with Abdul Williams in fabricating testimony against Bergrin.[24] A8096-98. The trial court, moreover, improperly refused Bergrin's request to discuss the need for investigation *ex parte*, A8096, thus allowing the government to direct the discussion. As a result, Bergrin was unable to interview potential witnesses Sayeed Grant or Kamau Muntasir about Braswell's allegations that they ceased supplying him with cocaine, to show that Braswell never needed to obtain drugs from Bergrin. *See* A8109-10; A8118-22; A8129-32; A8223-24; A8204-08; A8219. The prejudice to Bergrin was manifest. *See United States v. Celis*, 608 F.3d 818, 840 (D.C. Cir. 2010).

The trial court also denied Bergrin's request to briefly delay cross-examination of Vicente Esteves following the late disclosure of a video in which Esteves confessed to the DEA on the day of his arrest and began cooperating with the government. A7052-59. As a result, Bergrin was not able to effectively cross-examine Esteves, Moran, or the other murder-for-hire case witnesses about the logical fallacy of an alleged strategy to kill witnesses in a case in which the defendant was cooperating with the government. In fact, the court openly

[24] This material should have been disclosed in advance of Williams's testimony, particularly since Braswell implicated Williams in a murder that provided additional motive for Williams to fabricate testimony against Bergrin. *See* A8011-15.

chastised Bergrin for raising the issue late, rather than the prosecution for failing to turn over such materials timely, or in a comprehensible manner. A7052-59. *See also* A3584-87 (refusing to remedy disclosure two days before Pozo's testimony). These erroneous rulings materially contributed to Bergrin's inability to challenge the government's evidence.

e. Denial of Access to Exculpatory Evidence

Finally, on several occasions, the trial court erroneously denied Bergrin access to evidence that was likely to be exculpatory. *See generally United States v. Starusko*, 729 F.2d 256, 262 (3d Cir. 1984). Thus, the judge refused Bergrin's request for any information pertaining to a polygraph test given to Ben Hohn, who allegedly melted the gun Young used to kill McCray, although the defense had specifically requested such information before trial, A10202, and notwithstanding that, on the stand, Special Agent Brokos revealed for the first time that Hohn, whose testimony significantly contradicted Young's narrative, A3011-16, A3018-19, A10441-42, had failed a polygraph examination. A2755. The government's misleading representation that no witnesses had been administered a polygraph examination, and the court's subsequent refusal to provide any remedy to Bergrin based upon that flawed disclosure, deprived Bergrin of an adequate opportunity to "prepare meaningfully for trial, to design an intelligent trial strategy, or to address the strongest evidence linking him to" McCray's murder. *United States v. Lee*, 573

F.3d 155, 165 (3d Cir. 2009). Likewise, the court denied Bergrin's request to obtain records pertaining to a shooting in Irvington, New Jersey that Young testified provided his motivation for contacing the FBI regarding the McCray murder, A3016-18; A2806-07, and refused to order the government to provide Bergrin with discovery pertaining to Lachoy Walker, including statements that Walker made in an earlier case about Curry's drug dealing. A1315-22.

The trial court also denied Bergrin's motion to compel the Hudson County Prosecutor's Office to produce its file on criminal charges pending against Thomas Moran, A7216-19; A7362-64, though Moran later testified about that matter extensively. A7362-64. Absent the underlying records, Bergrin was prevented from establishing that Moran would be receiving a benefit in that case for his federal cooperation. Bergrin was similarly hampered in his cross-examination of drug case witness Rondre Kelly as a result of the trial court's refusal to order certain *Brady* and *Giglio* materials regarding Kelly's drug arrests in New York and Pennsylvania, or any other cooperation or testimony that Kelly provided; the trial court merely asked the government to see if those materials existed. A4471-83; A4592-95. But Bergrin never received them, and was unable to effectively impeach Kelly by showing the extent of Kelly's criminality or demonstrating that Kelly had never previously implicated Bergrin despite providing cooperation to various authorities. The court even curtailed Bergrin's cross-examination of Kelly

as to this issue, relying wholly on government representations about what Kelly had been asked in previous investigations, A4703-05, even though Kelly testified that his cooperation began sooner than the government represented, A4788.

Finally, the trial court denied the defense request for further information or investigation concerning the powerful fact that, as was discovered for the first time during trial, Vicente Esteves had verbal contact in prison with Alberto Castro, a former government witness in this case, about a protected government witness. A6643-47. Despite the obviously exculpatory nature of this development, the trial court precluded Bergrin from cross-examining Esteves to show that Esteves thus colluded to harm witnesses, without Bergrin's involvement. These erroneous rulings "interfer[ed] with the defendant's ability to prepare for trial and develop an intelligent defense strategy," *Lee*, 573 F.3d at 164, and denied Bergrin the opportunity to effectively challenge the government's case.

3. Erroneous Evidentiary Rulings Contributed to the Trial's Fundamental Unfairness

a. Standard of Review

This Court reviews a district court's decision to admit evidence for abuse of discretion. *United States v. Green*, 617 F.3d 233, 239 (3d Cir. 2010).

b. Argument

As noted, the record reveals that the trial judge fostered an anti-defendant attitude that permeated the trial. *See Persico*, 305 F.2d at 540; *Van Dyke*, 14 F.3d

at 418. Indeed, the court's contempt for the defendant was palpable, communicated not only through hostile interruptions, but also through tone, demeanor and facial expressions, particularly when addressing the defendant. *See, e.g.*, A7189-90; A2135, A2149; A2814; A3754; A4761; A6721, A6725-26; A7674; A6738-39; A6743-46. The trial court sustained withdrawn objections, A4973, mocked Bergrin's cross-examinations, A2105; A5805; A6376; A6377, and repeatedly commented that Bergrin was wrong, A6723-24; A7601; A9835; A5011-14. The court, moreover, disparaged private attorneys before the jury as "tight and cheap." A1372. The court thus abandoned its obligation, to "refrain from interjecting that perception into the trial," even when it believes that the "evidence provides the court with a negative impression of the defendant." *Ottaviano*, 738 F.3d at 595 (quoting *Godwin*, 272 F.3d at 678)). *See also Persico*, 305 F.2d at 537 (judge's "repeated recriminations and displays of temper towards defense counsel could not have helped but prejudice the jury."); *United States v. Eng*, 241 F.2d 157, 161 (2d Cir. 1957) ("the judge exhibited an attitude of impatience and annoyance ... an appellate court ... cannot disregard numerous remarks from the bench of a nature to belittle and humiliate counsel in the eyes of the jury").

This atmosphere was reflected in the court's rulings as well. The court's bias against Bergrin and unfair handling of the trial was particularly visible in its arbitrary and irrational admission of highly prejudicial evidence throughout trial.

See, e.g., A1740 (despite sealing order, Special Agent Snowden testified there were many more Curry wire tapes intercepted); A1772 (overruling defense objection to evidence that discovery from William Baskerville's federal drug case addressed to Bergrin was found at Rakim Baskerville's house); A2536-40 (allowing Special Agent Brokos to testify about irrelevant background of her Crip gang investigation, which unfairly tainted Bergrin as working with gang members); A4042 (permitting Special Agent Cline to read the contents of sealed Curry recording); A4247-55; A10205-07 (court threatened to allow testimony about Bergrin's sexual relations with women who worked at NY Confidential, including that he treated them roughly); A4301-05; A6115-18 (highlighting statement by defendant that when he sees "a cop got fuckin' killed or died in a car accident, I smile, man," which had been excluded on Rule 403 grounds, by instructing the jury to read everything except that sentence); A2263-73; A3032 (admitting inflammatory autopsy photographs of McCray over defense objection); A3157-58; A4256 (allowing hearsay statement that Bergrin was going to have Itzler's curfew extended); A6077-81; A6836-6840; A7060 (admitting entire package of state discovery in the Esteves drug case); A6315 (denying Bergrin's motion for a mistrial based upon unfairly prejudicial information volunteered by Oscar Cordova).

Perhaps the most egregious example of such conduct occurred with respect to a video of Carolyn Velez — first provided after trial began — recorded by local prosecutors following her testimony in her father's case. Initially, the government assured the defense that it would not seek admission of the hearsay video, A1714. The court thus precluded Bergrin from playing the video to confront Velez with prior inconsistent statements, instead permitting him only to play one short selection. A2083-84; A2125-26; A2138-40. The prosecution benefited from this ruling by asserting before the jury that Bergrin's cross-examination were "mischaracterizing the overall flow of the tape," A2127, A2133, and by suggesting that Bergrin was trying to hide evidence, A2138, A2152.

The court thereafter granted the government's motion to have the entire tape admitted on the basis of the rule of completeness. A2153-54. After the defense briefed the issue, A10203-04, the trial court reversed its ruling. A3004, A3007. Bergrin did not, therefore, rely on the tape during his summation. A9446-47. Yet, based upon a few isolated comments discussing Velez's video-taped statements, as to which she testified, in which Velez said that Bergrin was not involved in her false testimony, A9704-07, the trial court reversed its decision again, and allowed the government to play an inculpatory portion of the video, out of context. A9719; A9782-97; A9784, A9834. Significantly, that was the last thing the jury saw before deliberations, and the remaining portions of the video — including those

referenced by Bergrin during his cross-examination of Velez — were not admitted into evidence; Bergrin's request for a curative instruction was also denied. A9795-96; A10019. This series of rulings both limited Bergrin's presentation and left the jury with the impression that the video implicated him, resulting in unfair prejudice that surely tainted the verdict.

Likewise, the trial court admitted evidence of a prior adjournment that Bergrin had received in the Norberto Velez case for medical illness, even though the government failed to tie this evidence to the witness tampering allegations at issue. But since there was a delay in this very case as a result of Bergrin's bout with influenza, the trial court's ruling almost certainly discredited Bergrin in the jury's eyes as a lying malingerer. *See* A1555-57; A10214-20; A9443-45.

And, through Special Agent Brokos's testimony, which was littered with inadmissible hearsay bolstering Young's account, *e.g.*, A2625, A2627, A2629, A2631, A2653-55, A2710, A2949-56, the trial court allowed the government to introduce evidence that Curry and his associates were suspects in a separate murder of a witness, Derek Berrian, who was scheduled to testify against a client of Bergrin's. A2627-28; A2949; A2954, A3008-3010 (mistrial motion denied); A3095-86; A3097-3100. *See United States v. Murray*, 103 F.3d 310, 319 (3d Cir. 1997) ("evidence in a murder trial that the defendant committed another prior murder poses a high risk of unfair prejudice.").

Next, the trial court erroneously permitted prejudicial triple hearsay, over defense objection, when it admitted a letter asserting that Edward Peoples claimed that Bergrin told him to tell Anyea Williams to abscond after jury selection in Peoples' case. A5508-16, A5584-86; A10443-48. Since the government did not call Edward Peoples — who claimed the Fifth Amendment privilege against self-incrimination when Bergrin called him — Bergrin was unable to confront his accuser about the truth of that assertion. As noted above, Bergrin was particularly handicapped from fighting this accusation without transcripts of a hearing in which Peoples admitted that he never spoke to Bergrin about Williams' testimony.

Finally, the trial court should not have permitted the prosecution to infringe on Bergrin's right to a trial through its comment to Moran, before the jury, that, with respect to his decision to plead guilty in this case, "You decided to take responsibility for your actions." A7744. Likewise, Moran's response, when asked whether it would have helped Esteve's case to have a witness killed, that it "depends on whose perspective. From Paul's perspective, or from a normal person's perspective?" A7727, his comment that "[t]he 18 months I was with you [Bergrin] was quite a run. It was filled with conspiracies," A7628, and his remark that the evidence against him was "devastating, and I was guilty," A7743, should not have been allowed. *See United States v. Jackson*, 418 F.2d 786, 789 (6th Cir. 1969) (reversing where trial court should have ordered a mistrial as limiting

instruction could not cure unfair prejudice of inadmissible evidence); *United States v. Smith*, 403 F.2d 74, 77 (6th Cir. 1968) (same).

In sum, the trial court's attitude toward Bergrin not only affected his ability to challenge the government's case, and present his own, but also resulted in numerous evidentiary rulings that abused the court's discretion, which was consistently and unfairly exercised in a one-sided manner. Accordingly, Bergrin's convictions and the draconian sentences which followed, must be reversed and the case remanded for a new, fair trial.

III. THE DISTRICT COURT RELIED UPON FACTS LACKING A SUFFICIENT INDICIA OF RELIABILITY IN CALCULATING AND IMPOSING THE SENTENCE.

A. Standard of Review

This Court exercises plenary review as to whether the district court violated Bergrin's right to due process by relying on disputed facts without an appropriate hearing, *see United States v. Cifuentes*, 863 F.2d 1149, 1150 (3d Cir. 1988), and the interpretation of the Guidelines, *see United States v. Wood*, 526 F.3d 82, 85 (3d Cir. 2008).

B. Argument

At sentencing, Bergrin sought a hearing, pursuant to *United States v. Fatico*, 603 F.2d 1053 (2d Cir. 1979) and USSG § 6A1.3, to challenge certain facts set forth in the Presentence Report (PSR) and the government's submissions. A11239; A10049-68. Over Bergrin's multiple objections, the district court

adopted these facts wholesale, A10065-68, and relied upon them in imposing six concurrent terms of life imprisonment as well concurrent prison terms of 120 months, 240 months, and 60 months. A10161-65.

As set forth in Bergrin's Sentencing Memorandum, a life sentence, which was statutorily mandatory for Counts Three, Twelve, and Thirteen, *see* 18 U.S.C. §§ 1959(a)(1), 1512(k), and 1512(a)(1)(A), here violates the Eighth Amendment's ban on cruel and unusual punishment because it is grossly disproportionate to Bergrin's specific conduct with respect to the McCray murder, which is the basis for these life sentences.[25] A11263-68. Truly, there is a "gross imbalance between the crime" that Bergrin was found to have committed and a life sentence, *United States v. MacEwan*, 445 F.3d 237, 248 (3d Cir. 2006), given that Bergrin's alleged involvement in the conspiracy to murder McCray was limited to a few ambiguous comments about his client's case.[26] S*ee supra* at Section I.B; *see, e.g.*, *United States v. Edwards*, 945 F.2d 1387, 1392 (7th Cir. 1991) (remanding for resentencing where district court failed to give individual consideration to defendant's scope of involvement in the conspiracy).

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[25] *See United States v. Yousef*, 327 F.3d 56, 163 (2d Cir. 2003) (The Eighth Amendment forbids extreme sentences that are "grossly disproportionate" to the crime) (citing *Harmelin v. Michigan*, 501 U.S. 957, 1001 (1991) (Kennedy, J., concurring in part and concurring in the judgment).

[26] The trial court's imposition of a life sentence as to Counts One, Two, and Five, A1149, for which Bergrin was statutorily eligible, *see* 18 U.S.C. § 1962(c) & (d); 21 U.S.C. § 841(a)(1) & (b)(1)(A), is unconstitutional for the same reasons.

The trial court also erred, denying Bergrin his constitutional right to due process, and violating the Sentencing Guidelines, *see* USSG § 6A(1)(3), by refusing to hold a hearing to resolve disputed facts upon which it relied in determining that the appropriate Guideline Offense Level was 48, as calculated by the government, and not below Level 43, as Bergrin contended. *See* A11268-77; A11204-18; A10065-68; A10161-65. Specifically, the trial court was required to hold a hearing to enable Bergrin to substantiate his claims as to the limited nature and extent of his involvement in the offenses and to demonstrate that upward enhancements were not applicable for Bergrin's role as an organizer or leader, USSG §3B1.1(a)-(b),[27] for abuse of a position of trust or use of special skill, USSG §3B1.3, and for the offer or receipt of anything of pecuniary value for undertaking the murder, USSG § 2A1.5(b)(1).[28] A11268-77; A11204-18; A10162-63.

[27] For example, Bergrin disputed that any leadership/manager enhancements applied in the drug case, because he could demonstrate by questioning Yolanda Jauregui, Alejandro Barraza-Castro, Ramon Jimenez, and Jose Jimenez, none of whom testified at trial, that he did not, in fact, direct the drug trafficking enterprise's activities, but rather, was deliberately excluded from its operations. A11269.

[28] Likewise, since the jury found only that Bergrin conspired to distribute at least five kilograms of cocaine, the trial court was required to hold a hearing to establish whether the base offense level for the drug trafficking charges should be calculated using five kilograms, resulting in a base offense level of 32, USSG § 2D1.1(c)(4), as Bergrin argued, or 150 kilograms, resulting in a level of 38, § 2D1.1(c)(1), as the government contended. A11204-05; A11277. *See, e.g., United States v.*

Sentencing courts who resolve factual disputes without making independent and specific factual findings often violate Rule 32. *See United States v. Gricco*, 277 F.3d 339, 355 (3d Cir. 2002); *United States v. Martinez*, 83 F.3d 488, 494-95 (1st Cir. 1996); *United States v. Roberts*, 14 F.3d 502, 521 (10th Cir. 1993); *Fatico*, 603 F.2d at 1057 n. 9. *Cf. United States v. White*, 492 F.3d 380, 415 (6th Cir. 2007) (once defendant "calls the [disputed] matter to the court's attention, the court may not merely summarily adopt the factual findings in the [PSR] or simply declare that the facts are supported by a preponderance of the evidence"). The court, moreover, was required to hold a hearing as to the nature and extent of Bergrin's cooperation before it rejected the applicability of a downward departure on this basis. *See* A11277-80. *See Cifuentes*, 863 F.2d at 1155; *United States v. Walter*, 256 F.3d 891, 895 (9th Cir. 2001).

Instead, the trial court determined that an "evidentiary hearing is necessary only if written statements of counsel or affidavits of witnesses are inadequate to resolve a disputed issue that is important to the sentencing determination." A10066. Notwithstanding the disturbing contradictions between various witnesses' accounts to which Bergrin specifically pointed, the trial court determined that, given the pertinent trial testimony, there was no "reason to

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Quiroga-Cordova, No. 91-00201-01, 1992 U.S. Dist. LEXIS 12333, at *9 n.4 (E.D. Pa. August 14, 1992) (granting *Fatico* hearing to permit defendant to dispute drug amount).

'question the reliability of material facts […] having direct bearing on the sentence to be imposed.'" A10067 (quoting *Fatico*, 603 F.2d at 1057 n.9). Rather than provide Bergrin with a process to substantiate his claims, as was required, *see Gricco*, 277 F.3d at 355; *Walter*, 256 F.3d at 895; *Martinez*, 83 F.3d at 494; *Roberts*, 14 F.3d at 521; *Fatico*, 603 F.2d at 1057 n. 9; *Cifuentes*, 863 F.2d at 1155, the court summarily concluded that his assertions were "not supported by the evidence at trial or found otherwise by the jury or the Court." A10068. Because this holding contravenes Rule 32, USSG § 6A1.3, and the caselaw thereunder, this Court must vacate Bergrin's sentence and remand with instructions to hold a hearing regarding disputed facts.

CONCLUSION

For these reasons, this Court should reverse the denial of Bergrin's motion for a judgment of acquittal and vacate his conviction on Counts One, Three, Twelve, and Thirteen, and should order a new trial or sentencing proceeding as to the remaining counts.

Respectfully submitted,

s/ Lawrence S. Lustberg
Lawrence S. Lustberg, Esq.

GIBBONS P.C.
Attorneys for Appellant Paul Bergrin

Dated: May 30, 2014

CERTIFICATE OF COMPLIANCE

I, Lawrence S. Lustberg, Esquire, hereby certify that:

The attached brief exceeds the 14,000-word limit prescribed in Federal Rule of Appellate Procedure 32(a)(7) in that it contains 16,940 words, excluding those parts exempted by Federal Rule of Appellate Procedure 32(A)(7)(B)(iii). The attached brief complies, however, with this Court's February 10, 2014 Order permitting appellant to file a brief not exceeding 17,000 words.

The attached brief complies with the typeface and type style requirements of Federal Rules of Appellate Procedure 32(a)(5) and 32(a)(6) because this brief has been prepared using a proportionally spaced typeface, Times New Roman, using Microsoft Word with 14-point font. The text of the PDF copy of the attached brief is identical to the text in the paper copies, and a virus detection program, Sophos Endpoint Security and Control, version 9.5, has been run on the file, and no virus was detected.

s/ Lawerence S. Lustberg
Lawrence S. Lustberg, Esq.

Dated: May 30, 2014

CERTIFICATE OF BAR MEMBERSHIP

Lawrence S. Lustberg is a member in good standing of the Bar of United States Court of Appeals for the Third Circuit.

s/ Lawrence S. Lustberg
Lawrence S. Lustberg, Esq.

Dated: May 30, 2014

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on May 30, 2014, I caused the foregoing Brief to be electronically filed with the Clerk of the United States Court of Appeals for the Third Circuit through the Court's CM/ECF system, and to have paper copies delivered by sending seven paper copies of the Brief and four copies Appendix via FedEx.

I hereby certify that on May 30, 2014, I caused the foregoing Brief to be served upon the following counsel of record for Appellees through the Notice of Docketing Activity issued by this Court's CM/ECF system:

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Dated: May 30, 2014

IN THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Docket No. 13-3934

UNITED STATES OF AMERICA,

Appellee,

v.

PAUL BERGRIN,

Appellant.

On Appeal From: The United States District Court for the District of New Jersey
Sat Below: The Honorable Dennis M. Cavanaugh, United States District Judge

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JOINT APPENDIX
A1 - A29

Volume 1 of 12

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

UNITED STATES OF AMERICA, v. PAUL BERGRIN Defendant.	Criminal No. 09-369 (DMC) Filed Electronically **NOTICE OF APPEAL**

NOTICE IS HEREBY GIVEN that defendant Paul W. Bergrin, *pro se*, hereby appeals to the United States Court of Appeals for the Third Circuit, pursuant to 18 U.S.C. § 3742(a) and 28 U.S.C. § 1291, from the final judgment of conviction and sentence, and every part thereof, entered in the above-captioned matter by the United States District Court for the District of New Jersey (Honorable Dennis M. Cavanaugh, United States District Judge), on September 25, 2013. Standby counsel Gibbons P.C. (Lawrence S. Lustberg, Esq., and Amanda B. Protess, Esq.), who were appointed by the Court pursuant to the Criminal Justice Act, 18 U.S.C. §3006A, respectfully file this Notice of Appeal on defendant Bergrin's behalf, as directed by the District Court.

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September 25, 2013

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

UNITED STATES OF AMERICA,	:	**Hon. Dennis M. Cavanaugh**
v.	:	**OPINION**
PAUL W. BERGRIN	:	Crim. No. 09-369 (DMC)
Defendant.	:	

DENNIS M. CAVANAUGH, U.S.D.J.:

This matter comes before the Court upon the post-trial motions of Defendant Paul Bergrin ("Bergrin" or "Defendant") requesting that the Court: (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. (Def. Post-Trial Mot. Br. ("Def. Br."), May 16, 2013, ECF No. 555-1). After considering the submissions of the parties, and based upon the following, it is the finding of this Court that Defendant's post-trial motions are **denied**.

I. BACKGROUND[1]

On June 2, 2011, a federal grand jury in this District returned a thirty-three count Second Superseding Indictment ("Second Superseding Indictment") in this matter, thirty of the counts pertaining to Bergrin. The Indictment charges an array of criminal activity, ranging from conspiracy to murder a Government witness and witness tampering, to tax fraud and drug conspiracy. These varied charges were laid out by the Government schematically, under the umbrella of the Racketeering Influenced and Corrupt Organizations statute ("RICO"). As discussed herein, the Second Superseding Indictment alleges that Bergrin led "The Bergrin Law Enterprise" and committed the charged criminal acts in conjunction with the other members of his Enterprise.

On September 19, 2011, the Honorable William J. Martini, over objection by the Government, severed Counts Twelve and Thirteen and ordered those counts to be tried separately. On November 23, 2011, Judge Martini granted a mistrial after the jury failed to reach a unanimous decision. (ECF No. 338). Subsequently, on November 30, 2011, the Government appealed to an oral order by Judge Martini excluding from the retrial on Counts Twelve and Thirteen evidence supporting the Pozo and Esteves plots. (ECF No. 343). That same day, Bergrin moved for a judgment of acquittal under FED. R. CRIM. P. 29(c). (ECF No. 342). Judge Martini denied Bergrin's motion for acquittal. (ECF Nos. 373, 374).

On June 15, 2012, the Third Circuit vacated the order excluding evidence of the Pozo Plot, directed the reassignment of this matter, and instructed that the challenged evidentiary rulings and the severance issue be reconsidered by the newly assigned judge. See United States v. Bergrin,

1 The facts in this matter are lengthy and well-known to the parties. Contained herein is a brief synopsis of the procedural background taken from the parties' respective submissions.

682 F.3d 261 (3d Cir. 2012). Chief Judge Simandle reassigned the case to this Court. (ECF No. 377).

Pre-trial the Government moved to try Counts One through Twenty-Six in a single trial and to admit evidence of the Pozo Plot and Esteves Plot to prove the McCray murder charged in Counts Twelve and Thirteen. (ECF No. 381). Bergrin again moved to sever Counts Twelve and Thirteen and opposed admission of the aforementioned evidence. After oral arguments were heard on September 12, 2012, this Court denied Defendant's motion and granted the Government's motion. Jury selection for trial on twenty-three of the charges began on January 7, 2013. After the conclusion of trial, on March 18, 2013, the jury returned a unanimous verdict of guilty on all counts.

II. LEGAL STANDARD

When considering a motion for judgment of acquittal made pursuant to FED. R. CRIM. P. 29, a district court "must review the record in the light most favorable to the prosecution to determine whether any rational trier of fact could have found proof of guilt beyond a reasonable doubt based on the available evidence." United States v. Brodie, 403 F.3d 123, 133 (3d Cir. 2005) (internal citations omitted). "When sufficiency of the evidence at trial is challenged, the Court must affirm if a rational trier of fact could have found the defendant guilty beyond a reasonable doubt and if the verdict is supported by substantial evidence." United States v. Bobb, 471 F.3d 491, 494 (3d Cir. 2006). The prosecution is entitled to prove this "entirely through circumstantial evidence." Id. "A finding of insufficiency should be confined to cases where the prosecution's failure is clear." Brodie, 403 F.3d at 133 (internal citations omitted). "Therefore, '[a] defendant challenging the sufficiency of the evidence bears a heavy burden.'" United States

v. Delle Donna, Crim. No. 07-784, 2008 WL 3821774, at * 1–2 (D.N.J. Aug.12, 2008) (citing United States v. Casper, 956 F.2d 416, 421 (3d Cir. 1992)).

"[T]he trial court's ruling on the sufficiency of the evidence is governed by strict principles of deference to a jury's findings." United States v. Ashfield, 735 F.2d 101, 106 (3d Cir. 1984). This Court's "task is not to decide what [it] would conclude had [it] been the finder of fact; instead, [it is] limited to determining whether the conclusion chosen by the factfinders was permissible." Id. "Courts must be ever vigilant in the context of FED. R. CRIM. P. 29 not to usurp the role of the jury by weighing credibility and assigning weight to the evidence, or by substituting its judgment for that of the jury." Brodie, 403 F.3d at 133. This Court "must view the evidence in the light most favorable to the jury verdict and presume that the jury properly evaluated credibility of the witnesses, found the facts, and drew rational inferences." United States v. Iafelice, 978 F.2d 92, 94 (3d Cir.1992). "Indeed, 'all reasonable inferences must be drawn and all credibility issues resolved in the government's favor.'" Delle Donna, 2008 WL 3821774, at *2 (citing United States v. Scanzello, 832 F.2d 18, 21 (3d Cir. 1987)). "In assessing the sufficiency of the evidence, this Court must consider the totality of the circumstances, and must examine all of the evidence presented by the Government taken as a whole, and not consider pieces of the evidence in isolation." Delle Donna, 2008 WL 3821774, at *2 (internal citations omitted).

III. DISCUSSION

A. Motion for Judgment of Acquittal on Counts Twelve and Thirteen

Bergrin argues that, as a matter of law, there is insufficient evidence to support the jury's verdict on Counts Twelve and Thirteen, as well as the corresponding racketeering allegations charged in Counts One (Racketeering Act Four) and Three. (Def. Br. 16). Bergrin thus requests

that the Court enter a judgment of acquittal on those Counts pursuant to FED. R. CRIM. P. 29(c).

1. Sufficiency of Evidence to Sustain a Conviction for Count Twelve

Bergrin seeks a judgment of acquittal as to Count Twelve, charging him with conspiring with one or more persons to murder Kemo McCray ("McCray") to prevent McCray's testimony in an official proceeding, in violation of 18 U.S.C. § 1512(k). The jury was instructed with regard to Count Twelve that the Government was required to prove beyond a reasonable doubt:

> First, that two or more persons formed, reached, or entered into an unlawful agreement to murder Kemo McCray with the intent to prevent Mr. McCray's attendance or testimony at an official proceeding, and second, that at some time during the existence or life of that unlawful agreement, Defendant Bergrin knew that purpose of that agreement and intentionally joined it.

(Tr. 3/14/13 at 8883); accord Third Circuit Model Jury Instruction 6.18.371D. Bergrin avows that witness Anthony Young ("Young") provided the only testimony that connected Bergrin to the charged conspiracy to murder McCray. (Def. Br. 22). Young's testimony in part, included information about two conversations between Bergrin and Hakeem Curry ("Curry") on the afternoon of William Baskerville's ("Baskerville") arrest and one later in which Bergrin allegedly advised Curry, Young, Jamal Baskerville, Jamal McNeil, and Rakeem Baskerville (collectively "the Curry organization") that William Baskerville was facing life in prison and uttered the infamous phrase "No Kemo, no case." (Def. Br. 22). The defense argues, that even if this testimony is credited, no evidence exists that Bergrin knew the purpose of the agreement and intentionally joined it. (Def. Br. 22).

The Government points to the rejection of these starkly similar arguments in the preceding trial on this matter, wherein Judge Martini recognized "that the Government presented sufficient evidence from which a rational trier of fact could find Bergrin guilty of

conspiring to murder McCray" and "of aiding and abetting the murder of McCray beyond a reasonable doubt." United States v. Bergrin, Crim No. 09-369, 2012 WL 458426, at *5-6 (D.N.J. Feb. 10, 2012). The Government contends that Bergrin's assertion that no rational juror could conclude that he knew about and intentionally joined the conspiracy misstates the law and evidence. (Gov't Opp'n Br. 23). This Court agrees.

The Government was required to adduce legally sufficient evidence of: (1) an unlawful agreement to murder McCray to prevent his testimony at an official proceeding, and (2) Bergrin's knowledge of and intent to join that agreement to further its unlawful purpose. See United States v. Mastrangelo, 172 F.3d 288, 292 (3d Cir. 1999) (citation omitted). It is recognized that "illegal agreements are rarely, if ever, reduced to writing or verbalized with the precision that is characteristic of a written contract." United States v. McKee, 506 F.3d 225, 228 (3d Cir. 2007). In fact, "the very nature of the crime of conspiracy is such that it often may be established only by indirect and circumstantial evidence." United States v. Brodie, 403 F.3d 123, 133-34 (3d Cir. 2005).

The law recognizes, and Bergrin does not dispute, that circumstantial evidence suffices to prove the elements of a conspiracy. See United States v. Gibbs, 190 F.3d 188, 197 (3d Cir. 1999). Bergrin acknowledges "the Curry [O]rganization's conspiracy to murder McCray." (Def. Br. 22). Further, the jury was presented with evidence that, on November 25, 2003, Bergrin, Hakeem Curry, William Baskerville, Rakeem Baskerville, and Anthony Young were involved in a conspiracy to distribute narcotics and that violent acts were undertaken in furtherance of that objective. (See, e.g., Tr. 1/22/13 at 185-223; Tr. 1/24/13 at 698-720, 725-59; Tr. 1/30/13 at 1519-52; Tr. 2/2/13 at 2215-31, 2061-73).

On that date, at William Baskerville's initial appearance after arrest on narcotics charges, Bergrin learned the identity of the informant against Baskerville and relayed the name "Kamo" to Hakeem Curry. Young, who was with Curry at the time of the call, realized Bergrin was referring to Kemo McCray. (Tr. 1/30/13 at 1573-75; Tr. 1/31/13 at 1886-87). Young testified that, after a December 4, 2003 bail hearing Bergrin attended with Baskerville, it was determined Baskerville faced a statutory sentencing exposure of ten years to life and an imposed Guideline range of 360 months to life. (Tr. 1/30/13 at 1576-77; Gov't Exh. 2218). Shortly thereafter, according to Young's testimony, Bergrin went to Avon Avenue and 17th Street to speak with members of the Curry organization, specifically Curry, Young, Rakeem Baskerville, Jamal Baskerville, and Jamal McNeil ("Avon Avenue Meeting"). (Tr. 2/1/13 at 2249-50). Testimony elicited from Young showed that Bergrin told the group that Baskerville "was facing life in prison for that little bit of cocaine" and "if no Kemo, no case." (Tr. 2/1/13 at 2252-53). The Court finds that Young's testimony alone allowed a rational jury to conclude that an illegal agreement to murder McCray was formed on November 25, 2003 between Baskerville and Bergrin, and that on December 4, Bergrin joined with members of the Curry organization to further the objectives of that agreement. Additional evidence reinforces a finding that the jury's inference in that regard was rational; for example, Vincente Esteves testified that when Bergrin was discussing the implications of Junior the Panamanian's potential testimony, Bergrin stated "if there's no witness, there's no case," and promised to "handle everything and that it wasn't his first time." (Tr. 2/22/13 at 5825-26). Esteves testified that he interpreted that exchange to mean that Bergrin was going to have Junior the Panamanian

killed and had arranged for the murder of witnesses in prior instances. (Tr. 2/22/13 at 5825-26).[2]

Taken as a whole, and viewed in the light most favorable to the Government, the foregoing evidence establishes that a jury could have rationally inferred that Bergrin knowingly and intentionally entered into a conspiracy to murder McCray to prevent his testimony at an official proceeding.[3] "[A] written or spoken agreement among alleged co-conspirators is unnecessary; rather, indirect evidence of [a] mere tacit understanding will suffice." United States v. Barr, 963 F.2d 641, 650 (3d Cir. 1992). There was sufficient evidence to permit a rational juror to conclude that Bergrin knowingly and intentionally participated in the conspiracy charged in Count Twelve.

2. Sufficiency of Evidence to Sustain a Conviction for Count Thirteen

Count Thirteen of the Second Superseding Indictment charges Bergrin with aiding and abetting the murder of McCray to prevent McCray's testimony in an official proceeding, in violation of 18 U.S.C. § 1512(a)(1)(A), (a)(3)(A) and Section 2. (Second Superseding Indictment

[2] Testimony from Abdul Williams and Thomas Moran also bolsters this contention.

[3] In a series of letters filed after the parties' pleadings, the respective sides dispute the significance and content of two phone calls made on December 4, 2003. (Gov't Letter, Jul. 1, 2013, ECF No. 560; Def. Letter, Jul. 3, 2013, ECF No. 561; Second Gov't Letter, Jul. 10, 2013, ECF No. 563; Def. Supp. Br., Jul. 15, 2013). In his July 3, 2013 letter, Bergrin disputes that a rational jury could infer that the meeting about which Anthony Young testified occurred sometime after the December 4 bail hearing. Bergrin later states that the Government "wrongfully asserts that they never suggested in their summation that the 7:13 p.m. phone call on December 4, 2003, was offered to show that the meetings occurred on that date" when in fact the Government "ardently argued and suggested to the jury, that December 4, 2003, was the date of the Bergrin meeting." (Def. Supp. Br. 5). Bergrin asserts that "the substance of the [December 4] calls themselves negates Young's account (which is, of course, the sole evidence of Mr. Bergrin's involvement in the Kemo McCray murder) . . . ." (Def. July 3 Letter at 2). The Government asserts, that, were the content of the aforementioned calls as exculpatory as Bergrin claimed, he would have sought to use them at trial. (Gov't July 10 Letter at 2). The Court finds merit in this assertion and is not persuaded by Bergrin's countervailing argument that he opted not to use the recordings during trial because he "was intimidated by the Government attempting to deceive the jury, as they did anyway." (Def. Supp. Br. 5). The Court recognizes that, had Bergrin selected a sampling of the 33,000 intercepted calls, he would have exposed himself to admission of others. Bergrin may not now, post-trial, seek the benefits of suppressible calls that he claims may be exculpatory while avoiding the content of many others that may have promoted a countervailing viewpoint.

at 97, ECF No. 213).

Pursuant to 18 U.S.C. § 2(a), a person who "commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal." 18 U.S.C. § 2(a). As the jury was instructed, to find Bergrin guilty, the Government was required to prove the following four elements beyond a reasonable doubt:

> First that someone committed each of the elements of the murder offense . . . ;
>
> Second, that Mr. Bergrin knew that someone was committing or was going to commit murder of Kemo McCray to prevent him from testifying at an official proceeding;
>
> Third, that Mr. Bergrin knowingly did some act for the purpose of aiding, assisting, soliciting, facilitating, or encouraging another in committing that murder and with the intent that the murder be carried out;
>
> And, fourth, that Mr. Bergrin's acts did, in some way, aid, assist, facilitate, encourage, someone in murdering Kemo McCray;

(Tr. 3/14/13 at 8886-87); accord Third Circuit Model Criminal Jury Instruction 7.02.

Bergrin argues at the conclusion of the Government's case, it was clear that the second and fourth elements were not satisfied as a matter of law. (Def. Br. 34). Bergrin argues that Young's testimony did not support the assertion that the conspiracy participants discussed the scheme to murder McCray during the Avon Avenue Meeting with Bergrin, and instead that conversation occurred subsequent to Bergrin's departure. (See Def. Br. 34 (citing Tr. 2/1/13 at 2254-55)). Bergrin contends that there was no evidence that William Baskerville communicated to Bergrin that he wanted McCray killed. (See Def. Br. 34). Furthermore, Bergrin argues that, even if the jury was to deduce from Young's account of the Avon Avenue Meeting that Bergrin had knowledge of the Curry organization's scheme, the fourth element cannot be met because no evidence at trial demonstrated that Bergrin's acts did in fact assist or aid in the murder of McCray.

(Def. Br. 38 (citing United States v. Nolan, 718 F.2d 589, 592 (3d Cir. 1983)). Bergrin opines that the Government's case connecting Bergrin to the murder of McCray amounted to two pieces of evidence, alone insufficient: (1) that Bergrin identified the informant as Kemo and; (2) told the group at Avon Avenue Meeting that William Baskerville was facing life for four hand-to-hand drug sales. (See Tr. 3/13/13 at 8472-73, 8478).

Conversely, the Government argues that the evidence amply demonstrates "some affirmative participation" by Bergrin "which, at least, encourage[d] the principal offender to commit the offense." (Gov't Opp'n Br. 36) (citing United States v. Mercado, 610 F.3d 841, 846 (3d Cir. 2010)). The Government asserts that the evidence demonstrated that Bergrin relayed Kemo's name as the informant on November 25 in furtherance of the plot to murder McCray, and informed the members of the Curry organization at the December 4 Avon Avenue Meeting that if McCray were to testify against Baskerville, Baskerville would likely spend life in prison. (Gov't Opp'n Br. 37).

The jury was instructed that "facilitation" for aiding and abetting purposes is "more than associat[ion] with individuals involved in the criminal venture." See United States v. Soto, 539 F.3d 191, 194 (3d Cir. 2008) (quoting United States v. Dixon, 658 F.2d 181, 189 (3d Cir. 1981)). However, "it is not essential that the accessory know the modus operandi of the principal." Russell v. United States, 222 F.2d 197, 199 (5th Cir. 1955). Here, the Court determines that after evidence was presented and credited by the jury that Bergrin advised the members of the Curry organization that McCray's murder was necessary to secure the release of Baskerville, Bergrin cannot assert that he was unaware of the particularities of the mode and method of the murder itself to warrant acquittal. The Court finds that evidence produced, viewed in the light most favorable

to the Government, supports a finding that Bergrin's participation rose above the level of "mere association" with criminals, and the Bergrin's representation of and association with members of a known drug organization made it rational for the jury to infer that Bergrin was aware of the consequences of advising members of the Curry organization that an informant's absence would avoid a lengthy prison sentence for a key member of the organization. See United States v. Echeverri, 982 F.2d 675, 678 (1st Cir. 1993) ("A defendant's 'mere presence' argument will fail in situations where the 'mere' is lacking"); United States v. Bergrin, Crim No. 09-369, 2012 WL 458426, at *5 (D.N.J. Feb. 10, 2012) ("the Government presented evidence suggesting that McCray's murder was far from *fait accompli* and further suggesting that Bergrin's acts actually aided in the murder"). Even if Bergrin's argument that McCray's murder was a foregone conclusion after the November 25 conversation was credited, Bergrin would still incur accomplice liability for his actions on December 4. As Judge Martini previously concluded, "[i]t was only after Bergrin provided this additional information—and made statements which Young interpreted as encouraging the murder to happen—that Young and other members of the Curry organization finally decided to commit the crime." Bergrin, 2012 WL 458426, at *5. In sum, upon consideration of the record, the Government produced ample evidence to support a jury finding that Bergrin aided and abetted in McCray's murder. Based on the foregoing, Bergrin's motions for judgment of acquittal as to Counts Twelve and Thirteen are denied.[4]

[4] Bergrin argues the same analysis that is applicable to his motion for acquittal of Counts Twelve and Thirteen applies to Racketeering Act Four of Count One and Count Three. (Def. Br. 30). Bergrin asserts that, were the Court to enter a judgment of acquittal as to Count Twelve and Thirteen, then the corresponding Rackeering Act Four may not stand. As detailed above, this Court does not find judgment of acquittal appropriate for Counts Twelve and Thirteen and under the same reasoning, Bergrin's motion for judgment of acquittal as to Racketeering Act Four and Count Three are also denied.

B. Motion for Acquittal on Count Twenty-Six

Bergrin next moves for a judgment of acquittal on Count Twenty-Six and on Racketeering Act Eight of Count One. To support a conviction on Count Twenty-Six, the Government was required to prove four elements beyond a reasonable doubt:

> One that on or about September 4, 2008, in the County of Essex, in the District of New Jersey and elsewhere, Defendant Paul Bergrin was engaged in a trade or business, that is, the Law Office of Paul Bergrin.
>
> Two, that Defendant Bergrin had knowledge of the currency transaction report requirements.
>
> Three, that in the course of that trade or business, and with such knowledge, Defendant Bergrin knowingly caused or attempted to cause the trade or business to fail to file a Form 8300 with the Government within 15 days of a currency transaction wherein he received more than $10,000 in cash; and
>
> Four, the purpose of the transaction was to evade the transaction reporting requirements in section 5331 of Title 31.

(Tr. 3/14/13 at 8928-8929).

Bergrin argues that after the completion of the Government's case, no evidence exists from which the jury could find beyond a reasonable doubt that 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). Bergrin asserts that, as section 5331 expressly governs only cash transactions, one must deal in cash for the purpose of evading the reporting requirement; simply having knowledge that an individual is obligated to file a Form 8300 and not doing so is insufficient to incur liability. (Def. Br. 44). The Government, in turn, argues that there was ample evidence, though circumstantial, to prove beyond a reasonable doubt that when Bergrin received $20,000 from Oscar Cordova and subsequently failed to file a Form 8300, he intended to evade the

reporting requirement set forth in 31 U.S.C. § 5331. (Gov't Opp'n Br. 42).

Although intent to evade the reporting requirement is a necessary element of the offense, specific intent "can rarely be proven by direct evidence, since it is a state of mind; it is usually established by drawing reasonable inferences from the available facts." United States v. Starnes, 583 F.3d 196, 213 (3d Cir. 2009) (quoting United States v. Bank of New Eng., N.A., 821 F.2d 844, 854 (1st Cir. 1987)). This Court finds that the Government met its burden as to Count Twenty-Six by offering the following at trial: (1) Bergrin was aware of the reporting obligation, evidenced by his belated filing of a Form 8300 for a previous transaction (Tr. 2/27/13 at 6732-33; Gov't Exhs. 373, 550)[5]; (2) Bergrin did not file a Form 8300 reporting the $20,000 he received from Cordova. (Tr. 2/27/13 at 6738). Furthermore, the Government presented evidence that Bergrin had a motive to avoid law enforcement scrutiny of the $20,000 received from Cordova, including: that Bergrin believed Cordova was a gang member and narcotics dealer; the $20,000 was transmitted as shrink-wrapped cash contained in a black duffel bag; and Bergrin received the same sum on a previous instance in an identical manner from Richard Pozo, a narcotics dealer. (See, e.g., Tr. 2/19/13 at 4851, 4853, 4864-67; Tr. 2/20/13 at 5024-25; Tr. 2/21/13 at 5296-97; Gov't Exh. 4123b2).

Despite the Government's contention that the question for the jury was why Bergrin failed to file Form 8300, not why Bergrin conducted the transaction with Cordova, the jury was instructed to determine whether "the purpose of the transaction: in which

[5] The $20,000 in cash that was the subject of that transaction was supposedly received from Carmen Dente Sr., for a retainer fee. The Government offered evidence that it in fact was supplied by cooperating witness Shelton Leverett (Tr. 3/4/13 at 7363-70) and seized during the 2007 search of Bergrin's law office. (Tr. 2/7/13 at 3431-32, 3437-42; Tr. 3/4/13 at 7537-38). The Government argued that Bergrin's misuse of an untimely filed Form 8300 form speaks to Bergrin's intent in failing to file a form for the cash from Cordova one year later.

Bergrin received the $20,000 was to evade Internal Revenue Service reporting requirements. (Tr. 3/14/13 at 8929). However, even under that standard, the jury could have reasonably inferred that, if Bergrin had the specific intent to evade the reporting requirement when he failed to file Form 8300 fifteen days after the transaction (as required by law), he possessed the same intent on the day he received the $20,000 from Cordova.

This Court finds that evidence presented at trial allowed a jury to infer that, at the time he received the $20,000 from Cordova, Bergrin feared filing a Form 8300 because reporting the sum would constitute an admission of engaging in a transaction involving proceeds of a criminal offense (i.e. narcotics trafficking) or would trigger law enforcement attention that would negatively impact ongoing criminal activity or connect Bergrin with Cordova. See generally United States v. MacPherson, 424 F.3d 183, 192-93 (2nd Cir. 2005) (noting the jury can infer specific intent from repeated violations of the reporting requirement and rejecting the suggestion that the cash at issue has to be derived from criminal activity to support a finding of specific intent).

In sum, the evidence produced sufficiently showed that Bergrin acted with specific intent to evade the reporting requirement when he failed to file a Form 8300 for the $20,000 he received from Cordova. Therefore, Bergrin's motions for judgment of acquittal as to Count Twenty-Six and Racketeering Act Eight of Count One are denied.

C. Request for a New Trial Pursuant to FED. R. CRIM. P. 33

Bergrin asserts this Court should grant a new trial based on its denial of judicial immunity for the testimony of Jamal McNeil and Jamal Baskerville. Federal Rule of Criminal Procedure 33 provides, in relevant part, that the Court "may vacate any judgment

and grant a new trial if the interest of justice so requires." FED. R. CRIM. P. 33. If the motion for a new trial is based on errors alleged during the course of trial, the defendant bears the burden of showing that an error was committed and that such an error was prejudicial. United States v. D'Amario, No. 06-112, 2007 U.S. Dist LEXIS 21638, at *34 (D.N.J. March 26, 2007). Bergrin argues that this Court abused its discretion when it declined to confer immunity on Jamal McNeil and Jamal Baskerville, two defense witnesses who indicated they would invoke their Fifth Amendment rights if called to testify.

The Attorney General is given statutory authority to grant immunity to witnesses in order to obtain their testimony at trial. See 18 U.S.C. § 6003(b); Kastigar v. United States, 406 U.S. 441, 446 (1972). Despite the authority to immunize witnesses being within the Attorney General's purview, the Third Circuit in Government of Virgin Islands v. Smith allows for two narrow circumstances in which a court may immunize a defense witness: (1) where government actions denying use of immunity to defense witnesses were undertaken with the "deliberate intention of distorting the judicial fact finding process," and (2) where a witness' testimony is "essential to an effective defense." 615 F.2d 964, 968 (3d Cir. 1980). Bergrin asserts that the testimony of Jamal McNeil and Jamal Baskerville were essential to his defense and this Court's refusal to extend them judicial immunity necessitates a new trial. As both parties note, the Third Circuit alone recognizes the courts authority to extend immunity. The Circuit sat en banc "to reconsider the 'effective defense theory of judicial immunity' doctrine first established by the Court in [Smith]." United States v. Quinn, No. 11-1733 (3d Cir. July 10, 2012).

Even assuming Smith's continued vitality, there is a strong tradition of deference to

prosecutorial discretion and grants of judicial immunity "must be bounded by special safeguards and must be made subject to special conditions." Smith, 615 F.2d at 971. A District Court has the discretion to grant judicial immunity for a witness asserted as "essential to an effective defense" if five prerequisites are met: 1) immunity must be properly sought in the district court; 2) the defense witness must be available to testify; 3) the proffered testimony must be clearly exculpatory; 4) the testimony must be essential; and 5) there must be no strong governmental interests which countervail against a grant of immunity. Smith, 615 F.2d at 971. Bergrin has not sufficiently demonstrated the testimony which would be forthcoming is both clearly exculpatory and essential to his case. It is proper for the Court to deny such a motion "if the proffered testimony is found to be ambiguous, not clearly exculpatory, cumulative or if it is found to relate only to the credibility of the government's witnesses." Id. at 973. Further, "[i]t is important that a reviewing court evaluate the trial court's decision from its perspective when it had to rule and indulge in review by hindsight." Old Chief v. United States, 519 U.S. 172, 182 n.6 (1997).

Bearing in mind this standard, Bergrin has not demonstrated that a grant of new trial is appropriate. During trial, Bergrin's stand-by counsel made an oral application for judicial immunity for McNeil, submitting a written, yet unsworn, proffer as to what the defense anticipated McNeil would testify. (See Tr. 3/6/13 at 7838). The defense orally cited to Government of Virgin Islands v. Smith as offering legal support for its contention that this Court should issue immunity for McNeil's testimony, but did not offer a detailed argument for fulfillment of the five Smith factors. (See Tr. 3/6/13 at 7840) (citing 615 F.2d 964). During the subsequent lunch

break, the Government emailed the Court a written summary of Smith and its progeny. Following a conversation with McNeil's counsel and consideration of the issue, the Court denied defense counsel's oral application for judicial immunity for McNeil. (See Tr. 3/6/13 at 7853-55).

This Court is not convinced that McNeil's proffered testimony that there was no Avon Avenue Meeting where Bergrin uttered the phrase "no Kemo, no case" would have compelled the jury to acquit. Independent of that potential testimony, undisputed evidence demonstrated Bergrin relayed McCray's name to Curry on November 25, 2003 and such evidence could reasonably be construed as indicative of Bergrin's intent to notify the Curry organization of the negative import of McCray's potential testimony. See Bergrin, 682 F.3d at 280 ("Pozo's testimony is, therefore, powerfully suggestive of Bergrin's intent in passing Kemo's indemnity on from Baskerville to Curry."). Furthermore, it is not clear that McNeil would have testified consistently with the information contained in the proffer. Firstly, the proffer was unsworn and secondly, other defense witnesses fell short of providing testimony stated in the corresponding proffers. Based on the foregoing, this Court finds that Bergrin has failed to meet his burden in demonstrating proffered testimony of McNeil was "essential to an effective defense" or "clearly exculpatory."

Furthermore, this Court finds that there were "strong governmental interests which countervail[ed] against a grant of immunity." McNeil was one of the individuals Anthony Young testified was present at the Avon Avenue Meeting in which Bergrin instructed the Curry organization that without McCray, the case against Baskerville would not survive. McNeil was also one of the two individuals chosen to execute McCray's murder and was

part of the three-car caravan that traveled to South Orange Avenue and 17th Street. (Tr. 2/1/13 at 2250-56). This Court agrees that the Government has a compelling interest in objecting to McNeil falsely exculpating Bergrin for a murder conspiracy in which Bergrin participated. See United States v. Lowell, 649 F.2d 950, 961 (3d Cir. 1981) (recognizing need to prevent conspirators from "whitewashing" each other); accord United States v. Turkish, 623 F.2d 769, 775-776 (2d Cir. 1980) ("The threat of a perjury conviction, with penalties frequently far below substantive offenses, could not be relied on to prevent such tactics."). Furthermore, it is clear that the Government may elect to prosecute McNeil for his involvement in McCray's murder at a later date.

Bergrin next argues this Court erred in not immunizing Jamal Baskerville. However, there is no record of a formal application or denial of immunity for Jamal Baskerville. He was called as a witness during the first trial in this matter and invoked his right against self-incrimination, a sequence of events both parties expected to be repeated. After the request for immunity for McNeil was resolved, stand-by counsel submitted that Bergrin "would have a similar application for Jamal Baskerville," but that "we don't have to deal with it now because he's not here[.]" (Tr. 3/6/13 at 7856). The issue thus did not ripen as, when discussing a list of remaining defense witnesses, stand-by counsel for Bergrin acknowledged that Baskerville would invoke his Fifth Amendment rights. (Tr. at 3/7/13 at 8227). When the Court responded "[s]o he's out" in reference to Jamal Baskerville's potential testimony, Bergrin did not seek immunity for Baskerville under Smith. (Tr. at 3/7/13 at 8227). Bergrin's failure to seek such immunity thus resulted in a waiver of his Smith-based claim in regards to Jamal Baskerville. See United States v.

Wright, 588 F.2d 31, 36 (2d Cir. 1978) ("Because Wright failed to subpoena Parker and to prove any need for use immunity, he cannot now demonstrate that the refusal to confer immunity prejudiced his trial."); see also United States v. Klaubner, 611 F.2d 512, 514 (4th Cir. 1979) ("Since Klauber did not call Simons to the stand, the contention that he would have asserted his Fifth Amendment right and refused to testify without a grant of immunity from the government is not established as we believe it normally would be required to be for the question Klauber raises to be preserved."). Bergrin asserts that his failure to seek a ruling particularized to Baskerville was based on his belief that this Court had "so clearly indicated its intention to deny all such applications." (Def. Br. 53 n. 5). That, however, is not the case; this Court expressly conditioned its ruling on judicial immunity as to the proposed witnesses for whom such immunity was requested.

D. Request for a Poll of the Jury

Bergrin requests that this Court, pursuant to FED. R. EVID. 606(b) and Local Criminal Rule 24.1(g), inquire of the jurors whether they were exposed to extraneous information or outside influence prior to the rendering of their verdict. (Def. Br. 58). Bergrin points to the relative speed of the jury's resolution of this matter, claiming that "the jury reached its verdict so quickly on Monday, after giving every indication the preceding week that its deliberations were unhurried and that it was in the process of considering just two of the charges." (Def. Br. 58). Bergrin also speculated as to the reasoning behind the jury's request for "exhibits (audio) of conversations between Paul Bergrin and Hakeem Curry" on the date of William Baskerville's arrest, testimony from Anthony Young on February 4, 2013, Eric Dock's prison log, and whether there were "particular times" jurors

could be directed to in the recorded conversation between Hassan Miller and Anthony Young at the Hudson County Jail and what those requests meant in terms of the stage to which juror deliberations had progressed. (See Def. Br. Exh 1, 2; Tr. 2/4/13 at 2434-2448, 2456-2459, 2467-2484).[6]

On Sunday, March 17, 2013, the *New York Daily News* published an article referring to Bergrin as "cold-blooded" and "John Gotti with a law degree—a ruthless racketeer every bit as dirty as his lowlife clients." (See Def. Br. 47, Exh. 6). The article also featured several photos, including one of Bergrin in a suit and tie and one of John Gotti dressed similarly. (See Def. Br. 47, Exh. 6). Bergrin asserts that, because the jury returned a verdict the day after the article's release, the jurors may have been exposed to prejudicial information. (See Def. Br. 59).

Federal Rule of Evidence 606(b) provides in pertinent part:

> During an inquiry into the validity of the verdict . . . [a] juror may testify about whether (A) extraneous prejudicial information was improperly brought to the jury's attention; (B) an outside influence was improperly brought to bear on any juror, or (C) a mistake was made in entering the verdict onto the verdict form.

FED. R. EVID. 606(b). Pursuant to Rule 606(b), the Court has the discretion to question jurors to ascertain whether they encountered any extraneous prejudicial information or any outside influence during the course of their deliberations. See Wilson v. Vermont Castings, Inc., 170 F.3d 391, 394, 395 n. 5 (3d Cir. 1999) (recognizing district courts' discretion to investigate alleged juror misconduct and extraneous information).

This Court gave clear, detailed jury instructions, providing the jurors with an

[6] The jury was told that it would receive Young's testimony, but for the remaining items, was informed they were either not in evidence or the jury would need to rely on their own recollection from trial.

understanding of their various limitations during the course of trial. These instructions were given initially and repeated daily. A copy of the jury's instructions to avoid all outside information and news sources was also stationed in the jury room. There is no indication that the members of the jury did not abide by these instructions. This Court rejects the idea that, merely because the juror deliberations were not lengthy, a lack of fair consideration may be assumed. Instead, this could be demonstrative of the jurors' determination that each and every count was amply supported by the evidence.

The *Star-Ledger* article featuring statements taken from an interview of Juror Number Five after the verdict is not compelling evidence of bias or of influence by prejudicial information. The Court and parties expended significant time and effort pre-screening potential jurors. Each was extensively questioned as to whether they had previous knowledge of this matter and, if so, of what nature. Subsequently, each potential juror was asked during the selection process whether they were able to be fair and impartial and took an oath to that effect once empaneled. The jury was instructed on a consistent, daily basis that jurors were forbidden to review news articles on the case. The Court will not retroactively question this juror, based on a speculative request from the defense made post-verdict.

IV. CONCLUSION

For the foregoing reasons, Bergrin's post-trial motions are denied.

s/DENNIS M. CAVANAUGH
Dennis M. Cavanaugh, U.S.D.J.

Date: July 23, 2013
Original: Clerk's Office
cc: All Counsel of Record
File

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

UNITED STATES OF AMERICA,	:	**Hon. Dennis M. Cavanaugh**
v.	:	**ORDER**
PAUL W. BERGRIN	:	Crim. No. 09-369 (DMC)
Defendant.	:	

DENNIS M. CAVANAUGH, U.S.D.J.:

This matter comes before the Court upon the post-trial motions of Defendant Paul Bergrin ("Bergrin" or "Defendant") requesting that the Court: (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. (Def. Post-Trial Mot. Br., May 16, 2013, ECF No. 555-1). Upon careful consideration of the submissions of the parties,

IT IS this 23rd day of July, 2013;

ORDERED that Defendant's post-trial motions are **denied**.

s/DENNIS M. CAVANAUGH
Dennis M. Cavanaugh, U.S.D.J.

Original: Clerk's Office
cc: All Counsel of Record

AO 245B (Mod. D/NJ 12/06) Sheet 1 - Judgment in a Criminal Case

UNITED STATES DISTRICT COURT
District of New Jersey

UNITED STATES OF AMERICA

v. Case Number 2:9cr369-1

PAUL BERGRIN

Defendant.

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

The defendant, PAUL BERGRIN, was represented by himself and Lawrence Lustberg & Amanda Protess, Esq, as stand by counsel.

The defendant was found guilty on count(s) 1ss-5ss, 8ss-10ss, 12ss-26ss by a jury verdict on 18 March 2013 after a plea of not guilty. Accordingly, the court has adjudicated that the defendant is guilty of the following offense(s):

Title & Section	Nature of Offense	Date of Offense	Count Number(s)
18:1962(c)	Racketeering	11/2001 to 5/21/2009	1ss
21:846	Conspiracy to Distribute Controlled Substance(Cocaine)	11/2001 to 5/21/2009	2ss,5ss
18:1959(a)(1)(a)(5) & 2	Violent Crime in Aid of Racketeering, Activity, Murder/Kidnaping	11/2003 to 3/2/2004 & 6/2008 to 4/2009	3ss, 4ss
21:856(a)(2)(a)(1) & 18:2	Controlled Substance-Manufacture, Maintaining Drug involved Premises	1/2003 to 5/21/2009	8ss, 9ss, 10ss
18:1512(k)	Tampering with Witness, Victim, or an Informant, Conspiracy to Murder a Witness	11/25/2003 to 3/2/2004	12ss
18:1512(a)(1)(A)(a)(3)(A) & 2	Tamper with Witness, Victim, Informant(if Death Results) Murder of a witness	11/25/2003 to 3/2/2004	13ss
18:371	Conspiracy to Defraud the United States–Travel in aid of Prostitution Business	7/24/2004 to 3/2/2005	14ss
18:1952(a)(3) & 2	Racketeering Transporting in aid of Prostitution Business	12/10/2004 to 1/12/2005	15ss, 16ss
18:371	Conspiracy to Defraud United States Conspiracy to travel in aid of Drug Trafficking and bribery	6/21/2007 to 7/1/2007	17ss
18:1952(a)(3) & 2	Racketeering Transporting in aid of Travel in Aid of Drug Trafficking and Bribery	6/21/2007 to 7/1/2007	18ss, 19ss
18:371	Conspiracy to Defraud the United States, Conspiracy to Travel in Aid of Drug Trafficking Business	6/2008 to 4/2009	20ss

18:1952(a)(2) & 2	Racketeering - Transporting in Aid of Travel in Aid of Drug Trafficking Business	7/7/2008 to 12/8/2008	21ss, 22ss, 23ss, 24ss & 25ss
31:5324(b) and 18:2	Structuring Transactions to Evade Reporting Requirements	9/4/2008	26ss

As pronounced on 23 September 2013, the defendant is sentenced as provided in pages 2 through 6 of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is ordered that the defendant shall pay to the United States a special assessment of $2,300.00, for count(s) 1ss-5ss, 8ss-10ss,12ss-26ss (23 counts), which shall be due immediately. Said special assessment shall be made payable to the Clerk, U.S. District Court.

It is further ordered that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this Judgment are fully paid. If ordered to pay restitution, the defendant shall notify the court and United States Attorney of any material change in the defendant's economic circumstances.

Signed this the 23 day of September, 2013.

DENNIS M. CAVANAUGH
United States District Judge

11232

Defendant: PAUL BERGRIN
Case Number: 2:9cr369-1

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for the remainder of his natural life as follows:
Counts 1ss, 2ss, 3ss, 5ss, 12ss, & 13ss Life Imprisonment on each count to run concurrently to each other,
Count 4ss 120 months to run concurrently with all counts,
Counts 8ss, 9ss, 10ss, 21ss, 22ss, 23ss, 24ss, 25ss 240 months on each to run concurrently to each other and all other counts,
Counts 14ss,15ss,16ss,17ss,18ss,19ss, 20ss, & 26ss 60 months on each to run concurrently to each other and all other counts.

The Court makes the following recommendations to the Bureau of Prisons: facility close to his family to the extent of defendants characterization whatever that level may be as determined by the BOP.

The defendant shall remain in custody pending service of sentence.

RETURN

I have executed this Judgment as follows:

_____
_____
_____
_____

Defendant delivered on _____ To _____
At _____, with a certified copy of this Judgment.

_____
United States Marshal

By _____
Deputy Marshal

Defendant: PAUL BERGRIN
Case Number: 2:9cr369-1

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be placed on supervised release for a term of 5 years consisting of 3 years on counts 1ss,2ss,4ss, 8-10ss, 14-26ss and 5 years on count 5ss, all such terms to run concurrently.

Within 72 hours of release from custody of the Bureau of Prisons, the defendant shall report in person to the Probation Office in the district to which the defendant is released.

While on supervised release, the defendant shall comply with the standard conditions that have been adopted by this court as set forth below.

Based on information presented, the defendant is excused from the mandatory drug testing provision, however, may be requested to submit to drug testing during the period of supervision if the probation officer determines a risk of substance abuse.

If this judgment imposes a fine, special assessment, costs, or restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine, assessments, costs, and restitution that remains unpaid at the commencement of the term of supervised release and shall comply with the following special conditions:

While on supervised release, the defendant shall not commit another federal, state, or local crime, shall be prohibited from possessing a firearm or other dangerous device, shall not possess an illegal controlled substance and shall comply with the other standard conditions that have been adopted by this Court. Based on information presented, the defendant is excused from the mandatory drug testing provision; however, the defendant may be requested to submit to drug testing during the period of supervision if the probation officer determines a risk of substance abuse.

In addition, the defendant shall comply with the following special conditions:

Defendant: PAUL BERGRIN
Case Number: 2:9cr369-1

STANDARD CONDITIONS OF SUPERVISED RELEASE

While the defendant is on supervised release pursuant to this Judgment:

1) The defendant shall not commit another federal, state, or local crime during the term of supervision.

2) The defendant shall not illegally possess a controlled substance.

3) If convicted of a felony offense, the defendant shall not possess a firearm or destructive device.

4) The defendant shall not leave the judicial district without the permission of the court or probation officer.

5) The defendant shall report to the probation officer in a manner and frequency directed by the Court or probation officer.

6) The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer.

7) The defendant shall support his or her dependents and meet other family responsibilities.

8) The defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons.

9) The defendant shall notify the probation officer within seventy-two hours of any change in residence or employment.

10) The defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute or administer any narcotic or other controlled substance, or any paraphernalia related to such substances.

11) The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered.

12) The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer.

13) The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer.

14) The defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer.

15) The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court.

16) As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

(17) You shall cooperate in the collection of DNA as directed by the Probation Officer.

(This standard condition would apply when the current offense or a prior federal offense is either a felony, any offense under Chapter 109A of Title 18 (i.e., §§ 2241-2248, any crime of violence [as defined in 18 U.S.C. § 16], any attempt or conspiracy to commit the above, an offense under the Uniform Code of Military Justice for which a sentence of confinement of more than one year may be imposed, or any other offense under the Uniform Code that is comparable to a qualifying federal offense);

(18) Upon request, you shall provide the U.S. Probation Office with full disclosure of your financial records, including co-mingled income, expenses, assets and liabilities, to include yearly income tax returns. With the exception of the financial accounts reported and noted within the presentence report, you are prohibited from maintaining and/or opening any additional individual and/or joint checking, savings, or other financial accounts, for either personal or business purposes, without the knowledge

Defendant: PAUL BERGRIN
Case Number: 2:9cr369-1

and approval of the U.S. Probation Office. You shall cooperate with the Probation Officer in the investigation of your financial dealings and shall provide truthful monthly statements of your income. You shall cooperate in the signing of any necessary authorization to release information forms permitting the U.S. Probation Office access to your financial information and records;

(19) As directed by the U.S. Probation Office, you shall participate in and complete any educational, vocational, cognitive or any other enrichment program offered by the U.S. Probation Office or any outside agency or establishment while under supervision;

(20) You shall not operate any motor vehicle without a valid driver's license issued by the State of New Jersey, or in the state in which you are supervised. You shall comply with all motor vehicle laws and ordinances and must report all motor vehicle infractions (including any court appearances) within 72 hours to the U.S. Probation Office;

For Official Use Only - - - U.S. Probation Office

Upon a finding of a violation of probation or supervised release, I understand that the Court may (1) revoke supervision or (2) extend the term of supervision and/or modify the conditions of supervision.

These conditions have been read to me. I fully understand the conditions, and have been provided a copy of them.

You shall carry out all rules, in addition to the above, as prescribed by the Chief U.S. Probation Officer, or any of his associate Probation Officers.

(Signed) _____
Defendant Date

_____
U.S. Probation Officer/Designated Witness Date

No. 13-3934

IN THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

UNITED STATES OF AMERICA

v.

PAUL W. BERGRIN,

Appellant

Appeal from the Final Judgment in a Criminal Case of the United States District Court for the District of New Jersey (Crim. No. 09-369).
Sat Below: Honorable Dennis M. Cavanaugh, U.S.D.J.

BRIEF FOR APPELLEE

PAUL J. FISHMAN
United States Attorney
Attorney for Appellee
970 Broad Street
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On the Brief:

STEVEN G. SANDERS
Assistant U.S. Attorney
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TABLE OF ABBREVIATIONS

"A"	refers to the Appendix filed by Defendant.
"SA"	refers to the Supplemental Appendix filed by the United States.
"DB"	refers to Defendant's Brief.
"D.E."	refers to the District Court's docket entries. (Pin cites are to the page number in the ECF legend at the top of that pleading.)

STATEMENT OF THE ISSUES

I. Was there sufficient evidence to prove that Defendant conspired to murder, and aided and abetted the murder of, a federal witness?

II. Did the District Court plainly err by enforcing Federal Rule of Evidence 611(a) to prevent Defendant from misleading the jury?

III. A. Is life imprisonment for murdering a federal witness "cruel and unusual" punishment?

B. Did the District Court abuse its discretion when it found the trial record sufficiently reliable to resolve contested Guidelines enhancements, which are immaterial given Defendant's three mandatory life sentences?

STATEMENT OF RELATED CASES

See Defendant's Statement. DB2-3; see also A11116.

STATEMENT OF THE CASE

This appeal follows a 35-day racketeering trial in which the Government called 52 witnesses and introduced approximately 1,000 exhibits, including numerous recordings. Although the trial transcript spans some 9,000 pages, Defendant Paul Bergrin summarizes only the indictment. DB3-4. No wonder: the evidence overwhelmingly proved Bergrin's guilt and fatally undermines his scattershot claims on appeal.

I. THE FACTS.

A. The RICO Enterprise.

Bergrin became a defense lawyer in the early 1990s after stints as a state and federal prosecutor. A3312, A7795, A8330-34, A8797. Initially, Bergrin was a partner in Pope, Bergrin, and Verdesco. In 2004, Bergrin formed the Law Office of Paul Bergrin. He also controlled Premium Realty Investments Corporation ("Premium Realty") and Isabella's Restaurant ("Isabella's"), which was located at 710 Summer Avenue in Newark. A8330-34, A8561-62, A8566, A8581-82, A8597-601. Bergrin committed crimes through these entities with lawyer Thomas Moran, cocaine supplier Alejandro Castro, his girlfriend Yolanda Jauregui, and various "paralegals," including Ramon Jimenez, James Cortopassi, and Abdul Williams. A4316-22, A4382, A4536, A4782-83, A5134-36, A5155-59, A5175-76, A7305-11, A8124, A8333-34, A8589-93.

B. The RICO Pattern.

Moran practiced with Bergrin from September 2007 until May 2009. A7664. He gained unique insight into Bergrin's approach to defending clients:

> Many of the times in these cases, there will be a witness . . . who gives a statement against the particular defendant that [Bergrin is] representing. In discussing the cases with these individuals, he would ask them . . . ["]is there somebody, one of your affiliates . . . that could get to this person and make sure they don't come to court by either threatening them, by physical force, by intimidation, forcing them to either not to come to court or to give a statement recanting their former statement[."]

A7320; see A7312-22, A7373-81. Bergrin employed that approach in several cases, and committed a series of other crimes.

1. Carolyn Velez Tampering.

In 2001, Marilu Bruno and Norberto Velez were going through a bitter divorce. A1415-19, A1443, A1932-33, A2040-41. On November 19th, Bruno drove her nine-year-old daughter Carolyn[1] to school. On the way, she stopped at Norberto's house, stayed in the car while Carolyn retrieved her backpack, and then continued to school. A1423-26, A1455, A1936-38, A1947, A2094-95. As Carolyn went inside, Norberto got into Bruno's car. He said "this is over" and stabbed Bruno with a kitchen knife, puncturing her lung, cutting her chin, and causing defensive wounds to her wrists. A1429-33, A1684-90, A1695, A1706-10, A1946.

Norberto hired Bergrin after being charged with attempted murder. A1530-33. Bergrin pursued a defense of both insanity and self-defense, A1537, premised on the false claim that Bruno had taken the knife from Noberto's house and attacked Norberto. Bergrin told Carolyn that "this was a case where . . . you couldn't tell the truth, where you had to lie." A1950-62; see A2155. Bergrin, Jauregui, and Norberto then drilled the lie into Carolyn that her mother was physically abusive and had gone into the house and taken the knife before the stabbing. A1950-64. To coax Carolyn's cooperation, Bergrin plied her with toys, candy, and an autographed picture of Queen Latifah, one of his clients. A1991-95, A2111-12.

[1] Because Norberto's daughter, Carolyn, testified at trial, the Government refers to them by their first names to avoid confusion. The Government adopts this convention throughout.

Before trial, Bergrin listed Carolyn as a defense witness. A1544, A1549-50. But when detectives interviewed her in April 2003, Carolyn told the truth—"f-ed up" according to Bergrin. A1550-52, A1628-29, A1999-2003, A2136. Now desperate to delay the trial, Bergrin sought an adjournment and took an emergent appeal when his request was denied. Ultimately, he secured a continuance only by claiming, falsely, that he was too ill to proceed. A1558-61, A1646-47.

By the time trial began, A1647, the judge had denied the prosecutor's Rule 404(b) motion and granted Norberto's suppression motion, based partly on perjured testimony that Bergrin adduced from Carolyn. A1507-11, A1537, A1545-48, A1555-56, A1623-25, A1634, A1644, A1964-67, A1979-82. Called as a prosecution witness, Carolyn falsely testified that her mother had retrieved the knife from Norberto's house on the morning of the stabbing. A1561-62, A1622-23, A1638, A2005-28. When confronted with her inconsistent April 2003 statements, A1562-63, Carolyn blamed her mother for it, just as Bergrin had instructed, A2003-04. Norberto was acquitted of all charges. A1563, A2031, A2101.

2. McCray Murder.

William Baskerville belonged to a drug-trafficking organization headed by Hakeem Curry ("Curry Organization"). SA305. Bergrin was the Curry Organization's "house counsel," *i.e.,* the lawyer Curry retained for underlings to make sure they did not cooperate. A1207-29, A1234-50, A1727-71, A1781-88, A3091-94, A3101-03, A3141, A3157, A3244-51, A3259, A3332-33, A5126-33, A7393-94, A10978-99.

On November 25, 2003, the FBI arrested William for selling crack-cocaine to a confidential witness. A2530-89, A2854-55. William was interested in cooperating until he spoke with Bergrin. A2594-96, A2869. While awaiting his initial federal court appearance, William correctly determined from the dates and amounts in the complaint that the confidential witness was Kemo McCray, and he so advised Bergrin. A3087-88, A3130-31, A3172-74, A3187, A3215-16, A7393. Bergrin then telephoned Curry and said that "K-Mo" was the informant. Curry Organization member Anthony Young, who was with Curry during the call, realized that Bergrin was referring to "Kemo." A3272-73, A3756; see A2601, A3215-16, A3225, A4030-34, A7393, A8609-14; SA566, SA572. On December 4th, William was denied bail because he had been indicted on a conspiracy charge carrying a mandatory life sentence. A2605-07.

The Curry Organization dealt harshly with informants. A1232, A1252, A2628, A2949, A3151-52. But it had not decided to kill McCray because no one knew how much time William actually faced. That changed when Bergrin drove to Jamal's house sometime after Thanksgiving. A3278-80, A3513, A3568, A3576, A3623. Bergrin told the group assembled there, including Young, that Baskerville "was facing life in prison for that little bit of cocaine" and "if Kemo testify against Will, Will was never coming home. He said . . . don't let Mr. McCray . . . testify against Will, and if he don't testify, he'll make sure he gets Will out of jail." Bergrin emphasized, "if no Kemo, no case." A3282, A3513. Before he left, Bergin reiterated, "remember what I said: No Kemo,

no case," making a hand gesture that resembled a gun. A3283; see A3783-87. After Bergrin left, the group discussed how to find and kill McCray. A3283-84.

On March 2, 2004, McCray was spotted renovating a house. A2434-39, A2483, A3344-46, A3356-57. Shortly before 2:00 p.m., McCray and his step-father went for lunch. A2439-41, A2488-90, A3361-64, A3836. As they returned, Young fatally shot McCray three times in the head and neck, and got into a car driven by Rakim. A3367-80, A3864-65; see A2260-79, A2444-58, A2490-96, A3031-62. That night, Young and Rakim had the murder weapon melted at an auto body shop. A3387-99, A3970-81.

3. Pozo Proposal.

Between 1994 and 2004, Richard Pozo and his partner, Pedro Ramos, ran a lucrative cocaine-distribution network. A4054-57. On February 13, 2004, the DEA arrested Pozo in New Jersey on charges leveled in Texas. Pozo hired as attorneys Bergrin and Peter Willis. A4082-83.

Pozo was detained in the Passaic County Jail while awaiting transfer to Texas. During an unmonitored attorney-client visit, SA547, Bergrin asked Pozo, "Do you know where Pedro Ramos lives?," adding, "because if you know where he lives, we can take him out, and all this headache will go away." Pozo responded, "Are you nuts? . . . I'm not involved in murdering people," and changed the subject. Pozo hired a new lawyer after he was transferred to Texas. A4083-87.

4. Prostitution Business.

In 2004, Jason Itzler operated New York Confidential ("Confidential"), a high-end escort service. A4190-99, A4283, A4301-03, A4337 Itzler was on parole in New Jersey and was allowed to leave his apartment only between 12:00 p.m. and 4:00 p.m. Itzler hired Bergrin to loosen those restrictions. A4202-04, A4266-67, A4325-27, A4399-402, A4417, A4427-31. Bergrin knew Confidential was a brothel. SA647.

On September 14, 2004, Bergrin faxed a letter to the Parole Board falsely claiming that he had hired Itzler as a paralegal to work on a large case and that Itzler could work on it only between 5:00 p.m. and 1:00 a.m. A4432-34; SA428. Although that sufficed to modify Itzler's curfew, A4438, the parole officer demanded proof that he was being paid, A4434-35. Bergrin faxed the officer a copy of a $2,000 check, drawn on Premium Realty, for "legal services." A4434-45; see A4329-31, A4436-37; SA430-31. But Itzler performed no legal work, spent all of his time at Confidential, and never deposited the Premium Realty check. A4267-68, A4293, A8601-03.

On December 10, 2004, Bergrin faxed another letter to the Parole Board, claiming that Itzler would be working for his firm's New York office and seeking to have his supervision transferred to New York City. A4333-36, A4442; SA437. Parole officials denied that request. A4441-42. James Cortopassi, Bergrin's paralegal for seven years, knew of no New York office and never saw Itzler perform paralegal work. A4329, A4335-36, A4379.

Itzler was arrested on January 7, 2005. A8604. Soon after, Bergrin went to New York and explained to the remaining Confidential employees that he would operate Confidential. Bergrin installed Hiram Ortiz as a supervisor to ensure that no one stole money. A4344-46, A7401-02. Bergrin received envelopes containing cash, complained that they were short, and blamed Ortiz. A4348-49, A4371; see also A8604-07.

In May 2009, Bergrin pleaded guilty in New York to conspiring to promote prostitution between July 27, 2004 and January 11, 2005, and between January 12 and March 2, 2005. A4184; SA646.[2]

5. Cocaine Trafficking.

Beginning in 2002, Bergrin distributed and/or brokered the distribution of kilograms of cocaine. E.g. A1237 (Curry obtained his "connect" from Bergrin).

a. Rondre Kelly.

Former Bergrin client Rondre Kelly sold heroin and cocaine. A4485-93, A4500-09. In 2003, Bergrin proposed that Kelly launder drug proceeds by buying a house from Premium Realty. Title defects prevented Kelly from reselling the house, A4507-22, A5015-29, forcing him to spend $16,750 clearing title, A4525-28, A4792-806. Rather than repay Kelly, Bergrin sold him cocaine, A4528-33, A4475, using law firm employee Ramon Jimenez as a courier, A4432-42, A4730-31.

[2] Before his guilty plea, Bergrin was so concerned that Cortopassi would testify against him that he wanted to murder him and paid a former Confidential escort to provide false testimony to damage Cortopassi's credibility. A7402-06.

Eventually, Bergrin directed Kelly to Jauregui's house on Little Street in Belleville. A4603-05. When Kelly arrived, he called Bergrin and said he was outside. Moments later, Jauregui and Castro came out and gave three kilograms of cocaine and a phone number to Kelly. From then on, Kelly dealt primarily with Jauregui and Castro, speaking to Bergrin about pricing issues when necessary. In all, Kelly purchased over 100 kilograms of cocaine from Bergrin, Jauregui, and Castro. A4605-12, A4620-28, A4653-55, A4769.

In November 2005 (after Bergrin had referred Kelly to Jauregui and Castro), the DEA began intercepting Jauregui's calls. A3422-23. Kelly and Jauregui spoke in code about "cars" (cocaine) and "paper" (money). A4032-37, A4644-66, A4829-33, A4874-81, A10449-53, A10456-58, A10463-73, A10474-79, A10525, A11057-63. The calls confirmed that Bergrin had acted as a broker. A5010-11. On December 31st, DEA agents watched as Bergrin and Jauregui met with two Hispanic males to discuss getting Castro released on bail after he (and Norberto) were arrested for taking delivery of 20 kilograms of cocaine. A4893-907. Later that day, Jauregui was outraged when Bergrin told "the Mexicans" that he did not trust Kelly, given that Bergrin had introduced Kelly to them to buy "cars." A10541; accord A4898-4901, A10526-37.

b. Abdul Williams.

Curry Organization associate Abdul Williams was in prison when Curry and others were arrested and charged in March 2004. A5126-34. After his release, Williams told Bergrin that he was making money selling cocaine. Bergrin suggested that

Williams talk with Jimenez, one of Bergrin's "paralegals." Williams bought cocaine from Jimenez on two occasions. A5135-43.

In late 2005, Williams received six months in a halfway house for a parole violation. In July 2006, Williams was permitted to leave because Bergrin had hired him as a "paralegal," although he performed no paralegal work. A5144-45, A5155-60, A5525, A5544-46. Just after his release, Williams received an unsolicited call from Shelton Leverett about purchasing cocaine. A5144-55, A10926-32. Bergrin had given Leverett Williams's number, effectively telling him that Williams could supply him with cocaine. A8417-34, A10901-25. Leverett was cooperating with the FBI and recorded his conversations with Bergrin. A2725-39, A8415-16.

In late 2006, Bergrin told Williams, "I'm going to introduce you to the strongest connect you ever met in your life." They drove to Isabella's, where Bergrin told Castro, "This is my guy. . . . This is who's going to be coming for me." Castro approved. A5165-70. Bergrin instructed Williams to pick up cocaine from Castro and deliver it to customers and take money from customers and return it to Castro. A5170-74. One week later, at Bergrin's direction, Williams met with Castro and received a preprogrammed cell phone and a duffle bag that Williams successfully delivered to the customer. The next day Bergrin paid Williams. There were up to 30 such deliveries and payments by July 2007, including one instance in which Bergrin himself gave Williams the duffle bag containing cocaine. A5170-208.

On July 8, 2007, Newark police officers arrested Williams for possessing a handgun. A5525-26. After he made bail, Williams schemed to pay his friend, Jamal Muhammad, to "take the weight" (*i.e.*, falsely accept responsibility) for the weapon and informed Bergrin of his plan. A5208-16, A5479-80. Eventually, Williams was arrested on a parole violation and detained in the Essex County Jail, where he made a series of telephone calls, some to Bergrin, to further his plan. A5118-20, A5227-46, A5481-86, A10933-77, A11000-25.

Muhammad gave Bergrin's investigator a statement falsely claiming that the weapon was his. He was later arrested after falsely confessing to a Newark police officer. A5247; SA512-14, SA537-42. Bergrin told the Parole Board that Muhammad's statements exonerated Williams, and the Board agreed. A5248-89, A5330-41, A5477-79, A5541-42; SA505, SA521. After that, it was "business as usual" until Bergrin's arrest in May 2009. All told, Williams delivered hundreds of kilograms of cocaine for Bergrin. A5249-50.

c. Eugene Braswell.

Former Bergrin client Eugene Braswell was a New Jersey corrections officer who also distributed cocaine. Braswell lost his cocaine supplier when Bergrin mishandled a legal matter for the supplier's associate. When Braswell complained, Bergrin introduced Braswell to Jimenez. Braswell purchased several kilograms from Jimenez, but ultimately found a new supplier in Florida. A8104-32. The Florida connection dried up after Braswell was involved in a shooting. A8132-42.

Braswell eventually found a Texas supplier. In 2008, two of Braswell's couriers were arrested. To ensure they did not cooperate, Braswell retained Bergrin for one, and Moran for the other. Eventually, Braswell was arrested and, later, released on bail. A8140-60. Knowing that Braswell had lost his supplier, Bergrin introduced Braswell to Castro as someone who had an unlimited supply of high-quality cocaine at reasonable prices. Castro drove Braswell to 710 Summer Avenue and led him to an apartment over Isabella's, where Braswell examined Castro's cocaine. A8161-74.

When Braswell told Bergrin that he was uncomfortable dealing with Castro, Bergrin agreed to sell Braswell cocaine directly. Braswell bought cocaine from Bergrin on four occasions (13 kilograms in total), twice at his 50 Park Place office, and twice outside a hotel room in the same office complex. Braswell was arrested in July 2009 when he attempted to resell some of the cocaine to a DEA agent. A8174-201.

d. The 53-Kilogram Seizure.

On May 21, 2009, DEA agents executed a search warrant at 710 Summer Avenue, A8483-93, which Bergrin owned, A8599-600; SA306. In the basement, they discovered 53 kilograms of cocaine. A8499-500; SA574, SA641. In an upstairs apartment, they recovered $29,000 in cash, Bergrin's business cards, and utility bills in Bergrin's name. A8502-07. Bergrin had previously told Moran that Castro was paying him $2500 per month to "offload" cocaine at 710 Summer Avenue. A7485-87.

6. Peoples Tampering.

In 2006, Edward Peoples shot Rahman Jenkins to death in Baxter Terrace in Newark. A5556-58, A5734-35, A7383. Peoples retained Bergrin. A7383, A7409. Bergrin joked that Peoples (nicknamed "Fat Boy" due to his weight) had murdered Jenkins in front of several witnesses. Bergrin nonetheless had former client Rasheem King, a gang member, coerce Baxter Terrace resident Marvin McCloud into testifying (falsely) that a thinner person shot Jenkins. A5594-96, A7383-89.

Meanwhile, Peoples recruited fellow inmate Gregory Smith as a defense witness. A5733-43. Bergrin told Smith to follow Peoples' instructions and offered free legal assistance to Smith if he testified falsely for Peoples. A5743-49. Peoples gave Smith a handwritten "script" and a diagram of Baxter Terrace so that Smith would know what to say. A5574-75, A5752-56; SA421-22.

Bergrin also advised Peoples to have his girlfriend Anyea Williams, a critical prosecution witness, show up for the first day of trial (leading the prosecutor to believe she would testify) and then flee (forcing the prosecutor to proceed without her testimony), stressing that Williams should not use her cell phone, which could be used to locate her. A5581-87, A7389-90; SA416-17. Although Williams fled just before trial, she was located and brought back to Newark to testify. A5590-91, A7390-91. Smith also testified for the State, A5766-67, and Peoples was convicted, A5596.

7. Esteves Plot.

Vicente Esteves was a cocaine trafficker in New Jersey. A6786-98, A7407-08. On May 29, 2008, Esteves and his wife, Chantal, were arrested, along with four of Esteves's associates. A6809, A7787-88, A7955-56. Esteves retained Bergrin, and Chantal retained Moran. Bergrin also selected attorneys for some codefendants to ensure that none cooperated. A6809-13, A6852-53, A7408-09.

In a series of unmonitored jail visits, Bergrin worked with Esteves to identify and kill any informants, eventually concluding that "Junior the Panamanian," Carlos Noyola, and Miguel Tineo had cooperated. A6821-23, A6829-47, A7418-19. Bergrin tried to get Esteves released on bail by having his accountant prepare tax returns falsely claiming that Esteves had legitimately earned his money through Diamond Builders, a real estate company Esteves used to launder his drug proceeds. A6805-08, A6847-51, A7413-18; SA351-412. Esteves also transferred to a corporation controlled by Bergrin three properties in an effort to hide them from the prosecution. A7062-67, A7440-45; SA310-31. In return for Bergrin securing Esteves's release, Esteves promised to introduce Bergrin to a Colombian supplier who would sell Bergrin kilograms of cocaine at cheap prices. A7071-81.

At some point, Esteves learned that Junior had been spotted in New Jersey. When Esteves told Bergrin he would take care of Junior, Bergrin told Esteves not to worry, said he would handle everything, remarked that "it wasn't his first time," and

added that "if there's no witness, there's no case." Esteves understood this to mean that Bergrin would kill Junior and had killed witnesses before. A6853-56.

This plot was captured in a series of conversations secretly recorded by Oscar Cordova, a Latin King from Chicago. Cordova contacted the DEA and agreed to cooperate when he realized that Esteves wanted him to murder witnesses. A5879-97, A6824-29, A7791-94; SA552, SA557-60. Cordova flew to New Jersey and promised to help fund Esteves's defense during a July 8th meeting, and pretended to be a hit man thereafter. A5916-22, A7061-62. Cordova recorded virtually all of his meetings and calls between July 10 and December 9th. A5902-07, A6201-04, A7798-807.

On July 10th, Bergrin said that this "one motherf*cker," *i.e.*, Junior, "blows the whole investigation for us." And when Cordova asked, "What do you think I should do, kill [Noyola]?," Bergrin responded, "Yeah." A10617-20; see A5924-28.

In August 2008, Bergrin told Cordova that he had bought two cell phones so that Cordova and Esteves could speak without fear of law enforcement scrutiny. A10712. Moran smuggled one phone to Esteves in jail and gave the other one to Cordova. Cordova and Esteves spoke that same day, and Esteves gave Cordova his blessing to murder the witnesses, instructing Cordova to obtain discovery material from Bergrin. A6043-49, A6857-60, A7435-37, A7816-17, A7896, A10726-35.

On September 4th, Cordova handed Bergrin a bag containing $20,000 in cash (wrapped in a manner commonly employed by narcotics traffickers) for Esteves's case. A10739; see A6051-54, A7903-06; SA562-65. Bergrin did not file an IRS Form

8300 for this transaction, SA426-27, even though he had filed one in an unrelated case, SA333-34, SA424-35; see A7761-69.[3]

In late November 2008, Bergrin showed Cordova a discovery document he had studied for six hours, SA335, said he had "clear evidence these guys [Noyola and Tineo] are cooperating," and described Noyola as "a major f*cking rat," A11051-55; see A6070-85, A7745-53. Later that day, Moran arranged for Cordova to obtain a copy of the document. A10593-94, A11027-30; see A6090-92, A7753.

On December 8th, Cordova told Moran that he had located Junior and needed a gun. A10796-809, A10815-19; see A6097-107, A7455-56, A7914-15. At Bergrin's birthday dinner later that evening, Cordova told Bergrin that he had located Junior and asked, "Is it [killing Junior] gonna help our case?" Bergrin responded:

> It's gonna help it. They'll never figure it out. . . . [P]ut on a ski mask, and we'll f*ckin' rob him cause there's got to be a lot of money in the house. . . . [W]e gotta make it look like a robbery. It cannot under any circumstances look like a hit. . . . I'm not worried about the money but we have to make it look like a home invasion robbery.

A10850-51; see A6122-25, A7463-64.

The recordings also proved that Bergrin expected Esteves to introduce him to one of his cocaine suppliers. E.g., A10627-32 (discussing wholesale price Esteves quoted); A10648-50 (explaining that Esteves's supplier would not do business with anyone else but that Esteves had promised that they would make millions selling

[3] A business that receives more than $10,000 in cash must file an IRS Form 8300 disclosing the source of the case and purpose of the transaction. A7760.

cocaine after his release); A10727-28 (Esteves promises to introduce Cordova to meet his supplier); A10855-61 (Bergrin offers to distribute the cocaine); accord SA553-54.

II. PROCEDURAL HISTORY.

This case has a lengthy procedural history. This Court previously reversed an order dismissing RICO counts for failure to state an offense. U.S. v. Bergrin, 650 F.3d 257 (3d Cir. 2011). After a November 2011 mistrial on just two counts, D.E.338, this Court vacated an evidentiary ruling and ordered this matter reassigned, U.S. v. Bergrin, 682 F.3d 261 (3d Cir. 2012). Below, the Government describes the operative indictment and the procedural history following this Court's July 2012 mandate.

A. The Second Superseding Indictment.

A 33-count Second Superseding Indictment charged Bergrin with racketeering and related offenses. A98. Count 1 charged Bergrin, under 18 U.S.C. § 1962(c), with conducting the affairs of an association-in-fact enterprise through a pattern of six racketeering acts: (1) cocaine trafficking; (2) the McCray murder; (3) operating a prostitution business; (4) bribing a witness in Williams's gun-possession case; (5) conspiring to murder witnesses in Esteves's drug case; and (6) failing to file an IRS Form 8300. A98-143. Count 1 also alleged the Velez Tampering, Pozo Proposal, and Peoples Tampering. A103-05, A110-11, A119-20.

Count 2 charged Bergrin, under 18 U.S.C. § 1962(d), with RICO conspiracy. A144-69. Counts 3–4 charged Bergrin, under 18 U.S.C. § 1959(a), with violent crimes in aid of racketeering for, respectively, the McCray Murder and Esteves Plot. A170-

75. Counts 5–26 charged substantive counts that paralleled the crimes alleged in Count 1's six racketeering acts. A176-227; see SA171 (illustrative chart). Counts 27–33 charged tax offenses that were severed, SA72, and ultimately dismissed, D.E.581.

B. Pretrial Motions.

On August 6, 2012, the Honorable Dennis M. Cavanaugh, U.S.D.J., issued a briefing schedule for motions and set trial for October 1st. SA1-25. In connection with its pretrial motions, the Government gave Judge Cavanaugh the entire 2011 trial transcript, see D.E.381 at 12, and described Bergrin's improper tactics as a *pro se* litigant, D.E.381 at 43-63; D.E.389; see SA73-88. For example, in his 2011 opening statement, Bergrin claimed that RICO charges leveled in 2009 were retribution for his representation of soldiers accused of torture in 2004. Judge Martini found the theory so baseless that he barred Bergrin from mentioning it. SA1181-84.

On September 18, 2012, Judge Cavanaugh ordered a trial on Counts 1–26. SA54-89. After learning that he faced an imminent RICO trial, Bergrin disclosed that he expected to undergo elective surgery to repair a hernia that had bothered him since late 2011, SA90-95, prompting an adjournment until January 7, 2013, D.E.391.

C. The Trial.

An anonymous jury was sworn on January 9, 2013, A993, but opening statements were delayed until January 22nd because Bergrin had influenza, SA132-39. The Government rested on March 5, 2013, and the District Court reserved decision on Bergrin's Rule 29(a) motion. A8743. Bergrin called 17 witnesses during his defense

case. After hearing summations and legal instructions, the jury retired to deliberate on March 14th. A9970. On March 18th, the jury found Bergrin guilty on all counts, including all six racketeering acts charged in Count 1. A10034-42; see D.E.537.

D. Post-Trial Motions

On May 16, 2013, Bergrin filed a counseled motion for a judgment of acquittal and/or for a new trial. D.E.555. Judge Cavanaugh denied that motion, D.E.565–66, as well as Bergrin's *pro se* motion for reconsideration, which sought the Judge's recusal because of his supposedly close relationship with attorneys Bergrin had accused of misconduct before and during trial, D.E.571–72.

E. The Sentencing.

Bergrin faced mandatory life on Counts 3, 12, and 13 and a maximum of life on Counts 1, 2, and 5. A11173, ¶ 306. Before sentencing, Bergrin argued that a life sentence for murdering a witness would be cruel and unusual, A11263-68, and that the trial evidence was too unreliable to resolve disputed Guidelines enhancements, A11239, A11259-61, A11268-77. Judge Cavanaugh rejected Bergrin's Eighth Amendment challenge and overruled Bergrin's Guidelines objections. A10072-121. He imposed the following concurrent sentences of imprisonment:

- life on Counts 1, 2, 3, 5, 12, and 13;
- twenty years on Count 4;
- ten years on Counts 8, 9, 10, 21, 22, 23, 24, and 25; and
- five years on Counts 14 through 20 and 26. A26, A10164-65.

Judgment was entered on September 25, 2013, D.E.577; A25, and Bergrin filed his notice of appeal that day, D.E.578; A1.

SUMMARY OF ARGUMENT

I. Judge Cavanaugh correctly denied Bergrin's motion for judgment of acquittal on Counts 12 and 13. Bergrin intentionally leaked McCray's name to Curry and later advised Curry organization members that eliminating McCray would secure William's release. Young acted on Bergrin's illicit advice by killing McCray. There was sufficient evidence, therefore, that Bergrin conspired to murder, and aided and abetted the murder of, McCray.

II. Judge Cavanaugh did not plainly err by controlling the mode of proceedings to ensure that the trial was a search for the truth. Bergrin, a former state and federal prosecutor, disregarded the rules of evidence as well as the Judge's rulings. Many of the adverse rulings and rebukes Bergrin now cites were prompted by his misconduct, and did not prejudice him given the overwhelming evidence and effective jury instructions.

III. Judge Cavanaugh correctly held that the life sentences for Counts 3, 12, and 13 are not "cruel and unusual." By advising a violent drug gang to assassinate a federal witness, Bergrin deserved the punishment Congress mandated. Further, Judge Cavanaugh did not abuse his discretion when he found the trial evidence sufficiently reliable to resolve disputed Guidelines enhancements, especially where Bergrin claimed only that trial witnesses were incredible. And any error was harmless given the three statutorily mandated life sentences, which ran concurrently with the sentences on the 20 remaining counts and, thus, rendered the Guidelines range irrelevant.

ARGUMENT

I. Ample Evidence Proved Counts 12 and 13.

Standard of Review: Plenary. U.S. v. Boria, 592 F.3d 476, 480 (3d Cir. 2010).

Bergrin claims that the Government adduced insufficient evidence on Counts 12 and 13. DB7-28. Judge Cavanaugh rejected this claim, A5-12, as did Judge Martini, D.E.373. This Court should affirm.

A. The Standard of Review.

Bergrin bears "a very heavy burden." U.S. v. Anderson, 108 F.3d 478, 481 (3d Cir. 1997) (citation omitted). This Court applies a "highly deferential" standard, viewing the evidence (and the inferences drawn therefrom) most favorably to the verdict. U.S. v. Caraballo-Rodriguez, 726 F.3d 418, 430-31 (3d Cir. 2013) (*en banc*). This Court must affirm so long as "*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt," Jackson v. Virginia, 443 U.S. 307, 319 (1979)—*i.e.*, so long as the verdict crosses "'the threshold of bare rationality,'" Caraballo-Rodriguez, 726 F.3d at 431 (citation omitted).

B. Ample Evidence Proved Count 12.

Count 12 charged Bergrin with conspiring to murder McCray to prevent his testimony at an official proceeding, in violation of 18 U.S.C. § 1512(k). A189-93. The Government had to prove (1) an illegal agreement to murder McCray to prevent his testimony, and (2) Bergrin's knowledge of and intent to join in that agreement to further its unlawful purpose. The Government easily met its burden.

Based on the evidence described in Part I.B.2 of the Statement of the Case above, a jury rationally could have inferred that, as house counsel, Bergrin: (1) knew the Curry Organization dealt violently with informants (especially since a less-experienced Moran learned that gangs used violence to retaliate against informants, A7319-22); (2) relayed McCray's identity from William to Curry on November 25th; and (3) drove to Jamal's house sometime after Thanksgiving (most likely after the December 4th bail hearing)[4] and told Curry, Young, and others that eliminating McCray would secure William's release, whereas doing nothing would mean life imprisonment for William.

As the District Court found, A8, a rational jury could have inferred that William and Bergrin formed an illegal agreement to murder McCray on November 25th, and that Bergrin later met with Young and others to further the goal of that agreement. See U.S. v. Bingham, 653 F.3d 983, 991-92 (9th Cir. 2011) (finding the evidence sufficient to sustain a murder conspiracy conviction where defendant "told Benton to go to war, and Benton did"); U.S. v. Crawford, 60 F. App'x 520, 534 (6th Cir. 2003) (unreported) (relaying informant's name "alone would be sufficient to

[4] Bergrin claims that the Rule 29 "opinion was contrary to the evidence" because it adopted the Government's supposedly withdrawn assertion that the post-Thanksgiving meeting occurred on December 4th. DB13 n.5 (citing A8). But the Government only withdrew its assertion that *the pattern of phone activity* tended to show that the meeting occurred on December 4th; it maintained that the meeting likely occurred sometime after the December 4th bail hearing. A10431-32. That Judge Cavanaugh used December 4th (instead of "on or after December 4th") hardly undermines his Rule 29 opinion.

establish [attorney's] participation" in the murder conspiracy). See generally U.S. v. Riggi, 541 F.3d 94, 108-09 (2d Cir. 2008).

Additional evidence powerfully reinforced the jury's verdict. Bergrin:

- told Esteves that he would kill Junior and said that he had killed witnesses before, implicitly confessing to the McCray murder. A6853-56.
- counseled Pozo to murder a cooperating witness in February 2004, A4083-87, not long after the post-Thanksgiving meeting. See Bergrin, 682 F.3d at 280 (deeming Pozo Proposal "highly probative" of Bergrin's intent in passing McCray's name to Curry).
- implicitly admitted his guilt by boasting to Moran that the Government lacked sufficient evidence to convict him of the murder instead of denying his involvement in it. A7393-95.
- showed consciousness of guilt by: (1) falsely telling two reporters that William and Curry had nothing to do with murdering McCray, A3216, A3225, even though he told Moran that his client's criminal associates had murdered McCray, A7393-95; (2) expecting criminal charges just after the murder, A3157; and (3) expressing concern about William cooperating against him in April 2007, A5251-53; SA577-78, SA648.
- had a personal motive for preventing McCray from testifying against William: because William could have cooperated against Curry, who in turn could have cooperated against Bergrin. See A1237 (Curry told Lachoy Walker that he got his cocaine from "Paul's connect"); see also A1727, A2594-96, A3261-63, A3938-39.

Bergrin concedes that the Curry Organization conspired to murder McCray. DB10. But he insists that the conspiracy formed only after he left the meeting at Jamal's house, stressing that no evidence proved the substance of his conversation with William on November 25th, and that no one at the later meeting manifested his intent to follow Bergrin's illicit advice. DB11-16. These claims are meritless.

Initially, Bergrin described to two reporters his November 25th conversation with William. A3215-16, A3225. While Bergrin (obviously) did not admit to agreeing to assassinate McCray, "a written or spoken agreement among alleged co-conspirators is unnecessary; rather, indirect evidence of [a] mere tacit understanding will suffice." U.S. v. Barr, 963 F.2d 641, 650 (3d Cir. 1992). Here, William told fellow inmates that his crew was looking for McCray to "put a hole in [McCray's] melon," A3089-90, A3132, after Bergrin relayed McCray's identity to Curry and advised the gang to eliminate McCray—two actions which, the jury was entitled to infer, Bergrin took with the specific intent to kill McCray. See A4181-83, A7268-69. A rational jury could infer that an illegal agreement formed on November 25th because Bergrin acted with the same illicit intent to eliminate McCray that William manifested in his statements to fellow inmates. See U.S. v. Baskerville, 448 F. App'x 243, 250-51 (3d Cir. 2011) (non-precedential) (finding that basic same facts proved that the murder conspiracy formed on November 25th despite no direct evidence of the illicit agreement).

Bergrin relatedly claims that the only evidence of an illegal agreement was the conversation among Young, Curry, and Rakim about the details of the murder conspiracy after Bergrin left the meeting. DB11-12. But this simply restates Bergrin's flawed premise that there must be direct evidence of the unlawful agreement itself. That the coconspirators openly discussed the means for carrying out the illegal agreement after Bergrin left no more absolves Bergrin of culpability than does the fact that the coconspirators did not openly discuss the formation of the agreement before

he left. In fact, those later explicit discussions corroborated the circumstantial evidence showing that the agreement formed earlier. See U.S. v. Messerlian, 832 F.2d 778, 798 (3d Cir. 1987) (finding sufficient circumstantial proof of an agreement).

Bergrin also asserts that "there was no evidence that [he] was to take any action in furtherance of the conspiracy." DB16. To the contrary, Bergrin worked with William to relay McCray's identity to Curry on November 25th and then drove to Jamal's house after Thanksgiving to advise members of a violent drug gang that murdering a federal witness would secure the release of one of their brothers.

Bergrin stresses that no one openly discussed the plan in his presence, claiming that only "Young interpreted Bergrin's words as advice to kill McCray." DB16. But Young testified that everyone at Jamal's house discussed finding and killing McCray after Bergrin left, proving that they all understood what Bergrin meant. As Judge Martini observed in 2012, "Bergrin and his coconspirators formed an agreement during that meeting that was so clear that further communication was unnecessary." D.E.373 at 5; see U.S. v. Anderskow, 88 F.3d 245, 254 (3d Cir. 1996).

Bergrin claims that he was merely present at the scene of planned criminal activity or that he merely associated with those who actually conspired to kill McCray. DB18-19, 25. But "a defendant's 'mere presence' argument will fail in situations where the 'mere' is lacking." U.S. v. Echeverri, 982 F.2d 675, 678 (1st Cir. 1993). Here, Curry Organization members gathered at Jamal's house to meet with Bergrin, A3281, and Bergrin drove there for the specific purpose of advising the group that killing McCray

would ensure William's release, see U.S. v. Xheka, 704 F.2d 974, 988-89 (7th Cir. 1983) ("[P]resence or a single act will suffice if the circumstances permit the inference that the presence or act was intended to advance the ends of the conspiracy.").

Bergrin insists that he could not have rationally believed at the time that killing McCray would secure William's release from jail in light of all the other evidence inculpating William. DB19-20. But Bergrin had not seen any of that evidence by the December 4th bail hearing. And nine days earlier he passed McCray's name to Curry, allegedly to obtain information undermining McCray's credibility, so that he could secure William's release on bail. A3215, A3225. Impeaching McCray would have been pointless had Bergrin truly believed that the Government had an airtight case even without McCray's testimony. So Bergrin's argument fails on the facts. A9830-31.

Finally, Bergrin claims that the phrase "no Kemo, no case" is "less an opinion about the strength of Baskerville's federal drug case, than an accurate historical statement reflecting the fact that Kemo's cooperation was the catalyst for the government's case against Baskerville." DB20. But Bergrin's "alternative explanations are countered by the government's evidence"—especially Bergrin's gun-like gesture when uttering those words and his statements to Pozo and Esteves—"which the jury was entitled to accept and which we must assume that it did." Bingham, 653 F.3d at 991.

In sum, ample evidence supports Count 12.

C. Ample Evidence Proved Count 13.

Count 13 charged Bergrin with aiding and abetting McCray's murder, in violation of 18 U.S.C. § 1512(a)(1)(A) and § 2. A194.

A person who "aids, abets, counsels, commands, induces or procures" the commission of an offense against the United States "is punishable as a principal." 18 U.S.C. § 2(a). The Government had to prove that Bergrin "knew of the commission of the substantive offense and acted with the intent to facilitate it," U.S. v. Dixon, 658 F.2d 181, 189 n.17 (3d Cir. 1981), *i.e.*, that Bergrin "associated himself with the venture and sought by his actions to make it succeed," U.S. v. Mercado, 610 F.3d 841, 846 (3d Cir. 2010) (citation omitted). All the Government had to show was "some affirmative participation which, at least, encourage[d] the principal offender to commit the offense." Id. (citation omitted). As with conspiracies, "circumstantial evidence can be sufficient to uphold an aiding and abetting conviction." U.S. v. Soto, 539 F.3d 191, 195 (3d Cir. 2008).

Here, the evidence showed "some affirmative participation" by Bergrin "which, at least, encourage[d] [Young] to commit the offense." Mercado, 610 F.3d at 846. As explained in Section B above, Bergrin relayed the name of the informant to Curry on November 25th in furtherance of the plot to murder McCray. Further, Bergrin drove to Jamal's house after Thanksgiving and (as house counsel) advised the group that William would never see the streets again if McCray testified, but that he would secure William's release if they eliminated McCray. Based on Bergrin's advice, the group

thereafter searched for McCray and murdered him. This presented a paradigmatic case of "counsel[ing]," "induc[ing]," or "procur[ing]" the commission of the offense by the principal. 18 U.S.C. § 2(a); see Riggi, 541 F.3d at 109 (sustaining aiding and abetting conviction and finding that the "totality of evidence is sufficient to support a jury finding that Schifilliti commanded the murder, and that LaRasso was murdered pursuant to that command"); accord Bingham, 653 F.3d at 991-92 (similar).

Bergrin claims that the Government failed to prove that he knew someone would murder McCray because no one manifested his intent to follow Bergrin's advice in Bergin's presence. DB22-25. But such direct evidence is unnecessary. A12. Indeed, because the evidence allowed the jury to infer that Bergrin acted with the specific intent to kill when he advised members of a violent drug organization to eliminate a witness (e.g., based on Bergrin's menacing hand-gesture, suggesting that shooting McCray would accomplish his "no Kemo, no case" message), it also allowed the jury to infer that Bergrin knew that his advice would be followed—an inference reinforced by Bergrin's admission to Esteves. A6853-56; see U.S. v. Ray, 688 F.2d 250, 252 (4th Cir. 1982).[5]

[5] Bergrin's mere "presence argument," DB25, fails for the reasons explained in Part B above. And a fair reading of Judge Cavanaugh's opinion, A11-12, belies Bergrin's claim that he elided the knowledge requirement, DB27-28. Further, the fact that the Government had direct evidence of guilty knowledge on the Esteves Plot hardly shows that the circumstantial evidence of guilty knowledge on the McCray murder was legally insufficient. DB23-24. Similarly, the jury could infer that Bergrin knew members of the Curry Organization intended to heed his illicit advice because none of them rejected it (as Pozo had). DB24. Indeed, all of them followed it.

Bergrin claims that he could not have aided and abetted McCray's murder because McCray's fate was sealed when William identified the informant. DB25-26. Bergrin relies on Young's testimony that "you get rid of" someone who crosses a Baskerville, A3581, while ignoring Young's earlier testimony that Bergrin's advice at the post-Thanksgiving meeting impelled the decision to murder McCray, A3278-83. The jury could have credited that earlier testimony and found that Bergrin's advice "in fact render[ed] aid or assistance." U.S. v. Nolan, 718 F.2d 589, 593-94 (3d Cir. 1983).[6] But even if the jury believed that Young was inclined to murder McCray without Bergrin's encouragement, Bergrin's sufficiency argument fails, because a defendant who "counsels murder . . . is guilty as an accessory before the fact, though it appears to be probable that murder would have been done without his counsel." State *ex rel.* Martin v. Tally, 15 So. 722, 738-39 (Ala. 1894); accord U.S. v. Sacks, 620 F.2d 239, 241-42 (10th Cir. 1980). See generally Joshua Dressler, Understanding Criminal Law, § 30.04[B][2][a], at 468 (6th ed. 2012) ("A secondary party is accountable for the conduct of the primary party even if his assistance was causally unnecessary to the commission of the offense.").

In sum, ample evidence supports Count 13.

[6] Equally meritless is Bergrin's claim that his call to Curry rendered no aid because William had already relayed McCray's name to Rakim. DB26. That ignores testimony showing that William called Rakim one hour after the initial appearance concluded, A3175-76, A3200-02, whereas the jury could have inferred that Bergrin's call to Curry occurred much earlier, A2599-600, A8614; SA574, SA580.

II. The District Court Did Not Plainly Err By Ensuring That The Trial Remained A Search For The Truth, And Not A Perversion Of It.

According to the Almanac of the Federal Judiciary, litigants consistently praised Judge Cavanaugh's fairness and temperament. SA879. Yet Bergrin all but accuses him of having conducted a Soviet-style show trial. Bergrin devotes *38 pages* to attacking myriad rulings as not only wrong, but reflective of bias. DB29-67. He aggregates fifty or more rulings and rebukes (unable to persuade that any one alone warrants a remedy), but provides little if any context for his attacks. Had Bergrin "winnow[ed] out weaker arguments on appeal and focus[ed] on one central issue if possible, or at most on a few key issues," Jones v. Barnes, 463 U.S. 745, 753 (1983), the Government could have provided the necessary context. But the word-limit prevents a more fulsome response to each claim. Suffice it to say that, in the face of Bergrin's persistent misconduct, Judge Cavanaugh conducted a fair trial.

Troublingly, Bergrin deploys a series of half-truths to advance his claim. For example, Bergrin complains that Judge Cavanaugh:

- allowed the Government to play during rebuttal summation a small excerpt of Carolyn's July 2003 videotaped statement, DB64-65, never mentioning that he was warned not to selectively misuse the tape during his summation, A9446-47, but did so anyway, A9604-07.
- allowed Agent Brokos to provide "inadmissible hearsay bolstering Young's account," DB65, without mentioning that the Judge allowed her to relay out-of-court statements only to rebut Bergrin's attack on the investigation, A2535-40, and *not* for their truth, A2701-02.
- refused to suspend jury selection due to Bergrin's illness, DB30, without mentioning that he never sought a continuance, A480-993, or that the

Judge *sua sponte* adjourned opening statements for eleven days after a doctor diagnosed Bergrin with influenza, SA132-39.

- allowed a witness to read aloud the substance of an inadmissible wiretap, DB63, never mentioning that he was warned—twice—not to put the wiretap in issue, A2413-15, A2917, but did so anyway, A4034-42.
- accused him of foot-dragging by telling the jury that the Government is moving its witnesses quickly, DB53 (citing A7895), without quoting the Judge's statement one page earlier that "the *attorneys* have really been working diligently to move this case along," A7894 (emphasis added).
- precluded Robert Vannoy from testifying that Jauregui instructed him not to tell Bergrin about her and Castro's drug-dealing, DB40 n.17, never mentioning Vannoy's testimony that Jauregui "used to tell me not to tell you anything," A9309, which Bergrin used in summation, A9686.

Even worse, Bergrin omits a host of favorable rulings that undermine his caricature of Judge Cavanaugh's trial management. For example, the Judge:

1. adjourned (a) the trial by three months so that Bergrin could undergo elective surgery, D.E.391; (b) opening statements by eleven days so Bergrin could recover from influenza, SA132-39; and sentencing twice at Bergrin's request, D.E.567-68; SA163-70;
2. ended early when Bergrin felt ill, A6436, A7540, or wanted to observe the Sabbath, A3228-29, A4257, A5498, A6779;
3. allowed Bergrin to remain at the Metropolitan Detention Center in Brooklyn to facilitate his trial preparation, SA79-81;
4. provided CJA funds so Bergrin could add a *third* standby counsel, hire more investigators, and retain an audio expert, D.E.385, D.E.435;
5. delayed Carolyn's testimony at Bergrin's request, A1720-21, and then directed the Marshals to take Bergrin back to Brooklyn to retrieve his cross-examination notes, which Bergrin left in his cell after assuming that Carolyn would not be testifying that day, A1920-23;
6. admonished the prosecutor about needless repetition or detail, A1409-11, A1433, A1536-37, A1855, A5320-21, A5713, A6015-16, A8602, A8878-79, A9101-02, and for arguing with rulings, A9040, A9280;

7. reconsidered his ruling excluding Robert Vannoy's testimony and allowed him to testify, A9202-06;

8. granted Bergrin's motion to reconsider and excluded the July 2003 Velez video, A3003-07;

9. directed the prosecutor to instruct the lead FBI agent not to expound on her answers to cross-examination questions, A2907, and to instruct Cordova to answer questions directly, A6312; accord A6220, A6252-57, A6258-59, A6302, A6304, A6306, A6372-73, A6374;

10. declined to admit under Rule 801(d)(2)(A) Bergrin's first-person assertions about the McCray murder at the 2011 trial, A8662-64, even though Judge Cavanaugh permitted Bergrin to cross-examine Moran with statements his attorneys made in a bail motion, A7681-87, despite (correctly) ruling earlier that a lawyer's argument is not a prior statement of the client for Rule 613 purposes, A7219-22; A7366-70;

11. refused to admit a suppressible November 25th 4:00 p.m. wiretap intercept, even though Bergrin had opened the door to it by asserting that the content of an earlier intercept, which had been admitted only to rehabilitate Agent Cline, A4034-42, impeached Young, A4050-51;[7]

12. instructed the Government to facilitate the appearance of a Newark police officer, A9207-08, A9286, A9293, even though Bergrin did not properly subpoena him, A9350, and then asked the officer to search for a report potentially helpful to Bergrin, A9358-61;

13. refused to admit Bergrin's summation from the 2003 Velez trial, even though he marshaled Carolyn's false testimony, A8716, and his statements were admissions under Rule 801(d)(2)(A);

14. allowed Ben Hohn to testify by videoconference and (when the equipment failed) allowed the parties to stipulate to Hohn's testimony, A9253, A9413-15, which Bergrin used to impeach Young, A9615;

15. asked the Marshals to expedite the arrival of incarcerated defense witnesses, A8376-77, A8736-39, A9297, A9304;

[7] The 4:00 p.m. intercept corroborated Young's testimony that Bergrin had mispronounced Kemo's name as "K-Mo" when speaking to Curry, compare A10439, with A3271-72, strongly fortifying Young's credibility, A10436.

16. sustained many defense objections, e.g., A1914, A1948, A1969, A2622, A2643, A2644, A3086, A3249, A3264, A3282, A3391-92, A3453, A3943-44, A4026, A4059, A4272, A4300-05, A4626, A4795-96, A4874, A4878, A5028-29, A5235, A5473, A5483, A5484, A5595, A5703, A5710, A5715, A5717, A5719, A5737, A6038, A6081, A6084, A6118-20, A6199, A6812, A7215, A7263, A7274, A7388, A7471, A7481, A7738, A7744, A7746, A7986, A8109, A8111, A8146, A8157, A8307, A8318, A8484, A8610, A8810, A8833-35, A8877-79, A9039, A9043-44, A9216, A9048; and

17. overruled many Government objections, e.g., A1439, A1489, A1569, A2143, A2789, A2850, A3161-62, A3488, A3504, A4698, A4781, A4922, A5420, A5603, A5784, A5810, A5820, A5849, A5852, A6258, A6663, A6666, A6672, A7101, A7497-48, A8836, A8898, A9031-32, A9136, A9377-78.

A. Bergrin Must Show Plain Error.

Bergrin claims that he preserved his fair-trial claim by objecting to the underlying rulings he now challenges. DB29-30, DB44, DB61. To be sure, Bergrin objected to some of the rulings. E.g., A2399 (reprimand), A2427-28 (speaking objection), A1555-57 (evidentiary ruling). But he neither sought a mistrial on the basis of partiality nor sought specific curative action. And Bergrin's post-trial recusal motion, D.E.569, which was both untimely and baseless, D.E.571, did not preserve his claim for appeal, see U.S. v. Brennan, 326 F.3d 176, 186 (3d Cir. 2003) (claim first raised in post-trial motion is forfeited). Bergrin thus must show plain error. See U.S. v. Bencivengo, 749 F.3d 205, 216 (3d Cir. 2014).[8] His claim fails under any standard.

[8] Unlike the *pro se* defendant in U.S. v. Ottaviano, 738 F.3d 586, 594 (3d Cir. 2013), Bergrin "is an experienced defense attorney," A6117, who "cannot claim the special consideration . . . customarily grant[ed] to pro se parties," Holtz v. Rockefeller & Co., Inc., 258 F.3d 62, 82 n.4 (2d Cir. 2001).

B. Judge Cavanaugh Did Not Plainly Err By Exercising His Rule 611(a) Discretion.

A trial is "a search for the truth so that justice may properly be administered." U.S. v. Beaty, 722 F.2d 1090, 1093 (3d Cir. 1983). Judges must "exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to . . . make the interrogation and presentation effective for the ascertainment of the truth," and "avoid needless consumption of time." Fed. R. Evid. 611(a). As "the judge is . . . the governor of the trial," Beaty, 722 F.2d at 1092, "remarks . . . that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge," Liteky v. U.S., 510 U.S. 540, 555 (1994). Immune are "expressions of impatience, dissatisfaction, annoyance, and even anger, that are within the bounds of what imperfect men and women, even after having been confirmed as federal judges, sometimes display." Id. at 555-56.

No doubt, judges should never make it "'clear to the jury that the court believes the accused is guilty.'" U.S. v. Nobel, 696 F.2d 231, 237 (3d Cir. 1982) (quoting U.S. v. Robinson, 635 F.2d 981, 984 (2d Cir. 1980)). But courts are hesitant to find the type of "deep-seated favoritism or antagonism that would make fair judgment impossible," Liteky, 510 U.S. at 555, especially after a lengthy trial in which the defendant's misconduct provoked the very rebukes he challenges on appeal, see U.S. v. Carson, 455 F.3d 336, 354-60 (D.C. Cir. 2006). In fact, "[s]uch misconduct . . . may properly be taken into account by us in determining whether a defendant was prejudiced by the judge's response." Robinson, 635 F.2d at 984.

"In reviewing a claim of judicial bias," the question is not "whether the trial judge's conduct left something to be desired, or even whether some comments would have been better left unsaid," but "whether the judge's behavior was so prejudicial that it denied [Bergrin] a fair, as opposed to perfect, trial." U.S. v. Pisani, 773 F.2d 397, 402 (2d Cir. 1985). Bergrin's 35-day trial was nothing if not fair.

1. Unrequested Continuances.

Bergrin first claims that Judge Cavanaugh displayed bias by not granting unrequested continuances for illness. DB30-32. This claim sets the tone for and undermines the credibility of all that follow.

Jury selection started on January 7th and ended two days later. A483-993. Judge Cavanaugh scheduled opening statements for January 11th, A967-68, but *sua sponte* adjourned them by an additional eleven days after a doctor diagnosed Bergrin with influenza, SA132-39. Before that, Bergrin *never* sought a continuance. Nor did Bergrin seek a continuance on the two occasions he cites during trial. DB31. Instead, he said "I'm going to push through" on the first. A4259. On the second, standby counsel said "there's no ask here," A7371, but Judge Cavanaugh agreed to end early at Bergrin's request, A7540; accord A6436 (same); SA90-95 (granting three-month adjournment).

"A party who wants a continuance must make a proper motion for one," U.S. v. Steffen, 641 F.2d 591, 595 (8th Cir. 1981), and must show plain error otherwise, see U.S. v. Kizzee, 150 F.3d 497, 500-01 (5th Cir. 2000). Here, Bergrin "exhibited some cold symptoms" during jury selection, A962; see A526, A640-41, A757, A811, but:

actively questioned prospective jurors, A534-726; exercised peremptory challenges, A972-93; and cracked jokes, A554, A656, A950. The Judge did not plainly err (much less display bias) by not granting unrequested continuances. See U.S. v. Lessend, 545 F. App'x 3, 4 (1st Cir. 2013) (unreported) (no plain error where, despite defendant's medical condition, court allowed jury selection to proceed but *sua sponte* adjourned opening statements so defendant could obtain treatment). And Bergrin waived his rights under Rule 43, DB31, by asking to return to the jail on January 7th and allowing standby counsel to review the juror questionnaires, A501; see U.S. v. Riddle, 249 F.3d 529, 534-35 (6th Cir. 2001).[9]

2. Interrupted Jury Addresses.

Judge Cavanaugh did not show bias by interrupting Bergrin's opening statement and by allowing the jury to resolve factual disputes. DB32-35.

"'It is not the office of an opening statement to argue the merits of the case, to discuss the pertinent law, (or) to recite the anticipated testimony or other evidence at length and in detail.'" U.S. v. DeRosa, 548 F.2d 464, 470 (3d Cir. 1977) (citation

[9] Bergrin claims that he might have discerned Juror 5's "bias" had he not been forced to conduct jury selection while ill. DB31 n.14. Putting aside that Bergrin himself chose to proceed with jury selection, his speculation flunks Rule 52(b)'s prejudice prong. See U.S. v. Marcus, 560 U.S. 258, 263 (2010). Besides, Juror 5 simply commented on the overwhelming evidence and Bergrin's litigation misconduct, which hardly shows "bias." A22; A10367-68. Bergrin also footnotes that Judge Cavanaugh (1) erroneously denied his post-trial motion to examine the jurors, and (2) dismissed a "black female juror." DB31 n.14. Bergrin waived these undeveloped asides. See Fed. R. App. P. 28(a)(8)(A); U.S. v. Hoffecker, 530 F.3d 137, 162-63 (3d Cir. 2008).

omitted). Thus, courts have broad discretion to ensure that opening statements are not argumentative. E.g., Cox v. Treadway, 75 F.3d 230, 237 (6th Cir. 1996).

Here, Bergrin invited the first interruption by discussing the minutia of the Abu Ghraib scandal, A1133-34, as he had in the 2011 trial, SA1181-84, despite agreeing before trial that a vindictive prosecution claim was off-limits, SA87-88. Judge Cavanaugh did not plainly err by barring Bergrin from making a concededly improper argument. See U.S. v. Marks, 530 F.3d 799, 808 (9th Cir. 2008); U.S. v. Gladfelter, 168 F.3d 1078, 1082 (8th Cir. 1999). In fact, the trial proved that the Abu Ghraib scandal was irrelevant: Bergrin claimed that the amount of time he had spent in Iraq bore on his defense to the prostitution predicate, A4364, even though he pleaded guilty to related charges in 2009, SA646; accord A8473 (again misusing this evidence).

The second interruption occurred outside the jury's presence when Bergrin was warned that he was becoming too detailed. A1176, A1178-79. Instead of summarizing the evidence he expected to introduce, Bergrin explained in minute detail all the different ways he would undermine the Government's case and impeach its witnesses. E.g., A1167-75 (discussing all the evidence he claimed would show that he supposedly knew Cordova was an informant). The Judge's warning was perfectly proper. See Marks, 530 F.3d at 808; Lichtenwalter v. U.S., 190 F.2d 36, 36 (D.C. Cir. 1951).

The final interruptions—before the jury—occurred when Bergrin ignored earlier warnings. A1187, A1193-94, A1196. Judge Cavanaugh did not abuse his discretion—let alone display bias—by ordering Bergrin to deliver a proper opening

statement and by threatening to end it when he refused. "[R]eversal is not mandated where, as here, rebukes of defense counsel reflected not upon the merits of the case but rather on the way it was being handled." U.S. v. DiTommaso, 817 F.2d 201, 220 (2d Cir. 1987); see U.S. v. Gallagher, 576 F.2d 1028, 1038-39 (3d Cir. 1978); see also Marks, 530 F.3d at 808; Treadway, 75 F.3d at 237.

Equally meritless is Bergrin's complaint about summations. DB34. Initially, Bergrin neglects to mention that he interrupted the Government's rebuttal summation six times with improper speaking objections. A9800-01, A9810, A9812-13, A9823, A9826. Besides, Judge Cavanaugh properly instructed the jurors that their recollection controlled in response to a mistaken objection during Bergrin's summation, A9674-75,[10] which the Judge cited in declining Bergrin's mid-deliberations request for additional curative action, A10018-19. And there was nothing "sharp," "critical," or "chiding" about the Judge's rulings on summation objections. DB34.

3. CJA Funds For Transcripts.

Bergrin claims that Judge Cavanaugh showed bias by denying his mid-trial request for CJA funds. DB35-39. He is wrong.

[10] While the prosecutor correctly argued that Esteves's defense team did not receive full discovery until January 26, 2009, A7470-71, he did not recall that Esteves had discussed his post-arrest statement with Bergrin in May 2008, A7158. Bergrin rightly does not claim that this unintentional misstatement warrants a new trial: both at the time, A9675, and in the final charge, A9844, the jury was instructed that its recollection controlled, see Willis v. Lepine, 687 F.3d 826, 834 (7th Cir. 2012), which the law presumes the jury followed, U.S. v. Hakim, 344 F.3d 324, 326 (3d Cir. 2003).

The Criminal Justice Act ("CJA") provides for funds for "investigative, expert, or other services necessary for adequate representation." 18 U.S.C. § 3006A(e)(1). A defendant must show that he has a plausible defense and that services requested are necessary for adequate representation, and this Court reviews only for abuse of discretion. U.S. v. Roman, 121 F.3d 136, 143 (3d Cir. 1997). There was none here.

a. Cordova Recordings.

Bergrin received the Cordova recordings in July 2009. A8618; SA178. Six days before Cordova testified (in February 2013), Bergrin sought CJA funds to transcribe portions of five recordings that, he claimed, supported his defense that he had no intent to harm the witnesses against Esteves. A10209. Contrary to Bergrin's claim, DB35-36, Judge Cavanaugh did not abuse his discretion in denying the request because Bergrin did not describe how the statements helped his defense, A10213. Besides, Bergrin played the relevant excerpts for the jury, see A6432-33, A6651, A6654, A6655, A6683-84, A6692, A7249, making the transcripts unnecessary.

Bergrin claims that he looked inept or deceptive without the transcripts. DB36. But he needed no transcript to question Carolyn about statements she made on a recording he received in January 2013, A1303-04, A2123-49, and so it blinks reality to claim that having transcripts of recordings produced in July 2009 would have improved his cross-examination of Cordova. Further, by improperly suggesting to the jury that the Government had hidden something by transcribing only portions of the recordings, A6431-32; see A1157-58, Bergrin invited the AUSA's response that he

could have transcribed them, DB36, which was fair since he now admits that CJA-funded standby counsel had transcribed other recordings, A10209.[11]

b. State v. Castro Summation.

Judge Cavanaugh properly denied Bergrin's request for CJA funds to transcribe his 2004 summation in State v. Jeffry Castro, which predated by four years Bergrin's interaction with Cordova. A10213. Bergrin's *ex parte* request baldly asserted that the transcript would have undermined Cordova's claims about his Latin Kings affiliation without describing what Bergrin had said during that summation that would have supported that inference. A10209. Further, Judge Cavanaugh properly ruled that an attorney's legal argument is generally inadmissible to prove his state of mind, A10212 (citing A1046), a principle the Judge applied consistently by precluding the Government from admitting Bergrin's Velez summation, A8715-16, and October 2011 opening statement, A8662-64. And contrary to Bergrin's claim, DB37 (citing A1981), the Judge admitted only Carolyn's testimony from the Velez suppression hearing, SA798, not Bergrin's legal argument.

[11] Bergrin's footnoted aside, DB35-36 n.16, that the Judge should have authorized hundreds of thousands of taxpayer dollars for an expert to examine all of Cordova's recordings for supposed tampering is both waived, Hoffecker, 530 F.3d at 162-63, and meritless, U.S. v. Monea, Crim. No. 07-30, 2008 WL 731100, at *13-14 (N.D. Ohio Mar. 17, 2008), aff'd, 376 F. App'x 531, 549-50 (6th Cir. 2010). Bergrin *was* allowed to retain an audio expert, SA118-20; D.E.435, who found equipment malfunction, not tampering, D.E.494 at 23; A9193. The notion that Cordova could have altered digital recordings as Bergrin's expert suggested, A9167-99, was fanciful given the sheer complexity of that task, A5077-100, and comical to anyone who saw Cordova testify, e.g., A6284, A6741, A6304; see also Subsection 7 *infra*.

c. State v. Velez.

Judge Cavanaugh correctly denied Bergrin's request for transcripts from the 2003 Velez trial. A10213. Bergrin simply requested "transcripts of the testimony of the defense witnesses in the Norberto Velez assault case," without describing what those witnesses had said or why he needed their former testimony. A10209. Bergrin's effort to fill in the gaps, DB37-38, is too little, too late. Contrary to Bergrin's claim, DB38, Ophelia Velez testified in 2003 that she saw Bruno in the house, not that she saw Bruno take the knife, SA845-47. Besides, Bergrin could not have offered her 2003 testimony for its truth, Fed. R. Evid. 802, nor properly impeached Bruno with it, see U.S. v. Tarantino, 846 F.2d 1384, 1416 (D.C. Cir. 1988).

Bergrin also complains that he could not refresh Julio Isquierdo's recollection without a transcript of his 2003 testimony. DB37. But "[w]itnesses may use any aid to refresh their recollections," U.S. v. Booz, 451 F.2d 719, 724 (3d Cir. 1971), and Bergrin had and could have used his 2003 summation, which marshaled Isquierdo's 2003 testimony, SA846. He cannot transform his failure to do so into judicial error.

d. Four Recordings Of Informants.

Judge Cavanaugh properly refused to authorize CJA funds to correct transcripts (prepared by standby counsel in 2011, A10209) of recordings made by Government informants in which Bergrin allegedly made exculpatory statements. Bergrin has not explained why standby counsel could not correct their own transcripts. Besides, what "prevented the exculpatory statements from coming to

light," DB38, was Bergrin's "self-imposed" choice not to offer the recordings, U.S. v. Furst, 886 F.2d 558, 577-78 (3d Cir. 1989), which contained self-serving, inadmissible hearsay anyway, U.S. v. Haddad, 10 F.3d 1252, 1258 (7th Cir. 1993).

e. State v. Peoples.

Bergrin complains that he could not prove "that Peoples had denied that Bergrin ever instructed him to have Anyea Williams flee." DB38-39. Bergrin cites (and the record discloses) no request for CJA funds pertaining to Peoples. Bergrin thus waived any claim. See U.S. v. Greathouse, 2000 WL 1455706, at *3 (10th Cir. 2000) (unreported). Besides, the transcript of the October 23, 2007 disqualification hearing, which the Government just obtained, proves that Peoples did *not* absolve Bergrin of wrongdoing, SA1239-57,[12] just as the state prosecutor testified, A5703-05.

4. Defense Witnesses.

Judge Cavanaugh did not show bias by (1) discussing evidentiary issues posed by Bergrin's defense witnesses, (2) declining a last-minute continuance so that two prisoners could testify, and (3) accepting uncontested privilege assertions. DB39-44.

First, contrary to Bergrin's claim, DB39-40, the Government followed Judge Cavanaugh's instructions, A1723, A1906, A2157, A4480, A8955, by fronting potential evidentiary issues, A8778-92. This allowed the Judge to avoid disruptive sidebars and tainting the jury, see U.S. v. Werme, 939 F.2d 108, 115 n.4 (3d Cir. 1991), by ruling in advance, D.E.494, 497, 501; A8990-94, A9202-07, A9346-51.

[12] The Government has moved to expand the record to include this transcript.

Second, because "broad discretion must be granted trial courts on matters of continuances," Morris v. Slappy, 461 U.S. 1, 11-12 (1983), continuance-denials will be upheld, even if as a consequence a "party fails to offer evidence," so long as they are not "arbitrary," Ungar v. Sarafite, 376 U.S. 575, 589 (1964).

On March 11th, Bergrin sought a continuance to secure the appearance of two federal prisoners, Rahoo Drew and Syed Rehman, allegedly to impeach Abdul Williams's credibility. SA875. (Bergrin declined to call Maria Corriea and Jan Ludvik after consulting with their counsel, A9366-67, A9379, thus waiving any claim as to them.) The Judge ruled that Bergrin had waited too long to attempt to secure the witnesses' appearance and failed to show necessity, and found that a continuance would inconvenience the jury, which had been serving for nine weeks. A9381-84.

That was hardly "arbitrary." Because Bergrin did not apply for the habeas writs until February 26th, DB41, and did not obtain them until February 28th (the 25th day of trial), A7894; SA881-86, the Judge could have declined to sign them "solely on the grounds that the petition[s] [were] untimely," U.S. v. Rinchack, 820 F.2d 1557, 1568 (11th Cir. 1987). That the Judge signed the writs anyway did not obligate him to grant a continuance, see U.S. v. DeCologero, 530 F.3d 36, 74-75 (1st Cir. 2008), especially given his concerns over necessity and the untimeliness of the applications, see A4958-62, A8734-39, A8375-78, A8736-37, A9320-25.[13]

[13] Bergrin claims he acted promptly once the Marshals advised him that habeas writs were necessary. DB41 & n.19. But Bergrin (an experienced defense attorney

Beyond Bergrin's lack of diligence, the Judge had dismissed a juror on February 27th after learning that Hakeem Curry's brother had compromised her anonymity. A7575, A7854-87. The sobering prospect of additional such tampering militated against further continuances, even brief ones. See U.S. v. Diehl-Armstrong, 504 F. App'x 152, 157 (3d Cir. 2012) (non-precedential). Moreover, several defense witnesses had asserted their Fifth Amendment privilege, A8924, A9206-08, and others had failed to appear, A9283-85, forcing the Judge to send jurors home early or to start the proceedings late, e.g., A8954-55, A9317-19, A9366-86, A9422-23.

Judge Cavanaugh properly concluded that "countervailing public interests in the efficient administration of justice" outweighed any marginal benefit from the witnesses' expected testimony, Sparkman, 500 F.3d 682-83, given Bergrin's forceful cross-examination about Williams's motive to fabricate (getting him to admit that he expected to receive time-served for cooperating), A4529-31; A5260-66, A5277-78, A5290-91, A5416-19; see also A9278-81, and the overwhelming evidence, see U.S. v. Fountain, 768 F.2d 790, 796-97 (7th Cir. 1985).

Bergrin complains that the prosecutor exacerbated the alleged error by highlighting in rebuttal summation Bergrin's ability to subpoena witnesses without

assisted by very able stand-by counsel) should "have anticipated that transporting" incarcerated out-of-state witnesses "to trial would require significant lead time." U.S. v. Sparkman, 500 F.3d 678, 682 (8th Cir. 2007). Besides, even though Bergrin knew as of September 2012 that he faced a RICO trial, he waited until February 11, 2013, even to seek Rule 17(b) subpoenas, SA869, which are ineffective as to prisoners, Rinchack, 820 F.2d at 1567.

disclosing that the Government has the power to immunize witnesses, as it did with Cordova. DB42 & n.20 (citing A9800-01). That is not only wrong (as there was no error to exacerbate) but disingenuous: the Government did not immunize Cordova to secure his testimony against Bergrin, but merely agreed not to use against him, when recalled, his on-the-stand admission that he had perjured himself earlier. Compare A6257, with A7271-82, and SA649. The Government thus impeached its own witness, which *helped* Bergrin.[14] Further, the prosecutor's argument was a fair response to Bergrin's, which asked the jury to draw adverse inferences because the Government had not called a long list of witnesses. A9603-04; see U.S. v. Sblendorio, 830 F.2d 1382, 1394 (7th Cir. 1987).

Third, Bergrin released McNeil and Peoples after learning that they had asserted their Fifth Amendment privilege, A8924, without contesting their privilege claims, DB42-44. Indeed, Bergrin implicitly conceded their claims were claims valid by seeking compelled immunity. A8924. He "could complain of their failure to explain to the court their reasons for invoking the fifth amendment only if he had insisted that they take the witness stand once they had asserted the privilege." Wilkes v. U.S., 419 F.2d 684, 686 (D.C. Cir. 1969); accord U.S. v. Allen, 491 F.3d 178, 191 (4th Cir.

[14] Bergrin never asked *the Government* to immunize Jamal, Peoples, and McNeil. DB43 n.21. Rather, he asked *the Court* to immunize two of them, A8909; see A19 (finding waiver as to Jamal), which it lacked authority to do, U.S. v. Quinn, 728 F.3d 214, 257 (3d Cir. 2013) (*en banc*). Bergrin does not appeal the immunity ruling, which was correct when made and even more correct after Quinn. And he does not explain how a Judge's adherence to binding precedent shows bias.

2007); U.S. v. Ortiz, 82 F.3d 1066, 1073 (D.C. Cir. 1996). Besides, Judge Cavanaugh inquired into the privilege assertions by obtaining the parties' consent to speak privately with counsel for the subpoenaed witnesses. A8908, A8912-13; see U.S. v. Gibbs, 182 F.3d 408, 432 (6th Cir. 1999). And Bergrin makes no effort to dispute the privilege claims, Quinn, 728 F.3d at 264, or to show that the witnesses would have testified favorably, which is understandable given the Judge's observation that, for Bergrin, "it might have been just as well that they took the Fifth," A9285.

5. Speaking Objections.

Bergrin next claims that Judge Cavanaugh displayed bias by allowing the Government to make speaking objections, implying that his refusal to conduct side-bar conferences forced the parties to air objections before the jury. DB45-47.

Bergrin rewrites history. The Judge granted twenty-four requests by Bergrin for side-bar conferences. See A978, A1408, A1440, A1555, A1712, A1911-12, A2263, A2925, A3478, A4258, A6078-79, A6114-15, A6252, A6436, A7515, A7540, A8326, A8549-50, A8851, A8863, A9283, A9357, A9366. Further, Bergrin never asked for a sidebar in two of the examples he cites where the parties were forced to "air their grievances before the jury." DB45. Rather, he faults the Government's response to his meritless objections. A5949 (objecting that question called for Cordova to speculate as to Bergrin's state of mind even though Bergrin was recorded discussing the bogus tax returns with Cordova, A4950, and boasting that he had threatened to kill Esteves's accountant, A6012-14); A7393 (Bergrin raises frivolous hearsay objection to his own

out-of-court statement, forcing prosecutor to respond, correctly, that it was a "classic admission," see Fed. R. Evid. 801(d)(2)(A)).

Further, the Judge allowed both parties to make speaking objections. Bergrin used his opportunity to comment on the evidence and impugn the integrity of the prosecutors. E.g., A2473-74 (stating "[t]hat's not what he said," and then providing his own version of the witness's testimony); A7101 ("Judge, could you warn the prosecutor about frivolous objections? It's nonstop, Judge."); A7755 (sustaining Government's relevance objection, but noting that "the jury got your point" based on Bergrin's response to it).[15]

Ironically, Bergrin cites as proof of bias the Judge's reaction to his own improper speaking objection: "I would appreciate the Court requesting that Mr. Minish, *if he wants to keep something from the jury*, not make statements and elaborate like that," DB47 (quoting A3731) (emphasis added), omitting his acerbic comment, "It seems like whenever he wants to hide something, Judge," A3731-32; accord A6776 ("I could see why Mr. Gay wants to keep this out of evidence, Judge."); A7227 ("I can't say I blame the Government for trying to keep it out.").

At bottom, Judge Cavanaugh agreed that speaking objections by either side should subside. A2428, A2534-35. But the fact that both parties continued to make them hardly shows bias. See U.S. v. Cochran, 499 F.2d 380, 391 (5th Cir. 1974)

[15] Accord A1399, A2485, A3730, A3939, A5485, A5562, A5717, A5722, A5919-20, A8829, A8316, A8594, A8942, A9062.

(noting that both parties made speaking objections and declining to find reversible prosecutorial misconduct); see also U.S. v. Lucas, 516 F.3d 316, 349 (5th Cir. 2008) (speaking objections, while unprofessional, did not require a remedy). And the Judge cured any possible prejudice by instructing the jury that arguments of counsel are not evidence and not to draw any inference from the fact that the parties made and the court resolved legal objections. A9842-43.

6. Cross-Examinations.

Bergrin next claims that Judge Cavanaugh displayed bias by interfering with and rushing his cross-examinations. DB47-55. Bergrin misstates the record and downplays the role his misconduct played in inviting the challenged rulings.

The "Confrontation Clause guarantees an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." Delaware v. Van Arsdall, 475 U.S. 673, 679 (1986) (citation and quotation marks omitted). Courts have discretion to "impose reasonable limits on such cross-examination based on concerns about . . . interrogation that is repetitive or only marginally relevant." Id. Imposing such limits in a long trial hardly proves bias, see DeCologero, 530 F.3d at 57-58, especially where a litigant repeatedly violates evidence rules, see Carson, 455 F.3d at 357-60.

Here, Bergrin exhaustively cross-examined every witness regarding his or her motive(s) to fabricate; prior convictions; and material inconsistencies. The Judge allowed this questioning, but understandably intervened when Bergrin retrod covered

ground, intentionally misquoted the content of prior statements when trying to impeach witnesses, or spun his wheels trying to establish immaterial inconsistencies that had no real bearing on the witness's credibility. In fact, after several clashes over Bergrin's trial tactics, e.g., A1441-45, A1449, A1457, A1458-63, A1472-73, the Judge (during a break) reiterated his Rule 611(a) discretion, A1477-78. Yet despite standby counsel's admonitions, A2398-99, Bergrin persisted, often agreeing that he was being repetitive, A2795 ("All right. I'll move on, Judge. I promised the Court that I wouldn't repeat. I'm sorry, Judge.").[16] This led to repeated side-bar admonitions, A2901, A2904-06, A3751, A3583, A4999-5001, A7215, including attempts by Bergrin to litter the record with (false) claims that he either was skipping over material due to the "Court's ruling," A2153, A2853, A2928, A2931, A2942, or had been precluded from pursuing lines of examination, A6437, A7517-18. Judge Cavanaugh recognized that Bergrin was planting the seeds for an appeal. A2409, A6744-46, A7983.

Beyond the needless repetition, Bergrin spent inordinate amounts of time either intentionally misquoting prior statements (by adding or omitting words to manufacture inconsistencies), reading perfectly consistent prior testimony as if it was inconsistent with the witness's in-court testimony, or trying to establish utterly irrelevant contradictions. For example, when cross-examining a Newark detective

[16] Accord A1709, A1807, A2133, A2135, A2145, A2149, A2153, A2222, A2515, A2814, A3647, A3770, A3774, A3789, A3858, A4386-87, A4714, A5375, A5433, A5446, A5494-95, A6419, A6435, A6674-75, A6678, A6709, A6725-26, A7155, A7289, A7291, A7624, A7749, A8001-02, A8306, A9075-06.

about the description of the shooter that Johnny Davis (McCray's step-father) had provided, Bergrin purported to quote Davis's "exact words" in his question (that Davis was "sure" that Malik Lattimore had shot McCray), when in fact Davis had said that Lattimore "resembled" the person who had shot McCray. A2228-29. Similarly, Bergrin suggested through his questions that Young had admitted in his 2011 testimony that he used Bergrin's name to get the FBI's attention in 2005, when in fact Young merely testified that Bergrin was one of the people he mentioned in his first, brief call to the FBI. A3547-50.[17]

This misconduct recurred so frequently that Judge Cavanaugh admonished Bergrin out of the jury's presence numerous times:

> This is the last time I'm meeting at sidebar on this issue. Mr. Bergrin, we went over this when Young was testifying for two days. On a number of occasions, I pointed out to you doing exactly what you just did here — that is, going after someone as if it's an inconsistent statement, reading from the transcript, which is totally improper when there's no inconsistent statement. I just read this entire section that you talked about. It doesn't mention anything near that which you just said. You're doing the same thing again. We are wasting time. I will not tolerate it.

A4164; accord A3490-91, A3638, A3752-53, A6243-45. The Judge neither violated the Sixth Amendment nor showed bias by preventing Bergrin from mischaracterizing a prior statement, see U.S. v. Hale, 422 U.S. 171, 176 (1975) ("the court must be

[17] Accord A1319-20, A1446-49, A1458-63, A1475, A2222-23, A3128, A3144-46, A3490-91, A3504, A3543, A3548-49, A3630-31, A3637-38, A3672-73, A3690-91, A3676, A3721-22, A3791-93, A3809, A3862-63, A4715-18, A4759-61, A4764-66, A5544-46, A5687-88, A5797-99, A5812, A5852, A6241-45, A6735-36, A7195, A7513-14, A7523-24, A7539, A7651, A8259-60, A8291-92, A8449-50.

persuaded that the statements are indeed inconsistent"), or by precluding him from establishing "no more than minor discrepancies," see U.S. v. Mojica, 185 F.3d 780, 788-89 (7th Cir. 1999); U.S. v. Trotter, 529 F.2d 806, 814 (3d Cir. 1976).

Relatedly, despite a pretrial ruling on this very issue, SA74-75, Bergrin repeatedly tried to elicit the substance of inadmissible reports or documents, in violation of Rules 613 and 802. E.g., A4154-55 ("You see, one of the problems we have here is these aren't his statements. I recognize that the agent is attributing them to him."); A5315 ("But the prosecutor's right: You can't get around it just by reading the question and saying isn't that so.").[18] Sometimes Bergrin got away with it, eliciting blatant triple hearsay: "did you receive a text message from Maria Correia telling you that Yolanda had informed her that Paul said that Oscar's . . . a cooperating witness, an informant?" A9275. Judge Cavanaugh did not "abuse [his] discretion by insisting that impeachment be in accordance with the Federal Rules of Evidence." U.S. v. Adames, 56 F.3d 737, 744-45 (7th Cir. 1996); see U.S. v. Marks, 816 F.2d 1207, 1211 (7th Cir. 1987); see also Thompson v. U.S., 342 F.2d 137, 140 (5th Cir. 1965).

With that background, the record belies Bergrin's claim that the Judge foreclosed legitimate lines of impeachment. For example, while claiming that he was "curtailed" in his effort to establish that he represented only low-level members of the Curry Organization, DB49 (citing A1807), he wasted time addressing innumerable

[18] See A2211, A2223-24, A2760-62, A2924-27, A3144-46, A3508, A3653, A3814, A3985-86, A4129-30, A4142, A5258-59, A5262, A5268, A5293-94, A5317, A5697-98, A6282-83, A6337, A7131-32, A7143, A7174-75, A7523-24, A7612.

members that he had not represented, A1789-1807, forcing the Judge to intervene and say, "You've made your point. It's obvious they have no other people, Mr. Bergrin." A1807. Still, the Judge allowed Bergrin to ask about several more members, A1807-09, which Bergrin used in summation, A9655-56.

Similarly, Bergrin had no right to cross-examine Williams on uncharged domestic violence allegations. DB49. While the prosecutor briefly elicited one such incident on direct, A5116, Bergrin attempted to elicit the details of unrelated instances in an effort to impugn Williams's character, A5387-88. Judge Cavanaugh properly ruled that allegations of domestic violence were not probative of truthfulness under Rule 608(b). A5450-51. Bergrin makes no effort to explain how such allegations went "directly to [Williams's] credibility and motivation for testifying." DB49-50.

Bergrin's assertion that he was precluded from cross-examining Cordova about "mental health issues" is disingenuous. DB50. First, the Judge precluded such questioning *before* anyone knew that Cordova was in treatment, *i.e.*, when Bergrin could not show a good faith basis. A6313-14. Second, after Cordova revealed that he was in treatment, Bergrin deliberately chose not to address it. A6641-42. So whether the Judge also had legitimate Rule 403 grounds for precluding such questioning, see U.S. v. Roland, 545 F. App'x 108, 111-12 (3d Cir. 2013) (non-precedential), is academic.[19]

[19] Far from suppressing Cordova's treatment, DB50 n.23, the prosecutor disclosed it the moment he learned of it, A6316.

Judge Cavanaugh also properly precluded Bergrin from asking questions designed to elicit sensitive law enforcement investigative techniques. DB50. Bergrin's claim that the questions would have supported expert testimony regarding possible tampering with the Cordova recordings fails to note that Bergrin had not yet served an expert report (despite having been ordered to do so before trial, SA122), A7974, and that the report he ultimately (and untimely) served utterly flunked Rule 702 requirements, D.E.494; A8992-93, because it tied the supposed "anomaly" the expert found on a July 2008 recording to equipment malfunction, not tampering, D.E.494 at 23; A9193. Moreover, as set forth in footnote 11 above, the notion that Cordova successfully could have tampered with a digital recording was plainly nonsensical.[20] Finally, Bergrin waited until September 2012 (three weeks before the then-scheduled trial) even to request CJA funds to investigate the authenticity of hundreds of hours of Cordova recordings, see A10170, which he had received in July 2009, A8618; SA178. That fatally undermines Bergrin's claim that he had viable authenticity challenges. DB50-51. Indeed, Bergrin conceded the authenticity of the critical December 8th recording by repeatedly arguing that it would irrevocably taint the jury. SA900-01, SA914-15, SA925, SA931, SA958, SA1098-99, SA1144-45.

[20] Judge Cavanaugh did not preclude Bergrin from asking about what was said during alleged pauses and "unintelligibles." See A6428-31, A6696, A6707-08, A6710-11. He simply precluded Bergrin from testifying through his questions once Cordova testified that he could not recall what had been said. A6713-14.

Judge Cavanaugh's admonitions during Bergrin's cross-examination of Bruno, see DB51, were (as discussed above) prompted by the repetitive and trivial nature of Bergrin's questioning. At any rate, Bergrin (at sidebar) explained his principal defense theory (that Bruno took the knife from Norberto's house on the morning of the stabbing), A1479-80; elicited evidence to support that theory; and argued it in summation, A9703-08. Thus, while some of the Judge's remarks may have been brusque, Bergrin cannot cite any fact that he was unable to elicit. Besides, the Judge was justifiably concerned about the repetitive and marginal questioning of just the second witness at the start of a long trial. Carson, 455 F.3d at 357 ("attempts to control the trial" that were "sharp and constraining" did not "manifest bias.").

The Judge's comments during Bergrin's cross-examination of Agent Brokos and Anthony Young, see DB50-51, stemmed from the same basic problem: Bergrin's repetitious questioning and attempts to manufacture (or prove minor) inconsistencies. In fact, Bergrin's cross-examination of Young, which spans some 420 pages, A3459-878, shows in stark relief why the Judge became so frustrated. Bergrin covered the same topics over and over, and spent an inordinate amount of time on trivialities, e.g., A3844-48 (numerous questions on whether Young used the words "'Unc' or 'Pop'" or the phrase "Uncle Pop" at the 2011 trial to describe McCray's step-father), and attempts to mislead the jury, e.g., A3561-65 (suggesting that Young put an innocent man at risk by initially telling the FBI that Jamal McNeil shot McCray, when McNeil was plainly part of the murder conspiracy). And when the Judge was gracious enough

to allow Bergrin to resume his cross-examination despite saying the previous day that he was finished, A3915, Bergrin used his opportunity to ask the same questions he had asked previously, A3924, and to probe his far-fetched theory that Young supposedly pleaded guilty to a capital offense he did not commit because he expected no jail time after cooperating against Bergrin, A3921-23; see A9616, A9657.

Finally, Bergrin complains that, because he was preparing for trial from jail, the Judge unfairly criticized his lack of preparation. DB53. But Bergrin had nearly four years to prepare for trial, during most of which he had the services of retained counsel from the Gibbons firm, D.E.66, who were appointed as standby counsel under the CJA when Bergrin chose to represent himself in September 2011, D.E.237. Further, Bergrin chose to proceed *pro se* despite being warned that his incarceration would impair his ability to represent himself. SA1047-49. Moreover, Bergrin twice requested to stay at the Metropolitan Detention Center in Brooklyn because he could use the computer there to listen to the numerous recordings produced in 2009. SA1042-43, SA1231-32. The Judge's frustration with the needless wheel-spinning was readily understandable. And it hardly suggested that he "'agreed with the government that the defendant was guilty.'" DB53 (citation omitted).

7. Alleged "Vouching."

Far from vouching for the credibility of Government witnesses, DB53-56, Judge Cavanaugh simply exercised his discretion under Rules 403 and 611(a) to prevent Bergrin from misleading the witness and the jury.

Bergrin first quotes a *sidebar* conference prompted by his effort to impeach Bruno by equating an acquittal in a separate trial at which she testified with an adverse finding on her credibility. DB54 (quoting A1441-42). Because juries do not explain their verdicts, Judge Cavanaugh's refusal to accept Bergrin's flawed premise hardly suggests bias. Cf. U.S. v. Green, 735 F.2d 1018, 1027-28 (7th Cir. 1984); accord A4156-57 (Bergrin asserts that Pozo's proffer-session allegation about a DEA agent had been proven false, forcing the Judge to respond that any decision not to charge the agent did not automatically mean that Pozo had lied).

The other instances Bergrin cites and/or quotes arose directly from the misleading litigation conduct described in Subsection 6 above, *i.e.*, Bergrin's:

- repeated efforts to impeach witnesses either with prior statements that Bergrin had mischaracterized, or with a report written by a third party that the witness had neither seen nor adopted, see DB54 (quoting A1475-76); accord A1449-50, A1475-76, A2222-24, A3549, A3637-38, A3673, A3676, A3735-37, A3863, A4162, A4760-61;
- attempts to impeach by omission, even when there was no duty to provide the allegedly omitted information, DB54 (quoting A1463), or when it became clear that the witness had not been asked to provide that information at a prior proceeding, e.g., A3670;
- penchant for repetitive questioning, DB55, forcing the Judge to remind Bergrin that the witness had already answered the question, e.g., A1451; and
- inappropriate speaking objections that the witness had been non-responsive or was improperly speculating because he used the phrase "I believe" when answering questions, DB55 (quoting A2742); accord A7646, A8309.

Remarkably, Bergrin cites as his final example of "vouching" another sidebar conference in which the Judge warned Bergrin that his improper impeachment efforts

were prompting repeated (and proper) objections from the Government. DB55 (quoting A3751-54). A Judge who discerns no inconsistency in the impeachment material being used on cross-examination does not show bias by enforcing Rules 611(a) and 613 to ensure that the witness and the jury are not misled. See Hale, 422 U.S. at 176; U.S. v. Avants, 367 F.3d 433, 447-48 (5th Cir. 2004).

Finally, Bergrin complains that the Judge unfairly interrupted his witnesses. DB55-56. But two of them volunteered information or kept speaking despite objections. A9112-14, A9116, A9119-20, A9134, A9135, A9145-47, A9152, A9154. Further, the Judge rebuked Government witness Cordova more pointedly:

- "[Y]ou're doing yourself no favors by asking to review [the report] each time," A6284;
- "And to just say 'I don't remember' every time isn't helping your cause," A6741; and
- "I'm going to warn you one more time: Respond to the question and don't go off [like] that." A6304.

Accord A6128, A6247, A6258-59, A6268, A6280, A6282, A6289-90, A6302, A6306, A6310, A6332, A6336, A6339, A6370, A6373-74, A6379, A6398, A6401, A6416-17, A6653, A6656-57, A6740, A6742, A6748-49. And when advised that Cordova had to be recalled to correct testimony he had given on cross-examination, the Judge plainly was not surprised. A7406.

Far from signaling that Government witnesses were credible and that Bergrin's were not, DB56-57, Judge Cavanaugh simply exercised his Rule 611(a) discretion. See Bencivengo, 749 F.3d at 216 (citation omitted).

8. Alleged Discovery Violations.

Bergrin had nearly four years to prepare for trial. He had most of the discovery by July 2009, see SA172-216; D.E.140 at 166, and a list of most of the trial exhibits and a copy of most of the Jencks material by September 2011, SA668 (citing SA217); D.E.293 at 190. Nonetheless, he tried to litter the record with contrived claims of discovery violations, SA663-72; see also A4593-94, and now argues that the Judge showed bias by denying him a windfall remedy, DB56-61. His claims are meritless.[21]

First, the 700 pages of Jencks material, DB56-57, related to DEA Special Agent Ignacio Mendez and was timely produced on January 23rd, SA668 (Section II, items 3–5), seventeen days *before* Mendez took the stand, A4871. Further, instead of seeking to delay Mendez's testimony, Bergrin cross-examined Mendez so extensively on the very point he now claims he lacked sufficient time to develop, see A4919-998, that Judge Cavanaugh observed, "It's totally cumulative now. You've made your point. You are not in these. Yolanda is the one doing it. You've shown it over and over again," A4999-5000; accord A9697-99.

Second, Bergrin falsely claims that Judge Cavanaugh provided him with "only 24 hours to prepare to cross-examine Braswell after he received a critical 6-page

[21] Some of Bergrin's complaints stem from the production of isolated pieces of Jencks material *before* the witness testified (*i.e.*, timely under 18 U.S.C. § 3500(b)), but *after* Judge Cavanaugh's start-of-trial directive to turn over any remaining Jencks material, A1305. So Bergrin's real argument is that the Judge refused to remedy violations of a directive that conflicted with § 3500(b). That he denied a remedy after Bergrin failed to show prejudice hardly proves bias.

[USAO] Report." DB57. That USAO report, see SA779, was Jencks material timely disclosed two days before Braswell was scheduled to testify, A8012-13. When the Judge expressed concern about Bergrin's ability to digest it, A8015, the Government delayed Braswell's testimony by another day. Judge Cavanaugh properly denied Bergrin's request for time to investigate, A8100-01, because "[t]he purpose of requiring disclosure of impeachment information is not to assist the defense in a general pretrial investigation, but only to give the defense an opportunity to effectively cross-examine the Government's witnesses at trial," U.S. v. Giampa, 904 F. Supp. 235, 281 (D.N.J. 1995). And Bergrin had such an effective opportunity, see U.S. v. Higgs, 713 F.2d 39, 44 (3d Cir. 1983), which he proved by using the report to question Braswell, A8257-60, A8265-66, A8271-75.

Besides, additional investigation would have been pointless. For example, Sayeed Grant would have corroborated Braswell and other Government witnesses, because Bergrin received a separate report recounting Grant's statements that Bergrin supplied "E.T. Hak" (Curry), "WaWa" (Braswell) and "Mutallah" (Williams) with kilograms of cocaine. SA1231-38. Similarly, Bergrin claims he did not have time to interview Kamau Muntasir about why he stopped supplying Braswell with cocaine. DB58. But the reports turned over just before Braswell testified did not mention Muntasir. See SA779, SA1231. And contrary to Bergin's assertion, Braswell did not testify that Muntasir stopped selling him cocaine before Braswell turned to Bergrin. Rather, Muntasir started supplying Braswell with cocaine after Bergrin's May 2009

arrest, which has no bearing on any claim that Braswell did not need to buy cocaine from Bergrin.[22]

Third, Judge Cavanaugh correctly chastised Bergrin for not earlier requesting Esteves's May 2008 post-arrest statement. DB58-59. Despite discussing its substance in his opening statement, A1185, Bergrin waited more than one month to complain that he had not received it, A7052-53. The AUSA immediately contacted Monmouth County authorities (which Bergrin could have done himself) and had the recording rushed to court. A7055-57. Bergrin extensively questioned Esteves about his post-arrest statement, A7135-48, and makes no effort to show prejudice.

Fourth, the Government produced as Jencks material reports of Pozo's 2004 proffer about Bergrin's suggestion that he murder Ramos. DB59 (citing A3584-87). Because that was consistent with Pozo's testimony, it prevented Bergrin from falsely claiming recent fabrication. Bergrin cites no case holding that the timely production of information corroborating a Government witness's testimony justifies precluding it.

Fifth, Bergrin claims that the Government violated Rule 16 by not disclosing that putative defense witness Ben Hohn had failed an FBI-administered polygraph.

[22] Bergrin claims that the Government should have produced these reports before Williams testified because "Braswell implicated Williams in a murder." DB58. n.24. In fact, Grant implicated Williams. SA1235. Besides, Bergrin cannot show prejudice: he insinuated that Williams was involved in the murder when questioning Williams, A5319-22, and neither asked to recall Williams nor called Grant as a defense witness after receiving the DEA report, proving that it had no real impeachment value, see U.S. v. Stewart, 1997 WL 90311, at *2 (6th Cir. 1997) (unreported).

DB59. Hohn claimed that the gun-melting episode about which Young testified occurred between August and November 2004, not March. Although Bergrin could have elicited that information directly from Hohn, whom he later called as a witness, he instead tried to elicit it while cross-examining Agent Brokos. When Bergrin asked Brokos if Hohn had been polygraphed, Brokos responded that Hohn had showed deception. A2744. Bergrin then sought a mistrial, arguing that he had asked for the polygraph results before trial, and implying that the Government's failure to disclose them caused him unwittingly to damage Hohn's credibility, which hurt his efforts to impeach Young. A3011-12. Judge Cavanaugh denied Bergrin's motion, A3023, after the Government explained that Bergrin had not sought those results, A3012-14.

There was no abuse of discretion. Before trial, Bergrin asked for "the results of any polygraph examinations administered to any witnesses," which he claimed would "support [his] theory that the testimony of the government's witnesses is fabricated." SA684. The Government replied that "[n]o polygraph tests have been administered to any Government witness pertaining to the subject matter of their testimony." SA677. Bergrin never clarified that his request covered anyone the FBI had ever interviewed. Besides, Hohn's failing a polygraph meant little to his credibility given his professed belief that he is Jesus Christ. A9414-15.

Sixth, as Bergrin notes, DB60, the Judge granted the motion by the Hudson County Prosecutor's Office ("HCPO") to quash Bergrin's trial subpoena for information allegedly showing that the Government had asked state prosecutors for

leniency in connection with Moran's pending charges. But Bergrin neither submitted a written opposition to the motion nor requested an *in camera* review of the subpoenaed material. A7216-19. Rather, the Government learned that the subpoena was procedurally and substantively flawed, and noted that Bergrin had to call a witness from the HCPO if he wanted to impeach Moran properly. SA1229-30. Bergrin never did so, and the ruling quashing the subpoena was hardly erroneous, let alone proof of bias, A7362-64, especially where there was no competent proof that the file contained admissible evidence, see U.S. v. Cuthbertson, 651 F.2d 189, 192 (3d Cir. 1981).

Seventh, contrary to Bergrin's false claim, DB60-61, Judge Cavanaugh instructed the Government to investigate whether Kelly had been debriefed in New York and Pittsburgh and, if so, whether he was under any obligation to disclose information about Bergrin. A4471-83, A4544-55. The Government produced the relevant reports to Bergrin with a lengthy covering email explaining why the factual premise of Bergrin's impeach-by-omission theory was false. SA713-56; see A4592-93. Judge Cavanaugh properly exercised his Rule 403 and 611(a) discretion to prevent Bergrin from eliciting that Kelly did not proffer about Bergrin to New York or Pittsburgh authorities, especially where Bergrin established that Kelly: received concurrent sentences for his New York and Pittsburgh cases; was never charged in New Jersey; did not have to forfeit certain property; and expected to reduce his 14-year sentence by cooperating, A4606-07, A4685-88, A4691-96, A4699-500. See Lampkins v. Thompson, 337 F.3d 1009, 1013 (8th Cir. 2003).

Eighth, contrary to Bergrin's claim, DB61, Judge Cavanaugh allowed him to ask Esteves about his violation of WitSec rules by having contact with former Government witness Alberto Castro, A6647. But on cross-examination Bergrin shifted gears and tried to suggest that since Castro had supposedly fabricated allegations about Bergrin's involvement in the McCray murder, Esteves must have too, merely because he ran into Castro in jail, A7189. Bergrin withdrew the question, id., presumably because he realized that Esteves had proffered about Bergrin before running into Castro. Bergrin cannot fault the Judge for his own missteps.

Finally, the Government had no obligation to obtain information from the Irvington Police Department, DB60 (citing A3018), which Bergrin could have subpoenaed. And the Government explained below why Bergrin's complaints regarding Lachoy Walker were meritless. SA663-67; see A4593-94. Bergrin has waived any claim on appeal by failing to describe what information was supposedly withheld or how he could have used it. Fed. R. App. P. 28(a)(8)(A).[23]

9. Evidentiary Rulings.

Far from showing bias, DB62-67, Judge Cavanaugh properly exercised his discretion to admit or exclude evidence. Indeed, the "most egregious example"

[23] Some of the newly marked trial exhibits (DB59) were pictures of Young at Curry's wedding, which rebutted Bergrin's insinuation, A1348-49, that Young was not close to Curry, A1905-06; Bergrin does not allege, much less prove, prejudice from the other exhibits he cited below. See SA668-72 (describing those exhibits).

(DB64-65) is a textbook example of a Judge exercising his discretion to prevent a litigant from misleading the jury.

While cross-examining Carolyn, Bergrin selectively used portions of an 80-minute videotaped statement Carolyn gave just after Norberto was acquitted, even though Carolyn had inculpated Bergrin in that statement. A2123-49. During redirect, Judge Cavanaugh granted the Government's request to admit the entire recording under the rule of completeness. A2153-54. When Bergrin subsequently claimed that he had used the recording only for impeachment, A2401-09, A10203 (citing D.E.422), Judge Cavanaugh reconsidered his ruling and excluded the recording, A3003-07.

Before summations, the prosecutor warned that he would seek curative action if Bergrin misleadingly portrayed the recording as exculpatory. A9446-47. Yet Bergrin argued in summation (falsely) that Carolyn had exculpated him for most of the recording, which gave rise to reasonable doubt. A9604-07. To rebut the misleading impression, the prosecutor asked to play an inculpatory portion of the recording. A9719-23; SA887. Judge Cavanaugh granted that request after finding that Bergrin had misused the hearsay statements on the recording as affirmative exculpatory evidence instead of arguing that they impeached Carolyn's credibility. A9788-97.

No doubt, this ruling "left the jury with the impression that the video implicated" Bergrin, DB65, but *that was the point*: because Bergrin argued that the recording exculpated him, Judge Cavanaugh properly allowed the Government to rebut that misleading argument. See U.S. v. Gross, 888 F.2d 770, 775-76 (11th Cir.

1989) (affirming admission of witness's plea agreement in summation where defendants, who had successfully objected to its admission earlier, opened the door to it with a misleading summation argument); see also U.S. v. Harvey, 653 F.3d 388, 394-95 (6th Cir. 2011). Moreover, Carolyn on redirect had testified about the content of the small excerpt the Government played. Compare A2154-55, with A9784-86, and A9744. Any error was harmless because "no substantial right of the party is affected where the evidence admitted was cumulative as to other admitted evidence." Doty v. Sewall, 908 F.2d 1053, 1057 (1st Cir. 1990).[24]

Bergrin also complains that, by admitting evidence that he feigned illness to delay Norberto's attempted murder trial, Judge Cavanaugh unfairly "discredit[ed] him . . . as a lying malingerer," since the evidence allowed the jury to infer that Bergrin also had feigned illness to delay his RICO trial. DB65. But there was no risk of the jury drawing that inference: as Judge Cavanaugh properly held, A9444-45, he had told the jury, just prior to opening statements, that the RICO trial had been delayed due to a "brief bout of influenza"—unattributed to Bergrin. A1045. Further, the evidence was logically relevant here because it tended to showed that Bergrin used the time he bought by feigning illness to bring Carolyn back in line (since she reverted to the false story at the June 2003 trial). See A10218-19; see also Bergrin, 682 F.3d at 279 (prejudice from evidence's legitimate probative force is never "unfair").

[24] Upon request, the Government will provide a CD-ROM containing the entire recording and identifying the small excerpt played during rebuttal summation.

Bergrin falsely complains that Agent Brokos provided "inadmissible hearsay bolstering Young's account" of the McCray murder. DB65. In fact, the Judge admitted out-of-court statements (*i.e.*, various leads Brokos received and pursued) to rebut Bergrin's attack on her investigation, A2535-40, and not for their truth, A2701-02; see U.S. v. Christie, 624 F.3d 558, 568-59 (3d Cir. 2010). Further, because the Judge sustained Bergrin's objection, A2949, the jury never heard that Derrick Berrian (who was murdered one day before McCray) was supposed to testify against another Bergrin client, DB65; see A3008-10.

Bergrin complains that Judge Cavanaugh admitted Peoples's handwritten letter to Anyea Williams. DB66. But that letter, SA416-17, along with other evidence, A5581-91, A7389-91, A8387-403, showed a conspiracy among Peoples, Williams, and Bergrin to obstruct justice. That made Peoples's handwritten assertions admissible under Rule 801(d)(2)(E), A5508-16, and obviated any Confrontation Clause issue, see U.S. v. Figueroa, 729 F.3d 267, 276 & n.14 (3d Cir. 2013).

Finally, the complained-of testimony by Moran (DB66) was either elicited by Bergrin himself, A7628; see U.S. v. Baker, 432 F.3d 1189, 1215-16 (11th Cir. 2005), or fairly rebutted Bergrin's misleading suggestion that Moran's bail motion statements contradicted his guilty plea to and trial testimony about the Esteves Plot, A7681-87, and that killing witnesses against Esteves would have made no difference, A7519-22; see U.S. v. Sheeran, 699 F.2d 112, 119 (3d Cir. 1983); U.S. v. Walker, 421 F.2d 1298, 1299 (3d Cir. 1970).

C. Any Error Was Plainly Harmless.

"[T]he Constitution entitles a criminal defendant to a fair trial, not a perfect one," Van Arsdall, 475 U.S. at 681, especially "when, as here, the trial is long," U.S. v. Ammar, 748 F.2d 238, 264 (3d Cir. 1983). This Court must view any alleged error in light of the record as a whole and disregard it if it does not affect substantial rights, U.S. v. Hasting, 461 U.S. 499, 508-09 (1983), even where a Judge oversteps his role as neutral arbiter, e.g., Ottaviano, 738 F.3d at 596-98 (citing cases). If there was any error here, it was harmless for five reasons.

First, the evidence here was overwhelming, including recordings showing Bergrin explicitly counseling Cordova to murder Noyola and Junior. See Ottaviano, 738 F.3d at 597-98 (citing "damning recordings of" *pro se* defendant in concluding that Judge's improper questioning of him caused no prejudice); U.S. v. Wilensky, 757 F.2d 594, 598 (3d Cir. 1985); Beaty, 722 F.2d at 1095.

Second, "the District Judge twice reminded the jury that it was not to draw any inference from [his] comments as to whether the Court held any opinion as to [Bergrin's] guilt." Bencivengo, 749 F.3d at 216; see A1045-48, A9842-44.

Third, Bergrin invited many of the rebukes he challenges. It would undermine confidence in the judicial system if an experienced defense lawyer could repeatedly violate evidence rules and court rulings and then secure a costly and time-consuming retrial because of the very interventions he provoked. See U.S. v. Amiel, 95 F.3d 135, 146 (2d Cir. 1996) ("[M]any of the instances . . . reveal only that Judge Platt became

justifiably frustrated with the misleading tactics of [the] defense attorneys. These comments hardly provide ground for reversal."); accord Pisani, 773 F.2d at 403-04; Robinson, 635 F.2d at 984.

Fourth, Bergrin's credibility-destroying conduct before the jury dwarfed any allegedly improper conduct by Judge Cavanaugh. DB29, 33. For example, Bergrin:

- asserted through cross-examination questions that he had not shaken hands with two Latino males he and Jauregui met at a strip mall in Belleville, A4929, only to have the Government replay the surveillance footage showing Bergrin shaking their hands, A5007-08.
- claimed that he did not know that Jamal Mohammad was falsely exculpating Abdul Williams because he (Bergrin) did not say "take the weight" in speaking to Williams, A1155, only to have the Government play a recording of Bergrin using those very words, A10945.
- impugned Williams for allowing his sister to labor under gun possession charges instead of confessing that the gun was his, A5281-84, even though Williams relied on Bergrin's legal advice that the arrest violated state law, which proved correct when the gun later was suppressed and the charges dismissed, A5459-63, A8531-36.
- accused Eugene Braswell of having murdered someone over a drug deal gone bad, A8234-37, even though Bergrin represented Braswell on that shooting, which led to no criminal or administrative charges, A8135-40.
- used a bail motion filed by Moran's attorneys to suggest that Moran was not guilty of the Esteves Plot, prompting Moran to say that his attorneys had tried to put their best spin on a devastating set of facts, and that defense attorneys are paid to deceive judges, A7681-87.
- suggested that law enforcement officials found no wrongdoing by returning to him $20,000 in cash seized during a 2007 search of his office, A4465-68, even though he had secured the return of that money by filing an IRS Form 8300 that falsely identified its source, SA333-34; A4469-71; see A8434-41, A8606-09, A11082-111; SA432-96, SA652.

- elicited from Rashidah Tarver, whom Bergrin called to impeach Young, that Young had mentioned to her Bergrin's involvement in the McCray murder, A8866.

- was so sarcastic that he had to apologize in summation. A9600. See, e.g., A1399, A2785-86, A3123, A3475, A3554, A3574-75, A3870, A3946-47, A3948-49, A5256-57, A5444, A5684, A5722, A5831-32, A5919-20, A6268, A6386, A6776, A7227, A7498, A7519, A7604, A7609, A7624, A7646, A7666-67, A7673-74, A8316, A8840.

Cf. Ottaviano, 738 F.3d at 597 (noting that defendant's testimony was patently incredible even without Judge's improper questioning).[25]

Fifth, the post-trial remarks of Juror 5, A10298, which Bergrin himself cites, DB31 n.14, confirm that the jury based its verdict on the overwhelming evidence, not the Judge's conduct, see U.S. v. Blackwell, 459 F.3d 739, 770 (6th Cir. 2006) (*dictum*) (citing juror's remarks to reporter as proof that jury based its verdict on the evidence and not on any misconduct).

"In sum, considering the challenged rulings, procedures and comments together in the context of a long and difficult trial," Bergrin has failed to show that "the judge's behavior was so prejudicial that it denied him a fair, as opposed to perfect, trial." Carson, 455 F.3d at 360 (quotation marks and citation omitted). To the contrary, "[t]his was a complex and lengthy trial, handled with skill by a seasoned trial judge who did not let things get out of control." DeCologero, 530 F.3d at 56.

[25] Bergrin further damaged his credibility by trying to pass off his state-court pleading in the Peoples matter as the judge's ruling, A5513-14, and claiming that he never received the Curry wiretap intercepts in discovery, A4041, which was patently false, A6779-80 (citing SA173, item "i").

III. There Was No Eighth Amendment Violation, And The Sentence Was Procedurally Sound.

Standard of Review: Plenary as to the Eighth Amendment, U.S. v. Walker, 473 F.3d 71, 75 (3d Cir. 2007), and abuse of discretion as to the claimed procedural error, U.S. v. Kluger, 722 F.3d 549, 561 n.21 (3d Cir. 2013).

Bergrin claims that the District Court violated the Eighth Amendment by imposing life sentences on Counts 3, 12, and 13, and the Fifth Amendment by using unreliable evidence to resolve contested Guidelines issues. DB67-71. Not so.

A. A Life Sentence For The Premeditated Murder of A Federal Witness Is Hardly "Cruel and Unusual" Punishment.

The Eighth Amendment prohibits "cruel and unusual" punishments, U.S. Const. amend. VIII, *i.e.*, punishments "grossly disproportionate to the severity of the crime," Rummel v. Estelle, 445 U.S. 263, 271 (1980). Because this Court defers to Congress's judgment as to proper punishment, U.S. v. Miknevich, 638 F.3d 178, 186 (3d Cir. 2011), "only an extraordinary case will result in a constitutional violation," U.S. v. Walker, 473 F.3d 71, 75 (3d Cir. 2007).

As Judge Cavanaugh found, A10072-74, this is not an extraordinary case. To the contrary, "it is clear that a mandatory life sentence for murder does not constitute cruel and unusual punishment." U.S. v. LaFleur, 971 F.2d 200, 211 (9th Cir. 1991); see Harris v. Wright, 93 F.3d 581, 584-85 (9th Cir. 1996). Yet Bergrin complains that his sentence is cruel and unusual "given that [his] alleged involvement in the conspiracy to murder McCray was limited to a few ambiguous comments about his client's case." DB68 (citing DB7-21). Bergrin may not recast his meritless legal sufficiency challenge

to the McCray murder counts as an Eighth Amendment claim. See U.S. v. Baker, 415 F.3d 880, 882 (8th Cir. 2005) (finding "no authority to support this attempt"). Bergrin richly deserves the life sentences Congress mandated for advising a violent drug gang to murder McCray to prevent him from testifying against William. See U.S. v. Fernandez, 388 F.3d 1199, 1217, 1258 (9th Cir. 2004).[26]

B. Any Claim Of Procedural Error At Sentencing Is Meritless And Harmless.

"When any factor important to the sentencing determination is reasonably in dispute, the parties shall be given an adequate opportunity to present information to the court regarding that factor," and "the court shall resolve disputed sentencing factors at a sentencing hearing in accordance with Rule 32(i)." U.S.S.G. § 6A1.3(a), (b). Rule 32(i) requires a sentencing court to "rule on the dispute or determine that a ruling is unnecessary either because the matter will not affect sentencing, or because the court will not consider that matter in sentencing." Fed. R. Crim. P. 32(i)(3)(B). Holding a sentencing hearing and resolving disputed enhancements complies with Rule 32(i). U.S. v. Kluger, 722 F.3d 549, 562-63 (3d Cir. 2013).

Here, Bergrin demanded an evidentiary hearing to contest enhancements supported by the jury's findings, because (he claimed) the Government's witnesses were incredible. Compare A11239, and A11259-61, and A11268-77, with A11364-66.

[26] Because Counts 1, 2, and 5 relied in part on the McCray murder, Bergrin's Eighth Amendment challenge to the discretionary life sentences on those counts fails for the same reason. DB68 n.26.

But Judge Cavanaugh did not abuse its discretion when he found the 9000-page trial transcript (and numerous exhibits) sufficiently reliable to resolve the contested enhancements. A10065-68. "The extensive sentencing hearing before the District Court gave [Bergrin] a sufficient opportunity to present his case," Kluger, 722 F.3d at 563, because the court "presided over the trial and was in the best position to assess the credibility of" the witnesses whose testimony established the facts supporting the enhancements, U.S. v. King, 1998 WL 781594, at *3 (2d Cir. 1998) (unreported).

Besides, any procedural error is plainly harmless if this Court affirms on Counts 3, 12, and 13 and rejects Bergrin's Eighth Amendment claim. Because those counts mandate life imprisonment, A11173-74, ¶ 306, and because Bergrin received concurrent sentences on all counts, A26, "'the sentencing Guidelines range did not affect the sentence actually imposed,'" U.S. v. Zabielski, 711 F.3d 381, 386-87 (3d Cir. 2013) (citation omitted), making this "a prototypical example of harmless error," U.S. v. Sharpley, 399 F.3d 123, 127 (2d Cir. 2005).[27]

[27] Any error was harmless even without the mandatory minimum sentences. The final offense level for all grouped counts derived from the highest offense level for any single group. A11150-60, ¶¶ 177-253. Because the final offense level would have been at least 43 (life) based solely on the McCray murder, see A11153, ¶ 189, changing the offense level for any other counts cannot affect the advisory Guidelines range, see U.S. v. Stott, 245 F.3d 890, 915 (7th Cir. 2001) (finding Guidelines error harmless in such circumstances).

CONCLUSION

This Court should affirm the judgment of conviction and sentence.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify as an Assistant United States Attorney for the District of New Jersey that:

(1) this brief contains 18,477 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), and thus does not exceed the 18,500-word limit prescribed in this Court's July 28, 2014 Order;

(2) this brief complies with the typeface requirements of Fed. R. App. 32(a)(5) and the type style requirements of Fed. R. App. 32(a)(6) because it has been prepared using a Microsoft WORD 2010 word-processing system and it is in a proportionally spaced typeface, namely Garamond, that is at least 14 points;

(3) the text of the electronic PDF brief and appendix is identical to the text of the paper copies of the brief and appendix; and

(4) The electronic PDF brief and appendix have been prepared on a computer that is automatically protected by a virus detection program, namely a continuously updated version of Trend Micro OfficeScan, and no virus was detected.

s/ Steven G. Sanders
Assistant U.S. Attorney

Dated: September 19, 2014

CERTIFICATION OF FILING AND SERVICE

I hereby certify that on September 19, 2014, I caused the Brief and Supplemental Appendix for Appellee to be electronically filed with the Clerk of the United States Court of Appeals for the Third Circuit through the Court's CM/ECF system, and by personally causing to be deposited, with the United States Postal Service as postage-prepaid first-class mail, seven paper copies of the Brief and four paper copies of the Supplemental Appendix.

I also certify that September 19, 2014, I personally caused to be served on counsel for Appellant, Lawrence S. Lustberg, Esq., a true and accurate copy of the Brief for Appellee and Supplemental Appendix through the Notice of Docketing Activity issued by this Court's electronic filing system.

s/ Steven G. Sanders
Assistant U.S. Attorney

Dated: September 19, 2014

IN THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Docket No. 13-3934

UNITED STATES OF AMERICA,

Appellee,

v.

PAUL BERGRIN,

Appellant.

On Appeal From: The United States District Court for the District of New Jersey
Sat Below: The Honorable Dennis M. Cavanaugh, United States District Judge

REPLY BRIEF OF APPELLANT PAUL BERGRIN

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INTRODUCTION

Paul Bergrin is serving multiple terms of life imprisonment for his convictions for the murder of Kemo McCray, despite the government's failure to adduce any evidence as to elements required to convict him of conspiring in or aiding and abetting that crime. Specifically, since there is no evidence that Bergrin agreed to kill McCray, and no evidence of Bergrin's knowledge of or assistance in that scheme, requiring the government to rely wholly upon improper inferences and speculation to defend the verdicts, this Court should reverse the convictions on Counts Twelve and Thirteen.

The government also defends the deeply, and unconstitutionally, flawed trial proceedings by seeking to hold Bergrin responsible for the trial court's numerous errors, infused with a blatantly anti-defendant attitude. That position is legally flawed and wrong on the facts. Since the trial court's cumulative errors substantially affected the outcome of the trial, this Court should reverse the conviction. Likewise, the trial court's abandonment of the requisite sentencing procedures cannot be justified as harmless error, and the Court should therefore vacate Bergrin's sentence and remand for an appropriate hearing to resolve the many disputed facts upon which the sentence relied.

ARGUMENT

I. BERGRIN WAS ENTITLED TO A JUDGMENT OF ACQUITTAL ON THE MCCRAY MURDER CASE COUNTS.

In place of legally sufficient evidence on Counts Twelve and Thirteen, the government attempts to pile inference upon inference - often relying on conjecture – to establish critical elements of conspiracy and aider/abettor liability. Of course, convictions based on this kind of evidentiary house of cards cannot stand. *See U.S. v. Davis*, 458 F.App'x 152, 160-61 (3d Cir. 2012) (conspiracy cannot be predicated "on a foundation based on the piling of inference upon inference derived from facts that in the aggregate do not support those inferences"); *U.S. v. Cartwright*, 359 F.3d 281, 291 (3d Cir. 2004) ("case law 'forbids the upholding of a conviction on the basis of ... speculation'" in aider/abettor and conspiracy contexts) (quotation omitted).

A. Insufficient Evidence Of Conspiracy

The government concedes that no direct evidence demonstrated Bergrin's involvement in the conspiracy to kill McCray, but argues that circumstantial evidence was sufficient. GB21, GB24-25. As the government states, to establish Bergrin's liability on Count Twelve, it had to prove (1) an illegal agreement to murder McCray to prevent his testimony, and (2) Bergrin's knowledge of and intent to join that agreement to further its unlawful purpose, GB21. But the government omits that it also was required to prove that Bergrin, in fact, joined the

agreement.[1] *See* Third Circuit Model Criminal Jury Instruction 6.18.371C (citing, *e.g.*, *Iannelli v. U.S.*, 420 U.S. 770, 777 n.10 (1975); *U.S. v. Kelly*, 892 F.2d 255, 258 (3d Cir. 1989)). That is precisely what it failed to do.

As set forth in Bergrin's principal brief, there is simply *no* evidence that Bergrin ever joined the agreement to murder McCray. The only evidence of any mutual understanding among anyone to kill McCray was between Anthony Young and other members of Hakeem Curry's gang, which was reached after Bergrin left the Avon Street meeting. *See* DB10-21. There is not even evidence of a "tacit understanding" between Bergrin and anyone to kill McCray. *U.S. v. Barr*, 963 F.2d 641, 650 (3d Cir. 1992).

In lieu of any evidence that Bergrin joined the agreement, the government contends that the jury could infer that "as house counsel, Bergrin: (1) knew the Curry Organization dealt violently with informants (especially since a less-experienced Moran learned that gangs used violence to retaliate against informants…); (2) relayed McCray's identity from William to Curry on November

[1] As noted in Bergrin's principal brief, the government must also prove that Bergrin joined the agreement intending to work with the other alleged conspirators to achieve its objective. *See* DB9 (citing Third Circuit Model Criminal Jury Instruction 6.18.371D (citing *U.S. v. Cooper*, 567 F.2d 252, 255 (3d Cir. 1977); *U.S. v. Robinson*, 167 F.3d 824, 829 (3d Cir. 1999))). As discussed there, DB16, and below, there is no evidence Bergrin ever knew that Curry's associates had decided to kill McCray, or that Bergrin ever intended to take any steps to work with them to do so.

25th; and (3) drove to Jamal's house sometime after Thanksgiving (most likely after the December 4th bail hearing) and told Curry, Young, and others that eliminating McCray would secure William's release, whereas doing nothing would mean life imprisonment for William." GB22. Critically, the government fails to explain how these inferences circumstantially prove that Bergrin came to a mutual understanding with anyone that McCray should be killed. Moreover, this deeply flawed characterization of the evidence requires stringing together several unsupportable inferences.

The government first relies upon an inference that Bergrin served as Curry's house counsel, despite limited, conflicting testimony on that subject. That is, though the government repeatedly argued that Bergrin was the Curry organization's house counsel, *e.g.*, A1066, A1073, A9476, A9512, A9543, Curry did not testify here. And the members of his organization who did testify asserted only that they "imagined" that Curry hired Bergrin to represent his associates, A5132, and that, as far as they knew, Bergrin "represented a couple other people," A1233, or "maybe four or more," A3332. *Accord* A1788-1808 (establishing that Bergrin represented a small percentage of Curry organization members on only a few charges). Rather, the evidence showed that Bergrin was Curry's own attorney, and that Curry occasionally referred his friends to Bergrin. *See* A5131, A3267, A1788-1808.

Having labeled Bergrin Curry's "house counsel," the government contends that one can infer not only that Bergrin knew that the Curry organization punished informants, but also that he must have known that Curry and his associates would kill McCray. GB22. Though the evidence established that street violence among drug dealers is routine, *see* A3233-38, A3410, A5116-21, A7322, the government cites absolutely no evidence that Bergrin knew that Curry and his associates would kill McCray. Of course, Bergrin's association with Curry and his gang cannot establish conspiracy liability. *See Cooper*, 567 F.2d at 255 ("One may not be convicted of conspiracy solely for keeping bad company."). In fact, Moran's testimony about the "particular way" Bergrin handled criminal cases, A7319, demonstrates that one could arguably infer that Bergrin believed the Curry gang might take some illegal steps to prevent McCray's testimony, but not murder:

> So when [Bergrin] would say, could you get to the witness … and make sure they don't come to court by either threatening them, by physical force, by intimidation, forcing them to either not to come to court or to give a statement recanting their former statement….

A7320. In sum, the inference that Bergrin knew that the Curry gang would murder McCray based upon what he told them about Baskerville's case – merely one conjectural link in the government's lengthy and speculative chain – cannot legally be drawn from the fact that Bergrin was "house counsel" to Curry's drug trafficking organization.

Certainly, as Bergrin has always admitted, A3216, A3225, he shared McCray's name with Curry on the day Baskerville was arrested. But the fact that Bergrin shared this information with Curry at almost the same moment that Baskerville was independently calling his brother to provide him with the identity of the informant,[2] A3174-75, A3089, indicates that Bergrin and Baskerville had not coordinated with regard to revealing McCray's identity to the Curry gang and certainly had not conspired to murder McCray.

Similarly, Young provided uncorroborated testimony that sometime after Thanksgiving, A3278, Bergrin met with members of the Curry organization on Avon Street and told them that the federal authorities "got audio and video of Will making these crack sales, that Will was facing life in prison," A3282, and said "if Kemo testify against Will, Will was never coming home … if he don't testify, he'll make sure he gets Will out of jail," *Id.* The government infers that these remarks communicated "that eliminating McCray would secure William's release, whereas doing nothing would mean life imprisonment for William." GB22.[3] But the

[2] The government admits, of course, that Baskerville identified McCray before Bergrin mentioned the name to Curry. A9476.

[3] The government speculates that this meeting "most likely" occurred after Baskerville's December 4th bail hearing, GB22. It further dismisses the significance of the trial court's baseless conjecture that the meeting occurred on December 4, A8, notwithstanding evidence all but foreclosing that possibility, A10404-05; this although courts "must closely scrutinize the sufficiency of [conspiracy] evidence," *U.S. v. Tyson*, 653 F.3d 192, 206 (3d Cir. 2011), and

evidence showed, to the contrary, that surveillance corroborated McCray's testimony; and the government knows Bergrin told Curry on December 4, 2012 that he anticipated securing a 13-year plea deal for Baskerville, A10405.

Nevertheless, even accepting the government's flawed and impermissible inferences as true fails to establish, even circumstantially, that Bergrin formed an agreement to kill McCray. Bergrin has demonstrated why, contrary to the government's claim, GB22, there is no evidence – circumstantial or otherwise – to support an inference that Bergrin, had formed an agreement to murder McCray on November 25, as the trial court erroneously reasoned. *See* DB12-15. The government concedes as much when it contends that though, the "Curry Organization dealt harshly with informants," even after Baskerville's bail hearing, "it had not decided to kill McCray," and that such a resolution was not reached until Bergrin later met with them. GB5.

The government, moreover relies on inapposite cases to support its argument, GB22-23. Thus, in *U.S. v. Bingham*, 653 F.3d 983, 991-92 (9th Cir. 2011), there was testimony that the defendant, unlike Bergrin, had been specifically assigned to initiate violence using unmistakable and previously established codes. Likewise, in *U.S. v. Crawford*, 60 F.App'x 520, 524 (6th Cir.

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though inferences "must have a logical and convincing connection to the facts established," *U.S. v. Casper*, 956 F.2d 416, 422 (3d Cir. 1992).

2003), *see* GB22-23, the client of the attorney-defendant testified that they had "discussed 'getting rid' of" a witness before the defendant relayed the message. *Id.* The government here lacks anything like that kind of evidence to support the district court's finding as to the timing of the formation of the conspiracy and of Bergrin's joining it.

The remaining evidence cited by the government is equally speculative and, in any case, does not suffice to establish liability absent any evidence that Bergrin reached an agreement with someone to kill McCray. For example, as detailed in Bergrin's principal brief, DB18, Bergrin's alleged comment to Vicente Esteves that "it wasn't his first time" A6855, "handling" witnesses – which Esteves inferred meant killing them – requires far too much speculation to be considered a "confession" to the McCray murder, as the government contends, GB23. *See U.S. v. Jones*, 713 F.3d 336, 350 (7th Cir. 2013) (affirming judgment of acquittal where "an ambiguous statement is being used with little support to show guilt"). And, the jury was instructed that this evidence and evidence of the Pozo proposal could only be used for the limited purpose of determining whether Bergrin acted with *specific intent* to kill a federal witness, *see, e.g.*, A4183, A9963-64; *see also* Fed. R. Evid. 404(b); it cannot furnish sufficient evidence that Bergrin *agreed* to kill McCray. *See, e.g.*, *U.S. v. Valadez-Gallegos*, 162 F.3d 1256, 1263 (10th Cir. 1998) (Rule 404(b) evidence regarding similar activity at another time insufficient to show

guilt); *U.S. v. Garcia-Ruiz*, No. 07-00188, 2010 U.S. Dist. LEXIS 8254, at *17 (D. Colo. Jan. 11, 2010) (evidence of subsequent similar transaction, "even if properly admitted as Rule 404(b) evidence…is insufficient to convict").

Likewise, contrary to the government's claim, GB23, even when viewed in the light most favorable to the government, the law simply does not permit an inference that Bergrin "admitted" that he agreed to kill McCray, implicitly or otherwise, when he related to Moran the simple truth that the government had, at that time, unsuccessfully tried to indict him on the Kemo murder case, because "it was a bullshit case." A7395. Indeed, his protestation of innocence is consistent with Bergrin's unwavering view of the speciousness of the government's case. A9604-10. Moran's testimony, moreover, fails to reveal anything about Bergrin's tone to permit an inference that Bergrin was either boastful or confessional. A7393-95. And Bergrin's statements to Moran shed absolutely no light on whether, prior to March 2004, Bergrin knew and intended that the Curry Organization was planning to kill the informant, and joined that plot. Indeed, Bergrin's remarks, spoken to a close confidante, omit any causal relationship between his identifying the informant and the ultimate killing and reveal nothing about what Bergrin understood when he mentioned McCray's name to Curry or what he discussed with Baskerville on November 25.

Furthermore, the fact that Bergrin told the press in 2004 that Curry and Baskerville had no role in McCray's murder, but told Moran in 2007 that Baskerville's "people" killed McCray, A7393-95, also fails to shed any light on Bergrin's knowledge of the conspiracy plot prior to March 2004, let alone suggests consciousness of guilt, GB23, particularly since that information had since become public. Equally irrelevant to the formation of the agreement is the faulty inference that Bergrin demonstrated consciousness of guilt by "expecting criminal charges just after the murder," or expressing concern that Baskerville would implicate him, GB23, when federal agents created this expectation and concern by informing Baskerville that the government was seeking to implicate Bergrin in that crime and attempting to obtain Baskerville's cooperation in the murder, A3156.

Finally, the idea that Bergrin was personally motivated to prevent McCray's testimony, GB23, even assuming it could permissibly be used to establish an agreement, relies on so many speculative inferences that it fails to cross the "threshold of bare rationality," *U.S. v. Caraballo-Rodriguez*, 726 F.3d 418, 431 (3d Cir. 2013) (*en banc*). One must infer that Bergrin believed that Baskerville would cooperate against Curry, notwithstanding the considerable evidence establishing that none of Baskerville's criminal associates believed that Baskerville would cooperate, A3286 ("we wasn't concerned … he never told on nobody"), *accord* A3648-49. One must further infer that Bergrin believed that the government

would use information provided by Baskerville to indict Curry, and that he feared Curry would then implicate him based on yet another inference that Bergrin was involved in drug trafficking activity with Curry, itself based upon an inference that the "Paul" whom Lachoy Walker claimed Curry mentioned on one occasion as providing him with a drug connect, A1237, was, in fact, Bergrin, and that this offhand remark denoted additional drug trafficking activity between Curry and Bergrin – all absent any evidence of this whatsoever. *See* DB14. Finally, one must infer that Bergrin believed that McCray's potential testimony created the threat of Baskerville's cooperation, even though Bergrin knew that the government had audio and video surveillance of Baskerville's drug deals. Notably, though the government contends that Bergrin had not seen the surveillance evidence by the December 4 bail hearing, GB26, Bergrin apparently found the surveillance significant enough to mention to the Curry gang when he met with them after that hearing. *See* A3282 (Young testimony that Bergrin told them at the Avon meeting that the federal authorities "got audio and video of Will making these crack sales"). He was, moreover, well aware of its existence since Baskerville's November 25 initial appearance, where the government touted "the strength of the case, there are recorded conversations, as well as surveillance and some video tapes in this matter. So there is significant corroboration," A11430. In sum, the government's

argument is the prototype of piling inference upon inference, which this Court prohibits. *See Davis*, 458 F.App'x at 160-61.

Nor is the government correct that a "rational jury could infer an illegal agreement formed on November 25th because Bergrin acted with the same illicit intent to eliminate McCray that William manifested in his statements to fellow inmates." GB24. The government's evidence, derived from what Bergrin told reporters about his conversation with Baskerville on November 25, was that Baskerville had ascertained McCray's identity from the complaint, A3215-16, A3225. Baskerville then independently gave his brother McCray's identity, A3089-90, so that the Curry gang would effectuate his demand to "put a hole in his melon," A3090, A3764, A3798-99. Bergrin, of course, also shared McCray's identity with Curry, but, unlike Baskerville, did not express any desire for anyone to take any action based upon that information. A3271-72. Later, Bergrin also purportedly discussed McCray's significance to Baskerville's case with members of the Curry organization, A3282, but again, never suggested in that in-person meeting with Baskerville's closest criminal cohorts that Baskerville wished McCray to be killed, that he was conveying any information at Baskerville's behest, or that the information was based on anything that he and Baskerville had discussed – that is, that he had conspired with William, GB25.

In place of any hint that Bergrin and Baskerville ever agreed to anything, the government contends, GB24 (citing A4181-83, A7268-69), that the jury could have inferred that Bergrin's remarks in the Esteves and Pozo matters showed that Bergrin acted with the specific intent to kill McCray; from there, contends the government, the jury could have inferred that Bergrin's intent matched that of Baskerville, who was independently instructing his crew to kill McCray; and from there the jury could have inferred that those similar intentions bespoke some mutual understanding between Bergrin and Baskerville reached on November 25. Of course, this is precisely the sort of pile of inferences derived from facts that, "in the aggregate do not support those inferences" which do not establish conspiracy liability.[4] *Davis*, 458 F.App'x 160-61. This is true notwithstanding the government's disturbingly circular reasoning, by which it is unnecessary to point to evidence demonstrating the existence of an agreement because, "an agreement during [the Avon] meeting … was so clear that further communication was unnecessary," GB25 (citing D.E.373 at 5).

Even more troublingly, many of the inferences urged by the government arise from the commonplace actions of a criminal defense attorney doing his job.

[4] Nor may the government establish an agreement by arguing that when Bergrin allegedly said "no Kemo, no case," one may infer he meant "kill Kemo," because he made a "hand motion with your finger pointing forward" A3283, which constituted a "gun-like" gesture, GB 26, a characterization that is not in the record and was not argued at trial.

Specifically, the government contends that a murder conspiracy arose between Bergrin and his client when they met to discuss Baskerville's arrest. GB24. The government likewise attacks Bergrin's effort to challenge McCray's credibility to secure Baskerville's release on bail, GB26. In the same vein, the fact that Bergrin shared the name of the key witness against Baskerville with Curry, Baskerville's relative, and discussed Baskerville's exposure with his relatives and friends, permits, in the government's mind, inferences that Bergrin intended for McCray to be killed and that he conspired with those individuals to achieve that end. And, of course, most critically, the government construes the now infamous alleged statement "No Kemo, no case" as an instruction to murder, instead of an appraisal of the case against Baskerville, of the sort that criminal defense attorneys make every day. Were such evidence sufficient to prove that an attorney formed an agreement with his client, then the conduct of criminal defense attorneys would routinely subject them to criminal liability, with all of the chilling effects on attorney-client relations and the Sixth Amendment that would follow. Fortunately, the law of conspiracy commands a much greater showing. This Court should reverse Bergrin's conviction on Count Twelve.

B. Insufficient Evidence Of Aiding And Abetting

As Bergrin has argued, DB21-28, there was also legally insufficient evidence to permit an inference that he knew that McCray would be murdered

when he committed the acts alleged (accepted as true for purposes of this appeal) or that those acts in some way aided, assisted, facilitated, or encouraged Young to kill McCray. The government disagrees, contending that Bergrin's provision of McCray's name to Curry and his Avon meeting comments "presented a paradigmatic case of 'counseling,' 'inducing,' or 'procuring'" the offense, GB28. The government reasons that because the jury was entitled to infer that Bergrin had the specific intent that McCray be killed when he spoke to Young and other members of the Curry organization, that "it also allowed the jury to infer that Bergrin knew that his advice would be followed." GB28.

But that argument conflates the requirement for aider-abettor liability that the defendant intended that the offense be accomplished with the separate requirement that he knew the offense would, in fact, be committed. Indeed, the government's logic would allow it to avoid demonstrating that a defendant was aware that the illegal objective would be undertaken so long as it showed that the defendant wished it. That is simply not the law. *See* Third Circuit Model Criminal Jury Instruction 7.02 (citing *U.S. v. Nolan*, 718 F.2d 589, 592 (3d Cir. 1983); *U.S. v. Mercado*, 610 F.3d 841, 846 (3d Cir. 2010)).

Indeed, the absence of any evidence that Bergrin knew the Curry organization had decided to kill McCray distinguishes this case from *U.S. v. Riggi*, 541 F.3d 94, 109 (2d Cir. 2008), *see* GB28. There, the defendant was held liable

for aiding a murder based on evidence that the defendant knew the murder would occur, since the shooter "discussed the plans and logistics of the hit with" the defendant. *Id.* The same is true of *Bingham*, 633 F.3d at 991-92, *id.*, in which the defendant initiated violence through previously agreed-upon protocols. Of course, there was no evidence like that here. Moreover, the government speculates that the "pointing" gesture Bergrin allegedly made as he left the Avon meeting was "menacing," GB28, absent any evidence thereof. Accordingly, one cannot infer, but only speculate, that the gesture suggested to the Curry organization that "shooting McCray would accomplish [Bergrin's] 'no Kemo, no case' message," GB28.

The government also fails to effectively address Bergrin's argument that he provided no actual aid to McCray's killers because McCray's murder was inevitable as retaliation for cooperating against Baskerville. DB25-26. *See* A1232 (Q. Now, what would Mr. Curry do if he learned that somebody was cooperating? A. Cooperation is a no-no. You in danger. You can get killed by cooperating."). The government contends that the jury could have found that Bergrin provided the Curry organization with "advice," which thereby rendered aid. GB29. While Bergrin demonstrated in his principal brief that he transferred no information to the Curry organization that they did not otherwise possess, DB25-28, it bears repeating that the Curry organization knew that McCray was the informant independent of

Bergrin,[5] A3174; A3087, A3089-90, and had already been instructed by Baskerville to kill McCray, A3764; likewise, the organization knew from Agent Brokos that Baskerville faced serious time before Bergrin was even retained. A2594; *see also* A2602, A2606. *See U.S. v. Labat*, 905 F.2d 18, 23 (2d Cir. 1990) (no evidence showed defendant's efforts contributed to venture's success). The sources cited by the government suggesting that accessory liability need not be premised upon a causal relationship between the assistance provided and commission of the offense fail to account for the Third Circuit caselaw requiring proof that the defendant "in fact render[ed] aid or assistance." *Nolan*, 718 F.2d at 593-94. Since no such assistance, whatsoever, was provided here, this Court should vacate the conviction on Count Thirteen.

II. THE COURT DENIED BERGRIN'S FUNDAMENTAL RIGHT TO A FAIR TRIAL.

The government labors to defend the court's many prejudicial rulings, *see* DB29-67, by viewing them in isolation, and defends the court's decisionmaking overall by noting instances in which the court ruled for the defendant, or against the government. But an assortment of unchallenged rulings, or even Judge

[5] The government puzzlingly argues, GB29 n.6, that the jury could have inferred that Bergrin's call to Curry occurred "much earlier" than Baskerville's call to Rakim an hour after the initial appearance. Though the jury knew, from the evidence, precisely when Bergrin made that call, A8614, A3271, it is unclear why it matters, since the decision to kill McCray was not reached for several days, A3278.

Cavanaugh's generally favorable record, *see* GB30 (citing SA879), is irrelevant to this Court's determination of whether errors were committed and whether those errors cumulatively deprived Bergrin of his right to a fair trial.

The government is first incorrect that plain error review controls, GB33, because, Bergrin did, in fact, "interpose a contemporaneous objection to the trial judge's interruptions or tone of voice," and to similar actions which interfered with his ability to try the case. *U.S. v. Nobel*, 696 F.2d 231, 237 (3d Cir. 1982). *See, e.g.*, A2398-99, A2903-06, A3753-54, A6743-46. Moreover, to assess the numerous errors committed, the Court looks not to the bias standard, as the government maintains, GB34-35 (citing *U.S. v. Liteky*, 510 U.S. 540 (1994)), but rather examines whether those errors, "when combined, so infected the jury's deliberations that they had a substantial influence on the outcome of the trial." *U.S. v. Copple*, 24 F.3d 535, 547 n.17 (3d Cir. 1994) (quotation omitted). Here, the district court's prejudicial administration of the "mode and order of interrogating witnesses and presenting evidence," Fed. R. Evid. 611(a), warped the very factfinding that the government extols, GB34. Accordingly, reversal is warranted.

A. The Court of Appeals Must Focus on the Challenged Errors

The government excuses the court's errors by arguing that administration of the proceedings was generally evenhanded. To that end, it cites several rulings

contended to be favorable to the defense, GB31-33. Of course, in a lengthy trial one will naturally find many instances where the court acted appropriately and ruled correctly. Nevertheless, this Court's duty as an appellate tribunal is to focus on the errors raised. *See U.S. v. Higdon*, 638 F.3d 233, 247 (3d Cir. 2011) (though judge was an "experienced and hard working jurist," "neither this court, nor any other court, can tolerate a situation where a judge decides to follow his/her own custom and concepts of justice rather than the precedent of the applicable appellate court").

For example, the fact that the court adjourned opening statements upon the recommendation of Bergrin's physician, GB30-31 (citing SA132-39), is irrelevant to whether it should have postponed jury selection.[6] *See* DB30. Similarly, the court's comment that the "attorneys have really been working diligently to move this case along," GB31 (citing A7894), fails to dilute the effects of repeated tirades against Bergrin's performance, *see* DB33, DB47-56, DB62, just as rebukes of the government, *see* GB31, fail to undermine its larger approbation of the government's case, *see, e.g.*, DB33-35, DB45-47, DB53-56. For example, although the court "directed the prosecutor to instruct the lead FBI agent not to

[6] Neither the fact that the trial court had to, as a result of the prison's administrative error, reschedule the trial date to accommodate Bergrin's serious hernia surgery (which the government unfairly belittles as "elective"), nor the fact that the trial court rescheduled the sentencing date, GB31, is relevant to the question of whether the court's conduct at trial impinged on Bergrin's constitutional rights.

expound on her answers," GB32, that direction arose during one of the court's many *sua sponte* attacks on Bergrin's cross-examination and the time he was taking, A2899-2907 ("you accuse her of things that you think are incredible, and she has logical, reasonable answers … this is why we're taking so much time."). And, notwithstanding the court's reproaches of Oscar Cordova, whose testimony included outright perjury, GB57, the court's disparately abrasive treatment of defense witnesses was manifest. DB55-56. Even the government admits that the judge was "brusque" to the defendant, GB54, and persistently "clash[ed]" with Bergrin over his trial performance, GB49 (citing A1441-45, A1449, A1457, A1458-63, A1472-73); by contrast, even the few negative comments directed at the government, *see* GB31, were tame. For this reason, "cumulative error demands that trial errors be weighed 'against the background of the case as a whole, paying particular weight to factors such as the nature and number of the errors committed; their interrelationship, if any, and combined effect….'" *U.S. v. Sanabria*, 645 F.3d 505, 516-17 (1st Cir. 2011) (quotation omitted). *Accord U.S. v. Wood*, 207 F.3d 1222, 1237-38 (10th Cir. 2000) ("it is impossible to conclude that substantial rights were not affected" without "fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the errors") (quoting *Kotteakos v. U.S.*, 328 U.S. 750, 762 (1946)).

B. Bergrin Did Not Invite Unfairly Prejudicial Rulings

The government defends the court's errors by wrongly asserting that they ensued from Bergrin's trial conduct. In context, however, these claims are unfair.[7] For example, the court's mishandling of the parties' use of the Carolyn Velez video exemplifies the abuses of discretion — which routinely prejudiced Bergrin — committed throughout trial. As discussed in Bergrin's principal brief, DB64-65, the court thrice reversed rulings as to a video concerning Carolyn's testimony in her father's case. Those rulings prevented Bergrin from using the video effectively during either cross-examination, A2083-84, A2125-27, A2133, A2138-40, A2152, or summation, A9446-47, while the government was allowed to play a misleading sound byte on rebuttal. As a result, the very last thing that the jury heard before retiring to deliberate was a nine-year-old girl claiming that Bergrin had told her to lie. Allowing the government to play its clip at the end of rebuttal accorded it a resonance that was not merely "cumulative" of Carolyn's redirect testimony. GB65.

Most importantly, the government is wrong that Bergrin invited this result, GB30, GB64, by arguing on summation that reasonable doubt exists because, for

[7] The government repeatedly invokes Bergrin's experience as an attorney in support of its view that he was not prejudiced by the trial court's errors. *See* GB22, GB33, GB43, GB67. But its contention that his experience means that he should be viewed differently than an incarcerated *pro se* litigant is both wrong and unsupported by the footnote regarding filing deadlines in the civil case the government cites, GB33 n.8.

most of the video, Carolyn discusses who urged her to lie without mentioning Bergrin, and indicates that Bergrin believed her father's story. A9704-07. That argument was consistent with his use of the video to impeach Carolyn on cross-examination, *see* A2123-49 (agreeing she "said that what Paul was telling [her] was a lie, but that Paul never told you to tell a lie"). But, if the Judge was concerned that Bergrin was mischaracterizing the evidence, he could have instructed the jury that its recollection controlled, as he did when the government misstated evidence. A9674-75. Instead, the court allowed the last image in the jurors' minds to be an out-of-context remark painting Bergrin as a coercive liar.

Likewise, the court's first interruption to Bergrin's opening was far from "invited." GB37. The government erroneously asserts that Bergrin's work in Abu Ghraib was irrelevant to his defense on the prostitution charges[8] and pertained instead to a vindictive prosecution defense, GB37. In fact, Bergrin's remarks were limited to asserting that the evidence would show that the work involved required the assistance of a paralegal, *i.e.*, Jason Itzler. A1133-34. As Bergrin explained, "they talk about the prostitution case … and that Jason Itzler never worked for me as a paralegal. I got involved with a case called the Abu Ghraib case … I was

[8] The government is also incorrect that Bergrin's guilty plea on related state charges rendered his defense here irrelevant. GB37. Bergrin's plea, *see* SA646, did not resolve such factual issues as whether Bergrin ran NY Confidential or whether he fraudulently secured modifications to Itzler's parole restrictions.

inundated with over 20,000 pieces of material … And I needed help." A1134. Nevertheless, the court piled onto the government's disruptive objection, commenting before the jury:

> THE COURT: Well, even if there is evidence, what's the relevancy of that on the case before us? I'm going to have to ask you to move on, Mr. Bergrin. I have no problem with you letting it be known about your military service. That's fine. But I think you've done that. Let's move on.
>
> MR. BERGRIN: Can I be heard briefly on that, Judge?
>
> THE COURT: No. Move on.

A1134. The court's refrain of "move on" throughout trial shows that from opening statements, Bergrin never had an opportunity to make his case, regardless of how he conducted himself; rather, the court signaled to the jury – from the start and repeatedly – that whatever Bergrin had to say was a waste of its time.

Even as it accuses Bergrin of "deploy[ing] a series of half-truths to advance his claim," GB30, the government itself misrepresents the record throughout to shift responsibility for the trial's mismanagement onto the defendant. For example, the government chastises Bergrin for lacking the materials to cross-examine Carolyn Velez on a particular day, GB31, knowing full well that prosecutors assured Bergrin that she would not be called. *See* A1919. It claims that the court permitted Agent Cline to recite the contents of an inadmissible wiretap between Bergrin and Curry because Bergrin put its substance in issue,

GB31, when, in fact, Bergrin opened the door only to the issue of whether he placed the call – not what was discussed, *i.e.* his conversation about the details of Baskerville's drug case.[9] A4034-48. *See U.S. v. Johnson*, 502 F.2d 1373, 1376 (7th Cir. 1974) (curative admissibility cannot be "subverted into a rule for injection of prejudice").

Word limits do not allow full exposition of the misleading ways in which the government's brief attempts to justify the court's interference in Bergrin's cross-examinations. An example, however, is its claim that Bergrin misquoted Johnnie Davis's description of McCray's shooter while cross-examining the detective who took the statement. GB49-50. The record confirms, however, that Bergrin's reading was accurate, and that both the prosecutor's objection "He didn't say sure, he didn't say anything like that," and the court's warning to Bergrin, were unwarranted. A2229 ("Doesn't this say exactly … are you sure that the black male you choose ... does resemble the same black male that you observed … kill Kemo… A. Yes…word for word.").

Similarly, the government erroneously contends that, to the extent the court vouched for government witnesses, it did so to prevent Bergrin from misleading the jury. GB55. For example, the government implies that though its witness

[9] Similarly, given its burden of proving guilt beyond a reasonable doubt, the government's comment that Bergrin had equal subpoena power was not a "fair response," GB45, to Bergrin's identification of holes in the government's case.

Marilu Bruno claimed she could not remember her previous testimony, A1439-42, the court appropriately interrupted Bergrin's cross, A1439, attempted to reconcile a discrepancy in her testimony, *id.* ("I took it that when she said she only testified once, she was talking about the stabbing case"), interrupted again, A1440, and ultimately cut off Bergrin's line of inquiry altogether, *id.* GB55-56. At sidebar, the court defended Bruno, reasoning that Bergrin was not allowed to impeach her testimony as to the stabbing by pointing to other unproven claims she had made against her husband, because "I know of people that have been found not guilty when they were guilty…." A1441. But this truism obviously cannot justify shielding a government witness from questions about her *modus operandi* of making false accusations.

The "misleading litigation conduct" the government ascribes to Bergrin, GB56, then, comprises legitimate impeachment techniques highlighting ways in which witnesses' prior testimony was discredited, inconsistent,[10] or otherwise untrustworthy.[11] In response to such questioning, witnesses were entitled to answer, as Bruno did, "That's not what it says," A1449, without the court's intervention on their behalf: "That is not what it says, Mr. Bergrin. That is not

[10] *See, e.g.*, A1474-76 ("You're reading it like she said something that she didn't say when she explains it. This was something that happened 10 years ago.").

[11] *See, e.g.*, A1463, A3670, A7646, A3549, 3637, 3770, 3673, 3676, 3735, 3863 (regarding witnesses' omission of key details).

what it says. You're taking this out of context. That is not what it says," *id.* That is particularly so, given that, in that instance, Bergrin was correct that Bruno had admitted lying in prior testimony, A1453. But his point was lost to the jury in the court's intrusive intervention.

Likewise, when Bergrin demonstrated that witnesses were ducking questions by answering "I don't recall," *see, e.g.*, A7646, A1451, it was not within the trial court's Rule 611(a) discretion to implode Bergrin's cross by interjecting, for example, that, "It's also unfair. You're talking about somebody that's remembering things from 2007, 2008," A7646. *See U.S. v. Bencivengo*, 749 F.3d 205, 216 (3d Cir. 2014) (judges should not "express an opinion on any evidence presented by the defense").

Likewise, the court denied Bergrin the opportunity to demonstrate that inconsistencies in the testimony of government witnesses undermined their credibility. The government defends these practices by asserting that it discerned no inconsistencies, citing inapposite cases in which witnesses' refusal to speak with the government created no inconsistency, *see* GB57 (citing *U.S. v. Hale*, 422 U.S. 171, 176 (1975); *U.S. v. Avants*, 367 F.3d 433, 447-48 (5th Cir. 2004)). But the judge's obviously one-sided interference with the defense case violated his obligation not to "assume an advocacy role " *U.S. v. Beaty*, 722 F.2d 1090, 1093

(3d Cir. 1983). By attributing the court's errors to Bergrin, it is the government and not the defense who "rewrites history" here. GB46.

C. The Errors Were Not Harmless

The government dismisses Bergrin's claims, predictably citing harmless error, GB67-69, first because the "evidence here was overwhelming," GB67. But the court's repeated abuses of discretion prevented Bergrin from eliciting favorable evidence and exposing weaknesses in the government's case, thereby poisoning the very factfinding upon which the government relies. *See V.I. v. Joseph*, 685 F.2d 857, 864 (3d Cir. 1982) (deeming "the reality of the factfinding process" critical to harmless error analysis).

That is, whatever the government's view of the inconsistencies in witness' testimony that Bergrin sought to raise, *see* GB48-49, GB54, Bergrin had a constitutional right to point them out. *See Alexander v. Shannon*, 163 F.App'x 167, 174 (3d Cir. 2006) (confrontation right encompasses ascertaining "evidence corroborating or contradicting" witnesses' testimony). For example, with regard to Young, whose story concededly shifted over time, Bergrin was entitled to question whether, when he said that he mentioned Bergrin's name to the FBI, "just to get somebody to talk to me," he meant that he implicated Bergrin to pique law enforcement's interest, contrary to his testimony. A3549. That was a fair inference, and one which the court should have allowed Bergrin to present to the

jury, without protestations that, "Judge, this is absolutely not contradictory," and the court's blind acceptance that "Mr. Bergrin, this is exactly what he said. This is not a contradictory statement." A3549. *See Douglas v. Owens*, 50 F.3d 1226, 1230 (3d Cir. 1995) ("jury must have sufficient information to make a discriminating appraisal of a witness's motives and bias"). Nor was it misleading to suggest that "Young put an innocent man at risk by initially telling the FBI that Jamal McNeil shot McCray," GB54, when Bergrin sought to show that McNeil *was* innocent, *see* A8909-10 (referencing defense proffer of McNeil's anticipated testimony denying involvement in McCray murder). The government may ridicule Bergrin's defense theory that Young pleaded guilty to "a capital offense he did not commit because he expected jail time after cooperating against Bergrin," GB55, but whatever that theory, the court violated Bergrin's Sixth Amendment right – and deprived the jury the full benefit of the evidence – by curtailing Bergrin's cross-examination of Young.

Likewise, the jury could not fairly evaluate the Cordova recordings upon which the government so heavily relies, *see* GB67, without hearing the full extent of Bergrin's defense that those recordings were manipulated or defective, and that they did not show the full context of his intention to lead on Cordova, without harming the witnesses against Esteves. Specifically, the Judge erroneously limited Bergrin's cross-examination on the equipment used to record him, A5072-74,

A7973, A6662-68, A6713-14. The court also crippled Bergrin's defense by limiting CJA funding for a recording expert, thereby preventing him from investigating whether tampering occurred,[12] and foreclosing testimony about observed anomalies. A7974, A8990-93. And, because the court denied Bergrin's request to transcribe the recordings, A10211-13, his cross-examinations on favorable selections were repeatedly derailed. *See, e.g.*, A6685-86, A7247. Outrageously, the government suggests that the court need not have authorized such funds because standby counsel could have borne those costs, GB39-40, GB41.

Moreover, the idea that Bergrin did not need full transcripts of recordings to cross Cordova because he lacked such a transcript when crossing Carolyn about recorded statements, GB39, is both factually erroneous, *see* A2139-40 (Bergrin struggled with technological issues when confronting Carolyn), and nonsensical given that the roughly hour-long recording of Carolyn, A1717, is not analogous to the hundreds of hours recorded by Cordova. The Carolyn video does not feature Bergrin's own statements, was not taken surreptitiously, was not argued to have been manipulated, and was not intended to serve as conclusive evidence on charges carrying a life sentence.

[12] The government unfairly faults Bergrin for not requesting funds to transcribe and analyze the Cordova recordings sooner, GB53, though he did so as soon as it became certain the trial would include the Esteves charges. *See* DB35 n.13.

Moreover, while the government avers, usurping a jury decision, that the "notion that Cordova successfully could have tampered with a digital recording was plainly nonsensical" GB53, the court's rulings prevented Bergrin from demonstrating otherwise. Of course, Bergrin did not "conced[e] the authenticity of the critical December 8th recording by repeatedly arguing that it would irrevocably taint the jury," GB53, since unfair prejudice may spring from misleading evidence, and authenticity challenges are distinct from Rule 404(b) challenges.

In fact, the trial court denied Bergrin much of the evidence he needed to disprove the allegations. Thus, Bergrin absolutely could have refuted Bruno's credibility by offering Ophelia Velez's testimony in Norberto Velez's stabbing case for its truth, *contra* GB41, since it was the testimony of an unavailable infirm witness, Fed. R. Evid. 804. And, Bergrin should have been able to show Izquierdo his own words, not Bergrin's, as the government suggests, GB41 to refresh his memory. Likewise, although the government has sought to supplement the record with a small portion of the Edward Peoples trial, GB42 (citing SA1239-57), the government neither includes Anyea Williams' testimony that Bergrin told her to appear, nor mentions that Peoples, who was present at the hearing the government cites, apparently acquiesced in Bergrin's arguments that the letter at issue contained "embellishments" with "no merit, no veracity." A1244-45.

The court's exclusion of certain defense witnesses also warped the factual presentation. DB39-44. Syed Rehman and Drew Rahoo had asserted that Abdul Williams admitted fabricating evidence against Bergrin to avoid liability for crimes he and his family committed. Contradictorily, the government argues that such critical evidence was unnecessary both because Bergrin was effective at undermining Williams's credibility, and because evidence of Bergrin's guilt on matters as to which Williams' testimony provided the sole evidence, A5135-43. A5165-5208, A5208-16, A5479-80, was so overwhelming. GB44.

The government also faults Bergrin for not second-guessing the Marshals' instructions as to the necessary procedures for obtaining the presence of incarcerated witnesses, GB43-44 & n.13. But though Bergrin could have had certain witnesses in court within a matter of days, the court, intent on bringing the matter to a close, refused to allow him to do so.[13] That erroneous decision prevented critical testimony from reaching the jury.

Similarly, materials that Bergrin received late, or never at all, affected the factfinding. Thus, the delayed disclosure of over 700 pages of Jencks material regarding Yolanda Jauregui's drug trafficking activities prevented Bergrin from effectively establishing that he was not involved in the drug business, DB56-57,

[13] There is absolutely no evidence that, as the government claims, the dismissal of a juror in any way motivated the court's refusal to continue the trial for a few days to enable Bergrin to call these witnesses. *See* G44.

because he did not have time to digest this information, put it into useful form, or pursue investigative leads based upon it.[14] The Judge's criticism of how Bergrin did use this material, GB58 (citing A4999-5000), fails to excuse the error. We also cannot know how much more effectively Bergrin would have been able to challenge the allegations if he had prior access to Esteves's recorded confession, the investigative memorandum on Sayeed Grant, or the materials pertaining to Richard Pozo, Rondre Kelly, and Lachoy Walker's prior discussions with law enforcement. The Grant memorandum, for example, SA1232-38, does not state that Bergrin supplied Braswell with cocaine as the government maintains, GB59; but does describe a murder Abdul Williams committed, which provided a separate motive for Williams to fabricate evidence against Bergrin; certainly, this could have changed how he opened and cross-examined this critical witness. *See* GB52, GB60 n.22. And, had Bergrin had the report, he could have performed an investigation that would have resolved the conflict between the parties as to its utility.

Relatedly, the government argues, GB61-62, that the court appropriately quashed Bergrin's subpoena pertaining to Moran's Hudson County case, seeking materials that contradicted Moran's testimony and revealed additional benefits

[14] The government's brief, GB58, correctly identifies that this material pertains to Agent Mendez, and not, as inadvertently cited in defendant's brief, GB57, Agent Afanasewicz.

received for cooperating against Bergrin. The government faults Bergrin for not formalizing his oral opposition or belaboring the court's position that it was "not really in the mood to start looking at things in camera in the middle of a trial," A7219, but the fact remains that the court deprived Bergrin of ammunition undermining Moran's credibility.

Nor, as the government intones, *see* GB39, GB53, GB55, GB58, does the fact that Bergrin had some of the evidence prior to trial, excuse the court's mismanagement of late disclosures. Moreover, the Jencks material provided to the defense was delivered unindexed and largely uncategorized, such that, as standby counsel pointed out, it was impossible to determine what had been disclosed. *See* A1303-09. As the government's own explanation of its haphazard delivery demonstrates, significant time was wasted searching for materials that should have been identified and timely disclosed. SA668-72. Since the court refused to remedy those failures, GB58 n.21, the government knew that it could, without consequence, continue to deny the defense materials that provided the full picture of the facts.

Accordingly, the court was not simply "enforcing Rules 611(a) and 613 to ensure that the witness and the jury [were] not misled," GB57, but rather, stacked the deck for the government. The few curative instructions that the judge issued, *see* GB48, GB67 (citing A1045-48, A9842-44), failed to ameliorate the harm. *See*

U.S. v. Hernandez, 176 F.3d 719, 733 (3d Cir. 1999) (curative instruction inadequate to "'unring' the bell"). Indeed, the government concedes that the court permitted the jury to hear, uncorrected, its erroneous assertion concerning when Bergrin received discovery in Esteves' case, GB38 & n.10, contending that the court's instruction that the jury's recollection controlled cured any prejudice, GB38 (citing A9674-75), even as it used that precise instruction throughout trial to implicitly criticize Bergrin. *See, e.g.*, A6258, A2474, A5705, A5873, A7619. The Judge certainly opined on the evidence to correct the record in the government's favor. *See, e.g.*, A9071 ("Mr. Bergrin, that's my recollection. I think he said no"); A8291-92 ("MR. GAY: Objection, Judge. He never said anything like that. MR. BERGRIN: It's the jury's recollection, not Mr. Gay's. THE COURT: Well, it's the jury's recollection, but we have to have a proper basis. I don't remember that either, Mr. Bergrin").

Nor were the numerous errors here harmless because Bergrin "invited many of the rebukes he challenges." GB67. As discussed above, that is simply not an accurate portrayal of the record. And while the government accuses Bergrin of "planting the seeds for an appeal," GB49, even the court recognized the risk its rulings engendered:

> I realize that when I ask him to finish up and to not have these go on too long, I realize I run the risk of someday someone looking at this and saying that this wasn't occurring … and that will eventually wind up before

> someone, possibly. But you know what? I'm ready to take the risk.

A2409.

Moreover, the government attacks Bergrin's credibility, GB68, but does not, for example, explain how Bergrin's credibility is affected by *Williams'* decision to allow his sister to accept responsibility for his crime, or Bergrin's use of sarcasm to cross-examine untruthful witnesses, GB68-69. By contrast, irrelevant evidence that Bergrin feigned illness in the Velez trial actually prejudiced Bergrin given that his legitimate illness delayed proceedings here; as did the unsupported insinuation that Bergrin was involved in the murder of another witness against a member of the Curry organization. A2949, 3008-10.

Finally, far from indicating that the jurors based their verdict on the evidence, GB69, Juror 5's post-trial remarks referencing Bergrin's "character," A10297-99, demonstrate, rather, that the court's anti-defendant attitude permeated the jury's deliberations and "had a substantial influence on the outcome of the trial." *Copple*, 24 F.3d at 547 n.17. The conviction should be reversed.

III. THE SENTENCE MUST BE RECALCULATED BASED UPON THE RESOLUTION OF DISPUTED FACTS.

As Bergrin has argued, DB67-71, the life sentence here imposed violates the Eighth Amendment's ban on cruel and unusual punishment because it is grossly disproportionate to Bergrin's specific conduct in the McCray murder case.

Furthermore, Bergrin's concurrent sentences must be recalculated following a hearing, *see* DB69-71, in which Bergrin may substantiate his claims regarding his limited role in the charged offenses and to demonstrate that the upward enhancements imposed were not applicable.

The government concedes that Bergrin's mandatory life sentence is based solely upon his extremely limited involvement in the Kemo murder. That is both "extraordinary," *contra* GB70 (quoting *U.S. v. Walker*, 473 F.3d 71, 75 (3d Cir. 2007)), and constitutionally infirm. The government also fails to explain, GB71-72, how the sentencing hearing, in which the court adopted wholesale the Presentence Report and government submissions, provided Bergrin with "an adequate opportunity to present information to the court" regarding the facts relied upon in calculating the Offense Level. USSG §6A1.3. *See U.S. v. Cifuentes*, 863 F.2d 1149, 1155 (3d Cir. 1988) (where information is disputed, courts "should grant a hearing at which the government … can attempt to show the disputed information is reliable and the defendant can produce evidence … to refute it").

The government instead argues that the court's refusal to hold a hearing is harmless error. GB72. But, unlike in *U.S. v. Zabielski*, 711 F.3d 381, 383 (3d Cir. 2013), the procedural error here is not "insignificant or immaterial." The court failed to hold a hearing to establish the "reliability of material facts having … direct bearing on the sentence," *U.S. v. Fatico*, 603 F.2d 1053, 1057 n.9 (2d Cir.

1979), and incorrectly "apprehended both the facts underlying th[e] enhancement[s] and the significance of those facts," *Zabielski*, 711 F.3d at 387. Accordingly, the Court must vacate the sentence and remand with instructions that such a hearing occur.

CONCLUSION

This Court should vacate conviction on the Kemo murder Counts and order a new trial or sentencing proceeding on all counts.

Respectfully submitted,

s/ Lawrence S. Lustberg

GIBBONS P.C.
Attorneys for Appellant Paul Bergrin

Dated: October 20, 2014

CERTIFICATE OF COMPLIANCE

I, Lawrence S. Lustberg, Esquire, hereby certify that:

The attached brief exceeds the 7,000-word limit prescribed in Federal Rule of Appellate Procedure 32(a)(7) in that it contains 8,496 words, excluding those parts exempted by Federal Rule of Appellate Procedure 32(A)(7)(B)(iii). The attached brief complies, however, with this Court's February 10, 2014 Order permitting appellant to file a brief not exceeding 8,500 words.

The attached brief complies with the typeface and type style requirements of Federal Rules of Appellate Procedure 32(a)(5) and 32(a)(6) because this brief has been prepared using a proportionally spaced typeface, Times New Roman, using Microsoft Word with 14-point font. The text of the PDF copy of the attached brief is identical to the text in the paper copies, and a virus detection program, Sophos Endpoint Security and Control, version 9.5, has been run on the file, and no virus was detected.

s/ Lawerence S. Lustberg
Lawrence S. Lustberg, Esq.

Dated: October 20, 2014

CERTIFICATE OF BAR MEMBERSHIP

Lawrence S. Lustberg is a member in good standing of the Bar of United States Court of Appeals for the Third Circuit.

s/ Lawrence S. Lustberg
Lawrence S. Lustberg, Esq.

Dated: October 20, 2014

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on October 20, 2014, I caused the foregoing Brief to be electronically filed with the Clerk of the United States Court of Appeals for the Third Circuit through the Court's CM/ECF system, and to have paper copies delivered by sending four paper copies of the Brief via FedEx.

I hereby certify that on October 20, 2014, I caused the foregoing Brief to be served upon the following counsel of record for Appellees through the Notice of Docketing Activity issued by this Court's CM/ECF system:

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Dated: October 20, 2014

No. _____

IN THE SUPREME COURT
OF THE UNITED STATES OF AMERICA

PAUL BERGRIN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI WITH APPENDIX

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QUESTIONS PRESENTED FOR REVIEW

Whether an appellate court may rely on the number of issues raised to decline to consider the cumulative effect of any errors on the fairness of a criminal trial.

Whether the commonplace actions of a criminal defense attorney may serve as the sole evidence that the attorney knew of, assisted, and agreed to join a conspiracy.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Paul W. Bergrin respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit entered on December 18, 2014, in *United States v. Bergrin*, No. 13-3934, certified and issued in lieu of formal mandate on January 29, 2015.

CITATIONS OF OPINIONS AND ORDERS BELOW

The unreported opinion of the United States Court of Appeals for the Third Circuit affirming Bergrin's conviction is available at *United States v. Bergrin*, No. 13-3934, 2014 U.S. App. LEXIS 23818 (3d Cir. Dec. 18, 2014), and is attached to this petition, along with the order of the court of appeals denying Bergrin's motion for panel rehearing or rehearing *en banc*. Pet. App. 2a; 32a. The district court's opinion denying Bergrin's motion for a judgment of acquittal on Counts Twelve and Thirteen, available at *United States v. Bergrin*, 91 Fed. R. Evid. Serv. (Callaghan) 1369 (D.N.J. July 23, 2013), is also attached to this petition. Pet. App. 11a.

BASIS FOR JURISDICTION

The judgment of the court of appeals was entered on December 18, 2014. A timely petition for panel rehearing and rehearing *en banc* was denied on January 21, 2015. Pet. App. 32a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Due Process Clause of the Fifth Amendment to the United States Constitution provides that "No person shall be deprived of life, liberty, or property, without due process of law." U.S. Const. amend V.

The Sixth Amendment to the United States Constitution provides that "In all criminal prosecutions, the accused shall . . . have the Assistance of Counsel for his defense." U.S. Const. amend VI.

Sections 1512(a)(1)(A) and (a)(3)(A) of Title 18 of the United States Code provide in relevant part:

> (a)
>
> (1) Whoever kills or attempts to kill another person, with intent to—
>
> (A) prevent the attendance or testimony of any person in an official proceeding; . . .
>
> shall be punished as provided in paragraph (3).
>
> . . .
>
> (3) The punishment for an offense under this subsection is—
>
> (A) in the case of a killing, the punishment provided in sections 1111 and 1112 [*i.e.* imprisonment for life].

Section 1512(k) of Title 18 of the United States Code provides in relevant part as follows:

> Whoever conspires to commit any offense under this section shall be subject to the same penalties as those prescribed for the offense the commission of which was the object of the conspiracy.

Section 2 of Title 18 of the United States Code provides in relevant part:

> (a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.
>
> (b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

STATEMENT OF THE CASE

Petitioner Paul W. Bergrin is a former federal prosecutor and high-profile criminal defense attorney in New Jersey. Following an initial remand from the Third Circuit Court of Appeals reversing dismissal of the indictment against Bergrin, *United States v. Bergrin*, 650 F.3d 257 (3d Cir. 2011), on June 2, 2011, a federal grand jury returned a 33-count Second Superseding Indictment, of which thirty counts pertained to Bergrin.[1] The Second Superseding Indictment alleged RICO violations, witness tampering (including murder conspiracy), drug trafficking conspiracy, murder-for-hire conspiracy, aiding prostitution, and evading financial reporting requirements. A first trial on the murder case alone, *i.e.*, Counts Twelve and Thirteen, which addressed the killing of Kemo McCray, a witness against Bergrin's client William Baskerville in a prior drug case, resulted in a hung jury.

[1] The district court possessed jurisdiction in the first instance pursuant to 18 U.S.C. § 3231.

The government then appealed from various adverse rulings on severance and exclusion of evidence, and successfully sought the reassignment of the case. *See United States v. Bergrin*, 682 F.3d 261 (3d Cir. 2012). On remand, the newly assigned district judge denied Bergrin's pretrial motions to sever and for other relief.

Beginning with jury selection on January 7, 2013, an approximately eight-week trial followed on most remaining charges (all but several tax counts, which were ultimately dismissed on the government's motion). On March 18, 2013, Bergrin was convicted on all twenty-three counts, and thereafter sentenced to multiple life sentences.

On appeal, Bergrin argued that the district court's errors throughout the proceedings denied him a fair trial, and that the district court erroneously denied his post-conviction motion for a judgment of acquittal on the counts related to the murder conspiracy case. Specifically, Bergrin argued that the district court denied him a fair trial and the right to present a defense in violation of his constitutional rights through numerous erroneous rulings and caustic comments that, when combined, infected the entire proceeding with an anti-defendant bias. For example, the trial court allowed proceedings to continue when Bergrin was ill, and unduly interfered with Bergrin's jury addresses. As Bergrin argued, the trial court denied him access to expert services and transcripts necessary to his defense, precluded defense witnesses by denying requests for continuances to secure their presence, refused to inquire into witnesses' invocation of the Fifth Amendment privilege against self-incrimination, and limited defense witness testimony. Moreover, the

trial judge permitted improper and unfairly prejudicial prosecutorial comments and itself interjected hostile judicial commentary towards Bergrin, while unnecessarily limiting cross-examination of government witnesses and vouching for government witnesses' credibility. The court also denied Bergrin a fair opportunity to review late-disclosed government evidence, and admitted unfairly prejudicial evidence with minimal relevance. Bergrin specifically argued that the cumulative effect of these numerous errors crippled his ability to challenge the government's evidence and demonstrate that the government's witnesses misrepresented his lawful attorney services as criminal activities, often fabricating testimony against him.

In assessing Bergrin's claims that he was denied a fair trial, the court of appeals disturbingly invoked the shibboleth that "the number of claims raised in an appeal is usually inversely proportional to their merit," without addressing the substance of the majority of his claims. Pet. App. 5a. This analytical lens, however, eschews fundamental principles of appellate review established by this Court's precedents and stands in conflict with the decisions of other circuit courts of appeals, which require reviewing courts, in examining whether the defendant received a fair trial, to assess whether any errors were committed, and whether the cumulative impact of such errors affected the outcome.

The appellate court similarly gave little consideration to Bergrin's argument regarding his murder conspiracy and aiding and abetting convictions. In particular, though the government adduced no evidence either that Bergrin agreed to kill McCray (and thus joined the murder conspiracy), or that he knew of and assisted in that scheme (and thus aided and abetted it), the appellate court nonetheless

concluded that the district court did not err in denying Bergrin's motion for a judgment of acquittal on Counts Twelve and Thirteen. The appellate court reasoned that although the only evidence as to the formation of the conspiracy showed that Baskerville's associates first decided to kill McCray after Bergrin left their presence, a rational jury could nevertheless have inferred that Baskerville and Bergrin previously formed an agreement to murder McCray when they met to discuss Baskerville's case on the day of Baskerville's arrest, and that soon thereafter Bergrin met with Baskerville's associates in furtherance of that agreement. Pet. App. 3a. But the appellate court's theory troublingly relied upon the everyday practices of criminal defense attorneys to establish both Bergrin's conspiracy and his aider/abettor liability. The resulting threat to the attorney-client relationship and corollary Sixth Amendment right to counsel likewise demands this Court's consideration before it becomes a commonplace of our criminal justice system.

On January 2, 2015, Bergrin timely filed a motion for rehearing or rehearing *en banc*. The court of appeals denied that Motion in an Order dated January 21, 2015. Pet. App. 32a. The court's certified judgment in lieu of a formal mandate issued on January 29, 2015. Bergrin now seeks a writ of certiorari to the United States Court of Appeals for the Third Circuit, and requests the reversal of that court's decision sustaining Bergrin's conviction.

REASONS FOR GRANTING THE WRIT

This Court should grant a writ of certiorari to resolve a split in the circuits as to the methodology for evaluating claims of cumulative error that frequently arise in criminal appeals: most courts of appeals first assess claims of error individually, and then determine the aggregate effect of any errors, while a few, including the Third Circuit, look to the case as a whole and do not ever evaluate the merit of individual claims if the defendant was afforded a fair trial. In this case, the court of appeals entered a decision in conflict with the decisions of other courts of appeals by holding that the mere number of issues raised by the defendant can excuse the reviewing court from its obligation to evaluate the claimed errors and conduct a cumulative error analysis at all. Indeed, in its failure to perform such an analysis, the appellate court's opinion so far departs from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory power. *See* Supreme Court Rule 10(a); *McNabb v. United States*, 318 U.S. 332, 341 (1943) (supervising the administration of criminal justice in federal courts is a basis for a writ of certiorari).

A writ of certiorari is also warranted to enable this Court to settle an important federal question, namely, whether the commonplace actions of a criminal defense attorney acting on his client's behalf may constitute the sole evidence that the attorney entered into a conspiracy with his client, and that he aided and abetted a scheme benefitting that client. *See* Supreme Court Rule 10(c). Since the court of appeals' decision sets a precedent with the potential to imperil attorney-client

relations and the corollary Sixth Amendment right to the effective assistance of counsel, the Court should grant the writ here sought.

A. The Court Should Grant A Writ Of Certiorari To Clarify That The Number Of Issues Raised Does Not Excuse An Appellate Court's Obligation To Perform Cumulative Error Review.

The Petition should be granted, first, because the court of appeals' decision embodies a standard for reviewing criminal appeals alleging multiple trial court errors that not only represents a split in the circuits as to how cumulative error review should be performed by courts of appeals, but also circumvents cumulative error review altogether. That is, in evaluating Bergrin's claim that the proceedings against him were deeply and constitutionally flawed, the court of appeals framed its analysis by invoking the principle that, "the number of claims raised in an appeal is usually inversely proportional to their merit." Pet. App. 5a. Thus, the court of appeals expressly abdicated its duty as an appellate tribunal to consider Bergrin's argument that the cumulative effect of the rulings at issue unfairly prejudiced him.

In *Taylor v. Kentucky*, 436 U.S. 478 (1978), this Court held that several errors, none of which individually rose to constitutional dimensions, could, when considered cumulatively, deny a defendant a fair trial. In *Taylor*, the Court concluded that, "the combination of the skeletal instructions, the possible harmful inferences from the references to the indictment, and the repeated suggestions that [defendant's] status as a defendant tended to establish his guilt created a genuine danger that the jury would convict . . . [the defendant] on the basis of those extraneous considerations." *Id.* at 487-88. As a result, "the cumulative effect of the potentially damaging circumstances of this case violated the due process guarantee

of fundamental fairness . . . ." *Id.* at 488 n.15. *See also Kyles v. Whitley*, 514 U.S. 419 (1995) (cumulative effect of prosecutor's *Brady*[2] violations warranted reversal of conviction); *Kotteakos v. United States*, 328 U.S. 750, 762 (1946) ("it is impossible to conclude that substantial rights were not affected" without "fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error").

As other courts of appeals have held, the "rubric of cumulative error demands that trial errors be weighed 'against the background of the case as a whole, paying particular weight to factors such as the nature and number of the errors committed; their interrelationship, if any, and combined effect . . . .'" *United States v. Sanabria*, 645 F.3d 505, 516-17 (1st Cir. 2011) (quotation omitted). In *Sanabria*, the First Circuit Court of Appeals reversed a conviction because, as Bergrin argued occurred in his case, the trial court's erroneous rulings substantially interfered with the defendant's ability to counter the government's case by impeaching critical witnesses. *Id.* That concern was compounded by the admission of improper testimony, *id.*, also at issue here. *Accord United States v. Sepulveda*, 15 F.3d 1161, 1196 (1st Cir. 1993) ("Of necessity, claims under the cumulative error doctrine are sui generis. A reviewing tribunal must consider each such claim against the background of the case as whole, paying particular weight to factors such as the nature and number of errors committed; their interrelationship, if any, and combined effect").

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[2] *Brady v. Maryland*, 373 U.S. 83 (1963).

Although they vary in the way in which they articulate the process, other courts of appeals also accept that they must undertake a cumulative error analysis where multiple rulings are challenged and the defendant argues cumulative error. *See, e.g.*, *United States v. Dalton*, 574 F. App'x 639, 641 (6th Cir. 2014) ("when determining a cumulative-effect claim, the court determines if the defendant's allegations of error have merit and, if so, considers whether the combined effect of the errors was so prejudicial as to warrant a new trial"); *United States v. Perez*, 580 F. App'x 795, 804 (11th Cir. 2014) ("For purposes of [cumulative error] analysis, we must first consider each error individually"); *United States v. Baraloto*, 535 F. App'x 263, 280 (4th Cir. 2013) ("[i]f more than one error occurred at trial, then all errors are aggregated to determine whether their cumulative effect mandates reversal"); *United States v. Ramey*, 531 F. App'x 410, 421 (5th Cir. 2013) ("A cumulative error claim requires that 'we evaluate the number and gravity of the errors in the context of the case as a whole.'") (quoting *United States v. Valencia*, 600 F.3d 389, 429 (5th Cir. 2010)); *United States v. Boling*, 648 F.3d 474, 482-83 (7th Cir. 2011) (evaluating the "litany of errors [defendant] allege[d]" for cumulative error); *United States v. Allen*, 269 F.3d 842, 847 (7th Cir. 2001) ("We review to determine if 'the effect of the errors, considered together, could not have been harmless,'") (quotation omitted); *United States v. Wood*, 207 F.3d 1222, 1237 (10th Cir. 2000) ("cumulative error analysis aggregates all the errors that individually might be harmless, 'and it analyzes whether their cumulative effect on the outcome of the trial is such that collectively they can no longer be determined to be harmless'") (quoting *United States v. Rivera*, 900 F.2d 1462, 1470 (10th Cir. 1990) (*en banc*)); *United States v.*

Necoechea, 986 F.2d 1273, 1282 (9th Cir. 1993) ("In reviewing for cumulative error, the court must review all errors preserved for appeal and all plain errors.").

In fact, appellate courts regularly reverse conviction on this basis. *See, e.g.*, *United States v. Adams*, 722 F.3d 788, 832 (6th Cir. 2013) ("Although no one of the six identified errors may warrant reversal on its own, the cumulative effect of these errors rendered defendants' trial fundamentally unfair in violation of their rights to due process."); *United States v. Al-Moayad*, 545 F.3d 139, 178 (2d Cir. 2008) ("in the aggregate, the district court's [numerous] errors deprived the defendants of a fair trial"); *United States v. Holmes*, 413 F.3d 770, 774-75 (8th Cir. 2004) (remanding for a new trial based on cumulative error of prosecutor's remarks and exclusion of defense witness testimony); *United States v. Wallace*, 848 F.2d 1464, 1475-76 (9th Cir. 1988) ("Given the centrality of the credibility contest between the defendants and the co-conspirator witness, we are particularly troubled by the possible cumulative effect of those errors which go to the credibility of the witnesses"); *United States v. McLister*, 608 F.2d 785 (9th Cir. 1979) (cumulative errors required reversal in view of absence of evidence in drug conspiracy).

As a general matter, the Third Circuit Court of Appeals also recognizes the cumulative error doctrine. *See United States v. Copple*, 24 F.3d 535, 547 n.17 (3d Cir. 1994); *United States v. Thornton*, 1 F.3d 149, 156 (3d Cir. 1993); *United States v. Hill*, 976 F.2d 132, 145 (3d Cir. 1992). Thus, that court has stated that "[a] new trial is required on this basis only when 'the[] errors, when combined, so infected the jury's deliberations that they had a substantial influence on the outcome of the trial.'" *Id.*

Nonetheless, the Third Circuit Court of Appeals' cumulative error analysis, while similar to that of some other Circuits, is distinct from that of most. That is, appellate courts generally first assess claims of error individually, and then determine the aggregate effect of any errors. *See, e.g.*, *Perez*, 580 F. App'x at 804 ("For purposes of [cumulative error] analysis, we must first consider each error individually"); *Baraloto*, 535 F. App'x at 280 ("[i]f more than one error occurred at trial, then all errors are aggregated to determine whether their cumulative effect mandates reversal"). By contrast, the Third Circuit determines cumulative error by looking to the overall fairness of the underlying trial. *See, e.g.*, *United States v. Roland*, 545 F. App'x 108, 118 (3d Cir. 2013) ("Our own review of the record has found no support for the conclusion that the trial was tainted with error warranting a reversal of his conviction."); *United States v. Salehi*, 187 F. App'x 157, 169 (3d Cir. 2006) (summarily concluding that "[n]one of the issues raised by Salehi on appeal are of sufficient weight to trigger the cumulative error doctrine here, and Salehi's conviction is therefore affirmed").

The Eighth Circuit Court of Appeals employs a similar approach. *See, e.g.*, *United States v. Baldenegro-Valdez*, 703 F.3d 1117, 1124-25 (8th Cir. 2013) ("We may reverse on the basis of cumulative error only where the case as a whole presents an image of unfairness resulting in the deprivation of defendant's constitutional rights"); *United States v. Samples*, 456 F.3d 875, 887 (8th Cir. 2006) ("We may reverse where the case as a whole presents an image of unfairness that has resulted in the deprivation of a defendant's constitutional rights") (quoting *United States v. Riddle*, 193 F.3d 995, 998 (8th Cir. 1999)); *United States v.*

Blaylock, 421 F.3d 758, 773 (8th Cir. 2004) ("Our review of the record convinces us [defendant] received a fair trial.").

Likewise, though "the 'cumulative unfairness' doctrine is also firmly embedded in th[e Second] Circuit's precedents," that court generally declines to evaluate an appellant's claims individually.[3] *See, e.g.*, *United States v. Martinez*, 83 F. App'x 384, 388 (2d Cir. 2003) ("Having carefully reviewed the record, we conclude, finally, that cumulative error warranting reversal has not been established"); *United States v. Rahman*, 189 F.3d 88, 145 (2d Cir. 1999) ("most of the 'errors' he cites in support of his cumulative-unfairness claim were not errors at all"); *United States v. Salameh*, 152 F.3d 88, 157 (2d Cir. 1998) (rejecting cumulative error claim because the "record does not support [defendant's] claim that the circumstances of his trial were so prejudicial that his right to due process was denied"); *United States v. Guglielmini*, 384 F.2d 602, 605 (2d Cir. 1967) ("Where there is any substance to such a claim the reviewing court must examine the entire record and attempt to determine whether the conduct of the trial has been such that the jurors have been impressed with the trial judge's partiality to one side to the point that this became a factor in the determination of the jury"); *compare with United States v. Fell*, 531 F.3d 197, 233 (2d Cir. 2008) ("Because considered singly, none of the errors claimed by [defendant] undermine our confidence in the fairness of the proceeding, we similarly conclude that, given the care and soundness with

[3] Unlike the Third Circuit, however, the Eighth and Second Circuits will not decline to reach a cumulative error argument merely because the defendant challenged multiple aspects of the underlying proceedings. *See infra* at 16.

which this trial was conducted, 'the cumulative error doctrine finds no foothold in this appeal'") (quotation omitted).

This Court should address this profound split between the Circuits in order to assure that appellate review of criminal convictions in the common circumstances in which multiple issues are raised is done in a uniformly appropriate manner. This case squarely presents that issue, for here the court of appeals declined to assess whether any of the court's rulings were, in fact, erroneous, as well as whether any of those rulings, in combination, might have influenced the trial's outcome. Rather, in summarily concluding that "the record demonstrates that Bergrin received a fair trial," Pet. App. 7a, the court of appeal began with the proposition that "the number of claims raised in an appeal is usually inversely proportional to their merit," Pet. App. 5a (quoting Ruggero J. Aldisert, *The Appellate Bar: Professional Competence and Professional Responsibility—A View from the Jaundiced Eye of One Appellate Judge*, 11 CAP. U. L. REV. 445, 458 (1982)). The court, thus, not only failed to determine whether the trial court committed error; it also declined to meaningfully evaluate Bergrin's claims whatsoever, beyond touching upon what it viewed as his weakest contentions.

That is, although the court of appeals concluded that "Bergrin's scattershot arguments are exceedingly weak," Pet. App. 5a, it did not determine that he failed to raise any errors; nor did the court assess Bergrin's allegations of trial court error. It did not even review the categories of alleged error, such as the trial court's failure to order continuances when Bergrin was ill, its judicial interference with Bergrin's jury addresses, its denial of funds pursuant to the Criminal Justice Act, 18 U.S.C.

§ 3006A, preclusion of defense witnesses, rulings touching on Bergrin's ability to challenge government witness testimony and evidence, denial of access to exculpatory evidence, and other erroneous evidentiary rulings.

This decision is, therefore, not one in which the court of appeals validly held that the "cumulative effect of each non-error does not rise to constitutional error; as the saying goes, zero plus zero equals zero." *United States v. Powell*, 444 F. App'x 517, 522 (3d Cir. 2012). *See also United States v. Chhibber*, 741 F.3d 852, 861 (7th Cir. 2013) ("Given that there were no errors in the district court's rulings, we need not consider Chhibber's claim of cumulative error."); *United States v. Sypher*, 684 F.3d 622, 628 (6th Cir. 2012) (where "no individual ruling has been shown to be erroneous, there is no 'error' to consider, and the cumulative error doctrine does not warrant reversal"); *Hooks v. Workman*, 689 F.3d 1148, 1194-95 (10th Cir. 2012) ("[c]umulative-error analysis applies where there are two or more actual errors. It does not apply . . . to the cumulative effect of non-errors.") (quotations omitted); *Choi Chun Lam v. Kelchner*, 304 F.3d 256, 272 n.17 (3d Cir. 2002) ("Because we find only one instance of impermissible vouching, we have no need to consider Lam's argument that multiple instances of vouching resulted in cumulative error that rendered her trial unfair"). Nor did the court determine that any errors committed by the trial court would be harmless given the evidence against Bergrin. *See, e.g.*, *United States v. Wyly*, 548 F. App'x 363, 367 (9th Cir. 2013); *United States v. Anaya*, 727 F.3d 1043, 1061 (10th Cir. 2013); *United States v. Schatz*, 545 F. App'x 934, 939 (11th Cir. 2013); *Copple*, 24 F.3d at 547 n.17.

Instead, "[r]ather than catalogue all that transpired," the court of appeals chose to "focus on a few items that illustrate the inaccuracy and unpersuasiveness of Bergrin's argument." Pet. App. 6a. Thus, far from evaluating the "litany of errors allege[d]," *Boling*, 648 F.3d at 482-83, as courts of appeals in other circuits do even where they deem the claims weak, the appellate court expressly based its ruling upon what it believed the trial court did correctly at various points during trial, as well as on the *pro se* defendant's own purported blunders. *See* Pet. App. 5a-6a ("Judge Cavanaugh conducted this lengthy trial with great skill, patience, and fairness . . . in spite of an obstreperous pro se Defendant . . . ."). In focusing on what it viewed as the appeal's weakest arguments, the appellate court completely abandoned its obligation to discern whether any of Bergrin claims were meritorious. *See Kotteakos*, 328 U.S. at 762 ("The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the errors. It is rather, even so, whether the errors [themselves] had substantial influence.").

Rather, because Bergrin raised too many claims in the court's view, it simply threw its hands up in the face of his appeal. Pet. App. 5a (citing Aldisert, 11 CAP. U. L. REV. at 458). In this regard, the Third Circuit stands alone in its embrace of the Honorable Ruggero J. Aldisert's canon that, "when . . . an appellant's brief . . . contains ten or twelve points, a presumption arises that there is no merit to any of them." Aldisert, 11 CAP. U. L. REV. at 458.

Nor is this the first case in which the Third Circuit has expressed that alarming and unprincipled perspective. For example, in *United States v. Bonner*, 469 F. App'x 119, 122 (3d Cir. 2012), in which the Third Circuit also rejected

defendant's allegations of trial court error, the appellate court likewise preceded its analysis of "the multitudinous issues raised by Appellant," with the notion that "'[a]ppellate advocacy is measured by effectiveness, not loquaciousness.'" *Id.* (quoting Aldisert, 11 CAP. U. L. REV. at 458). As the appellate court there explained, "[e]ffective advocacy in this Court is predicated on a modicum of issues." *Id.* The *Bonner* court further noted that a "party's choice to raise over a dozen issues in one case at best interferes inordinately with the court's calendaring process; and at worst, requires the composition of an opinion on a hodgepodge of helter skelter contentions." *Id.* It reiterated the Circuit's view that "[l]egal contentions, like the currency, depreciate through overissue." *Id.* (quoting Robert H, Jackson, *Advocacy Before the Supreme Court*, 37 CORNELL L.Q. 1, 5 (1951)).

Similarly, in *United States v. Hart*, 693 F.2d 286, 287 n.1 (3d Cir. 1982), the court of appeals quoted Judge Aldisert's articulation of the presumption that a brief that alleges "that the trial court committed more than one or two reversible errors" is not meritorious and requires little further analysis. In *Hart*, the appellate court balked at having to review each aspect of the defendant's appeal on the basis of the fact that he raised multiple issues. *Id.* ("Because of the inordinate number of meritless objections pressed on appeal, spotting the one bona fide issue was like finding a needle in a haystack.") (citing Aldisert, 11 CAP. U. L. REV. at 458). *See also United States v. Sheika*, 304 F. App'x 135, 136 (3d Cir. 2008) ("wearily" reviewing appeal raising 12 claims of error) (quoting Aldisert, 11 CAP. U. L. REV. at

458 ("an appellant's brief that contains ten or twelve points, [creates] a presumption . . . that there is no merit to any of them")).

This case again adopts Judge Aldisert's jaundiced view, one that does not befit a federal appellate tribunal in a system that should be based upon jurisprudential principle and judicial industry. As a result, in its opinion, the court of appeals departed from any previously accepted basis outside the Third Circuit for reviewing multiple allegations of trial court error. In doing so, it undermined the standard for cumulative review set forth by this Court in *Taylor*, and applied by other courts across the country. Accordingly, a writ of certiorari should issue to clarify that appellate courts may not look to the number of claims raised to bypass their obligation to independently assess whether any trial court errors, in combination, denied the defendant a fair trial, and to resolve, once and for all, the proper methodology for evaluating cumulative error, so as to resolve a split in the circuits on that question.

B. The Commonplace Conduct Of Criminal Defense Attorneys Alone May Not Establish Key Elements Of Conspiracy And Aider/Abettor Liability.

The Petition should also be granted because the decision of the court of appeals risks chilling attorney-client relations, and accordingly threatens the Sixth Amendment right to the effective assistance of counsel. In this case, as the defense argued both post-trial and on appeal, the government failed to show that Bergrin joined the conspiracy alleged in Count Twelve, *see* 18 U.S.C. § 1512(k), because the evidence adduced at trial showed only that Baskerville's associates first resolved to kill McCray some time after November 25, 2003, and that they did so outside

Bergrin's presence. The court of appeals nonetheless held that the government had satisfied its obligation by inferring that Bergrin entered into an agreement to kill McCray with his client, Baskerville, on November 25, 2003.[4] Pet. App. 3a. In so finding, the court specifically concluded that Bergrin could be deemed to have joined the conspiracy on that date because he represented Baskerville and his associates in other cases; because, when Baskerville was arrested on November 25, 2003, he disclosed the name of the informant against him to his attorney; and because Bergrin thereafter shared that name with a criminal associate of Baskerville's who was also his client's relative. Pet. App. 3a-4a. Accordingly, in the Third Circuit's view, the mere facts that Bergrin met with his client, discussed the identity and significance of the informant, and disclosed that name to his client's relative adequately bespeak the formation of a mutual understanding to kill McCray.

This holding is particularly troubling because it relies on Bergrin's role as legal counsel to a criminal defendant to establish critical elements of conspiracy and aider/abettor liability. Such a precedent has the dangerous power to become a basis for criminalizing the practice of law. Indeed, the evidence cited by the court of

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[4] Although the court of appeals concluded that the record contained adequate evidence "to sustain Bergrin's convictions related to the McCray murder," Pet. App. 4a, it failed to provide any reasoning as to how the government had met its burden as to Bergrin's aider/abettor conviction on Count Thirteen, *see* 18 U.S.C. §§ 1512(a)(1)(A), 2, notwithstanding Bergrin's arguments that the evidence did not support inferences that he, in taking the actions alleged of him, knew that McCray would be murdered, *see United States v. Nolan*, 718 F.2d 589, 592 (3d Cir. 1983); *United States v. Mercado*, 610 F.3d 841, 846 (3d Cir. 2010), or that those actions "in fact render[ed] aid or assistance" in bringing about McCray's murder, *Nolan*, 718 F.2d at 593-94, given the inevitability that it would occur with or without Bergrin's participation. *See* Pet. App. 19a-21a.

appeals to support Bergrin's conviction are no more than the commonplace actions of a criminal defense attorney doing his job: meeting with his client following his arrest, discussing the allegations — including the identity of the informant — and sharing such information with the client's friends and relatives during a discussion of bail.

The court of appeals' decision thus allows actions intrinsic to the work of criminal defense attorneys to form the sole means of establishing that a lawyer formed an illegal agreement with his client. The obvious result will be that criminal defense attorneys, already under attack,[5] will hesitate to freely discuss these kinds

[5] *See* Tung Yin, *Boumediene and Lawfare*, 43 U. RICH. L. REV. 865, 883-85 (2009) (discussing conviction of criminal defense attorney Lynne Stewart related to her representation of terrorists); Aviva Abramovsky, Comment, *Traitors in Our Midst: Attorneys Who Inform on their Clients*, 2 U. PA. J. CONST. L. 676, 686-89 (2000) (discussing increasing targeting of attorneys for federal prosecution and the corollary rise in attorney informants). *See, e.g.*, *United States v. Kloess*. 251 F.3d 941 (11th Cir. 2001) (criminal defense lawyer charged with obstruction of justice for "misleading conduct" before state court that enabled his client to avoid federal charges); *United States v. Tarkoff*, 242 F.3d 991 (11th Cir. 2001) (defense lawyers convicted for money laundering in a case involving transfers of funds from a client's account, comprised of proceeds from Medicare fraud); *United States v. Cueto*, 151 F.3d 620 (7th Cir. 1998) (upholding conviction of lawyer for allegedly filing for restraining order against an undercover informant to protect his own financial interests in client's illegal gambling business); *United States v. Czuprynski*, 46 F.3d 560, 567-68 (6th Cir. 1995) (*en banc*) (Martin, J., dissenting) (criticizing the federal government's unprecedented prosecution of a criminal defense attorney for possessing a handful of marijuana, noting local prosecutors "intended to do whatever they could to remove Czuprynski from his law practice"); *People v. Simac*, 641 N.E.2d 416 (Ill. 1994) (upholding criminal contempt conviction of a defense lawyer who fostered an erroneous witness identification by seating an employee at the defense table in the defendant's stead); *United States v. Kelly*, 888 F.2d 732 (11th Cir. 1989) (reversing criminal defense attorney's drug conspiracy and aiding convictions where lawyer allegedly advised his client with regard to drugs sought by another client); *United States v. Cintolo,* 818 F.2d 980 (1st Cir. 1987) (upholding conviction for conspiracy to obstruct justice where defendant-lawyer represented a

of issues with their clients, or to provide meaningful clarity about the case to their clients' families. The opinion, thus, risks chilling the attorney-client relationship that is so critical to the functioning of our system of justice, and preventing defense attorneys from fulfilling their obligation to provide the effective assistance of counsel that is guaranteed by the Sixth Amendment. *See* Sam Kamin & Eli Wald, *Marijuana Lawyers: Outlaws or Crusaders?* 91 OR. L. REV. 869, 896 (2013) ("clients may be more likely to withhold . . . information about their cases if their lawyers believe that full disclosure by clients will subject the lawyers to criminal liability or discipline. This reticence, in turn, will undermine the ability of lawyers to represent clients effectively and deprive attorneys the opportunity to dissuade clients from engaging in wrongdoing."); Laura Rovner & Jeanne Theoharis, *Preferring Order to Justice*, 61 AM. U. L. REV. 1331, 1374 (2012) ("The successful prosecution of [Lynne] Stewart has had a chilling effect on lawyers throughout the country; many will not take these terror cases, and those who do operate with excessive caution about what they say in public and whom they consult for legal strategy."); Darryl K. Brown, *Executive Branch Regulation of Criminal Defense Counsel and the Private Contract Limit on Prosecutor Bargaining*, 57 DEPAUL L. REV. 365, 365 (2008) ("in recent years, prosecutors have more actively affected the power and effectiveness of defense counsel, especially privately financed counsel in white-collar crime cases"); Bruce A. Green, *The Criminal Regulation of Lawyers*, 67 FORDHAM L. REV. 327, 328-29 (1998) ("to avoid the possibility of an unwarranted prosecution, lawyers may

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witness in a grand jury investigation of racketeering, while acting at the direction of the criminal organization leader to ensure that the witnesses did not testify).

refrain from engaging in lawful conduct that is professionally desirable"). *See also United States v. Reid*, 214 F. Supp. 2d 84, 94-95 (D. Mass. 2002) ("Whatever the merits of [the Lynne Stewart] indictment, its chilling effect on those courageous attorneys who represent society's most despised outcasts cannot be gainsaid.").

After all, as this Court has stated, the fairness of our legal system depends upon "the 'noble ideal' that every criminal defendant be guaranteed . . . the expert advice necessary to recognize and take advantage of th[e] . . . 'safeguards designed to assure fair trials[.]'" *Fuller v. Oregon*, 417 U.S. 40, 52 (1974) (quoting *Gideon* v. *Wainwright*, 372 U.S. 335, 344 (1963)). And such advice cannot be rendered without communication between attorney and client. *See Weatherford v. Bursey*, 429 U.S. 545, 554 n.4 (1977) ("One threat to the effective assistance of counsel . . . lies in the inhibition of free exchanges between defendant and counsel"); *Clutchette v. Rushen*, 770 F.2d 1469, 1471 (9th Cir. 1985) ("government interference with the confidential relationship between a defendant and his counsel may implicate Sixth Amendment rights"). *See also* Model Rules of Prof'l Conduct R. 1.6 cmt. 2 (noting client's ability to communicate fully and frankly with the lawyer, even as to embarrassing or legally damaging subject matter, is necessary to effective representation).

Likewise, included in the Sixth Amendment guarantee of the right to effective assistance of counsel is, of course, the "correlative right to representation free from conflicts of interest." *Wood v. Georgia*, 450 U.S. 261, 271 (1981). But following the decision in this case, a case which, unfortunately is representative of a

trend of criminalizing the practice of criminal defense,[6] attorneys will be so concerned with their own potential exposure that they will not be able to take the most fundamental actions that are necessary to fulfill their obligation to zealously defend their clients.

This Court should, accordingly, grant a writ of certiorari because the Third Circuit's decision threatens to undermine the effective assistance of counsel in criminal matters and discourage attorneys from fulfilling their responsibilities to those who have been accused of a crime. To prevent such an attack on the attorney-client relationship, a writ of certiorari should issue, and the decision of the United States Court of Appeals for the Third Circuit should be reversed.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

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[6] *See* Kamin & Wald, 91 OR. L. REV. at 894 ("many defense attorneys believe that criminal prosecution of lawyers acting qua lawyers is an increasingly common tactic against those lawyers representing unpopular defendants"); Fred C. Zacharias, *The Myth of Self Regulation*, 93 MINN. L. REV. 1147, 1169 & n.99 (2009) (noting prosecutors, "particularly federal prosecutors, increasingly targeted lawyers"); Paul F. Rothstein, *"Anything You Say May Be Used Against You": A Proposed Seminar on the Lawyer's Duty to Warn of Confidentiality's Limits in Today's Post-Enron World*, 76 FORDHAM L. REV. 1745, 1749 n.16 (2007) ("There seems to be an increasing tendency to prosecute lawyers in connection with their client's crimes"); Peter J. Henning, *Targeting Legal Advice*, 54 AM. U. L. REV. 669, 674-75 (2005) (noting "trend towards using the criminal law and the government's investigatory tools against lawyers because of what appears to be a deep-seated suspicion of legal advice as something harmful or inappropriate").

Respectfully submitted,

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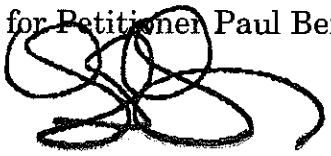
Counsel for Petitioner Paul Bergrin



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April 21, 2015

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

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

BRIEF IN SUPPORT OF DEFENDANT PAUL W. BERGRIN'S PRETRIAL MOTIONS

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I. PRELIMINARY STATEMENT

The procedural and factual history of this matter is set forth at length in the decision of the United States Court of Appeals for the Third Circuit reassigning this matter. *See United States v. Bergrin*, 682 F.3d 261, 265-275 (3d Cir. 2012). On August 7, 2012, the parties appeared before the Court for a status conference; the Court required that such pretrial motions as were appropriate for the Court's consideration in light of the Court of Appeals' decision be simultaneously filed by both parties on or before August 21, 2012; simultaneous replies are due on August 24, 2012. For the reasons set forth below (and in prior briefs filed in this action, which are not repeated here), defendant Bergrin respectfully requests:

(1) that Counts Twelve and Thirteen of the Second Superseding Indictment, alleging that Mr. Bergrin conspired to murder Kemo McCray, be severed from the remainder of the Indictment, in order to afford Mr. Bergrin a fair trial on those counts, for which he faces a mandatory sentence of life imprisonment;

(2) that evidence of the Esteves Plot, the Pozo plot, and the drug trafficking conspiracy be excluded from the severed trial of Counts Twelve and Thirteen under Federal Rules of Evidence 401, 403 and/or 404(b);

(3) that the Court hold a pretrial hearing regarding Mr. Bergrin's allegations of prosecutorial misconduct;

(4) that the Court should consider and grant the other pretrial motions previously filed by Mr. Bergrin (a) to dismiss Count Twenty-Six as facially invalid because it charges Mr. Bergrin with aiding and abetting himself, and thus that Count alleges a legal and factual impossibility, which does not amount to a cognizable criminal offense; (b) to suppress any evidence gathered as a result of statements made by Mr. Bergrin to government informants who acted as government agents after Mr. Bergrin was already represented by counsel, in violation of his

Sixth Amendment rights; and (c) to suppress evidence seized in violation of Mr. Bergrin's Fourth Amendment rights because the pertinent searches exceeded the scope of that warrant, the pertinent affidavit failed to provide known material information which bore upon the credibility of a key informant upon which the affidavit was based, and the evidence seized was the "fruit of the poisonous tree" because based upon a warrant obtained using information collected as a result of an unlawful, warrantless search; and

(5) that Mr. Bergrin be permitted to file additional motions not within the scope of the Court's Order and depending upon the Court's rulings on these matters and Mr. Bergrin's ongoing investigation of this matter.

II. THE COURT SHOULD SEVER THE KEMO MURDER CASE (COUNTS TWELVE AND THIRTEEN) FROM THE OTHER COUNTS PURSUANT TO RULE 14 BECAUSE JOINDER PREJUDICES MR. BERGRIN'S ABILITY TO RECEIVE A FAIR TRIAL .

A. Severance Is Warranted Pursuant To Rule 14.

This Court should sever the Kemo Murder Case from the remaining counts in the Indictment and proceed to trial on Counts Twelve and Thirteen to ensure that Mr. Bergrin receives a fair trial as to those charges. The Third Circuit Court of Appeals has repeatedly reaffirmed the view with respect to this case that, notwithstanding RICO's effect on the ordinary rules of joinder under Federal Rule of Criminal Procedure 8, the decision to sever counts under Federal Rule of Criminal Procedure 14, in the interest of justice, remains within this Court's discretion. *See United States v. Bergrin*, 682 F.3d 261, 284 n.28 (3d Cir. 2012) (citing *Bergrin*, 650 F.3d 257, 276 (3d Cir. 2011)). *See generally United States v. Zafiro*, 506 U.S. 534, 539 (1993) (Rule 14 "leaves the tailoring of the relief to be granted, if any, to the district court's sound discretion"). That is, even when joinder is proper under Rule 8, Rule 14(a) empowers the Court to order a severance of counts whenever joinder "appears to prejudice a defendant." *See United States v. Lane*, 474 U.S. 438, 449 n.12 (1986) ("Rule 14's concern is to provide the trial court with some flexibility when a joint trial may appear to risk prejudice to a party[.]"). Such

appearance of prejudice arises when "there is a serious risk that a joint trial would compromise a specific trial right … or prevent the jury from making a reliable judgment about guilt or innocence." *Zafiro*, 506 U.S. at 539; *accord United States v. Riley*, 621 F.3d 312, 335 (3d Cir. 2010); *United States v. Davis*, 397 F.3d 173, 182 (3d Cir. 2005); *United States v. Palma-Ruedas*, 121 F.3d 841, 853-54 (3d Cir. 1997); *United States v. Balter*, 91 F.3d 427, 432 (3d Cir. 1996).

Chief among the potential sources of prejudice are the twin risks that "the jury may use the evidence of one of the crimes charged to infer a criminal disposition on the part of the defendant from which is found his guilt of the other crime or crimes charged; or …. the jury may cumulate the evidence of the various crimes charged and find guilt when, if considered separately, it would not so find." *Baker v. United States*, 401 F.2d 958, 974 (D.C. Cir. 1968) (quotation omitted); *see also United States v. Torres*, 251 F. App'x 763, 764 (3d Cir. 2007) ("When considering whether a criminal defendant was prejudiced by joinder of multiple charges, we have considered factors such as whether the presentation of separate counts with distinct and extensive evidence confused the jury, whether the charging of several crimes made the jury hostile, and whether the jury was able to segregate the evidence as to each count.") (citing *United States v. Weber*, 437 F.2d 327, 332 (3d Cir. 1970)); *United States v. Coleman*, 22 F.3d 126, 132 (7th Cir. 1994) (observing that "jury cumulation of evidence, and jury inference of criminal disposition" are primary concerns when considering joint trials); *United States v. Daniels*, 770 F.2d 1111, 1116 (D.C. Cir. 1985) (noting there is a "high risk of undue prejudice whenever … joinder of counts allows evidence of other crimes to be introduced in a trial of charges with respect to which the evidence would otherwise be inadmissible"); *United States v. James*, No. 07-578, 2008 U.S. Dist. LEXIS 9761 at *20-21 (D.N.J. Feb. 11, 2008) (granting severance to prevent spillover prejudice and eliminate potential for an "unwieldy, unmanageable, and confusing" trial); *United States v. Delbridge*, 2007 U.S. Dist. LEXIS 15712 at *11 (W.D. Pa. March 6, 2007) (severing counts because "unfair prejudice to defendant from admitting evidence of any of the offenses in the trial of any of the others is significant"); *United States v. Stone*, 826 F. Supp. 173, 174 (W.D. Va. 1993) (granting severance of counts to prevent spillover prejudice);

United States v. Lavin, 504 F. Supp. 1356, 1364 (N.D. Ill. 1981) (severing tax evasion count from related mail fraud, RICO, obstruction of justice, and perjury counts because of danger of spillover prejudice).

The question the Court must ask in evaluating such an application "'is whether the jury could have been reasonably expected to compartmentalize the allegedly prejudicial evidence in light of the quantity and limited admissibility of the evidence.'" *United States v. Charles*, 432 F. App'x 57, 60 (3d Cir. 2011) (quoting *United States v. De Peri*, 778 F.2d 963, 984 (3d Cir. 1985)); *Davis*, 397 F.3d at 182 (severance turns on whether the jury "will be able to 'compartmentalize the evidence as it relates to separate defendants in view of its volume and limited admissibility'") (quoting *United States v. Somers*, 496 F.2d 723, 730 (3d Cir. 1974)); *United States v. Lore*, 430 F.3d 190, 204-05 (3d Cir. 2005) (same). In answering this question, the Court must evaluate whether, as the government will argue, the jury will be able to follow any limiting instruction as to the proper use of such evidence, given the temptation, as a practical matter, to rely on the forbidden inference of propensity, particularly where the amount of otherwise inadmissible evidence will prove too overwhelming to parse. *See United States v. Lee*, 573 F.3d 155, 163 (3d Cir. 2009) (clear error for district court to find that jury would be able to follow instructions to disregard evidence where other evidence to support the disputed issue was weak) ("The risk that a jury will be unable to follow the court's instruction to ignore information depends on a number of factors including the strength of the proper evidence against the defendant, the nature of the information, and the manner in which the information was conveyed"); *United States v. Diaz-Munoz*, 632 F.2d 1330, 1337 (5th Cir. 1980) (court's severance determination should consider whether, "as a practical matter" a jury would be able to follow limiting instructions); *United States v. Papia*, 560 F.2d 827, 837 (7th Cir. 1977) (ultimate question in ruling on a severance motion is whether in a particular case, a properly instructed jury can follow the court's limiting instructions). *See generally Greer v. Miller*, 483 U.S. 756, 766 n.8 (1987) (courts will not presume the jury will follow instruction to disregard inadmissible evidence where there is an "overwhelming probability" that the jury will be unable to do so and a

"strong likelihood that the effect of the evidence would be 'devastating' to the defendant") (citations omitted).

Thus, as Mr. Bergrin has argued from the beginning, *see* Compendium of Pleadings ("C") at C1-14, as Judge Martini correctly found,[1] and as the Third Circuit has twice recognized may, in fact, be the case, the admission of evidence as to the plethora of other charges presents too great a "risk of preventing the jury from making a reliable judgment as to Begrin's guilt or innocence with respect to Counts Twelve and Thirteen." *United States v. Bergrin*, No. 09-369, 2011 U.S. Dist. LEXIS 107598 at *2 (Sept. 21, 2011). *See also United States v. Silveus*, 542 F.3d 993, 1005-1006 (3d Cir. 2008); *Davis*, 397 F.3d at 182. The Kemo Murder charges, which have been the heart of the government's case against Mr. Bergrin since the return of the original indictment in 2009, carry a mandatory life sentence without the possibility of parole. *See* 18 U.S.C. § 1512(a)(3). Indeed, these stakes were critical to the prior determination to be especially careful to ensure that Mr. Bergrin received a fair trial on these counts. And the fact remains, after three indictments, two interlocutory appeals, and a severed trial on Counts Twelve and Thirteen resulting in a hung jury, that a joint trial on all of the charges will still entail the admission of evidence that would otherwise not come in to prove the murder conspiracy alone. Indeed, a joint trial necessarily will include evidence of such quantity and variety that no jury

[1] The government may well argue that Judge Martini's rulings are entitled to no consideration because of the Court of Appeals' reassignment of this case. But the Third Circuit did not find that Judge Martini's "discomfort" with the RICO statute in fact underlay his severance ruling -- it held that it could not be sure that it did not. *Bergrin*, 682 F.3d at 284. In fact, as a review of his opinions on remand reveals, Judge Martini's analyses followed a conventional Rule 14 analysis, focusing on his concern for whether Mr. Bergrin would receive a fair trial on the Kemo Murder Case were it tried with the Esteves Plot, in particular. See *United States v. Bergrin*, No. 09-369, 2011 U.S. Dist. LEXIS 107598 at *4-10. The Third Circuit applauded this concern, *see Bergrin*, 682 F.3d at 284 ("We do not doubt that depth of the District Court's commitment to ensuring a fair trial for all parties, and the Court's concern for the rights of a criminal defendant is commendable."), and, moreover, reiterated that it is appropriate for district courts to consider severance with respect to substantive offenses that make up predicate acts charged in RICO counts, just as Judge Martini did. *Id*. at 284 n.28 (citing *Bergrin*, 650 F.3d at 276).

will be able to "compartmentalize" it, by considering it solely for its proper purpose, in determining Mr. Bergrin's guilt or innocence with respect to the Kemo murder.

Specifically, at a joint trial on the 30 counts naming Mr. Bergrin in the 33-count indictment, the jury would hear evidence to support four counts alleging racketeering violations (comprising two RICO and two VICAR counts) (Counts One through Four) and 26 counts alleging substantive offenses, all in connection with six discrete schemes and tax offenses:

- the Kemo Murder Case (Counts Twelve and Thirteen);
- the Esteves Plot[2] (Counts Twenty through Twenty-Six);
- the Drug Case (Counts Five, Eight, Nine and Ten);
- the Prostitution Case (Counts Fourteen through Sixteen); and
- the Abdul Williams Bribery Case (Counts Seventeen through Nineteen); and
- the Tax Fraud Case (Counts Twenty-Seven though Thirty Three.

The various schemes can be summarized as follows: (1) the Kemo Murder Case concerns allegations that Mr. Bergrin conspired with his client and others to murder (and aided and abetted the murder of) a witness against that client in 2003 to 2004 in Essex County; (2) the Esteves Plot concerns allegations that in 2008 to 2009, Mr. Bergrin conspired to murder witnesses against his client Vicente Esteves in a Monmouth County drug case in exchange for a promise that V.E. would assist the drug trafficking business alleged in Counts One and Five of the Indictment; (3) the Drug Case concerns allegations that from 2003 through 2009, Mr. Bergrin was involved in a cocaine trafficking business in Essex, Hudson, Monmouth, and Passaic Counties; (4) the Prostitution Case concerns allegations that in 2004 to 2005, Mr. Bergrin and associates assisted a client in operating a prostitution business in New York; (5) the Abdul Williams Bribery Case concerns allegations that, in 2007 in Newark, Mr. Bergrin conspired with others to bribe a witness to falsely confess to committing a crime for which his client stood accused; and (6) the

[2] The pleadings and the prior District Court's opinions also refer to the "Esteves Plot" as "the Junior murder conspiracy" and the "Monmouth County Case."

Tax Fraud case concerns allegations that in 2005 and 2006, Mr. Bergrin failed to report certain income, claimed non-deductible expenses, and falsely claimed a short-term capital loss with respect to the sale of real estate that he owned, his law office, and his personal returns.[3]

In addition to those allegations, the racketeering counts and the Drug Case counts also include allegations pertaining to five separate sub-schemes:

- the E.P. Witness Bribery Sub-Scheme (SSI at 22-23);
- the N.V. Witness Tampering Sub-Scheme (SSI at 6-8);
- the R.P. Money Laundering Sub-Scheme (SSI at 13-14);
- the R.J. Drug Trafficking Sub-Scheme (SSI at 9, 29); and
- the R.K. Drug Trafficking Sub-Scheme (SSI at 12)

As to those charges: (1) the E.P. sub-scheme concerns allegations that in 2006, Mr. Bergrin devised a plan to bribe a person to falsely exculpate his client in a murder case in exchange for free legal advice; (2) the N.V. sub-scheme concerns allegations that in 2001, Mr. Bergrin influenced the testimony of his client's minor daughter so that the client would not be convicted of stabbing her mother, and additionally that N.V. was involved in the drug trafficking business alleged in Counts One and Five; (3) the R.P. sub-scheme concerns allegations that in 2003, Mr. Bergrin solicited R.P. to assist in the alleged drug trafficking business and additionally counseled him to murder a witness in the criminal case against him; (4) the R.J. sub-scheme concerns allegations that between 2003 and 2005, R.J. was involved with the alleged drug trafficking business and that Mr. Bergrin offered to launder drug proceeds for him; and (5) the R.K. sub-scheme concerns allegations that from 2003 to 2006, Mr. Bergrin sold property nominally owned by an entity controlled by him to R.K. in exchange for cash that R.K. had earned from his own

[3] When Mr. Bergrin's motion for a second severance was still pending, the government agreed to sever the tax counts from the next trial, in whatever form that trial would take. *See* D.E. 352 (Government 12/12/11 Letter). It is unclear if the government adheres to that position today.

drug trafficking and that R.K. thereafter became a customer of the alleged drug trafficking business.

As Judge Martini, who was thoroughly familiar with the details of this case, correctly recognized prior to the first trial, among all of these allegations, the "most substantial risk of unacceptable prejudice … is the risk that the jury will find Bergrin guilty of murdering and conspiring to murder [Kemo McCray] in late 2003 and early 2004 based on evidence of Bergrin's involvement in the [Esteves Plot] conspiracy to murder Junior the Panamanian in 2008." *Bergrin*, 2011 U.S. Dist. LEXIS 107598 at *5. This is because the Esteves Plot, which involves allegations of an unconsummated conspiracy to kill a witness, generally resembles the witness tampering which is alleged to have actually occurred with respect to Kemo five years earlier, though these discrete plots bear almost no relation in time, place or manner, *see* Section II.B, *infra*. Nevertheless, as the Court held, at a joint trial, it "would be perhaps unavoidable -- and merely human -- for the jury to use the direct, explicit evidence from the Junior murder conspiracy case to infer Bergrin's guilt of the K.D.M. Counts" based solely on the inference that Mr. Bergrin has a propensity to commit that type of crime. *Bergrin*, 2011 U.S. Dist. LEXIS 107598 at *7. The temptation to rely on that forbidden inference is so great, Judge Martini held, that the Court "cannot reasonably expect jurors to compartmentalize this evidence." *Id.* at *8. *See, e.g.*, *United States v. Jones*, 16 F.3d 487, 492-93 (2d Cir. 1994) (holding that defendant, who was tried jointly for being a felon in possession of a firearm and bank robbery, was deprived of his right to a fair trial because there was an "overwhelming probability" that, upon hearing the evidence necessary to support the firearm charge, the jury would use that evidence to convict defendant of bank robbery, despite the court's limiting instruction, in light of the devastating nature of the evidence); *United States v. Foutz*, 540 F.2d 733, 739 (4th Cir. 1976) (reversing convictions and remanding for separate trials because joint trial of two bank robbery counts provided a "strong likelihood" that the defendant was found guilty of second robbery merely because the jury concluded he was guilty of the first).

Furthermore, at a joint trial, the variety and scope of the remaining 28 counts, and the vast quantity of evidence that will come in to prove them, will make it impossible, as a practical matter, for the jury to fairly assess Mr. Bergrin's guilt in the Kemo Murder Case. Rather than face the onerous task of compartmentalizing that evidence, the jury may well yield to the temptation to presume that Mr. Bergrin must be guilty of some wrongdoing, thereby escalating the danger that a jury will draw the unfair "propensity" inference discussed above. *See, e.g. Torres*, 251 F. App'x at 764 (joinder engenders prejudice that may warrant a severance when "the presentation of separate counts with distinct and extensive evidence confused the jury"); *United States v. Jones*, No. 10-307, 2012 U.S. Dist. LEXIS 3248 at *11-13 (E.D. Pa. Jan. 11, 2012) (severing charges related to controlled purchase operation from charges relating to car stop because "the jury would be hard-pressed to compartmentalize extensive evidence relating to a prior drug sale when considering [defendant's] intent as to the gun and drugs found on his person" with respect to the later car stop); *cf. United States v. Burke*, 789 F. Supp. 2d 395, 399-400 (E.D.N.Y. 2011) (severing RICO charges from witness tampering charges, noting risk of spillover prejudice from the RICO conspiracy because the proof required to sustain a conviction on the witness tampering charge differed substantially from the proof required for the RICO conspiracy alleging murder, drug, trafficking, and robbery). Here, apart from the Drug Case, the five main schemes discussed above -- one of which is the Kemo Murder Case -- involve four discrete time periods; the Drug Case simply aggregates those allegations. In fact, the Drug Case, which spans six years, at least four separate counties -- only one of which is relevant to the Kemo Murder Case -- and at least five unrelated sub-schemes, will involve the testimony of dozens of witnesses, hours of surveillance footage, and thousands of documents that bear absolutely no relation to the Kemo murder conspiracy. Likewise, the Prostitution Case, which involves several witnesses who would not testify as to any of the other charges, engenders the additional risk inherent in "allegations that have the potential to incite strong emotion in jurors

and distract them from the merits of the case."[4] *James*, 2008 U.S. Dist. LEXIS 9761 at *20-21 (severing allegations pertaining to infidelity). And the Abdul Williams Bribery Case, pertaining to bribery allegations occurring four years after the Kemo murder, carries the overwhelming risk of demonstrating propensity, and thus of distracting jurors from the actual evidence of the Kemo Murder Case.

Nor would jury instructions serve to mitigate this risk. Rather, as set forth above, it is naive to presume that a juror could "act with a measure of dispassion and exactitude well beyond mortal capacities" and follow any limiting instructions designed to mitigate the risk of such unfair prejudice. *Daniels*, 770 F.2d at 1118 (noting where there is a high risk of prejudice, "it becomes particularly unrealistic to expect effective execution of the 'mental gymnastic' required by limiting instructions"); *accord Jones*, 16 F.3d at 492-93 (deeming it "quixotic to expect the jurors to perform such mental acrobatics" as to follow limiting instructions where additional counts unfairly buttress the government's proofs on a specific charge). *See generally Greer*, 483 U.S. at 766 n.8 (where "there is an 'overwhelming probability' that the jury will be unable to follow the court's instructions and a strong likelihood that the effect of the evidence would be 'devastating' to the defendant," the Court will not presume that a jury will follow the limiting instructions (citations omitted)). Severing Counts Twelve and Thirteen will eliminate this danger and ensure that Mr. Bergrin receives a fair trial on those charges.

On the other hand, a severed trial will, as it did once before, force the jury to focus on the government's proof of the Kemo Murder, for which Mr. Bergrin faces life in prison. The contours of that proof are clear: the trial revealed that the only direct evidence of Mr. Bergrin's

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[4] Indeed, this danger is exacerbated by the fact that Mr. Bergrin has previously pleaded guilty to charges related to the government's Prostitution Case in state proceedings -- a fact which would not be before the jury in a severed trial on Counts Twelve and Thirteen. *See, e.g.*, *United States v. Britt*, 216 F. App'x 317, 318-19 (4th Cir. 2007) (noting district court severed felon-in-possession offenses from remaining counts to prevent prejudice defendant would suffer if the jury learned he was a convicted felon); *United States v. Dockery*, 955 F.2d 50, 53 (D.C. Cir. 1992) (defendant was prejudiced by court's refusal to sever ex-felon count from remaining counts because the jury was thereby made aware of his prior conviction).

involvement in the Kemo Murder consisted of the testimony of Anthony Young, which was laced with inconsistency and subject to effective attack with regard to credibility, supplemented by out-of-court statements that Mr. Bergrin allegedly made to three drug dealers who came forward years later to avail themselves of government favors in return for testimony against him.[5] And there are no tapes, corroborative statements, physical evidence, photographs, or evidence of any kind to corroborate any of these accounts. By contrast, the government's evidence with regard to the Esteves Plot apparently includes hours of recordings of Mr. Bergrin's conversations, in addition to the testimony of the alleged Hitman and of at least three other witnesses who, it is alleged, can corroborate the Hitman's account that Mr. Bergrin explicitly discussed killing a witness against Esteves and instructed the Hitman to make the murder look like a home invasion robbery. As Judge Martini noted, this "disparity in the likely evidence the Government will offer for [the Kemo Murder and the Esteves Plot] conspiracies highlights the inherent dangers." *Bergrin*, 2011 U.S. Dist. LEXIS 107598 at *6; *see also Sandoval v. Calderon*, 241 F.3d 765, 772 (9th Cir. 2001) ("Undue prejudice may . . . arise from the joinder of a strong evidentiary case with a weaker one."); *Dockery*, 955 F.2d at 56 (prejudice arising from failure to sever exacerbated by fact that the evidence supporting the count that should have been

[5] Thus, the evidence as to the other charges would improperly bolster the testimony of Anthony Young, whose testimony about the murder and Mr. Bergrin's involvement contained numerous inconsistencies with the FBI's 302 reports, with his prior testimony in the Baskerville case, with his own testimony in this case, and, indeed with common sense itself. *See* D.E. 342-2. Nor was the Kemo case appreciably strengthened by the testimony of (a) Alberto Castro, who was completely incredible, for many reasons, including that he had framed his own daughter for his drug crimes, Tr. (10/27/11) at 20, and who admitted testifying in this case for revenge and pleading guilty to a crime that he did not commit, though the evidence that he had committed it was overwhelming, *id.* at 16, 36; (b) Abdul Williams, who likewise did not come forward with information against Mr. Bergrin until 2011 and waited until he had met with the government several times before providing any information about a purported statement of Mr. Bergrin that was not, in any event, a real admission, Tr. (11/4/11) at 86-87; and (c) Thomas Moran, who drank heavily during the relevant time of the statements and who also waited until he had several meetings with the government before providing any information as to Mr. Bergrin's again ambiguous statement, Tr. (11/8/11) at 45, 50, 51. A complete review of the trial record compellingly demonstrates the relative weakness of the Kemo Murder Case based upon which the government seeks a life sentence without parole for Mr. Bergrin.

severed out was weak); *United States v. Emond*, 935 F.2d 1511, 1515-16 (7th Cir. 1991) ("Cases in which 'the evidence against one defendant is far more damaging than the evidence against the moving party,' make the process of individually assessing the weight of the evidence as to each defendant particularly difficult, increasing the risk that 'the spillover may jeopardize one defendant's right to a fair trial.'" (citations omitted)); *United States v. Bryant*, 556 F. Supp. 2d 378, 465-66 (D.N.J. 2008) (granting severance because of "'clear risk that the evidence on [other] charges would unfairly spill over into the Government's case against [defendant], and that the jury would be unable to compartmentalize the distinct evidence against [him]'" (last alteration in original) (citation omitted)), *aff'd*, 655 F.3d 232 (3d Cir. 2011); *United States v. Gilbert*, 504 F. Supp. 565, 571 (S.D.N.Y. 1980) (severing defendant's trial from codefendant's where the movant "made a sufficient showing of disproportionate involvement in the overall scheme to raise a substantial risk that he would be prejudiced by the gradually accumulating effect of evidence," against his co-defendant). In this regard, the mistrial that resulted from a hung jury in the prior trial confirms the wisdom of the original severance order in this case, demonstrating as it does that the government could not obtain a conviction without bolstering its evidence with evidence of unrelated misconduct. *See generally United States v. Bowie*, 142 F.3d 1301, 1305 (D.C. Cir. 1998) ("a criminal trial should turn on the facts of the specific charge, not on who the defendant is or what [other acts] the defendant may have done").

Nor should considerations of efficiency, which will certainly be a centerpiece of the government's opposition to this application, as it has been in the past, trump Mr. Bergrin's fundamental right to a fair trial, particularly where the potential consequences for Mr. Bergrin are so grave. *See, e.g. United States v. Desantis*, 802 F. Supp. 794, 802-03 (E.D.N.Y. 1992) (ordering severance of counts because prejudice to defendant outweighed benefit to judicial economy of holding joint trial). That said, a severed trial of the Kemo murder case may well enhance rather than undermine the efficiency of the process because resolution of those charges may render certain subsequent proceedings unnecessary. Specifically, a joint trial on all 30 counts naming Mr. Bergrin will take several months -- the government estimates a 4-month trial.

By contrast, the testimony in the last trial on Counts Twelve and Thirteen was completed within four weeks. Nor need it take that long when repeated, particularly if the Court excludes some of the evidence erroneously admitted in that proceeding, *see* Section II.C, *infra*. Because of the life sentence at issue, if Mr. Bergrin is convicted of either count, further trials may well be unnecessary. Moreover, if Mr. Bergrin were to be acquitted of the Kemo Murder counts, the RICO Counts and the Drug Case will be significantly shortened, and there will no longer be any admissible evidence to support the VICAR allegations in Count Three.[6] But no matter the outcome, the Court retains the discretion and the duty to devise the fairest, most reliable means of adjudicating this charge, a charge which carries such a serious sentence, and as to which one jury already was unable to come to a decision.

For the foregoing reasons, Mr. Bergrin urges that the Court sever Counts Twelve and Thirteen of the Indictment and proceed to trial on those counts.

B. The Admission of Rule 404(b) Evidence at a Severed Trial on the Kemo Murder Case Would Undermine the Purpose of a Severance.

The Court of Appeals has required that this Court "consider anew whether the Indictment should be severed in any respect and, as necessary, the extent to which evidence of the Esteves Plot and the Pozo Plot can properly be used to prove the government's case against Bergrin on the Kemo Murder Counts." *Bergrin*, 682 F.3d at 284. Indeed, these issues are inextricably

[6] As a matter of double jeopardy and constitutionally derived principles of collateral estoppel, the government would be precluded from introducing evidence of Mr. Bergrin's involvement in the Kemo murder in any of the remaining counts in the event of an acquittal. *See United States v. Merlino*, 310 F.3d 137, 141 (3d Cir. 2002) (the Double Jeopardy Clause "embodies principles of collateral estoppel that can bar the relitigation of an issue actually decided in a defendant's favor by a valid and final judgment," like acquittal) (citing *Ashe v. Swenson*, 397 U.S. 436, 443 (1970) (collateral estoppel "is part of the Fifth Amendment's guarantee against double jeopardy")); *United States v. Console*, 13 F.3d 641, 664 (3d Cir. 1993) (estoppel principles apply when the government "has lost an earlier prosecution involving the same facts") (quoting *United States v. Dixon*, 509 U.S. 688, 705 (1993)); *United States v. Keller*, 624 F.2d 1154, 1160 (3d Cir. 1980) ("'it is fundamentally unfair and totally incongruous with our basic concepts of justice to permit the sovereign to offer proof that a defendant committed a specific crime which a jury of that sovereign has concluded he did not commit'").

intertwined, as the government likely will argue, as it has before, *see* C119, that Mr. Bergrin's motion for severance should be denied because, in its view, the majority of the evidence of the other predicate acts would be admissible under Federal Rule of Evidence 404(b) in a severed trial.[7] As was the case prior to the last trial, this claim ignores the inadmissibility of such evidence. *See* C145-149.

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[7] In the past, the government has also opposed severance on the grounds of witness safety and judicial economy. *See* C116-118. Mr. Bergrin continues to rely on the arguments he previously raised in response to those assertions by the government, *see* C143-147, assertions which Judge Martini found "insufficient to sway the Court's decision," *Bergrin*, 2011 U.S. Dist. LEXIS 107598 at *11, and which were not the subject of the Third Circuit's opinion; as such, those arguments by the government are not now before the Court. Similarly not before the Court is the admission of evidence of alleged acts beyond the Esteves and Pozo Plots that the government has previously proffered as Rule 404(b). *See* C207-248; C251-272; C303-312. Of course, Mr. Bergrin continues to maintain that such evidence is not offered for a proper purpose, as it is irrelevant to the Kemo Murder case, and, in any case that its potential for unfair prejudice substantially outweighs any probative value it may have, as he has previously argued. *See United States v. Himelwright*, 42 F.3d 777, 785 (3d Cir. 1994) (holding district court erred in admitting testimony that would otherwise be admissible under Rule 404(b) where risk of prejudice substantially outweighed its probative value). But, in any event, the admissibility of these other acts is no longer at issue in light of Judge Martini's rulings excluding this evidence, A7-13, rulings that the government did not appeal and which are not within the scope of the Third Circuit's mandate to this Court on reassignment or properly reconsidered, under the law of the case doctrine. *Bergrin*, 682 F.3d at 284; Judgment D.E. 376. *See Cooper Distrib. Co. v. Amana Refrigeration, Inc.*, 180 F.3d 542, 546 (3d Cir. 1999) ("It is 'axiomatic' that on remand … the trial court must proceed in accordance with the mandate and the law of the case as established on appeal …. Moreover, where (as here) the mandate requires the District Court to proceed in a manner 'consistent' with the appellate court decision, the effect is 'to make the opinion a part of the mandate as completely as though the opinion had been set out at length.'") (quoting *Bankers Trust Co. v. Bethlehem Steel Corp.*, 761 F.2d 943, 949 (3d Cir. 1985)); *Seese v. Volkswagenwerk, A.G.*, 679 F.2d 336, 337 (3d Cir. 1982) ("The district court is without jurisdiction to alter the mandate of this court on the basis of matters included or includable in [appellant's] prior appeal."); *see also Hayman Cash Register Co. v. Sarokin*, 669 F.2d 162, 165 (3d Cir. 1982) ("judges of co-ordinate jurisdiction sitting in the same court and in the same case should not overrule the decisions of each other") (quotation omitted); *Kennedy v. Lockyer*, 379 F.3d 1041, 1055 n.16 (9th Cir. 2004) (successor judge should not overrule first judge's order excluding evidence merely because it might have decided matters differently). *See generally Casey v. Planned Parenthood of Se. Pa.*, 14 F.3d 848, 856 (3d Cir. 1994) ("Law of the case rules have developed 'to maintain consistency and avoid reconsideration of matters once decided during the course of a single continuing lawsuit.'") (quotation omitted); Charles A. Wright, Arthur R. Miller, Edward H. Cooper, 18B *Federal Practice and Procedure* § 4478 at 637 (2002

1. Evidence of the Esteves Plot Should Not Be Admitted As Rule 404(b) Evidence in the Kemo Murder Case.

Critical to the issue of severance, evidence of the Esteves Plot would not be admissible under Rule 404(b) at a stand-alone trial of Counts Twelve and Thirteen. To be sure, the Third Circuit clarified in its opinion that the fact that the Esteves Plot occurred five years after the Kemo Murder conspiracy does not determine its admissibility because, "subsequent act evidence may be properly admitted under Rule 404(b), although Rule 403 permits exclusion when the probative value of such evidence is 'substantially outweighed by a danger of ... unfair prejudice[.]'" *Bergrin*, 682 F.2d at 281. Significantly, however, the Court of Appeals also made clear that "the District Court's decision to exclude evidence of the Esteves Plot was not clearly rooted in a flawed premise," approvingly citing as a proper basis for exclusion Judge Martini's extensive discussion of "concerns regarding the nature of the Esteves Plot evidence, (*see, e.g.*, Joint App. at 38 (explaining that if 'there was a conviction, I would believe ... that that conviction was the result of the Esteves evidence, because I don't see how they could humanly put that out of their mind'[).]" *Id.* Thus, Judge Martini's analysis -- that evidence of the Esteves Plot is not probative of intent in the Kemo Murder Case because it "looks more like evidence that is being offered to show that the accused is a 'bad guy,' someone with the propensity to commit criminal acts. He did it in 2008, so he must have done it in 2004," and that, in any case, in light of the "particularly high" risk of unfair prejudice," such evidence would not "be admissible under the third prong of Rule 404(b) analysis even it were technically available under the first," *Bergrin* 2011 U.S. Dist. LEXIS 107598 at *16, 21-22 -- remains not only legally viable but also correct.

The proper admission of Rule 404(b) evidence falls within this Court's discretion. *United States v. Kellogg*, 510 F.3d 188, 197 (3d Cir. 2007) (citing *United States v. Jemal*, 26 F.3d 1267, 1272 (3d Cir. 1994)). Rule 404(b) provides:

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ed.) ("[C]ourts are understandably reluctant to reopen a ruling once made. This general reluctance is augmented by comity concerns when one judge or court is asked to reconsider the ruling of a different judge or court.").

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident[.]

To admit putative evidence under the Rule, "(1) the evidence must have a proper evidentiary purpose; (2) it must be relevant; (3) its probative value must outweigh its potential for unfair prejudice; and (4) the court must charge the jury to consider the evidence only for the limited purposes for which it is admitted." *United States v. Givan*, 320 F.3d 452, 460 (3d Cir. 2004) (citing *Huddleston v. United States*, 485 U.S. 681, 691-92 (1988)).

In order to establish that proposed 404(b) evidence is being offered for a proper purpose, "the proponent must clearly articulate how that evidence fits into a chain of logical inferences, no link of which may be" an impermissible inference. *United States v. Himelright*, 42 F.3d 777, 782 (3d Cir. 1994); *accord United States v. Daraio*, 445 F.3d 253, 263-64 (3d Cir. 2006); *United States v. Cruz*, 326 F.3d 392, 395 (3d Cir. 2003). In particular, of course, Rule 404(b) specifically prohibits the admission of other criminal acts to show that a defendant has a propensity or disposition for criminal activity. *See, e.g., United States v. Mastrangelo*, 172 F.3d 288, 295 (3d Cir. 1999); *Gov. of V.I. v. Harris*, 938 F.2d 401, 419 (3d Cir. 1991); *United States v. Scarfo*, 850 F.2d 1015, 1018-1 (3d Cir.), *cert. denied*, 488 U.S. 910 (1988); *Gov. of V. I. v. Toto*, 529 F.2d 278, 283 (3d Cir. 1976). Moreover, a purported purpose "may often be a Potemkin, because the motive, we suspect, is often mixed between an urge to show some other consequential fact as well as to impugn the defendant's character." *United States v. Sampson*, 980 F.2d 883, 886 (3d Cir. 1992); *see, e.g. United States v. Herman*, 589 F.2d 1191, 1198 (3d Cir. 1978) (evidence improperly admitted because what "was centrally in issue was whether [the defendant] was the kind of person who would take a bribe"). Thus, unless the government "clearly articulate[s]" how the prior conduct is logically connected to its proper rule 404(b)

purpose, *Himelwright*, 42 F.3d 782, "there is no realistic basis to believe that the jury will cull the proper inferences and material facts from the evidence." *Sampson*, 980 F.2d at 889; *accord United States v. Johnson*, 27 F.3d 1186, 1193 (6th Cir. 1994) (court has "duty" to apply Rule 404(b) correctly because of the "very great" likelihood that jurors will otherwise use other-acts evidence "precisely for the purpose it may not be considered").

Furthermore, even evidence introduced for a proper purpose under Rule 404(b) is, as the Court of Appeals made clear, *Bergrin*, 682 F.3d at 281 n.25, subject to a Rule 403 balancing of probative value versus unfair prejudice to the defendant. *United States v. Haas*, 184 F. App'x 230, 233-35 (3d Cir. 2006). And other-acts evidence fails this Rule 403 balancing test where "[v]ery little logical space separates" the permissible inference from the general propensity inference that Rule 404(b) prohibits. *United States v. Mitchell*, 49 F.3d 769, 777 (D.C. Cir. 1995) (quoting 1 Christopher B. Mueller, Laird C. Kirkpatrick, *Federal Evidence* § 113, at 667 (2d ed. 1994)); *see, e.g.*, *Delbridge*, 2007 U.S. Dist. LEXIS 15712 at *11 (severing where inclusion of one count as Rule 404(b) evidence on other count, though probative of intent, would engender significant unfair prejudice to defendant that outweighed its probative value); *United States v. Hynson*, No. 05-576-2, 2007 U.S. Dist. LEXIS 67261 at *25 (Sept. 11, 2007) (excluding evidence of otherwise admissible prior conviction pursuant to Rule 403 because limiting instruction could not alleviate danger that jury would convict defendant based on prior conviction); *United States v. Barnes*, No. 05-CR-134, 2005 U.S. Dist. LEXIS 17151 at *19-20 (E.D. Pa. Aug. 16, 2005) (evidence of prior conduct excluded on basis of prejudice even though admissible for intent because "regardless of any limiting instructions … a substantial danger remains that the proffered evidence would lure the fact finder into declaring guilt on a ground different from proof specific to the offense charged") (quotation omitted).

Here, the government has previously argued that evidence of the Esteves plot is admissible 404(b) evidence in the Kemo Murder Case for three purposes. First, the government has sought to introduce evidence of the entire Esteves Plot to demonstrate a pattern of witness tampering -- that is, that it was Mr. Bergrin's *modus operandi*. C229-30, 235-239 ("Bergrin always used the same routine when tampering"). Second, the government has sought to introduce evidence that Mr. Bergrin told Esteves "no witness no case" in that murder-for-hire scheme to demonstrate that he intended to join the conspiracy to kill Kemo McCray when he allegedly said "no Kemo, no case." C240. And third, the government has sought to introduce evidence of certain statements Mr. Bergrin allegedly made to Vicente Esteves, *i.e.* that he "hates rats and would kill one himself," and that "this was not the first time he has done this," which the government interprets to be an admission regarding the Kemo murder, requiring that the balance of the evidence related to that plot be permitted in order to supply the context for that statement. C299-301. None of these grounds, however, support the admissibility of the extensive evidence of the Esteves Plot in the Kemo Murder Case because, with respect to each purported purpose, any potential probative value is substantially outweighed by the clear potential for unfair prejudice.

First, evidence of the Esteves Plot is simply not very probative of Mr. Bergrin's plan or intent with regard to the Kemo Murder Case. As an initial matter, evidence of Mr. Bergrin's involvement in the Esteves Plot is not sufficiently similar to the allegations with respect to his involvement in the Kemo Murder conspiracy to denominate a pattern or common plan. Only "sufficiently detailed [and] significantly unusual" evidence will suffice to admit evidence for that purpose. *Gov. of V.I. v. Pinney*, 967 F.2d 912, 916-17 (3d Cir. 1992) (shared characteristics of crimes six years apart not sufficiently unique for admission as to intent or common plan or

scheme); *accord Becker v. ARCO Chem. Co.*, 207 F.3d 176, 200 n.10 (3d Cir. 2000) (explaining error of admitting other bad acts evidence "under the rubric of 'plan'" based merely on "a series of similar acts" where identity is not an issue and the other bad acts were not sufficiently distinct to qualify as "modus operandi" evidence); *Carter v. Hewitt*, 617 F.2d 961, 968 (3d Cir. 1980) (degree of similarity required "extremely high" when government seeks to introduce defendant's bad acts); *United States v. Herman*, 589 F.2d 1191, 1198 (3d Cir. 1979) (evidence that defendant engaged in similar but unrelated extortion scheme improperly admitted because similarities were not so distinctive such that what "was centrally in issue was whether [the defendant] was the kind of person who would take a bribe"); *see generally* 1 Christopher B. Mueller, Laird C. Kirkpatrick, *Federal Evidence* § 113, at 667 (2d ed. 1994) ("it is not enough that other crimes resemble the charged crime. If they are not sufficiently similar to the charged offense or not distinctive enough to be admitted to show modus operandi … admitting other crimes to show plan or scheme merely because they bear some resemblance to the charged offense cannot be defended"); *McCormick on Evidence* § 190 at 559-60 (3d ed. 1984) (admissible *modus operandi* evidence demands "much more … than the mere repeated commissions of crimes of the same class . . . [t]he pattern and characteristics to the crimes must be so unusual and distinctive as to be like a signature."). In fact, as proffered, the two schemes have key differences that undermine the probative value of the Esteves evidence as evidence of a pattern. For example, in the Esteves case, Mr. Bergrin is alleged to have conspired directly with his client to kill the witnesses against that client so he could go free. There is no allegation -- and certainly no proof -- that he had any such conversations with his client in the Kemo Murder case, in which he is alleged to have (a) shared the identity of the witness with a relative of the client to assist in drafting a bail motion;

(b) told other relatives and associates of the client not to allow the witness to testify; and (c) solicited an outsider to kill the witness to protect his own drug trafficking activities.

Second, even the use of the phrase "no witness, no case" is not so unique a verbal construction as to be evidence of a signature or code. As Judge Martini held, *Bergrin*, 2011 U.S. Dist. LEXIS 107598 at *19, such evidence must be far more distinctive than that commonplace expression to be probative of a specific intent to kill Kemo McCray or prevent his testimony, the use of which might be probative of intent, particularly given the five year passage of time between the two statements. *See United States v. Ortiz*, 474 F.3d 976, 980-81 (7th Cir. 2007) ("Even assuming that [defendant] used code or slang in 1998, it requires another leap to conclude that he would quickly pick up on the same terminology six years later").[8] These differences also

[8] Although, as the Court of Appeals held, *Bergrin*, 682 F.3d at 281 n.25, Rule 404(b) does not distinguish between prior and subsequent acts, the fact that Mr. Bergrin is alleged to have made the statements five years apart is an appropriate factor to consider in assessing its probative value. *See Pinney*, 967 F.2d at 916-17 (shared characteristics of crimes six years apart not sufficiently unique for admission as to intent or common plan or scheme); *Givan*, 320 F.3d at 468 ("The act of hiding illegal drugs under the seat of a car is hardly so unique as to create an inference" that defendant hid heroin under the car seat seven years later); *see also United States v. Haywood*, 280 F.3d 715, 721 (6th Cir. 2002) (whether other-acts evidence is probative of intent depends on whether that evidence relates to conduct that is "substantially similar and reasonably near in time to the specific intent offense at issue"); *accord Johnson v. Elk Lake Sch. Dist.*, 283 F.3d 138, 144 (3d Cir. 2002). Nor is the fact that the Esteves Plot occurred years *later* (as opposed to before) irrelevant with regard to the probative value of evidence which the government seeks to introduce for the light it sheds on intent. That is, notwithstanding the Third Circuit's conclusion that "light can be shed on motive, intent, and the other issues listed in Rule 404(b)(2) as much by a subsequent course of behavior," *Bergrin*, 682 F.3d at 281, the probative value of the subsequent remark ("no witnesses, no case") sheds relatively little, if any light on what Mr. Bergrin meant by his purported earlier statement ("no Kemo, no case"). That is because even if a remark made in 2008 is similar one in 2003, it is as likely as not that intervening events affected the declarant's meaning and accordingly his intent. *See, e.g. United States v. Curley*, 639 F.3d 50, 61 (2d Cir. 2011) (temporal difference between charged conduct and other acts affects whether evidence is probative; chain of inferences too tenuous and attenuated); *United States v. Benjamin*, 125 F. App'x 438, 440 (3d Cir. 2005) (10-year gap between other act and time of indictment supported exclusion of reverse Rule 404(b) evidence); *United States v. Watson*, 894 F.2d 1345, 1349 (D.C. Cir. 1990) (temporal as well as logical relationship between a defendant's later act and his earlier state of mind "attenuates the

undermine the probative value of the Esteves Plot with respect to intent because, although the allegations share the general character of witness tampering, the distinctly different ways in which Mr. Bergrin is alleged to have gone about putting each scheme into being fail to connect what he meant to do in one instance with what he meant to do in the other. *See United States v. Queen*, 132 F.3d 991, 996 (4th Cir. 1997) (similarity of extrinsic act and charged offense crucial to admission for intent).[9]

Moreover, although the government has argued that this case is all about intent, the events of the trial belied that claim. For example, although prior to the last trial, the government contended that the "central issue for the § 1512 charges is *not* what actions Bergrin took, but rather his intentions in taking them," C122; *see also* C274 ("the Government believes … that Bergrin's intent will be the single most contested issue at a 1512 trial."), the trial proved that

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relevance" of other acts under Rule 404(b)). The result, of course, is the risk that the evidence will be considered for an improper purpose, *i.e.*, propensity. *E.g.*, *United States v. Garcia-Rosa*, 876 F.2d 209, 221 (1st Cir. 1989) ("glaring problem with this inferential chain" because, for evidence of subsequent conduct to relate to the defendant's state of mind on prior occasion, jurors had to "rely[] on an assessment of the defendant's character, which is exactly what Rule 404(b) is designed to prevent").

[9] That is, the two witness tampering conspiracies are not alleged to have been carried out in even remotely the same manner. In the Kemo Murder Case, the government alleges that Mr. Bergrin passed the name of the witness to his client's family members after meeting with his client upon arrest and then, on one occasion, purportedly went to the house of his client's associates and told them "no Kemo, no case" and that they needed to not let Kemo testify. Mr. Bergrin is not alleged to have ever had a conversation with Anthony Young, the alleged gunman. There is also no allegation that Mr. Bergrin ever checked in with these individuals about this alleged conspiracy after making that remark. Mr. McCray was then shot on a street corner in broad daylight. By contrast, in the Esteves plot, the government alleges that Mr. Bergrin hatched the plot to kill the witnesses with his client, enlisted a hitman, had multiple face-to-face meetings with the hitman at his law office and elsewhere during which he discussed details of the plot, and even flew to Illinois to meet with the hitman. SSI at 25-26. Mr. Bergrin is alleged to have explicitly told the hitman to disguise the hit as a home invasion robbery, a far cry from the gang shooting in the Kemo case. *Id.* at 27. The hitman further paid Mr. Bergrin for his services to the client. *Id.* Thus, the two very different schemes, in fact, resemble one another in nature alone, thus risking their consideration as propensity evidence instead of as unique "signature" proof of *modus operandi*.

assertion false. Mr. Bergrin strenuously denied that he ever attended a meeting on Avon Street, that he ever said "no Kemo, no case," and that he took any steps to facilitate Kemo's murder, including a denial that he ever solicited Alberto Castro to do so, or made the statements attributed to him by Abdul Williams, Thomas Moran, or Ramon Jimenez. A2943-44, A4189, A4241, A4270-74, A4281, A4291, A4294-96, A4307-4311, A4317, A4353. While, as the Court of Appeals held, that does not render the issue of intent, or evidence bearing thereon, irrelevant, it does affect the Rule 403 calculus: to the extent that intent is not the central issue of the case, its probative value is diminished, though not (as the Third Circuit stated) eviscerated.

Even the evidence of Bergrin's statement that "this is not the first time I've done this" is, likewise, not probative of Mr. Bergrin's guilt with respect to the Kemo Murder conspiracy. As Judge Martini correctly reasoned, independent of any concerns as to the limited probative value of subsequent act evidence, allowing evidence of the admissions "no longer seems appropriate now that the Court has a better understanding of those admissions. The admissions that Bergrin allegedly made are too vague to be of great probative value -- indeed, Bergrin does not mention the K.D.M. murder specifically, but only alludes in general terms to some past act of indeterminate nature." A13. Indeed, there is simply no rational link tying that remark to the Kemo murder. Such a slim reed likewise cannot support introduction of the entire Esteves Plot as context, not for the charged crime itself, but for Mr. Bergrin's statement. *See* C265-68.

In sum, the real purpose of such evidence is manifest: the government seeks to prove that Mr. Bergrin must have been involved in the Kemo Murder conspiracy because five years later, he was engaged in another plot to kill a witness against his client; in other words, he is a career criminal. But that, of course, is a propensity argument, forbidden under Rule 404(b), which results, as a matter of law, in precisely the kind of undue prejudice -- as a matter of law -- that demands exclusion under Rule 403. *See United States v. Carney*, 461 F.2d 465 467 (3d Cir.

1972) ("It is settled that evidence of other offenses is inadmissible in a criminal prosecution for a particular crime when such evidence is designed to show a mere propensity or disposition on the part of the defendant to commit the crime") (internal quotations and citations omitted). As Judge Martini explained, the introduction of the Esteves plot in the Kemo murder trial creates "a kind of perfect storm" that poses "a serious risk of undue prejudice." A72. Indeed, Judge Martini concluded (in an observation that the Third Circuit endorsed, *see Bergrin*, 682 F.3d at 281 n.25 ("the District Court's decision to exclude evidence of the Esteves Plot was not clearly rooted in a flawed premise. Indeed, the Court spoke at length about its concerns regarding the nature of the Esteves Plot evidence")) that evidence of the Esteves plot is potentially so prejudicial that its admission would ensure that Mr. Bergrin would not receive a fair trial: "now I'm even more convinced, having heard this case, I don't see how a jury could disregard that evidence and solely use it to consider it for intent here. When they hear that evidence, they're human." A35. That unfair prejudice substantially outweighs the minimal probative value such evidence bears with respect to plan or intent. As the Third Circuit has held in a closely related context, even if Rule 404(b) evidence of a prior unrelated murder "had some relevance to show something other than that [defendant] has a homicidal character, this relevance was so slight and the potential for unfair prejudice was so great that Fed. R. Evid. 403 demanded the exclusion of the evidence. . . . It should go without saying that evidence in a murder trial that the defendant committed another prior murder poses a high risk of unfair prejudice." *United States v. Murray*, 103 F.3d 310, 318-19 (3d Cir. 1997); *see also United States v. Stout*, 509 F.3d 796, 801 (6th Cir. 2007) ("despite the probative value of the prior bad acts evidence in this case, suppression is appropriate . . . the reverberating clang of those accusatory words would drown out all weaker sounds"). Evidence of the Esteves Plot must, therefore, be excluded from a stand-alone trial of the Kemo Murder Case.

2. Evidence of the Pozo Plot is Not Admissible Under Rule 403.

Likewise, the danger of unfair prejudice substantially outweighs the probative value of the proffered testimony of Richard Pozo that Mr. Bergrin advised him to kill a witness in Pozo's criminal case. The Court of Appeals determined that this proposed testimony would be admissible under Rule 404(b), but nevertheless expressly left it to this Court's discretion to determine whether that evidence also passed muster under Rule 403, so as to be admissible. *See Bergrin*, 682 F.3d at 284 n.29 ("depending on what is offered in evidence, the new judge may well be asked to determine the admissibility of the Pozo Plot evidence with respect to the Kemo Murder Counts and will, in that event, need to conduct an appropriate Rule 403 balancing"). As set forth below, it does not.

Pursuant to Rule 403, the Court "may exclude relevant evidence if its probative value is substantially outweighed by a danger of," among other concerns, unfair prejudice, undue delay, or wasting time. According to the government, Pozo will testify that Mr. Bergrin met with him about Pozo's criminal case and told him that, "if 'we' could get to [the witness against Pozo] and take him out, Pozo's headache (his drug charges) would go away," C317. The Pozo Plot and the Kemo Murder Case, thus, involve allegations of a similar character and inescapably invite the jury to rely on the notion that Mr. Bergrin must be guilty because he is, at bottom, the kind of person who tampers with witnesses. Accordingly, there is an overwhelming likelihood that the jury will use evidence that Mr. Bergrin allegedly advised Pozo to kill the witnesses in his case to convict him of the Kemo Murder charges based on the inference that he has a propensity to commit such crimes, rather than because of any evidence that he actually was involved in McCray's murder. As such, the potential for unfair prejudice substantially outweighs its probative value, and it must be excluded under Rule 403. *See, e.g.*, *Murray*, 103 F.3d at 318-19 ("It should go without saying that evidence in a murder trial that the defendant committed another prior murder poses a high risk of unfair prejudice"); *Delbridge*, 2007 U.S. Dist. LEXIS 15712 at *11 (severing where inclusion of one count as Rule 404(b) evidence on other count, though probative of intent, would engender significant unfair prejudice to defendant that

outweighed its probative value); *Hynson*, 2007 U.S. Dist. LEXIS 67261 at *25 (excluding evidence of prior conviction pursuant to Rule 403 because limiting instruction could not alleviate danger that jury would convict defendant based on prior conviction); *Barnes*, 2005 U.S. Dist. LEXIS 17151 at *19-20 (evidence of prior conduct excluded on basis of prejudice even though admissible for intent).

Moreover, although the Third Circuit settled in its opinion that it is improper to assess credibility for purposes of 404(b), *Bergrin*, 682 F.3d at 278-279 (citing *Huddleston*, 485 U.S. at 690), such credibility concerns will be vigorously contested at trial in a manner that at least bears upon the Court's Rule 403 analysis at this juncture. Specifically, because Mr. Bergrin denies that such a conversation ever took place and contends that Pozo is fabricating his testimony -- indeed, there is no documentation to corroborate that Mr. Bergrin ever instructed Pozo to "take out" the witnesses against him, and, moreover, it appears that Pozo, a convicted drug dealer facing a very lengthy prison sentence, made that accusation at a proffer session nearly a year after his first proffer, in which he did not mention such a conversation, C324 -- the other attorneys who were present before, during or after Mr. Bergrin's meetings with Pozo will, for example, be called to testify in support of Mr. Bergrin's position that he never made the statement attributed to him. Thus, evidence of the Pozo plot will devolve into a mini-trial on an issue that is truly collateral to the essential question of whether Mr. Bergrin in fact conspired to commit the murder of Kemo McCray. This of course, must be taken into account in this Court's Rule 403 analysis. *See, e.g., United States v. Williams*, 464 F.3d 443, 448 (3d Cir. 2006) (district court did not err by excluding testimony under Rule 403 based on weakness of the evidence and potential for an unnecessary mini-trial on collateral issue); *see also United States v. Hough*, 385 F. App'x 535, 537-38 (6th Cir. 2010) (proving that similar acts "actually occurred would make this case derail into a mini-trial into each of those, would inflame . . . [and] confuse the jury").

In light of the grave risk of "unfair prejudice," as well as "undue delay" and "wasting time," evidence of the Pozo Plot should be excluded under Rule 403 in the Kemo Murder Case. At the very least, the government ought not be permitted to open on the issue for, as the Third

Circuit indicated, the admissibility of the Pozo evidence under Rule 403 would necessarily turn on developments at trial.[10] That is, the Court of Appeals anticipated that this Court's ruling would turn on events yet to occur: the Court explained, "our review of the record *thus far* reveals no sound basis upon which it should have been precluded from the government's case on the Kemo Murder Counts under Rule 403. We nevertheless leave it to the new judge to whom this case will be assigned to conduct his or her own balancing under Rule 403 if the government again seeks to prove the Kemo Murder Counts using evidence of the Pozo Plot." *Bergrin*, 682 F.3d at 281 n.25 (emphasis added). In other words, in the view of the Third Circuit, the extent of the potential for unfair prejudice may not be clear at this time and will therefore require reevaluation at trial, assuming that this Court determines that a severed trial is appropriate. For the reasons set forth above, the potential for unfair prejudice in the form of both admitting evidence of propensity and allowing the case to devolve into a series of minitrials, is now patent, and should result in the exclusion of this evidence; at the very least, the parties ought not be permitted to open on the subject.

3. Evidence of the Alleged Drug Trafficking Conspiracy is Inadmissible to Show Motive in the Kemo Murder Case Pursuant to Rule 404(b).

Prior to trial, the government moved *in limine* to admit purported Rule 404(b) evidence that "Bergrin was involved in supplying kilograms of cocaine to Curry;" that Bergrin was involved in "arranging for a third person known as 'Changa' [a/k/a Jose Claudio] to supply cocaine to Curry;" and that "Bergrin and Changa were involved in supplying Curry with kilograms of cocaine …. Each of these events occurred prior to the K.D.M. murder." C283-84. The government argued that this evidence was admissible because it purportedly went to Mr.

[10] Indeed, the government has previously expressed its concerns, specifically with respect to this Pozo evidence, about the effects of opening on evidence that the Court later rules inadmissible after reassessing that evidence under Rule 403 in light of the events of the trial. A27-28. Obviously, this concern would be vitiated were the parties precluded from referring to this evidence in their opening remarks.

Bergrin's motive to murder Kemo. Specifically, the government contended that, as set forth in their prior proffer, "Bergrin protected both his and Curry's financial interest and freedom by preventing K.D.M. from testifying against Baskerville" because Baskerville had "enormous" "incentive to cooperate against Curry" and that "Baskerville's cooperation against Curry would have created two problems for Bergrin:" (a) the loss of "a primary customer for his drug business;" and (b) "Curry could have cooperated against Bergrin's drug trafficking business." C234. The government also proffered that this evidence was relevant to show that "Bergrin was not simply trying to protect his drug trafficking relationship with Curry, but rather his overall ongoing drug operation, which involved persons unrelated to Curry." C234-35. Judge Martini admitted this evidence, over defense objections, *see* C251-272, C303-12, on the ground that it appeared "probative of motive because it shows a reason Bergrin may have had for wanting to prevent K.D.M. from testifying -- to protect the drug business from which he allegedly profited." A8.

In fact, at trial, the government introduced evidence that (a) some time around October 2002, A3617, there was a meeting between Mr. Bergrin, Changa, and Hakeem Curry, Tr. (10/24/11) at 45-54; (b) the purpose of that meeting was to introduce Changa to Curry so that they could reach a multi-kilogram drug deal whereby Changa would supply Curry with cocaine, Tr. (10/20/11) at 121-24, 137-150; and (c) in late 2002, Curry told a member of his drug organization, Lachoy Walker, that the supplier that Mr. Bergrin had connected him with continued to supply him with cocaine, though that arrangement almost certainly ended in 2003 when Curry stopped selling cocaine and began selling heroin. Tr. (10/24/11 at 161-62, 169, 172). *See also* Tr. (11/14/11) at 25- 40 (government summation of drug motive evidence).

Because there is no proper purpose for introducing this evidence, it is not relevant, and its negligible probative value is substantially outweighed by its potential for unfair prejudice, the Court should exclude it pursuant to the dictates of Rules 404(b) and 403 . *See Givan*, 320 F.3d at 460 (citing *Huddleston*, 485 U.S. at 691-92). Putting aside that the testimony regarding Bergrin's alleged involvement in the Hakeem Curry drug organization, purportedly to establish

Bergrin's motive for ordering Kemo's murder, is not corroborated by any evidence aside from co-conspirator statements and was subject to vigorous and effective attack for credibility on cross-examination, A1401-45, 1475-1587, 1672-82, and accordingly accepting the truth of this evidence for purposes of this motion, the government's proofs at trial simply did not bear out its proffer because the government never tied the evidence of the alleged drug conspiracy to the Kemo murder in any way. That is, none of the evidence adduced at trial tended to show that the meeting in around October 2002 between Mr. Bergrin, Curry and Changa (a/k/a Jose Claudio) for the purposes of introducing Changa to Curry as a wholesale cocaine supplier for Curry's drug trafficking business established, or even tended to establish, that Mr. Bergrin had a motive to participate in some way in the murder of Kemo McCray. There was not, for example, any evidence that Mr. Bergrin reaped any profit from the Changa-Curry transaction, *see* C234, such that, even assuming that protecting Curry was the motive of Mr. Bergrin's alleged actions,[11] that meeting -- two years before the Kemo Murder -- was in any way related to that motive. Nor, of course, was Changa in any way implicated in the Kemo Murder conspiracy or the other participants in the Kemo Murder conspiracy (*e.g.*, the Baskervilles, Anthony Young or Jamal McNeil) in any way implicated in this transaction. Furthermore, there was no evidence tying Mr. Bergrin to any involvement in a Changa-Curry drug conspiracy beyond his mere presence at that meeting. That is, although there was limited evidence -- in the form of Lachoy Walker's

[11] There was, by contrast, plenty of other evidence introduced by the government regarding Mr. Bergrin's relationship to Hakeem Curry and the Curry drug organization. *See* Tr. (11/14/11) at 17-24) (describing evidence of Curry-Bergrin relationship including that Anthony Young and Abdul Williams knew Curry and Bergrin to be good friends, that Mr. Bergrin told Ramon Jiminez and Yolanda Jauregui that Curry was a major drug dealer and one of his best clients and that they saw one another once every two weeks or so, and that he was "like a brother" to Mr. Bergrin, that Curry was recorded calling Mr. Bergrin his "man," and that phone records and prison visitation records established their frequent contact, in addition to extensive evidence from witnesses demonstrating that Mr. Bergrin served as "house counsel" to the Curry drug trafficking organization). Thus, this evidence of Mr. Bergrin's participation in a drug transaction was not necessary to establish this relationship. *See Scarfo*, 850 F.2d at 1019 (admissibility depends on government's "genuine need" for the evidence based on contested issues and the existence of other evidence to prove the issue); *accord Sriyuth*, 98 F.3d at 748.

testimony -- that Changa and Curry continued to do business together,[12] neither that testimony, nor any of the other evidence as to the alleged drug conspiracy, showed that *Mr. Bergrin's* involvement in that business was ongoing in any way, or even involved anything more than this single meeting many months before the murder of Kemo McCray.

In sum, the government failed to provide any link between this Changa-Curry drug conspiracy and the testimony that Kemo McCray would have provided against Baskerville. The government certainly did not link McCray's testimony against Baskerville and the resulting threat of Baskerville's cooperation against Curry to the potential loss of a big customer for Mr. Bergrin's alleged drug business, *see* C121; nor did it bear out the entirely speculative notion that this meeting gave rise to a concern on Mr. Bergrin's part that Curry could offer cooperation against him, or that, even if he had such a concern, this was a reason to kill Kemo McCray.[13] *See* C234-35. Likewise, the government never made good on its promise to show that Mr. Bergrin was involved in the Kemo murder conspiracy to protect his "overall ongoing drug operation ... unrelated to Curry." C235. Certainly, this episode did not establish those facts.

Because this evidence in no way bears upon Mr. Bergrin's involvement in or motive to engage in the Kemo Murder conspiracy, the government has failed to establish a proper purpose for the introduction of this evidence at a retrial of the Kemo Murder Case. *See Himelright*, 42 F.3d at 782 (to establish that 404(b) evidence is being offered for a proper purpose, "the proponent must clearly articulate how that evidence fits into a chain of logical inferences"); *see also, e.g., United States v. St. Michael's Credit Union*, 880 F.2d 579, 601 (1st Cir. 1989) (reversing convictions for failure to file Currency Transaction Reports because, absent proof

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[12] That said, the evidence showed that this relationship between Changa and Curry almost certainly ended in 2003, prior to McCray's murder in March 2004, because that was when Curry stopped dealing cocaine. Tr. (10/24/11 at 172).

[13] Notably, Curry and Baskerville are serving life sentences and have now been incarcerated for years. At no time has there ever been any basis to believe that either could or would have cooperated with the government, let alone that such cooperation would include testimony that Mr. Bergrin was involved in a drug conspiracy with them. Nor was such an allegation part of the government's proofs against those individuals in their trials.

tying defendant to third party's related gambling activities, such conduct was irrelevant and improperly admitted under Rule 404(b)); *United States v. Hernandez*, 780 F.2d 113, 118 (D.C. Cir. 1986) (admission of other act evidence violated Rule 404(b) because "it was error to make the defendant bear the burden of uncertainty as to the meaning of" his actions where it was not clear that those actions had any probative value with respect to his motive in the charged offense). Indeed, it does not even satisfy the relevance standard of Federal Rule of Evidence 401, that it have "any tendency to make the existence of a fact that is of consequence to the determination of the action more probably or less probable than it would be without the evidence." *See, e.g.*, *United States v. Linares*, 367 F.3d 941, 952 (D.C. Cir. 2004) (Rule 404(b) barred admission of other acts evidence "because, in Rule 401's terms, the evidence made it no 'more probable or less probable' that [defendant] possessed the gun knowingly or unmistakenly"). It follows, of course, that the potential for unfair prejudice engendered by this other bad act evidence substantially outweighs its total lack of any probative value. *See id.* (where evidence failed under Rule 401, district court had no need to assess prejudice under Rule 403 to deem it inadmissible pursuant to Rule 404(b)). *See* A4460 (District Court noting that without introduction of this other crime evidence, "there would have been acquittal"). Accordingly, the Court should preclude the witnesses -- Ramon Jimenez, Yolanda Jauregui and Lachoy Walker -- from testifying as to this evidence at a severed trial of Counts Twelve and Thirteen.[14]

[14] This matter is properly before the Court, notwithstanding Judge Martini's ruling to the contrary. As the record reveals, towards the end of trial, during a colloquy with the District Court, counsel for Mr. Bergrin raised concerns about whether the government had fulfilled the terms of its proffer as to whether the evidence of Mr. Bergrin's alleged involvement in this Changa-Curry drug conspiracy in fact tended to show a motive for preventing McCray's testimony. A3601-04; A3618. Then, immediately after the Court declared a mistrial, during discussion of the briefing schedule for Mr. Bergrin's post-trial motions, counsel for Mr. Bergrin informed the Court that the next round of pretrial motion practice would include arguments about the lack of relevance of this drug-conspiracy-as-motive evidence, A4416-18. At the Court's request, counsel also filed a short letter providing notice of the pretrial motions that the defense intended to file in advance of the next trial, including that at a retrial of the Kemo Murder Case, Mr. Bergrin would move "to preclude the evidence elicited from Ramon Jiminez, Yolanda

III. THE COURT SHOULD HOLD A HEARING ON THE GOVERNMENT'S MISCONDUCT IN THIS MATTER TO DETERMINE WHETHER THE CHARGES SHOULD BE DISMISSED OR OTHER SANCTIONS IMPOSED.

At the recent trial on Counts Twelve and Thirteen, the credibility of several key witnesses was vigorously contested and, on more than one occasion, indicated that the government may have suborned perjury. Since the mistrial, the efforts of Mr. Bergrin and his investigator have brought to light other concrete examples of government misconduct with respect to both the suborning of perjury and the commission of egregious *Brady* violations.[15] This misconduct by law enforcement in detecting and obtaining evidence requires that the Court conduct an evidentiary hearing prior to trial. *See United States v. Voigt*, 89 F.3d 1050, 1067 (3d Cir. 1996) (defendant entitled to a pretrial evidentiary hearing if moving papers demonstrate a "colorable claim" for relief) (citing *United States v. Brink*, 39 F.3d 419, 424 (3d Cir. 1994)); *United States v. Soberon*, 929 F.2d 935, 941 (3d Cir.) (if district court had "reasonable suspicion" of prosecutorial misconduct proper course was to hold evidentiary hearing), *cert. denied*, 502 U.S. 818 (1991)).

Specifically, the trial evidence showed that, on a number of occasions, the government appears to have encouraged witnesses to lie under oath; at the very least, a hearing is required in order to explore whether that is the case. A few notable examples include Alberto Castro's testimony, including in response to questioning by the District Court, that the government had urged him to go forward with his guilty plea to certain charges even after he told the government

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Jauregui and Lachoy Walker, all of which, having heard it, we now know does not satisfy the dictates of Federal Rules of Evidence 404(b) and 403." C347. But the government's appeal was filed the same day, A1, thus divesting the District Court of jurisdiction and postponing such briefing until now.

15 *See Brady v. Maryland*, 373 U.S. 83 (1963).

he was innocent of committing these acts and later, not to retract that plea; instead, he was to testify against Mr. Bergrin and receive a benefit at sentencing for his cooperation. Tr. (10/27/11) at 36-40. Under questioning by the same government attorney with whom he had met, Castro later said that this testimony was mistaken because he had pled guilty before meeting with the government and that plea did not change thereafter. Tr. (10/27/11) at 82-93. But what really occurred here is, at the very least, in question, and demands exploration by the Court in order to determine whether a sanction, including, for example, precluding Mr. Castro from testifying, should be imposed for this potentially disturbing conduct. Likewise, Ramon Jiminez testified that while he was a cooperating witness, and days before he pleaded guilty, he filed an ethics complaint against his attorney alleging that the FBI told him "We need a witness and we are looking at that witness," that in exchange for his testimony, they promised not to charge him although they had a case against him, that they were only there to see if he could testify against Paul Bergrin, and that his attorney was acting in league with the government and interrogating and intimidating him in front of the Assistant U.S. Attorney in order to elicit information about Mr. Bergrin from him. Tr. (10/21/11) at 154, 156-162. The clear implication of Mr. Jiminez's testimony was that the government coerced him into making up testimony against Mr. Bergrin. Furthermore, the lead FBI agent in this case, Shawn Manson Brokos, testified that although she had interviewed a witness who had information damaging the credibility of the key witness in the Kemo Murder Case, Anthony Young, and impeaching his account of the murder -- upon which the government here relies -- the government did not document that conversation except to note the date it took place and never turned any of the potentially exculpatory information related to that conversation over to the defense. Tr. (11/9/11) at 127, 134-139.

These are but a few examples, derived from the trial. The investigation directed by Mr. Bergrin and conducted by his investigator since the trial has uncovered further attempts by government agents to elicit false testimony against Mr. Bergrin. Although this investigation remains still ongoing, some representative examples of such misconduct, which are set forth in the Certification of Louis F. Stephens (filed *in camera*), include:

- A defense witness (DW-5)[16] avers that government agents pressured DW-5 to cooperate against Paul Bergrin in order to receive a benefit in DW-5's criminal case after DW-5 expressly refused to do so on the grounds that Mr. Bergrin was innocent. DW-5 will further testify that government agents promised DW-5 immunity and told DW-5 they did not care if DW-5 lied to implicate Mr. Bergrin. Stephens Cert. ¶¶ 116-118.
- Defense witnesses (DW-1, DW-2 and DW-3) aver that government officials pressured, coerced and encouraged Yolanda Jauregui to testify falsely against Paul Bergrin and "put words in her mouth." For example, DW-2 asserts that FBI agents told Jauregui, "if you don't have anything, make things up." *Id.* ¶ 41. *See generally id.* ¶¶ 31-33, 40-42, 54-55.
- Defense witnesses (DW-9, DW-10) assert that the government coerced Abdul Williams to testify against Paul Bergrin by threatening to arrest his father and sister for drug trafficking activity. *Id.* ¶ 87.

Mr. Bergrin's investigation has also revealed that the government withheld crucial *Brady* material from the defense. The Court should hold a hearing so that Mr. Bergrin can adduce

[16] The identity of this and the other witnesses have not been provided, for fear that they will, if revealed, be subject to coercion and intimidation by the government. Of course, their identity will be timely revealed if they are required to testify at a hearing or at trial; moreover, Mr. Bergrin will reveal them to the Court in advance if the Court so desires.

evidence as to what his investigation has uncovered. Notable examples of this misconduct include:

- The government did not reveal prior to the last trial that Alberto Castro first came forward with the allegation that, in December 2003, Mr. Bergrin solicited him to kill Mr. McCray, shortly after he was visited by Maria Correia, a cooperating informant for the government. Specifically, Correia visited Castro in prison on March 21, 2009 and April 2, 2009.[17] On April 30, 2009, Castro first mentioned to the government that Mr. Bergrin solicited him to kill McCray. Castro testified before a grand jury about Bergrin's alleged statement on May 12, 2009 and was sentenced days later, on May 15, 2009. The government first turned over records of Correia's jail visits in May 22, 2012, long after the trial of this matter, at which Castro was a key witness.[18]
- The details of agents' interview with DW-5 in which DW-5 asserted that Paul Bergrin had no involvement in the alleged drug trafficking business were not turned over to the defense.
- A defense witness, DW-3 asserts that Jauregui told DW-3 that the government had promised her release, money, a car, and a house in exchange for her

[17] Castro fired Mr. Bergrin as his attorney in April 2009 and hired Richard Roberts to represent him, a fact also not revealed to the defense. Stephens Cert. ¶¶ 74-76. Mr. Bergrin's investigation reveals that, as he did with other government witnesses, *see* Stephens Cert. ¶¶ 58-112, Mr. Roberts acted as a *de facto* government agent conveying government threats to his clients (some of whom, like Rondre Kelly, were adverse to others, like Albert Castro -- conflicts which the government did not assert), most of whom in fact turned on Mr. Bergrin as a result. In any event, the government knew about but failed to reveal this information to the defense

[18] Notably, the defense first learned during opening statements that Alberto Castro would be testifying against Mr. Bergrin. Jencks material, *see* 18 U.S.C. § 3500, pertaining to Castro had been omitted from the materials that the government had turned over to the defense. Tr. (10/17/11) at 32-25.

testimony against Mr. Bergrin. DW-3 further asserts that the government promised Jiminez money and a vehicle if he implicated Mr. Bergrin in drug trafficking. Those promises were not disclosed to the defense.

- The government has not disclosed any information to the defense regarding its conversation with the wife of Jiminez after she called the District Court's chambers to complain that the FBI was forcing her husband to falsely testify against Mr. Bergrin.

The examples of government misconduct and *Brady* violations detailed above -- which raise numerous genuine issues of material fact which, if established, will require one or more of the following sanctions: dismissal of the indictment; exclusion of evidence tainted by that misconduct; or other remedies -- entitle Mr. Bergin to, at the very least, an evidentiary hearing. Such relief is well-established under Third Circuit law. As the Court of Appeals has held, "Where a factual question is raised as to whether a *Brady* violation occurred, the defendant is '*entitled to have it determined by the district court in a hearing* appropriate to the factual inquiry.'" *Gov't of Virgin Islands v. Martinez*, 780 F.2d 302, 306 (3d Cir. 1985) (emphasis added) (quoting *United States v. Alexander*, 748 F.2d 185, 193 (4th Cir. 1984)); *United States v. Dansker*, 565 F.2d 1262 , 1264 (3d Cir. 1977) ("Where the submission of written affidavits raises genuine issues of material fact and where, as here, the *Brady* claims are neither frivolous nor palpably incredible, an evidentiary hearing should be conducted."), *cert. denied*, 434 U.S. 1052 (1978)). *See also United States v. Reyeros*, 537 F.3d 270, 284 n.18 (3d Cir. 2008) (standard for granting evidentiary hearing is whether defendant has made "a threshold showing that a material fact was in dispute") (citing *Martinez* and *United States v. Panitz*, 907 F.2d 1267, 1273 (1st Cir. 1990) ("The test for granting an evidentiary hearing in a criminal case [is]

substantive: did the defendant make a sufficient threshold showing that material facts were in doubt or dispute?")); *United States v. Perdomo*, 929 F.2d 967, 973-974 (3d Cir. 1991) (remanding for evidentiary hearing where appellant had "made a very persuasive showing that a *Brady* violation did occur" but "there are several factual questions that should be determined before the issue can finally be resolved") (citing *Martinez*); *United States v. Scott*, 2009 U.S. Dist. LEXIS 35711, at *6-8 (E.D. Pa. 2009) (applying *Reyeros* and *Martinez* standard to whether hearing on prosecutorial misconduct warranted); *United States v. Nissenbaum*, 50 Fed. Appx. 87, 87-88 (3d Cir. 2002) ("A defendant seeking a hearing on the prosecutor's alleged investigative misconduct must make a *prima facie* showing of the alleged wrongdoing.") (citing *United States v. Armstrong*, 517 U.S. 456, 463 (1996)); *United States v. Gonzales*, 927 F.2d 139, 143-144 (3d Cir. 1991) (because "'the defense of outrageous Government conduct is not for the jury to consider, but must be decided by the trial court'" the defense raises an issue relating to a defect in the institution of the prosecution which should normally be raised prior to the trial "'so that the trial court can conduct a hearing with respect to any disputed issues of fact.'") (quoting *United States v. Nunez-Rios*, 622 F.2d 1093 (2d Cir. 1980)); *United States v. Lashley*, 2011 U.S. Dist. LEXIS 127165, at *2-3 (E.D. Pa. Nov. 3, 2011) (court held evidentiary hearing on motion to dismiss indictment on grounds of prosecutorial misconduct). *Cf. United States v. Brown*, 454 Fed. Appx. 44, 49 (3d Cir. 2011) ("a defendant is entitled to a hearing for a motion to suppress if the motion presents 'a colorable constitutional claim' and 'there are disputed issues of material fact that will affect the outcome of the motion to suppress.'") (quoting *United States v. Hines*, 628 F.3d 101, 105 (3d Cir. 2010) (citing *Voigt*, 89 F.3d at 1067)); *United States v. Jackson*, 363 Fed. Appx. 208, 210 (3d Cir. 2010) ("A claim is 'colorable' if it consists 'of more than mere bald-faced allegations of misconduct.' . . . Thus, to warrant an evidentiary hearing, a defendant's

motion must contain 'issues of fact material to the resolution of the defendant's constitutional claim.'") (quoting *Voigt*, 89 F.3d at 1067 & n.2).

Accordingly, this Court should hold a hearing to permit Mr. Bergrin to provide proof as to this proffered evidence and for the Court to determine whether the charges should be dismissed, certain government witnesses precluded from testifying, or any other appropriate remedies should result, including, potentially, the disqualification of the prosecutors in this matter. *See generally United States v. Cox*, 2012 U.S. Dist. LEXIS 78731, at *18-24 (D.N.J. May 31, 2012).

IV. THE COURT SHOULD CONSIDER AND GRANT MR. BERGRIN'S PREVIOUSLY RAISED PRETRIAL MOTIONS AND ALLOW HIM TO FILE ADDITIONAL SUCH ADDITIONAL PRETRIAL MOTIONS AS ARE NECESSARY.

As part of this motion, and in order to be sure to preserve these issues in the event of further appeal, Mr. Bergrin hereby renews all of his other previous pretrial arguments, including those made in his second brief in support of pretrial motions, which addressed the charges in the Second Superseding Indictment. Specifically, those motions asserted, *inter alia*, that the Court should (1) dismiss Count Twenty-Six as facially invalid because, by charging that Mr. Bergrin aided and abetted himself, that Count alleges a legal and factual impossibility, which does not amount to a cognizable criminal offense; (2) suppress any statements that Mr. Bergrin made to government informants (and evidence derived therefrom) who acted as government agents and thus violated Mr. Bergrin's Sixth Amendment rights, after the time that Mr. Bergrin was represented by counsel on the State Prostitution and Kemo Murder Cases; and (3) suppress evidence seized from 50 Park Place, 10th Floor, Newark, New Jersey; 62 Amagansett Drive, Morganville, New Jersey; 300 Winthrop Drive, Nutley, New Jersey; and 2009 Morris Avenue,

Suite 103, Union, New Jersey in violation of Mr. Bergrin's Fourth Amendment rights because (a) the search, both at the scene and of the computers off-premises, far exceeded the scope of the warrant; (b) the government failed to provide known material information which bore upon the credibility of a key informant in the affidavit upon which the Magistrate Judge relied in authorizing the search warrant; and (c) some of the evidence seized was the "fruit of the poisonous tree," because based upon a warrant that was obtained based upon information collected as a result of an unlawful, warrantless search that was not a valid "protective sweep." *See* D.E. 218-1, 221 (Brief in Support of Defendant's Pretrial Motions and Reply Brief). Defendant respectfully reasserts these motions and will, of course, provide the Court with hard copies of these filings if the Court so requests.

In addition, Mr. Bergrin respectfully requests leave to file additional pretrial motions should they be appropriate, depending upon the Court's ruling with regard to the above matters and, in particular, its rulings on severance; for example, if that motion were to be denied, there would likely be motion practice addressed to the trial date, *in limine* motion practice and motion practice addressed to discovery, among other matters. Certain motion practice may also ensue following the hearing requested in order to resolve the issues of prosecutorial misconduct alleged by Mr. Bergrin and his investigator, and given Mr. Bergrin's ongoing investigation into these matters. Particularly given the limited scope of the motions here required by the Court and the very short time frame within which such motions were to be filed, the opportunity to file additional motions is required in order to assure both a fair and an expeditious trial process, and in light of the critical matters here at issue.

V. CONCLUSION

For the foregoing reasons, the Court should grant defendant Bergrin's pretrial motions.

Respectfully submitted,

GIBBONS P.C.

Standby Counsel for Defendant Paul W. Bergrin

By: s/ Lawrence S. Lustberg
Lawrence S. Lustberg

Date: August 21, 2012

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

UNITED STATES OF AMERICA, **v.** **PAUL W. BERGRIN,** **Defendant.**	**Crim. No. 09-369 (DMC)** **ORDER**

THIS MATTER is before the Court by way of: (1) the Government's motion to rely on specific Rule 404(b) evidence to prove certain substantive counts in the Indictment; and (2) Defendant's motion to convene a hearing on alleged prosecutorial misconduct; and for the reasons stated on the record on September 12, 2012, which are incorporated herein at length; and for the reasons stated in the Opinion issued on this date; and for good cause shown;

IT IS on this 18 day of September 2012,

ORDERED that, the Government's motion to prove certain substantive murder counts with 404(b) evidence is **GRANTED IN PART AND DENIED IN PART**; and it is further

ORDERED that, Defendant's motion to convene a hearing on alleged prosecutorial misconduct is **DENIED**.

Dennis M. Cavanaugh, U.S.D.J.

Dated: September 18, 2012

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

UNITED STATES OF AMERICA, **v.** **PAUL W. BERGRIN,** **Defendant.**	**Crim. No. 09-369 (DMC)** **OPINION**

CAVANAUGH, U.S.D.J.

The parties in this case filed fifteen *in limine* motions in advance of trial. On September 12, 2012, the Court held oral argument and placed a series of decisions on the record, which resolved nearly all of the pending *in limine* motions. In addition to the oral rulings, the Court advised that, for reasons to be stated in a written opinion to follow, the Government's motion to rely on certain evidence pursuant to Rule 404(b) in order to prove two non-RICO murder counts would be **granted in part and denied in part**, and that Bergrin's motion for a hearing on alleged prosecutorial misconduct would be **denied**. This Opinion incorporates by reference the transcript of the September 12th hearing and provides the Court's reasoning for resolution of the remaining two motions.

BACKGROUND

The facts and procedural history of this case are detailed in prior opinions. See, e.g., United States v. Bergrin, 650 F.2d 257 (3d Cir. 2011) (Bergrin I); United States v. Bergrin, 682 F.3d 261 (3d Cir. 2012) (Bergrin II). They are repeated herein only to the extent necessary.

On November 10, 2009, the Government filed a 33-count Second Superseding Indictment (the "SSI") against Defendant Paul Bergrin, charging him with, among other things, RICO violations, witness tampering, drug crimes, tax evasion, and prostitution. Count 1 of the SSI charges Bergrin with conducting a RICO enterprise and alleges three different witness tampering episodes described as follows: (1) Bergrin and co-conspirators conspired to murder—and did murder—a man named Kemo D. McCray, who was a witness against one of Bergrin's clients; (2) Bergrin plotted to kill a witness who planned to testify against a client, Richard Pozo (the "Pozo Plot"); and (3) Bergrin plotted to kill witnesses in connection with the defense of another client, Vincente Esteves (the "Esteves Plot"). In addition to the RICO counts, the SSI charges Bergrin in substantive, parallel counts with murdering a witness and conspiracy to commit such a murder (the "Kemo Murder Counts").

Following two Third Circuit appeals and a mistrial, the case was assigned to this Court on August 2, 2012. On August 21, 2012, the parties filed *in limine* motions in advance of trial. On September 12, 2012, this Court held oral argument and ruled on the pending *in limine* motions, including granting the Government's motion to jointly try Counts 1 through 26 of the SSI. This Opinion supplements the September 12th transcript with respect to following motions: (1) the Government's motion to rely on certain evidence to prove the Kemo Murder Counts and Bergrin's cross-request to exclude such evidence on those counts; and (2) Bergrin's motion to convene a hearing on alleged prosecutorial misconduct.

DISCUSSION

A. The Government's Motion to Admit 404(b) Evidence & Bergrin's Cross-Request to Exclude

This Court has ordered a joint trial of Counts 1-26 in SSI. As the Third Circuit noted, because a joint trial will result in a full presentation of the evidence, this renders the majority of the parties' evidentiary disputes "essentially moot," except for the potential for appropriate limiting instructions. See Bergrin II, 682 F.3d at 281 n.25. Despite the joint trial that will include all of the evidence, the parties have briefed the discrete issue of the proper scope of admissible evidence for the jury's consideration of the non-RICO, substantive Kemo Murder Counts. The Government contends that five categories of evidence (described more fully below) are admissible, for various reasons, under Rule 404(b) to prove the Kemo Murder Counts. Bergrin counters that all five categories should be excluded from the jury's consideration of the substantive Kemo counts. [1]

Legal Standard – Rule 404(b)

Federal Rule of Evidence 404(b) permits the introduction of other bad acts unless such evidence is offered to "prove the character of the person in order to show conformity therewith on a particular occasion." Fed. R. Evid. 404(b). Rule 404(b) is a rule of inclusion, not exclusion, and evidence is admissible if it is probative of something other than character, such as "intent, plan, knowledge, identity, or absence of mistake or accident." Id.; see United States v. Jemal, 26 F.3d 1267, 1272 (3d Cir. 1994) ("We have recognized that Rule 404(b) is a rule of

[1] Again, these motions pose the limited evidentiary question of what information admissible in the joint trial is *also* appropriate for the jury to consider in connection with the individual, substantive Kemo Murder Counts. Thus, to be clear, any references in this Opinion to the exclusion or admissibility of evidence are limited solely to what consideration (if any) the jury in the joint trial should give a particular piece of evidence when deliberating on the Kemo Murder Counts.

inclusion rather than of exclusion"); United States v. Givan, 320 F.3d 452, 460 (3d Cir. 2003) ("We favor the admission of evidence of other criminal conduct if such evidence is relevant for any purpose other than to show a mere propensity or disposition on the part of the defendant to commit the crime." (emphasis added)).

A four factor test applies to questions of admissibility of evidence under Rule 404(b): (1) a proper evidentiary purpose; (2) relevance under Rule 402; (3) weighing of the probative value against any unfair prejudice under Rule 403; and (4) a limiting instruction concerning the purpose of the evidence. See, e.g., United States v. Butch, 256 F.3d 171, 176 (3d Cir. 2001). In order for otherwise admissible 404(b) evidence to be excluded under Rule 403, it must be shown that the "probative value is *substantially outweighed* by a danger of *unfair* prejudice . . . ." Fed. R. Evid. 403 (emphases added). Mere "prejudice" to the defendant is not enough; rather, it "must always be remembered that *unfair* prejudice is what Rule 403 is meant to guard against, that is, prejudice based on something *other than the evidence's persuasive weight*." Bergrin II, 682 F.3d at 280 (citing United States v. Cruz-Garcia, 344 F.3d 951, 956 (9th Cir. 2003)).

i. The Pozo Plot

The Government seeks to prove the Kemo Murder Counts with the testimony of Richard Pozo, a former Bergrin client, who was charged with drug crimes in Texas in 2004. Bergrin is alleged to have informed Pozo of the identity of a cooperating witness, asked Pozo if he knew where the witness lived, and told Pozo his charges would go away if the individual could be "taken out."

The relevance and probative nature of the Pozo Plot is not in legitimate dispute. The Third Circuit has found that the Pozo Plot "is proper Rule 404(b) evidence," that it is "powerfully suggestive of Bergrin's intent in passing Kemo's identity on from Baskerville to

Curry," and that it is "relevant to deciding whether Bergrin uttered the words, No Kemo, No Case, and if he did, what he meant." Bergrin II, 682 F.3d at 280-81 & n. 25. While the Third Circuit did state that this Court has an obligation to conduct an appropriate Rule 403 balancing to evaluate unfair prejudice, the Circuit also cautioned that its "review of the record thus far reveals *no sound basis* upon which that evidence should have been precluded from the Government's case on the Kemo Murder Counts." Id. (emphasis added). The record has not materially changed upon remand and, thus, there is no basis to exclude the evidence from the jury's consideration on the Kemo Murder Counts. Moreover, while Bergrin claims that he will suffer prejudice because the jury will conclude that he is "the kind of person who tampers with witnesses," this concern existed during the initial trial, and the Third Circuit already found that "no sound basis" existed to exclude the evidence when considering the appeal following that trial. Putting that all aside, and looked at anew, the similarities of the two alleged events are obvious and, while there is some potential for prejudice to Bergrin, that potential clearly does not substantially outweigh the evidence's probative nature. Thus, evidence of the Pozo Plot is admissible under Rule 404(b) with respect to the substantive Kemo Murder Counts.

ii. The Esteves Plot

The Government also seeks to prove the Kemo Murder Counts through evidence alleging that Bergrin conspired with others to murder an individual identified as "Junior the Panamanian" for the benefit of a client, Vincente Esteves. According to the Government, Bergrin made statements to Esteves to the effect that he had a hatred of "rats"; would kill a "rat" himself; admitted that he had "done this before"; and said "if there are no witnesses, there is no case." In addition, the Government states that Bergrin was later recorded by an informant instructing the informant to kill the main witness against Esteves, and also stating, "we gotta make it look like a

robbery. It cannot under any circumstances look like a hit . . . We have to make it look like a home invasion robbery."

The Esteves Plot is appropriate and relevant Rule 404(b) evidence on the Kemo Murder Counts for at least two reasons. First, the Esteves Plot involved conduct that is similar to Bergrin's alleged conduct with respect to the Kemo Murder. If the jury believes Bergrin made the statements attributed to him, Bergrin's comment to Esteves that he had "done this before" is appropriate Rule 404(b) evidence on the Kemo Counts in the sense that it could provide basic context for a jury to decide whether he was referring to and admitting the Kemo murder when he said it. Cf. In re Vivendi Universal, S.A. Sec. Litig., 765 F. Supp. 2d 512, 553-54 (S.D.N.Y. 2011) ("statements made at a later point, while certainly not dispositive, may be highly relevant to establishing facts at an earlier time").

Second, the Esteves Plot evidence is relevant and highly probative Rule 404(b) evidence on the Kemo Murder Counts to the extent that it allows the jury to evaluate Bergrin's intent in connection with the Kemo Murder. In the supposed Esteves Plot, Bergrin is alleged to have made statements to the effect of "if there are no witnesses, there is no case," while at the same time allegedly having made clear what he actually meant was that a witness against Esteves should be killed. In contrast, in the context of the Kemo murder, Bergrin is alleged to have made similar statements—"No Kemo, no case"—while not expressing intent in the same way it was alleged to have happened in conversations during the Esteves Plot. Thus, the Esteves Plot is relevant to the Kemo Murder Counts in that it could allow a jury to infer—if a jury chooses to give the evidence such weight—Bergrin's intent when he supposedly made the "No Kemo, no case" comments to members of the Curry Organization. See, e.g., United States v. Simels, 654 F.3d 161, 172 (2d Cir. 2011) (the jury was entitled "to infer what Simels meant and what action

he intended with respect to each witness not only from what was said about that witness but also from what he said about all the witnesses"); United States v. Queen, 132 F.3d 991, 996 (4th Cir. 1997) ("the more similar the extrinsic act or state of mind is to the act involved in committing the charged offense, the more relevance it acquires toward proving elements of intent").

Bergrin attempts to challenge the relevance and probative value of the Esteves evidence, arguing it is amorphous and does not provide reliable evidence of intent. However, these arguments do not effectively diminish the evidence's relevance and probative value. Indeed, at most, his arguments challenge the *weight* of the evidence, not its overall admissibility. Cf. Carter v. Hewitt, 617 F.2d 961, 968 (3d Cir. 1980) ("While some inferences, no doubt, must be drawn from Carter's letter to reach the conclusion that he had a plan[,] . . . these inferences only render the letter less probative, not less admissible."); see also United States v. Martin, 9 F.3d 113, 1993 WL 430154, at *5 (7th Cir. 1993) (table) (reversing district court's conclusion that statement was too "ambiguous" and lacking in probative value to be considered by a jury). For example, Bergrin's papers attack the probative value of the Esteves Plot because it occurred five years after the Kemo Murder. (DB 20 n.8.) Although now slightly refined, this was the same basic argument that was the driving force behind the exclusion of the Esteves Plot in the first trial. See, e.g., United States v. Bergrin, 2011 WL 6779548, at *5 (D.N.J. Dec. 27, 2011). However, as Bergrin II makes clear, the argument is based on a distinction without functional difference. See Bergrin II, 682 F.3d at 281 n.25 ("With respect to the Esteves Plot, we agree with the government that the District Court observed an unwarranted analytical distinction between a 'prior bad act' and a 'subsequent bad act' . . . [and later] "the District Court erred to the extent it dismissed the probative value of the subsequent act evidence."). And, in all events, as the Government convincingly argues, all admissions occur after the crime they are introduced

to prove, and thus, the fact that five years separate the two plots does not move the needle from relevant and probative to irrelevant.

Bergrin's claim of prejudice under Rule 403 is insufficient to exclude the evidence from consideration on the Kemo Murder Counts. The probative value of the Esteves Plot is high. See Huddleston v. United States, 485 U.S. 681, 685 (1988) ("extrinsic acts evidence may be critical to the establishment of the truth as to a disputed issue, especially when that issue involves the actor's state of mind and the only means of ascertaining that mental state is by drawing inferences from conduct"). To preclude the jury from considering it in connection with the Kemo Murder Counts, it must be shown that Bergrin faces "unfair" prejudice that "substantially outweighs" the evidence's probative value. See Bergrin II, 682 F.3d at 280. That is not the case here. The evidence carries high probative value directed to a key issue on the Kemo Murder Counts, *i.e.*, Bergrin's intent, which is not substantially outweighed by the danger of unfair prejudice.

The prejudice that Bergrin claims is essentially that the evidence is inflammatory and that the jury will not be able to effectively limit their consideration of the evidence for appropriate purposes when deliberating the Kemo Murder Counts. However, as the Court has already noted in rejecting Bergrin's severance request, this position is essentially a claim of prejudice due the evidence's persuasive weight, an improper basis for exclusion. Id. The argument also does not give adequate consideration to the jury's ability to compartmentalize evidence and the Court's ability to construct appropriate limiting instructions. See, e.g., United States v. Hakim, 344 F.3d 324, 330 (3d Cir. 2003) ("We begin our analysis with the presumption that juries follow instructions given by district courts." (citing United States v. Newby, 11 F.3d 1143, 1147 (3d Cir. 1993)). Despite Bergrin's claims to the contrary, a jury is, in fact, capable of evaluating

counts independently. See United States v. Jones, 482 F.3d 60, 67 (2d Cir. 2006) (convicting on RICO counts, but acquitting on certain murder counts). Thus, Bergrin's allegations of prejudice, while not without some basis, are neither of the "unfair" nature or of such a degree that they warrant the exclusion.

iii. All of the Witness Tampering Plots

The Government seeks to prove the Kemo Murder Counts with evidence of all of the witness tampering episodes in the SSI, including tampering plots that involved efforts short of attempting to murder witnesses—such as the N.V. Plot— contending that they are relevant to show Bergrin's "common scheme" or "*modus operandi*." However, Judge Martini excluded this evidence and it was not the subject of the Third Circuit appeal. (See DB at 10.) Judge Martini's rulings on these issues are persuasive. See, e.g., United States v. Bergrin, 09-369, Slip Op. (undated); Appendix A7-13. For the same reasons articulated by Judge Martini, the Government's motion to rely on this evidence under Rule 404(b) in order to prove the Kemo Murder Counts is **denied**, and appropriate limiting instructions will be given if necessary.

iv. The Context Evidence

The Government seeks to prove the Kemo Murder Counts with evidence of crimes charged in Counts 17 through 26 of the indictment because it claims that such evidence provides context for the testimony of two witnesses, Thomas Moran and Abdul Williams, to whom the Government claims Bergrin made admissions regarding the Kemo Murder. (Gov't Br. 28.) In short, the theory goes that Bergrin was involved in criminal activity with Moran and Williams and, because they were involved in criminal activity together, Bergrin felt comfortable enough to confide in these individuals about the Kemo Murder. Thus, the Government contends that evidence of their collective criminal activities is appropriate in order to place the testimony of

Moran and Williams in proper context. Judge Martini addressed this issue in connection with the first trial, largely denying the Government's 404(b) request with respect to Moran, and allowing limited background with respect to Williams. See Slip. Opinion (undated) located at Joint Appendix A11-12. The Court has reviewed Judge Martini's Opinion on this subject and entirely agrees with the persuasive reasoning therein. Thus, this Court adopts Judge Martini's prior rulings on this subject. As such, the Government's motion is **granted in part and denied in part**, subject to the same parameters detailed in Judge Martini's Opinion.

v. Drug Conspiracy Evidence

The Government seeks to prove the Kemo Murder Counts with certain evidence that purports to show that Begrin was involved in supplying drugs to Hakeem Curry; that Bergrin utilized a third-party [an individual "Changa"] to provide drugs to Curry; and that Bergrin, Changa and Curry were all involved in a drug conspiracy. The Government argues this evidence is admissible on the Kemo Murder Counts because it supplied a two-fold "motive" for Bergrin to murder Kemo: (1) it would have resulted in Bergrin losing a client (Curry); and (2) if Curry were arrested it would raise the possibility that Curry could cooperate against Bergrin.

Judge Martini admitted this evidence in the severed trial. Bergrin claims this was error because, he contends, the Government never tied the drug evidence to him and the prejudice of the evidence outweighs the probative value. Bergrin's perception about what the Government did or did not establish with respect to the conspiracy does not provide a sufficient basis to deviate from Judge Martini's initial ruling. Moreover, wholly independent from Judge Martini's previous ruling, the Court agrees with the Government that this evidence could be considered probative of Bergrin's motive with respect to the Kemo Murder Counts. Thus, the Court precisely adopts Judge Martini's prior rulings, which are incorporated herein by express

reference. See Slip Op. at A8. And, as Judge Martini suggested, if at some point during the trial, the evidence becomes cumulative and unnecessary, additional instructions may be given.

B. Bergrin's Motion to Convene a Hearing on Prosecutorial Misconduct

Bergrin has requested that the Court conduct a hearing on alleged Government misconduct with respect to broad allegations of coercing witnesses to lie and the commission of numerous *Brady*[2] violations. (DB 31.) The allegations supporting Bergrin's motion are contained in two documents: his brief and a declaration submitted by Bergrin's private investigator, Louis F. Stephens, which was submitted for *in camera* review. Because of the sensitive nature of the *in camera* submission, the Court does not repeat the arguments and allegations supporting and opposing the motion at length. It is enough to say that the Court has closely and carefully considered all the information that has been submitted. And, following that consideration, the Court will deny the motion for the reasons that follow.

Legal Standard

A party is not entitled to a pretrial evidentiary hearing as a matter of course. See Fed. R. Crim. P. 12(c). In the Third Circuit, an evidentiary hearing is required when a defendant's motion is "sufficiently specific, non-conjectural, and detailed" to show: (1) a "colorable" constitutional claim; and (2) disputed issues of fact material to its resolution. See, e.g., United States v. Hines, 628 F.3d 101, 105 (3d Cir. 2010). To be "colorable," a claim must contain more than "bald-faced allegations of misconduct." United States v. Voight, 89 F.3d 1050, 1067 (3d Cir. 1996). Moreover, there must be "significant factual disputes in order to receive a pretrial evidentiary hearing," United States v. Jackson, 363 Fed. Appx. 208, 210 n.2 (3d Cir. 2010), and the defendant must "make a *prima facia* showing of the alleged wrongdoing." United States v.

[2] See Brady v. Maryland, 373 U.S. 83 (1963).

Nissenbaum, 87 Fed. Appx. 87, 87-88 (3d Cir. 2002); see also United States v. Glass, 128 F.3d 1398, 1408-09 (10th Cir. 1997) (holding that defendant bears the burden to show there are material facts in dispute and that a hearing is only required when the motion raises factual allegations that are sufficiently definite, specific and non-conjectural); United States v. Panitz, 907 F.2d 1267, 1273-74 (1st Cir. 1990) (holding that "[t]he test for granting an evidentiary hearing in a criminal case should be substantive: did the defendant make a sufficient threshold showing that material facts were in doubt or dispute?"). The purpose of an evidentiary hearing is to "assist the court in ruling on specific allegations of unconstitutional conduct . . . *not* to assist the moving party in making discoveries that, once learned, might justify the motion after the fact." Hines, 628 F.3d at 106 (emphases added).

Here, there is no basis for a hearing with respect to Bergrin's allegations for the following reasons.

First, the Stephens Declaration, which is the chief support for the motion, consists exclusively of hearsay. Indeed, the Stephens Declaration not only contains hearsay statements in the sense that he is repeating statements that witnesses allegedly told him, but it contains an *additional* layer of hearsay in that, even if Stephens *was* told what he claims he was told, the "confidential witnesses" are repeating things *they* claim *they* were told—creating double and triple hearsay issues. This creates something of a threshold reliability issue that weighs against a hearing. Cf. Neil v. Gibson, 278 F.3d 1044, 1056 (10th Cir. 2001) (holding that district court did not abuse discretion in disregarding hearsay affidavits); United States v. Allied Steverdoring Corp., 258 F.2d 104 (2d Cir. 1958) (rejecting hearsay affidavit as "patently inadequate to justify a hearing").

Second, and more important, Bergrin has not raised a "colorable claim" of a constitutional violation. Bergrin's claims are purely speculative. For example, Bergrin alleges Government coercion with respect to four witnesses, but the allegations consist entirely of hearsay statements such as the Government "put words in the witnesses' mouths" and promised reduced jail time and other perks if the witnesses would implicate Bergrin. Attacking the credibility of prosecution witnesses is a *common defense strategy*, and Bergrin is free to attempt to attack the credibility of witnesses on cross-examination and/or at trial by suggesting they were coached or coerced to lie. This happened in the first trial, and it happens in nearly every trial. However, these types of allegations are not sufficient to warrant an evidentiary hearing. Accepting simple allegations of this type as a basis for an evidentiary hearing and a "colorable constitutional violation" would essentially mean in any case the Government has a cooperating witness, it would take nothing more than pure speculation to compel an evidentiary hearing on prosecutorial misconduct. That is not the law.

Third, the facts here differ dramatically from cases where the Third Circuit has suggested a pre-trial hearing should be held. For example, in United States v. Voight, 89 F.3d 1050 (3d Cir. 1996), the defendant alleged that the government had engaged in improper conduct by using his personal attorney, identified as Mercedes Travis, as a confidential informant against him, resulting in a breach of the attorney-client privilege. Defendant offered his own sworn affidavit, an affidavit from Travis, and Travis's grand jury testimony. Id. at 1066. In contrast, the Government offered an affidavit from an FBI agent stating that Travis was not acting in the capacity of Lewis's attorney at the time of the event. Id. The Third Circuit found that, based on the state of the record, the court should have conducted a pretrial evidentiary hearing. Id. at 1067. Voight stands in stark contrast to the much more attenuated and specious allegations here.

Finally, Bergrin's *Brady* allegations do not appear to be "colorable," and, in all events, do not warrant a hearing. A true *Brady* violation requires a showing of prejudice. See Strickler v. Greene, 527 U.S. 263, 281-82 (1999). Bergrin's moving papers show that he possesses the information he claims is exculpatory and that has not suffered any prejudice. Thus, there is no basis for his *Brady* claims. See, e.g., United States v. Kaplan, 554 F.2d 577, 580-81 (3d Cir. 1977).

CONCLUSION

For the reasons set forth above, the Government's motion to prove the Kemo Murder Counts with certain evidence is **granted in part and denied in part**, and Bergrin's motion to convene a hearing on alleged prosecutorial misconduct is **denied**.

An appropriate Order will be entered.

Dennis M. Cavanaugh, U.S.D.J.

Dated: September 18, 2012

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August 27, 2012

FILED & SERVED VIA ELECTRONIC MAIL

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

Re: United States v. Paul W. Bergrin

Dear Judge Cavanaugh:

Thank you for your letter of August 13, 2012, and for your patience in awaiting our response; as Your Honor is aware, on behalf of Mr. Bergrin, we have been hard at work on our pretrial motions in this matter, which were filed last week, with responses filed just three (3) days later.

Mr. Bergrin appreciates the Court's concern both for his well-being and for the increased convenience to the United States Marshals Service of potentially relocating him to the Bergen County Jail from the Metropolitan Detention Center in Brooklyn (MDC). Most respectfully, however, Mr. Bergrin opposes that relocation. As Your Honor may be aware, Mr. Bergrin was housed, for a several week period in late 2010, in the Bergen County Jail. Accordingly, he has a concrete understanding of the consequences that such a transfer would entail. Those consequences will pose a distinct disadvantage to Mr. Bergrin as he prepares for, and defends himself, at his trial.

First, and perhaps foremost, the Bergen County Jail does not afford Mr. Bergrin computer access. By contrast, Mr. Bergrin communicates numerous times per day both with standby counsel and with his investigator, through the Corrlinks system, which is available to federal inmates, but is not available at the Bergen County Jail. This is particularly important during trial when, after a long trial day, Mr. Bergrin returns to custody but counsel are frequently engaged in briefing evidentiary or other legal issues for the next day; often, drafts are exchanged with Mr. Bergrin utilizing Corrlinks. Similarly, Mr. Bergrin is able to give guidance and direction to his investigator, Mr. Stephens, and to Mr. Stephens' staff, while in custody, both prior to and during trial using Corrlinks. Obviously, this would be impossible were Mr. Bergrin held in the Bergen County Jail, which simply does not have this facility. To make matters worse, telephone access was also far more restricted at the Bergen County Jail than it is at the MDC.

Similarly, the last time Mr. Bergrin was in the Bergen County Jail, he did not have access to the computers that do exist at the Metropolitan Detention Center and that are used not only for email, but also, critically, for him to listen to the hundreds and hundreds of tapes that have been provided in discovery and to which Mr. Bergrin must listen, not only as he prepares for trial but

even more importantly, as the tapes are implicated by the evidence at trial. Proper cross-examination and presentation of a direct case both depend upon access to this facility. That the Bergen County Jail does not have these computers is likely a function of the types of State cases for which inmates are typically held there pretrial; in federal cases, like this one, tapes are often a part of the Government's case and it is an absolute necessity that defendants be able to listen to them. That, too, is apparently not possible in the Bergen County Jail where, beyond even the absence of the necessary technology, Mr. Bergrin was, the last time he was there, confined to his cell for 21 hours per day so that even if such technology existed, Mr. Bergrin had very limited access to it, especially given that much of the remaining three (3) hours must be spent showering, eating and otherwise attending to personal needs -- all of which is even more important when a defendant is representing himself *pro se* at trial.

Finally, as Your Honor may have heard, Mr. Bergrin is an observant Jew, who observes the Sabbath to the extent possible and prays daily. At the MDC, there is a prayer room, which provides the Sabbath necessities, such as Challah (the Sabbath bread), grape juice (in lieu of wine, given the prison environment), and where a light is kept on during the Sabbath so that an inmate will not have to switch one on. Appropriate religious material, such as prayer books and Tefillin are provided. None of these would, to Mr. Bergrin's understanding, be made available to him at the Bergrin County Jail.

Beyond the differences between the two facilities, which, as set forth above, bear significantly upon Mr. Bergrin's ability to defend himself in the forthcoming trial of this matter, relocating Mr. Bergrin would, at this critical stage, be particularly inconvenient. Mr. Bergrin has great concerns about whether his trial materials, which he has compiled and organized so that he can be ready for trial, will be moved intact to the Bergen County Jail. He is concerned about his access to the trial preparation materials, such as pads, writing utensils and folders, which we have provided him and which he uses every day in anticipation of trial. And he is even worried about the continuity of his medical care; Mr. Bergrin suffers from a hernia, of which the MDC staff is aware and for which it has referred him for appropriate treatment. His care should also not be interrupted.

For all of these reasons, Mr. Bergrin respectfully requests that the Court order the United States Marshals Service continue his detention at the MDC, just as Judge Martini did when this issue arose at the first trial of this matter. *See* DE 234 (minute entry of September 16, 2011, reflecting discussion of where Mr. Bergrin would be held during trial). He understands that there is some incremental inconvenience inherent in this request, although, Mr. Bergrin reports that, in fact, the difference in travel time is no more than 15 minutes and that, at the first trial of this matter, it routinely took between thirty (30) and forty (40) minutes of travel time, albeit very early in the morning. That Mr. Bergrin must, as Your Honor observed in your letter, wake up particularly early as a result, is a consequence that he accepts, and about which he has never

complained, understanding that it is necessary in order for him to be in Court on time, as he always was during the first trial.

Finally, if the Court is, nonetheless, inclined to allow the transfer of Mr. Bergrin, as he fervently hopes Your Honor is not, Mr. Bergrin respectfully requests that such transfer not occur until immediately before trial, so that he can continue his very intense preparation in the remaining weeks leading up to those proceedings.

Of course, if Your Honor has any questions or concerns, please do not hesitate to call me, or to schedule a hearing at which Mr. Bergrin may be heard. In that regard, however, please be advised that I will be on vacation from the remainder of this week, and would accordingly request that any such hearing occur next week, or await the argument on pretrial motions scheduled for September 12, 2012. Thank you for your kind consideration of this matter.

Respectfully submitted,

Lawrence S. Lustberg

LSL/leo

cc: John W. Gay, Assistant U.S. Attorney
Paul W. Bergrin

U.S. Department of Justice

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August 16, 2013

BY ECF AND E-MAIL

Hon. Dennis M. Cavanaugh, U.S.D.J.
U.S. District Court, District of New Jersey
Post Office Building & Federal Courthouse, Room 451
Newark, New Jersey 07101-0999

Re: United States v. Bergrin, Crim. No. 09-369 (DMC)

Dear Judge Cavanaugh:

On July 24, 2013, this Court filed an opinion and order denying in all respects defendant Paul Bergrin's post-trial motions. ECF Nos. 555, 556. On August 8, 2013, Bergrin submitted what he styled as a *pro se* "motion for reconsideration." ECF No. 569. Bergrin argues that: (1) the Government misconducted itself by sponsoring false testimony from Anthony Young: (2) this Court should recuse itself because an objective observer could reasonably question this Court's impartiality; (3) the Government purposely delayed indicting Bergrin to gain an unfair tactical advantage; and (4) the Government impermissibly intercepted Bergrin's jailhouse communications. These claims are untimely and meritless.

I. Bergrin's Recusal Motion Is Both Untimely And Meritless.

Bergrin's recusal motion asserts that this Court's "impartiality might be reasonably questioned" given its "personal and professional relationships with parties accused of misconduct in this case." ECF No. 569 at 4.[1] This claim is both untimely and meritless.

Title 28 contains two sections governing recusal: § 144 and § 455. Section 144 provides that a district court judge should recuse if the party seeking recusal submits a

[1]Although this is the second claim in Bergrin's motion, this Court should resolve it first as recusal would require this Court to refrain from taking further action in the case.

"timely and sufficient affidavit" illustrating that the judge has a personal bias or prejudice towards a party. Bergrin has not submitted an affidavit pursuant to § 144, and his motion is anything but "timely." Section 455, on which Bergrin apparently relies, requires a Judge to recuse "in any proceeding in which his impartiality might reasonably be questioned." 28 U.S.C. § 455(a). The decision whether to recuse lies within the discretion of the Judge. United States v. Wilensky, 757 F.2d 594, 599-600 (3d Cir. 1985). Further, a recusal motion must be based on "objective facts," not mere "possibilities" and "unsubstantiated allegations." United States v. Martorano, 866 F.2d 62, 68 (3d Cir. 1989).

A. The Recusal Motion Is Untimely.

Motions for recusal are untimely if a party is aware of the grounds supporting removal yet fails to act until the judge issues an adverse ruling. In re Kensington Int'l, Ltd., 368 F.3d 289, 314-15 (3d Cir. 2004). While § 455 does not contain an express timeliness requirement, one is read into the statute because "the judicial process can hardly tolerate the practice of a litigant with knowledge of the circumstances suggesting possible bias or prejudice holding back, while calling upon the court for hopefully favorable rulings, and then seeking recusal when they are not forthcoming." Smith v. Danyo, 585 F.2d 83, 86 (3d Cir. 1978).

Here, Bergrin admits that "the[] relationships" underlying his recusal motion "apparently were public knowledge." But he claims that they were "unknown to Defendant until after trial." ECF No. 569 at 5. There is ample reason to question the accuracy of this assertion. Bergrin brought his recusal motion only *after* an adverse jury verdict and *after* an adverse decision on his post-trial motions. "[T]hese considerations suggest that [Bergrin's] motion is a desperate effort to overturn an adverse decision." Martin v. Monumental Life Ins. Co., 240 F.3d 223, 236 (3d Cir. 2001). Bergrin "cannot be permitted to sit silently on recusal grounds and then to advance them only after [he has] lost the case." Faulkner v. Nat'l Geographic Soc'y, 296 F. Supp. 2d 488, 490 (S.D.N.Y. 2003), aff'd, 409 F.3d 26, 41-43 (2d Cir. 2005); see United States v. Bravo Fernandez, 792 F. Supp. 2d 178, 183 (D.P.R. 2011) (denying motion as untimely recusal motion brought just prior to sentencing where "[t]he acts that give rise to defendant Martinez's belief of bias or prejudice occurred in 1993 and have been in the public record for eighteen years"); United States v. Sypher, Crim. No. 09-85, 2010 WL 5393849, at *2 (W.D. Ky. Dec. 22, 2010) (denying motion for recusal as untimely where defendant failed to "specifically indicate what previously unknown facts she learned, when she became aware of them, or why she waited until nearly two months after the end of her trial to bring them to light" where many of the facts had been "publicly available since the inception of her case").

Further, the Certification of Louis Stephens, which Bergrin submitted in support of his pretrial motions one year ago, demonstrates Bergrin's intimate knowledge of Roberts

and his personal and professional relationships. The Stephens Certification alleged that "Roberts is a former assistant prosecutor who was portrayed in the movie 'American Gangster,' a movie about Roberts' successful prosecution of a large-scale drug dealer Frank Lucas who he then forged a closed friendship [with] after Lucas' conviction," and that "Roberts has close professional and/or personal relationships with agents and attorneys who work in the United States Attorney's Office and is reported to have brought one or more of these colleagues to the American Gangster movie premiere." Stephens Cert. ¶¶ 59-60. It strains credulity to contend that Bergrin knew about *those* "close professional and/or personal relationship[s]," but not the alleged relationship that he now claims requires recusal. See United States v. Brinkworth, 68 F.3d 633, 640 (2d Cir. 1995) (defendant's "455(a) motion, conveniently filed soon after the district court refused to make a pre-plea commitment to sentencing, was untimely").

Indeed, Bergrin maintained a law office in Essex County for over 17 years, and he was hired as an Essex County Assistant Prosecutor by Vincent Nuzzi 30 years ago. See Exhibits A and B. Further, it is the Government's understanding that Roberts and Bergrin were close friends prior to Bergrin's 2009 arrest. Thus, it is almost inconceivable that Bergrin—an Essex County insider himself—did not know of the alleged relationships that he now claims require recusal.

In sum, because Bergrin concedes that the public record contained all of the supposed "facts" on which be premises his recusal motion, he waived his right to relief under § 455(a) by waiting until the eve of sentencing to file his motion. See Jones v. Pittsburgh Nat. Corp., 899 F.2d 1350, 1356 (3rd Cir. 1990) (finding that a recusal motion filed after entry of an order dismissing complaint and imposing sanctions was not timely because "[a]ny other conclusion would permit a party to play fast and loose with the judicial process by 'betting' on the outcome"); see also United States v. Studley, 783 F.2d 934, 939 (9th Cir. 1986) (noting that "a motion for recusal filed weeks after the conclusion of trial is presumptively untimely absent a showing of good cause for its tardiness."); Bravo-Fernandez, 792 F. Supp. 2d at 183.

B. The Recusal Motion Is Meritless.

In any event, Bergrin's recusal motion fails on the merits. Section 455(a) requires a judge to "disqualify himself in any proceeding in which his impartiality might reasonably be questioned." The judge has discretion to determine whether a basis for recusal is present. In re Kensington Int'l. Ltd., 368 F.3d at 301 & n.12. Bergrin's claim must be "evaluated on an *objective* basis, so that what matters is not the reality of bias or prejudice but its appearance." Liteky v. United States, 510 U.S. 540, 548 (1994).

Bergrin claims that a reasonable observer would question this Court's impartiality because of its "personal and professional relationships" with attorneys Bergrin allegedly has accused of misconduct. Specifically, Bergrin notes that his pretrial motions accused

attorney Richard Roberts, Esq. of representing several cooperating witnesses and seeking to obtain "movie rights" from two such witnesses. Bergrin also claims that his pretrial motion and the trial testimony named three other attorneys: Vincent Nuzzi, Esq., John Azzarello, Esq., and Christopher Adams, Esq. Without so much as a single citation to the record, Bergrin claims that "the information provided to the Court specifically detailed how these attorneys . . . breached their professional obligations . . . and acted outside the bounds of the law." ECF No. 569 at 4. Bergrin then sets forth what he considers to be the personal and professional relationship between this Court and these lawyers that require recusal under § 455(a). ECF No. 569 at 4-5. Bergrin's motion fails for any or all of three reasons: (1) because the relationships between this Court and the four attorneys Bergrin names are insufficiently close; (2) because the attorneys at issue represent cooperators, not a party at the trial (*i.e.*, the United States or Bergrin); and (3) because Bergrin's allegations of misconduct on the part of those attorneys do not call into question this Court's ability to remain impartial.

1. A Close Personal Relationship Between A Judge And A Party Is Insufficient To Justify Recusal Under § 455(a).

Bergrin contends that this Court has a close personal relationship with four named attorneys. But even if true, that does not call into question this Court's ability to remain impartial in this case. As Judge Frank Easterbook wrote nearly twenty years ago:

> In today's legal culture friendships among judges and lawyers are common. They are more than common; they are desirable. A judge need not cut himself off from the rest of the legal community. Social as well as official communications among judges and lawyers may improve the quality of legal decisions. Social interactions also make service on the bench, quite isolated as a rule, more tolerable to judges. Many well-qualified people would hesitate to become judges if they knew that wearing the robe meant either discharging one's friends or risking disqualification in substantial numbers of cases. Many courts therefore have held that a judge need not disqualify himself just because a friend–even a close friend–appears as a lawyer.

United States v. Murphy, 768 F.2d 1518, 1537 (7th Cir. 1985) (citations omitted); accord Marcavage v. Board of Trustees of Temple University, 232 F. App'x. 79, 83 (3d Cir. 2007) (not precedential) ("Common membership in a legal organization between a judge and counsel is not, by itself, enough to create a situation in which a judge's impartiality might reasonably be questioned."); Henderson v. Dep't of Pub. Safety and Corr., 901 F.2d 1288, 1295-96 (5th Cir. 1990) (affirming a denial of a § 455(a) motion where the trial judge and opposing counsel knew each other for a long time and the judge had been a friend of the opposing counsel's late father); Smith v. Manasquan Sav. Bank, Civil No. 12-85(JAP), 2012 WL 4339561, at *4 (D.N.J. Sept. 20, 2012) (Judge's impartiality could

not reasonably be questioned simply because he attended the same law school as the state court judges who had presided over plaintiff's legal matters). So even if Bergrin's motion accurately recites the nature of the relationship, recusal would not be required.

At any rate, Bergrin's motion likely overstates the nature and extent of this Court's relationship with the four attorneys Bergrin identifies—something only this Court can say with certainty. Bergrin strings together otherwise innocuous facts (if fact they be), and then draws wholly unsupported conclusions, *i.e.*, an extraordinarily close personal relationship. E.g., ECF 569 at 5 (concluding that this Court has a close personal relationship with Roberts because Roberts considered Joseph Lordi as a second father and because Your Honor and Roberts attended the same law school from 1970 to 1972); id. (concluding that this Court has a close "intrapersonal relationship" with Joseph Hayden, Jr., because Your Honor served as a law clerk for Francis Hayden). Bergrin also asserts, incorrectly, that Your Honor was a partner in the firm that currently employs John Azzarello. But Azzarello is a partner in Arseneault, Whipple, Fassett & Azzarello, *not* Whipple, Ross and Hirsch. If Bergrin's allegations of an extraordinarily close personal relationship are false or exaggerated, then this Court should deny the recusal motion on that ground alone. See United States v. Olis, 571 F. Supp. 2d 777, 786-87 (S.D. Tex. 2008) (denying recusal motion under § 455(a) where the facts alleged did not establish an extraordinarily close personal relationship between Judge and prosecutor).

2. The Attorneys In Question Were Not Counsel Of Record To Any Party At The 2013 Trial.

Even if Bergrin accurately characterizes this Court's relationship with all four attorneys named in his motion (which is doubtful), *none* of those attorneys "appear[ed] as a lawyer" in this case. Murphy, 768 F.2d at 1537. In fact, Murphy shows the deficiency of Bergrin's motion. In that case, the lead prosecutor and the District Judge were long-time friends, and their families had preexisting plans to vacation together after the trial. The Seventh Circuit found that the Judge should have disclosed those plans and ensured that the defendants had no objection. Murphy, 768 F.2d at 1537-39. Here, in contrast, the attorneys Bergrin names—Roberts, Azzarello, Nuzzi, and Adams—represent cooperating witnesses, only one of whom (*i.e.*, Abdul Williams) actually testified at trial.[2] In other words, even if this Court would recuse itself under § 455(a) if one of those attorneys appeared as counsel for *a party*, that would not require it to do so just because one of those attorneys represents a cooperating witness.

[2] Roberts, to be sure, initially represented Rondre Kelly, but he ceased doing so because Kelly began to cooperate against Bergrin. Tr. at 3466-67. During trial, Abdul Williams discharged defense attorney Wanda Aken, Esq., and hired Roberts. But as the Government established one year ago, and again during trial, Williams proffered about Bergrin before meeting with or hiring Roberts. Tr. at 4361-62, 4440.

3. Specious Allegations Of Misconduct Do Not Require Recusal Under § 455(a).

Under the decisional law cited above, it takes much more than a close personal or professional relationship between a judge and an attorney to require recusal. The standard is "whether an astute observer ... would conclude that the relation between judge and lawyer (a) is very much out of the ordinary course, and (b) presents a potential for actual impropriety if the worst implications are realized." Murphy, 768 F.2d at 1537. Put another way, the key question is whether "the judge feels capable of disregarding the relationship and whether others can reasonably be expected to believe that the relationship is disregarded." Id. (citation omitted).

Here, even if Bergrin has accurately alleged a "relation between judge and lawyer" that "is very much out of the ordinary course," he alleges *nothing* "present[ing] a potential for actual impropriety if the worst implications are realized." Murphy, 768 F.2d at 1537. No reasonable person, fully informed of the relevant facts, would question this Court's ability to remain impartial given the allegations of misconduct Bergrin supposedly leveled against attorneys for cooperating witnesses. As this Court properly found last year, "Bergrin's claims are purely speculative." ECF No. 392-1 at 13. If a defendant cannot secure recusal by making disparaging statements about the Judge presiding over his case, e.g., United States v. Bray, 546 F.2d 851, 858 (10th Cir. 1976), then *a fortiori* he cannot secure recusal by disparaging attorneys he claims have close relationships with the Judge.

With respect to Nuzzi and Adams, Bergrin's motion is plainly deficient. He fails to cite a single pleading or piece of testimony suggesting that he accused those attorneys of any misconduct. And while Bergrin notes that Ramon Jimenez filed an ethics complaint against Azzarello, Jimenez did not testify at the 2013 trial. Further, Jimenez reiterated in the ethics complaint and in his 2011 testimony that he had told the truth about Bergrin. That falls woefully short of proving grounds for recusal. See United States v. Lovaglia, 954 F.2d 811, 815 (2d Cir. 1992) (recusal is not required where "a case . . . involves remote, contingent, indirect or speculative interests"); see also United States v. Jordan, 49 F.3d 152, 162 (5th Cir. 1995) (Garza, J.,dissenting) ("Friendship plus the speculation of retaliation is not enough.); Olis, 571 F. Supp. 2d at 786-87 (where defendant's habeas motion alleged that former U.S. Attorney had violated Sixth Amendment by pressuring defendant's corporate employer to stop paying defense costs, District Judge denies recusal motion alleging that he and former U.S. Attorney were close personal friends).

Beyond that, Bergrin has produced no evidence suggesting that his purely speculative allegations caused (or reasonably would have been perceived as having caused) such animosity that a reasonable observer would question this Court's ability to remain impartial. Indeed, this Court's trial rulings undermine any suggestion that this Court harbored animosity towards Bergrin or was somehow bent on protecting the attorneys Bergrin names in his motion. At trial Bergrin brought out the fact that Roberts

represented or had contact with various cooperating witnesses. E.g., Tr. at 3646-48, 3668-71, 4360-62, 7624-25. He also elicited from Lemont Love—who testified as a defense witness—that Roberts allegedly urged Love to falsely inculpate Bergrin. Tr. at 8320-21. Given that this Court permitted Bergrin to elicit from Love that Roberts had supposedly coached him to lie, no reasonable person would question this Court's impartiality.[3]

In sum, this Court should reject Bergrin's "desperate effort to overturn an adverse decision." Martin, 240 F.3d at 236.

II. Bergrin's Prosecutorial Misconduct Claim Is Untimely And Meritless.

Bergrin claims that the Government committed prosecutorial misconduct by sponsoring Anthony Young's testimony about the Avon Avenue meeting. He bases this claim almost entirely on the fact that none of the calls intercepted over a cell phone used by Hakeem Curry show him actually arranging the meeting with Bergrin, and on his belief that two December 4th calls prove that no such meeting occurred. Bergrin included this claim in a *pro se* supplemental brief in which he also claimed that he only recently learned the factual basis for his motion. ECF No. 564. This Court acknowledged the dispute between the parties over the December 4th calls and accepted the Government's contention that Bergrin would have used those calls if they were as exculpatory as he now claims. ECF No. 565 at 8 n.3. But this Court did not formally address and reject Bergrin's claim that the Government knowingly sponsored false testimony from Young. Given that Bergrin may seek to raise this issue on appeal, the Government explains why Bergrin's claim is both untimely and meritless and asks this Court to so hold.

A. Bergrin's Claim Is Untimely.

Federal Rule of Criminal Procedure 33(b)(2) requires defendants to file motions for a new trial within 14 days of the verdict, or within such additional time as a district court may grant under Rule 45(b)(1). That deadline had expired by the time Bergrin first raised his claim of prosecutorial misconduct in his *pro se* Letter dated July 15, 2013. See ECF 564. Under Rule 45(b)(2), this Court may extend an already-expired deadline "if the party failed to act because of excusable neglect." Fed. R. Crim. P. 45(b)(2).

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[3]Tellingly, despite securing this testimony, Bergrin neither renewed his outrageous Government conduct claim, nor argued in summation what he had alleged in his pretrial motion: that the Government was using Roberts as its "*de facto* agent" to get witnesses to falsely inculpate Bergrin. The reason for that is plain: Bergrin had no evidence to support such an argument. Thus, the trial record reinforces this Court's decision to deny Bergrin's pretrial motion without a hearing.

Apparently attempting to show excusable neglect, Bergrin claims that he discovered the December 4, 2003 recordings only after the deadline for filing post-trial motions because (1) "it was virtually impossible to scrutinize in excess of 33,000 recordings in the time allotted for pre-trial preparation and in the dysfunctional condition in which [Bergrin] and his defense team received the recordings," and (2) he "was assured by others that the calls were not incriminating and that it would be a waste of time to review." ECF No. 569 at 3. Both claims are specious.

Initially, Bergrin's reference to 33,000 Title III intercepts is misleading. While that is the entire universe of calls intercepted during the Hakeem Curry investigation, only a small fraction pertain to Bergrin. Significantly, moreover, Bergrin was represented by counsel when the Government produced in discovery all of the intercepted calls on July 1, 2009. As a matter of agency law, notice to Bergrin's then-counsel (as agent) was notice to Bergrin (as principal). See In re Kensington Int'l. Ltd., 368 F.3d 289, 315 (3d Cir. 2004) (quoting Restatement (Second) of Agency § 9(3) (1958) ("A person has notice of a fact if his agent has knowledge of the fact")). Thus, as a matter of law, Bergrin has had constructive knowledge of the contents of the suppressible calls since July 1, 2009.

In fact, Bergrin's counsel knew the contents of the December 4, 2003 calls a mere four months after having received the intercepted calls in discovery. In urging the Government not to seek the death penalty, Bergrin's counsel argued, "Remarkably, the electronic surveillance never picked up any hint of the meeting described by Mr. Young or that McCray had been targeted at that time for death." Letter from David A. Ruhnke, Esq., Nov. 30, 2009, at 11 n.10. Bergrin thus had constructive knowledge at a minimum, yet he claims he only recently discovered these very same facts. If Bergrin means to argue that his attorneys did not share this information with him, then he arguably has waived the attorney-client privilege and made discoverable any and all correspondence related to the intercepted calls. See United States v. Garba, 285 F. Supp. 2d 504, 509 n.3 (D.N.J. 2003), aff'd, 128 F. App'x 855 (3d Cir. 2005). In that same vein, Bergrin should be required to disclose the "others" who allegedly assured him "that the calls were not incriminating and that it would be a waste of time to review."

At any rate, common sense suggests that Bergrin had actual knowledge of the content of those calls. Bergrin had over *two years* to review them prior to the first trial, and an additional 14 months prior to the second trial. It strains credulity to contend that Bergrin did not scour the calls intercepted in November and December 2003 to determine if they corroborated or contradicted Young's account, which was first made public in early 2007 when Young testified at the William Baskerville trial. In fact, at the 2013 trial, Bergrin brazenly asserted that none of the 33,000 intercepted calls showed him arranging a meeting with the Curry Organization after Baskerville's arrest. Tr. at 162. And at the 2011 trial, Bergrin asked cross-examination questions that strongly suggested that he had reviewed the November and December 2003 calls. 10/19/2011 Tr. at 146.

Finally, and remarkably, Bergrin asserts that he could not have located the December 4th calls earlier because "the call files were not named, itemized or indexed, and complete transcripts were not provided." ECF No. 569 at 3. That is false: on the CD-ROMs produced in discovery, each .WAV file for each call was labeled by the date and time of the call. See Exhibit C (screen prints of the CD-ROM clearly depicting the calls over Curry's cellphone in late November and December 2003). All Bergrin had to do was open the CD-ROM, read the file-names, and play whatever file he desired.[4]

In short, Bergrin has failed to show the excusable neglect necessary under Rule 45(b)(2) to further extend the time limit prescribed in Rule 33(b)(2).

B. Bergrin's Prosecutorial Misconduct Claim Is Meritless.

Because Bergrin knew the basis for his claim before the trial concluded, he was required to raise it in a timely fashion so that this Court could decide whether any curative action was necessary. Fed. R. Crim. P. 51(b). Because Bergrin did not do so, he forfeited his claim, meaning that Bergrin can obtain a remedy only by showing plain error affecting substantial rights. Fed. R. Crim. P. 52(b); see United States v. Brennan, 326 F.3d 176, 186 (3d Cir. 2003). If "the record indicates that counsel for the complaining party deliberately avoided making the proper objection or request, plain error will almost never be found," because courts "will not tolerate 'sandbagging' defense counsel lying in wait to spring post-trial error." United States v. Sisto, 534 F.2d 616, 624 n.9 (5th Cir. 1976); accord United States v. Syme, 276 F.3d 131, 154 n.9 (3d Cir. 2002).

Bergrin claims that the Government violated the due process principle articulated in Napue v. Illinois, 360 U.S. 264 (1959), by sponsoring Young's testimony that the Avon Avenue meeting occurred sometime after Thanksgiving 2003, which Bergrin claims the Government knew and knows is false. To establish a Napue violation, Bergrin must prove that "(1) [Young] committed perjury; (2) the Government knew or should have known that [Young] committed perjury but failed to correct his testimony; and (3) there is a reasonable likelihood that the false testimony could have affected the verdict." United States v. Stadtmauer, 620 F.3d 238, 267 (3d Cir. 2010) (citation omitted).

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[4] The first time Bergrin complained that he had any difficulty playing the intercepted calls was in his two *pro se* submissions, filed in July and August 2013. The Government was surprised to hear this, given that Bergrin insisted on remaining at MDC in Brooklyn because he had access to a computer he was actively using to review discovery. E.g., 8/27/2012 Letter from Lawrence S. Lustberg, Esq. But even if Bergrin's complaints are true (which is doubtful), that is a direct consequence of Bergrin's decision to represent himself, which he was specifically warned about in 2011 when he chose to proceed *pro se*. 9/12/2011 Tr. at 31-33. Bergrin cannot now use his decision to represent himself to excuse an otherwise untimely claim.

Bergrin's claim fails at step one because he has not proved that Young perjured himself. As the Government has already explained in two prior submissions, there was no evidence conclusively corroborating or disproving Young's testimony about the meeting. Thus, it was up to the jury to decide whether Young was credible based on all of the evidence that corroborated other aspects of his testimony, evidence that the Government meticulously summarized in summation. As this Court found in denying Bergrin's Rule 29 motion, a rational jury could have found that Young was credible and rejected Bergrin's claim that he was lying. ECF No. 565 at 6-8 & n.3.

Bergrin nonetheless insists that the December 4th calls prove that Young lied. But that claim is meritless. See Lambert v. Blackwell, 387 F.3d 210, 249 (3d Cir. 2004) (no due process violation when prosecution elicits testimony that is contradicted by other evidence of which it is aware); United States v. Julien, 318 F.3d 316, 322 (1st Cir. 2003) (no due process violation where defendant who claimed that witness's testimony was inherently implausible had the opportunity to make that argument to the jury). Indeed, the Third Circuit rejected a similar claim alleging that the Government purposely created a misleading picture of a witness's credibility by allowing the witness to testify to facts that the Government knew were contradicted by statements documented in FBI 302s. The Third Circuit held that existence of evidence contradicting the witness's in-court testimony did not show that the witness was lying, much less that the Government knew that he was lying. Stadtmauer, 620 F.3d at 268. Bergrin's claim fails for the same reason.

Nor can Bergrin prove that the Government knew or should have known that Young testified falsely. In deciding to call Young as a witness, the Government took into account the corroborative evidence that the Government painstakingly described in summation in March 2013, as well as additional evidence that was not admitted at the 2013 trial (*e.g.*, suppressible Title III calls, testimony from the 2011 trial, *etc.*) that further corroborated Young's account. Bergrin apparently construes testimony and arguments in the 2007 William Baskerville trial as an admission that Young's testimony about Bergrin was false. ECF No. 569 at 2 n.1. To the contrary, Young's testimony about Bergrin's role in the McCray murder was the same in 2007 as it was in 2013. The statements Bergrin quotes simply show that the Government acted responsibly by bringing charges only when it was satisfied it could prove his guilt beyond a reasonable doubt.

Bergrin takes this Court to task for agreeing with the Government that Bergrin would have opened the door to other suppressible calls had he sought to use the December 4th calls to impeach Young's trial testimony. Bergrin claims that the Government offered no proof that any of the suppressible calls corroborated Young. ECF No. 569 at 1-2. But if none of the suppressible calls corroborated Young, then Bergrin had no reason to fear the consequences of using the December 4th calls at trial. Besides, Bergrin is wrong: the Government previously described two suppressible calls on November 25, 2003 that corroborated Young. The first was the 2:28 p.m. call, which Bergrin opened the door to at trial through his misleading cross-examination of Special

Agent Stephen Cline. The second was the 4:00 p.m. call, which corroborated Young's testimony that Bergrin mispronounced Kemo's name as "Kamo" when speaking to Curry. ECF No. 563 & 563-1. Put simply, Bergrin's failure to use the December 4th calls shows that he has dramatically overstated the impeachment value of these calls, and it fatally undermines his claim that those calls prove that Young lied.

Finally, Bergrin places great weight on the fact that he told Curry on December 4th that he could secure a 13-year plea agreement for Baskerville. According to Bergrin, that supposedly proves that neither he nor the Curry Organization could have believed that Baskerville was facing substantial imprisonment after the December 4th bail hearing (while contradictorily asserting that everyone knew that the case against Baskerville was airtight). But Bergrin was told at the December 4th hearing that, as a career offender, Baskerville's (then-mandatory) Guidelines range was 360 months to life imprisonment. See GX2218 at 3. Further, Baskerville faced (and ultimately received) mandatory life under 21 U.S.C. § 841(b)(1)(A) due to his prior convictions. Beyond that, the Government never considered a thirteen-year plea agreement, and Bergrin neither made nor solicited a plea offer *of any kind* from the Government. Thus, Bergrin (who at trial repeatedly invoked his experience as a criminal defense attorney) obviously knew Baskerville was facing life imprisonment. All the December 4th calls show is that Bergrin told Curry something that was untrue.

In sum, this Court should reject Bergrin's claim of prosecutorial misconduct as both untimely and meritless.

III. Bergrin Waived His Meritless Claim Of Preindictment Delay.

Bergrin claims that he is the victim of prejudicial preindictment delay. Bergrin waived this claim by not raising it in a pretrial motion, and he fails to show excusable neglect for not raising it in his Rule 33 motion. At any rate, the claim is meritless.

A. Bergrin Waived His Claim.

Federal Rule of Criminal Procedure 12(b) lists five categories of motions that "must be raised prior to trial." Fed. R. Crim. P. 12(b) (emphasis added). The first category includes "defenses and objections based on defects in the institution of the prosecution." Fed. R. Crim. P. 12(b)(3)(A). "A party waives any Rule 12(b)(3) defense, objection, or request not raised by the deadline the court sets under Rule 12(c) or by any extension the court provides. For good cause, the court may grant relief from the waiver." Fed. R. Crim. P. 12(e). A claim of prejudicial preindictment delay alleges a "defect[] in the institution of the prosecution" under Rule 12(b)(3)(A). See United States v. Brown, 498 F.3d 523, 526-27 (6th Cir. 2007). Here, Bergrin "never moved to dismiss the indictment based on delay. His argument on appeal is therefore waived," id., because he "has offered no explanation, other than that he was proceeding *pro se*, why he did not raise the issues" earlier. United

States v. Rose, 538 F.3d 175, 184 (3d Cir. 2008); see United States v. Ladson, 238 F. App'x. 874, 876 n.1 (3d Cir. 2007) (not precedential) ("the District Court correctly concluded that Ladson had waived this [pre-indictment delay] argument as it was available to him at the time he filed his motion to dismiss").

B. Bergrin's Claim Is Untimely.

Even were this Court to disregard the waiver, Bergrin's motion is untimely as it comes long after the deadline for filing post-trial motions. Fed. R. Crim. P. 33(b)(2). As Bergrin has failed to show excusable neglect for not raising this claim earlier, see Fed. R. Crim. P. 45(b)(2), this Court should dismiss it as untimely. See United States v. Rivera, Crim. No. 09-619, 2013 WL 2627184, at *3 (E.D.N.Y. June 11, 2013) (where defendants did "not advance any reason for their more than five (5) month delay in advancing" their claims, district court finds "that their failure to advance such a claim by July 18, 2011, the extended deadline for filing post-trial motions, was not the result of excusable neglect").

C. Bergrin's Claim Is Meritless.

The statute of limitations is the "primary guarantee against bringing overly stale criminal charges," but it "does not fully define the [defendant's] rights with respect to the events occurring prior to indictment." United States v. Marion, 404 U.S. 307, 322, 324 (1971). Pre-indictment delay violates the Due Process Clause if the defendant can prove both "(1) that the government intentionally delayed bringing the indictment in order to gain some advantage over him, and that (2) this intentional delay caused the defendant actual prejudice." United States v. Ismaili, 828 F.2d 153, 169 (3d Cir. 1987) (citing Marion, 404 U.S. at 325).

"The prosecution," however, "has wide discretion in deciding to delay the securing of an indictment in order to gather additional evidence against an individual." United States v. Lovasco, 431 U.S. 783, 790 (1977). "Investigative delay is fundamentally unlike delay undertaken by the Government solely 'to gain tactical advantage over the accused,'" and does not deprive a defendant of due process even if he is "somewhat prejudiced by the lapse of time." Id. Thus, no deviation from "fundamental conceptions of justice" is evidenced when a prosecutor "refuses to seek indictments until he is completely satisfied that he should prosecute and will be able promptly to establish guilt beyond a reasonable doubt." Id. at 790.

Here, Bergrin claims that the Government's delay in indicting him on the McCray murder enabled the Government to gather additional evidence of his guilt. In other words, Bergrin's real claim is that, had the Government indicted him when it indicted William Baskerville, Bergrin would have had a much better chance of acquittal because the Government lacked sufficient evidence to convict at that time, as it admitted in 2007. E.g., ECF No. 569 at 8 ("The government further bolstered its case and obtained a

significant tactical advantage through their unreasonable delay in charging Bergrin by procuring, inducing and hiring confidential informant Oscar Cordova to obtain recorded statements from Bergrin."); id. ("the Esteves charges . . . were used as 404(b) evidence for the jury to consider in weighing the McCray evidence"); id. ("the Government intentionally delayed pursuing the McCray murder charge to bolster the other charges in its 2009 indictment"). Given the clear language from Lovasco quoted above, the tactical advantage about which Bergrin complains is not legally cognizable.

To put it bluntly, the Government represents to this Court that it did not charge Bergrin with the McCray murder until May 2009 because it was gathering additional evidence supporting that crime and other crimes by Bergrin uncovered during the course of that investigation—all of which showed that Bergrin was operating a criminal enterprise through which he committed crimes extending well beyond the McCray murder. That is perfectly proper. See United States v. Beckett, 208 F.3d 140, 151 (3d Cir. 2000) ("We see no evidence of improper delay while the federal government was building its case against Beckett regarding the robbery of the Home Unity Bank, an armed robbery not charged by the state authorities."); United States v. Crooks, 766 F.2d 7, 11 (1st Cir. 1985) ("The government states, without contradiction from Crooks, that any delay resulted from its efforts to discover all those who participated in the conspiracy and to try them together. And, this reason, in context, provides a legitimate explanation.").

Bergrin, to be sure, complains about the supposed loss of evidence potentially exculpatory evidence. But the question of prejudice is beside the point if the reason for the delay was to gather sufficient evidence to convict, and not to interfere with the defendant's ability to defend. Snyder v. Klem, 438 F. App'x 139, 142 (3d Cir. 2011) (not precedential) ("the state courts correctly observed that apart from a demonstration of actual prejudice, the applicable caselaw likewise requires that the delay be motivated by an intent to gain an unfair tactical advantage over the defendant"). At any rate, Bergrin's claims of prejudice would be far too speculative to justify relief.

For example, Bergrin claims that the New York District Attorney's Office colluded with the Government by extending a lenient plea offer that Bergrin had no choice to accept, only to have the Government use that guilty plea to support one of the charged RICO predicates. ECF No. 569 at 7-8. That claim is false. Further, Bergrin offers no proof of any such collusion, and he never moved to withdraw his guilty pleas in New York, which alone shows that he pleaded guilty because he was guilty, and not because the lenient plea offer was just too tempting to refuse. Further, the Government's evidence on the prostitution-related predicate was extremely strong. Thus, Bergrin's guilty plea added little to the strength of the Government's case. And even if the guilty plea strengthened the Government's case, that is not cognizable "prejudice." See generally United States v. Martinez, 77 F.3d 332, 335-36 (9th Cir. 1996) (delay that resulted in

entry of state-court conviction against defendant not prejudicial simply because federal prosecutor could have used it for impeachment purposes under Rule 609).[5]

Bergrin also complains that the delay inhibited his defense of the McCray murder, citing the loss of Stacey Webb as a witness, the loss of supposedly exculpatory E-Z Pass records, diminished witness memories, and the inability to locate unnamed witnesses who supposedly moved. ECF 569 at 8. But "[v]ague assertions of lost witnesses, faded memories, or misplaced documents are insufficient to establish a due process violation from pre-indictment delay." United States v. Beszborn, 21 F.3d 62, 66 (5th Cir. 1994); see United States v. Al-Muqsit, 191 F.3d 928 (8th Cir. 1999) ("even if such diminishment could be shown to be material, there were ample alternate sources for this evidence given that Logan had access to the records from three earlier state court trials concerning the events of the robbery"), rev'd in part on other grounds, 210 F.3d 820 (8th Cir. 2000) (en banc); United States v. Dudden, 65 F.3d 1461, 1466 (9th Cir. 1995) ("She does not show how these or the other records *would* have been exculpatory.").

The trial record shows that Bergrin was not prejudiced. He elicited from Detective Sabur what Sabur had learned from Stacey Webb. Tr. at 1172-78. On redirect, Detective Sabur confirmed that Webb did not have a good opportunity to see who shot McCray. Tr. at 1216-17. And Bergrin got Agent Brokos to admit that the description of the getaway car that Webb provided differed from what Young told her, and that Williams could not identify the shooter when Brokos went to interview him in 2005. Tr. at 1742, 1773, 1808-14. Further, Bergrin did not call Webb as a witness in the 2011 trial, putting the lie to Bergrin's current claim (ECF 569 at 8) that Webb could have contradicted Young's testimony but for his death in 2013. Bergrin also attacked the integrity of the investigation because there were no E-Z Pass records proving (or disproving) that he was in Newark after Thanksgiving 2003. Tr. at 7622-23.

In sum, Bergrin's claim of pre-indictment delay is waived and meritless.

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[5]Bergrin cites an FBI-302 that was produced to him as Jencks material *in 2011*, which documents the Government's request that New York authorities hold off on arresting Bergrin because of covert recordings the Government was attempting to capture. The recordings at issue involved Shelton Leverett, who testified at trial. Bergrin cannot claim that he has been prejudiced simply because the delay in his arrest by New York authorities allowed the Government to obtain additional evidence supporting the narcotics charges the Government was investigating. See Martinez, 77 F.3d at 335-36. To the extent Bergrin tries to resurrect his Sixth Amendment claim, ECF No. 569 at 8 (citing "United States v. Massiah"), Judge Martini rejected that argument, ECF No. 238 at 3-4, and this Court adhered to that rejection last year, 9/12/2012 Tr. at 63-64.

IV. Bergrin's Complaint About The Government's Monitoring Of His Jail-House Communications Is Both Untimely And Meritless.

Bergrin also asserts, without citing a single case, that the Government's monitoring of his communications at the Metropolitan Detention Center ("MDC") "clearly violated the Department of Justices' [sic] Electronic Surveillance Manual and Title III of the Wire Intercept Act as well as the auspices and spirit of the Fourth Amendment prohibition against unreasonable search and seizures." ECF No. 569 at 10. This claim is both untimely and patently meritless.

A. Bergrin's Claim Is Untimely.

Without objection, the Government cross-examined defense witness Ana DeStefano using e-mails she had exchanged with Bergrin while he was incarcerated at MDC. Tr. at 8031-37. Bergrin's post-trial motion did not challenge the Government's review and use of his e-mails. And he makes no effort to show excusable neglect for not doing so. See Fed. R. Crim. P. 45(b)(2). Accordingly, this Court should dismiss Bergrin's claim as untimely. See Rivera, 2013 WL 2627184, at *3.

B. Bergrin's Claim Is Meritless.

At any rate, Bergrin cannot show error, much less plain error affecting substantial rights. See Fed. R. Crim. P. 52(b); Brennan, 326 F.3d at 186.

Bergrin claims "the government obtrusively, and in contravention of Bergrin's Fourth Amendment, Constitutional and due process rights, seized all of Bergrin's e mails and telephone conversations, without judicial authorization or prior notice to Bergrin." ECF 569 at 11. He further asks this Court to ascertain "the extent of the monitoring, how the Government used this information to counter the defense's strategy and impede the defense's investigation and trial preparation, and whether other actions were taken to interfere with the defense . . . to determine the full impact on Bergrin's due process rights and, in particular, whether acts prejudicial to the administration of justice were engaged in by members of the Department of Justice." Id. These claims are meritless.

1. There Was No Due Process Violation.

To elevate an alleged violation of the attorney-client privilege to a due process claim of outrageous misconduct, a defendant must demonstrate "deliberate intrusion into" his attorney-client relationship and "actual and substantial prejudice." United States v. Voigt, 89 F.3d 1050, 1067 (3d Cir. 1996). Here, Bergrin cannot legitimately assert the privilege as to communications he admittedly knew were not confidential. See Point IV.B.2. below. But even if he could, Bergrin cannot prove the "deliberate intrusion into" that privilege, let alone "actual and substantial prejudice," that Voigt requires.

As Judge Martini previously recognized, the Government has a "Filter Team—an independent privilege review team walled off from the Government's trial attorneys." ECF No. 238 at 8. The Filter Team employed procedures that prevented both the Filter Team and the trial AUSAs from reviewing any potentially privileged information:

> All reviews of e-mails and other communications of Bergrin were done in accordance with established Department of Justice and Bureau of Prisons policies and procedures, utilizing a filter team of agents and attorneys separate and distinct from the prosecution team.
>
> The filter team specifically set up a protocol so that communications between Bergrin and his standby counsel were not reviewed by the filter team. Material was relayed to the prosecution team only after the filter team insured that no attorney client communications were being disclosed.

Exhibit D, Letter from AUSA Thomas Eicher, dated Aug. 14, 2013. Thus, neither the filter team nor the trial AUSAs had access to any potentially privileged communications. See Voigt, 89 F.3d at 1063 (noting that AUSA "Ernst turned [documents received from attorney-informant] over to an AUSA who was not part of the investigation into the Trust to make an independent privilege determination"); see also United States v. Taylor, 764 F. Supp. 2d 230, 236 (D. Me 2011) ("as the record stands, not even the filter agent read any privileged communications"). And for the same reason, Bergrin cannot show that the Government used such communications to further its case. See Voigt, 89 F.3d at 1070 ("if Voigt's assertion that 'the evidence introduced both prior to and at the trial included hundreds, if not thousands, of privileged attorney-client communications had any merit whatsoever, he would have pointed to at least one document Travis provided the government that was privileged").

Accordingly, Bergrin's outrageous government conduct claim fails.

2. Bergrin Cannot Claim Any Privilege Or Expectation Of Privacy In Non-Confidential Communications.

In any event, Bergrin properly admits that he knew that his communications were not confidential. ECF No. 569 at 10. Indeed, he signed numerous documents consenting to the monitoring of his phone calls—documents which confirmed that legitimate calls to attorneys would not be monitored. Exhibit E at 3, 6, and 7. Further, prior to each use of the MDC's electronic mail system (called "TRULINCKS"), Bergrin had to click the "accept" button at the bottom of a screen containing the following warning:

> I understand and consent to having my electronic messages and system activity monitored, read, and retained by authorized personnel. I understand

> and consent that this provision applies to electronic messages both to and from my attorney or other legal representative, and that such electronic messages will not be treated as privileged communications, and that I have alternative methods of conducting privileged legal communication.

Exhibit F. That destroys any privilege claim, and it eviscerates Bergrin's assertion that the Government violated the Fourth Amendment or Title III.

"[I]t is fundamental that the [attorney-client] privilege only applies to confidential communications, which are intended as confidential." United States v. Cariello, 536 F. Supp. 698, 702 (D.N.J. 1982). But where "inmates and their lawyers were aware that their conversations were being recorded, they could not reasonably expect that their conversations would remain private." United States v. Hatcher, 323 F.3d 666, 674 (8th Cir. 2003); see United States v. Mejia, 655 F.3d 126, 133 (2d Cir. 2011) ("on the basis of the undisputed fact that Rodriguez was aware that his conversation was being recorded by BOP, Rodriguez's disclosure to his sister of his desire to engage in plea discussions with his attorney was not made in confidence and thus constituted a waiver of the privilege").[6]

For similar reasons, Bergrin cannot claim a reasonable expectation of privacy in his jail-house communications. Monitoring of telephone communications does not offend the Fourth Amendment because prisoners have "no reasonable expectation of privacy." United States v. Friedman, 300 F.3d 111, 123 (2d Cir. 2002); accord United States v. Van Poyck, 77 F.3d 285, 292 (9th Cir. 1996) ("any expectation of privacy in outbound calls from prison is not objectively reasonable and the Fourth Amendment is therefore not triggered by the routine taping of such calls"). "So long as a prisoner is provided notice that his communications will be recorded and 'he is in fact aware of the monitoring program [but] nevertheless uses the telephones, by that use he impliedly consents to be monitored for purposes of Title III.'" United States v. Balon, 384 F.3d 38, 44 (2d Cir. 2004) (quoting United States v. Workman, 80 F.3d 688, 693 (2d Cir. 1996)). Here, as set forth above, Bergrin admits he received notice that his jail-house communications would not remain confidential. Accordingly, he cannot show the expectation of privacy necessary to trigger the Fourth Amendment, and the monitoring is permissible under 18

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[6]Similarly, the marital communication privilege does not apply "where the spouse . . . knows that the other spouse is incarcerated," because it was unreasonable to expect such communication to be confidential given "the well-known need for correctional institutions to monitor inmate conversations." United States v. Madoch, 149 F.3d 596, 602 (7th Cir. 1998); accord United States v. Barlow, 307 F. App'x 678, 681 (3d Cir. 2009) (not precedential) (finding defendant's assertion that jail-house call to his wife was protected by the marital communication privilege to be "completely without merit").

U.S.C. § 2511(2)(c), Title III's consent provision. See United States v. Sababu, 891 F.2d 1308, 1329 (7th Cir. 1989) (holding that a non-prisoner had no reasonable expectation of privacy when speaking to a prisoner on the telephone because, as a frequent visitor to the prison, she was "well aware of the strict security measures in place" and that the Code of Federal Regulations puts the public on notice that prison officials are authorized to monitor prisoners' telephone calls); see also United States v. Shavers, 693 F.3d 363, 389-90 (3d Cir. 2012) (defendant who was not incarcerated when he placed a call to an inmate had no reasonable expectation of privacy because he had previously been incarcerated and, thus, knew calls were monitored), vacated on other grounds, 133 S. Ct. 2877 (2013).

Bergrin baldly asserts that "[i]nmates consent to the screening of telephone conversations and emails while detained within the Bureau of Prisons. This consent, however, is not limitless. It is implicitly understood that interception and monitoring is for security purposes only." ECF No. 569 at 10. But the only court that appears to have addressed such a claim has rejected it. See United States v. Noriega, 764 F. Supp. 1480, 1491 (S.D. Fla. 1991) ("Here, Noriega's consent extended to the recording of his third-party conversations in their entirety, rendering their interception squarely within the scope of his consent."). The court noted that the defendant's complaint addressed not the interception of the jail-house recordings, but their disclosure to the prosecution team, a disclosure that, even if wrongful, would not result in suppression. Id. at 1491-92 ("Whatever the merits of this claim, it is clear that where the alleged violation consists solely of an improper disclosure or use of otherwise legally intercepted communications, the only remedy under Title III is a civil action for damages").

In sum, Bergrin cannot establish a violation of either the Fourth Amendment or Title III because he lacked a reasonable expectation of privacy in, and validly consented to the monitoring of, his jail-house communications.

Respectfully submitted,

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October 18, 2011

BY ECF & ELECTRONIC MAIL

Hon. William J. Martini, U.S.D.J.
U.S. District Court, District of New Jersey
King Federal Building & U.S. Courthouse
50 Walnut Street, Room 5076
Newark, New Jersey 07101

Re: United States v. Bergrin, Crim. No. 09-369 (WJM)

Dear Judge Martini:

The Government respectfully submits this letter in lieu of a more formal brief to address how this Court should cure the unfairness created by Mr. Bergrin's various door-opening assertions during his opening statement.

BACKGROUND

In pretrial motion practice, Mr. Bergrin argued that he could receive a fair trial only if this Court (1) severed the Kemo murder charges from the remainder of the Second Superseding Indictment, and (2) excluded (as inadmissible under Rules 404(b) and/or 403) relevant evidence of his intent (including evidence proving the Monmouth County witness tampering predicate).

The Government warned this Court that, even with a severance, Mr. Bergrin would open the door to inadmissible evidence, calling on this Court to confront and resolve numerous evidentiary issues as the trial progressed. Aug. 30, 2011 Tr. at 15. Mr. Bergrin (through counsel) responded that "that's a decision that Mr. Bergrin will make in this case," that "[i]f he opens the door, then that stuff could come in," and that "[h]e's going

to obviously be very careful about that." Sept. 12, 2011 Tr. at 73.[1] Four days later, Mr. Bergrin's counsel reiterated that "we fought very hard for the severance. We're going to make -- I'm certain and I know Mr. Bergrin feels just as strongly about it as I do, that he will make every effort to not [undo] the effect of such a severance were your Honor to grant it by opening the door." Sept. 16, 2011 Tr. at 30. In an abundance of caution, this Court properly warned Mr. Bergrin that he could open the door "in fairness after cross or after whatever you imply or suggest or something." Sept. 16, 2011 Tr. at 31 (emphasis added). Mr. Bergrin acknowledged that warning. Id. at 32.

In reliance on Mr. Bergrin's assurances, this Court not only severed the Kemo murder charges, but issued Rule 404(b) rulings that severely restricted the amount of evidence the Government could introduce to establish Bergrin's motive and his intent.

Having secured those favorable rulings, one would have expected Mr. Bergrin to live up to his assurance that he would "make every effort to not [undo] the effect of" the severance "by opening the door." Instead, Mr. Bergrin exploited this Court's rulings, and abused his status as a *pro se* litigant, by testifying in his opening statement. Mr. Bergrin affirmatively placed in issue evidence that this Court had excluded at Mr. Bergrin's request, and made relevant other evidence that the Government had not intended to offer (that had not been the subject of earlier motion practice).

The Government identified the door-opening assertions at the conclusion of today's proceedings, and provided this Court with citations to two cases. The Government here particularizes some of its objections in an effort to help this Court decide how to cure the numerous misleading impressions Mr. Bergrin created. The Government reserves its right to supplement its written submission with oral argument.

ARGUMENT

"A trial is not a contest but a search for the truth so that justice may properly be administered." Riley v. Goodman, 315 F.2d 232, 234 (3d Cir. 1963). Thus, "a party who raises a subject in an opening statement 'opens the door' to admission of evidence on that same subject by the opposing party." United States v. Chavez, 229 F.3d 946, 952 (10th Cir. 2000); accord United States v. Milan, 304 F.3d 273, 290 & n.22 (3d Cir. 2002) ("The defense opened the door by intimating during opening statements that the government was willing to engage in improprieties-had made 'a pact with devils' in order to convict Milan.") (citation omitted). "Otherwise, litigants could exploit the rules of evidence to create misleading impressions, secure in the knowledge that the other side was barred

[1] To be sure, Mr. Lustberg was discussing whether cross-examination questions would open the door, but Mr. Bergrin, as a self-professed experienced criminal defense attorney, surely knew that he could open door through opening statement assertions.

from disabusing the jury." United States v. Catano, 65 F.3d 219, 226 (1st Cir. 1995) (court properly allowed redirect examination to elicit otherwise inadmissible evidence to rebut misleading impression created by cross-examination questions). Here, Bergrin opened the door in numerous ways.

First, Mr. Bergrin repeatedly attacked the integrity of the Government's investigation, including accusing the Government of having allowed its cooperators to lie. Oct. 17, 2011 Tr. at 47, 54, 61, 65, 66, 75, 77-78. Having done so, Bergrin made relevant evidence disproving his assertion, including out-of-court statements on which Special Agent Brokos relied to build the case. As the Third Circuit recently explained in sustaining the admission of the fact that other suspects arrested in the same investigation had confessed, it was the confessions' "existence, not their details, or even ultimately their truth, [that] was relevant to rebut the implication that the investigation was a dragnet for the innocent and that MacFarlane knew it." United States v. Christie, 624 F.3d 558, 569 (3d Cir. 2010). Such "testimony can be seen as relevant to a proper, non-hearsay purpose because it illustrated the reliability of the investigation, a fact of considerable consequence since challenging the nature of the investigation was at the crux of Christie's defense."). Thus, Mr. Bergrin had no basis to object on hearsay grounds to Agent Brokos' testimony about the information that led her to William Baskerville, to Anthony Young, and ultimately to Bergrin.

Second, Mr. Bergrin repeatedly referred to the existence of phone conversations intercepted during the investigation into Hakeem Curry, arguing that the jury would not hear certain conversations showing him having discussions with Curry, and that the jury would not hear evidence that he tampered with witnesses on behalf of William Baskerville. Oct. 17, 2011 Tr. at 47, 54, 61, 65, 66, 75, 77-78. However, as Mr. Bergrin knows (and as Mr. Lustberg knows from having perfected Hakeem Curry's direct appeal), there is a substantial question whether those recordings were promptly sealed under 18 U.S.C. § 2518(8)(a). By referring to those calls in his opening statement, and by arguing that the jury would not hear evidence tending to support the Government's Rule 404(b) evidence, Mr Bergrin misled the jury.[2] Thus, this Court should admit otherwise suppressible calls that rebut Mr. Bergrin's misleading assertions. At the very least, this Court should permit the Government to elicit evidence about the existence of the Title III authorization, and the sealing violation, to explain why the jury will not hear certain evidence. Cf. Milan, 304 F.3d at 290 & n.22 (defendant opened the door to testimony concerning judicial approval of wiretaps obtained during investigation by suggesting that 'the government was willing to engage in improprieties ... in order to convict'" him).

[2] In fact, one of the improperly sealed calls was Bergrin's November 25, 2003 call to Curry immediately after William Baskerville's first appearance, in which Bergrin relayed Kemo's name to Curry.

Third, Mr. Bergrin repeatedly asserted that Anthony Young was not the shooter, and that the Government allowed him to falsely take responsibility for the Kemo murder. Oct. 17, 2011 Tr. at 76, 78, 80, 81 Mr. Bergrin thus made highly relevant not only the crime scene photos and autopsy photos to which he has objected on Rule 403 grounds, but other evidence that reinforces Young's credibility. See United States v. Green, 617 F.3d 233, 251-52 (3d Cir. 2010) (where defendant in opening statement attacked government witness's motive for cooperating in a drug case, district court properly allowed Government to introduce evidence showing that witness came forward because defendant wanted to purchase dynamite to kill an undercover police officer, which rebutted his attack on the witness's credibility).[3]

Fourth, Mr. Bergrin in opening statement asserted that he had prevented both Alberto Castro and Abdul Williams from engaging in efforts to obstruct justice. Oct. 17, 2011 Tr. at 51-52, 82-85. Assuming that Mr. Bergrin intends to use this information to impeach the witnesses' credibility, that directly conflicts the position his counsel took in pretrial motions, *i.e.*, that the Government should not be able to question *Mr. Bergrin* about his recent witness tampering efforts in the event he takes the stand. If obstructive conduct by a Government witness is sufficiently probative of truthfulness or untruthfulness under Rule 608(b), then such conduct by Mr. Bergrin is equally probative should he take the stand.

Beyond that, Mr. Bergrin's assertions regarding Abdul Williams' effort to have his sister take responsibility for a gun offense should open the door to the 2007 witness tampering evidence that formed the basis for Racketeering Act No. 6 in the Second Superseding Indictment — evidence that this Court effectively excluded by (1) granting a severance, and (2) excluding subsequent acts as insufficiently probative of intent. Now that Mr. Bergrin has attacked the Government for relying on Williams after Williams tried to get someone else to falsely take responsibility for a gun offense, he has opened the door to evidence that Mr. Bergrin himself helped Williams escape a separate gun charge by bribing a witness to falsely take responsibility for the gun.[4]

---

[3] Mr. Bergrin cannot object to such evidence in any event because "Rule 403 does not provide a shield for defendants who engage in outrageous acts, permitting only the crimes of Caspar Milquetoasts to be described fully to a jury. It does not generally require the government to sanitize its case, to deflate its witnesses' testimony, or to tell its story in a monotone." United States v. Gartmon, 146 F.3d 1015, 1021 (D.C. Cir. 1997).

[4] To the extent Mr. Bergrin argues on summation that he is not guilty of the charged offense because he allegedly refused to obstruct justice on behalf of clients in unrelated matters, that would clearly violate Rule 404(b). See United States v. Hill, 40 F.3d 164, 168-69 (7th Cir. 1994).

Fifth, Mr. Bergrin clearly and unambiguously opened the door to testimony about other acts of witness-tampering by asserting, with respect to Government witness Richard Pozo, by assertion that:

> I never say to him: Let's get rid of the informant. Because what does it matter? It doesn't matter. I would never say that because it has no impact, has no effect and I would never say that to this type of individual.

Oct. 17, 2011 Tr. at 85 (emphasis added). Mr. Bergrin's bald assertion — "I would never say that [*i.e.*, "[l]et's get rid of the informant] to this type of individual" — is a classic door-opening event. See United States v. Gilmore, 553 F.3d 266, 271-72 (3d Cir. 2009) (defendant's denial of involvement in drug activity opened the door to admission of two prior narcotics convictions). Indeed, it closely resembles the door-opening example Mr. Bergrin identified in his October 7th Rule 404(b) opposition:

> Of course, if Mr. Bergrin, in his presentation, were to argue or insinuate that he would never make these kinds of statements to these individuals because they were not sufficiently close, then he might 'open the door' to additional such proofs (as always, still subject to the Rule 403 balancing test). But such a tactic is not anticipated.

Oct. 7th Rule 404(b) Opp. Letter at 8 n.2.

The only way to correct the misleading impression left by Mr. Bergrin's blanket, self-serving assertion is to admit evidence that would forcefully rebut that assertion: *i.e.*, testimony from Vincente Esteves establishing that Mr. Bergrin in fact *would* say "[l]et's rid of the informant . . . to this type of individual," *i.e.*, a client facing charges because of a cooperating witness. See United States v. Higham, 98 F.3d 285, 293 (7th Cir. 1996) ("when Higham insisted on direct examination that he would never have entertained the idea of killing Yates but for Burroughs and Martin, he opened the door to inquiries about his willingness to use violence for his own ends, as the district court itself pointed out; that is why the court permitted some inquiry into this area notwithstanding its earlier ruling").

Finally, and on a different matter, the Government points out that, in discussing Abdul Williams and Richard Pozo in opening statements, Bergrin appeared to rely on information that he could only have learned in confidence, *i.e.*, in his role as an attorney for Williams and Pozo. The fact that Mr. Bergrin's former clients are now witnesses against him does not give him license to violate the attorney-client privilege by using other information gained in confidence for impeachment purposes. Had Mr. Bergrin opted to have Mr. Lustberg represent him at trial, the attorney-client privilege, and Mr. Bergrin's ethical duty to maintain client confidences would have barred him from disclosing confidential information to Mr. Lustberg for use in cross-examining

Government witnesses. Indeed, courts routinely cite the risk that an attorney might use information obtained in confidence from one client to harm another client to disqualify an attorney. See United States v. Moscony, 927 F.2d 742, 747-51 (3d Cir. 1991); see also United States v. Voigt, 89 F.3d 1050, 1078-79 (3d Cir. 1996). Accordingly, unless Mr. Bergrin shows that his former clients have waived their attorney-client privilege (or that the information in question was not privileged to begin with), then he should be precluded from using confidential information for impeachment or any other purpose.

CONCLUSION

Mr. Bergrin said on Monday that "when people are facing potentially spending the rest of their natural life in jail with never being released . . . they will say and they will do anything to gain their release." Oct. 17, 2011 Tr. at 46. That is just what Mr. Bergrin did in his opening statement, and that is just what he intends to do as the trial progresses. The Government asks this Court to ensure that this trial is what it supposed to be: a search for the truth, and not a game whereby Mr. Bergrin secures favorable evidentiary rulings dramatically cutting down the Government's case, and then exploits those rulings by referring to inadmissible or irrelevant evidence.

We thank the Court for its consideration.

Respectfully submitted,

PAUL J. FISHMAN
United States Attorney

By: /s STEVEN G. SANDERS
Assistant U.S. Attorney

cc: Lawrence S. Lustberg, Esq.
(by ECF and by e-mail)

From: Minotti, Douglas (USANJ)
To: AProtess@gibbonslaw.com
Cc: Sanders, Steven (USANJ) 1
Subject: RE: USA v. Bergrin
Date: Tuesday, February 12, 2013 6:22:22 PM

Amanda

I have a feeling that's the problem, although I can't say for sure without having the actual CDs we gave you because it's possible that your copies are defective. I'm pretty sure we can convert them to another format that your computers can play. Out of the 6 CDs, only those 2 have .cda files on them.

Take care,
Doug Minotti

From: Sanders, Steven (USANJ) 1
Sent: Tuesday, February 12, 2013 6:15 PM
To: Minotti, Douglas (USANJ)
Subject: Fw: USA v. Bergrin

Fyi

From: Protess, Amanda B. [mailto:AProtess@gibbonslaw.com]
Sent: Tuesday, February 12, 2013 06:12 PM
To: Sanders, Steven (USANJ) 1
Subject: RE: USA v. Bergrin

I am not familiar with .cda (although I'm not very tech savvy). Whatever is necessary to be able to read them -- the first four were fine. Thanks.

> -----Original Message-----
> **From:** Sanders, Steven (USANJ) 1 [mailto:Steven.Sanders@usdoj.gov]
> **Sent:** Tuesday, February 12, 2013 6:09 PM
> **To:** Protess, Amanda B.
> **Subject:** Re: USA v. Bergrin
>
> The file format of the files on those CDs is .cda, not .wmv. That may be the issue. We can convert to .wav if you prefer.
>
> ---
>
> **From**: Protess, Amanda B. [mailto:AProtess@gibbonslaw.com]
> **Sent**: Tuesday, February 12, 2013 05:40 PM
> **To**: Sanders, Steven (USANJ) 1; Lustberg, Lawrence S <LLustberg@gibbonslaw.com>; Levy, Bruce A. <BLevy@gibbonslaw.com>
> **Cc**: Gay, John (USANJ); Minish, Joseph (USANJ); Minotti, Douglas (USANJ)
> **Subject**: RE: USA v. Bergrin
>
> Thanks. After our document support team could not copy these two cds because they appeared blank, I tried to open them on my desktop and they both read as 0 bytes of data. We were able to copy Leverett cds 1-4.
>
> -----Original Message-----

From: Sanders, Steven (USANJ) 1 [mailto:Steven.Sanders@usdoj.gov]
Sent: Tuesday, February 12, 2013 5:34 PM
To: Protess, Amanda B.; Lustberg, Lawrence S; Levy, Bruce A.
Cc: Gay, John (USANJ); Minish, Joseph (USANJ); Minotti, Douglas (USANJ)
Subject: Re: USA v. Bergrin

No worries. We can do it. But if you cannot open the new CD on your laptop, but we can open on ours, then we'll have to figure out why your computer can't read the CDs.

From: Protess, Amanda B. [mailto:AProtess@gibbonslaw.com]
Sent: Tuesday, February 12, 2013 05:26 PM
To: Sanders, Steven (USANJ) 1; Lustberg, Lawrence S <LLustberg@gibbonslaw.com>; Levy, Bruce A. <BLevy@gibbonslaw.com>
Cc: Gay, John (USANJ); Minish, Joseph (USANJ)
Subject: RE: USA v. Bergrin

I think that makes the most sense. Please note that since they will be provided in court, we need 2 copies, as we will not be able to burn one for our records before handing it over to Paul to review. Let me know if that creates any problems. Thanks.

-----Original Message-----
From: Sanders, Steven (USANJ) 1 [mailto:Steven.Sanders@usdoj.gov]
Sent: Tuesday, February 12, 2013 5:23 PM
To: Protess, Amanda B.; Lustberg, Lawrence S; Levy, Bruce A.
Cc: Gay, John (USANJ); Minish, Joseph (USANJ)
Subject: Re: USA v. Bergrin

Amanda,

We checked each one before sending out and thought they were ok, but we'll be happy to re-burn them and hand them over in court.
Regards,

Steve

From: Protess, Amanda B. [mailto:AProtess@gibbonslaw.com]
Sent: Tuesday, February 12, 2013 04:41 PM
To: Sanders, Steven (USANJ) 1; Lustberg, Lawrence S <LLustberg@gibbonslaw.com>; Levy, Bruce A. <BLevy@gibbonslaw.com>
Cc: Gay, John (USANJ); Minish, Joseph (USANJ)
Subject: RE: USA v. Bergrin

Hi Steve,

SL CD-5 and SL CD-6 appear to be blank. Could you provide 2 copies of each tomorrow in Court? Please let me know if that poses any problems.

Thank you,
Amanda

-----Original Message-----

From: Sanders, Steven (USANJ) 1 [mailto:Steven.Sanders@usdoj.gov]
Sent: Tuesday, February 12, 2013 1:35 PM
To: Lustberg, Lawrence S; Levy, Bruce A.; Protess, Amanda B.
Cc: Gay, John (USANJ); Minish, Joseph (USANJ)
Subject: USA v. Bergrin

Bruce,

As promised here is a letter responding to your email earlier today and disclosing additional information, which an FBI agent is hand-delivering to your office as we speak.

If you would like PDFs of the exhibits mentioned in the meantime, please let me know.

Kind regards,

Steve

Steven G. Sanders, Assistant U.S. Attorney
U.S. Attorney's Office, District of New Jersey
Appeals Division
970 Broad Street, 7th Floor
Newark, New Jersey 07102
973-297-2019 (phone)
973-297-2007 (fax)

****

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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,

v.

PAUL W. BERGRIN,

Defendant

TRANSCRIPT OF PROCEEDINGS
- Trial -

Newark, New Jersey
November 14, 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

November 14, 20011

(Trial resumes - Jury not present.)

THE COURT: Good morning, everyone. Please be seated

MR. BERGRIN: Good morning.

MR. LUSTBERG: Good morning, your Honor.

THE COURT: Everyone, be seated, please.

Before we get started, let me just -- Mr. Minish, do you have an idea how long you'll be, a better idea? I'm not holding -- I wonder -- if you need a break, if you do need a break, then whenever you think it's appropriate, indicate that and we'll break.

MR. MINISH: Okay, Judge, I will.

THE COURT: If you feel like you need a break, just turn to me, and if that's an appropriate time we'll break, okay? Don't make it after a half hour.

MR. MINISH: I will not, Judge.

THE COURT: And if there's nothing further we'll get started.

If everyone in the courtroom would please remember to turn off your cell phones, including myself, or any other electronic equipment.

All right. With that said, then we'll bring out the jury.

THE DEPUTY CLERK: Please rise for the Jury.

(Jury present.)

THE COURT: All right, everyone, please be seated and welcome back.

In a moment we're going to be having what's called summations. These are the arguments by the respective counsel. Under the rules of law, the Government proceeds first with their closing summation, their closing arguments to you. After that, the Defendant has an opportunity to do his closing address to you, and then after that, the Government has a chance to do what's called a short rebuttal remarks, which is also part of the closing address to you, and then after that I have an opportunity to provide you with the law of the case. Okay?

You should remember again that whatever is said by attorneys in summations is not evidence. It's their arguments to you that what they believe the evidence has proven or not proven or not shown; either way. And so it's important, but again, your best recollection of the evidence, what you heard from the witness stand and what the exhibits will show to you is what the jurors, yourselves, will have to consider. But listen closely to the arguments of counsel. They're important, but don't confuse them with the evidence. Okay?

And with those opening remarks, Mr. Minish -- you're giving the opening, the closing address for the Government?

MR. MINISH: I am, Judge.

THE COURT: All right. Please step forward.

MR. MINISH: Thank you, your Honor.

Counsel, emergency: Good morning.

On March 2nd, 2004, at approximately 2:00 p.m. on South Orange Avenue and 19th Street, right here in Newark, Kemo DeShawn McCray was gunned down in a brutal attack. He was grabbed by Anthony Young and he was shot in the head and died, lay bleeding in a pool of his own blood on 19th Street with his stepfather strides away from him.

Now, it was not a random killing. This was not a robbery. This was an execution.

In the Government's opening, Mr. Gay said to you, at the time of the murder it begged the question: Why?

Now you know why.

Kemo DeShawn McCray was killed because he cooperated with the Government.

There were a number of people who were involved in this conspiracy, there were a number of people who were involved in this murder. What you've learned is that William Baskerville wanted it done, figured out who the cooperator was and told Paul Bergrin.

You heard Jamal Baskerville after months of searching by the group finally locating Mr. McCray. Then on the day of the murder, on March 2nd, Hakeem Curry and Jamal -- excuse me -- and Jamal McNeil acted as lookouts, and on that day Anthony Young put a gun to his head and fired, and Rakeem

Baskerville drove the getaway car.

But what did Paul Bergrin, what did Paul Bergrin do?

Well, what Paul Bergrin did was informed the gang that the cooperating witness, the individual referred to only as the "cooperating witness" in the complaint was, in fact, Kemo. Remember, they thought it was somebody else.

He did the legal analysis on William Baskerville's case, the strength of the Government's case, whether they would -- whether Mr. Baskerville would be successfully prosecuted, whether he would be convicted, and then he developed a strategy to win the case. And the strategy, you learned, he shared with the gang when he met with them, that the only way to win the case was to kill Kemo. And knowing that the members of the gang wanted William Baskerville to come home, wanted him to get out of jail, made a promise: If you kill Kemo, William Baskerville will come home. I will get it done.

Now, that was not just a boast from anybody, that was a legal analysis from their lawyer, from their house counsel, from a trusted advisor. And, in fact, as you learned also, from a member of the drug-trafficking chain. And it was those statements that sealed Kemo's fate.

When Paul Bergrin said William Baskerville is not coming home if Kemo testifies, but if you get rid of him, he would, that became the only option. The die was cast. It

wasn't a matter at that point of whether Kemo would be killed, it was just a matter of when.

Members of the Jury, that's the facts. Not because I told you so. As the Judge told you, evidence doesn't come from what the lawyers say, not myself, not Mr. Gay, not Mr. Bergrin. Evidence comes from the witness stand. The witness' testimony. It's that and the various objects and documents that you will bring back to the jury room with you to look at. And that evidence, the evidence you've heard, the evidence that you'll have shows beyond a reasonable doubt that Paul Bergrin was a member of the conspiracy to kill Kemo DeShawn McCray and his actions aided and abetted the murder of Kemo.

The evidence shows, members of the Jury, that not only was Paul Bergrin a member of the group, but also why. We discussed house counsel, we discussed the personal -- excuse me. You heard evidence of the personal stake that Paul Bergrin had in Kemo being murdered because he was part of the drug-trafficking chain. But in order to understand the evidence, you do have to understand the law. And the Judge will tell you, as he indicated, he'll give you very specific instructions, and obviously that's what you have to follow. But there's a few things I would like you to keep in mind when you're listening to the summations today about the law.

Now, the Judge is going to tell you that one of the charges is for a conspiracy to murder and that the Government

has to prove a couple of elements, which are just sort of parts of the charge.

And it's largely that two or more persons, Element One, reached an unlawful agreement to murder Kemo, knowingly and with the intent to prevent Kemo from testifying at an official proceeding.

Now, how do you know that there's more than a couple of people involved in the case?

Well, from a number of sources. Right? Anthony Young tells you as an insider in the group who was looking what everybody's job was. Eric Dock, who just was someone else in jail with William Baskerville tells you that William Baskerville is involved and that his people were involved. Even Thomas Moran at the end tells you that, well, after the conspiracy, Paul Bergrin tells him that after he passed the name along, William Baskerville's people killed him. So I think the evidence is pretty clear that you're not talking about the act of one man. There are multiple people for the purposes of the conspiracy. And I also submit to you that the part about whether they did it on purpose, knowingly, is also pretty clear.

And with respect to whether or not they did it for stopping him from testifying; just recognize that the Judge will instruct you as a matter of law that United States vs. William Baskerville, the prior trial is, as a matter of law, an

official proceeding. So I submit to you that's also not an issue.

Now, there's a couple of other terms you're going to hear that I want to discuss with you. One of them is called "premeditation," which again is largely about planning and deliberation. And the evidence for that is quite obvious. Paul Bergrin had time to reflect prior to taking any of the steps he took. Certainly before he passed the name along, that it's Kemo, Will said it's Kemo, certainly in the days between those conversations on the phone to the actual meeting, doing the legal analysis, figuring out the various angles, trying to figure out if there was anything to do besides kill Kemo. He had time to consider, before he counseled, again, to kill Kemo, and then again, the gang over the period of time, months, searching, planning the murder. This was certainly not done (snapping fingers) on the spur of the moment.

The second term I want to tell you about is "malice aforethought," which means willfully, or with respect to willfully taking the life of a human being.

Again, fairly obvious that this was not accidental. Kemo was killed because they planned to kill Kemo. They went up to kill Kemo with the intent to kill him, and, in fact, did. This, again, was not an accident, this was not some random spur of the moment event.

Now, the final -- the second element for conspiracy is

a decision that you'll have to make: Whether or not during the life of the conspiracy Paul Bergrin intentionally joined that conspiracy, that he took actions to further the conspiracy.

Now again, similar evidence. Mr. Bergrin told the gang that the cooperating witness was Kemo; he did the legal analysis on William Baskerville's case; he developed the strategy, that the only winning strategy was to kill Kemo. He passed that information along to the gang that that was the way they had to go, and then made the promise that if they followed through on his strategy, William Baskerville would come home.

The second count is an aiding and abetting of the murder.

Now, with respect to the aiding and abetting there's also a number of elements. One of the elements being that someone actually murdered Kemo. And I submit to you also not much of an issue unto itself; that Paul Bergrin knew that someone was going to kill Kemo. And as I will discuss with you later, that he knew the members of the gang, he knew them intimately, he knew what they would do when he passed along the information and, in fact, when he counseled them they would kill Kemo, he knew it would happen.

And the third and fourth elements, that he did some act for the purpose of aiding, facilitating, encouraging another to commit the murder, and that those acts did, in fact, facilitate, encourage someone to actually do the murder.

Members of the Jury, again, those four or five points is the same evidence for all of these counts -- excuse me -- for all of these elements: Passing along the name, doing the legal analysis, making the decision that the only way William Baskerville gets out of the Government's case is to kill Kemo, passing that information along to the gang and telling them that's what has to happen, and then making the promise that if it did happen, William Baskerville would come home.

Members of the Jury, what the Judge is going to tell you is that this has to be proven, these elements, beyond -- excuse me -- beyond a reasonable doubt. And that's true. The Defendant has the presumption of innocence.

So it's clear, that standard is the same standard that is used in every courthouse in every state in the country for every criminal case.

Now, let's talk about the evidence. There certainly was a conspiracy to kill Mr. McCray, but before we get to that let's talk about the drug conspiracy. You've learned that Hakeem Curry sold drugs, a lot of drugs for a long time, cocaine and heroin, made a lot of money. But he didn't do it by himself, he had many people in the organization. And you heard from members of that organization. You heard from Anthony Young, from Lachoy Walker, and you heard from Abdul Williams that there was at least -- well, quite a few members that we discussed: Ishmael Pray; Al-Quan Loyal; Abdul

Williams; Maurice Lowe; Al-Hamid Baskerville; Keet; Akmoon; Al-Quaadir Clarke; Rakeem Baskerville; William Baskerville; Jamal Baskerville; Malsey, Jamal McNeil; Kenneth Sutton; Atif Amin; Norman Sanders; Justin Hannibal; Jason Hannibal; Tyheed Mitchell; Jarvis Webb; Ray-Ray; and Anthony Young.

Now, that group made a ton of money, and Hakeem Curry especially. What you heard testimony about was that he was the leader of the group, not because he was the toughest, but because he had the connections to the drugs, the sources of supply. Because what you learned is that's where the power comes from. The power comes from being able to get the kilos to the group. If you're the one with the connection, you're the one on top.

And the power flows from there down to the rest of the members of the gang. The closer you get to the source of the drugs, the more power you have, the more money you make. The further away from the chain -- excuse me -- the further up the chain from the guys on the street, the more money you're making.

You heard testimony about Mr. Bergrin and Hakeem Curry's relationship. And what most people in the group didn't know was that the relationship went well beyond that of mere lawyer or even house counsel. For the group, Paul Bergrin gave Hakeem Curry a source of cocaine, a connect, and that didn't just help Hakeem Curry. For Mr. Bergrin, that put him in the

drug chain. If the organizational chart, if there was an organizational chart for the Hakeem Curry organization, certainly Hakeem Curry would be at the top, but beyond him were his connections, and between at least one of those connections, Jose Claudio, was Paul Bergrin.

Because in the drug chain, what you learned was that all people who sell drugs have two concerns: Number one, that they personally will be caught by law enforcement selling drugs, passing drugs, receiving money; and number two, that someone immediately below them on the drug chain will get caught. And when that person is caught, will that person cooperate and then provide information about the next link up the chain.

Anthony Young told you, he explained that if someone under him gets caught, he's worried. Abdul Williams told you, if someone under him gets caught and they cooperate, he will be in trouble. You also heard about it from the law enforcement side. You heard testimony from Special Agent Shawn Brokos as well as from Detective George Snowden. And what they told you was that the drug traffickers are right, that is how they do the operations; they try to go from the bottom, the guys on the street, and work their way up the chain to their suppliers, to the distributors, and further and further and further until they can get no farther.

That's why, members of the Jury, when William

Baskerville was arrested, everyone wanted to know who else was caught in the trap, because law enforcement had reached the management level of the Hakeem Curry organization. This was not a street arrest. They had reached management. Remember what Lachoy Walker told you, what Eric Dock told you: William Baskerville was a manager, he controlled a section of Newark, a block where he sold the drugs and had people working for him, that he was in the Curry gang and he received cocaine directly from Hakeem Curry.

Remember also, this was not any members of law enforcement that made the arrest, this was the feds, and they explained to you, you heard the evidence, the testimony, what that meant. That meant this was not just going to be one guy grabbed. They were worried that a bunch of people were coming. And you heard that Anthony Young and the rest of them were correct, because not three and a half months later, after William Baskerville was arrested, Hakeem Curry was arrested and many of his associates. They didn't just pick off one or two guys. The group was decimated, destroyed.

So let's talk about that concept. You heard about it from both sides of the drug-trafficking. You heard about it from law enforcement and you heard about it from the drug traffickers themselves. And I'm certain that the strategy, while the strategy makes sense to you, perhaps you didn't even need to hear it, that obviously when you're doing any sort of

investigation you try to move as far up the chain as you can. So, for example, if I was involved in illegal drug-trafficking and I supplied Mr. Gay, Mr. Gay supplies drugs to Ms. Santos, then Ms. Santos gets arrested. Who's worried? And what are we worried about? Well, certainly Mr. Gay is worried that Ms. Santos may provide information about him. What am I worried about? I'm worried about stopping the dominoes from falling. I can't have Ms. Santos cooperate to get to Mr. Gay, because then I'm next. In that scenario I have the vested interest in stopping those dominoes from falling. If I can prevent law enforcement from prosecuting Ms. Santos, I don't have anything to worry about because they can never get to John Gay, so I'm safe.

And that's exactly the situation that you heard about here. Hakeem Curry had a vested personal interest in stopping law enforcement from being able to prosecute William Baskerville.

Now, you heard that he was a family member.

That's true, he's his cousin. They had a group, they had been together for many years so there was some degree of loyalty I'm sure. But beyond that, beyond that, what they had was a practical reason, a business reason, personal survival. William Baskerville could give law enforcement Hakeem Curry. Hakeem Curry knows that.

Paul Bergrin in the situation, the example I just gave

you, is in my position. He knows if those dominoes start falling and they get to Hakeem Curry, the person they're going to be asking him about is Paul Bergrin.

Now, while there's always some trust, members of the Jury, I'm certain amongst the guys that commit crimes with one another, there also has to be a worry. What would your co-conspirators do when the rubber meets the road? What would they do when actually faced with long, long, long periods of time in jail? Everybody can talk tough, everybody can say, "no, I'd never tell" when they're out on the street, when they're out with their friends. Anthony Young told you he never cooperated. He did his time on a number of occasions and came back to the gang.

But at some point when the rubber meets the road, when that guy is one link away from you in the drug chain, is sitting in a law enforcement interrogation room of the FBI, of the DEA, is sitting at a table across from that agent, sitting at a table across from Special Agent Shawn Brokos and Agent Brokos explains the process, you got two options: You can either say nothing, face the consequences of your action and get whatever time you face; or you can give us information, try to cooperate, try to help yourself.

At that point, members of the Jury, the concern is: Will that person stand up, will that person stand up to the pressure, or will that person cooperate? Will that person call

their lawyer and will that lawyer recommend to their client to cooperate because they have a strong case, or say, no.

Now, if the lawyer only has his client's interest at heart and the Government has a strong case against that client, what sort of advice would you expect that lawyer to give at that moment?

Let's put aside what you'd expect and let's talk about what William Baskerville was told the day he was arrested. Again, you heard he was arrested on November 25th, 2003. He was brought to the FBI. There was a period of time where he sat there waiting for Agent Brokos to appear. He sat in an arrest room. And then finally she arrived, and Agent Brokos told him those two options: Face his charges and huge jail time, or give the Government information and try to help yourself.

He was given time to consider his options. And after he had sufficient time to think, he said, Agent Brokos tells us, and I'm quoting: (Reading) He said that he is interested in talking but has concerns about talking because he would implicate other family members and that he would feel more comfortable talking in the presence of an attorney. His attorney.

Agent Brokos told you she understood that statement to be that he would like to talk, meaning he would like to cooperate.

So what happens?

Agent Brokos did the appropriate thing: Gave him time to contact his attorney, and after a series of back-and-forths, eventually Agent Brokos hears William Baskerville say: Hi, Paul. So she walks out of the room and closes the door and allows him privacy to talk with his attorney, again, as is appropriate.

And this, members of the Jury, is where the wheels start moving. This is where the plan starts in motion. Because after that call, after William Baskerville spoke to his attorney, Mr. Bergrin, he said he's not interested in cooperating. That William Baskerville said, Paul Bergrin told him -- again, quoting, "To not cooperate, to keep his mouth shut and not cooperate."

Now, members of the Jury, was that advice from an independent lawyer? Was that advice from someone looking out for his client's interest? Or was that advice from someone who was representing a drug organization? Someone who was concerned or had concerns beyond that merely of his client; concerns about the organization which, in fact, he was part of?

Now, you've heard a lot about the relationship between Paul Bergrin and Hakeem Curry, and we should talk about that. And it's important because it explains one of the reasons why Mr. Bergrin was involved in the murder to kill Mr. McCray.

You heard testimonial evidence from the witness stand,

people saying things. Anthony Young referred to Paul Bergrin as, quote, Curry's boy; a lawyer that be around; they good friends.

Abdul Williams said that Hakeem Curry himself told him more or less at that time, he just let me know that Paul was "his boy." As opposed to more than a lawyer, he was his friend, he was his confidant, someone he confided in.

Ramon Jimenez was told by Paul Bergrin himself that he's one of his best clients, one of the big guys in Newark, a big drug dealer and he saw him in the office once every two weeks or so.

That's important, members of the Jury, too because you'll have -- one of the things you're going to have back in the jury room is a statement, a stipulation from the Defendant and the Government that says the last time Mr. Bergrin represented Hakeem Curry in any criminal case was December 12th, 2002. So after that, no representation in any criminal case. Yet, as Ramon told you, every couple of weeks while he's working there he sees Hakeem Curry there.

You also heard from Mr. Bergrin's girlfriend, Yolanda Jauregui, that Paul Bergrin told her about Hakeem Curry, and again I'm quoting, he, meaning Mr. Bergrin, said that he would represent him, meaning Curry; that he was the biggest drug dealer in Newark and controlled some part of the Newark area. He was a good client, like a brother to him.

You also heard out of Hakeem Curry's own mouth, remember that very short recording you heard of the telephone call? How did he refer to Mr. Bergrin? When his wife was -- seemed a little upset that Hakeem Curry seemed to be rushing her off of the phone, he explained he had to get off because: "I'm talking to my man."

From Paul Bergrin's own mouth in his opening statement, he told you: "Hakeem Curry was a client of mine. He referred business to me. He did refer business to me."

But more importantly than any of those statements, you have objective evidence. You have information that you will see back in the jury room and you will be able to review. Again, recognizing that stipulation and remembering those dates, December 12th, '02, no more criminal case work between Paul Bergrin and Hakeem Curry. There are still many phone calls; phone calls between Paul Bergrin and Mr. Curry. Why? What could they have been talking about?

Now, that chart, that was just page 1 of it that you'll have in the back. It shows between just over a two-month period, October 4th, '03 to December 16th, '03, connections between a phone used by Mr. Bergrin and a phone used by Mr. Curry. In that little over two months, 116 connections, at least ten months after his last representation of Mr. Curry in a criminal case.

Now, what could they have been talking about?

Members of the Jury, what I submit to you is that it's simple: If you look at that time period, about half of it, or maybe a little less than half is after the time when William Baskerville is arrested. Are they talking about that? Or as you learned, the continuing drug business with Changa? But we certainly know what it's not: It's not about a criminal case that Hakeem Curry was involved in.

Then what you have is other objective evidence. You're going to have two exhibits in the back with you, 920 and 921, and those are visitation records from the Monmouth County Jail.

Now, the Monmouth County Jail is where Hakeem Curry was housed after he was arrested and, again, Mr. Bergrin not representing him. For the time period from May 4th, 2004 through October 19th, 2004, you'll see up on the screen ten visits, Paul Bergrin to Hakeem Curry. Was he worried that Mr. Curry might cooperate now that the link right below him in the chain was sitting in jail? Again, what we do know is it wasn't about a criminal case.

Remember, members of the Jury, Paul Bergrin knew Hakeem Curry very well, and as we all know, everybody's got their price, everybody has their limit. And for Hakeem Curry, remember what Anthony Young told you: I'm going to quote from Anthony Young's testimony: (Reading) And we had a thing we used to always talk about, we used to say that when we do get

there, he's telling.

And there's a question asked: Meaning?

And the answer was: Hakeem Curry. And turned out, he was the one to stand and never told, but we used to say that. We used to say that, when the feds get us, Hak will tell. But it was a joke. But we were serious, because we always thought he was soft. But he was one of the guys that stood up and didn't tell.

Now, if Anthony Young knew that, do you think Paul Bergrin knew? If Anthony Young had those concerns, the rest of the gang had those concerns about Hakeem Curry.

Do you think Mr. Bergrin did? Do you think that had anything to do with those visits, those phone calls?

Now, you've also heard the term "house counsel" a number of times. And why it's important, members of the Jury, is because it explains one reason why Paul Bergrin is involved in this criminal conspiracy involved in the murder of Kemo McCray. Now, Paul Bergrin said to you, well, he sent me a lot of clients.

That's not what we're talking about as house counsel. It's not even about the close relationship, one to the other. What it is, is about representing the underlings of the boss that came in. Having an interest not for your client, but for the organization. That's what we mean by "house counsel." Having your services paid for by the boss, not by the client,

and having an interest in the boss and the organization, not your client.

Abdul Williams explained it to you, how a leader of an organization uses lawyers. You get the lawyer to represent your underlings so that they know you're taking care of them, because you don't want them to cooperate. The leader could face a lot of jail time if things start going in the wrong direction, meaning if that person who gets arrested starts cooperating and the dominoes start falling.

Lachoy Walker took the stand and he explained it to you, too. He said that Hakeem Curry referred underlings to Paul Bergrin. He paid the lawyer's bill. And, in fact, used himself as an example. On two occasions Paul Bergrin represented Lachoy Walker. Hakeem Curry told Lachoy Walker, I'm going to pay the bill.

Lachoy Walker told you that Hakeem Curry used Mr. Bergrin as house counsel to keep tabs on the underlings, to see what they were doing, because it helps the boss to know -- and I'm going to quote it again from Lachoy Walker -- that if the boss knows, he can take care of an underling through violence or anything like that.

And he told you that he heard specific conversations between Hakeem Curry and Paul Bergrin about that. When Mr. Bergrin cross-examined Lachoy Walker and asked him about it, Mr. Walker went further. He said -- Mr. Bergrin asked him

something to the effect of: Well, you don't know if I got paid.

He explained simply, Hakeem Curry told me he paid you, and it's not like you would not -- you would do it if you weren't getting paid, two representations of Lachoy Walker for free.

In an attempt I assume to deflect some of the attention of being house counsel, that title, Mr. Bergrin asked Mr. Walker about a number of people: Did I represent this guy? Did I represent this guy?

Now, remember what Lachoy Walker said. It's the responsibility of the boss to provide counsel for the managers, for the people below him, all right? It's not his responsibility to provide attorneys for everybody and anybody who may or in fact may not be associated with the Curry organization. And the fact that he did not represent a number of people in no way takes away from the fact that he did represent quite a few.

Who he did represent? Upper level guys, guys in management.

Now, so let's put aside those guys that he did not talk about and let's talk about the ones he did. All of whom you heard testimony about as being management, as being members of the Curry organization or management or some upper level position. Lachoy Walker himself; Al-Quan Loyal on three

occasions; Jarvis Webb; Rashid Pryor on two occasions; Justin Hannibal; Rakeem Baskerville on two occasions; Abdul Williams; Kenneth Sutton on seven different charges -- eight -- excuse me, eight different charges; Maurice Lowe; Tyheed Mitchell on two different charges; and Hakeem Curry himself, although again, not after December 12th, 2002, on three different occasions; and as you all are very well aware, William Baskerville.

And beyond that, members of the Jury, beyond the numbers, the volume, the explanation that you heard from the witnesses, I want to refer you back to what Thomas Moran told you. Remember, he was the lawyer that worked for Mr. Bergrin and testified here. Right? He told you that when multi-defendant cases came into the office that Paul Bergrin had, he would be the lead attorney and then he would farm out the other defendants to various other lawyers, including himself.

Paul Bergrin would be the lead attorney for the lead defendant, and the other attorneys would represent the various underlings. Now, we don't have, so it's clear, any evidence about what the other lawyers who handled those cases for those underlings did, the ones that were given to them by Mr. Bergrin. But what we do know is what Thomas Moran did, because he told you. What he said -- and again, I'm going to quote -- I reported everything I did to Paul.

With that background, with that knowledge of how the drug business works, with that knowledge of what the drug traffickers are concerned about from law enforcement, from their underlings, with that knowledge of what house counsel does, let's move to Paul Bergrin's involvement in drug-trafficking.

Now, the drug evidence is important, members of the Jury, because it provides a motive beyond just being house counsel. Paul Bergrin, so it's clear, had a personal stake because of his involvement, his position in the drug chain, of William Baskerville flipping, cooperating against Hakeem Curry, a personal stake in stopping the dominoes from falling.

It all really starts with Ramon Jimenez. Right? Ramon told you he was involved in selling drugs for most of his adult life. He had just gotten out of jail and was looking to make some money. He had a connection to a guy who could actually provide significant kilograms of cocaine, an old family friend, Changa. A guy he's known for a long time, and, in fact, had supplied Ramon periodically with cocaine when he could afford to buy it.

He also knows that there are people who Mr. Bergrin represents who sell drugs. So what he figures is, I'm going to make a match. I have a guy that sells kilos, and now I have access to the names and information for people who buy and then distribute. So he reads through a file, or reads through a

number of files and ultimately settles on Hakeem Curry.

Now, again, think about the time that Ramon was there working in 2002. Presumably there would have been a file because Mr. Bergrin was representing Hakeem Curry until December 12th, 2002. What Ramon Jimenez told you is that he approaches Hakeem Curry. He asks him if he's interesting in buying "weight." And as you learned, "weight" means kilograms of coke. Not grams; large quantities. Because he explained to you how he planned on making money. Just like in any other business in the supply chain, no matter what it was that's being made, being manufactured, legitimate or not, every step of the way a little bit gets tacked on until it gets to the consumer.

Changa would have a price. Ramon would add a little bit for himself, a thousand dollars a kilo. Hakeem Curry would buy it and presumably pass on a larger price for that kilo to everyone below him.

So Ramon saw an opportunity to put these two pieces together. He approached Mr. Curry, and Mr. Curry said, yeah, I'm actually looking for a new drug supplier. And he said, I would like, if it works out, 25 kilos, and if it goes well, next time it will be 50, because Hakeem Curry did not deal in grams.

After he makes that pitch and Hakeem Curry seems interested, he speaks to Changa and he says, can you really get

me 25 kilos?

Changa says, yes, I can supply that. He gives him a price.

Now again, members of the Jury, these numbers, 25, 50 next time, are important because remember what Lachoy Walker told you; that the amounts that Curry was getting from the connect that Paul gave him, 25, 50, up to a hundred.

So now again, we're talking about 20, 50. He gets the price. He talks to Curry about the price. Curry tries to negotiate the price a little bit when he's at the office, but Ramon still thinks this deal is on. Curry is negotiating a price. Changa said he's going to make it happen. But Ramon Jimenez made a tactical error. He told Changa the guys on the street call him "Hak" and he's one of Paul Bergrin's clients.

Now, why is that a tactical error?

It's a tactical error because now they don't need Ramon. Why create and allow Ramon to be involved in this if they don't need to? So Changa has the ability to get to the man that Ramon was trying to set him up with without using Ramon at all.

And then we move to the conversation in Paul Bergrin's office. Ramon Jimenez is called in to a closed-door meeting and he, quote, was asked by Mr. Bergrin, he asked me if I spoke to anybody about making any -- any deals.

Ramon Jimenez told you he believed he was talking

about the Curry deal, about the 25 -- 25 kilos.

And then what did Mr. Bergrin follow up with?

His, again -- I'm quoting -- meaning Paul Bergrin's response was that if I was to talk to any of his clients, that I had to go through him first.

Now, members of the Jury, obviously he didn't say the word "drugs," but in the context that's clearly what he's talking about. Ramon Jimenez is not discussing a loan closing deal with Hakeem Curry, a real estate purchase, some family law matter. And what clearly not from Mr. Bergrin's mouth is: How dare you talk to my clients about drugs? Don't talk to my clients about drugs. Don't bring your drug business into my firm.

What it is, is simply: If you want them, you've got to go through me.

So Ramon apparently not picking up on it as quick as perhaps he should have still thinks this deal is going to happen for him.

He tries to call Curry a number of times to finalize the deal, and he gets blown off. Then he sees Changa in the office who he never saw there before go up and meet with Paul. He asks Changa about it and he says, oh, I'm here for a real estate -- a real estate matter.

But now even Ramon is starting to get a little suspicious he tells you, and he goes back and he looks through

files and finds nothing with Jose, and he told you that the secretary gave him the last name he didn't remember, and looked through the files and found nothing.

But then the suspicion gets even more -- or more suspicious. Excuse me. He is asked by Mr. Bergrin for Changa's number.

Why would he need that?

He overhears a conversation between Mr. Bergrin and Hakeem Curry. The secretary saying, "Hak's on the phone," and Mr. Bergrin saying, "I'll be at the restaurant."

He realizes at that moment, perhaps later than he should have, that he has been cut out of this deal, that it's happening, the players have been put together but he's not part of it and therefore he's not going to make his money. So he finishes up what he has to do, he waits for Mr. Bergrin to leave, gives him some time, and drives over there.

And what does he see when he gets there?

He sees Hakeem Curry leaving the restaurant, Mr. Bergrin's restaurant -- he sees Mr. Bergrin inside and Changa inside. He told you, he was angry, he felt betrayed.

Who was he mad at?

He was really mad at Changa, a trusted friend of the family, very close to the family, the man he made the mistake of giving the name to, who he believes cut him out. Because remember, this was not a couple of dollars, this was going to

be $25,000 Ramon expected to make, a thousand dollars per kilo, plus whatever he could have made in the future.

Now, he never confronts Hakeem Curry, he never confronts Mr. Bergrin. I think both of those reasons are logical and understandable to you. But for Ramon Jimenez in his position, to create bad blood with Hakeem Curry is probably not the smartest thing to do. He worked at the time for Mr. Bergrin. Confronting your boss when you need the job and you've just been cut out of $25,000, also probably not the smartest thing to do.

So while he doesn't go right at them, what does he do?

He goes to speak to a man named Alejandro Barraza-Castro. And in his mind, what he did was confirm that the deal actually did happen.

Remember the conversation he had with him. Alejandro, Mr. Barraza-Castro told you -- excuse me -- told Ramon Jimenez that he just completed a 25 kilo deal. He asked -- Ramon asked, was Changa involved?

And he said, yeah, Changa was involved.

And he asked him the name.

And Mr. Castro said he didn't really remember.

So Ramon pressed him: Was it -- was it -- was it Curry, Hakeem Curry, Hak?

And Mr. Jimenez told you, he said, I'm not sure, but I think that's who it is.

But the real kicker is that what Mr. Castro told him was he was now getting ready for a 50 kilo deal. And he explained that he sells cocaine with Changa, with Jose Claudio.

So now all of Ramon's suspicions in his mind have been confirmed.

He speaks to his sister about it, Mr. Bergrin's girlfriend. Now, she told you she was pretty interested in what was going on that day also, right? She told you she was working at the restaurant. Some time in September, early October 2002 when Hakeem Curry -- who she had met with Mr. Bergrin -- walked into the restaurant, first time she's ever seen him there.

She speaks to him and he says either he's waiting for either Paully or PD, she said. Then a few minutes later, who walks in? Mr. Bergrin. Walks straight to Hakeem Curry. Not to his girlfriend, not to get food, not to get a soda; right to Hakeem Curry.

He's leaning in, you know, talking low she says.

I asked: Did you try to hear what they were saying?

She said, yes.

I asked, why couldn't you?

Leaning, you know, you know, talking low.

Then Changa comes in, the family friend who we know is involved in drug-trafficking through her testimony, through Ramon Jimenez's testimony. He goes over to the group, again,

not to get a soda, not to say hi to Ms. Jauregui, right to the group. They start to talk.

And she was asked: Could you hear what they were saying?

No.

Did you try?

Yeah, I tried.

Why couldn't you?

They were talking low.

Now, members of the Jury, we're going to show pictures in a minute, but you remember how small that restaurant was. This is not, you know, a room like this. From the counter to those booths is a matter of a few feet and someone who was trying to hear couldn't.

Now, why? Why talking low? Why leaning into each other?

After the three, Mr. Curry, Mr. Bergrin and Changa, Mr. Claudio talk, what happens next?

Mr. Bergrin's girlfriend tells you that Mr. Bergrin walks away from the group with Mr. Curry, more whispering, more head leaning in. Another time Yolanda tries to hear what they're saying but can't. Why? Why the whispering?

Then after their brief conversation, what happens? They call Changa over.

Now again, in this little area of the restaurant

towards the back the conversation takes place. The photograph that's up right now, what you can see is the booths, the distance between the booths and the counter --

Could we show the next one?

That's the area where they went back to talk.

Remember they circled the area with the Smart board?

The three of them talk in that area amongst themselves. Ms. Jauregui told you, I was trying to hear what was going on. I was curious. I wanted to know. They were leaning in. And I'm going to quote her: (Reading) They were talking by themselves, whispering to each other, you couldn't hear them.

Why? Why is what Yolanda Jauregui said to you important?

Not just because it corroborates what Ramon Jimenez thought that went on prior to him showing up, not just because you now have firsthand evidence that this drug meeting actually took place, not just what Ramon Jimenez thought in his mind, but you heard Ms. Jauregui say on a number of occasions she tried to hear but she couldn't hear. If this was about a legitimate meeting, if this was about real estate, some manufacturing, some closing, house closing, why the whispering?

The obvious answer, members of the Jury, is it's not about legitimate business. This was about drugs. The same reason that anybody whispers; they whisper because they don't

want anybody else to hear what they're saying. They don't want his girlfriend three feet away, four feet away, whatever it is away from him to hear, they don't want to hear any other patrons. You whisper so that no one else will hear what you're saying, period.

Now, what you also heard from Ms. Jauregui is that her curiosity was pretty high at this point as to what was going on. She had heard from her brother, she had seen a guy that she knows is a family friend who is involved in drug-trafficking meet with the guy who Mr. Bergrin told her was the biggest drug dealer in Newark, and her boyfriend, all meeting together whispering.

So she asked him, she hounded him. What was going on? What was going on?

Mr. Bergrin said, nothing, nothing. It was a legitimate, you know, conversation. Don't bother me about it, words to that effect. Right?

Then there's a series of back-and-forths, a number of conversations, and then finally she directly confronts him: Was it about drugs?

And what does Mr. Bergrin say?

He says to his girlfriend, all he did was introduce Hakeem to Changa and he don't know what had happened. Whatever happened, he doesn't know. He didn't have nothing to do with it. He doesn't have nothing to do with them or no drug-dealing

with any drug transaction. He's not involved with drugs.

So, Mr. Bergrin's explanation is that he introduced a big time drug supplier to a big time drug dealer but he doesn't know what's going on between them.

I mean, you have to picture this scene. You have his girlfriend hounding him for information, and when she finally confronts him he doesn't say it's not about drugs, he just says: I have nothing to do with it. And we already know that he does have stuff to do with them, both Mr. Curry and Changa during this period of time. So not only is the logic strained by the idea that he would put these two men together not knowing what's going on, but we know it's just a lie that he had nothing to do with them.

We've already gone over the relationship between Mr. Bergrin and Hakeem Curry, so let's talk about the connections to Jose Claudio, to Changa.

You'll see a telephone chart. Again, it's number 2525. It's a number of pages. That from October 6th, 2003 through July 16th, 2004, maybe a little under ten months or so, a phone used by Mr. Bergrin connected with a phone used by Jose Claudio, Changa in that ten-month period 87 times. The guys he said: I don't have anything to do with them, I don't know what they do.

And again, so it's clear, I know the dates, it gets a little confusing. This time period is a full year after that

meeting and prior -- or at least part or most of it is prior -- I guess about half is prior to Hakeem Curry being arrested.

Now, what else did Ms. Jauregui tell you? That she saw Curry at the restaurant after the meeting.

So now after never having seen him at the restaurant, he's now a regular. Over the period of the next, she said, approximately a year, she seems him there about ten times, and even goes up and talks to him about Changa on that one occasion that she told you. She's also asked about a time period, I guess it's about a year and a half after that meeting when Hakeem Curry gets arrested. You ever see Changa again after that, your family friend, the guy you've known since you were a little girl? No.

Not at the restaurant, not anywhere.

Why?

Because the link below him, Changa, Paul Bergrin, Curry; Curry's in jail. And when he gets locked up she doesn't see Changa anymore, not around the restaurant, not anywhere.

But who does see him?

Ramon sees him. And what did he tell you?

He said that Changa when he saw him already knew that Hakeem Curry had been arrested from some source, and that Changa was concerned. And I'm going to quote again: He said: What do I think about Hakeem Curry?

This is Changa asking Ramon.

And is he -- meaning Curry -- going to start telling on people now? Or what's -- I mean, do you think they're going to start -- or do you think they're going to start rounding people, you know, arresting people?

The same concern that every person at every point in the drug chain has. Are they going to tell when they get picked up and how does that affect me?

And in that chain, members of the Jury, if Changa is concerned, remember who's between Changa and Hakeem Curry: Mr. Bergrin.

Now, just to sort of finish with that phone chart, that 2525 that you have, in the period of time two months, give or take, two months, 10 days, from 10 -- October 6th, 2003 through December 16th, 2003 -- so two months and 10 days -- between Changa and Paul Bergrin, 32 calls; between Curry and Paul Bergrin, 116 calls.

So for the guy who was never in the firm before Ramon sees him and doesn't have a file, 32 calls. For the guy who he does not represent on a criminal case anymore, 116 calls.

And you'll also see calls between Changa and Curry himself on that list. That's all after the meeting. Again, it's just a two-month, or two-month and ten-day period of time.

Now, the period of time after Hakeem Curry's arrest, about four and a half months, there's 22 connections between Paul Bergrin and Changa. Again, after the arrest, after the

meeting. This is important, members of the Jury, the timing of these phone calls and the number of connections, because again, it's during a time period when the two individuals next in the chain would be worried about what Hakeem Curry is going to do, the guy that everybody thought was soft while he's sitting in Monmouth County Jail.

And again, during that time while he's sitting in Monmouth County Jail, during the period of time when these phone calls are being made, Paul Bergrin visits Hakeem Curry four of his ten visits: May 4th, 2004; May 17th; June 7th; and July 6th, all, again, well after he stopped representing him on criminal cases.

Now, let's talk about what Lachoy Walker told you. He was the guy who worked very closely with Hakeem Curry, storing and distributing cocaine, dealing with Mr. Curry's money. He tells you that he personally gave Hakeem Curry's cocaine to William Baskerville, Rakeem Baskerville and Al Hamid Baskerville. He also told you that Hakeem Curry got a connect, a drug connection from Mr. Bergrin.

Now, what Mr. Walker tells you is important for how it corroborates what Ramon Jimenez told you for a couple of reasons. All right? One, the volume, the numbers, the 50, the 25, very specific. But more importantly and even more specific, that conversation that Mr. Walker told you about when Curry turns to him and says: You know who I got this connect

from?

Walker says, no.

He says, Paul, meaning Mr. Bergrin.

And what is Lachoy Walker's response?

Paul Paul?

Yeah. Paul Paul.

So it's clear, members of the Jury, when you're thinking about Mr. Walker's testimony, remember, he was shown photographs. He does not know Ramon Jimenez, he does not know Yolanda Jauregui. They never met, they never talked, they never had any discussions. And what he told you largely follows what Yolanda also told you about the shipments, how often Curry is there, right? That all of a sudden he became a regular. Every couple of weeks the waitresses were looking for him for the tips.

Mr. Walker tells you he got these shipments approximately every 10 days. He also told you, when he got involved in this section, this part -- because remember he had sort of multiple points where he was involved in the Curry organization -- when these kilos starting rolling in, the 25, the 50, the up to a hundred is approximately the same time that Ramon Jimenez and Yolanda Jauregui tell you that that meeting took place; the fall, late, 2002, at Mr. Bergrin's restaurant.

And keep in mind with Mr. Walker, this is an individual who has got no pending charges against him, he's not

looking to earn any benefit, not from the Government, not from the court, not from anyone. He's already got whatever benefit he was going to get for testifying at a prior trial. He's out of jail, moved on with his life, and I submit to you, just testified truthfully to the best of his memory what he could.

Now, I assume you figured out why that original meeting at Mr. Bergrin's restaurant is so important; because that is what puts Paul Bergrin in the drug-trafficking chain. That's what causes Mr. Bergrin to have a personal interest in William Baskerville's case, not just his interest as house counsel, not just his interest as William Baskerville's lawyer, but his own stake, his own neck.

Now, so it's clear, members of the Jury, you've heard limited evidence with respect to Mr. Bergrin's drug-trafficking involvement. There are no drug charges pending against Mr. Bergrin, there's nothing -- no drug charges before you. The drug evidence is not intended to prove a drug conspiracy against Mr. Bergrin beyond a reasonable doubt. As the Judge has told you and we'll tell you again, this evidence is for a very limited purpose; it's only presented to you as evidence of Mr. Bergrin's motive, his motive to kill Kemo. Nothing more, nothing less.

So with that having been said, let's move from Lachoy Walker who, like I said, is not looking for any benefit, let's talk about witness credibility.

Now, as you know, members of the Jury, as we all know, no one has a perfect memory. If someone came in here and they claimed they had a perfect memory, I mean, I submit to you, that would probably be indicative of someone would was lying to you. No one remembers everything. We all forget details about certain things. But when it comes to important events, we remember them. When it comes to important events, important conversations, we remember them. Maybe not word-for-word literally, but certainly the substance. And I'm certain that you all can come up with your own examples of things you remember because for whatever reason that conversation, that meeting, that discussion had impact on you. And you may not be able to come back with it word-for-word but you'd be very certain about the substance of those conversations and of those meetings that meant something to you, that were important. We all know that's how the human mind works.

And with respect to the credibility of the witnesses, when they tell you "I don't remember that"; or "I made a mistake," the only thing I'd ask you to do is think about the difference between a mistake and a lie. If you were going back and you were being asked about one of those sort of events that I just said, something that happened a couple of years ago that was very important to you and, do you remember?

And you said, you know, I was on the left side, she was on the right side. And then later on, you said, oh, no,

no, no, she was on the right side, I was on the left side. Things like that and you were quizzed about it, would that be a mistake or a lie?

I mean, they're very different. A mistake, so it's clear, is exactly that, just an honest misrecollection: I thought it was that, but I guess it could have been left/right, right/left. It could have been I saw her first, then she sees me, or vice-versa.

A lie is very different. A lie is intentionally knowing; knowing that what happened was this: She was the one who was there and saying, no, no, no, she wasn't there. Knowing it and saying something different is a lie.

And I submit to you, members of the Jury, besides the very significant lie that Anthony Young told you about Jamal McNeil being the shooter, what you have heard are not lies. You've heard a series of mistakes that randomly came up during the course of various witness' testimony; nothing more, nothing less.

Now, in his opening Mr. Bergrin asked you to use your common sense. And the Government agrees, you should when doing your analysis in this case. The Judge will tell you, when you're thinking about the testimony and the evidence you heard, to use your common sense. He will also tell you, the Court will also tell you that when judging the witnesses and the evidence there are various factors you take into account, and

he'll explain them to you. But, members of the Jury, it's ultimately not really any different from what you do in everyday life. There are no magic tricks. People provide you with information every day of your life. You ask questions, they give you answers. You figure out the source. You believe what they say. Does it make sense? That certain, I asked him for directions. He said go up the street, okay. Seemed like he knew what he was doing. He was a local shop merchant. He would have that information. So you would consider the source. Would that person possibly know the answer to my question?

It's the same analysis you do each and every day. Would that person, like Anthony Young, an insider, have that information? And then you think to yourself, when you hear the information, does it make sense? Is it logical?

And as long as we're in this area, I want to talk to you about testifying for a benefit. There's many, many questions to a number of witnesses who are hoping to get sentences reduced. Remember, there's a number of Government witnesses that have pending sentences. And what Mr. Bergrin tried to imply through his various cross-examination questions was that the Government solely determines who told the truth and who didn't tell the truth, that's it's up to us, and therefore that the Government determines whether or not they're going to get any time off. Well, whether they would get any benefit without any independent backstop.

Now, all the witnesses, all of them told you a very different story. It's up to the Government to write a letter to the Judge if we believe a witness told the truth.

That's correct. But there is a backstop to the process. Ultimately it's up to the judge whether the witness gets any benefit at all, period. If the judge does not believe the witness was telling the truth, the judge will not give any benefit. No reduction. It does not matter what the letter is that the Government writes.

I submit to you, members of the Jury, it is clearly in the witness' interest to tell the truth to the best of their ability.

What did Anthony Young tell you?

He's already been through the process once. Right? So he understands it. He got his sentencing reduction before a different judge, not Judge Martini, when he testified in the William Baskerville case. He knows how the system works. And we're not hiding the fact certainly that he's hoping to get a second reduction.

What he said to you was, since this time, he is not testifying before his sentencing judge like last time. What he hoped for was that the Government would write a letter and include the transcript of his testimony so it can be sent to that judge, his sentencing judge, so that that judge might decide whether to reduce his sentence, the same way Judge

Martini will have the opportunity to make a decision whether or not to make similar reduction -- excuse me -- to make a decision whether or not to reduce sentences of people who testified before him who are sentenced in his court.

Now, this is important again because it's in the witness' own interest to tell the truth, not simply what I or some other member of law enforcement would like them to say. And I'm going to give you specific examples now.

What did they say?

Anthony Young was asked by Mr. Bergrin: (Reading) The judge does not decide if you're truthful or not. Isn't that a fact, Mr. Young?

And his answer: Well, I testified in front of my judge -- referring to the prior testimony -- so I thought it was up to him to know if I was telling the truth or not.

Lachoy Walker told Mr. Bergrin during his cross-examination, quote: The judge determines you tell the truth.

Yolanda Jauregui was asked on cross: (Reading) So they -- meaning the Government -- determine if you're telling the truth. Correct?

And she answered: I always thought it was up to the judge.

Ramon Jimenez was asked about it. And what did he say? Not only up to them, the Government. I mean, from my

understanding it's also up to the judge.

But finally, beyond everything else, besides Anthony Young who's actually been through the process, besides what these witnesses told Mr. Bergrin their understanding of it was during his cross-examination, Tom Moran, a lawyer, a guy that actually knows the procedures explained it. He was questioned by Mr. Bergrin about what's in the sole discretion of the Government. And what did he tell you? I'm going to quote: (Reading) No, actually I have two hurdles to jump. I have to be truthful and the U.S. Attorney's Office has to believe that I'm being honest and truthful, and so does Judge Martini. It's just not solely based on the U.S. Attorney's Office.

So, listen, at the bottom line, the Government certainly has to decide whether or not to write a letter, that's indisputable and that's what gets the system going. But the letter does a witness no good, there will be no reduction if the judge does not believe they told the truth. Further, from this I hope what you can take away from it more importantly, is it's clear that the witnesses know, the witnesses know who they have to impress, and it's not me, it's not Mr. Gay, it's not the agents; it's the Court.

Now, what Mr. Moran also told you about was he gave you a little bit of an insight into the various meetings that witnesses had with the Government. There were a lot of questions about: When did you say this? How many meetings,

this and that.

What he explained to you first is, before you do anything, you have to talk about your own criminal conduct, you have to come clean. That's step one before you get to say anything about this person or that person or the other person. After you've done that, as Agent Brokos told you, the Government goes out and tries to vet this information, tries to see if there are some things that could back up that information. And then and only then are you allowed to start talking and pointing fingers at other people.

And just so I'm clear, I'm talking about the proffer sessions, those meetings.

With Anthony Young, obviously calling on the phone and saying he had information about this and this is different because we're not talking about an individual who at least at the time was charged with something. What I'm talking about are charged individuals who come in and say we want to cooperate. So I don't want you to have the impression I'm talking out of two sides of my mouth.

Now, finally, I want to talk a little bit about the corroboration. I know that's a word you've heard me say and I certainly will mention it a number of times after this. Corroboration could have a number of different sources. It's basically what backs up some of the evidence. One witness tells you this; what backs that up?

Sometimes it's one witness saying something that another witness said; or two pieces, two different witnesses saying things that piece together; sometimes it comes from records, be it the phone records, some sort of physical evidence, jail visitation records; and sometimes corroboration can come from corroborating, say, one part of someone's testimony. And if you know that they absolutely told the truth about this, then it lends some credibility to what else they told you. If we know they're telling the truth about that, what do you think about the rest of the testimony? And again, just like you would do in everyday life. If you know somebody absolutely told you the truth about one thing, how does that affect their credibility with the other things they tell you?

So let's talk about a specific example. Ramon Jimenez told you about a tracking device. All right? A tracking device that was found by Hakeem Curry under his car.

Now, why is this tracking device important, members of the Jury? Beyond just that it corroborates Ramon Jimenez's testimony, it also establishes the relationship that Paul Bergrin had with Hakeem Curry, the position as house counsel for the group; an ongoing advisory relationship for Hakeem Curry and the drug organization evading law enforcement. The fact that Hakeem Curry was comfortable enough to walk into Paul Bergrin's office with a tracking device to show him speaks volumes of their relationship.

But just going back to corroboration for a moment. What did he tell you?

He said one night after hours I'm working at the firm. Hakeem Curry comes in with this thing that looked like a bomb. All right? He went straight into Paul's office. Curry said someone put it on his car. Paul said it's the feds, get it out of my office.

Ramon believed it was a tracking device.

Now, Ramon doesn't know what the DEA did or didn't do. Ramon does not know what conversations have been recorded or not. He again, I submit to you, just testified about that incident to the best of his memory. I'm sorry, and he also said, this time -- so we're clear -- this event occurred after the meeting that he heard Mr. Bergrin tell Mr. Curry, "No witness, there would be no case," and prior, obviously, to Hakeem Curry being arrested days prior.

But what do we know actually happened? Ramon said that to you without any records and without any information. What actually happened?

George Snowden took the stand, Detective Snowden, and he told you what was going on in law enforcement. They were having a hard time surveilling Mr. Curry, so they did, they put on a tracking device. It was on for a short period of time until it didn't send a signal anymore, February 23rd, '04 to February 25th '04.

So we know days before Hakeem Curry is arrested, that did happen. What Ramon told you is true. We also have a recording which takes place at around 6:00 p.m., after hours, just when Ramon told you it happened. A call from Hakeem Curry to his wife right around the time when a tracker stops transmitting. Now, members of the Jury, I remind you, that's the call that you hear Mr. Bergrin in the background say "real bad" while Hakeem Curry is on the phone with his wife.

Then putting aside what law enforcement told you, what did Lachoy Walker tell you?

Again, mimicking and matching up with law enforcement, the objective evidence, the tracker existing, the actual phone call. What Mr. Walker told you was that Curry told him that he went to Paul and Paul told Curry what the tracker was. It was a tracker from law enforcement. Mr. Bergrin told him to dump your phone. Don't talk on the phone. Change phones. Just be safe.

That's what Mr. Walker told you. Again, he doesn't know what DEA has. He doesn't have a copy of that recording, of that phone call.

And to complete the loop, what did George Snowden testify about Mr. Curry's use of that phone? The last call he remembers was the call that you heard recorded. That phone was dumped, members of the Jury. No more calls.

Hakeem Curry did what his house counsel advised him to

do: Be safe, get rid of the phone.

Now, beyond that corroboration, and again, for certainly Ramon Jimenez and, I submit to you, also Lachoy Walker, because he told you largely the same thing that law enforcement told you and the objective evidence tells you, let's just talk about what Yolanda Jauregui and Ramon Jimenez told you. They told you just what they saw, nothing more.

Yolanda Jauregui said, I couldn't hear what they were saying. Ramon Jimenez said, I got to the meeting late. I didn't actually see them together, I just saw the aftermath.

If they were lying, if they were trying, trying to put the finger on Paul Bergrin, would they have said: Yeah, I'm sorry, I didn't hear what they said? Yeah, I didn't actually see the meeting, I'm just sort of putting pieces together from this other stuff?

Why would they lie and then say, no -- you know, why wouldn't Yolanda Jauregui say: I heard them mention cocaine sort of? Somebody said, done deal; or Ramon say: I saw all three of them together? Why?

Because it's not the truth. They didn't see those things so they can't testify to those things. You don't get to just make stuff up to make it better.

And when you're doing the analysis of what's a mistake and what's a lie, I'd like you to keep that in the back of your mind. Again, when people lie to you they have a reason. All

right? If people don't have a reason to lie they would generally tell you the truth. If you walk down the hallway right now and you said to somebody, hey, what time is it, it's likely if they had a watch they would look at their watch and they would tell you, unless that person had a reason to lie to you. And if they have a reason to lie, why would they stop short if they chose to lie?

This is where, again, your common sense comes in. The witnesses, all of them, I submit to you, told you just what they saw and they heard; nothing more and nothing less. They didn't try to make stuff up, they didn't try to add facts, what they couldn't possibly have seen, things that might make Mr. Bergrin look more guilty. They didn't lie. They didn't stop short. They didn't lie and then stop short of telling things that were really damning.

So now let's move on to what Ramon Jimenez tells you about the no-witness-there-would-be-no-case meeting.

THE COURT: Mr. Minish, did you want to take a break at this point?

MR. MINISH: That's fine, Judge. Sure.

THE COURT: All right. We'll take just a very short 15-minute break, please, ladies and gentlemen.

THE DEPUTY CLERK: Please rise for the Jury.

(The Jury leaves the courtroom.)

THE COURT: Be seated, everyone, please.

How much longer --

MR. MINISH: About a third of the way through. I'm almost halfway through.

THE COURT: Okay. Then it's a good thing we took a break. Thanks.

We'll be back in 15 minutes. Twenty after, please.

(A recess is taken.)

(Proceedings resume - Jury not present.)

THE COURT: All right. We're going to bring out the jury.

THE DEPUTY CLERK: Please rise for the Jury.

(Jury present.)

THE COURT: All right, everyone, please be seated.

Mr. Minish, resume, please.

MR. MINISH: Thank you, Judge.

Excuse me. When we broke we were talking about Mr. Jimenez, Ramon Jimenez and the other things he talked to you about. And the area I want to discuss right now is the meeting that he observed, the conversation I guess that he observed between Mr. Bergrin and Hakeem Curry when they were discussing no witness, there would be no case.

Let's talk about what Ramon Jimenez said. He said he's in Mr. Bergrin's private office organizing files, he's on the phone with his wife. Mr. Curry comes in and sits down and he asks, what's going on in his cousin's case.

And again, both from your knowledge of the fact that William Baskerville is Hakeem Curry's cousin as well as the time frame of this, we know the cousin he's talking about is William.

Mr. Jimenez finishes up the phone conversation. What he says he hears is, and I'm quoting: If there had been no witness there would have been no case.

Putting sort of the syntax of that aside, what's clearly being discussed is something about a witness in Mr. Curry's cousin's case not being around.

And what is Mr. Curry's reaction? Ramon told you that he turned and stared as him. Did not seem all that happy about Mr. Bergrin saying that in front of Ramon Jimenez.

And what does Mr. Bergrin say?

It's not: Why? What's the worry? We're not talking about anything bad?

It's: Oh, don't worry. He's okay.

And what does in his context "he's okay" -- excuse me -- "He's all right" mean?

He's not someone that's going to go to law enforcement with this information. You can trust him.

Now, why is this important, members of the Jury?

Again, this conversation, one more reason why you know Mr. Bergrin's involved in the murder of Kemo McCray.

And to sort of finish with Mr. Jimenez, let's talk

about the things which corroborate what he's told you. Okay?

With respect to the drugs, he told you Curry is a big time drug dealer. We know that to be so from Mr. Walker, from Mr. Young, from Mr. Williams, George Snowden, all of them talking about the volume, the size of Mr. Curry's organization.

That Paul Bergrin knows Hakeem Curry is a drug dealer. His girlfriend told you, that's how he explained who he was, he's a big time drug dealer, he controls a section of Newark. Abdul Williams told you that he had discussions with Mr. Bergrin himself about Hakeem Curry and his drug-trafficking.

Mr. Jimenez told you, Changa is a drug supplier. Something also that his sister, Yolanda Jauregui, says the same thing: I've known him since I was a little girl. The whole family, he's a family friend. He's been in drugs since I was little girl.

He told you about the meeting that took place between Curry, Mr. Bergrin and Changa at Mr. Bergrin's restaurant. Yolanda, again, Jauregui, confirms the same thing, the speaking in whispers, if you remember.

Then the meeting about the drugs also was confirmed by the fact that Lachoy Walker got on the stand and told you that Curry started around this time to get huge shipments of cocaine, later 2003. Kilograms of cocaine from a connect that Paul gave him.

And he told you about what he figured out the

connection was between Changa, Mr. Bergrin and Hakeem Curry. And you have the phone records now to show exactly that.

The tracking device. He's obviously corroborated in many ways about exactly that. We've already discussed it.

And now with respect to the meeting, the last thing we just talked about, between -- that he observed -- excuse me -- between Mr. Curry and Mr. Bergrin, we know that Paul Bergrin was, in fact, representing William Baskerville at the time. So he was the lawyer, in fact, that Hakeem Curry would go to if he wanted information about his cousin's case. He told you about a couple of files being in the office; the Baskerville file and a Curry file. Again, we know from that stipulation that Mr. Bergrin represented Mr. Curry up to December 12th, 2002.

So do you think there was a Curry file there?

His terminology, although again, the syntax of it being a little bit different or the tense maybe being a little bit different, mimics what Anthony Young, a guy he does not know, he has not seen says: If they'd be no witness they'd be no case.

What does Anthony Young tell you? "No witness, no case." "No Kemo, no case."

And finally, just because again, like we discussed earlier, it's important that the source of information actually have the ability to give this information. You know, again you're not going to ask somebody who can't possibly know the

answer the question. All right? We know that Ramon Jimenez was, in fact, working at Mr. Bergrin's office during this time period. So he would have that access, he would have been in the office, he would have been in this area, and these are the things we know that corroborate Mr. Jimenez.

Now the next area I want to talk about is, I just want to briefly discuss the drug case that you heard testimony and evidence about that's against William Baskerville. Now, you heard extended testimony, recordings, videos. And obviously we are not here to prove the drug case against William Baskerville.

The reason why that evidence was presented to you, because it's important for you to take away a few things from the evidence that the Government had against William Baskerville. It was an incredibly strong case. It's important that it was an incredibly strong case -- the video, the audio, the witness, the surveillance, the drug-testing, the number of sets -- it's extremely important that it's an incredibly strong case, because in the beginning if they didn't think in the beginning, Mr. Bergrin and the rest of the gang, that William Baskerville was going to be convicted, if Mr. Bergrin didn't know right from the beginning that William Baskerville was going to be convicted and faced a boatload of time, there would be no reason to kill Kemo. And it was also important for you to understand in the context of this case that Mr. McCray, as

you heard, provided information that pled to arrests of quite a few other people.

Now, why is that important?

Well, it's not important in volume necessarily, but what is important is that you heard from Agent Brokos that they all pled guilty. And why that's important is it just sort of eliminates perhaps what might be a lingering thought in one of your minds that, oh, it could have been somebody else entirely; it could have been this guy he provided information about, or this guy he provided information about.

So what he heard is, he provided information about a bunch of guys. Everybody pleads guilty. The only one who doesn't, who didn't, William Baskerville, represented by Mr. Bergrin.

So with that as a background, let's move to November 25th, 2003. This is the day you may remember that Mr. Baskerville actually gets arrested.

As Anthony Young told you, he knows Will got arrested and he knows he went to Jamal Baskerville's house but he doesn't remember the exact date until Mr. Bergrin told him the date on the stand. Now, not knowing the date in and of itself isn't important. But again, I submit to you, it lends credibility to all things Anthony Young said. If he was making stuff up, if somebody was feeding him the information, he would have known the date. In fact, it's public information, the day

he's arrested. But even as he sits here now, sits there then until Mr. Bergrin told him, he knew it was in -- I forgot how he described it exactly -- but late November.

He was not shown, members of the Jury -- and I hope this wasn't lost on you -- anything from the Government, despite repeated questions by Mr. Bergrin that seemed to imply the contrary. He was not shown phone records, police reports. No matter how many times he was questioned, he answered "no." Even, in fact, the Judge asked him at some point: Didn't you see this before?

He said: No, your Honor, I did not.

So with that in mind, recognize the limitations of anybody's memory to remember a specific day and an exact time about an event as opposed to the substance, what is important of an event.

So what does he tell you?

He finds out that William Baskerville is arrested. He goes Jamal's house, his brother, and he meets with the other guys. He finds out that the feds got William Baskerville, not the locals, and he explained to you why that's a problem. Because again, if a local police officer in Anthony Young's world arrests somebody, it usually stops there. They see drug activity, they make an arrest. They charge the guy and they move on to the next. Police officers are just charged with a different responsibility. They're to get back out in the

street. Right?

But when they heard it was the feds it had a different effect, a ripple effect for the gang. What they had learned, members of the Jury, the important part of this, is they had learned that the gang had been infiltrated up to the management level by the Federal Government, by the FBI, and they were desperate to find out the details. Who else was in the chain? Who else was going to get scooped up? Who else was the FBI looking for? That's what they were trying to figure out all morning.

And he said he talked, they looked for people, made phone calls, tried to find this guy, tried to find that guy, where is he, why isn't he arrested? All these worries, all these concerns.

They initially thought it was a person that Anthony Young told you named Ray-Ray. Right? Now you've also learned his name was Horatio Joines. Why did he tell you they were worried about that? Because he knew how the Federal Government operated. And Ray-Ray sells drugs with Will all the time, is what Anthony Young told you. So he's not arrested. There are one of two premise: Either he's cooperating, right, or the feds are coming back for him, too.

So they're desperate to speak to Ray-Ray.

They're also worried about a guy named T-Money -- not a name -- I guess known as "T-Money." They couldn't get him on

the phone. He's another associate of William Baskerville's in the drug-trafficking sense. They're worried he might have been arrested. If he's arrested, who else?

Now, as it turned out that Anthony Young told you, Rakeem Baskerville actually went to T-Money's house and found that he had just been sleeping through the whole morning, so everything was okay.

But what is important, members of the Jury, is what's going on in their heads at this time. This is an insight to exactly the concerns we discussed earlier this morning. One guy gets arrested by the Federal Government, we are worried about where that goes.

Now, with respect to Ray-Ray, remember what Agent Brokos told you. His information, the testimony he gave you about him selling drugs with William Baskerville was corroborated by the William Baskerville drug investigation itself. Kemo identified a guy in a vehicle during one of the buys as Ray. And what did law enforcement do? It took that information, they turned around, they tried to ID the guy. At some point they pull William Baskerville over in his vehicle. Sitting in the vehicle is Horatio Joines. He provides ID. They get a photograph, they show it to Kemo. Is that the guy? That's the guy. So now we know who Horatio Joines is and we know who Ray is that Kemo told us about.

Now, again, what's before you in and of itself is not

important, but it's just further corroboration of Anthony Young telling you what was going on that morning. These guys worked with William Baskerville, and we were worried about them, we were worried about what their status was, arrested or not, and we had to find out answers.

And it's important also, members of the Jury, I guess finally, that the gang thought that the person who did William Baskerville was someone other than Kemo McCray until Mr. Bergrin told them. Ray-Ray was out there denying it, but what did Anthony Young tell you? We were not sure that we were buying.

Now, what does Anthony Young tell you after that?

That same day, again although he didn't know the exact time, a call took place between Mr. Bergrin and Mr. Curry. Now the thing is, we knew the actual time, it was 2:26 p.m. and you'll see that in the phone chart. On November 25th, the day William Baskerville is arrested, there is a call from Mr. Bergrin to Mr. Curry. Now, this is after Mr. Bergrin has received a copy of the complaint.

Can you put that up, please.

Okay. That's the first page of the complaint. We're just going to hone in a little on the second page. All right.

Now, remember, what did Anthony Young, the guy without the phone records, the guy without the complaint in front of him tell you Mr. Bergrin said during that phone call?

Remember, he said, Hakeem Curry had the phone, he was getting information, he's repeating it, repeating it.

What did he tell you?

The dates of the sales, the amounts of the sales. He things it was about three or four. Let's take a look at that complaint. Not a lot of information on the complaint.

But what is on there in paragraphs one, two, three and four, four separate dates, four separate transactions, each of them having a weight of crack cocaine associated with them.

That's what Anthony Young told you that first conversation had. We know that Mr. Bergrin got the complaint, and we know that information was available, and we know that a phone call was made.

We also know from Agent Brokos that when she brought William Baskerville in this building, she said I believe, to the Marshals Service and she was there, she saw Mr. Bergrin have a conversation or meet with William Baskerville. Obviously, she doesn't know the substance of the conversation. But that is prior to now William Baskerville's first court appearance.

So let's talk about what happened during that court appearance. Because now at this point, so we're clear, Mr. Bergrin has made one phone call, has the complaint in hand, has met with William Baskerville and is on his way to his first court appearance.

Now, during that court appearance, what is learned?

The strength of the Government's case. There's audios and videos. The penalties he's facing: Up to 40 years, and that the Government is seeking no bail.

So the first thing I'd like to do is direct your attention to the first clip.

Please.

Obviously, you can tell from the transcript of that hearing, Mr. Gay made an appearance for the Government.

(Reading) Yes, your Honor. The Defendant is charged with knowingly and intentionally distributing and possessing with intent to distribute more than five grams of a mixture of substance contained cocaine base in violation of Title 21 United States Code, Section 841. The maximum penalty for this charge is 40 years, and $2 million.

Okay. What's the Government's position on bail in this case?

The Government requests, your Honor, the Government requests detention in this matter both on the flight risk and the danger to the community. As your Honor can see from the complaint, this is an extremely strong case against this defendant. He's facing a five-year minimum based on the charges. And, however, I would note, your Honor, that by my calculation he is a career offender, which would place him at a Level 37 for this charge given the nature of the case, also the

fact that he's failed to appear when ordered to on prior cases.

Now, the rest of it is really -- skipping down to:

The Government feels that detention is appropriate in this case.

Now, so what is learned by Mr. Bergrin in this case, now this hearing?

We know he's facing a lot of time; career offender; Government is seeking to have him detained, meaning no bail.

Let's skip to what Anthony Young tells you.

Anthony Young tells you there is a second phone call. Again, he doesn't know the exact time but it was later in the day. And again, we know the time, and you'll have it in the phone records. It was either 3:59 or 4 p.m. exactly, depending on which record you review.

And as Anthony Young told you, he gave the name of the witness at that phone call. Again, remember, at this point Mr. Bergrin has met with William Baskerville, complaint in hand. And as you saw from the complaint, there is no mention of Kemo. There is no mention of DeShawn or Mr. McCray. It says, "cooperating witness." The only person at this point who could have said it was Kemo, who had both access to a complaint and had the information, knew again, considering the source, who had the ability to provide this information is William Baskerville. And just prior to the court appearance, just prior to that phone call, who met with William Baskerville,

complaint in hand?

Mr. Bergrin.

So again, matching up what you heard there, what does Anthony Young tell you?

He mentions he's facing a lot of time, he's a career offender, doesn't want to get bail -- or the Government doesn't want to give him bail, and that the cooperating witness' name is Kemo.

Anthony Young told you that from the stand. Now you have the line of how the information was received by Mr. Bergrin.

Now, beyond that -- I'm sorry -- could you put the chart up.

All right. So the full day goes like this. All right? November 25th, the day he's arrested. Paul Bergrin receives a copy of Baskerville's complaint, that's William Baskerville; the first call from Paul Bergrin using his office phone to Hakeem Curry, 2:26; Baskerville's first court appearance; second call from Paul Bergrin using his cell phone this time to Hakeem Curry, 3:59, 4 o'clock. In the middle there is his meeting with William Baskerville.

But honestly, you don't even have to go through the trouble of putting the pieces together, one, two, three, four Anthony Young told you. Mr. Bergrin himself told you, or told the reporters -- excuse me -- that he did exactly what Anthony

Young said he did. He told you that he gave Hakeem Curry, or the relatives or whatever the quote was, of William Baskerville the name of the cooperating witness, period. You will have -- or you will have heard that testimony.

And like Thomas Moran told you, when Paul Bergrin passed the name of the witness, he passed it along to William Baskerville's "people," not relatives. And Mr. Moran explained to you what the difference was in Paul Bergrin's world. Relatives: Cousins, aunts, uncles, sisters, brother. "People" means criminal associates. There's a difference. And the fact that Hakeem Curry was also a relative or Rakeem Baskerville, was also a relative is of no consequence.

Members of the Jury, so it's clear, at this point in the case or this point in the presentation, if you believe that Paul Bergrin passed this name along to William Baskerville's drug-trafficking associates knowing what would happen to Kemo, he is guilty of both charges. But, we have significantly more evidence of what Mr. Bergrin did and his involvement in the conspiracy. So let's skip ahead to the meeting.

Anthony Young, again, said, I don't know the right date. He said four days, he said five days, he said it maybe even up to six, I don't know. But what he does know is there was a meeting. He knows that he and a number of the other Curry associates were, again, by Jamal Baskerville's home. He knows it was some amount of days after William Baskerville was

arrested. He knows it wasn't Thanksgiving weekend, but other than that he's not really sure.

What do we know?

Well, what we know is on December 4th, nine days after William Baskerville is arrested, there's a court appearance number two. We know on that day there are three phone calls between Mr. Bergrin and Mr. Curry: 3:45 in the afternoon; 4:47; and finally in the evening at 7:13.

Now, why is that important, members of the Jury?

Well, what it shows is that during the day, the next significant event in William Baskerville's case: Who is Mr. Bergrin calling? Mr. Curry, three times.

And we know that because we know the day of the detention hearing. We have a transcript that we can go through. During that appearance, again, let's discuss what Mr. Bergrin found out. He found out that Mr. Baskerville now faced more significant charges, higher charges, and therefore new penalties, harsher penalties, up to life in jail; 360 months minimum to life because of William Baskerville's record as a career offender for this case.

Now, that's important, members of the Jury -- well, let's go through -- excuse me -- let's go through the transcript, first.

Do you want to put that up, please.

All right. Again, I'm going to quote from the

transcript.

(Reading) Your Honor -- this is Mr. Gay speaking -- the Government's position is that detention is the only appropriate status for the Defendant in this case. I will note that since his appearance in front of Judge Falk we've indicted the Defendant. In addition, it's on actually a higher charge than what's contained in the Complaint. I have the copy of the Indictment for your Honor if you'd like to see it and I've provided to defense counsel, Mr. Bergrin, that is, a copy of the Indictment as well.

The Court says, that's very good.

And Mr. Gay goes on to say: And, your Honor, the Indictment charges the defendant with six counts of the sale of a controlled substance containing cocaine base, that weighing in excess of five grams; one count of conspiracy to distribute more than 50 grams of a controlled mixture containing cocaine base. On the second charge, your Honor, the defendant is facing a life sentence and a $4 million fine. In addition, if you look at the Defendant's criminal history, he is considered a career offender. He has a prior robbery conviction as well as other convictions.

And we'll skip down to: (Reading continues) And under the current charge, that would make him a Level 37, and he would be looking at a sentence between 360 months and life if convicted of the charge, the charges in the Indictment.

This is all laid out in court December 4th, 2003 -- Mr. Bergrin is the lawyer, Mr. Bergrin is present -- the same day these three calls go to Hakeem Curry.

So, now, what does Anthony Young tell you happened at that meeting?

He says he's facing a lot of time because he's a career offender. There are not going to be any **bed** mixed in the rest of the stuff we get to. (awaiting correcction)***

It's important, ladies and gentlemen, that this information was given at the time it was, not just for the motive but exactly what Anthony Young told you Paul Bergrin said to the gang at the meeting. These are the phrases that Anthony Young testifies to you about that Paul Bergrin told him at the meeting.

So before Mr. Bergrin gets there, what does he say happens?

He saw the gang sitting there, they're talking, they're going over different things. All they know at the time is that the feds are bad news, the feds are the feds, he says something like that. But as far as the amount of jail time, he knows you do 85 percent, but he's not really sure about the sentencing, doesn't really know the laws. Obviously, he as well as all of them, very familiar with the State system.

So he's not sure what's going to happen with Will. They know who the informant is, but at this point they're not

sure what to do about it.

Then Hakeem Curry shows up and he says, quote: My man is on his way. He let us know what's going on, and he be here in a little while.

Now, unless Hakeem Curry told Anthony Young that, knowing that Anthony Young did not have any phone records, probably was not receiving Hakeem Curry's phone bills or Paul Bergrin's phone bills, how else would he have known that Hakeem Curry spoke to Mr. Bergrin and that he was on his way?

Now remember, that last call, 7:13 p.m. When did Anthony Young tell you that meeting was? Some time in the evening, not sure, it was dark, things along that line.

Now, again, the phone records may not prove to a hundred percent certainty that the meeting took place, but what they do prove is that in the second important development in the William Baskerville case, Paul Bergrin calls Hakeem Curry.

So what happens?

Paul Bergrin eventually shows up, again not sure of the time, in a black Mercedes, Anthony Young tells you. Which when we go back to corroboration, if we could take a step to the side for a second, you'll have EZ Pass records in the back with you to review. You look at the vehicle that is registered to Mr. Bergrin. Mercedes, dark color. It's a little hard to tell from the photographs but it's clearly a dark color. It's corroborated what Anthony Young tells you by independent

records, the EZ Pass records. The EZ Pass account is in Paul Bergrin's name at his home address in Morganville. The transponder, the thing that you stick in the window or on the license plate, comes back to a license plate number NPA-22K, and that's the plate, you can't -- while the photo is a little hard to see the color, you can certainly see the license plate. And that photo or the earliest of the photos is January 20th, 2004.

Remember, William Baskerville arrested the end of 2003; these meetings, conversations the end of 2003.

And this is also all corroborated by what Detective Snowden told you. We surveilled the office, we saw Mr. Bergrin show up. He exited in a dark colored Mercedes at the end of 2004.

So he says Anthony Young says he showed up with a Mercedes. We have evidence that he was driving a Mercedes at the time.

What does Mr. Bergrin do when he shows up?

Shakes everybody's hands, then he gets down to business. He says, as was said during that hearing that we went through: Will is facing life for the little bit of drugs, just like was said during the meeting. The group was surprised to get life for such a small amount of crack. 100 something grams. Go back and add it up. That's what Anthony Young says Paul Bergrin told him.

It's much more than you'd face with the State charges Anthony Young told you. And he said that Paul Bergrin said Will Baskerville is facing this amount of time because of his record, because he is a career criminal.

What is in that transcript?

Career criminal. 360 to life.

And what did that mean to the group, Anthony Young told you?

It meant, and I'm going to quote: "Something going to have to happen to get William Baskerville out." He, meaning Paul Bergrin, was just saying Mr. Baskerville wasn't getting no bail.

Again, just like was said in the court appearance.

And I'm going to flip you to -- I think we skip -- if you could put up --

(Mr. Minish confers with Ms. Santos off the record.)

MR. MINISH: Now, you heard already that the Government was seeking detention. Right? But inadvertently -- apologize -- I skipped over what the judge's ruling was. Look at what the judge says: (Reading) He has now been indicted. The court is aware of the presumption that would, in fact, exist as a result of that indictment. As a result, detention will be ordered at this juncture.

So it's not just the Government seeking it, this is a done deal. The judge has made the order the same day, 12/4,

same court appearance.

So again Anthony Young tells you that Mr. Bergrin said, just like in the court appearance, Mr. Baskerville was not getting a bail.

Where else would he get this information from so specific, so accurate?

He said, Mr. Bergrin said, "You need not let him testify," meaning Kemo.

Can you put up the next clip.

And he was asked: (Reading) Now, did Mr. Baskerville -- excuse me -- Mr. Bergrin say anything specifically about Kemo or the witness?

He said, if Kemo testify against Will, Will will never see the streets again. He will be sent to prison for the rest of his life. And he said, we need not let Kemo testify against Will. And his words to us, which all five of us, "No Kemo, no case."

And what did you take that to mean, sir?

Get rid of Kemo.

Get rid of Kemo, how?

Kill him.

Then there's a short conversation between Mr. Curry and Mr. Bergrin, Anthony Young tells you they sort of step away and have a separate conversation. And as he left, he said -- if we could put that one up.

(Reading) Yes, he told us he see us later, see what he could do. And he said, remember what I said: No Kemo, no case. Don't let that kid testify against will. And that was it.

And truly, members of the Jury, that was it. He gave his hand signal. You know, he said he wasn't sure if it was this or this (gesturing), but he gave a hand signal as he made this statement and walked back to his black Mercedes.

But before he left, members of the Jury, he made a promise, he made a promise to the gang. I'm going to show you that clip.

(Reading) Had Mr. Bergrin told you anything that would happen if he didn't testify?

He said he get Will out if Kemo don't testify, that Will will come home.

So, members of the Jury, as we discussed in the beginning of my presentation to you, with that legal analysis, with the advice to murder the witness from Curry's confidant from his house counsel, the die was cast. That was it: Kemo was going to be killed.

So at this point we know Mr. Bergrin has passed along the name over the phone, he has done some legal analysis on the quality of William Baskerville's case, or the Government's case against William Baskerville, and he developed a strategy to win the case, not a legitimate strategy but a strategy.

He meets with the gang and he tells them the strategy. He advises them, counsels them, tells them: The only winning strategy is to kill Kemo.

And knowing that the gang wants Kemo out -- excuse me -- wants William Baskerville out of jail makes them that promise: You take care of your end, I'll take care of my end. You follow my advice, Will will get out.

And so it's clear again, members of the Jury, if you believe that Paul Bergrin said those things at that meeting, he is guilty of both charges before you.

Now, what happens after the meeting?

All right. The group discusses some stuff, they talk about how they're going to find Kemo, because now the die has been cast. As Anthony Young said, that was it.

And they explain to you, Anthony Young explains to you why they hadn't done it before, simply they didn't know William Baskerville was facing so much time. They, each of them had been in jail a number of times, Anthony Young especially. He said almost half of his life, right? In and out, in and out, a few years here, a few years there. But if it would have been like State time, Kemo would not have been killed.

That's important, members of the Jury, because it's the words out of Mr. Bergrin's mouth that seals Kemo's fate, that seals the deal that Kemo would be murdered.

Do you want to show that next clip.

Mr. Young was asked in the context of discussing what was going to happen and organizing the murder: (Reading) Why hadn't you done it before? Why hadn't you done that before Mr. Bergrin showed that you?

And what did Anthony Young tell you?

(Reading) Because we didn't know Will was facing that much time. If he was facing a little bit of time, three years, five years, we -- that plenty of time. You just go do it. But for somebody to try to take the rest of our life from our family, you know, there's consequences.

Now, putting aside whether people outside of this Curry world would think three years, five years is no big deal, remember the world you're in when you're listening to this testimony. Remember the world that Mr. Bergrin is in, remember the world that Mr. Bergrin is talking to, the people. Three, five years, you do your time, cost of doing business. 30 years, life? There's no other way to get out from under this case. If Kemo testifies, Will goes away for that much time, Paul can't do anything else? There are consequences.

Now, they made some decisions, Anthony Young told you, that day. All right? He said that Rakeem Baskerville will be the getaway driver because he was a good driver, that either he or Jamal McNeil would end up being the shooter depending on would was around, and that the shooter was definitely not going to be Hakeem Curry or Jamal Baskerville for whatever reasons,

they didn't get involved in shootings unless they had to apparently.

Now, before we leave this day I want to discuss one of the points of cross-examination that Mr. Bergrin went through with Agent Brokos. Now, this is important not just because it's inaccurate on the facts, but it's important, members of the Jury, for you to keep in mind, why. Why would Mr. Bergrin have gone to such lengths to try to make this point?

Remember, there are phone records that you will have in the jury room that there were three calls after the court appearance. We now know the date of the appearance, we know the date the phone records show. But Mr. Bergrin during his cross-examination of Shawn Brokos with phone records that he marked as Defendant's Exhibit Number 3, all right?

Can you put the clip up, please.

There's a series of photographs -- excuse me -- a series of phone calls. And he asked, he said: (Reading) There are no calls, he said, between Paul Bergrin and Hakeem Curry from November 26th to December 3rd, 2003.

Now, what was Agent Brokos's answer?

(Reading) I'm not sure. I -- I don't have all the phone records.

She wasn't sure but answered honestly, of course.

On the paper that Mr. Bergrin showed her that, in fact, there were no calls.

All right. So let's roll through the transcript.

This is Mr. Bergrin asking Agent Brokos:

(Reading) Are those phone records?

These are phone records, yes, she said.

From what appear to be your telephone phone, 10/14 to July 3rd.

From November 26th --

And Hakeem Curry's number appears on that too. Correct, ma'am?

If you just give me a minute. I'm reviewing it.

Yes, it does.

From November the 26th, 2003 'til December 1st, 2003, within that four or five, even six-day time frame, isn't it a fact that there's not one call between me and Mr. Curry on these phone records, on those phone records?

"ANSWER: From November?

"QUESTION: 26th.

"ANSWER: 26th, yes.

In 2003.

'til October 27th?

No, November --

I'm sorry.

November 26th to November 30th, even December 1st of 2000 --

And Agent Brokos apologizes, she said there's markings

on it.

I thought that's what you were directing me to.

Then we get down to line 6 where Mr. Bergrin says:

(Reading) I'm asking you a specific question.

Yes.

Are there any calls between me and Mr. Curry from November 26th until even up to December 3rd?

And what does the agent say?

There does not appear to be, no.

And that's approximately a nine-day period. Correct?

Yes.

Again, this is from your cell phone, this is not from your office line though.

Do you have any knowledge that my office was open on Thanksgiving weekend?

I do not.

You've reviewed the office phone calls, correct, or my phone numbers in my office and records. Correct?

Yes, I have.

Isn't it a fact that there are no calls from November 26th until returning to work in December?

And what does the Agent tell you?

(Reading) I can't answer that, again, without seeing the records. I just don't recall.

As you sit here now you don't recall any phone calls

between those two numbers?

All right.

You remember that?

On to the next one.

During that period of time?

Yes.

And again, answering honestly: I can't say whether there were or weren't without looking at the records.

Well, you guys will be able to look at the records. And, in fact, in front of you, when Mr. Bergrin said there were no calls between Mr. Curry and himself from November 26th to December 3rd, 2003, it just wasn't true, period. They weren't on that page that Mr. Bergrin showed, but there were phone calls. Because what Mr. Bergrin showed the agent only showed calls from Mr. Bergrin's cell phone to Mr. Curry's cell phone and to Mr. Changa -- or Changa's cell phone, not calls from Mr. Curry to Mr. Bergrin, and not calls from Mr. Bergrin's office to Mr. Curry.

So it turns out that the truth is, the full records of the exact same period of time that Mr. Bergrin asked the agent about repeatedly again and again and again, there were, in fact, calls, in fact, a number of calls from Curry to Paul Bergrin and one from Paul Bergrin to Mr. Curry. There was a call on 11/26 from Curry to Paul Bergrin's cell phone; on December 1st from Curry to Paul Bergrin's cell phone; on

December 1st from Paul Bergrin's office to Curry; and then as you can see, on December 2nd and again on December 2nd, and again on December 3rd, the exact period that he's asking the agent about, there are three more calls from Mr. Curry to Mr. Bergrin's cell phone. So remember those records only had the calls from Mr. Bergrin's cell phone.

Now, you may ask yourself, well, why, why would he do that?

Well, it's not a random date range that Mr. Bergrin was asking about. All right? This is the date range that goes between when William Baskerville is arrested until the day before that second court appearance. The 26th is the day after the arrest; December 3rd, the day before that hearing where William Baskerville found out, no bail. It wasn't a random period of time. Very specific with his question, and he even said: "I'm asking you a specific question."

I submit to you, members of the Jury, that these calls, and going into December 4th, were of concern to Mr. Bergrin, and the reason he went after this in cross-examination, albeit incorrectly, is because he knew these phone calls do exactly what I've submitted to you: They corroborate what Anthony Young told you; that on the day of the meeting was the day of the detention hearing, even if Anthony Young does not know the exact date and he thought it was four, five, or six days. It was nine days. It was the day that you

know the hearing took place. It was the day where William Baskerville and his attorney found out the information, facing life, 360 to life, no bail because you're a career offender. Three phone calls that day added to the other phone calls along the way.

Again, members of the Jury, what we take away from those phone records, we do not know what was said during those phone calls. The only ones we know about are the first two on the day he was arrested because Anthony Young was there. But we don't know, so it's clear, what was said on those days. But from the surrounding circumstances, the date of the detention hearing, the date of that last phone call at 7:13 p.m., the fact that when Mr. Young told you when that meeting took place and that Hakeem Curry had said, "My man is on his way," you do know. And you do know, even more importantly, that that meeting took place and that that information was passed along by Mr. Bergrin. Those demands were made, that counsel was given by Mr. Bergrin to the gang to kill Kemo.

Now, the search begins for Mr. McCray some time in December. Right? Anthony Young told you it was after the meeting. They try to run down a few leads. They think it's going to happen a couple of times where they're going to find him. But before we get into the details about the search, let's talk about the actions that Mr. Bergrin took on his own without the day to make this happen, to further this

conspiracy, to aid and abet the murder of Kemo DeShawn McCray.

Because during this search time he calls Albert Castro down to his office. Albert Castro shows up. Albert Castro, as you learned, was a big time drug dealer in his own right. No connection to Hakeem Curry, so presumably if he was involved in the murder of Kemo, law enforcement would not be able to put those pieces together. All right? Someone outside of the group.

He said he remembered because of something with his daughter that it was about the second week of December. They had a closed-door meeting in a private office, in Mr. Bergrin's private office. There's limited small talk. They get right to the point. Mr. Bergrin asks: Do you want to make $10,000 to put a hit on someone?

Mr. Castro asks him who?

He says, Kemo. Or, for something that had been done the either E.T. Hak or someone in E.T. Hak's group.

He certainly knows who E.T. Hak is, although he has no personal involvement with the crew. He's a big drug dealer, well-known although he said he never met him.

He told you: I've never killed anyone. I'm making 20, 25 grand a week selling drugs. I am not getting involved. I thought it was a joke. I said no.

There were no hard feelings, no further conversation. He leaves.

He said he could have made it happen if he wanted to but he had no interest.

He went about his business selling drugs, what he had been doing before, continued to do after -- oh, I'm sorry -- and receiving stolen property and selling it, all kind of bad things. And he eventually gets caught on State charges.

And who does he call to help him out of his jam?

Paul Bergrin.

Mr. Bergrin cut a deal for him that you've heard a lot of testimony about. At some point Mr. Castro was angry about this. He has a falling out with Paul Bergrin during his representation.

And what did he tell you? Because he didn't think Mr. Bergrin was working hard enough on his case, that he was stealing money from him, and for whatever it was that happened to his daughter with Mr. Bergrin.

He decides because he is angry to come and tell on Mr. Bergrin what he knows. He comes to the meeting at the U.S. Attorney's Office, the first meeting, and he doesn't say anything, he clams up, he gets cold feet. He said he was scared; scared of Mr. Bergrin and he decided not to say anything.

But then he comes back later and he tells the Government that Mr. Bergrin shopped the murder to him, and he later testifies at the grand jury.

He's fairly straightforward, fairly simple testimony.

Now let's talk about the cross-examination just briefly.

There wasn't much cross-examination about the meeting, when it took place, if it took place, when it took place. Most of the cross-examination was sort of over here, right off to the side, trying to make Mr. Castro look like a liar, that he lied in state court, and worse, that either myself or Agent Brokos had something to do with it.

Now even though Mr. Castro said repeatedly, neither myself nor Agent Brokos ever told him to lie, he was asked about it again and again and again and again. He said basically, I maintained, I didn't point the gun at the police officer. I didn't put it under the cop's vest.

Now, ultimately I hope that this issue was put to bed by Assistant Prosecutor Thomas Fennelly testifying when he told you that -- and I'm quoting -- well, the question was: (Reading) Now, when this plea was worked out, did anyone from the Federal Government contact you in any way, influence your plea bargain decisions for the plea that was offered to Mr. Castro?

No.

Now, Mr. Bergrin wanted to make this look like a big Government scheme. And there's many other things that Mr. Gay will get into his rebuttal so I will not be repetitive with you

with respect to this. But I hope it was clear from Mr. Fennelly's testimony that the Government -- meaning the Federal Government -- had nothing to do with this plea agreement. It was well in advance of before he even came to speak to the Federal Government.

Now, the one area I do want to talk about that Mr. Bergrin questioned again in an attempt to make Mr. Castro appear like a liar, he asked him questions about who represented him on a State case. Do you remember that?

He insisted -- Mr. Castro, that is -- that he did not remember Joe Ferrante representing him. He said, no, I hired him. He wanted me to drive around and pick out people with the police, then I think I never went back to him. That's how I remember it.

And Mr. Bergrin insisted, he showed him a document:

Doesn't this document say Joe Ferrante?

And he insisted -- well, Mr. Castro stuck to -- I was going to say "stuck to his guns" and that would be a poor choice of words -- stuck to his versions of events.

No. Paul, you represented me, not Joe Ferrante.

Mr. Bergrin insisted with those documents, remember that document?

Let's show the clip.

(Reading) All right. So the first one we got here is: Now, you said that I represented you for the first in 1997.

That was your testimony. Right?

Yes.

And that was a case involving possession with intent to distribute within a thousand feet of a school?

Yes. My home was --

And possession of a controlled dangerous substance?

Correct.

And receiving stolen property?

Correct.

And then we went through this:

And you're about as sure about that as about all your testimony in this case, right, that I represented you?

Yes, he said.

All right. Let's skip to the next clip.

Mr. Bergrin insisted: (Reading) And isn't it a fact that the lawyer that is listed is Joseph Ferrante, Jr.?

That's that document he was waiving around.

His answer: I didn't use Joseph I don't believe because he wanted me to ride out in an unmarked car and point out people, and I got rid of him.

So you're telling us that this is incorrect, this document?

I believe so.

Now, who -- who in this scenario so far -- well, we'll get to that -- but here's another question I want you to keep

in mind: Who was trying to be honest with you? All right? And when we get to the end you can answer it yourselves. Is it Mr. Castro or Mr. Bergrin?

Who is trying to pull the wool over your eyes? Who is trying to give you a false impression of what happened?

Can you put that up.

Then the final part. (Reading) Isn't it a fact that you used Joe Ferrante on your case and received a three-year sentence?

Again, Mr. Castro: I don't believe I used him. I gave him a retainer fee. I never went back to retain him as an attorney.

Mr. Bergrin: And I'm not listed anywhere on that case, isn't that a fact, in any of the court records anywhere?

What did Mr. Castro say? He was looking at that document, right? (Reading) I don't see it on there.

Well, funny thing, there are some documents that you will be able to see. They are Exhibits 690, 691 and 692. All right?

Let's go to 692.

As you can see, members of the Jury, or hopefully you can see if we zoom in a little on the top maybe, that is an Essex County Prosecutor's Office Request to Recommend Disposition. And you can see, '97, a bunch of drug counts and the RSP, receiving stolen property.

And if you scan down to the bottom, who's name is listed as the defense attorney?

Joseph Ferrante? No.

Let's skip to the next document.

Now, this one's a little hard to see on the screen, I will grant you, but you will have the -- I won't say the original -- the Essex County copy back with you. The Defendant's name: Albert Castro. This is an official -- the court plea form. Then on the bottom of page 3 and 4, next to the word "Defense Attorney," typed out you will see the signature of Paul Bergrin.

And finally, Exhibit 690. You'll have this, which is a State Adult Presentence Report. At the top you will see "Castro, Albert." '97 case. Right? The prosecutor's numbers. You'll be able to see those numbers at the top. You'll be able to match that number that's highlighted as well as the other number on the indictment with the other two documents. Prosecutor's Number 97001011 is their file number, as well as there's Indictment Number 97-04-1827 will be consistent in these three documents, as are the charges if you look down the bottom left: Drugs; drugs; drugs; receiving stolen property.

And at the bottom towards the right there's a box called "Attorney's Name." And whose name is in there?

Paul Bergrin.

Members of the Jury, I ask you to keep one thing in

mind when we're going through that. Why would Mr. Bergrin go to such lengths to try to make Albert Castro look like a liar?

I submit to you the answer is obvious. If what Mr. Castro said is true, he's guilty.

But more importantly, when you're weighing out credibility, in that little scenario -- you guys will have the jury transcripts back there, and you don't to have take my word for any of this -- you'll have the documents, you'll have access to transcripts if you request them and you can read through yourself. But the thought I want you to keep in mind as you're going through that section is: Who is trying to be straight with you and who's trying to pull the wool over your eyes?

Did Mr. Bergrin represent Albert Castro exactly how he testified to you in the exact case he testified to, despite Mr. Bergrin showing him what he said were official documents, despite the aggressive cross-examination? There is indisputable proof that Mr. Bergrin, not Joseph Ferrante, represented Mr. Castro on that case, period. I leave you to determine what the implications of that are.

Before we leave Mr. Castro, I want to talk about one more thing. Now, he said at some point that there was an issue of stolen money. Right? He accused Mr. Bergrin of stealing money and there were some questions back-and-forth.

We're not here to prove a stolen money case against

Mr. Bergrin, but again, there's some things that I'd like you to keep in mind when you go back there and you will have this stuff.

Can you put that up.

Now, that is a check during that period of time that was made payable, very clearly, to Albert Castro from the Essex County -- or excuse me -- the County of Essex, not to Paul Bergrin. He's listed below, "Care of Paul Bergrin," the address, because Mr. Castro was in jail, right? He said, this happened when I was in jail.

It's going to be a little hard to see on the screen but we'll zoom in as best we can.

Who deposited that check into whose account?

What does it say about halfway down?

It's a little hard to read, I know. You'll have it in the back with you. It is the Law Office of Paul Bergrin. Not Albert Castro, not signed by even a relative of Albert Castro.

So putting aside logistically why the bank would ever have allowed this to happen, the reality is, while Mr. Castro was in jail, a check was sent to Mr. Bergrin in Mr. Castro's name for $20,000. That check was not given to his wife, was not given to his daughter, was not signed by them in the back to say, oh, we're turning it over to Mr. Bergrin for fees. None of that. Stamp. Bergrin. Deposit.

You have a slip, you have the check and you will have

the account records that show further that it made it into Mr. Bergrin's account, and then some -- well, it's a little -- the date is a little tricky, but ultimately a $20,000 check is -- although it's postdated, is actually sent out from his firm for a personal matter, unrelated to anything to do with an Albert Castro, for $20,000.

So again, we're not here to prove a case against Mr. Bergrin stealing $20,000. This is offered to you only in response to what was an aggressive cross-examination of Mr. Castro.

Now again, Mr. Bergrin has every right to do an aggressive cross-examination in whatever tone or attitude or questions he wants to ask, and he made a significant attempt to make Albert Castro look like a liar. But at the end of the day, members of the Jury, what you know now is that those areas that he went after, Mr. Castro was being truthful with you. Mr. Castro may not be a great guy, but he wasn't up there lying to you, he was not the one trying to pull the wool over your eyes, he was not the one trying to fool you with records and documents.

What you're left with after hearing this is that Mr. Castro is a significant drug dealer. He's angry at Paul Bergrin. Therefore, he decides to do something about it. And what does he do? He comes to the Federal Government to tell us what Mr. Bergrin told him. That was his way of getting back.

Judge, I don't know when you want to stop.

THE COURT: If you have more to go, why don't you continue.

MR. MINISH: I have quite a bit. I didn't know if --

THE COURT: Keep going for a little while longer if you can, Mr. Minish.

MR. MINISH: Absolutely.

So, what I'm asking you to do is to go back there during your deliberations and ask yourself why; why did Mr. Bergrin go to such lengths to try to make Albert Castro look like a liar? And again, I submit to you the answer is obvious: Mr. Bergrin shopped a murder to someone not involved in the Curry chain, someone who if caught they would not be able to point the finger back, except just by word, not by association. Law enforcement would not look and say, oh, that's a Curry thing because it was this other guy. All right? He had no association. And most importantly, because if you believed what Mr. Castro said, Mr. Bergrin is guilty of both counts, period.

So let's move back now to what the Curry gang is doing while Mr. Bergrin was doing that.

They're out looking for Kemo. They're trying to find him. It's some time in December. We don't have an exact date but we know they waited a period of time, Anthony Young told us, and some time -- the period of time again we're talking

about is Kemo is ultimately killed on March 2nd, so from late December or middle of December through January and February.

Anthony Young tells you, we need to ask the right people the right questions. We can't just walk up and down the street looking for Kemo.

And you know that's logical. You ask people who were in the group, people you would trust. You've got to trust somebody.

So he goes over and speaks to this guy: Hey, have you seen the guy with the braids? If you seen him around here, if you know him, let us know.

Have you seen this guy -- I'm trying to think who the guys were. It was John-John and Kiki, all right, he said down in Bradley Court. Bradley Court is the big housing complex, where, by the way, as it turns out, you had heard from Agent Brokos Kemo was staying with his girlfriend for part of this period of time, right, when he wouldn't leave and he wasn't taking this seriously.

So Rakeem tells Anthony Young at some point prior to Christmas, he thinks that John-John has told him that Kemo is in Bradley Court, the guy with braids -- I'm sorry. First they say no, but then a couple days later they say they have the guy with braids. He's not sure what building.

So what do they do? They sit out there and they wait. They can't find him. But again it's important, he was staying

there, as Agent Brokos told you.

Then we have the tickets for the All-Star game. Anthony Young told you, some time in late December, early January he wants some money for the game.

Now, again, why $30,000 is not enough spending money for a weekend at a basketball game? Anthony Young told you, that's just not the way it is. He wanted some extra money. He wanted $7500.

So at some point when she's showing off his $10,000 Rolex to E.T. Hak, to Hakeem Curry, what does Curry do?

He says, listen, I'll give you the 7500 now but that means you got to kill him, or you got to give me the money back if someone else does it. All right?

They go back-and-forth. He says, I'm also collecting for the All-Star game. So Anthony Young takes 7500, gives him $3500 back. He walks away with the $4,000 and the promise of the tickets to the game and a hotel. He said the airline tickets are on me, I didn't have anything to do -- Hak wouldn't do that.

Now, why is that important, ladies and gentlemen?

Well, in and of itself, again, it may not be a critical issue, but we have a number of things here. We have corroboration from documents you will have, travel records, a series of names that will sound very familiar to you by now when you look through it, hotel reservations, not plane

reservations, and more importantly, this is the time when Anthony Young's position as the shooter has been solidified. All right? He's there, it's going to happen. The only way he told you it wasn't going to happen is if he happened not to be in the area and it had to happen like that (snapping fingers), because he is now half paid.

So again, they're looking through January. They're starting to get frustrated. They think the feds have him in witness protection. Rakeem gets information that he's in Irvington. He picks up Anthony Young, he goes to the baby's mother's house, or what he believes to be the baby's mother's house. Anthony Young says he goes in and looks for him, and even bribes a fiend, right, a drug user to try to see, is Kemo here? He's not.

February comes. They go to the All-Star game. They come back. They're still looking.

Members of the Jury, what I told you originally about sort of the premeditation on those issues, this is again another phase beyond just what Mr. Bergrin did as far as his thought, his analysis, his figuring out of the case and his figuring out of the options that the gang is going through some very well planned conspiracy. Each of these steps are planned, each of these steps are coordinated, and each of these steps they know what they're doing with the exact specific intention of making it happen, that Kemo gets killed.

Finally, after a frustrating couple of months they get a break. Jamal Baskerville sees Kemo working at the house on 18th Street. He's driving around and he finds him. He contacts Rakeem Baskerville, who contacts Anthony Young. Everybody is contacted, and they all show up.

Anthony Young, you're going to be the shooter, Curry says. You already got paid, that's done.

Yeah, okay.

They come up with their plan of attack. They get a rental car.

Why? They explain the logic of it to you, right? It can't come back to anybody, they got a rental car. Curry gets it. They describe the model of it to you. Anthony Young said it's silver, right? Silver or gray Grand Am. The exact color, so we're clear that the eyewitnesses said the car was. They take the plates off. Anthony Young takes off I think it was the back and Rakeem Baskerville takes off the front.

Why do they take the plates off?

So no one can identify the plate number when they're leaving the murder. This is the getaway car.

They have the murder weapon. Where do they get it from? They get it from the trap in the van. You've seen photographs of the van, and there's the trap. Right? Anthony Young tells you there's this trap in this van and, lo and behold, when law enforcement actually seizes the van, there it

is. And Agent Streicher told you how they go through the process to even find that was there.

Takes out the gun, he describes the process of opening it up; takes out the clip, he fills it with bullets, they wipe the things down, and now he's armed with the gun.

And he tells you, there's no big deal me having a gun. Generally when I leave the house I have a gun. But this was a specific gun. Right? This is a gun that was a fully automatic. Not (speaking slowly) bang, bang, bang; but one pull (speaking fast), bang, bang, bang. He told you about his clothing.

Now, clearly from his testimony, members of the Jury, Anthony Young has no specific memory of his pants. He says he believes they were jeans. He said he was 90 percent sure. Now whether he has a specific memory of that or he's just assuming, I leave that for you to decide.

That's what I always wore.

Timberlands, the same thing. It was winter, I must have worn timber lands. Okay?

I'm not really sure what the issue is with respect to the jeans or the khakis. Again, there's not a witness out there saying, no, no, the shooter had red pants and a -- I don't know -- a white T-shirt on. All right?

The only thing that's really contrary for the clothing is that at some point Johnny Davis says, I don't think I

remember him having a Yankee hat on.

Okay. I submit to you, members of the Jury, that the clothing is just of no issue whatsoever.

Now, again, what is Anthony Young not sure of? Pants, shoes.

What is he sure of? The things that matter. The things that he had specific memory of.

It makes no difference what pants he was wearing that day.

What does make a difference? The jacket, right? And the hat. The fleece.

Why did that matter? Because that's part of his disguise. Collar up to here, and he pointed to his lip, right? Bottom part of his lip -- I'm sorry. And he zipped it up, and the hat, he pulled it down and he pointed to his eyebrows. So about from here to here you could see, right? Eyebrows to the bottom of his lip.

That was part of his disguise, part of his protection. Of course he remembers that. Again, I'm sending you back to the idea that when important events happen there are some maybe side issues we don't remember perfectly, we can make I think it was jeans, it must have been jeans, that's-what-I-usually-wore kind of answers; but when he says it was a fleece, he remembers it was a fleece because that's what he did, because he zipped it up, because he had it here; because he had a hat, it was

pulled down.

And again to my exact point: What does Mr. Young tell about you the hat? Was he sure it was a Yankee hat?

He says, "That's what I always wore."

He knew it was a hat because that's important. What's up here. He thinks it was a Yankee hat. He knows it was a dark hat. That's not important. The existence of the hat is.

Now, and so we can call the issue, he said his hair was probably not that dissimilar from nine, a little grown in on the side. Certainly not dredlocks, certainly not anything like that.

He explains to you that the fleece is also important because that's what he balls up, that's what the blood is on. That's why remember these things as opposed to the shoes and things like that.

What else does he tell you he has very specific memory of?

That there were a series of cars, the parade of cars, how they left. Jamal Baskerville first. Why? He knows where they're going and he's going to protect the fact that there's no license plate on the front of the getaway car. Hakeem -- the getaway car next; Hakeem Curry third. Why? Getaway car in the middle. You can't see that it has no license plate on either side. Mr. Curry protects the back, Mr. Baskerville protects the front. They drive to the area. They point at the

vehicle or he makes them understand that's the house I'm talking about, the one with the dumpster. Jamal Baskerville flees the scene. Anthony Young, Rakeem Baskerville park. Hakeem Curry goes out to South Orange Avenue and sets up there.

Because as you've seen from the pictures, if they leave the area you know which way they're going, they're going towards South Orange Avenue because there's nothing in the other direction. There's a cemetery across the street and there's nowhere else to go. And even if there was, behind them on that side is Anthony Young and Rakeem Baskerville. So remember the setup: It's Anthony Young and Rakeem Baskerville in the car; Kemo's car -- or the house Kemo is working at is in front of them to the right and then South Orange Avenue is further from them. All right? And that's where -- excuse me -- that's where Hakeem Curry and Jamal McNeil set up.

They're waiting for Kemo to leave the house. Anthony Young tells you he sees the dumpster. Kemo brings the stuff to the dumpster. He sees him with a mask on. He sees him a couple of times.

This is corroborated by the medical examiner who told you there's a dust mask there; the crime scene guy who recovers the dust mask there.

And what did Johnny Davis tell you, his father tell you about that?

Well, first he told you he was scared, Kemo, because

he was cooperating against guys that were going to kill him. But also he told you we were working on a house on 18th Street, there was a dumpster. We were throwing stuff in the dumpster, and Kemo was one of the guys throwing stuff in the dumpster, and he had a breathing mask, just like Anthony Young told you.

So during this setup you have Curry and Jamal McNeil set up on South Orange Avenue. They're communicating back and forth with their phones. A period of time goes by where Kemo doesn't leave the house. There's a discussion: Should we go in? Should we not go in? It's decided not to.

Which hand should we shoot with? I'll shoot with my left hand. That will throw the cops off.

And they wait and they wait, and at some point even leave to go get something to eat because they don't want to be out there too long. But after they get back, at some point at approximately 2:00 p.m. a little before, out of the house comes Kemo and his stepfather, Johnny Davis.

They see Kemo leave. They contact Curry: He's coming your way.

They watch him. Anthony Young even described -- he acted it out for you. Remember?

He had to lean out of the car. There were the trees. You could see this. Rakeem really couldn't see it. I could see some of it, and then at some point, at some point they disappear and I couldn't see them anymore. The same way he

watched them go on that day he described that for you.

Do you think when he was talking to you about that he was going from a memory or he was just making that up?

When you looked at him at that moment, could you say to yourself he's making that up, or was he going from his memory? And the only way you have a memory, members of the Jury, as you know, is if you're telling the truth.

He said he saw him leave with the other man, the older man.

And what did Johnny Davis tell you? Well, we did walk to South Orange Avenue, it was about 2:00 p.m., and we did walk west up South Orange Avenue past 19th Street.

And obviously from the photographs you can tell, and from seeing Mr. Davis in person and seeing the photographs of Kemo, Mr. Davis is an older man relative to Kemo.

So what happens now?

They're out. Kemo is out in the street. The guys are set up. Hakeem Curry is set up, Anthony Young is set up. Rakeem Baskerville drives down to South Orange Avenue and drops off Anthony Young.

Anthony Young walks into the area, he told you it was a little cut-out like the door there but steeper on a step and he sets up. He looks out. Then he looks out. And he's waiting and waiting. And what he doesn't know what's going on is, they're getting sandwiches, then they forget to get some

cigarettes. They remember. They go back in they get cigarettes and the whole time Anthony Young is waiting (demonstrating).

Kemo might have been worried the night before, the day before when he had the conversation with his father, and obviously when they're buying those cigarettes and walking back to 19th Street they have no idea what's going to happen. They have no idea that Anthony Young is waiting in the doorway, they have no idea that Rakeem Baskerville is feet away, half a block away in a getaway car.

So Kemo is walking down the street. And as he's coming toward you, his father is on his right, and further on the right is the actual street, South Orange Avenue. The buildings are here on the left. And he's walking, mask around his neck, cigarette in his hand. Remember what Johnny Davis told you, he bought some "looseys."

Anthony Young sees him. Sees him coming down the street at him. When he gets close to 19th, Anthony Young comes out. He walks around this way on the street side. Walks around the father gets behind Kemo, and just as he tells you, just as he's about to step onto 19th Street, grabs him.

Where did he point to?

About here. Grabs him, takes the automatic weapon in his left hand, as he told you. Puts it as close as he can get it as Kemo was moving to the back of his head, and pulls the

trigger, and then follows Kemo down to the ground trying to hold the gun as close as he can to his head as Kemo falls lifeless onto 19th Street.

His momentum carrying him forward, he said he actually sort of jumped over Kemo. Right? Because what did he care about at that point? He had done what he had promised to do. He had done -- another bad pun -- executed the term that -- the plan that Mr. Bergrin gave him and gave the whole gang. This was the culmination of the advice, of the counsel, of the plan, and now he had to get out of there.

And he said, he is looking -- as he's looking at Kemo he's also looking for that car because he does not want to get hung out to dry. And that car pulls in, parks. He is already moving his way. He goes right into the passenger side and that car takes off as fast as they can, no plates in the back, no plates in the front, away from 19th Street, leaving Mr. Davis to turn around and see his son lying dead on 19th Street, leaving Kemo with his work gloves and his mask and his half smoked cigarette in a pool of his own blood on 19th Street.

THE COURT: Mr. Minish, maybe this is a good time for us to recess for lunch. Okay?

MR. MINISH: That's fine, Judge.

THE COURT: All right. We'll resume after lunch.

Ladies and gentlemen, please, again, don't begin to discuss anything about the case, you still have more to hear.

We'll see you back at 2 o'clock. Have a nice lunch and we'll see you at 2 o'clock. Thanks very much.

THE DEPUTY CLERK: Please rise for the Jury.

(The Jury leaves the courtroom.)

THE COURT: All right, everyone, be seated.

We're in recess. Mr. Minish, 2 o'clock we'll resume.

How much more do you think you have?

MR. MINISH: I would say without making a promise, about an hour.

THE COURT: All right. Then we'll get started on the summations this afternoon.

MR. BERGRIN: Yes, your Honor.

THE COURT: You probably have several hours?

MR. BERGRIN: Yes.

THE COURT: Okay. All right. We'll go into tomorrow morning then I'm sure. Okay.

MR. MINISH: Yes, your Honor.

THE COURT: We'll see you back at 2 o'clock, everyone. Thanks.

MR. GAY: Thank you, Judge.

(A luncheon recess is taken.)

A F T E R N O O N S E S S I O N

THE COURT: All right. Bring out the jury.

THE DEPUTY CLERK: Please rise for the Jury.

(Jury present.)

THE COURT: Everyone, please be seated.

Mr. Minish, you can resume.

MR. MINISH: Thank you, Judge.

Members of the Jury, when we broke we were talking about the getaway, Kemo laying in the street, Johnny Davis looking at his son and at the vehicle driving down 19th Street.

The important part of not just the murder for you to remember is a little thing; the location of where the getaway car was. Where did Anthony Young tell you the car was? All right?

And you have the photos just up past Kemo's body. Right? Kemo is laying here. 19th Street. The car was just ahead sort of to the left side, which is what Johnny Davis tells you also.

Johnny Davis' position is somewhere over here looking back at his son. Turns -- again, not a significant point in whether or not Kemo was actually killed but just further corroboration of Anthony Young told you one thing and another independent witness told you the same thing. Also, Johnny Davis told you the same direction, the same color of the vehicle.

Now, the vehicle takes off to the prearranged location that they had set up somewhere, he said it was in South Orange

or West Orange. They get into that garage, close the door and wait for Hakeem Curry to show up.

Now, at this point, members of the Jury, a significant part of the murder conspiracy has been completed, so let's talk about what the various players did.

We have Hakeem Curry who got Paul Bergrin to represent him, gets the gang information and counsel from Paul Bergrin. He puts up half of the money for the hit. He sits in the lookout vehicle, he got the getaway car, and he confirmed afterwards that Kemo was dead.

Rakeem Baskerville was part -- certainly part of the search. He got the gun for Anthony Young, he drove the getaway vehicle, he helped him destroy the gun when it melted, and he put up $7500, half of the payment for the murder.

Jamal Baskerville assisted in the search and actually located Kemo and drove the lead car protecting the license plate.

William Baskerville from jail determines the name of the confidential witness, gave the name to Paul Bergrin and, again, Anthony Young said it was a request, order; he wanted it done certainly.

Anthony Young participated in the search for Kemo, agreed to be one of the potential shooters, accepted prepayment of $7500, ultimately shot and killed Kemo, and then destroyed the weapon, went with Rakeem Baskerville to melt it.

What about Paul Bergrin? What did Paul Bergrin do?

Well, number one, let's not forget he stops William Baskerville from cooperating the day he's arrested, that's number one. He speaks with William Baskerville, gets the name of the cooperating witness, passes it along to the gang who at this point thinks it probably Ray-Ray. He does his legal analysis. He looks at the case, tries to figure out whether the Government has a good case, bad case and, again, develops a strategy that he needs -- he believes he needs to win the case: Kemo has to be killed.

And goes to the gang, meets with them. And as their house counsel, as their lawyer, as the confidant to Hakeem Curry, tells them, this is what must happen, and makes them that promise: I know you guys want him out. If you follow my strategy, Will will come home.

Now, the Judge is going to tell you -- again, and you have to listen to him on the law -- but as soon as everybody agrees, makes the agreement to have this conspiracy, they're all guilty of the conspiracy. It ultimately doesn't matter for the conspiracy count whether it actually took place. The agreement is the crime. The second, the murder, assisting the murder is different.

So even if they weren't successful Mr. Bergrin would be guilty. Now, unfortunately, they were successful. In reality, Kemo was killed, and he was killed because everybody

that we just talked about played their part, and without each of them doing their part in the conspiracy, combining their efforts, it would not have been successful.

Now, before we finish with the day of the murder, let's just talk about what a few of the other witnesses told you, and it's important because it corroborates what Anthony Young told you, again.

You heard from Peter Gosza, he was the crime scene guy who came in, he used to work in Essex County and now works in Monmouth or Ocean. He told you he was at the crime scene on that day at South Orange and 19th Street. He told you it was so windy that it was actually blowing the shells around.

Now, in and of itself again, is it that important that it was that windy? No. But it does go to corroborate Anthony Young telling you how cold it was that day, that the wind was whipping around pretty good up on South Orange Avenue, certainly hard enough to blow the shell casings around on the ground.

He told you there were four shell casings found.

Anthony Young told you the gun fired three or four times.

The caliber of bullets: 9 millimeter. Anthony Young told you it was 9 millimeter bullets.

And despite what Mr. Bergrin sort of insinuated during the course of the trial about fingerprints on these bullets and

things like that -- excuse me -- exactly, on the bullets, Mr. Gosza explained to you that it just cannot happen. That once the bullet goes through and is ejected, the heat that's created will not allow you to get fingerprints off it, period. He went through how many cases, how many tests, how many weapons that he tried in his career. It's never happened, never can happen.

He told about you the particle dust mask, as Anthony Young said, and he told you, again, that a non revolver weapon was used. A revolver, the one with the wheel, because they would not eject cartridges, they would all stay within the gun. So obviously an automatic weapon or semi-automatic weapon would have to have been used. And that Kemo McCray collapsed just off of the curb on 19th Street.

And do you want to show that photo.

All of that, again, corroborating what Anthony Young told you.

Now, moving to the ballistics expert, Louise Alarcon. Again, the bullet size: 9 millimeter. Three or four shells, as Anthony Young said; that an automatic weapon was used, not a reflector. Again, also from the same gun. All things that Anthony Young told you.

How about Dr. Shaikh, the medical examiner?

Now, obviously the medical examiner told you that Kemo was fatally wounded and killed from gunshot wounds but I assume that wasn't much of an issue. But what he did say was three

gunshot wounds, not just any gunshot wounds. He said the location was, again, the left side of the neck, the second was the left side of the neck, and the other one was just above the left ear. All right? So, I mean you saw it, I don't have to act it out for you, and you'll have the things back in evidence. That he had a bandanna and there was a gunshot wound through the bandanna, a "defect" he called it. Remember? It was a hole in the bandanna.

And again, despite Mr. Bergrin's cross-examination of Agent Brokos, the extended questioning about front-to-back; back-to-front; bullet here traveling backyards; you're not the expert; you're not a pathologist; all of those questions, what did the medical examiner do when he got on the stand? What did he tell you? They acted it out, right? I played Kemo.

That the medical examiner, the expert, the one Mr. Bergrin was questioning Agent Brokos about said, yeah, I mean, I can't tell you it was absolutely a lefty, because who can tell? I wasn't there. But if you're asking me, are the wounds consistent with those facts? He said yes.

In fact, so it's clear, members of the Jury, the same stuff he said in the last trial, and anybody who read that transcript would have known that.

And Johnny Davis -- oh, I'm sorry, one more thing for the medical examiner. I forgot. Besides the mask, he gave you one other little key bit. It's not a big deal, but there was a

smoked, broken, half or half-smoked partially smoked cigarette.

What does Anthony Young tell you? As Kemo is walking down the street, cigarette in one hand, what does Johnny Davis tell you? We just bought four or five looseys. So Anthony Young is able to remember he's got a cigarette in his hand, and lo and behold the medical examiner in his report tells us about a half-smoked cigarette.

So then completing that thought. Johnny Davis told you, Kemo had cigarettes, that he was walking with him in the same direction with him on the outside towards South Orange Avenue, the same way Anthony Young told you. The location of the body, as Anthony Young described to you. The getaway car being silver; the location of the car when Anthony Young got in; the direction of the car went; and the speed with which the car took off.

Now but let's be clear. Johnny Davis also believes he saw a guy with braids, which is different from Anthony Young, the way Anthony Young looked that day. There's no getting around it. But remember what Johnny Davis told you. Now, he takes he said a number of steps away, after he hears the gunshots. All right? He hears the gunshot. He takes -- he wasn't sure -- I think two or three steps and then turns. And I acted out, I said to him: Where do you think -- what was the angle?

Remember I stood over here?

What was the angle?

And I stood facing him. I'll face you, right?

I stood facing him. And he said, no. I did a quarter turn. He said no. I kept turning, got to about another eighth away and he said yeah, about that angle, that's what I saw.

So he's saying he saw braids back here. Listen, I believe he genuinely believes it.

I submit to you that what he probably saw was Anthony Young's collar up, zipped up. He was scared, he had seen a horrific thing. He said he saw it (snapping fingers) for an instance at an odd angle as the man got in the car. I don't doubt that he genuinely believes it. I think Mr. Davis came in here and tried to be as absolutely honest and truthful as he possibly could, he would have no reason not to. But I submit to you, from all the other evidence that we know, that he was mistaken. You know logically the shock that must have been involved and the amount of time you're talking about, from him -- Anthony Young jumping over Kemo's body to the vehicle being steps away, to Johnny Davis saying he took a couple of steps himself. How much time could he actually have had? And was he focused on that, or was he focused on Kemo?

Now, the thing that's really important about that is that when he took the stand, what you learned was that despite all the cross-examination questions about: You think it was this guy, do you think it was that guy; despite the efforts

that Mr. Bergrin's investigators made prior to trial, that obviously -- I wasn't at that meeting -- but obviously from what you observed, stirred some significant emotions in Mr. Davis about whatever happened at that meeting. But at the end of the day, whether meeting with investigators, testifying in the William Baskerville trial, testifying before you, what did Mr. Davis say, the bottom line? That he is no more sure today than he was, whatever it was, a number of weeks after Kemo was actually killed and he was shown the photo. He said to you, on a 100-point scale, he was a 30. And his quote, and I asked him: How would you characterize 30? His quote today: It's not very accurate and it's not very good.

Mr. Davis obviously desperately wants to be right, and I think anybody in his position would recognize that. But he was also honest. 30 percent, not very good.

And ultimately, I submit to you, its' really not much of an issue anyway, because at the end of the day all that really speaks to is whether Anthony Young is the shooter.

Now, Mr. Bergrin from his opening statement seems to be implying that Anthony Young is just not the shooter, as if this is some sort of big issue.

Now, why would he do that? And I submit to you the reason is that he's just simply trying to attack Anthony Young's credibility so ultimately you may have a question about the telephone calls and the meeting.

But let's go over what we know to be true. All right? Anthony Young first told law enforcement he was a lookout. He thought he was going home. He thought the FBI would take the version at face value, but the FBI continued its investigation. He realizes he's not going home. He's sitting in jail. So he comes up with a new plan: He wasn't there at all. He tries to avoid all responsibility. And that didn't work either. He was sent back to jail.

Comes back and doesn't claim, all right, fine, I was the lookout. Then he comes back and actually takes more responsibility. Not less, more.

Why? I submit to you, members of the Jury, there's only one logical reason: Because it's the truth and because he realized playing the game of saying I was only here, or playing the game of, oh, I wasn't there at all, wasn't going to work, that the Government wasn't going for it. And he realized after meeting with his attorney, you heard, Mr. Fusella, that there was one way and one way out, and the only avenue he had was to become truthful and to tell everything. Logically there is no way anybody makes themselves more guilty than they are, more responsible.

Ultimately again, members of the Jury, Anthony Young walked into Federal Court before a federal judge and pled guilty to a crime -- and you heard the testimony, we showed it in the Plea Agreement, written in black and white -- a minimum,

not a maximum, a minimum sentence of life, no parole, period. That's what he pled guilty to. The only way he gets out from under life, one day under, is if he cooperates and if he's truthful. And I will not go back through all of that again, but I submit to you, members of the Jury, that's as clear and as convincing an argument that it is in the witness' best interest to have everyone, Government, judge, believe he is telling the truth. The only other option if he's not telling the truth is literally life in jail.

Now, as we know, he did get a benefit. His lawyer explained it to him, the only way to get out less than life was to cooperate.

He did. He testified at the William Baskerville trial and he was sentenced by the judge who presided over that to 30 years. He was granted a reduction. And you are allowed to take that into account I guess as you see fit if you believe that affects his reason for testifying.

Anthony Young was cross-examined for an extended period of time in this case, and obviously as you learned with the transcripts back-and-forth during the other case, the William Baskerville case, and there are inconsistencies, there are things that Anthony Young said that are slightly different than when he testified before you. There are. Now, part of that, obviously, can be attributed to, he was lying when he first showed up, and he kept the lie going, and it is difficult

to keep a lie going.

But you have to ask yourself as you're going through this, if you eliminate the part that he told you he lied about, is there anything left of consequence that he might have been mistaken about? Do they actually matter? Do they actually affect your ability to determine whether or not Anthony Young is being credible? Or did he simply just try to tell you from the best of his memory as best as he could the truth?

And I submit to you, members of the Jury, if you find these things to be of no particular consequence; someone was in the door; someone was here; this is the time; I spoke to Dedre; nobody asked me about it, I didn't say; things like that, then give it the value that it deserves when you're back in the jury room. If things are of no consequence, don't allow them to have more influence about your opinion of Anthony Young's truthfulness.

Now, again, as we said before, Mr. Bergrin certainly has the right to cross-examine as he sees fit, and even cross-examine as aggressively as he sees fit certainly with the Court's permission, and I'm not going to go through the entire cross, but I would like to point out one example for Anthony Young.

Now, you remember when Mr. Bergrin asked him a series of questions about how Anthony Young was holding the gun before he shot Kemo? In your pocket; not in your pocket?

He directed Anthony Young to a specific page. Took out the transcript, walked up to the table, can I approach? Here we go. All right? And he put it down.

He claimed it didn't say, Mr. Bergrin claimed it didn't say, that section, didn't have a gun, Anthony Young didn't say he didn't have a gun in his pocket. And Anthony Young basically answered, sorry if I didn't say that, but it's true, I did have a gun in my pocket.

Let's throw that clip up.

So let's -- he's directing at the top there you see starting at line 10. Right? (Reading) Look at page 190, Mr. Bergrin directing Anthony Young, to a very specific section. Page 190 starting at line 12.

Anthony Young. 190, yes, sir.

I opened it up for you, sir.

You had it on 103, sir.

Oh, I'm sorry. Please forgive me.

Starting at you say 18?

You can start looking at line 9, that's where the question starts, I believe.

I'm looking at it.

And Mr. Bergrin's big question: Isn't it a fact that on Thursday you told this jury that you came out of the doorway, I got my hand on the trigger, I got the gun in my hand and my hand -- my finger on the trigger?

And what does Anthony Young's answer? I did, sir, inside of my pocket.

Oh, inside your pocket?

Inside my coat pocket.

Put up the next clip.

So the question, continuing along this line: (Reading) You told this jury you came out of the doorway, that the gun is in your hand, right, and your hand is on the trigger. You say nothing whatsoever on October 27th that the gun is in your pocket. Correct?

Well, I'm sorry I didn't say that, but no, my hand was on the trigger, my hand was on the gun, sir.

And Mr. Bergrin again: And there's a difference, you understand, between the gun being out, the gun being in, the gun being in your pocket. Right?

And Anthony Young obviously agrees, yes.

And finally, and you say nothing whatsoever about the gun being in your pocket. You say the gun is in your hand and your finger's on the trigger. Right?

Again, it was, sir.

Now, so we can look at -- if we go to the next one -- what Mr. Bergrin is referring to is this line on page 190. All right? And it's the top. It says "Young - direct - Minish," page 190, and I'm going to direct you to 14, line 14. His answer:

(Reading) I come out of the doorway. I got the gun in my hand on the trigger. I'm nervous, adrenaline going. It's wintertime.

All right? That was what he showed Mr. Young.

Let's go back literally one page prior in the transcript, page 189.

So again -- do you have it?

MR. GAY: She's got it.

MR. MINISH: I'm sorry, Judge. Just one second.

Okay. Now again, one, literally one page prior in the transcript. After having been asked, you said nothing about that on October 27th, he's asked the question:

(Reading) So they're half -- they're halfway between 20th and 19th?

What is his answer?

Yes. So what I do is, I come out off the steps, got my hands in my pocket, I got the gun in my hand, both hands in my pocket.

One page apart.

"QUESTION: In your left hand?"

Mr. Young held up his hand.

And I said for the record, "I'm saying for the record he was holding it in his left hand."

And then goes on: (Reading) I got the gun my pocket, I got my head low and I start walking towards them, both of

them.

Now, members of the Jury, again, I ask you: Who during that section is trying to be truthful with you?

Anthony Young told you: I don't see it there. If I made a mistake I'm sorry, but it's true, I had my hand in my pocket.

Mr. Bergrin cross-examined him, transcript in hand about this page, not the prior page. Never shows Anthony Young the prior page, right? Why?

Do you think maybe because it's another case where, like with Albert Castro, Mr. Bergrin realizes that if the jury believes this witness, I'm going to get convicted? If the jury believes this witness, they're going to find me guilty so I want to pull out all the stops?

Just ask yourself when you're back there, members of the Jury, when you're thinking about Anthony Young's credibility, which is obviously a significant issue in this case, who is trying to pull the wool over your eyes?

Mr. Bergrin said, and I'll quote: "You say nothing whatsoever on October 27th that the gun is in your pocket. Correct?"

It's just not true.

Now, having discussed the cross-examination to that extent, let's move to what corroborates Anthony Young. Okay?

You know what Anthony Young testified to, now let's

talk about how the other witnesses interplay with that.

Thomas Moran told you that Mr. Bergrin said to him he got the name of the cooperating witness from William Baskerville. Mr. Moran told you that Mr. Bergrin said he passed that name along to William Baskerville's people. And in Mr. Bergrin's world, when he said "people," it meant criminal associates, just like what Anthony Young told you.

Abdul Williams, what did he tell you? That Paul Bergrin was worried about William Baskerville flipping, about cooperating with the Government. And there is also testimony about Paul Bergrin asking Abdul Williams about a potential payoff that he heard Curry or might have heard Curry was doing with Anthony Young to change his testimony.

The reporters, as presumably as independent as you can get, they learned, Mr. Bergrin told them: I learned the name and I passed it along.

The melters. Well, the one who you saw testify, Devon Jones. Now, again, what he told you is that Anthony Young came to his shop and they melted down a gun. He even -- back now I guess it was a couple of years after the incident -- identified Anthony Young out of the lineup. Right? And you guys have this, the photograph in the back, and you can say, he said yes, number 2, I see him there a lot, just as Anthony told you.

Now, the second photograph array he was shown, he said: I'm not really sure. I think it was number 3 but I'm

not really sure.

Well, you'll be able to go back, members of the Jury, and see who number 3 is. Number 3, you'll have the photograph, is Rakeem Baskerville.

Who did Anthony Young tell you was with him?

Rakeem Baskerville.

Out of those six people, and they all, you know, basic features, similar features as all good arrays should, who does he pick out? Again, not a hundred percent sure certainly, but Rakeem Baskerville.

Do you think that was random? It's a one in six chance.

The phone records corroborate Anthony Young. Two calls on the day that William Baskerville was arrested. He talked about two conversations that Paul Bergrin had with Hakeem Curry. There are records of two calls. There are three calls in the day after the second court appearance, after Anthony Young tells you Hakeem Curry said, "My man's on his way," three calls that day. Ramon Jimenez corroborates him. Ramon says, again, different tense but: If there's no witness they'd be no case.

The EZ Pass records, and George Snowden's, Detective Snowden's testimony. Black Mercedes, black Mercedes.

What does Anthony Young say he showed up in? Black Mercedes.

Lachoy Walker explaining the house counsel and the job that is involved in being a house counsel; to make sure the underlings don't cooperate, to represent the managers. And we know William Baskerville is a manager.

And the Defendant called Paul Feinberg to the stand. Now, Mr. Feinberg's memory is obviously exceedingly specific and slightly different than what Anthony Young told you, but the reality is, he did tell Anthony Young: Do not incriminate yourself, that's what Anthony Young said.

Anthony Young never at any point says: My lawyer told me to lie. He said, he told me not to incriminate. He never said that. Not anywhere in any question will you see that. And, in fact, when he lied and was asked the question, who's fault is that, whose responsibility is that that you lied? He said, me.

So we can parse words however closely you would like, but the reality is, Mr. Feinberg said: I told him to tell the truth, but I told him not to inculpate himself.

Well, if you're guilty, that's a difficult trick, and Mr. Young is certainly not a lawyer. And what he took from that is exactly reasonable: I didn't implicate myself. I told the truth about everybody else, but I didn't want to implicate myself. That was my lawyer's advice.

And if you go back and you think about what Mr. Feinberg told you, its' really no different.

Eric Dock told you, William Baskerville sells drugs. He controls a block on Avon Avenue under Hakeem Curry's drug organization. He said a conspiracy exists, that William Baskerville is involved, just like Anthony Young told you. They're out looking for Kemo. They couldn't find him. They thought the Government had him in hiding, just as Anthony Young told you. And Mr. Dock's quote, "He," meaning William Baskerville "said they were looking for him to put a hole in his melon."

And what else did William Baskerville tell Eric Dock about how the drug organization would kill someone?

Again, this is a quote: "He said," meaning William Baskerville said, "as long as you got a getaway driver, a stash spot, you could ride up on a person in broad daylight, shoot him with some hot cookies in the face, and he said after that, all you had to do was just drive off, park the car in the location, leave the gun inside the stash spot and just walk away."

This is William Baskerville talking about this before Kemo was killed in jail to Eric Dock. Did it sound familiar, that scenario?

Pretty much a shortened version of exactly what Anthony Young testified to; what he testified to actually happened on March 2nd.

Further corroboration, Anthony Young making that

recording where he said the shooter was a lefty. Now, listen, obviously he wasn't doing it to corroborate that he was the shooter, he was doing it to try to put the blame on Jamal McNeil. But the reality was, he was telling the truth at the time, he just wasn't telling anybody he was a lefty. That corroborates the shooter.

Lachoy Walker, Detective Snowden, they testified about the makeup of the Curry organization, that they sold drugs for a living, that Curry was the head of the organization and that the Baskervilles, including William, were in the management part of the group.

Special Agent Streicher told you about the arrest of Norm Sanders and the seizure of Rakeem Baskerville's van -- that was the one we saw the pictures of the traps and the various things -- and that there was a seizure. They found heroin. Remember he said he went through the traps, they found heroin?

Now in and of itself is that critical? No. But let's compare it to what Anthony Young said, again, corroborating things that can be corroborated.

Anthony Young tells you he drove by that morning, saw the police, kept rolling by, thought they were coming for him, because his father lives down the street. Turns out his father told him they were arresting Norm, and they took the van, which he said it was too bad, because there was heroin in the van.

Then lo and behold, what does the agent tell you? Yep, we were arresting Norm Sanders; yep, we got the van; and, yep, there was heroin in it.

Further corroboration of the conspiracy is the discovery package that is found in Rakeem Baskerville's home. As you were instructed by the Judge, we do not know exactly how it got to -- from whose hands it got to Rakeem Baskerville's, but we do know that it was originally given to Mr. Bergrin and that it ended up in Rakeem Baskerville's hands. So obviously there are multiple people involved in this. Rakeem Baskerville is not doing any legal analysis, I submit to you, of William Baskerville's case.

Richard Hosten testified, he told you that William Baskerville figured out it was Kemo, just like Anthony Young said, and he believes that the feds were trying to get William Baskerville to roll on Hakeem Curry, he also told you that Eric Dock was on there, too, the guy who said all those other things.

We have transcripts that show Paul Bergrin actually represented William Baskerville. You can see it for yourself in black and white, just like Anthony Young told you.

Now, as far as the specifically, again, the corroboration of the phone calls between Mr. Bergrin and Mr. Curry, all you have to do is look at the phone records. We talked about that I'm not going to go back into that. The

corroboration of the meeting. Again, we saw the transcript, the quotes in the transcript, when that information came out, when Anthony Young told you they were told about that information and the phone records that match up with those meetings.

So let's skip ahead to the time after the murder. All right? Curry and a bunch of his crew were arrested, some time, a few days, March 5th, a few days after Kemo was killed. Anthony Young finds himself a new supply of drugs because for whatever reason he was not one of the guys that got picked up by the DEA. He's selling drugs, living his life until what? Until he breaks the code. He tells what he calls a female about criminal activity; and not his criminal activity, criminal activity of people in the gang. Which is all well and good if you're treating that female well. But as she told you and as Anthony Young himself told you, he was not. Things were not going well between them. So now armed with this information, she goes and tells Jamal Baskerville's wife. And as you heard, her best friend as she told you, her friend. Right?

Jamal Baskerville is not happy. Tries to confront Anthony Young. You heard about the very tense meeting they had in the car. Anthony Young tries to get him to come into his car but Jamal Baskerville will have none of it. No, no, you come in my car. Anthony Young said, yeah, I guess I'll come in

but he had his gun ready in his pocket. Right? And he was ready to fire. He said he wasn't that worried about Jamal because without Malsey, without Jamal McNeil, he's not likely to take a shot at me.

But even that tense meeting, when it ends he gets a phone call, and it's the message of "the street"; we'll see you in the streets.

And listen, Anthony Young knows what it means. He told you what it means. If somebody else said that in a different situation it could be a million things I guess. But Anthony Young knows Jamal. Anthony Young has grown up with this family. Anthony Young is in this gang, he knows what they mean. That's a message. Anthony Young, as he told you himself, listen, he's no punk. He sat on the stand and he told you that, he said, I'm not saying I'm the toughest guy but I'm no punk. He thought he was in over his head, two against one, Jamal McNeil, Jamal Baskerville, and this was a problem.

So he tries to figure out how to make himself safe. Starts thinking and makes that fateful decision to go to the FBI.

Now, the important part of this, members of the Jury, is that it's not just that he spoke to the FBI, it's that he initiated contact. The FBI didn't go find him, the FBI didn't knock on his door and say, hey, Mr. Young, we have to talk to you and he had ten seconds to put together this story. He had

time, he thought about this. What am I going to do? I'm in trouble.

He left the Essex County area, he said three hours away. Right? And this is a guy, remember, who refers to five blocks away like it's another planet. This guy goes three hours away and calls the FBI.

Let's just talk about this for a minute, set the scene. No one has been charged in the Kemo murder at this point, no one. Curry is arrested, a whole bunch of other people are arrested. Rakeem Baskerville is on the run. By whatever grace of whatever God, Anthony Young is not among the people that the DEA arrested.

So what is his decision? He decides to initiate contact with the Federal Government.

Is there any reason you can think of besides trying to protect himself why he would do that? To go into the "belly of the beast" to initiate contact? They've just wiped out his gang. You have Rakeem, his best friend, running all over and he's going to say, now we solved this problem, I'm going to talk to the feds, and I'm not going to talk about drugs, I'm going to talk about a murder of one of their witnesses. (Knocking on lectern) I got some information for you guys. He gives his real name. All right? And he says, I got information about the murder. Not just any murder again, the murder of a federal witness.

Now, make no mistake about it, he also wants to try to get a benefit for his gun case. But the three, four years he thought he was facing for that gun case, as Mr. Feinberg said, you know, theoretically there could have been another count out there. But what he was facing was max, five. Right? Isn't that what Paul Feinberg told you? Max five. Anthony Young said, hey, I plead guilty, I get three or four. Okay?

For that he comes to the FBI? No.

For his life he comes to the FBI.

He told you he had a plan, he was trying to manipulate the system. It is what it is. He was not planning on coming and telling the truth. He was planning on getting what he wanted and letting the chips fall where they may, period.

That didn't work out for him. He got involved with the Government. He tried to lie. The Government tried to -- the Government continued to investigate his claims. You know, for example, you've heard testimony that Hasson Miller was sent in with a recording device to speak to Anthony Young.

That's not what he thought. He thought we were just going to swallow hook, line and sinker what he said, and now you know that's not true.

So I'm sorry, I just want to talk briefly about that initial contact. He said he spoke with Mr. Feinberg, decides to go to the FBI. And you heard from Agent Bill Gale. He makes a decision to finally call the agent -- excuse me --

finally call the FBI, and he gets Agent Gale who is on duty. Doesn't know anything about the case. He gets some notes together, he gets a little bit of information. He writes it down and he sent that short little report he told you about, as best he can to figure out who he has to send it to, because he's not going to be the one to investigate it. He writes down some names spelling them phonetically, even misspelling Mr. Bergrin's name. All right? And as Anthony Young told you, he just wanted to get enough information out there to get himself in the door.

Let's talk about what he said in the very first time. He's facing gun charges, he wants a deal, he has information about Kemo, the murder. The method of murder: He was shot. The location of the murder is South Orange Avenue and 19th Street. And right from the very first time, again without anyone being charged in the case to an agent who knew nothing about the case, Anthony Young told the FBI that Paul Bergrin was involved. That Paul Bergrin provided info when Kemo -- to determine that Kemo was working for the Government, that Paul Bergrin had said, "No Kemo, no case." First time, first call, agent who knows nothing about it.

Also from the beginning, the very first call he tells him he's not happy with the way the subjects and his associates are treating Anthony Young. He's staying three hours away and he's requesting protection for himself and his girlfriend/wife.

Now, Mr. Bergrin asked a series of questions: It doesn't say you have any fear of safety in that report, does it? And went through that routine. It doesn't. The word "safety," so it's clear, is not used in there. What is used in there is a request for protection. You could draw whatever conclusion you want from a cross-examination that says it doesn't say "safety" in there when it does say "request for protection."

All of this information, as Agent Gale told you, without prompting -- because he didn't know anything about the case -- in a short call to an agent who knew nothing about the case, who had never talked to Anthony Young before, and would never talk to Anthony Young again. But even the agent knew how important this information was, and he immediately shuffled it off to Agent Brokos. He doesn't put it in a memo in the normal course, he puts it in a memo and makes the phone call. And he told you, never done that before, haven't done that since.

Now, I'm not going to go through in painstaking detail certainly this -- you've been very patient, I appreciate it -- with the reports, but let's call this what it is. Anthony Young was not honest with the FBI when he first came in. Period. No one is debating that. He made contact with the FBI. He tried to execute his plan. He even blamed another, a whole 'nother person, Jamal NcNeil for the shooting. He told you, because he wanted him off the street, Jamal Baskerville.

He tells you the version of events like he told you on the stand: I tried to tell him this, I tried to tell him this, I tried to tell him this. But from the very beginning, members of the Jury, always consistent about Paul Bergrin from the first call.

What he learned, contrary to what he wanted I guess, was that the Government did not take what he said at face value, that there was an investigation, that we did have other witnesses like an Eric Dock, we did look into the medical examiner and what he said, Pete Gosza, the crime scene, the ballistics, the phone records. Johnny Davis was shown arrays. We tried to identify Jamal McNeil. All right? We had the photograph Anthony Young told you. We sent Mr. Miller, Hasson Miller in to record Anthony Young. The melters -- excuse me -- Devon Jones told you he was -- he was interviewed, shown photo arrays.

So there is an investigation going on, and then during this time it suddenly dawns on Anthony. He's in jail for over a year and it dawns on him, he realizes his plan has not worked very well. This whole get in/get out and blame it on these guys it's going to happen. It doesn't work. He's learned about the conspiracy, what the law is, at least from the guys in jail. And so at this point again it's important for you to note, members of the Jury, the dates of these things. He has spoken to the Government but he has not been given a

cooperation agreement. He has had interviews, a number of interviews, but he has not been offered a plea agreement and he has not been offered a cooperation agreement.

So if Mr. Bergrin says he was cooperating, he was providing information, but until you get a cooperation agreement you are not a cooperator, period.

So he tries a new plan: I wasn't there. I don't know anything about it.

You're lying. Back to jail.

Has his heart-to-heart with his lawyer. The lawyer tells him to tell the truth. And two important points again about this: He makes himself more culpable when he comes back, not less, and he never changed his story with Mr. Bergrin.

Now, if I could just briefly talk about Devon Jones.

I submit to you, members of the Jury, Devon Jones tried again to be as honest as he could with you to the best of his memory. And he obviously has a very specific memory of melting the gun. It was a significant event in his life, doesn't happen every day. We have evidence of one. Right? He remembers the handle, or I don't remember exactly how he said it, but where you would hold the gun went very fast. And then on the barrel there was the coating outside. That did not go as quickly. And his buddy said, you don't know what you're doing, and he started to do it, it was pop, pop, pop he kept saying. Some things must have been crackling. And then at the

end they got down to the barrel, the actual pipe, and that took a long time. The two guys that were there, said no, no, no, that's what you have to get, you have to get that. They went back-and-forth and chop, and this and that and smaller and smaller, and liquid, until he described it as a soup, right, like sort of a chunky soup. He said something like that?

Now, members of the Jury, play that back, what Anthony Young told you. And how much of that in any real fact that matters is exactly what he said? He came there. Rakeem Baskerville. We went through that photo arrow. I will not do that again. He showed up. There were two guys. Anthony Young remembers that Ben, the owner of the shop started it. Devon Jones said, okay.

One way or the other we know they started melting it, and we know a part went fast, then the part went slow, and then they had to kind of brush it together and scoop it up and take it out, which is exactly what Devon Jones said and exactly what Anthony Young said: It became liquidy, mush it together, got it, took it out. All right?

Now, Devon Jones admittedly -- well, I won't say "admittedly." Obviously your interpretation will certainly control, but I submit to you, members of the Jury, he had no idea when that thing happened. He said it was about two years. He was initially asked, was it around March?

Yes.

Then it was, could it have been September or October -- August, September?

Yes. Maybe it was December.

All I know is my kid was about 9. It was about two years before they came to interview me.

Why would he remember that? And I certainly have no quarrel with Mr. Jones and I'm not speaking ill of him, but you know, remember what really matters here.

What matters? The date is important to Anthony Young because this is the date he killed another human being. The event of melting a gun is important to Devon Jones, not the date. But that it happened certainly was important, and he remembered that pretty well in pretty excruciating detail. Again, those details, the same as with what Anthony Young told you.

Now, some time passes. We're getting closer to the William Baskerville trial. Jury selection started now in 2007. February 13th, 2007 is when jury selection started. You'll have a stipulation that lays those dates out for you so you can put the pieces together if you choose.

During that time, what does Paul Bergrin do? You have the hearing for William Baskerville. During this gap -- excuse me -- this gap in time before William Baskerville's trial. There's a hearing for William Baskerville.

After the hearing is a call from reporters to Mr.

Bergrin. He admits he passed the name along to the criminal associates. William Baskerville gets a new lawyer. And then Mr. Bergrin during that time speaks to both Abdul Williams and Thomas Moran. First to Abdul Williams.

Now, you already heard Abdul Williams was a member of the Curry organization, got a job at Paul Bergrin's office and had conversations with him. Right?

What did he tell you.

Paul Bergrin was no longer William Baskerville's attorney. Abdul Williams with this job, with his relationship with Curry, who was not arrested in the big roundup, not because he wasn't doing anything wrong but because he was actually already in jail he told you, right? So when they had actually rounded up the Curry guys he had already been in jail. So when they go in he's out some time thereafter. So the William Baskerville trial coming up, he's one of the lone connections back to the Curry gang.

So what does Mr. Bergrin do? He's no longer able to have the contact with William Baskerville, direct contact, he's not his lawyer anymore. He's got a whole 'nother lawyer. So no more direct contact. He doesn't know therefore what William Baskerville's plans are: Cooperate/not cooperate? Have there been discussions with the Government? He wants to know whether or not William Baskerville would cooperate.

Do you think that's just professional curiosity? No.

He's worried. And Abdul Williams told you, he was not his usual cocky self. He wanted to know if William Baskerville would roll, meaning would cooperate with law enforcement, which is important because the information, if William Baskerville did cooperate, would point at who? Mr. Bergrin. That's why he cared.

He's worried not just about the drug chain any more, not just worried about keeping Hakeem Curry anymore, now he's involved in a murder. And if he went to the lengths he did to protect himself from a drug chain and drug charges, do you think maybe he's a little concerned about William Baskerville facing trial? And again, the timing of this is important. It's during jury selection, which went on for, if my memory serves, about a month.

Yeah, a month and a half.

William Baskerville testified that he gave the name of Kemo to Paul Bergrin and told him to pass it along to his drug people because he wanted Kemo dead, and it happened.

Let's move to Thomas Moran.

After the William Baskerville trial had occurred there was some media coverage, again, after Anthony Young has testified. Thomas Moran, as you remember, is a lawyer, did criminal work, worked under Mr. Bergrin's practice, handled cases for Mr. Bergrin. I think he said 80 percent of his cases came from Mr. Bergrin. He did a good job, he developed a

relationship with Paul Bergrin. He was admittedly star struck. He stuck by his side. Paul Bergrin groomed him, introduced him to clients, he did work for Paul Bergrin's clients. We talked about that multi-defendant situation when Mr. Bergrin would be the lead attorney and Mr. Moran would represent an underling.

Anyway, one day in December of 2007, the Baskerville case is now over, he's in Essex County Jail -- we walked you through those pictures, right, the special room walled off that no one can hear you in -- they start to discuss an article that had recently been published. It was published on December 21st, 2007 about the Kemo case.

It said he had been representing -- Mr. Bergrin had been representing William Baskerville, a major drug dealer. During the attorney visit with William Baskerville, William Baskerville told you -- excuse me, I guess I should say this -- Mr. Bergrin told Thomas Moran. There was major drug dealer during the attorney visit, like the one Agent Brokos testified about, William Baskerville told him the name. Mr. Bergrin met with William Baskerville's people. We already discussed what "people" mean.

And even just to finish the "people" thing, when Mr. Bergrin cross-examined him, what did Mr. Moran say?

You don't know people, family?

He said, I know how you talk. All right?

He told them the name of the informant, and then he

explained three months later he was dead.

And as an aside, again, Mr. Bergrin tried to elicit from Mr. Moran about, oh, I brought in people to cooperate before, why wouldn't I have done it for William Baskerville?

What did the evidence turn out to be?

No, one guy, one time. He wasn't paying, that was it. Right?

Members of the Jury, as Mr. Gay told you in his opening, after Kemo was killed, after he was laying on 19th Street, the question was why. Now you know. Paul Bergrin got involved with Curry's drug group beyond just representing him and members of the group, beyond being house counsel. He arranged for a source of supply from Changa to Hakeem Curry. He became a link in the chain, and what you've learned what that means: The closer law enforcement gets to the link, gets one link, the next link is worried, the next person is worried.

What if they roll? What if they cooperate? William Baskerville, one link from Hakeem Curry, his manager directly got drugs from Hakeem Curry. Hakeem Curry got his source directly from Paul Bergrin. Link, link, link.

This was no longer about simply being house counsel, this was no longer simply about trying to keep Hakeem Curry happy, no longer simply about representing his own client, William Baskerville. Paul Bergrin's own neck was on the line and Kemo DeShawn McCray had to be eliminated. If law

enforcement could be stopped from getting to William Baskerville, they would never get to Curry and therefore never get to Paul Bergrin. The dominoes would never start falling. Paul Bergrin would be safe.

So on March 2nd, as Anthony Young ran from the body to Rakeem Baskerville's car and Kemo lay dying in the street on 19th Avenue they all hoped that their assault on the law enforcement investigation into their gang was over.

They were wrong. Law enforcement continued to investigate. They found answers to the questions. Why was Kemo killed? Answers that you now know also: Because Paul Bergrin and the rest of the Curry gang made a decision; a decision that Kemo's life was a fair trade for their freedom, freedom to continue to keep the drug business going.

Members of the Jury, while this may be a very important case, it's also a very straightforward case. What the case boils down to is, a member of Curry's gang got caught; William Baskerville. Caught by the FBI. Curry and Paul Bergrin knew he would not be released on bail. The Government had a strong case. William Baskerville would be convicted. They knew who the key witness against him was, they knew what they had to do to protect themselves. So Paul Bergrin came up with his five-point plan. All right? He tells the gang that the cooperate rating witness is Kemo. He does his legal analysis. This is a strong case. The Government's going to

convict him. He develops a strategy to win the case. He meets with the gang and tells them about that strategy, counsels them, encourages them: The way to win is to kill Kemo. And then finally he makes the promise: If you follow my directions, you follow my advice, you do what I tell you, I'll get Will home. If Kemo is dead, Will will get out.

They thought that killing Kemo would save them. Mr. Bergrin was wrong. He now faces not drug-trafficking charges, but charges related to the murder. He faces the responsibility for his actions related to the murder of Kemo DeShawn McCray on March 2nd, 2004.

Members of the Jury, you've heard the evidence. You'll take that back with you to the jury room and apply the law that the Judge gives you to that evidence. And when you do that, I'm confident that you will come back with the only verdict that makes sense, the only verdict that the evidence indicates and what you know is true: That the Defendant, Paul Bergrin, is guilty of both conspiring to kill Kemo DeShawn McCray and aiding and abetting in Kemo's murder, because by providing the name of the witness to the gang, by providing that legal advice, the instructions that the only way William Baskerville will come home is if you kill Kemo, he put the wheels in motion. His analysis of William Baskerville's case, his counseling to kill Kemo drew a straight line to Kemo's murder for what Kemo had done to the gang, but more

importantly, out of fear of what would happen to the gang if he was able to continue to testify, what would happen to them in the future, what would happen to Mr. Bergrin in the future.

Members of the Jury, again, you know this is true, not because me, a lawyer, tells you it's true, but because the evidence tells you it's true.

Thank you.

THE COURT: All right. Ladies and gentlemen, I'll see counsel at sidebar, please.

(Off the record discussion at the sidebar.)

(In open court.)

THE COURT: Ladies and gentlemen, because it's 3:20 already and Mr. Bergrin's summation is going to take some hours as well, we're going to start tomorrow at 8:30. You've been terrific about getting here on time. We'll probably have a long day tomorrow, until 5:00, 5:30 maybe, so just be patient. But we are at the end of the trial. So if you have to make arrangements at home, no later than 5:00, 5:30, but somewhere around that if we need to. And then of course on Wednesday we'll get in early as well, 8:30, and may have another longer day on Wednesday as well. Okay?

We try not to keep you over 5:00, 5:30 even during deliberations. But that is -- probably will be the schedule from now on, from about 8:30 in the morning until 5:0, 5:30 every day. Okay?

So please don't discuss anything about the case. Of course, you still have to hear the summations of the Defendant, the rebuttal summation and, of course, the law which I have to give to you, so it would be inappropriate to start formulating your final decisions or any decisions at all. Okay?

So please don't discuss it at home and don't read anything about it in the newspapers. Okay? But we'll see you promptly and we'll do our best to get started by 8:30. I don't think they'll be anything to delay us tomorrow in getting started at 8:30. Okay?

Thanks very much. Have a good safe ride home.

THE DEPUTY CLERK: Please rise for the Jury.

(The Jury leaves the courtroom.)

THE COURT: You can be seated.

All right. We'll try -- let's get started at 8:30 tomorrow. And, Mr. Gay, especially in view of the lengthy summation we've had so far, in your rebuttal -- I told you this before, I've told all assistant U.S. attorneys -- I don't view rebuttal as another summation to repeat everything. It should be very focused and to the point. And we'll see how long Mr. Bergrin goes, and I may even give you some time frame which I've done in all my cases here. I've always given the AUSAs some indication of what I think is an appropriate amount of time.

MR. GAY: I understand.

THE COURT: So I'm telling you that tonight. So if you have to adjust your notes any, you know, you have ample warning. Okay?

MR. GAY: Okay.

THE COURT: And I do this in all the cases I've had, so it's nothing different here than that. Okay?

MR. GAY: I understand.

THE COURT: I don't view it at another summation. Okay?

MR. GAY: Okay.

THE COURT: All right. Thanks very much.

We'll see you tomorrow morning at 8:30.

Marshals, make sure Mr. Bergrin is here on time. Thanks very much.

MR. LUSTBERG: Thank you, your Honor.

MR. BERGRIN: Judge?

MR. LUSTBERG: Your Honor, one quick thing.

MR. BERGRIN: Judge, I need to take the pens with me obviously to work on my summation, but I need a Court Order actually for them to be transported to the MDC.

THE COURT: You need a written Court Order?

MR. BERGRIN: No, it could be oral I guess.

A MARSHAL: I just explained to Mr. Bergrin that he's not allowed to have pens during transport between here and MDC. At MDC he can have a million pens, but just downstairs and

transport we don't allow it.

THE COURT: Mr. Bergrin, you'll have ample time when you get back I guess to use your pens.

MR. BERGRIN: I don't intend to use them during actual transport anyway, Judge.

THE COURT: Oh, okay.

A MARSHAL: As long as you have them on your person, that's fine.

MR. LUSTBERG: Can he have them in the folder?

A MARSHAL: Sure.

THE COURT: We'll see everybody tomorrow morning.

MR. BERGRIN: Yes, your Honor.

(At 3:25 p.m., an adjournment is taken to Tuesday, November 15, 2011 at 8:30 a.m.)

ooOoo

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

UNITED STATES OF AMERICA v. PAUL BERGRIN, YOLANDA JAUREGUI, a/k/a "Yolanda Bracero," THOMAS MORAN, VINCENT ESTEVES, a/k/a "Vinny," and SUNDIATA KOONTZ, Defendants.	Criminal No. 09-369 Filed Electronically

BRIEF IN SUPPORT OF DEFENDANT PAUL BERGRIN'S PRETRIAL MOTIONS

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X. THE COURT SHOULD SUPPRESS STATEMENTS MADE BY MR. BERGRIN BECAUSE THE GOVERNMENT VIOLATED *MASSIAH v. UNITED STATES*.

A. Introduction

The Court should hold a hearing to determine what information the government learned about the Prostitution Case in violation of *Massiah*. As set forth in Section IX.B, *infra*, it is well-settled that the government may not send an undercover paid informant to talk to a defendant about a charge after he has been indicted for it. That protection flows from the Sixth Amendment's right to counsel. Here, Mr. Bergrin was indicted and represented by counsel on the Prostitution Case at the time the government sent its paid informant, Oscar Cordova, to speak with and try to get incriminating statements from him. Because he was represented in connection with the Prostitution Case during those conversations, any information the government learned from its informant related to the Prostitution Case, including information thereafter incorporated into the RICO case, must be suppressed. *See* Section X.C, *infra*.

B. The Applicable Legal Standard

Once a defendant has been indicted, the government may not obtain statements from the defendant by sending an undercover paid informant to talk to the defendant about those pending charges. As the Supreme Court of the United States put it, "once the adversary judicial process has been initiated, the Sixth Amendment guarantees a defendant the right to have counsel present at all 'critical' stages of the criminal proceedings. Interrogation by the State is such a stage." *Montejo v. Louisiana*, 129 S. Ct. 2079, 2085 (2009) (citations omitted). "Interrogation" is interpreted broadly and encompasses a government agent, such as an undercover paid informant, talking to the defendant. For example, in *Massiah v. United States*, 377 U.S. 201 (1964), a cooperating witness helped the government install a radio transmitter in the defendant's car after indictment; the cooperating witness then elicited incriminating statements from the defendant while the agent listened. *Id.* at 202-03. The Court held that a defendant's Sixth Amendment right to counsel is violated by the use in evidence against him of incriminating statements which government agents deliberately elicit from him after he has been indicted and in the absence of

his retained counsel. *Id.* at 206. *See also Kansas v. Ventris*, 129 S. Ct. 1841, 1846 (2009) ("the *Massiah* right is a right to be free of uncounseled interrogation, and is infringed at the time of the interrogation. That, we think, is when the 'Assistance of Counsel' is denied"); *Maine v. Moulton*, 474 U.S. 159, 176 (1985) (the Sixth Amendment is violated when the State obtains incriminating statements by knowingly circumventing the accused's right to have counsel present in a confrontation between the accused and a state agent); *Price v. Wynder*, 2009 U.S. App. LEXIS 24006, at *11 n.3 (3d Cir. Oct. 30, 2009) ("[T]he Sixth Amendment is violated when the State obtains incriminating statements by knowingly circumventing the accused's right to have counsel present in a confrontation between the accused and a state agent.") (quoting *Moulton*, 474 U.S. at 176); *United States v. Brink*, 39 F.3d 419, 422 (3d Cir. 1994) ("*Massiah* and [*United States v. Henry*, 447 U.S. 264 (1980)] establish that the government violates a pre-trial detainee's right to counsel when it deliberately creates a situation in which a prisoner is likely to make incriminating statements, *Henry*, 447 U.S. at 274, and deliberately uses an informant to elicit information from the prisoner, *Massiah*, 377 U.S. at 269.").

Similarly, in *Henry*, the Court found that the government had "'deliberately elicited' incriminating statements from [the defendant] within the meaning of *Massiah*" where "an inmate at the same jail and a paid informant for the Federal Bureau of Investigation, told a Government agent that he was housed in the same cellblock as several federal prisoners, including [defendant] Henry. The agent told [the informant] to pay attention to statements made by these prisoners, but expressly instructed [the informant] not to initiate any conversations and not to question Henry regarding the bank robbery. [The informant] and Henry subsequently engaged in some conversations during which Henry told [the informant] about the robbery. [The informant] testified about these conversations at Henry's trial, and Henry was convicted." 447 U.S. at 270.

The Third Circuit has provided the following guidance to determine if the government has committed a *Massiah* violation:

> In a subsequent line of cases, the [Supreme] Court developed the *Massiah* doctrine governing the constitutionality of these so-called

> "secret interrogations." The cases establish three basic requirements for finding a Sixth Amendment violation: (1) the right to counsel must have attached at the time of the alleged infringement; (2) the informant must have been acting as a "government agent"; and (3) the informant must have engaged in "deliberate elicitation" of incriminating information from the defendant.

Matteo v. Superintendent, SCI Albion, 171 F.3d 877, 892 (3d Cir. 1999) (citing *Moulton* and *Henry*). Because the Sixth Amendment right to counsel is offense specific, *Texas v. Cobb*, 532 U.S. 162, 164 (2001), defendant Bergrin recognizes that the *Massiah* inquiry is limited to statements obtained regarding the charges pending against the defendant at the time he makes them to the government agent, not to new charges under investigation.

Statements that meet the three-prong test articulated in *Matteo* must, however, be excluded from evidence. As the Court stated in *Michigan v. Harvey*, 494 U.S. 344 (1990):

> The exclusion of statements made by a represented and indicted defendant outside the presence of counsel follows … as a necessary incident of the constitutional right itself. … admission of the evidence is itself error [because] [a]s we explained in *Massiah*, even when police investigation of a defendant may be 'entirely proper,' a defendant is 'denied the basic protections of [the Sixth Amendment] guarantee when there [is] used against him at his trial evidence of his own incriminating words, which federal agents . . . deliberately elicited from him after he had been indicted and in the absence of his counsel.'

Id. at 362-63. *See also United States v. Morrison*, 449 U.S. 361, 366 & n.2 (1981) ("when before trial but after the institution of adversary proceedings, the prosecution has improperly obtained incriminating information from the defendant in the absence of his counsel, the remedy characteristically imposed is not to dismiss the indictment but to suppress the evidence or to order a new trial if the evidence has been wrongfully admitted and the defendant convicted" unless "there was continuing prejudice" which "could not be remedied by a new trial or suppression of evidence," which might "call[] for more drastic treatment").

C. The Motion Should Be Granted

The Court should suppress all statements related to the Prostitution Case including information that the government incorporated into the RICO case, which were made by Mr. Bergrin that were recorded by the paid informant because the government committed a *Massiah* violation. First, at the time that informant met with and elicited statements from Mr. Bergrin, it is clear that his right to counsel had attached. Mr. Bergrin was indicted in connection with the Prostitution Case on January 10, 2007, at which point his right to counsel attached, a right which he exercised by retaining Gerald Shargel, Esq., to represent him. Because Mr. Bergrin has pleaded guilty, but has not been sentenced, those charges remain pending against him. Thus, during the entire time that he had conversations with the paid informant ("July 2008 through December 2008," Exhibit 1 at 6, ¶ 11), some of which were recorded, Mr. Bergrin was entitled to the protections outlined in *Massiah* as required by the Sixth Amendment. The Indictment, the Smith Certification offered in support of Mr. Bergrin's detention, and the government's press release all demonstrate that Oscar Cordova interrogated Mr. Bergrin without his lawyer being present. Second, there is no question but that Cordova was acting as a government agent. That much is clear, once again, from the government documents filed in connection with this matter. Exhibit 2 at 10. Third, the paid informant deliberately elicited information from Mr. Bergrin. The government, which is intimately familiar with the taped conversations, having quoted Mr. Bergrin's alleged conversations with Cordova, *e.g.*, Exhibit 2 at 14-15, ¶ 26, cannot credibly deny or even challenge that he clearly engaged in "deliberate elicitation" of incriminating information from the defendant.

For all these reasons, the Court should enter an Order precluding the government from using any information at trial that it obtained in violation of *Massiah* and hold a hearing to ascertain what information is so implicated. Mr. Bergrin also respectfully requests that he be permitted to supplement this motion and, if appropriate, seek other relief based upon the facts that are revealed at such a *Massiah* hearing.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

UNITED STATES OF AMERICA v. PAUL BERGRIN and ALEJANDRO BARRAZA-CASTRO, a/k/a "George" Defendants.	Criminal No. 09-369 Filed Electronically

BRIEF IN SUPPORT OF DEFENDANT PAUL BERGRIN'S PRETRIAL MOTIONS

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

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

BRIEF IN SUPPORT OF DEFENDANT PAUL W. BERGRIN'S PRETRIAL MOTIONS

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

UNITED STATES OF AMERICA, **v.** **PAUL W. BERGRIN,** *et al.* **Defendants.**	Criminal No. 09-369 **OPINION**

This matter comes before the Court on Defendant Paul Bergrin's Second Omnibus Motion. As discussed in more detail below, the Court grants the motion in part, denies it in part, and reserves on the remainder.

I. Background

Because this Court writes this Opinion for the benefit of the parties only, it need not and will not describe the factual and procedural background of this case at much length. On June 2, 2011, the Grand Jury in and for the District of New Jersey charged Bergrin, an attorney, in the Thirty-Three-Count Second Superseding Indictment (the "SSI") with racketeering, in violation of 18 U.S.C. § 1962(c), racketeering conspiracy, in violation of 21 U.S.C. § 846, and various other federal offenses, including tax evasion, running a prostitution business, drug crimes, witness tampering, and conspiracy to murder a federal witness (the "K.D.M. Murder"). Bergrin moves pretrial for various form of relief, which the Court will now address issue-by-issue.[1]

II. Legal Analysis

A. Dismissal of Count Twenty-Six of the SSI

Bergrin moves to dismiss Count Twenty-Six under Federal Rule of Criminal Procedure 12(b)(3)(B). In analyzing a motion to dismiss under Rule 12, the Court must accept as true the facts as alleged and determine if those facts constitute a

[1] Bergrin has also moved for severance under Federal Rule of Criminal Procedure 14. The Court will address that motion in a separate opinion.

violation of the law under which the defendant is charged. *United States v. Zauber*, 857 F.2d 137, 144 (3d Cir. 1988). In assessing an indictment's sufficiency, the Court looks to whether the charging document: (1) contains the elements of the offense intended to be charged, (2) sufficiently apprises the defendant of what he must be prepared to meet, and (3) allows the defendant to show with accuracy to what extent he may plead a former acquittal or conviction in the event of a subsequent prosecution. *United States v. Vitillo*, 490 F.3d 314, 321 (3d Cir. 2007).

Count Twenty-Six charges Bergrin with causing or attempting to cause a nonfinancial business – in this case, his law firm – to fail to file certain tax reports with the intent of evading the reporting requirements. After charging the relevant facts, the SSI indicates the specific statutes Bergrin allegedly violated as "Title 31, United States Code, Section 5324(b) and Title 18, United States Code, Section 2." 31 U.S.C. § 5324(b) is the substantive criminal statute; 18 U.S.C. § 2 creates aiding and abetting liability.

Bergrin does not dispute that the SSI sufficiently alleges the substantive crime. He instead argues that because Count Twenty-Six charges him with violating Section 5324(b) "and" Section 2, and the factual allegations supporting the charge name no other actors or defendants, the Count necessarily charges Bergrin only with aiding and abetting himself in committing a crime. Bergrin further argues that not only is this an impossible act, it is not supported by the factual allegations of the Count, which do not contain a necessary element of aiding and abetting liability – namely, that another individual acted as the principal in committing the crime. *See United States v. Mercado*, 610 F.3d 841, 846 (3d Cir. 2010) (discussing elements of aiding and abetting including first element: "that another committed a substantive offense").

But aiding and abetting is an alternative theory of liability and is distinct from the charging of specific statutory crimes. *See, e.g.*, *United States v. Sutcliffe*, 505 F.3d 944, 959-60 (9th Cir. 2007). The fact that Count Twenty-Six also charges a violation of Section 2 does not bear on whether the Count sufficiently alleges a substantive criminal violation but merely serves to advise the accused that a conviction may be had even if the evidence tends to show that the accused was not the principle actor. *See United States v. Caruso*, 948 F. Supp. 382, 394-95 (D.N.J. 1996). Nor does the absence of specific facts in the Count explicating aiding and abetting liability necessarily prevent the Government from obtaining a conviction under that alternate theory. *See United States v. Somers*, 950 F.2d 1279, 1283 (7th Cir. 1991). In fact, if the SSI did not explicitly include aiding and abetting liability, this Court might still be required to read the alternative theory of liability into each and every count. *See United States v. Forsythe*, 560 F. 2d 1127, 1136 n. 15 (3d Cir. 1977) ("Nor is it dispositive of the substantive charge, since the indictment need

not specifically charge aiding and abetting in order to support a conviction for aiding and abetting. The indictment must be read as if 18 U.S.C. § 2 were embodied in each count.").

For the foregoing reasons, the Court will deny Bergrin's motion to dismiss Count Twenty-Six.

B. Alleged Violations of *Massiah v. United States*

Bergrin asks this Court to suppress certain statements that Bergrin made to government agents regarding the K.D.M. Murder, as well as any information derived from these statements, under *Massiah v. United States*, 377 U.S. 201 (1964). In *Massiah*, the Supreme Court held that the deliberate elicitation of incriminating statements by a government agent outside the presence of a charged defendant's attorney violates the defendant's Sixth Amendment rights. In order to show a violation under *Massiah*, the defendant must prove that: (1) the right to counsel attached; (2) an informant was acting as government agent; and (3) the informant engaged in deliberate elicitation of incriminating information. *Matteo v. Superintendent, SCI Albion*, 171 F.3d 877, 892 (3d Cir. 1999).

The key issues here is the timing of the attachment of Bergrin's right to counsel. The right to counsel does not attach until: (1) there is a formal charge, preliminary hearing, indictment, information, or arraignment; or (2) the accused is confronted by the procedural system or his expert adversary, or both, in a situation that might settle the accused's fate and reduce the trial to a mere formality. *Matteo*, 171 F.3d at 892. Bergrin was first indicted on May 19, 2009. The statements at issue were all made over a period of time between April 2008 and March 2009 – before Bergrin was indicted.

But Bergrin alleges that his right to counsel attached in 2007 because of several events. First, the state of New York indicted Bergrin on state law prostitution charges on January 10, 2007. Second, Bergrin hired an attorney around this same time to represent him in the New York case and the scope of this representation allegedly included dealing with possible future federal charges. Third, in April 2007, during a separate federal criminal trial against another defendant involved in the K.D.M. Murder, witnesses for the Government testified that Bergrin was part of a conspiracy to commit the murder. Fourth, on May 1, 2007, then-United States Attorney for the District of New Jersey, Christopher Christie, issued a press release describing the federal criminal trial and mentioning the testimony regarding Bergrin's role in the murders. Bergrin argues that because of these facts, his right to counsel attached at the earliest in January 10, 2007, and in any event, no later than May 2007.

Despite Bergrin's creative attempts, *Matteo* and *Massiah* simply do not stretch wide enough to cover his particular situation prior to his formal indictment. First, the right to counsel is offense specific, and provides no protection from elicitation of statements about uncharged conduct. *Texas v. Cobb*, 532 U.S. 162, 175 (2001). Thus, Bergrin's Sixth Amendment right to counsel that attached in connection with the New York state case is limited to statements regarding those charges and does not extend to statements regarding the K.D.M. Murder for which he was not yet charged. Second, the fact that Bergrin obtained counsel to represent him in possible future criminal charges does not mean that his right to counsel under *Massiah* attached; it is the conduct of the Government, not the suspect, that drives the determination. If it were otherwise, an individual could commit a crime and then immediately insulate himself from undercover investigation by merely signing a retainer agreement regardless of whether law enforcement had begun any formal proceedings or was even aware of the crime. Finally, the right to counsel does not attach merely because an individual is the object of an investigation – public or otherwise – where the individual has not been charged. *United States v. Ayala*, 601 F.3d 256, 272 (4th Cir. 2010); *see also Kirby v. Illinois*, 406 U.S. 682, 690 (1972) (refusing to find Sixth Amendment right to counsel attached during course of pre-indictment criminal investigation). Thus, the fact that United States Attorney Christie and persons in his employ made statements alleging Bergrin's possible involvement in the K.D.M. Murder is insufficient to trigger his Sixth Amendment rights.

And for those reasons, the Court will deny Bergrin's motion to suppress these statements.

C. Alleged Fourth Amendment Violations

Bergrin alleges various violations of his Fourth Amendment rights, separated into three specific events, and seeks suppression of certain seized evidence under each. As discussed below, the Court finds no violations occurred, and so it will deny the coordinate motions to suppress.

i. Alleged Overbroad Execution of Search Warrant at 50 Park Place, 10th Floor, Newark, New Jersey ("50 Park Place")

Bergrin argues that the Court should suppress all evidence seized from 50 Park Place because the agents who conducted the search flagrantly disregarded the terms of the search warrant. *See United States v. American Investors of Pittsburgh, Inc.*, 879 F.2d 1087, 1107 (3d Cir. 1989). Bergrin is incorrect.

Execution of a warrant must rise to the level of abuse to constitute flagrant disregard justifying suppression of all materials seized; where the officers appear to have acted in good faith, such abuse is not present even though the officers seized material well outside the scope of the warrant. *Id.* While Bergrin presents a brief list he claims is indicative of the kinds of materials seized that fall outside the scope of the warrant, perusal of the list does not suggest that the execution of the warrant was so overbroad that the agents were acting with flagrant disregard. Indeed, the search warrant itself was very broad, and an agent could reasonably and in good faith have believed that many of the items on Bergrin's list were well within the scope of the warrant.

Similarly, the fact that agents seized computer material for off-site search is not evidence of a Fourth Amendment violation. In collecting computers or hard drives, the Government does not need to conduct on-site data collection and may move the computer hardware off-site to conduct searches for relevant evidence. *United States v. Stabile*, 633 F.3d 219, 233-34 (3d Cir. 2011). And while it is true that the off-site search of computer material must be conducted within the scope of the warrant, *see id.* at 238-39, Bergrin has not presented evidence that might suggest that the Government failed to conduct focused searching in accordance with the warrant.

Of course this Court may still suppress materials seized that fall outside the scope of the warrant provided Bergrin properly objects to their introduction, but Bergrin has failed to justify a blanket suppression of all evidence seized from 50 Park Place.

ii. Alleged *Franks* Violation

Bergrin alleges that a warrant obtained by the Government to search various physical locations was obtained in violation of *Franks v. Delaware*, 438 U.S. 154 (1978) and seeks a hearing on the issue and, ultimately, suppression of the evidence seized from those locations.

Under *Franks*, a court must suppress the fruits of a search obtained through the execution of a search warrant supported by misleading affidavits. *Id.* at 155-56. In order to secure suppression, a defendants must prove by a preponderance of the evidence that: (1) the affiant made a knowingly or recklessly included a false statement in the affidavit or omitted information from the affidavit; and (2) that without the omission or false statement, the affidavit would fail to establish probable cause, that is, that the omission or statement was material. *United States v. Frost*, 999 F.2d 737, 742-43 (3d Cir. 1993). In order to be entitled to a *Franks*

hearing, a defendant must make a "substantial preliminary showing" on both prongs. *United States v. Brown*, 3 F.3d 673, 676 (3d Cir. 1993).

Bergrin fails to make the necessary showing. Bergrin argues that the affidavit of FBI Special Agent Timothy B. Sillings was improper because it relied on information provided by Anthony Young but failed to provide information that would have allowed the magistrate judge to adequately determine Young's credibility. Specifically, the affidavit fails to mention that Young gave three conflicting versions of the information, only one of which appears in the affidavit. But even assuming the truth of this assertion – and assuming Bergrin can satisfy the first prong, which he does not appear able to – the alleged omissions are far from material. The Court has reviewed the affidavit as if it included the alleged omissions from Young's testimony and is satisfied that adequate probable cause still existed to support the search warrants at issue. *See Frost*, 999 F.2d at 743 (analyzing materiality of alleged omission and holding that "where an omission, rather than a misrepresentation, is the basis for the challenge to the affidavit, a court should ask whether the affidavit would have provided probable cause if it had contained a disclosure of the omitted information.") The affidavit is seventy-one pages long – with Young's statements providing only a small portion thereof – and it includes information more than adequate to show probable cause that specific evidence of the alleged criminal activity would be found at all of the locations ultimately searched.

iii. Alleged Illegal Search of 710 Summer Avenue, Newark, New Jersey ("710 Summer Avenue")

Bergrin argues that agents conducted an illegal search of 710 Summer Avenue on May 21, 2009 when they entered the premises shortly after arresting a suspect just outside. While Bergrin concedes that agents later returned with a valid search warrant before actually seizing any evidence, Bergrin argues that the Court must suppress the evidence seized in that second search under the fruit of the poisonous tree doctrine. *See Wong v. United States*, 371 U.S. 471, 484-85 (1963). Again, Bergrin is mistaken.

The pertinent facts of the alleged illegal search are largely undisputed. Drug Enforcement Administration ("DEA") agents started surveillance of 710 Summer Avenue after receiving a tip from an informant around March of 2009. On May 21, 2009, after collecting large amounts of information from observation and the informant, the DEA agents arrested Alejandro Barraza-Castro outside in front of 710 Summer Avenue. At the time of his arrest, agents saw Jimenez, another individual who had been under surveillance, watching from the second floor of the

building. The agents, including one agent with his gun drawn, ordered Jimenez to grant them access to the building. Jimenez came down and opened the door, and the agents arrested him. At that same time, other agents entered the building and went to the second floor, where they found and arrested Alonso Barraza-Castro, another individual who had been under surveillance. They then conducted a protective sweep of the building, during which they observed that the building had a basement. After the sweep, they pulled out, leaving a few agents to secure the premises. Several hours later, they returned with a signed search warrant and searched the building. The warrant was based on evidence and information collected almost entirely independent of the sweep with the exception of information relating the existence of the basement. They found various pieces of evidence on the second floor and fifty-three kilograms of cocaine in the basement.

Officers have a right to conduct a protective sweep of a building where an arrest occurs – even if the arrest occurs outside the building – if the officer have a reasonable suspicion based on articulable facts that the area harbors individuals posing a danger to those on the arrest scene. *Maryland v. Buie*, 494 U.S. 325, 334 (1990); *Sharrar v. Felsing*, 128 F.3d 810, 823-24 (3d Cir. 1997). Bergrin argues that because of surveillance, the agents knew that there were only three individuals connected to the location, and thus, had no reason to search for other persons in a protective sweep once all three were arrested. But in doing so, Bergrin makes an assumption for which he lacks factual and legal support. Knowing that he was likely at the location and was possibly armed, the DEA agents certainly had a reasonable suspicion to enter to find Alonso on the second floor. And despite having conducted some surveillance on the building prior to the arrests, the agents lacked knowledge as to whether any additional individuals could be within the premises. Given that they were dealing with a drug distribution conspiracy that involved additional persons, and the fact that they had information from their investigation that firearms were on the premises, even after arresting all three targets, the agents could easily have had sufficient articulable facts to support a reasonable suspicion that other dangerous individuals were within the building.

Thus, the Court finds that the protective sweep was not illegal, and therefore suppression under the fruit of the poisonous tree doctrine is inappropriate.[2]

[2] Even if the Court were to find that the sweep was illegal, the warrant still would have been valid under the independent source doctrine. *United States v. Burton*, 288 F.3d 91, 103 (3d Cir. 2002). That is, even if the tainted information from the affidavit were removed – the statement regarding the basement – the affidavit would still support the necessary probable cause determination. The Court does not reach the issue of whether the search was independently justified by exigent circumstances.

D. Preclusion of Privilege Material

As part of its search of the seized materials, the Government obtained numerous documents from Bergrin's law offices and computer hard drives. The Government's Filter Team – an independent privilege review team walled off from the Government's trial attorneys – reviewed these documents to determine whether they were protected by the attorney-client or work product privileges. The Filter Team has turned over – or intends to turn over – certain documents they have reviewed to the trial attorneys. Bergrin challenges the propriety of turning over two of these documents, which the Court will refer to merely as the Loyal Communication and the Quijano Communication.[3] The Government concedes that both documents are privileged communications sent by Bergrin in furtherance of his representation of certain clients. But the Government argues that the communications are subject to the crime-fraud exception to privilege.

In order to invoke the crime-fraud exception, the Government has the burden of making a prima facie case that: (1) the client was committing or intending to commit a fraud or crime; and (2) the attorney-client communications were in furtherance of that fraud or crime. *In re Chevron Corp.*, --- F.3d ----, 2011 WL 2023257, at *12 (3d Cir. May 25, 2011). A prima facie showing requires presentation of evidence which, if believed by the fact-finder, would be sufficient to support a finding that the elements of the crime-fraud exception were met. *Id.* While the attorney-client privilege normally can only be waived by the client, the crime-fraud exception applies in a case against the attorney or his law firm where the attorney is acting unilaterally in committing crimes to further his representation of his client. *See In re Impounded Case (Law Firm)*, 879 F.2d 1211, 1213-14 (3d Cir. 1989).

The Government contends that both documents were communications made in furtherance of acts of witness tampering or attempted witness tampering that are not charged in the SSI. Both are communications from Bergrin to an investigator instructing the investigator to ask certain questions and to attempt to obtain certain statements from witnesses in then-pending cases against Bergrin's clients. The communications are not facially suspicious. Indeed, though the phrasing may be inelegant at times, the mere fact that Bergrin is hoping to obtain certain statements from witnesses is not indicative of criminal intent. And while the Government has proffered additional facts and evidence regarding the targeted witnesses and their

[3] The Filter Team has not turned over either of the two documents at issue, but intends to turn over both, if allowed to do so by this Court. The Government concedes that a third document formerly in dispute – the "Sobers Memorandum" – is privileged and has indicated it no longer intends to produce that document to the trial attorneys. Thus, the Court will deny Bergrin's motion as moot as it pertains to those particular documents.

testimony, they have not brought anything to the Court's attention to adequately show that the crime of witness tampering actually occurred or Bergrin's link thereto. *See Chevron*, 2011 WL 2023257, at *12.

For the foregoing reasons, the Court will grant Bergrin's motion on this point and order that the two documents be withheld from the Government's trial attorneys.[4]

E. Suppression of Expert Testimony

The Government intends to elicit the expert testimony of Dr. Junaid Shaikh and Detective Luis Alarcon, a ballistics expert, regarding the cause of death and other evidence relating to the K.D.M. Murder. The Government has two reasons for introducing this evidence: (1) to prove the cause of death, a necessary element of a crime with which Bergrin is charged, and (2) to corroborate Young's story and thereby bolster his credibility as a witness. Bergrin wants the Court to exclude any expert testimony regarding the cause of death arguing that it is potentially prejudicial and irrelevant to the only disputed issue: whether Bergrin was actually involved in a conspiracy to commit the murder.

Despite this, the Court recognizes that the Government will likely have the right to introduce a limited amount of evidence regarding the cause of death in the K.D.M. Murder. This may include testimony from both experts. But the Court is not currently situated to make the determination of what particular evidence is necessary and appropriate. The Court will therefore reserve judgment on Bergrin's motion until later in the proceedings.

F. Immediate Production of Exculpatory Material

The Government has offered to provide *Brady* and *Giglio* material three days prior to the appearance of the relevant witness; Bergrin moves for immediate production of all exculpatory material. This Court has discretion to determine when the Government should produce this material to Bergrin. *United States v. Starusko*, 729 F.2d 256 (3d Cir. 1984). Bergrin must receive the material early enough to make effective use of it at trial. *Id.* Given the potential complexity and amount of the material, and given that there are no countervailing security

[4] There are also issues around six additional documents Bergrin seeks to prevent the Filter Team from turning over to the trial attorneys. But the Government has represented that it has no intention of turning those documents over to the trial attorneys, and so this Court will deny Bergrin's motion regarding these documents as premature. Should the Filter Team later decide to turn these documents over to the trial attorneys, it should first notify Bergrin and this Court, and Bergrin will have the opportunity to renew his motion.

concerns that cannot be addressed otherwise, this Court will order the Government to produce the material two weeks prior to the beginning of trial. To the extent the Government feels that certain material or certain information regarding witnesses should not be turned over because of security concerns, the Government must make specific in-camera applications to this Court explaining the need for the withholding.

III. Conclusion

For the foregoing reasons, the Court will grant Bergrin's motion in part, deny it in part, and reserve on certain issues. An appropriate order follows.

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

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

UNITED STATES OF AMERICA v. PAUL BERGRIN, Defendant.	Criminal No. 09-369 (DMC) **ORDER**

THIS MATTER having come before the Court upon the *ex parte* application of Gibbons P.C. (Lawrence S. Lustberg, Esq., appearing), standby counsel for defendant Paul Bergrin, pursuant to the Criminal Justice Act ("CJA"), 18 U.S.C. § 3006A and the CJA Plan for the United States District Court for the District of New Jersey, and defendant Bergrin having previously been determined to be indigent, and standby counsel having been appointed by the Honorable William J. Martini on September 16, 2011, *nunc pro tunc* to September 12, 2011; and

WHEREFORE, pursuant to the CJA, 18 U.S.C. § 3006A(e)(1), and the Court having entered an Order on March 20, 2012 approving L.F. Stephens, Inc. to provide investigative services to defendant Bergrin at the expense of the United States of America, effective September 12, 2011, and this Court having further determined that the services of at least two additional investigators and other investigative staff are essential to an adequate defense of defendant Bergrin, and

~~**WHEREFORE**, pursuant to the CJA, 18 U.S.C. § 3006A(e)(1) and this Court having further determined that the assistance of an expert on digital audio recordings is essential to an adequate defense of defendant Bergrin, and~~

THE COURT having considered the submissions of the defendant, and the arguments of counsel and for good cause shown,

IT IS on this 4 day of Oct, 2012,

ORDERED that appointed standby counsel for defendant Bergrin in this action in the United States District Court for the District of New Jersey hereby shall be compensated in accordance with the procedures and standards set forth in 18 U.S.C. § 3006A and the CJA Plan for the services of Lawrence S. Lustberg, Esq., Bruce A. Levy, Esq., Amanda B. Protess, Esq., and any other necessary employees of the law firm Gibbons P.C., One Gateway Center, Newark, New Jersey 07102-5310; and

IT IS FURTHER ORDERED that, in accordance with 18 U.S.C. § 3006A and the CJA Plan, Gibbons P.C. shall hereby receive an interim payment to compensate appointed standby counsel for the legal services provided and expenses reasonably incurred in providing services as standby counsel in the United States District Court in this case through August 31, 2012; and

IT IS FURTHER ORDERED that L.F. Stephens, Inc. be and he hereby is authorized to hire and utilize additional investigative staff, as necessary, to provide investigative services to defendant Bergrin; ~~and~~

~~**IT IS FURTHER ORDERED** that defendant Bergrin is hereby authorized to retain the services of an expert to conduct a forensic examination of the digital audio recordings at issue in this case and to testify with respect to those recordings at trial on behalf of defendant Bergrin~~.

Honorable Dennis M. Cavanaugh, U.S.D.J.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

UNITED STATES OF AMERICA, V. PAUL BERGRIN, Defendant.	Criminal No. 09-369 **CERTIFICATION** **OF** **LOUIS F. STEPHENS**

I, Louis F. Stephens, of full age, being duly sworn according to law upon my oath hereby depose and say:

1. I am a private investigator licensed by the State of New Jersey and the principal of a professional investigative services firm, L. F. Stephens, Inc. and am the investigator assigned to the defense of Paul W. Bergrin (hereinafter "Bergrin").

2. I submit this certification in support of Bergrin's Motion for a Pre-trial Evidentiary Hearing seeking Dismissal of the Indictment or, alternatively to suppress evidence, bar witness testimony or impose other appropriate sanctions based upon the Government's Misconduct, described herein.

3. This certification provides a proffer of the evidence that would be presented to the Court at an evidentiary hearing based upon the investigation which I personally conducted; it does not and is not intended to set forth all of the information I have ascertained in the course of this investigation.

4. The statements set forth herein are based upon: (1) my knowledge of the facts as reported to me by witnesses I personally interviewed and/or witnessed; and (2) information I ascertained which independently corroborates the information provided by the witnesses I interviewed.

5. In addition, some of the sources I referenced or/reviewed include but are not limited to:

(a) Excerpts of the transcripts from the 2007 *United States v. William Baskerville* and the 2011 *United States v. Paul Bergrin* trials;

(b) Various investigative reports and discovery provided by the Government and local law enforcement agencies; and

(c) Reports and records recently provided by the Government that were not provided to the Defense prior or during the 2011 trial against Bergrin.

6. I have been an investigator for more than forty (40) years. I am also a former Special Agent of the Federal Bureau of Investigation (hereinafter "FBI" or "the Bureau") where I worked for 18 years, beginning in 1971.

7. During my service with the Bureau, I investigated and/or supervised a wide range of criminal investigations including charges involving federal organized crime; money laundering; international terrorism; and counter-intelligence investigations and operations primarily focused on detecting acts of espionage, arms smuggling and identifying, assessing and responding to threats against the President of the United States.

8. In 1989, I founded my own private investigation firm, L.F. Stephens, Inc.

9. For more than twenty years, the firm has provided investigative services to a wide spectrum of clientele in diverse areas.

10. Most of the firm's investigators and the network of investigators who service the firm's clients are retired FBI agents.

11. Based upon my decades of experience working with the Bureau and as a private investigator, I am familiar with standard protocols, guidelines and procedures that federal law enforcement agents are expected and/or are required to follow in undertaking investigations as outlined in the FBI's Manual of Investigative Operations and Guidelines (hereinafter "MOIG").

12. I began serving as an investigator in this case in 2011.

13. Prior to serving as the investigator in this case, I never worked for, with or on behalf of Bergrin professionally and did not know him personally.

14. In undertaking this investigation, I primarily have been charged with identifying and/or locating and interviewing witnesses who have knowledge relative to the charges brought against Bergrin in the indictment.

15. During these interviews, the witnesses frequently described the investigative tactics employed by the Government in building its case against Bergrin. In virtually every interview, these witnesses reported acts of misconduct by the Government's agents and/or members of the prosecution team, as set forth below. In almost all instances, I have independently corroborated the information provided by the witnesses I interviewed.

I. THE GOVERNMENT THREATENED AND COERCED JAUREGUI INTO FALSELY IMPLICATING BERGRIN AND INDUCED HER TO ACT AS A *DE FACTO* AGENT BY RECRUITING OTHER WITNESSES TO FALSELY IMPLICATE BERGRIN.

16. Yolanda Jauregui Bracero (hereinafter "Jauregui") is one of several co-defendants charged in this case. She is the former girlfriend of Bergrin.

17. According to reports provided by the Government, Jauregui met with federal agents more than thirty (30) times since her arrest in 2009.

18. During these interviews, Jauregui implicated Bergrin as being involved in a large-scale drug distribution conspiracy in which Jauregui and co-defendant Alejandro Bazzaro- Castro were involved along with unindicted co-conspirators Abdul Williams and her brother Ramon Jimenez.

19. Both Williams and Jiminez also are testifying on behalf of the Government against Bergrin.

20. The defense investigation has identified numerous witnesses who reported that Jauregui admitted lying to the Government to falsely implicating Bergrin.

21. According to these witnesses, Government agents pressured, coerced and encouraged Jauregui to lie. The agents used suggestive interviewing techniques and leading questions to enable Jauregui to provide the Government with the testimony it sought to mount its case against Bergrin.

22. These witnesses also have reported that, per Jauregui, the Government's agents asked Jauregui to recruit other individuals to implicate Bergrin and disseminate false information to those individuals to further the Government's objective.

A. DW-1, A RELIABLE CONFIDENTIAL INFORMANT FOR THE GOVERNMENT, REPORTED THAT THE GOVERNMENT COERCED JAUREGUI, "PUT WORDS IN HER MOUTH," AND MADE UNDISCLOSED PROMISES TO HER IN EXCHANGE FOR HER TESTIMONY.

23. DW-1 reported that she has worked with the Government as an informant in the past. She stated that she has provided information and confidential assistance to U.S. law enforcement agencies which has led to arrests and convictions.

24. DW-1 was an inmate who was confined with Jauregui for several months.[1]

25. During that time, Jauregui discussed her case with DW-1.

26. DW-1 advised that Jauregui admitted to her that Bergrin was never involved in the drug business; had no knowledge of Jauregui's drug smuggling and dealing; and had no knowledge of or involvement in any criminal conduct or the drug distribution scheme in which Jauregui was involved with other individuals.

27. Jauregui described Bergrin to DW-1 as "a dumb fool who took in every loser he ever met and put him/her to work in his office" and that Bergrin was "clueless" as to what was going on and was "stupidly smitten" with Jauregui.

28. Jauregui told DW-1 that she was desperate to get out of jail and would do anything to do so including implicating Bergrin in various illegal drug deals in which she was involved.

29. Jauregui told DW-1 that she " had to do what she's gotta do" to get back on the street and that Jauregui had sex with jail guards in return for favors such as passing on messages to "the outside" and having the officers bring her skin lotion and perfume.

30. DW-1 recalled numerous occasions when Jauregui was removed from jail to meet with the U.S. Attorney's Office. According to Jauregui, the agents questioned her for hours about Bergrin and whether he was involved in the drug business.

31. When Jauregui returned from one of her many meetings with the FBI and the U.S. Attorney, she told DW-1 that the Government often "put words in her mouth" to implicate Bergrin in various criminal acts that were not true; that Jauregui would be asked leading

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[1] Given the information herein, there are serious concerns that the Government will attempt to intimidate and coerce the Defense's witnesses who have come forward and pressure them into recanting their testimony. Due to these concern and concerns over trial strategy, the names of the Defense's witnesses, current locations and dates of their interviews are being omitted from this affidavit. The Defense will, however, identity and produce these witnesses if the Court Orders an evidentiary hearing.

questions to prompt her as to what the Government wanted her to say to implicate Bergrin; and that, in response to their prompting, she told the Government "whatever they wanted to hear" to implicate Bergrin.

32. Jauregui told DW-1 that the Government promised her that, if she (Jauregui) testified against Bergrin and implicated him that she would be released very soon and provided with money and a home.

33. As a result of these promises, Jauregui told DW-1 that she in fact lied and told the Government that Bergrin was involved.

34. Jauregui told DW-1 that the more lies Jauregui told the Government about Bergrin, "The better they liked it."

B. DW-2 CORROBORATES DW-1'S REPORTS THAT THE GOVERNMENT COERCED JAUREGUI INTO LYING AND USED JAUREGUI TO RECRUIT OTHERS TO FALSELY IMPLICATE BERGRIN.

35. DW-2 met Jauregui during her confinement; Jauregui and also discussed her case with DW-2.

36. Jauregui told DW-2 that the Government believed Bergrin was "the key player" in a large scale drug distribution conspiracy in which Jauregui had been involved.

37. Jauregui confided in DW-2 that the FBI had it wrong and that it was not Bergrin who was involved in the drug conspiracy but rather Jauregui was.

38. Jauregui admitted to DW-2 that she did a lot of things behind Bergrin's back and that "Paul knew nothing about drugs and knew nothing about the restaurant." But, Jauregui explained to DW-2, just as Jauregui did to DW-3, "...a girl has gotta do what a girl has gotta do."

39. DW-2 reported that FBI agents visited Jauregui frequently to interview her during her confinement.

40. Jauregui told DW-2 that FBI agents "want Bergrin;" that prosecuting her "was not enough;" and that she would have to cooperate and implicate Bergrin if she expected any break from the Government.

41. The agents told her that "she better come up with something good" and that "...if you don't have anything, make things up."

42. DW-2 recalled at least 2 occasions when Jauregui returned after FBI interviews and commented, "They want more! I don't know what else I can come up with!" She then commented, "The poor guy didn't do anything. I don't know anything but the feds are pressuring me."

43. Jauregui told DW-2 that the FBI pressured her so much that she thought she would have an emotional breakdown on several occasions. DW-2 witnessed Jauregui finally break down, cry, became emotional and say she "couldn't take it anymore" and "had to get out of here."

44. Jauregui told DW-2 that when she met with the FBI, she "made things up" and her story just "kept getting bigger and bigger."

45. DW-2 stated that Jauregui told her that the FBI kept hammering her for more information and told her she had to convince other persons to testify against Bergrin and "roll over" on him.

46. Jauregui told DW-2 the only way she would get a "5K letter" was if her brother Jimenez and Williams also lied about Bergrin's involvement.

47. Jauregui told DW-2 she was able to pass information through prison guards an that she told both Williams and Jiminez to cooperate with the FBI and say Bergrin was involved. She told them "to just add Paul's name to everything."

48. Jauregui mentioned to DW-2 that the "guys" were present at a meeting or meetings she had with the FBI, indicating that other cooperating witnesses were present at the conference(s).

C. DW-3 CORROBORATES REPORTS THAT THE GOVERNMENT COERCED JAUREGUI INTO FALSELY IMPLICATED BERGRIN, WAS PASSING MESSAGES TO OTHER COOPERATING WITNESSES IMPLICATING BERGRIN AND THAT THE GOVERNMENT MADE UNDISCLOSED PROMISES TO JAUREGUI.

49. DW-3 is a close relative of Jauregui whom she saw on an almost daily basis prior to Jauregui's confinement.

50. DW-3 was in grammar school at the time of Jauregui's arrest.

51. Jauregui regularly took DW-3 with her when she engaged in her drug dealing activities.

52. Jauregui would instruct DW-3 to never tell Bergrin, where they were, what they did and to lie if necessary.

53. DW-3 was present when Bergrin confronted Jauregui about her affair with Bazzara-Castro. DW-3 witnessed Bergrin break down in tears, beg Jauregui not to see or deal with Bazzara-Castro and heard Bergrin tell Jauregui that Bazzara-Castro would ruin their lives.

54. DW-3 advised Jauregui's relatives informed her that the FBI had been pushing Jauregui to testify against Bergrin and to say that he was involved in the drug business with her and Bazzara-Castro.

55. Jauregui told DW-3 that the FBI promised Jauregui she would be released immediately after Bergrin's trial if she testified and that they would provide her with money, a car and a house.

56. DW-3 also knew Jauregui was communicating with Jauregui's brother Ramon Jimenez while he was incarcerated by using intermediaries to pass messages between them.

57. DW-3 advised that Jauregui's relative informed her that the FBI promised Jimenez he would be immediately released and provided money and a vehicle if he testified against Bergrin and stated that Bergrin was in the drug business and that Jiminez had expected to be released from prison but his is being forced to stay in jail until he testifies against Bergrin.

II. ATTORNEY RICHARD ROBERTS ACTS AS THE GOVERNMENT'S "*DE FACTO*" AGENT BY RETAINING AND RECRUITING CLIENTS TO "GET ON THE GRAVY TRAIN" AND FALSELY IMPLICATE BERGRIN.

A. ROBERTS CONTACTS JAUREGUI TO INQUIRE ABOUT MOVIE RIGHTS.

58. Richard Roberts is a criminal defense attorney who practices in Essex County, New Jersey.

59. He is a former assistant prosecutor who was portrayed in the movie "*American Gangster*," a movie about Roberts' successful prosecution of a large-scale drug dealer Frank Lucas who he then forged a closed friendship after Lucas' conviction.

60. Roberts has close professional and/or personal relationships with agents and attorneys who work in the United States Attorney's Office and is reported to have brought one or more of these colleagues to the *American Gangster* movie premiere.

61. According to the Government's investigation reports, Roberts met with Jauregui while she was in custody, although she was represented by other counsel.

62. The only documentation of what Roberts and Jauregui discussed during this meeting is regarding Roberts reported attempt to solicit "movie rights" to Jauregui's story relative to her involvement with Bergrin.

63. In addition to meeting with Jauregui, Roberts has met with, counseled and/or represented four other individuals who feature prominently in the Government's case: Maria Corriea, Abdul Williams, Albert Castro and Rondre Kelley.

B. ROBERTS CONTACTS WITH CONFIDENTIAL INFORMANT MARIA CORRIEA.

64. Maria Corriea is a confidential informant whom the Government sent in to infiltrate Bergrin's law office for more than six months.

65. During the time Corriea acted as a cooperating government witness, she met with Roberts on multiple times at locations outside of his office.

66. In early 2009, the Government terminated Corriea as an informant after discovering that Corriea stole Government funds which were supposed to be used as part of its undercover operation. No charges have been filed against Corriea, however.

C. THE GOVERNMENT HID EVIDENCE THAT CASTRO IMPLICATED BERGRIN ONLY AFTER RETAINING ROBERTS.

67. In addition to being acquainted with Roberts, Corriea is acquainted with Castro.

68. Castro is a 15-time convicted career criminal who has been incarcerated on multiple occasions in state and county prisons in the past 30 years.

69. From December 2003 through April of 2009, Castro never implicated Bergrin as being involved in criminal activity.

70. After Corriea was caught by the Government stealing money, she and her brother Carlos Taveras visited Albert Castro in jail.

71. This fact was not made known to the defense prior to the 2011 Kemo Murder trial.

72. On May 22, 2012 -- more than 7 months after the McCray murder trial ended in a hung jury and more than three years after Bergrin's indictment -- the Government provided the Defense with Castro's jail visitation records.

73. According to the records, Corriea visited Castro on multiple occasions.

74. Within days after Corriea's visits with Castro, Castro retained Roberts to represent him.

75. Prior to consulting with Roberts, Castro had not implicated Bergrin.

76. After meeting with Roberts, Castro implicated Bergrin for an act he claims occurred eight (8) years earlier, in exchange for a favorable plea deal.

77. At the Kemo Murder trial, Castro testified that Bergrin solicited him to kill McCray in 2003.

78. Castro's retention of Roberts, Roberts' acceptance of Castro's case, the timing between Corriea's visits of Castro, Castro's retention of Roberts and the timing of Castro's sudden inculpation of Bergrin is highly suspect.

79. Moreover, the Government's non-disclosure of these records denied the Defense the ability to investigate whether the Roberts was conspiring and colluding with the Government and acting as a de facto agent.

D. ROBERTS' REPRESENTATION OF COOPERATING WITNESS ABDUL WILLIAMS.

80. Williams is a career criminal who was facing a very lengthy prison term at the time he agreed to cooperate with the Government in implicating Bergrin.

81. Williams testified at the Kemo Murder trial against Bergrin.

82. Williams formerly was represented by or counseled by Roberts.

83. Prior to Roberts' representation and/or counsel of Williams, Williams did not implicate Bergrin.

84. At the time of the McCray trial, the Defense was unaware of Roberts' former representation of Williams.

85. Had this fact been disclosed by the Government, the Defense would have investigated the recurring pattern of cooperating witnesses who suddenly implicate Bergrin after meeting, being counseled by or retaining Roberts.

86. The Government's discovery revealed that multiple confidential witnesses implicated Williams' sister in narcotics trafficking conspiracy and that Jauregui and Jimenez and implicated Williams' father.

87. DW-9 and DW-10 stated that Williams admitted to them that the Government threatened to arrest Williams' father and sister with drug trafficking if he did not cooperate with them by implicating Bergrin.

88. Williams reported to DW-9 and DW-10 that he lied and fabricated evidence to inculpate Bergrin and to save his family.

89. After meeting with Roberts, Williams implicated Bergrin and in exchange received more lenient treatment on charges for which he had been facing a maximum of life imprisonment.

E. ROBERTS TELLS DW-5 THE GOVERNMENT THREATENED MORAN WITH THE DEATH PENALTY TO PROCURE HIS COOPERATION.

90. DW-5 is a former client of Bergrin's who was facing substantial jail time.

91. Roberts offered DW-5 a "25 percent discount" of his legal fees since DW-5 was a former Bergrin client.

92. DW-5 accepted Roberts' offer of representation at this reduced rate.

93. In one of their first meetings, Roberts brought up Bergrin's case and told DW-5, "I have inside connects with the case," and explained he was close with an individual or individuals, whom he did not name, in prosecuting the case against Bergrin.

94. Roberts described to DW-5 "inside information" regarding the Government's case against Bergin.

95. Per DW-5, Roberts stated, "Everybody and their mother is rolling on Paul." He named numerous people, including Moran and Jauregui.

96. Roberts told DW-5 so many people were jumping on the "gravy train" to get deals from the Government that Bergrin's fate was undoubtedly sealed.

97. Prior to the Government's filing of a Superseding Indictment, Roberts told DW-5, "They are about to charge Paul with drug charges that are more devastating than the murder charges."

98. Several months after Roberts provided DW-5 with this information, Bergrin was charged in a Superseding Indictment with drug offenses.

99. In addition to having advance knowledge of the Government's plans to file additional charges against Bergrin, Roberts described to DW-5 the FBI's tactics in coercing Moran to cooperate.

100. Roberts told DW-5 that the agents sat Moran down in a room, threatened him with the death penalty unless he "gave Paul up" and that he had "ten minutes to think about it."

101. Roberts said that when the agents returned, Moran told the FBI what they wanted to hear.

F. ROBERTS' ATTEMPT TO HAVE DW-5 JUMP ON THE "GRAVY TRAIN" AND FALSELY IMPLICATE BERGRIN FAIL.

102. Roberts told DW-5 that he had already spoken with the FBI about Bergrin and that the FBI was very interested in speaking with DW-5.

103. Roberts advised DW-5 to "tell on Paul" and that DW-5 should get on the "gravy train" with the rest of his clients.

104. DW-5 told Roberts that DW-5 knew Bergrin was not involved in selling illegal drugs.

105. DW-5 told Roberts that DW-5 had no interest in speaking with the Government, but Roberts persisted.

106. Despite DW-5 consistently communicating disinterest in meeting with the Government's agents, Roberts told DW-5 in a subsequent meeting that he had spoken to the FBI, to the U.S. Attorney's office and the local Prosecutor about DW-5's charges.

107. Roberts told DW-5 that he could arrange complete immunity from prosecution if DW-5 cooperated.

108. DW-5 again told Roberts that he knew nothing of Bergrin's involvement in drugs or other illegal activity. Roberts remained undeterred and continued to attempt to convince DW-5 to "just make something up."

109. Roberts flatly told DW-5 that it did not matter if DW-5 told the FBI the truth and to "just lie and tell them what they want to hear."

110. When the time came for DW-5 to decide whether to proceed to trial on his charges, Roberts once again implored DW-5 to "go to the FBI with something--give them anything" and that his "charges would go away."

111. Roberts persisted and told DW-5 that the prosecutor was willing to give DW-5 immunity if he did so.

112. DW-5 became frustrated with Roberts pressuring him. He told him that he did not want to talk about Bergrin; that he was not going to lie; and that he wanted to talk about his own case.

G. THE GOVERNMENT'S ATTEMPT TO HAVE DW-5 JUMP ON THE "GRAVY TRAIN" TO FALSELY IMPLICATE BERGRIN FAIL.

113. Despite DW-5 telling Roberts that he did not wish to meet with the Government, DW-5 was visited by two FBI Agents. DW-5 does not recall their names but does recall that one was a slender blond female and the other a male.

114. DW-5 said the female agent did most of the talking.

115. DW-5 asked why they had come to visit without contacting DW-5's attorney to be present or to request permission. The female agent brushed it off, telling DW-5 it "was not a problem."

116. The agents were focused on information about conspiracy to commit murder charges and drug charges against Paul Bergrin. They informed DW-5 that "they knew" Bergrin was involved in both activities and that if DW-5 gave them "a story" on Bergrin they could make DW-5's pending charges go away.

117. DW-5 advised it was very clear that they, in particular the female agent, did not care if what DW-5 told them about Bergrin was true or not.

118. They promised DW-5, who was facing substantial jail time, immunity from prosecution in exchange for DW-5's testimony.

119. DW-5 told both agents that he knew Bergrin was not involved in illegal drugs; was not aware of Bergrin being involved in any other illegal activities; and that they were "going after the wrong person."

120. DW-5 never once observed Bergrin involved in drug activity and was aware Jauregui hid her drug dealing from him.

121. DW-5 refused to lie and/or otherwise cooperate with the FBI Agents.

III. THE GOVERNMENT ISOLATES THOMAS MORAN IN A 33-HOUR LOCK DOWN AND THREATENS TO DO SO FOR YEARS UNLESS HE IMPLICATES BERGRIN.

122. DW-6 and DW-7 corroborate that Thomas Moran was threatened, coerced and intimidated into falsely implicating Bergrin.

123. Both were confined with Moran at some point during Moran's incarceration.

124. Moran told both DW-6 and DW-7 that he and Bergrin were innocent and never had any intent to do anything to any witness.

125. Moran admitted that he was a drug addict and a severe alcoholic at the time he met and had conversations with Oscar Cordova, the alleged "hit man" in the Esteves Plot.

126. Per Moran, Cordova also was a drug addict and alcoholic. Moran said that they both could be heard on the recordings snorting cocaine together.

127. Moran told DW-6 and DW-7 that he and Bergrin absolutely knew Cordova was not a "hit-man" and that he and Bergrin laughed about Cordova being a complete joke.

128. Moran said Cordova lied all the time; they did not believe a word he said; and they knew that he was an informant.

129. Moran told them that he and Bergrin humored Cordova and strung him along because he kept promising to pay their legal fees and expenses to defend the Esteves case.

130. Moran reported to them that his attorney told him that he would have to stay in lock down until he went to trial; that the trial very likely would be years away; and that he would not be allowed into general population until that time.

131. Moran said words to the effect that the prosecutors were attempting to break him by keeping him in solitary confinement or lock-down to get Moran to lie so that he could improve the conditions of his confinement.

132. Moran told these witnesses that he could not take being locked up for thirty-three (33) hours at a time and was losing his mind.

133. While he was in jail, Moran's former wife and the mother of his child committed suicide. Moran was devastated.

134. DW-6 and DW-7 said Moran was losing his mind, stopped showering and became physically disheveled and emotionally distraught.

135. Moran said he "could not take it," "did not care anymore if he had to lie about Paul" and would "do and say anything to get out."

136. Moran said his "lawyer told him what they wanted to hear" so he knew what lies to tell them about Bergrin. He knew if he did not tell them these lies that they would not let him cooperate.

IV. A FORMER BERGRIN CLIENT BOASTS THAT BERGRIN CAN BE ANYONE'S "GET OUT OF JAIL FREE CARD."

137. DW-6 further stated that he was incarcerated with a former client (hereinafter "FC-1") of Bergrin's.

138. FC-1 told DW-6 many times, "Whoever knows Paul Bergrin is lucky. It was the laughing joke of the facility ... all anyone has to do is have someone they know go on-line, find

out as much as you can about Paul and then call over to the Prosecutor's office and tell them you have information...they will be believe anything … It is a guaranteed get out of fail free card."

V. THE GOVERNMENT THREATENS, INTIMIDATES AND COERCES RAMON JIMINEZ.

139. In or about January of 2012, I received a report that DW-11 called Judge Martini's chambers complaining that the FBI was forcing Ramon Jimenez, one of the Government's cooperating witnesses, to testify to untruthful statements about Bergrin, or words to that effect.

140. I called DW-11 to speak to her/him about it.

141. I thereafter received a call from Ramon Jimenez, DW-11's family member, who, to my knowledge remains listed as a Government witness.

142. Mr. Jimenez asked why I had called DW-11.

143. I explained the above and Ramon Jimenez informed me that he wished to speak with me because "they're playing dirty".

144. Mr. Jimenez stated that he did not want the Government to know that he was agreeing to meet with me and suggested how we could meet without the Government finding out.

145. After the government contacted Bergrin's standby counsel about the issue, I did not meet with Mr. Jimenez as he suggested.

146. Thereafter, DW-11 called me and complained about the Government agent's treatment of Mr. Jimenez.

147. DW-11 told me that s/he contacted the Court at the direction of Mr. Jimenezto report that the "FBI was putting words in his (Jiminez's) mouth" and were pressuring Jimenez to lie about Bergrin when he testified.

148. DW-11 said that Jimenez was angry and very frustrated over what s/he called the Government's "harassment."

149. Based on my most last communication with DW-11, I understood Jimenez still was interested in meeting with me, but I was instructed not to do so unless Jimenez's counsel gave permission. I am told that he has refused to do so.

VII. THE GOVERNMENT ENCOURAGES DW-4 TO LEAK DAMAGING INFORMATION TO THE PRESS IN AN EFFORT TO SMEAR BERGRIN.

150. FBI Special Agent Shawn Brokos contacted DW-4 a few years ago. Brokos informed DW-4 that Jauregui was in jail and that Jauregui's boyfriend Bergrin was a "modern day John Gotti."

151. DW-4 told Brokos that she did not know and had never met Bergrin.

152. Brokos asked DW-4 to convince her daughter to "speak against Bergrin and provide information regarding Bergrin's illegal activities."

153. In exchange, Brokos promised that she would "do everything in her power" to see to it that DW-4's children were returned to her if D-4 would cooperate.

154. Brokos also told DW-4 that she should be a "little birdie in the press' ear" and suggested that she call Joseph Ryan, a reporter at the *Star-Ledger* in Newark, New Jersey.

155. Brokos encouraged DW-4 to report to the press that Bergrin had somehow been involved with an illegal adoption of Jauregui's daughter.

156. DW-4 did speak to Ryan about the matter.

157. Brokos continually promised that she would help DW-4 get her children back as soon as Bergrin was arrested. Brokos did not keep her word.

158. As soon as Bergrin was arrested, Brokos broke off all contact with DW-4.

159. DW-4 became angry and disenchanted with the FBI, particularly agent Brokos as she felt used and helpless.

I hereby certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

Louis F. Stephens

Dated: 29 August 2012

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 II (pp. 615–1232)

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW JERSEY

UNITED STATES OF AMERICA	:	Criminal No. 09-cr-369-DMC
v.	:	
PAUL W. BERGRIN,	:	TRANSCRIPT OF STATUS CONFERENCE
Defendant.	:	

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Newark, New Jersey
January 3, 2013

BEFORE:

THE HON. DENNIS M. CAVANAUGH, 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.

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BRUCE LEVY, ESQ.
Standby counsel for Defendant

(Defendant present)

THE COURT CLERK: All rise.

THE COURT: Be seated.

Good morning.

In the matter of United States v. Bergrin.

Counsel, can we get your appearances?

MR. GAY: John Gay on behalf of the United States Attorney's Office. Good morning, Your Honor.

MR. SANDERS: Good morning, Your Honor.

Steve Sanders on behalf of the United States Attorney's Office.

MR. MINISH: Joe Minish, Your Honor.

MR. BERGRIN: May it please the Court.

Good morning, Your Honor. Paul Bergrin on behalf of myself, Your Honor.

MR. LUSTBERG: And as standby counsel, Lawrence S. Lustberg, Bruce Levy, and Amanda Protess from Gibbons.

THE COURT: You may be seated.

MR. BERGRIN: Thank you.

THE COURT: All right. Well, as you know, we're starting this trial on Monday. We've sent out the jury questionnaires -- or the jury notices, and it's my understanding that we will bring in the jurors for the questionnaires on Monday. I guess we will then go over the questionnaires, and if we have to question any jurors, we

can do that, until we get down to the list of the appropriate number that we can draw from.

The jurors will be anonymous, they will have numbers only, but I want to talk to you a little bit about this issue of juror sequestration that's still pending.

I've had the benefit of discussing the matter to some extent with the Marshals, who have certainly been on top of this matter, and they've got significant experience.

And I'll hear you briefly on what your position is on the sequestration.

MR. GAY: Your Honor, the Government believes sequestration is appropriate in this case.

THE COURT: What form of sequestration?

(Off the record discussion)

MR. GAY: Oh.

Your Honor, could we have a brief sidebar on this issue? I apologize, Your Honor, for this, but I do think it might be important for us to just --

(The following takes place at sidebar)

MR. GAY: Your Honor, my only concern is that we are in open court. I don't want to reveal something that could possibly if it's not going to be admitted at trial that's going to --

THE COURT: Well, reveal what? I'm not closing the courtroom.

MR. GAY: No, no, no, I'm not asking to close the courtroom, Judge. I'm just kind of raising this as an issue for everybody. I'm more than happy to have a full discussion about this on all the bases for why I believe sequestration is necessary.

THE COURT: Well, you can make your record. I'm telling you right now, though, I've pretty much decided that we're not going to have sequestration.

MR. GAY: Okay. That's fine.

THE COURT: But I'll let you do whatever you have to do.

And the reason for that is, I think that we're going to create more issues than we're going to solve. It's been my experience that jurors are very careful, and they will let the Court know, either me personally or through my clerk, if anybody tries to talk to them, if anything unusual is happening. The Marshals are going to be aware of what's going on and they're going to do whatever they have to do to make certain that the jurors get in and out of the courtroom without any problem, and I'm talking about problems from the press, from anything.

But I have no reason -- there are ramifications when you sequester a jury. Jurors aren't stupid. And I think that the Defense has a good argument that, you know, we're just creating issues and having this jury think that

there's something here that might not be here.

MR. GAY: Okay.

THE COURT: And if somebody tries to tamper in any way with a juror, I'm going to let the jury know that they're going to have to let me know, and they take this seriously.

But, quite frankly, the way I look at it, and after talking to the Marshals, sequestration is either like all or nothing.

MR. GAY: I would agree with that, Judge.

THE COURT: It's almost more difficult for the Marshals to try to keep track of them here and there. If they were going to take them all, put them in one place, segregate them and all of that stuff and put them on bands, but I don't think this case deserves that. I don't see any reason for it.

So, that said, I'll still let you say whatever you want to say.

MR. GAY: I think what I will say is, we'll rely on the papers, probably, but I'll say that when we get out there. Okay?

Thank you.

(The following takes place in open court)

THE COURT: Mr. Gay?

MR. GAY: Your Honor, the Government relies on the

papers they submitted in connection with this argument.

Thank you.

MR. LUSTBERG: As does the Defense, Your Honor.

THE COURT: All right. Should I assume that for the purposes of these arguments today that it's going to be Mr. Lustberg, or --

MR. BERGRIN: Yes, Your Honor, please.

THE COURT: And I assume that if Mr. Bergrin wants to say something, he'll let me know what he wants to say. Otherwise, I'll just assume when Mr. Lustberg speaks, that's it?

MR. BERGRIN: Yes, sir.

THE COURT: All right.

MR. BERGRIN: Thank you.

THE COURT: All right.

Well, under the circumstances, as I just mentioned at sidebar, other than the assistance of the jurors in and out of the courthouse itself to their parking area, I don't think any further sequestration is going to be necessary. They're going to be anonymous as best we can. I'm going to try to let the jurors know that that is really for their benefit because this case might get a certain amount of notoriety, and I'm more concerned with the press than I am with a party doing something to a juror.

I think that's a fair way to handle it. If

Defense believes I should say something else, I'll certainly consider that, but I think that's the best way to handle the jurors. Okay?

All right. Next.

MR. LUSTBERG: Judge, before you move from the questionnaire.

THE COURT: Yes. Sure.

MR. LUSTBERG: Just as we were looking it over this morning, there's a couple of additions that we need to make.

For example, I just noticed on our side that Mr. Levy's name is not on there, so they don't have that. I think that Mr. Gay mentioned to me that there are additional witnesses he wants to add to the list at the end of the --

THE COURT: When we finish today, to the extent -- I can't imagine that those types of things are anything more than ministerial.

(Off the record discussion)

THE COURT: Okay. Scott tells me that -- my clerk tells me that he's already made one of the changes.

MR. LUSTBERG: You added Bruce? All right. So it's really just the Government's witnesses.

THE COURT: All right. So you know what to do? When we finish today, just let Scott know that so we have

them.

I think these, again, are ministerial. They're not of substance.

MR. LUSTBERG: Yes. And for the record, other than that, we have no problems with the questions that are on the questionnaire.

The way I think we did it last time, and again, Your Honor will do it how you wish, but just to assure that there was no taint, this was a pretty big jury pool, Judge Martini just asked whether anybody had any yes answers, and to the extent that there were, he would just question people individually, we actually used the back room, but however the Court wishes to do it, outside the presence of the other jurors.

THE COURT: Well, that's probably the way to do it. I don't know how else to do it.

MR. LUSTBERG: I don't, either.

THE COURT: If there's something on there that deserves further discussion, we'll have to call them in and talk to them and find out where to narrow it down. I'm sure we're going to get a lot of requests.

I've already received some letters from people telling me that this is going to be a hardship and a problem. I have tentatively told them -- denied their requests. I'm not quick to let people off jury duty, but

this could take a little bit of time, and so I am certainly sympathetic to people in this economic environment. I don't want jurors here that are just looking to get this over with and get out.

So we'll talk to them and we'll see what's what. But I didn't want to take any action until you saw those letters and heard what was going on, too.

MR. LUSTBERG: Thank you.

MR. GAY: Judge, the only other thing is that, in addition to the questionnaires, at the last trial, Judge Martini took submissions from both parties for some oral questions that the Court then asked, and I would request that Your Honor --

THE COURT: Two things. Two things.

I have no problem with that.

I want two things from you. I don't know if we have them yet.

One is, we'll take that, your questions. I'd like those submitted by the end of the day today.

MR. GAY: Yes, Your Honor. We have them.

THE COURT: The other is a neutral statement that the Court can read to the jury about what the case is all about.

Now, the operative word here is "neutral" statement. Okay? I'm going to let you make your opening

statements and do what you have to do so you'll have all of your opportunities to get into the minds of the jurors when you need to. But I just want to be able to let the jury know in a brief synopsis what the case is all about.

So I would like that to be agreed upon by both sides, and again, I want that by tomorrow morning.

MR. GAY: We will have that, Judge.

THE COURT: Okay? And what I will do, eventually, when the jury gets here, what I'm going to do is have each side stand up and introduce themselves and read off the list of witnesses. I will have previously told them what kind of case this is about, and that will be the use of the neutral statement.

MR. GAY: Okay.

THE COURT: So rather than me glean from the indictment what I should say, I'd prefer that you all do it, again, neutral.

MR. GAY: Absolutely, Your Honor.

THE COURT: Okay.

MR. LUSTBERG: And, Judge, just one last question on jury selection, which is -- and I just can't remember, I should know this, but how does Your Honor do it in terms of --

THE COURT: We do it the way they do it in the State Court. I believe that's the best way. We'll have,

what, 10 and six?

MR. LUSTBERG: I think last time we got a few more because of the length, but I don't remember.

THE COURT: Well, I see no reason to do that.

MR. LUSTBERG: Maybe it was 10 and six last time.

MR. GAY: It was, yes, 10 and six, yes.

MR. LUSTBERG: And then for the --

THE COURT CLERK: Three additional for the alternates.

MR. LUSTBERG: And three additional for the alternates.

THE COURT: For each two, because we're going to do the six alternates.

MR. GAY: That's what we did the last time.

MR. LUSTBERG: Okay.

THE COURT: And the way we would do it, I'll just --

What did we do; two-one, two-one?

THE COURT CLERK: Yes, it's four rounds of two-one.

THE COURT: So that will keep them equal so nobody can sandbag for the end. And if you knock a juror off, excuse a juror, preemptory, and then another juror is picked, you can still go back, even if you've said -- the other side, if the other has said that it's satisfactory,

when a new juror is -- because that changes the whole jury selection.

So that's the way we do it.

MR. GAY: Judge, just one additional thing on that, and that is, one of the measures that Judge Martini took the last time that we are requesting the Court take this time as well is that nobody knew who the alternates were. In other words, what happened was, we picked the 16 jurors, and it wasn't until the end of trial -- now, the Court, I don't know if Judge Martini knew who the alternates were, but at the end of the trial, it wasn't until then that the alternates were revealed, and part of the reason he did that, Judge, my understanding, is that -- or not my understanding, we made the request, so I assume he followed our request, was that that would be an additional measure that would prevent tampering. It was something that would not raise any spectre with the jurors about --

THE COURT: Well, except it creates some issues for us, though. I mean, I think that the -- how do we do that? We pick the first 12, and you use your 10 and three -- 10 and six, and then we have two, two, and two for the remainder.

MR. GAY: Well, what we did the last time, Judge, was, we simply pulled all of the challenges together and picked the panel of 16, so --

MR. SANDERS: Eighteen.

MR. GAY: Of eighteen. I'm sorry.

MR. SANDERS: And if I just may add to that point, and also, the benefit of it is that it makes all the jurors pay attention.

THE COURT: Oh, I'm very cognizant of that. I understand. I understand the wisdom in it.

What do you say?

MR. LUSTBERG: Your Honor, we would prefer to identify the alternates up front, and here's why.

First of all, we noticed this last time as well, it's incredibly disappointing for people to know that they're not being able to deliberate. It's just -- on a human level. People -- I think it's good for people to have their expectations, that these people know they are alternates, so they don't have their hopes dashed at the end, but more to the point really is the issue that Your Honor just raised, which is, with alternates, at the very end, you just -- you run out, and, you know, you only have limited challenges, and so you don't --

THE COURT: I agree. I think it changes the dynamic of the choosing of a juror.

No, I think we're going to do it, put in the 12 and then do the six alternates. And, you know, I know that you believe that this case is going to take a certain amount

of time. No matter what that time is, I believe it's going to take less, and -- but it's still going to be somewhat lengthy.

MR. GAY: Yes, Judge.

THE COURT: So I think the jurors, the alternates, the issue of them not knowing or being upset, they're going to be told that there could be a very good possibility due to illness or some problems that they will indeed be seated. So they're going to have to act just like any other alternate at any other time. I recognize in civil cases we don't have those alternates, they all deliberate, but this is different, and I think that the Defendant has the right to know who the first 12 jurors are.

MR. GAY: Okay.

THE COURT: So I'm going to do it that way.

MR. GAY: Okay.

THE COURT: All right. So let's see. We talked about that.

Let's talk for a second about the length of this trial.

How long do you think this is going to be? I know since the motions were decided that the trial is somewhat expanded. It took, I guess, before Judge Martini, including deliberations, what, five weeks?

MR. GAY: I believe it was about five weeks,

Judge, yes.

THE COURT: So what do you think this is going to take?

MR. GAY: Your Honor, my best estimate is that this is approximately a three-month-long trial.

THE COURT: Three months.

MR. GAY: Yes.

THE COURT: And why would that be?

MR. GAY: Judge, we have a large number of acts we have to prove in addition to the murder. There's also the tampering with witnesses for Abdul Williams, there's the prostitution, there's the drug trafficking, and there's also the plot to kill witnesses against Esteves. In addition to that, there's going to be some additional evidence besides that that's going to be offered to prove the enterprise and the RICO, although most of what I believe the proofs will be will be related to those acts, but there are a significant number of acts, and although obviously the Government will be doing everything in its power to move this along, one thing we can't control, obviously, is how long Mr. Bergrin questions these various witnesses, and he did -- I'm not saying inappropriately, but he did have extensive cross-examination of most of the Government witnesses. So that's part of the reason we're factoring this information to make it a three-month trial.

THE COURT: What does the Defense say about the timing? What do you think?

MR. BERGRIN: Judge, obviously I can't speak as to the Government's side of it, but there's going to be an extensive Defense case also.

THE COURT: I understand that.

MR. BERGRIN: So I would say three to four months, Judge.

THE COURT: Well, now we're going to four months?

Okay. Well, here's what I'm not going to do. I am not going to allow us to be finishing up witnesses and then summarizing everything they do. I'm not going to allow to go over things that, once they've been over a number of times, all of that stuff.

So I'm going to let everybody have a fair trial.

Mr. Bergrin, I certainly understand the position you're in and the fact that you would want thorough and extensive cross-examination. I have no problem with that.

But I think I want to let it be known that I'm going to expect this trial to move along at a good clip. And that's for the jurors. I've had the benefit over the years of being able to talk to jurors after the cases are over, and, believe me, their biggest complaint is waiting around, wasting time. And that's why I'm going to really place a big burden on the Government to have not only their

witnesses here but backup witnesses here and ready. And I also understand that some witnesses are coming in from other areas and there are going to be some logistical issues, but I'm going to ask you to work on those so we move this case along. That will be for everybody.

And again, I assure you I'm going to try to give everybody a fair and thorough opportunity to do what you have to do.

All right. I'm going to push this a lot quicker than three months, though, if I have anything to say about it.

Along those lines, we're going to start every day at nine o'clock with the jury. We're going to go every day except Mondays until four o'clock. On Mondays, we're going to break at 3:30. Four o'clock or thereabout; if we're in the middle of an examination and it's almost over and we have to go an extra few minutes, fine, but if it's going to be lengthy, we'll bring the witness back the next day or whatever.

There are a couple of holidays during the course of the next couple of months. I'm sure other things might arise that are unforeseen. We'll hopefully keep that to a minimum.

I'm going to expect the attorneys and Mr. Bergrin on his own behalf to be here, be brought here by about 20 to

nine each morning. Any legal argument or issues that have to be dealt with will be dealt with out of the presence of the jury before the jury comes in or at the end of the day, after they leave. I am not going to waste the jurors' time on issues, legal issues that have to be argued.

Also, once I rule on something, it is ruled upon. I do not wish and I will not be revisiting evidential rulings from one day to the next. If a mistake is made, that's why we have people sitting in Philadelphia. But I'm going to make my rulings, and we move on. Okay? I'll give everybody their full opportunity to be heard on that before I make the rulings, but once the ruling is made, we don't revisit. I don't need somebody coming in the next day handing me a memo telling me why I was wrong the day before. I will not consider that. Okay? We'll be here forever.

What else?

MR. LUSTBERG: Well, I guess, Judge, we have the authentication issue, and let me -- I don't know if Mr. Sanders wants to go first, but let me, if I could, set forth --

THE COURT: This authentication issue came up when the Government submitted a proposed order that -- bringing to the Court's attention that when Judge Martini signed the order I guess for inspection and discovery way back when, it did not include this issue of advising of authentication

issues before trial, and they asked me to sign it, which I did.

And since then, I received your objection.

I'm standing by the order. I'm going to do it. I think this is more of an issue of weight than of admissibility. If there is something that -- and I want to make clear here, this material and this information, that's been in the Defendant's hands for years. I mean, it's not like this is something that's just been dropped on him.

MR. GAY: That's correct, Your Honor.

THE COURT: So I think that plays a big part in it.

MR. LUSTBERG: Some of it.

THE COURT: Well, the vast majority of it.

MR. GAY: Just to be clear, the things that Mr. Lustberg and Mr. Bergrin are complaining about they've had since I would say about June of 2009.

MR. LUSTBERG: In any event, under the order of the Court which requires that the objection be lodged within 14 days of the trial, we provided it in a timely fashion, because the trial's January 7th and we filed our letter on December 21st.

With regard to authentication, I understand the Court's ruling with regard to weight.

There's one area that I want to raise with the

Court, and to a certain extent, this is news to the Government as well, but Your Honor is, of course, aware that we filed two applications for C.J.A. assistance with regard to a tape expert. As I read the Government's response to our objection on authentication grounds to these particular tapes, really, the linchpin of what they say is that these tapes are --

THE COURT: Tamper-proof.

MR. LUSTBERG: -- I'm calling them tapes. They're recordings. I mean, the Government --

THE COURT: They're digital, and they said they can't be tampered with.

MR. LUSTBERG: And they said that they're tamper-proof.

THE COURT: You want an expert to have his opinion or her opinion as to whether or not that's true.

MR. LUSTBERG: Correct.

THE COURT: I agree with you. I agree with you. Since I didn't realize that argument was necessarily going to be made, but I think that that's a valid argument as to -- because, from what I read in the Government's papers, it looks like you're going to bring somebody in expert in that field, so I think it only fair that the Defense has -- for that limited purpose --

MR. LUSTBERG: I understand.

THE COURT: -- I'm not going to get into all those other things that you wanted me to have some expert sign on for.

MR. LUSTBERG: No, no. This -- so I'm clear, the full scope of what they'll talk about is this tampering issue, nothing else, absolutely. Not having to do with, you know, whether the transcripts are accurate, you know, all those, I understand.

THE COURT: This is whether or not -- I'll allow you to retain the services of an expert for a reasonable fee on that issue to rebut or make the argument that what the Government claims for whatever reason may or may not be so. I don't know anything about it other than what I just saw in that letter. But I think that's a valid issue, Mr. Lustberg, and I will allow that.

MR. LUSTBERG: And to the extent -- and I apologize to the Court because, as Mr. Sanders pointed out in his letter back in 2009, it's a while ago, they had a --

THE COURT: I was a young man in 2009.

MR. LUSTBERG: What's that?

THE COURT: I was a young person.

MR. LUSTBERG: Yes. Same here. I had hair back then.

THE COURT: No, you didn't.

MR. LUSTBERG: This is going to be a longer trial

than I thought.

(Laughter)

MR. LUSTBERG: So that, anyway, we understand, and we'll get appropriate papers to the Court with regard to that appointment.

THE COURT: Okay.

MR. SANDERS: Your Honor, I would just ask, obviously, that we get the appropriate disclosure from the Defense.

THE COURT: Oh, absolutely.

MR. LUSTBERG: Of course.

THE COURT: Absolutely.

I would assume this will be -- when do you expect to be producing? I mean, we will have a little bit of time.

MR. SANDERS: Yes. I mean, our expert is -- I would say February sometime?

THE COURT: Oh, all right.

MR. GAY: Ball park.

THE COURT: Okay. Here's what I would like you to do. I would like you to give them your best estimate as to the time frame so that they could act accordingly, and I'll expect the Defense to exchange whatever report is done beforehand.

Okay. What else?

MR. GAY: Judge, I don't think there's anything

else from the Government side at this point.

MR. LUSTBERG: Your Honor, I understand that the Court has said that the trial's going forth on Monday.

THE COURT: Yes.

MR. LUSTBERG: Mr. Bergrin wishes to request extra time, and in order to support that application, he has information that he wishes to present to the Court in camera that has to do with the -- that stems from the investigation that the Defense has done.

THE COURT: The case is going forth on Monday. I don't need any further in camera review of anything. This case is going forth. I've got a very, very busy schedule. I've rearranged it for this case. There is a lot of other cases that are depending on this case moving along. And Mr. Bergrin's been in jail. This case is going forward. Now is the time.

MR. LUSTBERG: Just one -- and there's one last thing, Your Honor, which is, the Defense has raised with the Government, and we have more to do in that regard, certain information that we believe that we're entitled to that the Government has not yet provided. We're not interested in having extensive motion practice on all of this, but to the extent --

THE COURT: Motion practice is over.

MR. LUSTBERG: I understand. And so for that

reason, to the extent that we ultimately cannot agree on those things, we'll bring those to the attention of the Court and you can rule on them, you know, again, before the jury gets here in the morning, along the time frames that the Court has prescribed.

THE COURT: My suggestion would be, again, Mr. Lustberg -- I feel like we're dealing with the fiscal cliff here.

(Laughter)

THE COURT: Talk to the Government --

MR. LUSTBERG: We do.

THE COURT: -- today, let it be known what it is. I don't know whether it's Brady material, Jencks material.

MR. LUSTBERG: Yes, that kind of thing.

THE COURT: But I'm assuming that the Government knows their obligations and they'll turn over that which they have to, or there can be consequences. So I'm sure they're well aware of that. And everything I see from them, it seems that they have been doing what they're supposed to do. I don't know exactly what it is you're talking about, but my suggestion is, before you come to me, why don't you talk to them.

MR. LUSTBERG: Of course.

THE COURT: And to the extent it's valid, I expect it to be turned over.

MR. LUSTBERG: We will do that today.

MR. GAY: Judge, I apologize. Just one additional thing, and that is, I assume -- and this I guess is more addressed to Mr. Bergrin and Mr. Lustberg, but since the Defense is intending to present witnesses, apparently, that we should make sure that those witnesses' names are added to whatever list is given to the Court so that -- obviously that's the purpose of the witness list -- so the jurors can determine whether they know these individuals or don't know these individuals. So I assume that's going to be provided to the Court as well.

MR. LUSTBERG: Yes, to the extent that there are additional -- the original list included some of them. To the extent that there are any others, we'll add them to the list.

THE COURT: And another thing that I also expect at trial is, I would expect that the Government tell the Defense the day before what witnesses they plan to call. I think it only fair that the Defense should have the opportunity to properly prepare. There's going to be a number of witnesses. Now, I realize that sometimes it's not always easy to pinpoint, there has to be a little bit of a logistical issue sometimes, but to the extent you can, I would like you to let the Defense know the witnesses and the order in which they'll be called the next day for each day.

MR. GAY: Yes, Judge. We did that the last trial, and we'll do it this time, too.

THE COURT: And that would also be for the other side.

MR. LUSTBERG: We don't anticipate any problems with that.

THE COURT: I just thought that it just makes things move more smoothly. Here we have Mr. Bergrin, that doesn't have the full facilities of a regular law office. I think it only fair that he know this in advance.

All right. Anything else?

MR. LUSTBERG: Oh, yes, one last -- this is a logistical matter that Judge Martini was helpful with this last time, and Your Honor's comment regarding the limited facilities that Mr. Bergrin had reminded me.

Obviously the Court probably knows that there's a huge amount of documentation in this case, and it's difficult for Mr. Bergrin to keep all of that sort of in order and organized as he goes back and forth between the MDC and here, and one thing that he's not been permitted to do, we think that it won't be a problem if Your Honor orders it, if we can provide -- and we'll be happy to provide it, no one else has to bear that expense, just binders that he could use to organize his materials, as opposed to having them in loose paper form in these folders. Again, I don't

see what the possible objection to that could be from the Bureau of Prisons or the Marshal Service, but we would just ask for that for his ease in organizing his materials and transporting them.

THE COURT: Well, I have no problem with that. I do not know -- security is the Marshals' issue, and I don't know what the rules are in the Bureau of Prisons for having certain things.

I'll suggest that that be allowed. If it can't be for some reason, I'd like to know why, and if there's a valid reason, well, then I'll deal with it; but if there isn't, I think that's a fair request. But I want to include the Marshals and the Bureau of Prisons on this as to whether or not that's violative of some kind of a rule and why. That, to me, seems fair.

Didn't we talk about this the last time as far as having some kind of a room or place that, once Mr. Bergrin is here, brought in from New York, that he have a place to --

MR. LUSTBERG: I don't recall, Judge. I'm sorry.

A DEPUTY MARSHAL: Your Honor, usually when Mr. Bergrin is brought in, he's in a cell by himself, and he's allowed access to his legal documentation and he's allowed to have a pen to do whatever note taking he needs to do. There is nobody else in there with him, so he's allowed

to have those items. We didn't have any problems the last time.

THE COURT: Okay. And how about the notebooks? Do you have any knowledge of this?

A DEPUTY MARSHAL: I'm not sure what the Bureau of Prisons' position is on binders. Obviously there's a lot of metal in a binder. That could be a huge problem with them. We'll find out and we'll let the Defense know, and we'll try to --

THE COURT: And in the meantime, if it turns out that that's a problem, maybe there's some other way that they can be bound, Mr. Lustberg, that will alleviate that.

MR. LUSTBERG: We'll work on that. I was thinking we could Velband things for him that would have no metal.

THE COURT: Yes, something to make it more usable.

But, again, I recognize that the Bureau of Prisons may have very strict rules on this, and I'm not going to have them change their rules. All right? Let's do what we can do.

Anything else?

MR. GAY: Nothing from the Government, Your Honor.

MR. LUSTBERG: Nothing else, Judge. Thank you.

THE COURT: Okay. We will see you all on Monday morning.

MR. LUSTBERG: Judge, what time do you want us

here? I'm sure that they're going to do the movie and stuff downstairs with the jurors. What time do you need us here on Monday?

THE COURT: Scott, what time? What did we figure the jurors would -- the jurors will probably need a couple of hours to get acclimated, orientation, and then filling out the thing. I don't know. Noon? 11:30?

(Off the record discussion)

THE COURT: All right. My clerk brings up a good point. Normally, at the beginning of the jury selection, I would give them the neutral statement to let them know what the case is about, because we wouldn't be having all of this preselection going on. So Scott just asked me whether or not I'll be addressing them before they start filling all of the forms out, questionnaire. If that's the case, then you would have to be here sooner.

MR. LUSTBERG: That's right, Judge. I remember now last time what we did was, we all went down to the jury assembly room, including Judge Martini, and sort of introduced ourselves there so they did not have to all come up, and after that, there were a couple of free hours.

THE COURT: So I think probably what we should do is, maybe we should be here about 9:30 on Monday, and then we'll make a determination as to where we go.

That is a good time, right, Scott?

The jury will be doing other things until then. And then we'll figure out what we have to do. But that's why it's very important that we get the neutral statement, because, what I might do -- well, then I guess I could just read it to them there. Okay?

MR. LUSTBERG: Okay. Thank you, Judge.

THE COURT: Anything else?

MR. LUSTBERG: No. Thank you, Your Honor.

MR. GAY: Not at this time.

THE COURT: Counsel, I would hope that if there is anything that comes up, everybody's got numbers and the like, cell numbers. Make sure Scott has them. If there's any last-minute issues that come up, please talk to one another. I don't like surprises. I don't want everybody coming in and not knowing what's going on. So if you have to get ahold of me, Scott can get ahold of me at whatever time is necessary and we'll deal with it. But I'd like this to move along fairly and quickly and so we don't waste a lot of people's time. Okay?

MR. LUSTBERG: Judge, in that regard, one thing that we did last time, and we were hoping -- and we've been doing this already here, but I just want to make sure it's good with Your Honor is that when we have filings, we just have been e-mailing them to Scott, who then does whatever he does to get them to you and to each other, just as opposed

to worrying about hand deliveries and all kinds of other ways of getting stuff to the Court --

THE COURT: I have no problem with that.

MR. LUSTBERG: Okay.

THE COURT: Okay? All right. Thank you.

MR. LUSTBERG: Thank you.

(Matter concluded)

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)

October 27, 2011

(Trial resumes - Jury not present.)

(The Witness, Albert Castro, is escorted into the courtroom by the Marshals.)

THE DEPUTY CLERK: Remain seated.

(The Court and the Deputy Clerk confer off the record.)

(The Defendant Bergrin is escorted into the courtroom by the Marshals.)

THE COURT: Good morning, everyone.

MR. GAY: Good morning, your Honor.

MR. SANDERS: Good morning, Judge.

MR. LUSTBERG: Good morning.

THE COURT: Is everybody ready?

MR. BERGRIN: Could I have a moment?

THE COURT: Yes. You're going to be back on cross-examination, Mr. Bergrin?

MR. BERGRIN: Yes, sir.

THE COURT: Okay.

THE DEPUTY CLERK: Please rise for the Jury.

(Jury present.)

A L B E R T C A S T R O, recalled at a witness, having been previously duly sworn, is examined and testifies further as follows:

THE COURT: All right. Good morning, everyone, please be seated.

All right. Mr. Bergrin, you can proceed with cross-examination.

MR. BERGRIN: Thank you very much.

CROSS-EXAMINATION CONTINUES

BY MR. BERGRIN:

Q Mr. Castro, you testified yesterday that when you pled guilty to the first degree attempted murder on the police officer, the first degree manufacturing and trafficking in drugs before Judge Bernstein back in 2009, that you accepted responsibility for your criminal conduct. Correct?

MR. MINISH: Objection, Judge, that's not what he testified to. Those were not the crimes he testified he pled to.

THE COURT: All right. Ask had him if those it were crimes he pled guilty to.

Q You pled guilty to --

A First degree pointing.

Q -- pointing the weapon at a police officer. Correct?

A Yes.

Q When you testified yesterday, you denied that you had even held a gun in your hand or pointed it. Correct?

A I never denied holding the gun in my hand. I denied pointing a gun at an officer.

Q So you're telling us now that you held the gun in your hand when the officers came to your door. Is that what you're telling us?
A I never said I didn't have a gun in my hand.
I never put a gun under an officer's vest and tried to shoot him, and I never pointed a gun at an officer.
Q So then all the officers, the state trooper that was there and testified to that, the Essex County Prosecutor's Office detective that saw that and the Newark detective to which you put the gun under his vest and said that you pointed it and pulled the trigger, are all lying. That's what you're telling us?
A Yes, they are.
Q And Albert Castro is telling the truth?
A Yes.
Q Now, you said you accepted responsibility for the first degree pointing. Is that what you're saying?
A Correct.
Q But now you're testifying that you never pointed the gun at the police officer?
A Because when we went to court -- I'm going to explain the whole situation. When we went to court, is it true that you came to see me in the bullpen outside the courtroom?
When you went to speak to the Judge -- I'm going to explain the whole thing now.

He came to me. The only way you can get a lesser plea without going to trial is to get the charge downgraded. If I would have went to trial I probably would have been doing life in prison.

So he spoke to the Judge, he came to me with a plea bargain with a lesser charge and I took it. I never pointed a gun at an officer, never.

THE COURT: When you took the plea before a judge, you were sworn. Correct?

THE WITNESS: Correct.

THE COURT: Did you swear at that time that you did point a gun at the police officer?

THE WITNESS: Yes.

THE COURT: Did you swear in court?

THE WITNESS: Yes.

THE COURT: At that time that you took the plea?

THE WITNESS: Yes, I did.

THE COURT: That you did?

THE WITNESS: Yes.

THE COURT: And you're explaining why you did that?

THE WITNESS: Exactly.

THE COURT: But you swore under oath at that time and said, I did point a gun --

THE WITNESS: I did.

THE COURT: -- at a police officer?

THE WITNESS: I did.

THE COURT: All right.

BY MR. BERGRIN:

Q And it's the same oath that you've taken today in court. Correct?

A Correct.

Q Now, you testified that you had your daughter serving drugs for you?

A Yes.

Q And you had your ex-wife or your wife serving drugs for you; Laura Castro?

A Yes.

Q How many times did your daughter do that for you?

A She was doing it with me for four years maybe.

Q So you had your daughter doing it with you since she was 15 years old?

A No. She's 24 now. 19 maybe.

Q 19.

And how long was your wife doing it with you?

A My wife haven't did it with me for years since she got caught.

Q Now, and that was only a short time ago that your daughter was serving drugs with you. Correct?

A Correct.

Q And you pled guilty before the judge, Judge Bernstein,

which was a short time ago. Correct? Approximately two years ago?

A Yeah.

Q Correct?

A Yes.

Q When you pled before the judge, you were placed under oath like you are today. Right?

A Correct.

Q And you were instructed by the judge that you had to tell the truth, that you cannot lie. Correct?

A Correct.

Q And although you were instructed to that, you repeatedly lied to the judge. Right?

A It's not that I repeatedly lied. If I didn't take a plea bargain, I would have to go to trial for all my charges, so I took a lesser charge and took the plea.

Q Did you ever tell the judge or did the judge ever ask you if you were satisfied with your lawyer?

A Yes.

Q And you told the judge "yes." Correct?

A Yes. Until sentencing date when I fired you to get another attorney, because I wasn't satisfied with you.

Q But when you testified before the judge under oath after the judge advised you that had you had to tell the truth, the same oath that you took today, you told the judge that you're

completely satisfied with your attorney, didn't you?
A Yes.
Q You never told the judge that "Paul Bergrin is forcing me to plead guilty." Correct?
A Correct.
Q You never told the judge that you're doing it to get the benefits of a plea bargain. Correct?
A No, because if I would have told him that, he wouldn't accept my plea and I would have had to go to trial for 43 counts and probably be found guilty on all of them.
THE COURT: Who made that choice, Mr. Castro ultimately? Would made that choice?
THE WITNESS: I made that choice.
THE COURT: And when you did it, when you swore to the judge though, you didn't tell him any of that. Correct?
THE WITNESS: No; correct.
Q Now, the first time that you say that you were essentially coerced or forced into a plea is right before you were about to be sentenced. Correct?
A Correct.
Q And you fired me and you hire another lawyer. Right?
A Yes, I did.
Q Did that other lawyer subpoena the videos from the bank?
A No, he didn't.
Q Did the other lawyer subpoena or obtain the videos from

your house?
A No.
Q But you used this other lawyer, and that's one of the complaints that you had about me. Correct?
A Correct.
Q That I didn't do my job on your behalf. Right?
A The surveillance in the bank doesn't last that long. You can't subpoena it two years later.
Q Did he try to subpoena the surveillance video?
A No, because it couldn't be done.
Q Did he try to subpoena the video?
A No, he didn't try.
Q Did you try to obtain the videos from your house?
A No.
Q They were in evidence, weren't they?
A I'm pretty sure.
Did you try to subpoena them?
Q The videos from your house --
THE COURT: Mr. Castro, it's not your job to ask the questions. It's not your job. You respond to the questions.
THE WITNESS: Okay. All right.
Q The videos from your house were in evidence. Correct?
A Correct.
Q Now, you accused the detectives and the police officers and even the federal agents, because it was a joint

investigation -- correct?
A Correct.
Q -- you accused them of stealing -- how much money from you?
A If I knew the exact amount they confiscated I could tell you exactly what they stole.
Q Well, didn't you agree to confiscate $700,000?
A First it said 750, then it said five and change.
Q On the date that you pled guilty, again, you were under oath. Correct?
A Yes.
Q And didn't you agree to confiscate, or give up the rights and relinquish the rights to $700,000?
A Yes.
Q Now, no report ever said more than 700,000. You agreed to give up everything that was recovered from you. Isn't that a fact?
A Correct.
Q And you made accusations and allegations that the agents and police officers and task force officers stole money from you. Correct?
A That's the truth.
Q You made accusations that they stole money from you. Correct?
A It's not accusations, it's the truth.
Q And you swore to the judge that that was all the money that

you had, the $700,000 that you were relinquishing. Correct?
A Correct.
Q So again, you lied to the judge on the date you pled guilty?
A When I went and spoke to the FBI agents I told them the whole story about the money being stolen.
Q When you pled guilty in court when you were under the oath, the same oath that you're under today, you told the judge the only money you had was the money that you're giving up. Correct?
A Correct.
Q Now, that was part -- that wasn't even part of the criminal case, that was what they call a civil forfeiture. Right?
A Correct.
Q And if you said that the FBI or the state police stole or DEA stole money from you, that wouldn't have affected your plea. Right?
A I'm not sure if it would have or it wouldn't.
Q That was civil in nature, that wasn't part of the criminal plea. You just agreed to give up all the money that you had. Correct?
A Correct.
Q So if you had told the judge -- which you never did -- that money was stolen from you, you could have said it back in 2009 before you went to the FBI. Right?

A Correct.
Q And you never told anybody about that, correct, except me?
A I told you, exactly.
Q And I told you that I don't believe you, and that I'm not going to allow you to make that false allegation. Isn't that a fact?
A You didn't tell me that, you just didn't try to fight the case for me. You didn't try to do anything about it.
Q And you were also upset about the fact that I didn't fight for the money. Correct?
A Correct.
Q Knowing all that money was drug proceeds that you made from drugs. Correct?
A Yes.
Q So you didn't accept responsibility for your drug-dealing, you wanted money back to -- you wanted money that you had made dealing drugs to go back to you. Is that what you're telling us?
A It doesn't matter how I got it, it doesn't give them the right to steal from me because they're authority.
Q And again, how much did they steal from you?
A Close to a million dollars.
Q And as you testify here under oath, you're telling us that the cops stole a million dollars from you?
A This is the truth.

THE COURT: Was it just the police or was it DEA agents?

THE WITNESS: Well, it was Richie Webber took my kid's mother to the bank. I could only go by what they told me.

THE COURT: My question is: Was it just local police or also DEA agents?

THE WITNESS: It was the East District, it was Narcotics Bureau.

THE COURT: All right. And you told that information to the FBI?

THE WITNESS: Yes, I did.

THE COURT: And what did they do with it?

THE WITNESS: They showed me pictures of the -- the cops, I pointed them out. Supposedly it was under investigation.

THE COURT: Anybody get arrested for that?

THE WITNESS: One got arrested for something but --

THE COURT: No, no. For what you claim happened.

THE WITNESS: Not that I know of.

THE COURT: You've never been a witness against those people. Correct?

THE WITNESS: No. And another one has been indicted.

THE COURT: Not for that?

THE WITNESS: I don't know for what.

THE COURT: But not for that?

THE WITNESS: Okay.
THE COURT: You've never been asked to be a witness against these police officers for stealing money from you?
THE WITNESS: Not yet.
THE COURT: Okay, "not yet."
BY MR. BERGRIN:
Q None of them were ever arrested for any of these false allegation you made against them. Isn't that a fact, and you know that?
A They wasn't a false allegation. They have arrested for what I told them. They have been arrested.
Q One was arrested for a sexual abuse. Correct?
A Correct.
Q So when you told this jury that you didn't know if they had been arrested on your case, you just lied to them again under oath. Correct?
A No. No, I did not.
MR. MINISH: That's not what he said.
THE COURT: No, overruled.
MR. BERGRIN: Thank you.
Q You knew that they hadn't been arrested for anything that you told them. Correct?
A They haven't been arrested for my case, and I said that before I said what I said.
Q And you knew that they hadn't been arrested for allegation

of stealing the money or the false statements about you putting the gun underneath the vest. Correct?
A It was not false statements, it was the truth.
Q Just like you're telling the truth today. Right?
A Yeah.
THE COURT: All right, Mr. Bergrin, go on to another subject.
MR. BERGRIN: Thank you, Judge.
A All they have to do is get the surveillance --
THE COURT: Mr. Castro, listen to what I said.
THE WITNESS: Okay.
THE COURT: You don't respond if there's no question.
THE WITNESS: Okay.
BY MR. BERGRIN:
Q Now, you're telling us that you pled guilty because I failed to do my job. Correct?
A I didn't say I pled guilty because you failed to do your job. You didn't defend me in the right manner. If you would have got all the evidence and subpoenaed the evidence I probably would have got lesser time and I wouldn't be here today.
Q Well, the time that you pled guilty in 2009, you had multiple, more than two robbery convictions. Correct?
A Correct.
Q You had multiple drug-trafficking and distribution

convictions. Correct?
A Correct.
Q You had multiple convictions for dealing drugs within a thousand foot of a school. Correct?
A Yes.
Q You had convictions for receiving stolen property. Right?
A Yes.
Q And you're telling us -- and when you pled guilty before Judge Bernstein in this case that we're talking about back in 2009, you were offered a 15 year deal with five years before you're eligible for parole. Correct?
A Correct.
Q And that was for a 41-count indictment. Correct?
A Correct.
Q And you also had a second indictment that was not even part of this case for distributing drugs within a thousand foot of a school that was incorporated into this plea bargain. Correct?
A Yes.
Q And you also had a third indictment for planning the robbery with a teenager that recorded you in your car. Correct?
A Correct.
Q And you would have gotten lesser time, right, is that what you're telling us under oath?
A Surveillance --

Q You can answer my question.

THE COURT: No, there's a question. You would have gotten lesser time, is what the question is.

THE WITNESS: Well, this whole thing to that is if the surveillance --

THE COURT: No, don't go back to the surveillance.

THE WITNESS: Okay.

THE COURT: Just answer the question.

THE WITNESS: I don't know.

THE COURT: You don't know.

THE WITNESS: I don't know.

Q Now, let's say hypothetically I have gotten the surveillance tapes. You still distributed drugs to an undercover police officer. Correct?

A Yes.

Q Within a thousand feet avenue school?

A Yes.

Q You still planned the robbery of a restaurant which was recorded. Correct?

A Correct.

Q And as a matter of fact, that was your young daughter's friend that you were planning the robbery with?

A Yes.

Q While you're out on bail for the police officer case where you attempted to murder the police officer and distribute

drugs. Correct?
A Correct. I didn't attempt to murder no police officer.
Q You still had multiple kilograms, kilograms of cocaine on you. Correct?
A When?
Q When you were arrested and charged with the police officer case.
A Yes.
Q You were also charged with first degree drugs?
A Yes.
Q And the videos would have made a difference to you in your mind. Right?
A The videos would have proven nothing was in my possession, it was in the next house. It wasn't in 44, it was in 42. Nothing was in my possession. The weapons wasn't in my possession but one handgun.
Q One handgun which you had in your hands coincidentally when the police officers come to your door. Correct?
A Correct.
Q Now, the drugs you're saying weren't in your possession. Those were your drugs in your daughter's house. Right?
A They was mine.
Q And those were your drugs that your daughter was holding for you. Correct?

A Correct.
Q So that in case police came you could say that, hey, they're my daughter's drugs, I had no knowledge. Right?
A No, I would have never did that.
Q Well, didn't you attempt to do that in this case?
A She wanted to take the plea so I could be home with the family and support them and take care of her. She offered to do that. And is if she could have gotten less time being a first time offender, I would have did it.
Q You would have done that. You would have allowed your daughter, your own flesh and blood to go to State Prison so Albie Castro can be home with his family?
A Yes.
Q Isn't it a fact that that was your idea, Mr. Castro?
A No, it wasn't, it was Stephanie Castro's idea.
THE COURT: After she brought it to you, did you bring it to Mr. Bergrin and bring it up to him?
THE WITNESS: I don't remember speaking with him about it. I might have or I might have not, but she brought it to my attention --
THE COURT: Either way you would have let her take the plea so that you could be home?
THE WITNESS: Yeah, if she would got lesser time --
THE COURT: Even though it wasn't her drugs?
THE WITNESS: Well, she offered -- she was willing to

take --

THE COURT: No, no, I'm asking the questions now.

THE WITNESS: Yes, yes.

THE COURT: Even though it was not her drugs, it was your drugs, you would have let her do that?

THE WITNESS: Yes.

THE COURT: And you don't recall if you went to Mr. Bergrin and you told him about this?

THE WITNESS: I don't remember actually speaking with him about it?

THE COURT: You don't remember that?

THE WITNESS: No, I don't.

BY MR. BERGRIN:

Q This is an important --

THE COURT: Let's take a recess, please. Let's take a 15-minute recess.

Please step into the jury room.

THE DEPUTY CLERK: Please rise for the Jury.

THE COURT: We'll be back in ten minutes.

(The Jury leaves the courtroom.)

(The parties remain in place while a recess is taken.)

(Off the record conference in chambers with Mr. Gay and Mr. Lustberg.)

(Proceedings resume - Jury not present.)

THE DEPUTY CLERK: Please remain seated.

THE COURT: All right. We're all set, we'll bring the jury back.

THE DEPUTY CLERK: Please rise for the Jury.

(Jury present.)

THE COURT: All right, everyone, please be seated.

Mr. Bergrin, proceed.

CROSS-EXAMINATION CONTINUES

BY MR. BERGRIN:

Q Mr. Castro, before you were arrested in this case, the pointing the gun at the police officer, the first degree manufacturing and all the other cases, the school zone case, the robbery case, you were out from serving prison sentence. Correct? The last time that you had been in prison was in 1999. Correct?

A Yes.

Q You were released in 1999?

A Yes.

Q So from 1999 to 2008 when you were arrested on the police officer case, you were out. Correct?

A Yes.

Q And you were dealing multi-kilograms -- you were dealing cocaine. Correct?

A Yes.

Q And you had sold probably hundreds of kilograms of cocaine. Right?

A Yes.
Q And you were making between 20 and $50,000 a week. Right?
A Yes.
Q And you weren't paying taxes on that money. Right?
A No.
Q And you were laundering that money and spending it?
A Correct.
Q Having a good old time. Right?
A Yes.
Q When you told the Prosecutor and the Government, did you tell them about that?
A Yes.
Q And they didn't charge you with any of that?
A No.
Q They didn't charge you with distribution of hundreds of kilograms of cocaine?
A No, they didn't.
Q They didn't charge you with money laundering?
A No.
Q They didn't make you plead to these offenses?
A No.
Q All you had to do was mention the name of Paul Bergrin, wow, here's Albie Castro, we're not going to charge you with dealing hundreds and hundreds of kilograms in the City of Newark. Right?

A They said they couldn't pick my case up.
Q Who told you that?
A The FBI.
Q What FBI told you that?
A Joe Minish and Shawn Brokos. They couldn't pick my case up, they had to wait until my case was over before I could do anything with them.
Q And you got sentenced on May the 20th. Correct?
A Correct, May 15th -- 20th? Correct.
Q May 20th of 2009 you were sentenced. Right?
A Right.
Q The 15 years in State Prison. Right?
A Yes.
Q Did they pick your case up from May of 2009 until today when you're testifying in court, 2011?
A No, they didn't pick my case up.
Q Were you ever charged with all the narcotics that you distributed, the hundreds and hundreds of kilograms?
A No.
Q Were you ever charged with the millions of dollars you made?
A No.
Q Were you are charged with the tax fraud and the tax evasion?
A No.

Q And the money laundering?
A No.
Q Now, you testified yesterday that you have no clue whatsoever, all the experience of Albie Castro -- you had been to county jail. Correct?
A Yes.
Q You had been to State Prison. Right?
A Correct.
Q You had been on probation before?
A Yes.
Q You had been on parole multiple times before. Correct?
A Yes. Not most -- twice before that.
Q Twice before. Several times before. Correct?
A Correct.
Q And several times before you had gone before the parole board. Right?
A Yes.
Q And you testified under oath yesterday that you had no idea, not even a clue what the parole board is going to do, that you're not expecting a hit. Is that what you're telling us?
A Correct.
Q What's a "parole hit," can you explain to us?
A It's when you go to prison, if you have a five-year sentence and you have a back number, they could hit you for

likelihood, like you're likely to go out and commit the same crimes, or three time offender. They can hit you for different -- various things in prison if you commit things -- crime in prison. But the chances are if you're doing good, most likely parole will parole you. They give you eligibility.

Q Now, you would be going before the parole board now after five years. Correct?

A Correct.

Q And going before the parole board as a ten time convicted felon. Correct?

A I don't know about ten times, but, yes.

Q You have at least ten convictions, felonies. Correct?

A Correct.

Q You have at least three violent crimes, robberies. Correct?

A Correct.

Q You have at least three distributions within a thousand feet of a school zone. Correct?

A Yes.

Q You have a first degree distribution, which is the heaviest in the State of New Jersey under the law. Correct?

A Correct.

Q Narcotic trafficking. Right?

A Yes.

Q You have a case where you pointed a gun at a police

officer. Correct?
A Correct.
Q You had a case where you possessed a weapon with the purpose to use it unlawfully against the person of another. Right?
A For protection, correct.
Q For protection. You're telling us that you had the gun and you were going to use it unlawfully against the police for your protection?
A No, I didn't say unlawfully against the police officer. I bought a gun for my protection, not against police.
Q Well, you pled guilty in 2008 in this case to possession of the weapon for unlawful purpose, with the purpose to use it unlawfully against the person of another. Correct?
A Correct.
Q And when you pled guilty before Judge Bernstein, you swore under oath that you possessed it with the purpose to use it unlawfully by pointing at the police officer. Correct?
A That's what I took the plea for, correct.
Q No, that's not what you took the plea for, that's what you swore under oath to the judge. Right?
A Exactly.
Q Now, you just told the jury that you only had the gun for your protection.
A I did have it for my protection, that's why I purchased it.

Q Protection against the police?
A No, not against the police.
Q Did you think the police were a threat to you?
A I didn't know who it was coming to my door three weeks prior to my raid. I had a home invasion where they put guns to my family's head, took jewelry, money, pocket books. So my daughter woke me up and said, somebody is trying to get in the house, of course I grabbed my gun.
Q And I'm sure, I'm sure, I'm sure you reported that to the police?
A Yes, I did.
Q And I'm sure you cooperated with them and gave them the video of your house. Correct?
A Yes.
Q And I'm sure someone was arrested and charged with it. Isn't that right?
A Nobody was charged yet.
Q And you're telling us that you didn't have a gun before that?
A Yeah, I had a gun. I never said I didn't have a gun before that.
Q And you had guns since you've been dealing drugs. Right?
A Correct.
Q And as a matter of fact, on 2008 when the police raided your house, you had a gun and you were a convicted felon.

Right?
A Yes.
Q Did these people ever charge you with possession of a gun by a convicted felon?
A No.
Q Did they ever charge you under the trigger lock law where you'd be facing at least -- you know, with drugs, at least 5 to 10 years?
A No.
Q Now, you testified that you don't know what the parole board is going to do with you. Right?
A Correct.
Q Isn't it a fact, Mr. Castro, that you're what they call a three-strike defendant?
A Yes.
Q And you're what they call a persistent offender?
A Correct.
Q You're what they call a career criminal?
A Yes.
Q And we just went over your record so I'm not going to repeat it ad nauseam. But you're telling us that the parole board is going to release you on your first parole chance?
A It's a chance. I can't say what they're going to do. If I would have been in a halfway house, you have to be two years eligible for a halfway house. If I was working they probably

would have granted me parole.

THE COURT: Don't you know, Mr. Castro, that you're prior record is one of the factors that the parole board looks at and sees how many you've been convicted of other felonies?

THE WITNESS: Yes, I understand that.

THE COURT: Yeah, you understand that? Okay.

THE WITNESS: Yeah.

BY MR. BERGRIN:

Q And you understand they consider also your likelihood of committing another offense. Correct?

A Yes.

Q And they also consider the violence in your past. Correct?

A Yes.

Q And they also consider your attitude and demeanor and the fact that you committed crimes while you're out on probation -- while you're out -- excuse me -- on bail. Correct?

A Correct.

Q Like in this particular case. Right?

A Yes.

Q And you're telling us under oath, the same oath that you've taken repeatedly and lied to a judge about -- that you don't expect -- you don't expect a parole hit. Is that what you're telling us under oath now as you testify?

A I can't say what parole is going to do. If I said they were going to give me a hit or release me, I'd be lying.

Q Now, you've used multiple Social Security numbers. Correct?
A That's not true.
Q And you've used multiple dates of birth. Right?
A That's not true.
Q Do you know what a criminal history report is?
A Yes.
MR. BERGRIN: May I have one minute, sir, please?
THE COURT: Go ahead.
(There is a pause for Mr. Bergrin.)
MR. BERGRIN: Your Honor, I lost track of the exhibit numbers.
Ms. Hansen, please?
THE DEPUTY CLERK: D-23 we're on.
MR. BERGRIN: Thank you, ma'am.
BY MR. BERGRIN:
Q You understand you're under oath. Correct?
A Yes, I do.
Q Isn't it a fact that you've used at least, at least three different Social Security numbers?
A I never used a fake social every time I've been in trouble.
Q And isn't it a fact that you used --
THE COURT: Mr. Bergrin --
Q At least three dates of birth?
A I never used fake dates of birth.

THE COURT: His answer is he's never done that.
MR. BERGRIN: May I approach the witness with D-22?
THE COURT: For what purpose?
MR. BERGRIN: To show he's lying.
THE COURT: That was an inappropriate response to me.
MR. BERGRIN: To see if it refreshes his recollection.
THE COURT: That's an appropriate response. Put it before him and see if it refreshes his recollection.
MR. BERGRIN: Thank you, your Honor.
Q I show you what's been marked D-22 for identification.
Is that the criminal history, the federal look-up, the federal criminal history on Albert Castro; you?
A I never used a fake Social Security number, I never used a fake number either. My name is Albert J. Castro.
Q Is that your criminal case history?
A Yeah, I guess that's mine.
Q And how many dates of birth --
MR. GAY: Judge.
THE COURT: All right, all right. Does that refresh -- there's information on there about dates of birth. Does that refresh your recollection as to different dates of birth?
THE WITNESS: It says different dates of births, yes.
THE COURT: It does? All right.
Q And how about different Social Security numbers?

A Yes.

THE COURT: All right. That's it. Go ahead, what's the next question, if any?

MR. BERGRIN: Thank you.

Q And how about different names?

A It's the same name.

Q There's not multiple names listed there?

THE COURT: No, Mr. Bergrin.

Reading this, does that refresh your recollection that you used or provided the Government with different dates of birth or Social Security numbers?

THE WITNESS: I never recall using a fake social, never.

THE COURT: How about a fake date of birth?

THE WITNESS: Never.

THE COURT: Okay. Go ahead, Mr. Bergrin.

BY MR. BERGRIN:

Q Now, you come into this court and you're playing this game of being nice and calm. Right?

A I'm not --

THE COURT: Mr. Bergrin, ask the question in a different way.

Q This is not the regular way that Albert Castro talks. Correct?

A I was never a violent person out there. I never was that

loud.
Q You were never a violent person?
A I had crimes but I was never obnoxious and loud.
Q You just testified that you were never a violent person.
A Well, I didn't mean violent. I mean obnoxious and loud.
Q Did the words come out of your mouth you were never a violent person.
THE COURT: Mr. Bergrin, he did.
Next question.
Q Now, isn't it a fact that when you went before Judge Bernstein in 2008 and pled guilty to this case that we've been talking about, the pointing the gun and manufacturing the trafficking and all the other crimes, isn't it a fact that you yelled out, "This is bullshit" in court?
A Yes.
Q In front of a superior court judge?
A Yes, I did.
Q And you weren't calm like you are now. You said, "This is bullshit," and you slammed your hand on the desk. Correct?
A I don't remember slamming my hand, but it was bullshit because --
Q But you remember yelling out --
A Because I have to take a plea for something I didn't do, exactly.
Q You took a plea for something you didn't do.

What didn't you do?

A I didn't point a gun at an officer. I'm not going to admit to something I didn't do. I admit to it to take the lesser plea.

THE COURT: Was the plea accepted by the court?

THE WITNESS: Yes, it was.

THE COURT: So you eventually said that you did it?

THE WITNESS: Exactly.

THE COURT: Okay. But the court found that you gave a voluntary and knowing plea?

THE WITNESS: Exactly.

THE COURT: After he heard -- you came back and said something?

THE WITNESS: Yes. I would have went to trial for the 43 counts --

THE COURT: No, when I -- you just respond to my questions.

You came back and said something, and then the court accepted your plea?

THE WITNESS: Yes.

THE COURT: And you knew he accepted the plea?

THE WITNESS: Yes.

THE COURT: When you got the new lawyer eventually, did you ever ask that lawyer to try to set aside your plea of guilty?

THE WITNESS: Well, when I got the new --
THE COURT: No, no. When you got the -- did you ever ask the lawyer: My plea of guilty, I want to set it aside?
THE WITNESS: I did try to retract my plea.
THE COURT: Did you do that formally? Did you make an application to the court to do that?
THE WITNESS: Well, I had to take the plea because I cooperated --
THE COURT: Oh, because you cooperated with the Government?
THE WITNESS: Yeah, I took that plea. I had to take that plea.
THE COURT: You accepted that plea --
THE WITNESS: Yes.
THE COURT: -- because you were now cooperating with the Government?
THE WITNESS: Yes.
THE COURT: Okay. Otherwise you would have retracted the plea?
THE WITNESS: I would have retracted the plea, correct.
THE COURT: All right.
BY MR. BERGRIN:
Q And you would have went to trial on 41 counts?
A I wouldn't have had to take my chance to do what I had to

do if he would represented me in the right manner.
Q Well, you just told the jury a little while ago that you took the plea so you didn't have to go to trial on not only the 41 counts in that one case, but the possession with the intent to distribute, and conspiracy within a thousand feet of a school, the second indictment. Correct?
A Correct.
Q And the robbery that you were caught being recorded on. Correct?
A Correct.
Q So you're telling us that you would have taken back your plea and taken your chance at trial. Is that what you're saying now?
A I would have retracted my plea and tried to fight the case, exactly.
THE COURT: All right. When you say you would have retracted the plea, what stopped you from retracting the plea? You told me just a moment ago, you said because you now agreed to cooperate with the Government.
THE WITNESS: Cooperate with the feds, exactly.
THE COURT: When you discussed that with the Government, did they tell you not to retract the plea?
THE WITNESS: They told me to go ahead and take the plea.
THE COURT: They did?

THE WITNESS: Yes.
THE COURT: Did you tell them you had a problem with the plea?
THE WITNESS: Yes.
THE COURT: You told them you didn't do it?
THE WITNESS: They knew I didn't point any gun at no officer. I did tell them.
THE COURT: Based on what you told them?
THE WITNESS: Exactly.
THE COURT: Based on what you told them?
THE WITNESS: Based on what I told them, correct
THE COURT: Okay. But they said, go ahead with the plea?
THE WITNESS: Yes, to sign the plea.
THE COURT: Because you were now cooperating?
THE WITNESS: Correct.
THE COURT: And part of the cooperation would be, they would assist you with respect to the sentence at some point?
THE WITNESS: Correct.
THE COURT: Okay.
BY MR. BERGRIN:
Q And you're telling us that the Government allowed you to offer false testimony in open court and swear falsely so you could get a better sentence. Is that what you're telling us?
A It's not false statements.

Q Well, you testified that you never pointed the gun at the police officer. Correct?
A Correct.
Q And you told that to the Government. Right?
A Correct.
Q And you told them that you swore under oath that that charge was accurate -- excuse me -- you told them that you swore under oath that you did that, although you were lying to a superior court judge. Correct?
A Correct.
Q While under oath. Correct?
A Correct,
Q And you're telling us that this Government told you to lie, and continue lying just so you can get the benefits of a plea bargain?
A No, they never told me to lie about anything.
Q They told you --
THE COURT: Wait, wait. But are you telling us that you told them that when you gave the plea you weren't guilty of what, certain parts of the plea?
THE WITNESS: I had to take the plea bargain in order to work with them. They had nothing to do with that.
THE COURT: All right.
THE WITNESS: So after I took --
THE COURT: But you just told me a moment ago that you

didn't retract the plea because you took the plea bargain with the Federal Government. Correct?

THE WITNESS: Correct.

THE COURT: All right. But in your discussions with them, did you tell them you had problems about the plea because you didn't point the gun at the police officer?

THE WITNESS: Yes.

THE COURT: And you told them that?

THE WITNESS: Yes.

THE COURT: And did you tell them you wanted to withdraw that plea at least initially? Did you tell them you weren't guilty of that and you wanted to withdraw that plea?

THE WITNESS: I told Richie Roberts that, my lawyer.

THE COURT: And did your lawyer tell that to the Government in your presence?

THE WITNESS: I'm pretty sure he had a discussion with them about that.

THE COURT: All right. All right. And then the decision was made not to seek to withdraw the plea because you were now getting the benefit of a cooperation agreement with the Federal Government?

THE WITNESS: Correct.

THE COURT: And you're hopeful that because of that the sentence will be reduced?

THE WITNESS: Correct.

THE COURT: Go ahead.

BY MR. BERGRIN:

Q And as you swear under oath, the same oath that you took before Judge Bernstein when you pled guilty, before -- let me strike that.

Before you went into the Federal Government you hired a new lawyer. Right?

A Yes.

Q And how much time passed from the time you hired a new lawyer until that you went into the Federal Government?

A Not long.

Q Very quickly. Correct?

A Correct.

Q And right before your sentence. Right?

A Yes.

Q And before you went into the Federal Government, isn't it a fact that your new attorney never tried to file a motion to withdraw your plea?

A Correct.

Q Isn't it a fact that your new attorney never had discussions or filed any paperwork whatsoever -- and you were right, you were just about to be sentenced -- to postpone your sentence. Correct?

A Correct.

Q Now, when you went into the proffer session with the

Government, who was present?
A Richie Roberts, me, Joe Minish, and Shawn Brokos.
Q And Richard Roberts in your presence told them about the plea and your difficulties with the plea. Correct?
A Yes.
Q And you heard him talking to Minish and Brokos about that. Right?
A He knew I had a problem --
Q My question to you is: You heard him talking to Minish and Brokos about that. Correct?
A No, I didn't.
Q So then why did you testify a couple of minutes ago that your attorney told them?
A He -- he spoke with them. I don't know if -- he didn't speak with them in front of me about it.
Q Did you tell the prosecutors, did you talk about the plea to the prosecutors?
A Yes, I spoke to them.
Q And you told them out of your mouth that you were not guilty of pointing the gun at the police officer?
A I told them my whole case, yes.
Q And you told them that you were not guilty of possessing the weapon for an unlawful purpose, using it against the police that you testified to. Correct?
A I didn't purchase a weapon to point it at an officer.

Q Answer my question, Mr. Castro. You told --
A What's --
Q That you did not possess the weapon with the purpose to use it unlawfully against a police officer also. Correct?
A Correct.
Q And you told them that you were not guilty of the robbery also. Correct?
A Correct.
Q And you told them that even though you're not guilty of it, they, of course, knew that you had pled guilty and sworn under oath that everything you said in court to Judge Bernstein was the truth, the whole truth and nothing but the truth after putting your hand on the Bible. Correct?
A Correct.
Q And they told you not to withdraw the plea. Is that your testimony?
A Yes.
Q Because you were cooperating with them. Right?
A Yes.
Q And they told you to allow those lies to continue. Correct?
A They didn't tell me to allow the lies to continue, they just told me to go forward and take the plea.
THE COURT: And then part of your cooperation would be assist you with respect to the sentencing. Correct?

THE WITNESS: Exactly.

THE COURT: Okay.

Q And that's what you expected; to be assisted with your sentencing. Correct?

A Correct.

Q And you were going to allow, and you were going to allow these lies to continue, right, after you had sworn to a judge and the prosecutors even knew about it now?

A I'm not -- it's not necessarily lies, but I swore under oath, correct.

Q Now, you're saying it's not lies.

Is it a lie or wasn't it a lie?

A I never pointed a gun at a cop. I took the plea bargain for a lesser plea, that's what I did.

Q So then you lied?

A If that's what you want to call it.

If I went to trial I would get a life sentence.

Q You lied, didn't you?

A Yes.

Q So why are you afraid to admit that you lied? I asked you that question five times.

A I'm not afraid to admit it. I did not point a gun at an officer. I did not put a gun under a cop's vest in my case. That's not true at all.

Q And you didn't commit the robbery either. Correct?

A I spoke about the robbery. I never committed it.
Q But you pled guilty to it under oath and swore to the fact that you did. Right?
A Correct.
Q Now, isn't it a fact that the only reason that the robbery didn't occur is because the police took the recording and they were monitoring it and they arrested you immediately thereafter?
A That's not the only reason the robbery didn't happen.
Q Isn't it a fact that you were arrested as soon as -- that same night after you had the conversation, you were arrested. Right?
A Yes.
Q And the robbery was planned for the next day. Correct?
A Yes.
Q And you even planned it so meticulously that you told this young kid on the recording exactly where to park the car. Correct?
A He wasn't young.
Q How old was he?
A It's a grown man.
Q How old was he?
A I don't know how old he is, but he wasn't no kid.
Q That was your daughter's friend. Right?
A It was no kid.

Q That was your daughter's friend?
Answer my question.
A Right. Yes.
Q And you even told him where to park the car. Correct?
A Correct.
Q And you told him how to get away. Correct?
A Yes.
Q And you told him how to go in there with the gun pointed at the store owner --
A No, I never told him how to go in the place. I told him --
Q You told him how to conduct the robbery?
A To catch the guy when he came outside the place, not inside this store.
Q So you told him how to catch the guy going out, but you had nothing to do with a robbery, you weren't guilty. Right?
A I wasn't going to do the robbery. I never said I wasn't guilty of it.
Q You had planned it with this other individual. Right?
A Correct. I'm not going to deny it.
Q And you had given that person the idea, and you had told the person exactly how to do it. Correct?
A Correct.
Q Step-by-step, line-by-line. Right?
A Yes.
Q You're under oath. Do you understand that?

A Yeah, I know where I'm at.
Q Now, isn't it a fact that Joe Ferrante -- we talked about this yesterday -- was your attorney in 1997 when you pled guilty to third degree possession with the intent to distribute within a thousand feet of a school; second degree possession with the intent to distribute drugs; third degree possession of drugs; and third degree receiving stolen property?
A Joseph Ferrante did not represent me in that case.
Q And isn't it a fact that Joseph Ferrante put the plea through when you pled guilty on November the 12th of 1997?
A I honestly -- Joe Ferrante did not represent me in that case. I went to his office, retained him and never went back.
Q All right. So you gave him money?
A Yes, 3500.
Q How much?
A $3500.
Q And I'm sure you kept a receipt for that. Correct?
A I'm not sure if I have a receipt now.
Q Now, did you ever ask for your money back?
A No. I never went back to speak with him because he wanted me to ride around in an unmarked car and point people out, and I told him I wouldn't do that.
Q Ride around in an unmarked car and point people out?
A He told me, to save my family I had to ride around in a car and point people out. And I told him no, and I never went back

to Ferrante for that.
Q And that was right when you retained him?
A In his office that day after I paid him we started talking about the case, that' what he asked me to do.
Q Did you ask him for the money back?
A No.
Q Did you take the money back?
A No, I didn't.
Q Did you ask him to withdraw from your case?
A He never represented me. I never went back to him to go to court with him.
Q Isn't it a fact that Mr. Ferrante appeared on your sentencing on January the 16th of 1998?
A I honestly don't believe Joseph represented me in that case.
Q You say you "honestly don't believe"?
A He did not represent me in that case.
MR. BERGRIN: May I approach the witness with D-20, your Honor?
THE COURT: Yes.
MR. BERGRIN: Thank you.
A You showed me that yesterday.
THE COURT: Take a look at that document --
A Yeah, you showed me yesterday.
THE COURT: -- Mr. Castro.

And just generally describe the document, Mr. Bergrin.
BY MR. BERGRIN:
Q Is that the official, what they call Promise Gavel, the official records of the New Jersey Judiciary, the Judicary Court System of the State of New Jersey?
A Yes.
Q And who is the attorney listed for Albert Castro on that form?
MR. MINISH: Judge, again --
THE COURT: No.
Does that refresh -- looking at that now, does that refresh your recollection that Mr. Ferrante was representing you at that time?
THE WITNESS: I'm looking at this. But I did not go back to Joseph Ferrante.
THE COURT: I asked you: Does that refresh your recollection as to whether or not Mr. Ferrante appeared with you at that time?
THE WITNESS: It says here yes, he did represent me.
THE COURT: Okay.
BY MR. BERGRIN:
Q And it shows that he appeared for the disposition. Correct?
THE COURT: All right. Mr. Bergrin, he said it shows that. Okay.

MR. BERGRIN: Yes, your Honor.

Q Now, going back again to the case that we were talking about before Judge Bernstein where you pled guilty. You got out on bail on the first degree distribution, trafficking, and the first degree pointing the weapon at the police officer. Correct?

A Yes.

Q And while you were out on bail you were rearrested on the robbery with the informant. Right?

A Correct.

Q And you couldn't make bail, you couldn't get out on that case, correct, the robbery case?

A Yes.

Q And you remained in the Essex County Jail. Right?

A Yes, I did.

Q And were you happy about that?

A No, I wasn't happy about it.

Q As a matter of fact, you blamed me for not being able to get you out. Isn't that right?

A I didn't actually blame you, I just didn't see why they couldn't reconsider my bail and let me out.

Q You blamed me for not doing my job and being able to get you out. Isn't that a fact, Mr. Castro?

A It's not a fact.

Q Isn't it a fact that you accused me of screwing -- your

exact words -- screwing you and not doing my job and working hard enough to get you out?

A On the first case.

Q Didn't you accuse me on the second case also?

A I never accused you of the second case, I accused you on the whole case completely.

Q On the whole thing?

The robbery was included in the whole thing, that's why --

A The robbery was after the first case basically, right? I was incarcerated, I got caught May 2nd, 2008, I got arrested, I made bail. When I came home I got locked back up for the robbery.

Q And you couldn't get out. Correct?

A Exactly.

Q You couldn't make bail on that second robbery case?

A Correct.

Q And isn't it a fact that you were angry at me for not being able to get you out?

A No. I couldn't be angry at you for the second case for not getting me out. I was on bail for a million dollars, I got back -- locked back up and they revoked my bail.

Q And you're telling us that you weren't upset in not being able to get out?

A Of course I was upset for not being able to get out but I

didn't blame you for that.
Q Now, you went to the FBI in February of 2007. Right?
A Yes.
Q Do you know who contacted who?
A When they raided Carmen DeSilva's house on Polasky Street, I lived upstairs. I went to internal affairs because they went upstairs and they raided my apartment and stole a bunch of stuff from me.
Q Who is that that stole stuff from you?
A The same detectives, Webber, Victor Patella, the same crew.
Q The same screw that are Newark police officers?
A Right, so I went to internal affairs --
Q Wait a minute. Let me ask the question the question, please.
The same crew that are part of the tactical unit now of the Newark Police Department?
A Yes.
Q The same screw that are working the vice squad and are all detectives?
A Yes.
Q The same crew that have never been charged with any criminal offenses?
A Yes.
Q The same crew that have never been even investigated?
A Not for my charge, but they have been investigated.

Q The same crew that have never been disciplined by even internal affairs. Correct?
A Correct.
Q Now, you say that they went into your house and they stole things. Right?
A Yes.
Q What did they steal from Albert Castro?
A I had some money, cameras laying around, I went to my apartment, it was all gone. I went to internal affairs, spoke with them. Then I contacted the FBI. They contacted my job which was T. Fiore Demolition, told me they wanted to speak to me. I went to the Federal Building on Route 21. Went in. They showed me a stack of pictures. I told them who was who and what they did. From that point on they started to -- an investigation on them.
Q And nothing ever happened. Correct?
A Correct.
Q And at the time that you went down to the FBI, tell the jury what kind of charges you had lingering over your head.
A At the time I went to the fed building -- I didn't get -- I had not charges really, but a little charge that was dismissed, an harassment charge.
Q And you weren't charged with harassment, you were charged with aggravated assault. Correct.
A Exactly.

Q You were charged with, as a matter of fact, a second degree aggravated assault. Right?
A Correct.
Q Knowingly, purposely or recklessly, under circumstances manifesting extreme indifference to value of human life, causing or attempting to cause serious bodily injury. Correct?
A Correct.
Q Firing at a young lady in a house?
A Not true.
Q That was behind the door. That was the accusation. Correct?
A That's not true. Nobody fired a gun, nobody had a gun.
Q That's what you were accused of. Right?
A That's what I was accused of but that's not what happened.
Q And you had those charges lingering over the head of Albie Castro. Right?
A Correct.
Q And you went down to the FBI voluntarily. Right?
A I went to the FBI on the police, not because of the charges I had lingering over me.
Q You went down to the FBI voluntarily. Right.
A Yes.
Q You went down there. They didn't come pick you up. Right?
A They called my job, came to my job looking for me they wanted to speak to me. So, yes, I went down to the Federal

Building.
Q And you knew that you had the right to speak to them and you knew you had the right not to speak to them?
A Correct.
Q And when you went down there, I'm sure the first words out of your mouth while -- and you began to cooperate with them. Right?
A About the police, yes.
Q But you were cooperative. Right?
A About the police, yes.
Q And they were asking you questions about what you knew. Correct?
A Yes.
Q And they were asking you questions about what you knew about everything. Right?
A Correct.
Q And I'm sure you told them about this conversation of 2003 with Paul Bergrin. Right?
A I never mentioned that to them.
Q Albie Castro, the great United States citizen, the great citizen of New Jersey --
THE COURT: All right, Mr. Bergrin, retract that kind of statement.
MR. BERGRIN: I retract it, your Honor.
Q Now, that case where you were accused of firing the gun at

the young lady who was behind a closed door, isn't it a fact that there was a bullet hole and a round recovered from inside of her house?

A Not true.

Q Isn't it a fact that the only reason that they couldn't prosecute that case is because her boyfriend who identified you ended up going into a coma for an illness?

A Correct. Because he set himself on fire, that's why he went into a coma.

Q But he went in into a coma, and the witness they had against you was unable to testify. Correct?

A Correct.

Q And that's why you got a harassment charge.

A Yes.

Q Now, you testified that when you went down to speak to the Government, the Government that knows that you lied before the judge back in 2009 right before your sentencing, the first time that you went in was a couple of weeks before your sentencing. Right?

A Yes.

Q And at the time that you went in to the Government, you're telling us and you testified under oath yesterday that you had no idea whatsoever, not even a clue, an inclination about the benefits to your sentencing in your state case?

A I had no idea about that. They didn't discuss nothing with

me.
Q You're telling us under oath that you went in there as a good citizen just to give evidence against Paul Bergrin, that you had knowledge about Paul Bergrin?
A Correct.
Q And you had no idea, no knowledge, you couldn't even guess in this brain of yours, the head of yours, that you were going to get some benefit for a sentence a couple of weeks away?
A No, I had no knowledge of it.
Q It was just coincidence the timing of going in there. Is that what you're telling us?
A I figured I got rid of you as a lawyer, why not go tell them what you asked me to do.
Q Now, you had never told anybody about it in 2003. Right?
A No.
Q And you never told anybody about it in 2004. Right?
A No.
Q And in 2005?
A Correct.
Q In 2006?
A Correct.
Q In 2007 when you went into the FBI and you were cooperative, a great citizen Albie Castro --
A Because I went to them for police, yes.
Q And in 2008. Right?

A Yes, that's true.
Q The first time you ever tell anybody about it is in 2009 when you go into the Government. Right?
A Correct.
Q And as a matter of fact, you didn't even tell your wife bit. Right?
A Because it's none of her business.
Q My question to you is --
A No, I never told her.
Q You never told anybody about it. Right?
A No, sir.
Q And, of course, you didn't write any memos to yourself. Right?
A No.
Q And you didn't go back and try to record me. Right?
A No.
Q And they didn't send you back to record me. Right?
A No.
Q Now, you knew that your wife had gone in and spoken to the FBI also. Right?
A Yes.
Q And that was right before your sentencing, too. Right?
A Correct.
Q And you're telling us that your wife went in and she didn't expect you to get any benefits either from her cooperation?

A Well, she went to speak to them about police, about the incident with the raid.
Q Your wife also went in to speak to them about Paul Bergrin, correct, and the check?
A Yeah, about the check, correct.
Q And that was right before your sentencing also. Right?
A Yes.
Q And she didn't expect any benefits either. Right?
A No. Why would she expect a benefit?
Q She didn't expect you to get any benefits for your sentencing. Right?
A Not that she knew of.
Q Now, we have a major disagreement after your plea of guilty. Right?
A Yes.
Q In Judge Bernstein's on the first degree case.
And as a matter of fact, you cursed me out. Right?
A I called you a criminal in the courtroom, that's what I did.
Q For not investigating your case. Right?
A Yes.
Q And you called me a piece of shit also, right, for not investigating your case and selling you out and having you plead guilty. Right?
A Yes.

Q And then there's the allegation of the $20,000 check.
A Yes.
Q And all this happens right before you go to the FBI. Right?
A Yes.
Q And then there's the allegation of me hitting on your daughter. Right?
A Correct.
Q And the allegation -- and again, I'm not going to go into that, I'm not going to ask what your daughter looks like again.
You have a new attorney. Right? You fire me and up completely terminate our relationship. Right?
A Correct.
Q And as soon as you get the new attorney, after the check accusation, after calling me a piece of shit and a no good attorney and a criminal for selling you out -- correct?
A Correct.
Q -- after telling me that I screwed you because you're getting 15 years with 5 on a 41-count indictment, a second indictment with all the drug cases, and a third indictment with the robbery with nine prior felonies, you then decide you're going to the FBI, you're going into the Government to cooperate a couple of weeks later. Right?
A Yes.
Q Without expecting any benefits whatsoever?

A I did not know I was going to get any benefit. Until this day I still don't know if I'm going to get any, it's not up to them.

Q And when you go in there to talk to them, a week later you're in the grand jury. Right?

A Yes.

THE COURT: Excuse me a second.

When you say it's not up the to them; you understand how it works?

THE WITNESS: Yes, I understand they write a letter.

THE COURT: They could write a letter --

THE WITNESS: Yes, and if the judge grants it --

THE COURT: -- about the cooperation and if they believe it's truthful and accurate, they can write a letter. Correct?

THE WITNESS: Exactly, yes.

THE COURT: Then it goes the judge?

THE WITNESS: Correct.

THE COURT: It will go to the sentencing judge?

THE WITNESS: Yes.

THE COURT: Which is not me?

THE WITNESS: No, I know. I understand that.

THE COURT: All right.

Q And you also knew, Mr. Castro, that the only chance that you had or have to reduce your 15 year New Jersey State Prison

sentence is if they write the letter. Correct?
A Correct.
Q They're your mechanism, they're your vehicle to reduce your charges. Right?
A Correct.
Q And you knew that. Correct?
A After speaking with them, correct.
Q So you're telling us that you didn't know that until you spoke to them?
A I didn't know when I first went and spoke to them, no, I didn't.
Q But a week later when you testified before the grand jury on May the 12th of 2009, you certainly knew it. Isn't that right?
A Exactly.
Q But a week before you had no clue whatsoever?
A When I first spoke to them, that was never brought up.
MR. MINISH: Judge, I think Mr. Bergrin --
THE COURT: Thank you, Mr. Minish, thank you. You can step down. Sit down, please.
Q You had been part of the system, Mr. Castro, since what age?
A I can't recall what age, but I've been getting in trouble a long time.
Q Since you're a juvenile. Right?

A A juvenile, exactly.
Q You had a very extensive juvenile record. Right?
A No, I don't think it was that bad. I never did any juvenile time.
Q But you had multiple arrests. You had, what, 11 arrests?
A Probably.
Q And you had about nine adjudications as a juvenile, as a delinquent?
A Yes.
THE COURT: Next question, Mr. Bergrin. Go ahead.
Q And that was since the time that you were 11 years old, 12 years old. Correct?
A I don't think it was that early.
Q 13 years old. I'm sorry, 13 years old.
So from 13 until you're 40 years old, one offense after another. Isn't that right?
A Yes.
Q And you're telling us that you didn't know the system that you're going to get benefits from cooperation when you went to speak to the feds?
A No, I didn't know that. I never knew that. I never had a federal case. I never was involved with the feds.
THE COURT: Did you ever hear anyone else who was arrested and who cooperated and got benefits --
THE WITNESS: Never knew anybody who cooperated.

THE COURT: -- in your criminal discussions or activities, you never knew anybody who got a benefit?

THE WITNESS: No I --

THE COURT: No, please. You never talked or heard about anybody on the street who got a benefit for cooperating?

THE WITNESS: No.

THE COURT: Okay.

BY MR. BERGRIN:

Q And you had been to County Jail. Correct?

A Yes.

Q And you had talked to hundreds of inmates in County Jail. Correct?

A Yes.

Q And you never knew anybody that got any benefits from cooperating?

A Never did.

Q And you had been to State Prison. Correct?

A Correct.

Q How many times before you went in to talk to these people had you been in State Prison?

A One time before I spoke to them.

Q One time?

Are you about as sure about that as your testimony here?

A Before I went to speak to them I was only -- I only did

State Prison one time, a seven with a three and a third.

THE COURT: Mr. Castro, with respect to this plea before Judge Bernstein, this was the most time you were ever facing in custody. Correct?

THE WITNESS: Yes, this time.

THE COURT: Yeah, okay.

BY MR. BERGRIN:

Q You knew -- who contacted the feds?

A I did.

Q Who gave you the number?

A Maria Correia.

Q Who told you to contact Joe Minish?

A Maria. She didn't actually tell me to contact Joe Minish, she told me to contact Shawn Brokos.

Q She told you to contact who?

A Shawn Brokos.

Q Who is Shawn Brokos.

A The agent.

Q And is that the agent that you told you lied before a Superior Court judge while under oath, she told you, don't say anything about that except to plea?

A Excuse me? Repeat it.

Q Is that the same Shawn Brokos that told you to lie and not say anything about having lied before a Superior Court judge?

A No, she never told me to lie about anything.

Q She told you not reveal it; to accept the plea. Right?
A She told me I would have to take my plea bargain first before I even did anything with them.
Q A plea bargain that she knew that you had lied under oath to a Superior Court judge about. Right?
MR. MINISH: Judge, I have to object. Could we be heard at sidebar?
THE COURT: All right. No -- overruled.
When you discussed this matter with the FBI, did you tell them your reservations, your problems with the plea, that you didn't point the gun at the police but pled guilty to that?
THE WITNESS: Yes, I told them I didn't point it at him. I told them I didn't put no gun under the cop's vest.
THE COURT: Was the response that you still should go ahead whether the plea?
THE WITNESS: To go ahead with the plea bargain, yes, correct.
THE COURT: Go ahead that, Mr. Bergrin, next question.
BY MR. BERGRIN:
Q Now --
THE COURT: I'll see you sidebar.
Ladies and gentlemen, we'll take a morning recess for about ten, 15 minutes, please, okay?
THE DEPUTY CLERK: Please rise for the Jury.
(The Jury leaves the courtroom.)

THE COURT: I don't mean sidebar, we'll do it here.

Mr. Castro, can you step outside, please, in the hallway?

Thanks.

(The witness is escorted out of the court room by the Marshals.)

(Witness temporarily excused.)

THE COURT: Mr. Minish, you have an objection?

MR. MINISH: I do, Judge.

THE COURT: Keep your voice up, please.

MR. MINISH: I'm sorry.

Mr. Bergrin insists on putting in information in his questions which attack both Agent Brokos and actually myself personally, which he has no good faith basis to make.

THE COURT: All right. I've heard enough. I'll tell you why I heard enough. This is your witness.

MR. MINISH: Yes.

THE COURT: This is your witness. The process here is for a search for the truth, Mr. Minish. Okay?

MR. MINISH: Yes.

THE COURT: It's your witness who is saying on my questions even that he did go to the agent -- and you were probably present -- he told them about the problems with his plea, he insists on telling us all that he didn't point the gun at the person, but he pled guilty in court. And he's saying

the Government said: You've got to take the plea and we'll cooperate going forward.

It's not his witness and so I am giving him latitude. Because, to be very frank with you, I'm deeply concerned -- and by the way, Mr. Minish, don't do that with your head when I'm talking. And, by the way, you did it a few times in front of the jury when I asked you to sit down, you shook your head to this way. Don't do it again or I'll ask you to step out of the courtroom. Okay?

MR. MINISH: Yes.

THE COURT: I am deeply troubled by this man's testimony. He's your witness. And while I've given Mr. Bergrin latitude, I have asked questions myself, and in response to my questions -- you know what, we'll publish -- we'll get this transcript, because I'd like to know what kind of a letter you're going to write to Judge Bernstein after he testifies. Because I'm going to write a letter, too. Okay?

Do you have anything else you'd like to say?

MR. MINISH: Well, Judge, what I would like to do is clear up what actually happened. And I can do that through the witness on redirect.

THE COURT: You can do that by calling yourself to the stand or --

MR. MINISH: I will do it during redirect.

THE COURT: -- Or calling Agent Brokos to the stand.

And if you want to impeach your own witness through Agent Brokos and she'll say he never said that, you're welcome to do it.

MR. MINISH: Judge, I plan on doing it on redirect of --

THE COURT: You'll have limited redirect, and it better not be leading. I am telling you now, it better not -- because he's extensively testified all morning that he went to the FBI, he told them he was unhappy with his plea, he has told us ten times he didn't point the gun at the cop, and he's told us at least three or four times that the Government said: You have to go through with the plea, and we'll help you with cooperating on the sentence.

I asked those questions.

MR. MINISH: But, Judge, the reason -- the issue is simply this: That what Mr. Bergrin has done is condensed this time period. And because he has condensed the time period, it gives the appearance to the jury, and apparently to Court, that is just inaccurate. Mr. Bergrin said that a couple of weeks before -- you pled guilty a couple of weeks before you came in.

That's not true.

THE COURT: How many weeks was it?

MR. MINISH: The proffer agreement is dated in March.

THE COURT: All right.

MR. MINISH: Okay? So it's well in excess of two

months. And --

THE COURT: The proffer agreement, the initial one he didn't say anything. Correct?

MR. MINISH: Exactly, Judge. But he's saying the first time he came, the first time he came in was a couple of weeks before. So it's making this period of time as if it's two weeks when it's not.

And secondly --

THE COURT: Well, what I understood is, a few weeks before is when he first said something about Mr. Bergrin.

MR. MINISH: Exactly, Judge. And that's the point, it's not correct. Because -- if that is what you understood, I understand that, but that's not the correct fact, it's also still in March.

THE COURT: We'll hear how your redirect goes, Mr. Minish. It's got to be nonleading in this area. Okay? And, you know what, you're welcome to call the agent back.

MR. MINISH: All right.

THE COURT: Or if you would like to take the stand yourself, go ahead. Do you want to contradict your own witness? Go ahead. You have that right, you have that opportunity. Go ahead.

MR. MINISH: But, Judge, so it's clear, I'm not looking for contradiction, I'm just looking to explain what happened. And the explanation --

THE COURT: I don't know if you can do that without calling yourself or the witness. I'll give you the chance to see on redirect what it is you're going to ask him --

MR. MINISH: Okay.

THE COURT: -- but the clear import that I've gotten from him is, when he went in, he made it clear to the Government he was not happy with his plea. He's made it clear to all of us he did not point the gun at the police officer he claims, and he made it clear to all of us that he told the Government, the United States Government that -- all of that, and the response was: Go forward with the plea and we'll work out a cooperation agreement.

I mean, that's the -- that's what I've heard. Now if you can -- if you want to challenge that, you want to explain it, you can try. But no leading. Okay?

Mr. Minish, if you haven't figured it out, I'm deeply concerned by this witness. He's admitted lying, he's admitted to a lot of allegations that haven't been proven. He's refuted the cops, he's refuted -- he's made claims that haven't been proven, he's insisted that he never pointed a gun at police. If you want to bring in evidence to show that that's true independently that he never did that, go ahead. Bring the cops in here. Go ahead. Bring the cops in here to testify that he never pointed the gun to the police.

This is your witness. Okay? And all of a sudden two

weeks before his sentence he claims he doesn't know the benefit of cooperation.

This guy has been on the streets since he was 10 or 11. He doesn't know the benefit of cooperations, but Paul Bergrin's name comes up. He's got it two weeks before he's facing the longest sentence he ever faced before.

Okay? That's -- that's what this is all about.

We'll take a recess.

(A recess is taken.)

(Proceedings resume - Jury not present.)

THE DEPUTY CLERK: Please remain seated.

THE COURT: Mr. Sanders, I understand you have an application?

MR. SANDERS: I do, your Honor.

THE COURT: Okay.

MR. SANDERS: Your Honor has every right under Rule 614 to question witnesses, you have the right to draw conclusions about the credibility of the witness or have concerns based on the evidence presented in the courtroom. But respectfully, your Honor, you're making reactions to the credibility apparent to the jury.

You did that when you took the recess before, when you asked Mr. Gay and Mr. Lustberg to come to chambers. It was apparent you were upset with the testimony and that you had an opinion. I would ask your Honor, please, number one, to

refrain from doing it in the future; and, two, to reinstruct the jury that when you ask questions they're not to draw an inference that you have an opinion about the case.

THE COURT: All right. Mr. Sanders, first of all, I think the record will reflect my conduct. As far as the immediate recess I took this morning, I stated we were taking a recess and I did walk out. If you haven't figured it out at all, I am deeply disturbed by the testimony of this witness, I'm disturbed that the Government put forth this witness if they knew a lot of this, quite frankly.

He has not been forthright. I think he's lied, quite frankly. And I'm human. I don't think the record will show that I've done anything inappropriate. And, quite frankly, it's hard to refrain when I hear some of this testimony. And I think I have as best I can as humanly possible.

And I will at the end of the case explain to the jury that when the Judge asks questions they have to weigh those answers the same way they weigh other answers.

By the way, the questions I asked I think were very pointed and very fair. He answered them several times in the same way. And as I stated a few moments ago, part my job is to get to the truth as well if I feel that there's things the witness is testifying about that are not believable.

MR. SANDERS: I'm not disputing that, your Honor, you have a right to question witnesses. But the jury, it's the

jury's job to determine the facts and to determine credibility. And when your Honor asks him in a way or takes recess in a way that says you disbelieve the witnesses, that's interfering with their role.

Respectfully, your Honor, I ask you to repeat the instruction now before we resume.

THE COURT: The only recess I took that was out of the ordinary was this morning after about a half hour of testimony.

MR. SANDERS: That's what I'm referring to.

THE COURT: Yeah. Not this recess, this recess was the normal recess. And the only recess I took then, quite frankly, I was so disturbed I needed to take a recess, quite frankly, and I wanted to have a brief conversation with Mr. Gay at that time and Mr. Lustberg, which I did. And I thought it was necessary to take that recess at that time based upon what I heard from this witness.

MR. SANDERS: And, I understand that, your Honor. But I'm saying the manner in which you did it and your expressions, it was clearly apparent that you disbelieved the witness, and that is the jury's job. And if that's not corrected, if they think you disbelieve the witness -- I mean, I know you have a right under 614(b), but I ask you to repeat that instruction.

THE COURT: All right. Thank you, Mr. Sanders.

MR. SANDERS: Thank you.

THE COURT: Can we bring out the jury, please.

THE DEPUTY CLERK: We need the witness.

THE COURT: All right. Bring out Mr. Castro.

(The witness is escorted into the courtroom by the Marshals.)

A L B E R T C A S T R O, resumes, testifies further as follows:

THE DEPUTY CLERK: Please rise for the Jury.

(Jury present.)

THE COURT: All right, everyone, please be seated.

Mr. Bergrin, do you have more?

MR. BERGRIN: Not long.

THE COURT: Before you do, Mr. Bergrin, let me just explain to the jury:

Ladies and gentlemen, I think I explained it earlier on in the beginning of the case, but as Judge I have a right, if I feel there's a need, to ask a question to clarify a point or to get a further explanation or to get a fuller understanding of the testimony of the witness, and I have that right. However, you should understand that whether I ask the question or the Government asks the question or Mr. Bergrin asks the question, the answer that you hear should be given no greater weight just because I've asked the question. Okay? And it's for you to determine the credibility of the witness

based upon the answers that the witness gives you here in court. So whether I'm asking the question or one of the lawyers, the fact that I ask a question should not be given any further weight to the answer.

And as I explained before, it's the answers of the witnesses not the questions of any of the lawyers or the Judge that is evidence. Okay? So I just want to make sure you understand that as well.

Thank you.

MR. BERGRIN: May I inquire, Judge?

THE COURT: Yes, you may. Go ahead.

CROSS-EXAMINATION CONTINUES

BY MR. BERGRIN:

Q The meeting -- the first time that you ever mention in your life the statement of Paul Bergrin in December of 2003 is on April the 30th of 2009 during the proffer session. Correct?

A Correct.

Q And your sentencing was scheduled for May the 20th. Correct?

A Yes.

Q And you went into the grand jury on May the 12th, right, a week before your sentencing?

A Correct.

Q Now, when you went in to see me, you didn't record -- in December of 2003 -- there was no recording ever made. Right?

A No.
Q And you never went back and made any recordings. Correct?
A No, I never --
Q And you never made any notes whatsoever. Right?
A No.
Q When you went into this proffer session on April 30th of 2009, six years, over six years after this alleged statement that I made in 2003, you told the prosecutor that you remembered me using the name "Kemo." Correct?
A Yes.
Q As you sit here today under oath, are you telling us -- did you read any newspaper articles about Kemo?
A No, I never read anything about it.
Q And you never read any newspaper articles about me talking to the press about Kemo?
A No.
Q Do you read The Star-Ledger?
A No, I don't read papers.
Q And you're telling us, as you sit there under oath, the same oath that you've taken throughout this day and a half, that you've never read any articles about Kemo or about me and the statements that I made to the press?
A No, I heard on the streets, not this newspaper.
Q You heard on the streets.
When did you hear on the streets?

A Throughout the years people talked about your case, in the County Jail people talk about it.
Q Now, you told the prosecutors that you knew, you knew -- the exact words was: You know of Kemo. Is that from hearing it on the streets?
A Yeah, just knowing of him.
Q You have never met him. Correct?
A Never met him.
Q You can't even identify him or give us a description. Right?
A No, can't.
Q And you told the prosecutors that you know of him because he was a drug dealer. That's what you told them in your Grand Jury testimony. Right?
A Something with drugs, correct.
Q Now, what did you know about Kemo and drugs?
A The only thing I knew is that he was involved -- from the streets, that he was involved when drugs. Every drug dealer basically hears something or knows something about another one.
Q There are thousands of drug dealers in the City of Newark. Right?
A Correct.
Q Kemo was a small-time nickel and dime dealer. Correct?
A I don't know what his involvement was.
Q You said you just --

A Yeah he had involvement in drugs. I don't know if he was big, small.
Q And you're telling us that -- where did Kemo live, where did Kemo deal?
A Up the hill.
Q Up the hill? Where up the hill?
A Around Avon Avenue.
Q Avon Avenue? Wrong.
A Okay.
Q Where did Kemo deal?
A I don't know. I just said, I thought it was up the hill, around Avon Avenue.
Q You knew nothing about Kemo. Isn't that a fact?
A I heard of him, like I said, didn't actually know the guy, couldn't pint him out. That's the truth.
Q So you're telling us you know every drug dealer in the City of Newark?
A No, I don't know every one but I know a lot of them, and I know lot of people.
Q You don't even know where Kemo dealt.
A I didn't say I actually knew the guy, I didn't personally know him. I never admitted to that.
Q What kind of drugs did Kemo deal?
A Coke.
Q And you're telling us that you heard of Kemo's name before

reading any newspaper articles?
A Correct.
Q And you heard Kemo's name because you know other drug dealers throughout the City of Newark?
A Exactly.
Q Do you even know what the oath means when you take the oath to tell the truth?
THE COURT: All right, Mr. Bergrin.
A I know what it means.
Q When you went in to speak to the prosecutors on April the 30th, the first time that you talked to them about the case -- because you went in one time and you remained silent. Correct?
A Yes.
Q Then you went a second time on April 30th.
A Correct.
Q A short time before your sentencing. Right?
A Yes.
Q Who was taking notes in there while you were talking to them?
A Shawn Brokos and Joe Minish.
MR. BERGRIN: Your Honor, could we have those notes before I finish my cross-examination? We've been provided none whatsoever, not even a 302 as to what he said.
MR. MINISH: That's absolutely incorrect. He's been provided with the reports that I have right in front of me that

have been marked and provided to the Defense Counsel that show the actual date, not the date Mr. Bergrin has been implying to this witness and this jury.

THE COURT: All right. At the next recess I'll make inquiry.

If there are any notes. I mean, you have 302 reports, Mr. Bergrin, I assume?

THE COURT: There's no 302 as to what he said during the proffer session, your Honor. We have a 302 that says:

(Reading) On April 30th, the proffer was -- a proffer meeting was held with Albert Castro, Castro's attorney, Richie Roberts, was present, Shawn Brokos, Internal Revenue Service Agent Stephen Cline, Assistant United States Attorney Joseph Minish.

That is the extent of what we have, your Honor.

THE COURT: On what date is that?

MR. BERGRIN: April 30th, 2009.

MR. MINISH: And, Judge, marked J03414, dated March 31st, 2009, Agent Brokos, Agent Cline, myself, and AUSA Nancy Hopick --

THE COURT: All right. Mr. Minish, you'll have a chance on redirect on that. Okay?

MR. BERGRIN: I have no further questions Judge,

THE COURT: If there was a 302 report of another meeting, you'll have a right on redirect. Okay?

MR. BERGRIN: Yes, your Honor.

I have no further questions.

THE COURT: Go ahead, Mr. Minish, redirect.

MR. MINISH: If I could just have one second, Judge.

THE COURT: Sure.

(There is a pause for Mr. Minish.)

REDIRECT EXAMINATION

BY MR. MINISH:

Q Sir, explain for jury, sir, why you brought up Mr. Bergrin's name at the time you did.

A Because I thought it was the right thing to do.

Q And were you angry?

A I did a lot of criminal activity in my time. I thought that was something right to do, and I was angry with him for over my case.

Q If you weren't angry would you have done it?

A I probably wouldn't have did it, and I still feel a little bad that I'm doing it.

Q Why didn't you do it before the day that you actually came forth?

A Because I basically had no reason to do it.

Q What does that mean?

A Like, the reason I did it, because I was angry with him.

THE WITNESS: If you did what you were supposed to do in my case, I wouldn't be here today.

Q Let's get some dates straight.

Sir, do you recognize -- I'm showing you what's been marked -- at least the first page is J01603. Do you recognize what that is?

A Yes.

THE COURT: Which one is it, Mr. Minish? J0?

MR. MINISH: I'm sorry, Judge. J --

THE WITNESS: I have it right here.

MR. MINISH: You have one? Okay.

MR. MINISH: J01613. It's the --

THE COURT: Just a moment. Do I have that?

MR. MINISH: I believe so, Judge.

THE COURT: Yeah. Okay, go ahead.

BY MR. MINISH:

Q Could you tell the jury what that is?

A It's a proffer.

Q Okay. And that's an agreement that you signed with the Government the first time you came?

A An agreement with the Government to tell the truth.

Q But my question though, sir, is more specific about the date.

Do you recall whether or not this agreement was given to up the very first time you came?

A Yes.

Q Okay. Do you recall the date?

A Yes.
Q Okay. what was the date?
A Well, I can't really see it over here. I don't actually -- 3/15.
Q 3 -- I'm sorry?
A Looks like 3/15/09.
Q 3/15/09.
If you look at the top of the first page, sir, does that help you?
A Yes.
Q Okay. What's the date?
A March 13, '09.
Q And again, without -- we don't have to go into any great detail -- but did you provide any information to us on that day?
A No, I did not.
Q Why not?
A Because I was scared. I had a little cold feet. I didn't want to -- I was thinking about proceeding with it, so I didn't give them any information.
Q At that time, sir, was your state case open, or had you pled guilty?
A It was still open at that time.
Q At that time, sir, did you have Mr. Bergrin as an attorney or not?

A I believe I still had him and I was in the process of firing him.
Q But when you showed up at the U.S. Attorney's Office --
A I had Richie as the lawyer, Richie Roberts, so that Paul was no longer my lawyer.
THE COURT: Is that Mr. Roberts whose signature is on the bottom of the page? It is. Correct?
THE WITNESS: Yes, that is.
THE COURT: Okay.
MR. MINISH: I'm sorry, Judge, I grabbed the wrong document here.
Q So then moving forward, sir, did you come back to the U.S. Attorney's Office?
A Yes, I did.
Q Okay. When you came back again, was your case still opened, the -Essex County case that is?
A Yes. I don't believe I took my plea as of that time.
Q And do you recall the day that you came, when you came back?
A I don't remember the exact date. It was a week or two later.
Q All right. Sir, I'm going to show you what's been marked --
THE COURT: Mr. Minish, do we have the date he actually pled guilty before Judge Bernstein?

MR. MINISH: Judge, it's stamped over. That's what I've been trying to figure out.

THE COURT: I think it's important.

MR. MINISH: On the Judgment of Conviction. And I'm trying to --

THE COURT: I'm trying to find out the date he pled guilty before Judge Bernstein.

MR. MINISH: Yes, Judge. And that's --

THE COURT: Just tell us what it is. It's an official date, so it's a public record. Correct?

MR. MINISH: I'm saying, Judge, I'm having a hard time reading it so I don't want to misstate something to the Court.

THE COURT: Because I think he's saying when he came back he had not pled guilty yet.

MR. MINISH: Yes, Judge.

THE COURT: And that was what, April 2nd?

MR. MINISH: Well, I --

THE COURT: Okay. I'm trying to follow. Go ahead.

BY MR. MINISH:

Q Sir, I'm showing you what's been marked J03414. Can you take a look at that?

I'm going to direct your attention specifically to --

A March 31st.

Q Right after the word "details" towards the middle. Does that refresh your memory when you came to the U.S. Attorney's

Office the second time?
A Yes.
Q Okay. When was that?
A The 31st.
Q Okay. Had you pled guilty yet by that time?
A I don't think I have been.
Q Okay.
A I don't think I pled guilty at that time.
Q Okay. With your lawyer were there discussions whether or not the Federal Government would adopt your case?
A Yeah, yous couldn't adopt my case.
Q My question, sir is: Were there discussions?
A With me and you, yes.
Q Okay. And ultimately were you told --
THE COURT: No, no, no.
A You couldn't --
THE COURT: Just: What were you told?
Q What were you told?
A That yous couldn't pick my case up.
Q And were you told whether or not we would be involved in any way with respect to this -- the state case?
MR. BERGRIN: I object to the leading nature.
THE COURT: No, no, no, you're leading in an area that I think it's important that his recollection be what it is.
MR. MINISH: Okay.

Q What --

THE COURT: It's leading and don't do it again, Mr. Minish.

Q What if anything were you told our involvement would be with the state case?

A Yous had no involvement with the state case. The only involvement is if I jumped on board with yous, that yous can -- after I take my plea bargain and cooperate and tell truth, that yous would write a letter to the state judge.

THE COURT: When you say "jump on board with them," what did that mean?

THE WITNESS: That means talk to them, cooperate with them.

THE COURT: Did you know what the subject matter was?

THE WITNESS: The subject matter?

THE COURT: Yeah. What was the subject matter that you were to jump on board with?

THE WITNESS: To cooperate against Mr. Bergrin.

THE COURT: All right.

Was there a discussion about that?

THE WITNESS: Yes. At that time there was. If I --

THE COURT: Would you tell us what that was about?

THE WITNESS: Well, if I told the truth, the only thing they could do is write a letter to the state judge, and if they grant it, they grant it. It's up to them. It had

nothing to do with the state case.

THE COURT: All right. But how did the subject of Paul Bergrin come up?

THE WITNESS: I brought it to their attention.

THE COURT: Okay. Go ahead.

BY MR. MINISH:

Q So the discussions that you've just answered with respect to the Judge's question, was that before or after you told us about Mr. Bergrin?

A When I told yous, it was at that point in time I believe. Like, after I start talking to you about the case, yous told me what can be done and what can't be done.

Q So after you provided the information?

A Yes.

Q Then did you come back again to the U.S. Attorney's Office?

A Yes, I did.

Q And at that point had you pled guilty?

A Yes, I pled guilty at that point.

Q Do you recall the date you pled guilty?

A No, I don't offhand.

THE COURT: Did you hire Mr. Roberts before the plea?

THE WITNESS: I took the plea --

THE COURT: And Mr. Bergrin represented you at the plea?

THE WITNESS: Yes, at the plea. I never stood in

front of a judge to actually sign the plea. I signed the plea but never stood in front of this judge to say what I did and how everything took place. That's when I fired him and hired Richie.

THE COURT: Okay.

THE WITNESS: And then that when I stood in front of the judge with Richie is when I had to admit to all the crimes.

THE COURT: So you had another lawyer after Mr. Bergrin and you still went ahead with the plea?

THE WITNESS: Correct.

THE COURT: Even though, as you testified to, you still today say you never pointed a gun at a police officer?

THE WITNESS: I never did point a gun.

THE COURT: Did you tell your lawyer Mr. Roberts that as well?

THE WITNESS: Yes, I told him that.

THE COURT: And what was his advice to you?

THE WITNESS: Everything depended on afterwards speaking with them. To take the plea, sign for the plea, after my cooperation hopefully I could get a lesser -- to go in for a lesser time.

THE COURT: So this actual day you went before Judge Bernstein and you swore under oath about the plea --

THE WITNESS: Yes.

THE COURT: -- you admitted to pointing a gun?

THE WITNESS: Correct.
THE COURT: You had already had a new counsel before that?
THE WITNESS: Yes.
THE COURT: And at that point you still went ahead and made the plea?
THE WITNESS: Correct.
THE COURT: And that's because you had already spoken to the Federal Government now about cooperating?
THE WITNESS: Correct.
THE COURT: Okay.
BY MR. MINISH:
Q Why did you take the plea, sir, if you're telling the jury that at least in part you were not guilty?
A I took the plea bargain because, like I said earlier, if I took the case to trial with a 43-count indictment I would have to go to trial for all the charges. So when you hire a lawyer, they usually get charges downgraded so you could get a lesser plea. If I would have took that plea from the beginning -- if I wouldn't have took the plea and went to trial I would have did life in prison.
THE COURT: But, Mr. Castro, the plea that was worked out when you had Mr. Bergrin --
THE WITNESS: Correct.
THE COURT: -- that was the same plea that Mr. Roberts

your new attorney --

THE WITNESS: Same plea.

THE COURT: -- agreed to?

THE WITNESS: Same plea.

THE COURT: So you had the benefit of speaking to Mr. Roberts about going forward with the plea?

THE WITNESS: Yes.

THE COURT: And you still went ahead and swore and entered the plea?

THE WITNESS: Correct.

THE COURT: But in between you had now gone to the Federal Government. Correct?

THE WITNESS: It was at that time, yes.

THE COURT: All right. So before you actually swore before Judge Bernstein about the plea, you had already gone in and spoken to the Federal Government about cooperating against Mr. Bergrin?

THE WITNESS: Correct.

THE COURT: Okay.

THE WITNESS: And Richie couldn't -- he told me go ahead take the plea bargain and we'll work it out later. Supposedly the judge and the state prosecutor knew what was going on.

THE COURT: Here, with the Federal Government?

THE WITNESS: Yeah. And they entered the plea,

THE COURT: So Mr. Roberts indicated to you: Take the plea -- tell me if this is accurate or not: Take the plea, but you'll have the possible benefit of a cooperation agreement with the Federal Government --

THE WITNESS: Correct.

THE COURT: -- to address the sentence. Correct?

THE WITNESS: Correct.

THE COURT: Okay.

BY MR. MINISH:

Q So the jury is clear: From the time before you came to the Federal Government until the time you actually pled guilty, did your plea offer change? Did you get a better deal, a better offer?

A No, not at all.

Q And ultimately were you, in fact, sentenced exactly in accordance with that plea agreement?

A Yes.

MR. MINISH: I have nothing further, Judge.

THE COURT: All right. Is there any recross?

MR. BERGRIN: Yes, Judge.

RECROSS-EXAMINATION

BY MR. BERGRIN:

Q So you went to the Federal Government due to our anger. Correct?

A Yes.

Q And you testified about a proffer session that you had to tell the truth. Correct?
A Correct.
MR. BERGRIN: May I approach with J01603, your Honor?
THE COURT: Yes.
Q What is J01603.
A This is the proffer.
Q Please, state that a little louder.
A The proffer.
Q The proffer that you signed?
A Correct.
Q I want you to read that carefully, word-by-word, line-by-line, paragraph-by-paragraph and you show me and you show this jury where it says you have to be truthful.
(There is a pause for the witness.)
Q Take your time, Mr. Castro, I don't want you to miss any words.
Is it contained -- I saw you just turn the page. It's a two-page document?
A It has stuff --
Q And you read page 1 very carefully. Correct?
A Correct.
Q And you can read English, sir?
A Yes, I can.
Q Where does it say "truthful" on page one?

A The whole thing reveals basically, of a truthful statement.
Q Where does it say "truthful" on page one?
A It doesn't actually say it, truthful.
Give me one minute.
Q It contains nothing about saying the truth. Correct?
A Exactly.
Q Now read page 2.
A I didn't --
Q Read page 2, Mr. Castro, so you don't miss any paragraphs, words or sentences.
(There is a pause for the witness.)
THE COURT: All right. Mr. Bergrin, the question?
Q You've read it, Mr. Castro. Correct?
A Yes.
Q And you've read it very carefully. Right?
A Correct.
Q Word-by-word, line-by-line, the entire document?
A Yes, I did.
Q Even up to the point where you put your signature?
A Yes.
Q Isn't it a fact it says absolutely not one word about you being truthful, correct, as you testified a couple minutes ago? Isn't that a fact, Mr. Castro?
THE COURT: All right, Mr. Bergrin, you don't have to raise your voice. Just ask the question once.

MR. BERGRIN: I'm sorry, your Honor.
Q Is isn't that a fact, Mr. Castro?
A Listen, the proffer was based on me telling the truth.
THE COURT: No, Mr. Castro, it's a simple question. Just whether or not that document says anything about you're required to tell the truth. That's all.
THE WITNESS: Yes, it is contained --
Q You can answer the Judge's question, you can answer my question.
THE COURT: No, Mr. Bergrin.
THE WITNESS: Yes, it is containing me telling the truth. If I say any false statements it could be held against me.
Q Where does it say that?
THE COURT: The question is not -- you know, just what the document says, that's all. Whether or not the document says anything about your obligation -- does it, Mr. --
MR. MINISH: It does, that's what he's referring to. That's what I said.
THE COURT: No, go ahead then. Point to that and tell us.
MR. MINISH: It's paragraph 2, Judge.
THE WITNESS: I was going to point to that myself.
THE COURT: Okay. Go ahead.
THE WITNESS: It says, should your client be

prosecuted, no statements made by your client during the interview will be used against your client in the Government's case-in-chief at trial or for purpose of sentencing, except as provided below.

Q Except what?

A As provided below.

Then it has the other paragraphs.

Q So it says nothing about you being truthful, because you're not being proffered. They already told you that they're not prosecuting you. Correct?

A But I have to be honest and tell the truth.

Q The proffer agreement says nothing about you being truthful during the proffer session because you're not being prosecuted by the Federal Government. Correct?

A I'm not being prosecuted by the Federal Government.

MR. MINISH: I object to the line of questioning.

THE COURT: All right. Okay. Sustained.

Q Now, you testified that on March the 13th, when you went in for your questioning -- correct?

A Correct.

Q -- you testified that you still had me as your attorney. Right?

A Correct.

Q And you're about as sure about that as about all your testimony in this case. Is that what you're telling us?

A No, I didn't have you as my attorney on the 13th.
Q Then why did you tell that to the jury a few minutes ago?
A I don't recall saying that. On the 13th I had Richie Roberts as my attorney.
Q So when you went in to the feds to speak to them you had Richie Roberts as your attorney, not Paul Bergrin. Correct?
A Correct. I fired you and went to speak with him, correct.
Q And isn't it a fact that I put the plea through before Judge Bernstein, not like you just swore under oath Richard Roberts, it was put through in February of 2009?
A I did say you entered the plea. I did not stand in front of the judge and cop out to it, because I got rid of you in the court and Richie Roberts then went and sentenced me.
Q And you're about as sure about that as about all the testimony in this case, including the statement I made. Right?
A Yes.
Q Isn't it a fact that on February the 13th of 2009, you pled guilty before Judge Bernstein with me standing next to you, and Judge Bernstein on the record says that: I accept your plea of guilty, I find it to be a knowing, voluntary and intelligent plea under oath?
A Didn't I retract my plea that day?
Q Isn't it a fact that you plead guilty with me at your side as your attorney, with Thomas Fennely, Supervising Assistant Prosecutor, and the judge accepted your plea with me there.

Isn't that a fact, sir?
A I don't --
Q Isn't that a fact?
A I don't recall.
Q You don't recall? Now you don't recall? You just testified a few minutes ago that I wasn't with you.
A I did testify to that.
I said, when you went in front of the judge I didn't take the plea. I fired you as my attorney, and then I went back in front of the judge with Richie Roberts and accepted the plea. That's what I said.
Q Richard Roberts went before the judge on May the 20th right after you testified before the grand jury and he handled your sentencing. Isn't that a fact?
A Correct. Well the sentencing, that's --
Q And that' --
A Okay. Go ahead.
Q That's all he handled in this case is your sentencing. I put the plea through, not like you just lied to this jury. Respect?
A I got confused, I didn't lie.
MR. BERGRIN: I have no further questions for this witness.
MR. MINISH: Judge, I would like to move into evidence the proffer agreement.

THE COURT: Is there any objection to that?

MR. BERGRIN: I have no objection, Judge. I would like to move --

MR. MINISH: If I could just ask one question because I think the witness stopped short of the paragraph he had intended to read.

THE COURT: Okay, go ahead.

REDIRECT EXAMINATION

BY MR. MINISH:

Q Do you still have the proffer agreement in front of you, sir?

A Yes.

Q Now, you had stopped reading after paragraph 1?

A Correct.

Q Would you read paragraph 2.

A (Reading) The Government may use any statement made or information provided by the client, or on your client's behalf, in a prosecution for false statements, perjury, or obstruction of the justice, premised on statements or actions during or subsequent to the interview.

Q And the interview that's referred to in this agreement is when?

A After this date is when we --

Q So after you signed this, anything you say?

THE WITNESS: Correct.

MR. MINISH: I have nothing further.
THE COURT: Okay. Is there anything further?
MR. BERGRIN: No, Judge.
THE COURT: All right. Then we can excuse -- ladies and gentlemen, we'll have to take a recess and have another witness, but we'll take a break. I don't know -- I'll find out in a few minutes if we're going to be taking lunch break and then resuming early. We don't know if your lunch is here yet.
So if you would just be patient for about five minutes in the jury room, we'll inform you how we're going to proceed. Okay?
THE DEPUTY CLERK: Please rise for the Jury.
(The Jury leaves the courtroom.) (
THE COURT: We don't need the witness --
Who's the next witness?
MR. MINISH: Anthony Young, sir.
THE COURT: All right. Is he available?
MR. MINISH: I think there's a lot of little transitions that have to be done, but --
THE COURT: Is the lunch here?
THE DEPUTY CLERK: No.
THE COURT: What time does it usually get here?
THE DEPUTY CLERK: Twelve.
MR. MINISH: He would be on for like two minutes, Judge, probably.

THE COURT: No, I understand.

I'll tell the jury we're going to break for lunch. We'll resume at quarter of one. Okay? And we'll take his direct testimony starting at quarter to one.

Okay. We'll see you then. Thanks.

(Witness excused and escorted out of the courtroom by the Marshals.)

(A luncheon recess is taken.)

A F T E R N O O N S E S S I O N

(Proceedings resume - Jury not present.)

(The prospective witness is escorted into the courtroom prior to the Court coming on the bench.)

THE DEPUTY CLERK: Please remain seated.

THE COURT: Are we all set? Is this your witness, Mr. Gay?

MR. MINISH: No, Judge.

THE COURT: Let's begin.

Bring out the jury, please.

THE DEPUTY CLERK: Please rise for the Jury.

(Jury present.)

THE COURT: Everyone, be seated. Welcome back. Everyone be seated, please.

Mr. Gay, identify your witness, please.

MR. MINISH: Judge, at this time the Government calls Mr. Anthony Young to the stand.

A N T H O N Y Y O U N G, called as a witness, having been first duly sworn, is examined and testifies as follows:

THE DEPUTY CLERK: Please state your name for the record.

THE WITNESS: Anthony Young.

THE DEPUTY CLERK: Thank you. You may be seated, sir. Talk into the microphone.

DIRECT EXAMINATION

BY MR. MINISH:

Q Mr. Young, where did you grow up?

A Newark, New Jersey.

Q Did you spend any time out of state?

A As a little kid, North Carolina.

Q Do you remember about how old you were when you were in North Carolina?

A From, like, 5 to 7.

Q Other than that have you been a Newark resident?

A Yes.

Q Would you tell the jury how far you got in school?

A To the tenth grade.

Q Have you since gotten any other accreditations or any

studies?
A Yes.
Q Tell the jury what that is.
A Right now I'm working on my GED, so within the next couple of months.
Q Next couple of months, what?
A I should be taking the test within -- by January.
Q Do you have any brothers or sisters?
A Yes.
Q And how about children?
A Yes, a daughter.
Q Are you in jail right now, sir?
A Yes.
Q When were you arrested for this time that you're currently incarcerated for?
A February 1st, 2005.
Q And that wasn't the first time you had involvement in the criminal justice system. Is that correct, sir?
A No.
Q How old are you right now?
A 37.
Q How much of your life do you think you've spent in jail?
A Approximately between 17 to 18 years.
Q Now, sir, going back to your juvenile days, all right, before you hit the age of 18, were you involved in any criminal

activity?
A Yes.
Q Okay. Would you tell the jury the type of activity you were involved in?
A Stealing cars, robbing, and gun charges.
Q Who were you involved with, who were the other individuals?
A A bunch of guys from around my way, just from my neighborhood.
Q Would you tell the jury some of their names?
A Rakeem Baskerville, William Baskerville, Jamal Baskerville, Hamid Baskerville, Royce Hodges; Rashid Pringle. There's a bunch of guys from Avon Avenue.
Q Did you get arrested related to any of those activities?
A Yes.
Q Did you ever cooperate with law enforcement after you were arrested on that time period, 15 to 18?
A No, not back then. This is my first time.
Q All right. Now, after you turned 18, were you involved in any sort of assaults?
A Yes.
Q Okay. And specifically, sir, back in 1992, were you involved with a shooting by Alexander Street?
A Yes.
Q Would you tell the jury about that?
A Well, I had a problem with two guys and I shot both of

them.
Q Did they die?
A No.
Q And on May 7th, 1993, did you plead guilty to two counts of aggravated assault --
A Yes.
Q -- related to that?
A Yes.
Q And were you sentenced to five years with three years of parole ineligibility?
A Yes.
Q Now, when you came home from jail or were released from jail, do you recall about how old you were?
A 23.
Q After your 23rd birthday, or after you were released, did you get involved in another sort of crime?
A Yes.
Q Tell the jury about that.
A I start selling heroin, and I was locked up, got locked up again for heroin, another gun charge, and an assault charge.
Q And was that your sentence; to five years for that?
A Yes.
Q Did you tell on anybody that you were committing criminal acts back then when you were arrested?
A No.

Q Why not?
A Well, at that time that wasn't something you supposed to do. Growing up in the hood, you don't tell on people.
Q Now, moving forward, sir, to October 20th, 1997, did you plead guilty to a burglary charge and were you sentenced to about 100 days?
A Yes.
Q And moving forward to March 2nd of 1999, did you plead guilty to possession with intent to distribute a controlled dangerous substance, drugs?
A Yes, heroin and cocaine.
Q Aggravated assault?
A Yes.
Q Possession of a handgun by a convicted felon?
A Yes.
Q Receiving stolen property?
A Yes.
Q Now, what was that related to, sir, that criminal activity?
A Part of an organization we had that we all sold heroin and cocaine.
Q And who was the assault on?
A The assault, I had an altercation with I think -- I'm not sure if he was a correction officer, which I heard he was, inside a nightclub that he had started fighting my sister.
Q Okay. Now, for those charges were you sentenced to three

years; five years with 20 months of parole ineligibility, and three years for those various charges?

A Yes.

Q And moving forward to May 16th, 2003, did you get out of jail?

A Yes.

Q Were you charged with something and represented on that case charged with a criminal case?

A Yes.

Q Okay. Would you tell the jury about that?

A Well, I came home May 16th, and this is the charge that I'm locked up on now I caught in February 2005.

Q But prior to that, sir, back in May, were you represented by a lawyer named Donna?

A Yes, that was before I went to prison though.

Q I apologize. Please explain that to the jury.

A There was in -- don't know, I forgot her last name, but this was in 1999. She represented me.

Q Okay. And did you plead guilty to charges?

A Yes.

Q Did there come a time related to those charges you tried to hire another lawyer?

A Yes.

Q Okay. Could you explain to the jury what happened?

A Well, I was trying to get postponement so I could stay out

for the whole summer.
Q Postponement of what, sir?
A Of all those charges, because I had pled guilty and I copped out to five years with 20 month ineligibility.
Q Was this the sentence date?
A Yes. I was supposed to get sentenced in May, and I went to court and I was trying to get a postponement to September. And I asked Mr. Paul Bergrin, could he represent me on that.
Q Tell the jury what happened.
A He said yes. And he said he'd see me at the courthouse.

I told him I'll get my thousand dollars to get me a postponement.

But the day that I got to the courthouse I called him that morning he said he couldn't make it, that he was going to send somebody, and he sent another attorney.
Q Did another attorney show up?
A Yes.
Q And were you able to get that sentencing postponed?
A No.
Q So what did you do?
A The attorney told me, I'm going to be sentenced after lunchtime, he said, either you going to stay or you going to leave, it's up to you. And I left.
Q So you didn't stay?
A No.

Q Did there come a time when you eventually were sentenced on that charge?
A Yes.
Q Tell the jury what happened.
A In September. In September I walked into the Sheriff Department and told them I was turning myself in, and they locked me up. And I was sentenced to the same five month -- five years, 20 months.
Q And why did you get the same sentence?
A Because the judge, she asked me, why did I leave?

And I explained to her that I had just had a daughter and I wanted to have some time with her, and I just wanted the summer out with her. And I turned myself in, and she decided to give me the same -- the same sentence.
Q Because she could have given you more, you're saying?
A She could have gave me seven years.
Q Now, in another area, besides the one time you told the jury about, shooting at two guys, were there any other individuals that you shot at?
A Plenty times.
Q Tell the jury about that.
A Well, I had a shootout on 21st Street -- 22nd Street and 18th Avenue, me and Rakeem.
Q Who is Rakeem, sir?
A Rakeem Baskerville. We had a shootout with some guys. As

teenagers I had a couple of shootouts with guys. And that's it.

Q What were they over, do you recall?

A Drugs, drug blocks. And I had one guy shoot a friend of mine 13 times, so one time it was over that.

Q Did any of those individuals die?

A No.

Q Now, you've mentioned that you've sold drugs in your life, sir. Did you also use drugs in your life?

A Yes, for a small period of time.

Q Tell the jury about that.

A As a juvenile I experienced using cocaine and marijuana.

Q And did you continue the use for a period of time?

A Yeah, for a small period of time, not long.

Q Now, you mentioned a number of individuals with the last name "Baskerville." Can you tell jury the first time you met anybody in the Baskerville family?

A The first time I met one of the Baskervilles was maybe around 1985, '86.

Q Which Baskerville did you meet?

A Jamal.

Q Now, could you tell the jury the circumstances?

A There's a -- just a lot of guys in the neighborhood that stole cars, and they was -- they was from another area, they stole cars also, but we only was two blocks apart. I was from

19th Street, they was from 17th Street, and we decided all that we all start hanging together doing the same activities.

Q Criminal activities?

A Yes.

MR. MINISH: Judge, I'm going to show the witness Government Exhibit 2261.

THE COURT: Go ahead.

Q Sir --

A Jamal Baskerville.

Q Okay. So you do recognize who that is?

A Yes.

MR. MINISH: Judge, I would like to move this into evidence, please. If we could publish it to the jury.

(An exhibit is published to the Jury.)

Q Sir, I know you said it, but now that the jury is looking at the picture, who is that?

A Jamal Baskerville.

Q So, after Jamal Baskerville, you met him, did you meet any other Baskerville -- members of the Baskerville family?

A Yes.

Q Tell the jury who you met, who else you met.

A Jamal Baskerville, Hakeem Curry, Rakeem Baskerville, Hamid Baskerville and Terique Baskerville.

MR. MINISH: Judge, we'll put up 2257 in evidence.

THE COURT: Go ahead, publish it.

(An exhibit is published to the Jury.)

Q Who is that, sir?

A Rakeem Baskerville.

Q Sir, I'm growing to show you what's been marked 2262. Do you know whose picture that is?

A Yeah, that's Hamid Baskerville, which Haseem, it's both the same person.

Q Judge, I'm going ask that this be moved into evidence.

MR. BERGRIN: No objection, sir.

THE COURT: All right. It's in evidence, go ahead, publish it.

(Government Exhibit 2262 is received in evidence.)

Q Again, could you tell the jury who that is?

A One of the Baskerville brothers.

Q Okay. Which one?

A Hamid or Haseem they call him. That's both his names.

Q Now, what sort of things were you doing with Rakeem Baskerville when you first met him?

A Stealing cars and doing robberies.

Q Did there come a time when you met a brother named William?

A Yes.

Q Okay. Would you tell the jury the circumstances of meeting William Baskerville?

A The first time I met William was on a phone call.

Q What does that mean?

A He was in prison in 1986. The first time I met him was on the phone. He had went to prison for shooting somebody in the back, and that was my first meeting with him.
Q Did there come a time when you met an individual named Hakeem Curry?
A Yes.
Q Could you tell the jury the circumstances of that meeting?
A I first met Hakeem Curry in 1987.
Q How did you meet him?
A Because he's a cousin of the Baskervilles. I met him at the Baskervilles' house.
Q And was he involved in any of the -- in the criminal activity you were talking about?
A Yeah, he would steal cars with us but he was more into selling drugs at the time. But he used to be in stolen cars with us some time.
MR. MINISH: Judge, if we could publish the photo 2258.
(An exhibit is published to the Jury.)
Q Would you tell the jury who that is?
A Hakeem Curry.
Q Now, sir, you've spoken about drug-trafficking that you've done. Could you explain how, to the jury, how the drug-trafficking worked, initially, at the very beginning?
A At the very beginning it was just everybody for they self

when we was younger and --
Q Which means what?
A Everybody did they own little thing selling cocaine in different areas. And everybody was selling drugs for they self.
Q And did there come a time when it was no longer everyone for themselves?
A Yes.
Q Okay. Could you explain that to the jury?
A Well, I went to prison in 1992 and I came home in 1997, and when I came home Hakeem Curry was running what you would say, a drug empire, an organization of -- which was just family and friends.
Q And what sort of drugs were involved in this drug empire?
A Cocaine and heroin.
Q Now, can you explain to the jury -- did you know every member of this group?
A Well, he mess with people on two sides of town, and I would say 80 percent of the people I knew.
Q Okay. And when you say "messed with"; what do you mean?
A That they -- everybody got they drugs from Hakeem.
Q Now, for the ones that you know, can you tell the jury some of the names of the individuals that were involved at that time when you came back in Mr. Curry's organization?
A When I came home, all the Baskerville brothers except for

Terique, he doesn't hustle.
Q And "hustle," you mean what, sir?
A Selling drugs.
Hakeem was still in prison because we's all in prison the same prison together. Hakeem was still in prison when I came home in '97, which is Hakeem Baskerville,
Q Not Hakeem Curry?
A No not Hakeem Curry. They brother, Baskerville, he was still in prison.
And everybody else is home. And you got all the brothers, then you had Shaheed from Avon, you had Terence from Avon, which be with us from Avon, which is another one of they cousins, me, myself;
Q Do you know somebody named Pooh?
A Yes.
MR. BERGRIN: Objection, your Honor, to the leading nature.
THE COURT: I'll allow it. Go ahead.
A Pooh is from Georgia King Village, though.
Q Okay. Do you know his real name?
A No.
Q How about someone name Jahad?
A Jahad is from Georgia King Village.
Q Do you know his real name?
A I think his first name is Amad, but I'm not sure. But I

know his last name is Pryor. I think it's Amad Pryor. But I'm not a hundred percent positive.

Q Now, you said earlier Mr. Curry had an empire.

A Yes.

Q Why do you say it was his as opposed to anybody else's?

A Because in order for you to do any dealings you had to go through him. He was like the top of the chain, he had the connect.

Q Just, if you could explain that to the jury, how it works.

A Well, you got a man which is Hakeem Curry at the top that had the drug connect in New York, and then you have Pooh, you have Jahad, and you also at the time in '97 you had a guy name Sheik, which is Al-Quan Loyal, he was at the top.

So him and Hakeem Curry had the connect, the drug connect from New York. And whatever heroin and cocaine you wanted, you had to go through them.

Q And who makes the most money in this chain?

A Hakeem Curry and Al-Quan Loyal.

Q And how about the next level down? Just give -- walk the jury through how the money is made.

A You had Al-Quan Loyal, Hakeem Curry at the top. Then the next step you had, which would be Jahad and Pooh right up under them.

Q How were they each making money though, that's my question? How does it work, not necessarily who?

A Selling heroin and selling cocaine.
Q If you can explain to the jury how each level --
A Yes.
Q -- makes money.
A Well, you had to get your drugs from Hakeem or Al-Quan. Once you got it, you distribute it through Al-Nuk or whoever hustle for you. We had low level dealers that hung out on the street corners and on -- you know, middle of the block and they hustle for us.
Q And you would sell the drugs for more than you got them for?
A Yes.
Q Where did you fit in in this chain?
A I would fit right up under Will Baskerville.
Q Who did you get your drugs from?
A Me and Rakeem got our drugs from Hakeem Curry.
Q And what did you in turn do with them?
A I distribute them to people in my neighborhood, which was Alexander Street and South Orange Avenue and on Avon Avenue.
Q Okay. Did you personally distribute it?
A Yes.
Q Did you do the hand-to-hand transactions?
A No.
Q Explain that to the jury.
A I had lower guys that was lower than me on the streets

doing it.
Q So there were people that worked for you?
A Yes.
Q Now, you've mentioned "connect" a couple of times and you said Mr. Curry had a connection in New York.
Do you recall the time period that was?
A The time period from 1997 to 1999.
Q And after 1999, were you out on the streets?
A No, I went back to prison.
Q And when did you get out?
A I got out May 2003.
Q And do you know who Mr. Curry's connect was at that time?
A No.
Q Was he still able to get cocaine and heroin at that time?
A Yes.
Q Did you actually see -- now we're into May 2003 -- Mr. Curry distribute cocaine?
A Yes.
Q Could you tell that to the jury?
A Well, Jahad, one day me and Jahad was together and Hakeem Curry gave Jahad a bunch of heroin -- a bunch of cocaine. And me and Will was together on 16th Street and Avon, and he asked Hakeem for some -- he told Hakeem he need two birds.
Q What are "birds"?
A Two kilos of cocaine.

Q I'm sorry to interrupt. What happened after that?
A He told Will to call Jahad and get it from him.
Q Who's cocaine was it, Jahad's or Mr. Curry's?
A Mr. Curry.
Q Did Mr. Baskerville have to pay for that cocaine?
A Yes, he got to pay for it.
Q He was family. Was there a discount or --
A You could get -- let's say a kilo of cocaine was running 24, 25,000, and being that's his cousin, he probably get it for about 21.
Q Now, again, in 2000, bringing your attention to the summer of 2003, you described a series of relationships that you had with members of the Baskerville family as well as Mr. Curry. So we can sort of move this along, from childhood to then, did your relationship with those individuals change during that period of time?
A It got a lot closer, more so. I was like a part of they family because I been with them since, like I told you, 19 -- in 1985, beginning in 1986.
Q And when you say their "family," you mean who?
A Meaning the Baskervilles, Curry, and Terrence, which is another cousin.
Q Do you know Terence's last name?
A No. I don't know T-Money last name.
Q T-Money you said?

A Which is Terence, yes.
Q The same person?
A Yes.
Q Were you selling drugs yourself during the summer of 2003?
A Yes.
Q And into the fall of 2003?
A Yes.
Q I'm going to direct your attention to November 25th, 2003.
Did anything happen on that day that was unusual?
A Yes. Will Baskerville got arrested.
Q Okay. Could you tell the jury how you found out and what happened?
A Well, I was on Alexander Street in the morning, early in the morning.
Q And what were you doing there early in the morning?
A I was setting up my block to distribute heroin during the day, getting my workers out there, and I got a chirp from Rakeem Baskerville.
Q And a "chirp," meaning?
A We got phones that's walkie-talkies, and Rakeem Baskerville chirped me and said I need to come down the hill.
Q What did that mean to you, sir?
A Come down the hill.
Q I'm sorry, to where? Where was "down the hill"?
A Oh, to 17th Street and Avon, where we from.

Q And did you, in fact, do that?
A Yes.
Q Was it any specific location?
A Yes, he said come in front of Jamal house.
Q And Jamal Baskerville?
A Yes.
Q And did you do that?
A Yes.
Q Now, when you arrived there, what did you learn.
A I learned that Will Baskerville was arrested by the feds.
Q And how did you find that out?
A Through Rakeem.
Q Did the fact that William Baskerville had been arrested by the feds mean anything to you?
A Yes, it meant a lot to everybody.
Q Explain that to the jury, please.
A Well, everybody was nervous, scared because there's a difference when you get arrested by, you know, Newark Police or State Police than somebody -- than somebody in your organization being arrested by the feds. The first thing you think is all 20 of you, all or 15 of you all are under investigation, you really don't know.
Q And that's different from local police?
A A lot different.
Q Why is it different?

A Because we know, like going to the State ain't a problem. We know people that went to the feds that we never seen again.
Q Now, at that time did you know much about the federal system?
A Not a lot, but a little.
Q Did you take -- with this concern in mind, did you or members of the group take any steps to find out any information?
A Yes.
Q Please tell the jury about that.
A Well, when I got down on 17th Street and Avon and we found out that Will was arrested by the feds, our first thing was, who else are they coming to get, and who do they -- who else do they have at that time?

So we start making phone calls to see who the feds arrested.

Q And anybody specifically you were looking for?
A Ray-Ray and T-Money, which is Terence.
Q I'm going to show --

MR. MINISH: Judge, with the Court's permission, photo 2256 in evidence.

THE COURT: Go ahead.

MR. MINISH: If you could publish that.

THE COURT: That's fine.

(An exhibit is published to the Jury.)

Q Do you know who that is, sir?
A That's Ray-Ray.
Q Now, why were you concerned -- we'll start with Ray-Ray and we'll get to Terence -- why were you concerned about Ray-Ray?
A Because he hangs with Will, he hustle with Will every day of the week.
Q And again so the jury is clear: When you say "hustles," you mean sells drugs?
A Yeah, he sell drugs with Will every day.
Q So why did it matter where Ray-Ray was?
A Because we want to see who they got and who they don't have. And the whole thing is, if they arrested Will, they had to arrest T-Money and Ray-Ray.
Q Why is that?
A Because they ride around with him every day in a van and every day in their Monte Carlo selling cocaine.
Q Now, did there come a time when you saw Ray-Ray?
A Yes.
Q And what happened?
A He drove up to where we was all standing at.
Q And what happened after that, if you could describe that for the jury?
A Well, we was sort of uneasy when we saw him, because now we thinking, at the time is Ray-Ray a rat or did he tell on anybody? And we don't know.

So that most -- mostly of all of us were scared, like we didn't really want to talk to him too much but we needed to talk to him just enough the see what he knew.

Q All right. Now shifting gears to Terence. Did anybody -- what steps did you take to find out about Terence?

A You had Rakeem calling him on his chirp phone, kept calling Terence, and he wouldn't answer. And then Jamal Baskerville kept calling him and he still wouldn't answer, so we figured he got arrested.

Q And did you later find out whether that was true or not?

A Yes, later on.

Q And tell the jury what the truth was.

A Well, Rakeem went looking for Terence, which is his cousin T-Money. Rakeem Baskerville went looking for him. Ed he said -- because he couldn't get him on the phone, so that he said he had to see, did he get arrested? And if he got arrested we knew for sure that Ray-Ray was the person in the group that told on Will.

Q Okay. So just so I understand in the chain, starting with Mr. Baskerville. If you put Mr. Baskerville at the top -- or, where does Ray-Ray fit, above or below?

A Much below.

Q So he worked for Mr. Baskerville?

A Yes.

Q So if he had been arrested before, what issues would that

have created for Mr. Baskerville?
A It would have created a lot of issues because if, like I said, if he telling, Mr. Baskerville will face some time.
Q Then if someone who was working for you, you said out on Alexander was arrested, what concerns would you have?
A I would have plenty of concerns.
Q Which are?
A Are they going to give me up?
Q And how is it they would be able to give you up?
A Well, you could tell the feds that they hustled for me, where our drug house is at, you know, where we keep the drugs and the guns at.
Q Now, would those individuals be able to give up, say, Hakeem Curry?
A No, not people from my block, no.
Q Why not?
A Because they know nothing about him, all they know is he's my connect, that's it. But they don't know where nothing ever his is at.
Q That morning did there come a time when Mr. Curry showed up to Jamal Baskerville's home?
A Yes.
Q Would you describe that to the jury?
A Well, Mr. Curry first got there maybe an hour after we did, and -- or less, I don't know. I would say 45 minutes to an

hour maybe, and he pulled up. We was all standing in front of the house already, me and the Baskervilles and Ray-Ray.

And Hakeem pulled up in a Range Rover, got out, we all start talking about what happened. And he said he had to get in touch with Paul Bergrin to get Paul on the job.

Q And who at that time, to you, was Paul Bergrin?

A Paul Bergrin was a lawyer, a prominent lawyer we know of that represented a lot of people that we be around.

Q And when you say "be around," you mean just as neighbors, or people involved in the organization?

A People involved in my organization, and a good friend of Hakeem's.

Q And why do you say he's a good friend of Hakeem's?

A If you pay attention and you be around us, you can see he cared about Hakeem more than he cared about others.

Q Can you give anybody an example of that?

A Well, if anything happening, Hakeem is the one that got to go to Paul to make sure everybody's all right.

Q I'm sorry, sir, if you could just explain that.

A Like when Will went to -- the day Will got arrested, it wouldn't have been Rakeem or Hamid or Jamal calling Paul, it would be Hakeem getting in touch with Paul for Paul to make sure everything's all right, and his main concern is to make sure he's all right.

Q Hakeem Curry?

A Yes.
Q So again, just so the jury is clear, when you're saying "Hakeem," you don't mean Hakeem Baskerville?
A No.
Q You mean Hakeem Curry?
A Hakeem Curry.
Q Can you explain what you mean by "making sure he's all right"?
A He don't want his empire to fall, he don't want to go to jail.
Q But how could Will Baskerville being arrested cause the empire to fail?
A First, that's his cousin, and second, if Will was to snitch -- which I don't think he would -- but there's a possibility so it was a concern to everybody. And Hakeem knowing he at the top, he was very, very nervous that morning.
Q And you said you didn't think he would. Why not?
A Just because of the fact Will Baskerville did so much time in prison and you don't look at him as his character as being a person to tell.
Q Do you recall what type of prison terms Mr. Baskerville had done before this one?
A Well, in '86 he went to jail for shooting somebody in the back, he did five years. He went back in maybe '93, he had three more years, maybe two and a half, three years. Then he

came home, and then I think -- I'm not for sure -- he went to Northern State for like another year. I'm not positive though.

Q To the best of your memory?

A Yes.

Q Did there come a time when Mr. Curry was able, in fact, to get in contact with Mr. Bergrin?

A Well, that morning -- he called somebody that he contacted, but I don't know if it was Paul on the phone. We was standing on the sidewalk --

Q Let's just go to what you do know.

Did there come a time when Mr. Curry was able to get in contact with Mr. Bergrin?

A Yes.

Q Could you please explain that to the jury.

A Well, somebody was on the phone, and he said, "I need to speak with Paul."

I don't know who it was. Like I say, he hung up and he told us he was waiting for Paul to get back at him, meaning call him back.

Q Okay. Did he get back at him?

A Yes.

Q Could you explain that to the jury?

A Well, we was all standing on the sidewalk, and --

Q Who is "we all"?

A Me, Jamal, Hakeem, Hamid, Ray-Ray and Malsey.

Q And what if anything happened?
A Hakeem phone running, and he answered it and said it was Paul, and proceeded to get in his truck that was parked right there maybe five steps from us.
Q Okay. Now in the truck; front seat, back seat?
A He got in the driver's seat.
Q Anybody else get in the truck?
A Yes, me, myself, I got in the back seat, and I think it was Jamal who got in the front. Jamal, yeah, Jamal got in the front seat, passenger's seat.
Q Okay. Now, were you able to hear anything with respect to that conversation?
A Well, I could hear Paul's voice but I couldn't hear nothing he was saying. It was just -- it was quiet in the truck. You could hear a voice on the other line but --
Q Could you hear what Mr. Curry was saying?
A Yes.
Q What was Mr. Curry saying?
A He's asking Paul, do he know anything about Will, this, and that, telling him that Will was locked up by the feds and did he hear about it.

And told him he need to find out what really happened.

Q Now, were there any comments about the charges Mr. Baskerville was facing?
A Yes.

Q Could you tell the jury about that?
A Crack cocaine charges.
Q Was any specific information provided?
A All he said is --
THE COURT: Who's "he"?
THE WITNESS: Hakeem Curry.
THE COURT: Okay.
A (Continuing) Hakeem Curry was relating whoever was telling him whatever on the phone, which he said was Mr. Bergrin. He would move the phone and tell us that Will had made a certain amount of crack sales on certain days. And he was saying --
Q Do you remember those days right now?
THE COURT: No, let him finish, Mr. Minish. Let him finish, please.
MR. MINISH: Oh.
A No. I remember him saying a couple of days, maybe three, four. I don't remember exactly how many, but it was more than two or three.
THE COURT: And again, who was saying this?
THE WITNESS: Mr. Curry.
THE COURT: Mr. Curry was saying this to?
THE WITNESS: To us.
THE COURT: To you?
THE WITNESS: To us two sitting in the truck with him.
Q Just so the jury is clear: Is Mr. Curry talking to you

directly or is he on the phone?
A He's on the phone. Then, whoever giving him the information on the phone, he would turn around and give it to us.
Q Okay. Now, sir, the -- are the individuals that are in the vehicle, you said you weren't sure.
A Yes.
Q Now, you previously testified in this matter. Is that correct?
A Yes.
Q And during your prior testimony, do you recall what you said or who you said was in the vehicle?
A In my previous testimony I said me -- me, Hakeem and, I think I said -- I might have said Rak or Jamal. I don't exactly remember.
MR. BERGRIN: Your Honor, is Mr. Minish impeaching his own witness? I don't understand this line of questioning.
MR. MINISH: Judge, if I was, it would be perfectly permissible under Rule 607, so...
THE COURT: Go ahead. I'll allow it.
Q Mr. Young, so the jury is clear --
A Yes.
Q -- as you sit here now, do you know who was there or not?
A Yes.
Q Okay. Who was there?

A Jamal Baskerville.
Q Where was, if you know, Rakeem Baskerville?
A I think Rakeem at the time went to see the T-Money get locked up, so that he was searching for Terence, which is they cousin.
Q And did he eventually find T-Money?
A Yes.
Q Would you tell the jury where he was?
A T-Money was in the house asleep the whole time and he didn't answer his phone.
Q Did there come a time, sir, when another phone call came in from Mr. Bergrin?
A Yes, which was later that day.
Q Could you describe that for the jury?
A He was just telling Hakeem that he --
THE COURT: No, no, no, wait one second.
Were you on the phone?
THE WITNESS: No.
THE COURT: So where were you?
THE WITNESS: I was with Hakeem Curry.
THE COURT: Where?
THE WITNESS: In the truck.
THE COURT: Okay. And Mr. Curry was the one on the phone?
THE WITNESS: Yes.

THE COURT: All right. So now you heard Hakeem Curry. Correct?

THE WITNESS: Yes.

THE COURT: Okay.

THE WITNESS: Yes.

BY MR. MINISH:

Q Why do you think it was Mr. Bergrin?

MR. BERGRIN: Objection as to "think." Speculation, Judge.

THE COURT: Sustained.

MR. MINISH: Judge, he has to be able to explain his state of mind.

THE COURT: Well --

Q Well, what did Mr. Curry tell you.

THE COURT: Did Mr. Curry tell you anything

THE WITNESS: Yes.

THE COURT: Okay. Go ahead.

A Mr. Curry told me that Paul Bergrin was telling him that -- he sat down and spoke to Will or -- and Will said the informant name was "Kamo."

Q Did that mean anything to you?

A Yeah, it mean the informant which made us feel better that it wasn't Ray-Ray that was the one that told on Will, he was telling us who the informant was, which wasn't a part of my crew.

Q So it made you personally feel better?
A Yes.
Q Now, do you know, when you heard "Kamo," did you know who that was?
A They was saying "Kamo," but I knew who he was, his name is "Kemo."
Q And how did you know that?
A Because I grew up around him and we did some jail time, a lot of jail time together.
Q Could you tell the jury where and when?
A Well, I'm positive we was in Skillman together from 1989 to roughly 1990 when I left. Then we was in another spot called Bordentown, New Jersey, which is juvenile medium security facility. We was there for about a year and a half together.
Q Now, was there any other information that was provided during that phone call that you remember?
A Well, I can remember that Hakeem said that the person on the phone, which he said was Paul, that the informant name was Kamo, and that they had some type of audio and video surveillance of Will making sales to the kid Kamo, which his name is Kemo.
Q What did that mean, that information mean for Ray-Ray personally?
A Well, it meant good information for him, because now we know he ain't the one who told, but I'm pretty sure he's very

scared.
Q Before that? Before Kemo came out?
A Before Kemo came out we thought he was a rat. But once Kemo came out we knew he wasn't the one who told because we got the information now.
Q And with that information, did you immediately do anything?
A No.
Q Why not?
A Because we had to sit around and really find out what's going on, everything.
Q And what did that mean? What did you want to find out?
A We wanted to find out what type of time Will was facing, would he make bail. That was what we hoping for, that he get a bail and he'd be home.
Q At that time, sir, the day Mr. Baskerville was arrested, can you tell the jury what you knew about the federal system?
A All we knew was the federal system at the time, that you do 85 percent of your time and --
Q Did you know anything else?
A No.
Q Did there come a time when you later learned additional information about the federal system?
A Yes.
Q Did there come a time -- well, let me say this: In relation to Thanksgiving, when, in the best of your memory, was

William Baskerville arrested?
A Some days before Thanksgiving, but I don't know the exact day.
Q Was it Thanksgiving week or the week before?
A Thanksgiving week, but I don't know the exact day.
Q So Monday, Tuesday or Wednesday?
A Yeah.
Q Did there come a time when you actually met in person with Mr. Bergrin?
A Yes, maybe -- we went through Thanksgiving kind of depressed that Thanksgiving -- this is my first Thanksgiving home which we usually go to each other houses, you know, watch the football games and have Thanksgiving dinner, and nobody wanted to do that because --
Q Why not?
A Because Will just got locked up, people still wondering about this federal thing, and people know if you under federal investigation, you got problems. And we really was depressed that one of our brothers was in jail.
Q Now, he's not literally a blood brother?
A No, not to me, but if you ask anybody on the street, they would tell you that Ant is their brother. They think I'm their brother, a lot of people that don't know us growing up.
Q They think you're actually related by blood?
A Yes.

Q I'm sorry. You were describing a meeting. Do you recall when that meeting was?
A The meeting was after Thanksgiving, because we went through Thanksgiving, everybody just being home at their houses, not visiting each other or nothing.
Q Was it over the weekend?
A No, it wasn't during the weekend.
Q Do you recall when it was?
A Some time the next week that came, a couple of days of next week.
Q Now, if you could describe the setting for the jury, where are you at this meeting?
A For the meeting?
Q Yes.
A We back on 17th Street.
Q And that's Jamal's Baskerville home?
A Yes, Jamal Baskerville house.
Q Do you recall the time or approximately the time?
A I didn't give you an exact time, but it was nighttime.
Q Night --
A That's all, later on after work hours.
Q Okay. Who was present at this meeting?
A Me, Jamal Baskerville, Hakeem Curry, Malsey, which is Jamal McNeil, Rakeem, Jamal, me, Malsey and Hakeem and Paul.
Q Just so the jury is clear, there's Jamal Baskerville and

someone you referred to as --
A And Jamal McNeil. There's two Jamals.
Q And you refer to Jamal McNeil as "Malsey"?
A "Malsey," yes.
Q And how do you refer to Jamal Baskerville?
A "Jamal."
Q So if you could just try to do that going forward so that the jury can focus.
A You have two Hakeems and you have two Jamals.
Q Okay. Now, prior to Mr. Bergrin arriving, was the group together?
A Yes.
Q Okay. Was there any discussion?
A Yeah. We's all across the street by the garage where we keep our motorcycles at, and --
Q What were you talking about?
A This time what we think will happen with Will, we really didn't know because, like I said, all we knew about the federal system is, the feds is the feds and you face time or you do 85 percent of your time. But we didn't know the exact laws of the feds.
Q And what do you mean, you didn't know the exact laws?
A We don't know how much, like, you know, if you get caught with a gun in the state you facing three to five. But if you cop out to a deal you could easily get two years or a year.

But in the feds it's a lot different. You get caught with a gun in the feds, you face time.
Q So more time, not less time?
A A lot more time.
Q How about drugs?
A The same way, but we didn't know at the time.
Q When did you learn that?
A When Paul Bergrin came to 17th Street.
Q That evening?
A Yes.
Q So, but before we get to that, what was the discussion, what was the conversation prior to Mr. Bergrin arriving?
A Hakeem just showed up and said, my man on his way, he let us know what's going on and he be here in a little while. And the discussion was --
Q You said, Hakeem; you mean Curry?
A Curry, yeah, not Baskerville.
Q I'm sorry, I apologize for interrupting.
And "my man is on the way." Who was he referring to?
A Paul.
Q And what else did you talk about?
A Just talking about general what happened, that's it. About Will getting arrested with the crack cocaine.
Q Did there come a time when Mr. Bergrin did show up?
A Yes.

Q And did he provide you with any information with respect to the federal charges?
A Yes.
Q Would you tell the jury what that was?
A When he arrive, he got there, he said, you know, what's up to everybody? Shook everybody hand. And he's the one that told us that Will will be facing life in prison for the little bit of the drugs he got caught with.

And we was kind of surprised, like, life in prison for what he got charged with?

We didn't know that you could face life in prison for that.
Q Because it was a small amount or because it was crack; what surprised you?
A Because it was a small amount.
Q Do you recall what the amount was?
A No, not at that time. I knew, but right now I can't exactly tell you how much it was. But it was somewhere like a hundred, a hundred something grams, in that area. But I can --
Q Back then you knew?
A Yeah, I know at that time.

We was like a hundred something grams? People get caught with that every day in Newark, you know, by regular police and you go do three years and you home.
Q Did Mr. Bergrin explain anything else with respect to the

federal system?
A Just saying, reason Will could face that time, because all the times he been arrested and convicted and --
Q And what did that mean?
A That meant something going to have to happen to get Will out.
Q I'm sorry, I didn't mean to skip ahead, sir. I meant when you said, "because of his record" --
A Yeah.
Q -- what impact did the record have?
A Because he become a career criminal.
Q And what does that mean?
A A lot of time in prison.
Q That you wouldn't have had necessarily if you didn't have those convictions?
A No, you wouldn't have that.
Q Now, did Mr. Bergrin tell you anything else with respect to Mr. Baskerville's bail status?
A Well, he just was saying Mr. Baskerville wasn't getting no bail. And he said, we need not to let Kemo -- which they call "Kamo," but at the time, but he was saying Kemo now -- we meant not to let Kemo testify. We need not to let him testify.
Q Meaning the group?
A The group.
Q Now, when, specifically about the bail, sir, was there --

is that the same as the state system?
A No.
Q How does the bail work in the state system?
A Bail in the state system, you get a bail the next day and whatever it is, you home.
Q Now, did Mr. Baskerville -- excuse me -- Mr. Bergrin say anything specifically about Kemo or the witness?
A He said if Kemo testify against Will, Will will never see the streets again. He will be sent to prison for the rest of his life. And he said, we need not to let Kemo testify against Will. And his words to us, which all five of us, "No Kemo, no case."
Q And what did you take that to mean, sir?
A Get rid of Kemo.
Q Get rid of him how?
A Kill him.
Q Did Mr. Bergrin move away from the group at that point, sir?
A From that point he start talking to Hakeem for a minute to the side.
Q If you could describe that for the jury, please.
A They just slid over maybe five steps at most. You could -- you could hear them talking but we wasn't paying no attention. So it was just --
Q So that everybody who was there originally is in one group,

and who's in the other group?
A Paul and Hakeem.
Q All right. And again, Hakeem Curry?
A Yes.
Q You said you couldn't hear what they said, but do you know how long that conversation was? Was it long, short?
A No, very short.
Q Did Mr. Bergrin say anything, or did he do anything after that conversation?
A Yes, he told us he see us later, see what he could do. And he said, remember what I said: No Kemo, no case. Don't let that kid testify against Will. And that was it.
Q Had Mr. Bergrin told you anything that would happen if he didn't testify?
A He said he get Will out if Kemo don't testify, that Will will come home.
Q Did Mr. Bergrin make any hand motions on his way out the door?
A When he was leaving to get in his car, he just did like, thing, like thumbs up or put his hand to us and said, "No Kemo, no case," and got in his car.
Q Are you, as you sit here now, do you know what that hand motion was?
A I think it was either a thumbs up or just, fellows, no Kemo, no case.

MR. MINISH: For the record, Judge, he's extending his pointer finger in one and only the thumbs up in the other example.

THE COURT: And you remember that?

THE WITNESS: Yes.

Q Was there any discussion after Mr. Bergrin left amongst group?

A Yeah, yes.

Q Okay. Now again, remind us of who is actually there.

A Hakeem Curry, myself, Rakeem Baskerville, Malsey, which is Jamal McNeil, and Jamal Baskerville.

Q Tell the jury what you talked about.

A Now we was more so talking about how we was going to find this guy and who was going to kill him.

Q Why hadn't you done that before Mr. Bergrin showed up?

A Because we didn't know Will was facing that much time. If you facing a little bit of time, three years, five years, we -- that plenty of time, you just go do it. But for somebody to try to take the rest of our life from our family, you know, there's consequences.

Q Now, planning for those consequences, sir, what did the group decide?

A They decided that either me or Jamal McNeil was going to be the one to kill Kemo.

Q And why was that decided?

A Well, Rakeem's a good driver, a very good driver. So we know Hakeem, he's not going killing -- he'll shoot you, but --
Q Before we get to Rakeem, Rak, you said Rakeem is a good driver, like a safe driver?
A Not, no safe, but a good enough driver. We going to get away from the police.
Q Okay. So a fast driver?
A Yes, very fast.
Q I apologize, I interrupted you. you said Hakeem was not going to shoot anybody. Why do you say that?
A Well, I ain't saying he ain't going to shoot nobody, but he ain't going to kill nobody, he's at the top of the organization. He ain't going to risk his life killing nobody.
Q Why not?
A And risk everything he got. He got too much, too much to lose.
Q How about Jamal Baskerville?
A He's not going to shoot nobody, he's not killing nobody. Some time he barely want to be around a gun. That just ain't something he want to do unless he forced in that position.
Q So why was it limited to just that group? Why wasn't it -- you could have picked somebody else, one of the guys that worked for up on Alexander?
A No, that ain't going to happen. We not going to make them a part of -- we got, like, a little family. Somebody from the

outside ain't going to be a part of what we doing.
Q Was there a discussion as far as payment goes?
A Yes.
Q Could you explain that to the jury?
A There was a discussion that $15,000 would be paid to the first person that kill him, me or Malsey. And Rakeem was going to pay 7500, which was Will brother, and Hakeem would pay the other 7500.
Q Did Jamal Baskerville chip anything in?
A No.
Q Did you make any decisions on that day with respect to whether or not you would shoot Kemo if the opportunity presented itself?
A Yes.
Q Tell the jury about that.
A Well, I told Hakeem, I said, if I could get him first I'm going to get him, I said, because I could use that $15,000. Because we had plans, we was about to go to the All-Star Game in LA, to the basketball All-State Game, and I told him I could use some extra spending money.
Q When is the All-State Game?
A February.
Q What month are you in now, are you in November or December?
A November.
Q And I don't think my question was clear. The meeting

you're talking about?
A Yes.
Q Now after the meeting, what month are you in?
A Either the last couple of days, the last day of November, first couple of days of December.
Q Okay. So you're not sure?
A Yeah.
Q And the All-State Game you're talking about is then approximately two plus months later?
A Yes. But you got to have -- get your stuff ready, you know, months ahead of time.
Q And what do you mean by "your stuff"?
A You got to get your tickets, you got to get it for sky box, you got to get your hotel and your travel plans.
Q Okay. Is it expensive to do all that?
A Yes.
Q How much money did you expect do have to spend to go to the All-State Game?
A I expected to spend about $15,000.
Q Did you have other money, or was this your only source of income?
A No, I had money.
Q How much money did you have, putting aside the payment that we're talking about?
A Probably had 50, $60,000 in the house.

Q And was that earned legitimately or from some other means?
A No, from selling heroin.
Q You said you said that you wanted to do it to Hakeem again. Were you talking of --
A Say that again.
Q You said something to the effect of: I told Hakeem I was going to do that if given the opportunity.
A Yeah.
Q Was that Curry or Baskerville?
A Curry.
Q Did there come a time when you actually did make arrangements to go to the All-State Game?
A Yes.
Q Do you remember around when that was?
A I remember a couple of weeks later, I don't exactly know if it was two, maybe three weeks, I'm not for sure, but a couple of weeks down the line I went to a jewelry store and I had just bought a watch, a Rolex, Presidential Rolex and --
Q How much did that cost you?
A Ten grand.

And I call Hakeem and told him, I just bought this watch.

He's like, I want to see it. He's like, as a matter of fact, I'm going to meet you at your house.

So I said, all right.

And he maybe got to my house about five minutes after I did. I was still outside parked when he pulled up.

And I jumped in the van with him, showed him the watch that I had just purchased to go with the rest of my jewelry. And he had a bag of money, not large, but fairly small bag of money.

Q Okay. If you could just show with your hands perhaps the size.

A About (demonstrating).

MR. MINISH: Judge, for the record, he's holding his hands approximately a foot apart.

A Yeah.

A couple of stacks of money in there.

And he said, you want that $7500 now?

I said, yeah, I can take it.

He said, I'm going to tell you now, if you don't kill Kemo, I want my money back.

I said, no problem, you know. I got $15,000 upstairs, but the 7500 that you give me I give right back if Jamal McNeil is the one that kill Kemo.

And he took $7500 out the bag and gave it to me.

He said, all right, now you need to give me 3500 back for your tickets for game.

And I give it back to him.

Q So first he gives you money?

A He give me 7500, and I give him 3500 back for my tickets --
Q Why are you giving --
A -- and my hotel.
Q Why are you giving it to Mr. Curry for your tickets and hotel?
A Because he's the one, that's what he's doing at that time, that's what the bag of money was for. He's riding around collecting all the money from everybody to go to this All-State Game because he's the one that purchase our rooms and our tickets.
Q So he was organizing the event?
A Yes.
Q Now, did there come a time after the meeting with Mr. Bergrin that evening that you described where you went to Mr. Bergrin's office?
A Yes.
Q Could you please describe that for the jury?
A After the meeting, maybe three, four days -- I don't know, it could have been up to a week, I wouldn't be positive -- but I was in the car with Rakeem.
Q Later you're saying?
A Yes, after the 17th Street meeting.
And he said, I got to take $10,000 down to Paul Bergrin for he could get Will case started, get started on Will's case.

And we went to the house, Rak ran into the house and got a little stack of money, $10,000. Came, jumped in the car, threw it on the seat and we shot to Paul office.

Q And where was Paul's office at the time?

A Paul's office is, you got -- you come under Penn Station, Penn Station tunnel, straight down, you got a precinct right there because I used to live right around the corner from Paul's office, and his office is -- I want to say that's Broad Street. Right on the right-hand side.

Q Okay. What did the building look like?

A Like a brownish beige.

Q And how many floors, if you remember?

A Well, I've been in there a couple of times, so I already know. When you first walk in, you in the lobby. Then it's like two floors. Then you go to your left, go up a couple of steps, and then you got the law offices right there.

Q Now, speaking specifically of that day, not prior meetings, what happened when you arrived, you and Mr. -- Rakeem Baskerville arrived at Mr. Bergrin's office?

A Well, I stayed in the car. There was no reason for me to run in. And he said, I just run this in there. I be right out.

And maybe he was in there four minutes, five minutes, somewhere. It was quick, just to drop off the money.

Q All right. Now, I'm going to take you back, sir, to the

time period now after the meeting with Mr. Bergrin that evening.

Did the group take any steps towards locating Kemo?

A Not right away.

Q Why not?

A Because we had -- you know, people got other things to do, we got drug blocks to run, we got families to take care of. But we knew we would get to it shortly and try to find this kid.

Q And in your mind, what is "shortly"?

A Within weeks, within a month, you know, two weeks or a month. And we had other things to do.

Q So at least a couple of weeks later. Then let's move forward to that.

What steps did you take, or members of the group take?

A The first step was to see if a couple of people in the hood knew him. And I knew a couple of people that did know him because I knew him. So I got in touch with a kid named John-John, because I heard Kemo used to be in a spot called Bradley Courts.

Q And what did John-John have to do with Bradley Courts?

A That's where he hustle at and he's a good friend of mine.

And we went up to Bradley Courts, and I asked John-John, did he know Kemo?

And at first he like, no. He didn't know him, and he

don't know what I'm talking about.

But if he think about it or if he know somebody that know him. Because we was talking to John-John and a kid named Kiki, and they said they let us know.

Q Now, why did you go to him as opposed to anybody else?

A Because Kiki is a part of our drug organization.

Q And what did that mean?

A We knew -- we kill Kemo and they knew about it, they wouldn't say nothing.

Q So you were concerned about who you brought this information to?

A Yeah, you couldn't just tell anybody.

Q Can you describe what Bradley Court is like for the jury, what sort of complex it is?

A It's a project in the hood. It's on South Orange Avenue and Munn, across the street from Vailsburg Park.

Q Now, you said "the hood" a number of times. Do you mean Newark in its entirety or are you talking about a specific area?

A Well, when you say "the hood," you mean the bad part of Newark. You know, you got people that say you have an okay part of Newark, you have a good part of Newark. But when we say "the hood," we mean the bad part of Newark.

Q And where was Bradley Court in relation to that bad part of Newark?

A In the bad part of Newark, the hood.
Q And where were the drugs in various areas that you were talking about; Alexander Street and the other ones, where were they located?
A That's right up the street from Bradley Courts. Bradley Courts is a big time heroin and cocaine area, too.
Q So that's in the hood also?
A Yes.
Q Did you take any other steps to locate Mr. McCray -- excuse me -- Kemo?
A That day we asked John-John and Kiki if they ever, you know, ran into him or see him, find out who he is, let us know.

They said, okay.

We also, me and Rakeem one day -- well, after that I got in touch with a guy name Rasheen Smalls, and I told him the same thing, if he knew Kemo.

He say he knew of him.

And I told him, if he see him, get in touch with me because he have my number. He's another guy I could trust.

And also one day we went to a house which supposed to have been his baby mother house.
Q Describe that for the jury.
A Well, one day I was actually in my bed laying down watching TV, and Rakeem Baskerville give me a phone call and he said, yo, I think I know where Kemo at.

Q What did you do?
A I told him, come get me.
And he came and got me. And I got in the car with him and we proceeded to go to a house in Irvington. And when we got there, we may have waited outside a couple of hours into the night waiting to see if it was Kemo in this house.
Q And what if anything did you do after that, after you waited a couple of hours?
A I went in the hallway. And I asked a man -- I had my gun out -- and I asked a man did he know which apartment the kid Kemo went in?
And he said no, he didn't know. He said Kemo wasn't in the building, which, you know, we knew he was. And we don't know if he left or not, but I told the man I pay him if he found out which apartment he in.
Q And did you find him that evening?
A No
Q These various people you talked to, did you provide a physical description of him?
A Yes.
Q And how did you describe him?
A I described him as, you know, a black male with an afro with -braids in it, he wear braids in his hair.
Q How can you wear a braids and an afro simultaneously?
A Well, he got a lot of heir, and he wear corn rows or either

he wear plats.
Q Could you explain "plats," please?
A Plats is like just regular string braids coming down inside of a box, and then corn rows is going to the back, or whatever type of design, they got so many designs today. But his corn rows usually go to the back.
Q Now, if we can move forward to February, and the All-Star Game.
Did you actually go?
A Yes.
Q And at that time had you found Kemo?
A No.
Q And did everybody in the group go?
A No.
Q Who didn't go?
A Rakeem and Malsey didn't want to go.
Q Why not?
A Rakeem said he was stressing because his brother was in prison, in jail rather, and Malsey said if Rakeem wasn't going, he wasn't going. And Rakeem said he wasn't doing nothing until after he found Kemo. He said, after he found Kemo then he get back, you know, to feeling better.
But he didn't feel right at the time because Rakeem is actually the one that introduced Kemo to Will, so he felt real, real bad.

Q Okay. Could you explain that to the jury?
A Well, Kemo came to Rakeem first and asked Rakeem for some crack, and at the time Rakeem was just selling heroin. And he pointed him in his brother direction and told him to get it from his brother, not knowing he was an informant.
Q So he felt responsible?
A He felt responsible, like he the one that hurt Will.
Q Now, after you got back from the All-State Game, again, it's February?
A Yes.
Q Did there come a time when you did receive information about the location of Kemo?
A Yes, again I got a phone call from Rak, which is Rakeem, and he's like, yo, bro, we know where that kid at. He said, just come down here.
Q And how did you know "that kid" meant Kemo?
A I know who he was talking about because we been searching for him for some months now. And when he said "that kid," he didn't want to do too much talking on that phone.
I said, I'm on my way down there.
Q Where is "down there"?
A 17th Street and Avon.
Q And who lives there?
A Jamal Baskerville.
Q So it's the same location as the other meeting?

A Excuse me. Yes, sir.
Q When you arrived, who was there?
A When I arrive, Jamal McNeil, Jamal Baskerville, Jamal McNeil, Jamal Baskerville, Rakeem Baskerville, myself. And we was waiting for Hakeem to get there.
Q Did there come a time when Hakeem Curry got there?
A Yeah, within minutes.
Q Minutes of your arrival?
A Yeah.
Q Did the group devise a plan of attack?
A Yes.

MR. BERGRIN: Your Honor, I have to object to the leading nature continually, your Honor.

MR. MINISH: It's not leading, Judge. It doesn't imply an answer. It's yes or no, then I'll describe it.

THE COURT: Why don't you just ask him: What did they discuss or -- go ahead, Mr. Minish. Sustained.

Q What was the first thing that you discussed when the whole group got there?
A Well, as soon as we got there, the first thing was asked, I asked Rakeem, I said, yo, we got a car? Meaning do we have a stolen car?

Because a lot of times we have a stolen car in the garage that --

Q For what purpose?

A Just for the purpose of we have to shoot somebody or got to go out looking for somebody, we usually have a stolen car around.
Q Well, how does a stolen car help you?
A Well, it ain't none of our cars, it can't be traced back to us.
Q Was there a stolen car available on that day?
A No.
Q So what steps, if any, did you take?
A So I was like, what we going to do, we don't have a car? We can't do it walking.

And Curry was there by then, and Curry is like, I got a rental car on hand.

So I was like, that's kind of dangerous to get this kid in a rental car. He's like, take the license plates off.

And I said, let's do it, man, because we're not going to get this opportunity every day to catch this kid.
Q Why was a rental car dangerous?
A Because the license plates, you know, and it could be traced back to whoever rented the car.
Q And had it been rented by Hakeem Curry?
A I don't know exactly who rented that car.
Q So, was the car actually obtained?
A Yes.
Q And tell the jury what happened once the car arrived.

A Well, Hakeem and Rakeem got in the van and left, they went to get the car and a gun and came back with a silver Grand Am GT.
Q And how is it you remember that car so specifically?
A Because I'm a real car guy. So -- and we drive Grand Prixes, which is almost the same as this Grand Am, and maybe like four of us had the Grand Prix GTs. And --
Q When you say "the same," you mean in speed or size or shape or --
A Almost the same in size, speed and everything. The Grand Prix GT is a little faster, but it's the same model car, both on Pontiac.
Q So you got a slower car. Was that going to be a problem?
A No.
Q Why not?
A Because it was still considered a real fast car because it's a GT.
Q And were the license plates taken off?
A Yeah.
Q Would you please describe that for the jury.
A Rakeem Baskerville took off the front plate, I took off the back plate and took the plates and threw them in the garage, which we were parked right in front of the garage where we keep our motorcycles at. So --
Q Could you explain to the jury where the garage is in

relation to Jamal Baskerville's house?
A Straight across the street, exactly across.
Q So it's not connected to the house?
A No, it's across the street.
Q And the garages are assigned to a house on the other side?
A No, it's not assigned. There's a guy name Vincent that owns the garage, and he's a guy that put our motorcycles in his name and stuff like that. And he's the one that let us uses the garage. So we all got keys to the garage. It's just a bunch of motorcycles in there.
Q Now, what other steps did you take? You mentioned the gun. Could you describe that to the jury?
A Well, when they picked the gun up, they put the gun in a stash box.
Q And what's a stash box?
A Inside this van we got, me and Rakeem -- it was actually in Rakeem name though but it was both our van that we drove to move drugs around and to move guns around, it had two trap boxes in it.
Q What's a trap box?
A A trap box is a remote control stash box inside the van that opens and close, but it takes more than one step to get it activated. So just a regular person or even if a cop or police officer, they would never be able to open this stash box.
Q Now, can you tell jury where they were located, the two

stash boxes?
A Well, you got one stash box under the radio inside the van, and you got one stash box which is a speaker -- well, it's not a speaker no more -- it looks like one -- in the back of the van about that big and it opens up by electronic. And you can just put anything down in between the quarter panel of the van and the wall of the van, which the same thing with the front. The whole cover of the radio, if you activate it, you use the window button, it will fold the whole front of -- the radio will fold up, and there's a box in there you could sit in drugs, guns or anything in there.
MR. MINISH: Judge, I'm going show the witness 2234a, b, c, d, e, and f, which have been previously provided to the Defendant.
Q I'm going to ask you to you review these and just tell me yes or no whether or not you know what those are pictures of.
A That's our Caravan, the first picture.
Q If you could flip through all of them and we'll describe them just yes or no if you know what they are.
A This is number -- the stash box that's within the radio; I can't really tell what this is, this picture. It look like the floor but I can't really tell what you it is.
Q That's fine.
A This picture here is the Caravan; then you got the trap box where you see Trap 1, that's by the radio, then Trap 2 the

speaker at in the back that I tell you you flip open and close by electronic; and the picture on the bottom is just a picture of the van.

THE COURT: Mr. Minish, these aren't in evidence yet. Correct?

MR. MINISH: No.

THE COURT: Just tell him to identify them and if they accurately depict what they represent and then we'll move them in, that's all.

Q You have two more left.

A Yeah. That's the stash box, a speaker and another stash box.

MR. BERGRIN: Objection. He's not responding to the question.

THE COURT: I know.

Mr. Young, do they accurately reflect what's in the photographs? Do they photographs accurately reflect what's depicted in them?

THE WITNESS: Yes.

THE COURT: Do you have any objection?

MR. BERGRIN: There's no objection.

THE COURT: So we'll move them in.

And then you can publish them and/or refer to them now.

MR. MINISH: Thank you. Except for "c," which the

witness didn't identify, I'm pulling it out of the group.

THE COURT: All right. "c" is not in evidence.

(Government Exhibits 2234a, 2234b, 2234d, 2234e, and 2234f are received in evidence.)

MR. MINISH: If we could put "a" up on the screen.

(An exhibit is published to the Jury.)

Q What's in that photograph, Mr. Young?

A That's just the Caravan.

Q That's the van you were describing that had the gun in it?

A Yes.

Q How about -- MR. MINISH: If you can put up 2234b.

(An exhibit is published to the Jury.)

A That's the stash. That's the stash box right up under the radio.

MR. MINISH: If you could put up 2234d.

Q Okay. Could you tell jury what's in the top photograph?

A The top photograph is the Caravan.

Q And the second one on the left on the second row?

A Where it say Trap 1, that radio and the air conditioner part right there, that's a trap box.

Q And the picture to the right of it, what's that depict?

A Trap 2 is the speaker to the back on your right, it folds up and down, come open.

Q All right. And the bottom photograph?

A Just the Caravan again.

MR. MINISH: Can you put up "e," 2234e.

Q What's in that picture, Mr. Young?

A That's the stash box to the back where the speaker at on your right.

Q And finally, 2234f?

A The same stash box.

Q Now, you said somewhere, sir, there was a gun in there. If you could explain to the jury what exactly happened.

A The gun was in the front stash box.

Q Start with how it got in. Who was there?

A Okay. Well, they came back with the van and the car, came back. We took the plates off the -- the Grand Am GT first, and Hak, which is Hakeem Curry, he say -- I said, what kind of gun you brought back?

He said a 9 millimeter.

I say, get it here.

Because we had already set up what we's going to do and how we's going to go over there and do it, meaning talking.

Q Where was the weapon? Where did the weapon come from?

A Hakeem Curry went somewhere and got it.

Q When you walked -- when you got in the van, did you see; was Mr. Curry holding it or did it come from somewhere else?

A No, it was still in the stash box when I got in the van.

Q If you could explain in to the jury.

A Well, I got in the van, I got in the front seat, the passenger's seat. He was in the driver's seat. And in order for you to activate the stash box, there's a button inside of the steering column on this side. And there's a button on this side of the steering column. You can't see them visually, you got to feel and press both buttons to activate the boxes.

So that he activated it. And then you got to lock the windows, that way when you use the window to open the stash box the windows won't roll. Because if you don't lock the windows, the windows will roll up and down.

So you lock them then you click, and then instead of the windows rolling up and down, the stash box opens up and the gun was sitting there.

So as he's opening the box, I'm putting my gloves on.

Q And did he give you the weapon or did you take the weapon?

A No. He passed it to me, grabbed it out of the stash box and gave it to me.

Q So now you have the weapon and the vehicle already has the license plates off?

A Yeah.

Q What's the next step that the group takes?

A I take the gun and get in the -- there's two captain chairs in the back. I climb back there, I empty the gun, I start popping the shells out, popped all of them out. So I wipe the gun off. We had a rag in the van, a couple of rags from

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

car, I knew I was going to need some gloves, so I grabbed them out of my car.

Q These are batting gloves like?

A Yeah.

Q Not baseball mitts?

A No, batting gloves, like you would see someone hitting a baseball.

Q Do you remember what type of hat you were wearing that day?

A Not quite, but most likely if you had to ask me, I guess a Yankee hat, that's my team.

Q Do you remember the color of the hat? Was it yellow, green, blue?

A Blue or black. It was a dark color. Because if it was light I would have changed it.

Q And what was your hairstyle back then?

A Just like it is today.

Q Okay. How about your beard?

A Like this, but maybe shaved lower.

Q So less facial hair?

A Yes, a little bit less.

Q Now, you described all the things that you guys got. What was the plan?

A The plan was --

Q I'm sorry, I apologize. Let me start. What information were you told about where Kemo was located?

MR. BERGRIN: Objection, your Honor.

THE COURT: No, I'll allow it.

Go ahead, without getting into the -- go ahead. Did you receive information about where Kemo was located?

THE WITNESS: Yes.

THE COURT: Okay. Go ahead.

A (Continuing) Well, when I got there and we was all talking, I said, how you all find him?

And Jamal is like, I found him, I happened to riding past, and he working on a house emptying some garbage in a dumpster.

And I was like, damn, you got lucky.

And --

Q Did he tell you the location of the house?

A Yeah, he said it was on 18th Street and South Orange Avenue, in between South Orange Avenue and 13th Avenue.

Q So again, now moving forward, what was the plan?

A The plan was to go over there, but the whole thing was getting the car there because the car has no license plates. So we told Hakeem Curry to ride in front -- actually, no -- the Tahoe which was Jamal Baskerville, we told him to ride in front, we put the Grand Am GT in the middle and we put the van in the back, that way can't no cops see that this car don't have no license plates.

Q Why not?

A Because you can't really get a good look. If we riding towards you, we wasn't bumper to bumper, we was a little ways back, but it still would have been hard for you to see this car didn't have license plates on it because we was close together.
Q And did you eventually reach that location?
A Yes.
Q Could you describe for the jury what happened?
A We rolled up 19th Street, and before we got over there, Jamal said he was going to ride past the house again, and he said, look at my brake lights, I'm going to stop in front of the house by that dumpster for you all to know exactly what house it is.

But even when we parking I could see the dumpster though. And Jamal Baskerville rolled up, he stopped by the dumpster. I looked at him, me and Rakeem we see it, and he kept proceeding to go where he was going.
Q Where was he going?
A I don't know.
Q Was he planning on staying in the area, if you know?
A No. No, he wasn't planning on staying there.
Q Do you know why?
A Well, one, he got a job, I don't know if he was going to work that morning, but he was trying not for that Tahoe to be seen over there because everybody know that Tahoe.
Q Know the Tahoe as what?

A As one of the Baskervilles.
Q And why would that have been bad?
A Because if Kemo find out that Tahoe around there, that's it, he's going to run.
Q Excuse me.
So you said Jamal Baskerville, Mr. Baskerville left the area?
A Yes.
Q Where did -- which car are you in?
A I'm in the Grand Am GT.
Q And who else is in that car?
A Just me and Rakeem, just the two of us.
Q Where did you park?
A Up the street from the house the kid was working in, Kemo.
Q Is that closer to South Orange Avenue or further away from South Orange Avenue?
A Farther away from South Orange Avenue.
Q Okay. So --
A Because it's an one-way street.
Q So where you parked, the house would be on your left or right?
A On the right-hand side.
Q And South Orange Avenue is in front of you?
A Yes.
Q Where did the third vehicle go?

A The third vehicle went on South Orange Avenue. There's an old beer factory around there which is going towards Grove Street, and Hakeem say he wanted to sit on South Orange Avenue.
Q And why was that?
A Just in case anything go wrong, anything be seen, he could just chirp us, because that's the busiest block around there. So if any police activities, anything, or if anybody was to come out, he can easy chirp us and telling us what's going on.
Q Now, you used "chirp" a number of times.
A Yes.
Q So the jury is clear, that's on a regular cell phone?
A Yes. It's a cell phone, but it's a Nextel.
Q So you can directly connect with somebody else with a Nextel?
A Yes.
Q So Mr. Curry, did he have any other responsibilities besides looking out for police?
A Just, he said, his whole thing, he was, like, man, let me know when you all hit him because I want to see him. But because don't nobody know that, you know, as far as Kemo and them Hakeem can't be with us.

So Hak is the person he say, I'm going to make sure he dead. I just want to see him, so...
Q Afterwards?
A After, yeah, after we hit him.

Q So is anybody in the vehicle with Hakeem Curry?
A Yeah, Jamal McNeil.
Q And Jamal McNeil is another drug trafficker in the group. Correct?
A Yes.
Q Did he have any responsibilities on that day?
A No, just sit and keep an eye on the area as far as law enforcement.
Q So the jury is clear, there's two vehicles and a total of four people?
A At that time, yes.
MR. MINISH: Judge, I don't know when you want to break for the afternoon. I can move into a new area or --
THE COURT: We'll take a recess for about 15 minutes, ladies and gentlemen. Ten to three we'll be back. Please don't discuss anything about the case, okay.
THE DEPUTY CLERK: Please rise for the Jury.
(The Jury leaves the courtroom.)
THE COURT: All right, everyone, be seated. We're on recess. Ten of.
MR. LUSTBERG: Thank you, Judge.
THE COURT: Mr. Minish, do you think you'll complete direct this afternoon?
MR. MINISH: I don't think so, Judge. What time is your Honor intending to --

THE COURT: We'll see. 4:30?
MR. MINISH: 4:30. Okay.
THE COURT: Just keep going, okay? We'll see.
MR. MINISH: Absolutely.
(A recess is taken.)
(The Witness is temporarily excused and escorted out of the courtroom by the Marshals.)
(Proceedings resume - Jury not present.)
(The Witness escorted into the courtroom by the Marshals.)

A N T H O N Y Y O U N G, resumes, testifies further as follows:

THE COURT: Are we all set?
Let's bring out the jury, please.
THE DEPUTY CLERK: Please rise for the Jury.
(Jury present.)
THE COURT: All right, everyone, please, welcome back. Be seated, please.
All right, Mr. Minish, you can continue, please.
MR. MINISH: Thank you, Judge.

DIRECT EXAMINATION CONTINUES

BY MR. MINISH:

Q Before I hop back, there's two things I noted I apologize I

forgot to ask you.

I'm going to show you, sir, what's been moved into evidence, Government Exhibit 2255. Who is that?

A William Baskerville.

Q I'm going to show you what's been marked Government Exhibit 2267, which the Defendant has been provide add copy of. Do you know who the individual is in that photograph?

A Jamal McNeil.

Q Okay.

MR. MINISH: If we could publish that to the jury, please.

(Exhibits are published to the Jury.)

MR. MINISH: Thank you.

Q When we stopped, sir, you were set up on 18th Street. Is that correct?

A Yes, sir.

Q Okay. Could you explain to the jury what you two did in the vehicle, you and Rakeem Baskerville?

A Well, once Jamal stopped his truck in front of the house that the kid was working in, which we already saw the dumpster from where we was at, he left. So --

Q Why was the dumpster significant?

A Well, the dumpster is because they was doing -- the kid we was looking for, Kemo, he was doing construction work, and the house they was working on, the dumpster was right in front of

the house.
Q So you set up, you said, on the other side of the house from South Orange Avenue. What did you do once you were set up?
A Well, on the same side but back up the street, all the way up the street where we could see down the street of what the people in the house was doing, the workers, meaning Kemo and the other guys that was working on the house.
Q So from where you were sitting, do you see people walking to the dumpster?
A Yes.
Q What side -- you're in the passenger's seat or the driver's seat?
A I'm in the passenger's seat.
Q Now, once you're set up there, what is it that you do?
A Well, I'm directly looking at the house that they working in. If I go like this, I could see the house as people come out and put stuff in the dumpster.
Q Could you in fact see that?
A Yes.
And I chirp Hakeem and told him that we's parked on the block and we could see the house. And he chirped me back and told me they were sitting on South Orange Avenue.
Q Did you actually see Mr. -- excuse me -- Kemo come out of the house?

A About ten minutes later, maybe longer. I was sitting there and I see him come out with a garbage can to take the dumpster, and I tap Rakeem and I tell Rakeem, there you go right there.
Q What did you see Kemo do?
A Kemo was bringing some trash out of the house to dump it into the dumpster.
Q Do you recall what he was wearing on that day?
A All I could see from there that I remember, he had a hoody on, a mask, which is a construction mask, and a bandanna. That's it.
Q And how was he wearing the bandanna?
A Just tied around his head.
Q Did he have anything on top of his head?
A One time he came out he didn't, then one time he came out he had his hoody on, which half his head.
Q You're saying "hoody." Could you explain to the jury what you mean by that?
A Like a sport hoody that you pull over that you put on with two draw strings.
Q So a sweatshirt with the hood attached?
A Yeah.
Q Do you know about what time it is at this point after you've seen Kemo go to the dumpster?
A I couldn't tell you exactly what time it was but --
Q Was it morning, afternoon, night?

A No, it's morning time. But I don't know the exact time.
Q Does there comes a time when you leave the area in the vehicle or in another --
A Well, I didn't leave the area in that vehicle, we left the area in the van.
Q Could you please describe that to the jury?
A Well, after waiting so long, I asked Rakeem, I said, do you want me to go in the house and shoot him?

He said no, there's too many people working in there.

So we waiting and we waiting 'til we's thought -- we got hungry.

So Rak like, let's leave him here, go eat something and come right back.

So I said, all right.

So we chirp Hakeem, which they was in a van around the corner, they came around, we jumped out of the Grand Am GT and jumped into the van and we went and ate. We's gone maybe 20, 30 minutes. Came back, and got back in the Grand Am. They dropped us back off.

Q Do you know where Mr. Curry went in the van?
A Back the same spot where he was at before on South Orange Avenue.
Q And again, he's with the individual you've identified as Jamal McNeil?
A Yes.

Q Once you're set up there, were there any discussions about any steps you may or may not take to disguise what's going to happen?

MR. BERGRIN: Objection, your Honor. Leading nature, putting words into his mouth. "Disguise."

THE COURT: I'll allow it.

Go ahead. Overruled.

A Well, only thing we talked about was, I asked him again, because we started waiting again, I said, I'm thinking about going in the house again.

And he said, no, we don't want to take that chance because we ain't wearing masks, we don't have nothing. All we got on is baseball cap and I got a fleece jacket.

So as we talking, I'm like, I tell Rak, like, we ain't got nothing to worry about as long as you get us away. Drive right and we get away.

And he was like, yo, you shoot him in his head with your left hand.

And I told him, I said, yeah, that would be a good idea to mislead the police, whoever investigate this murder. And I said, that's what I'm going to do when we get around there to --

Q Why would that be a good idea? Why would it mislead the police?

A Because, you know, my criminal history showed that I'm

right-handed. So --
Q Are you right-handed?
A Yeah.
Q Do you do anything left-handed?
A Yeah, I box, you know, I'm a southpaw boxer, so I box with my lefty and I shoot pool left-handed.
Q Do you shoot guns left-handed?
A Plenty of times.
Q "Plenty of times"; prior to this day we're talking about?
A Yeah.
Q So does there come a point when you again see Kemo leave this home?
A Well, I see him a couple more times go to the dumpster to empty trash again, and then later on in the day I see him come out the house with a man and start walking towards South Orange Avenue.
Q Okay. So they came out of the house and they go right or left?
A Right.
Q Could you describe the man for the jury?
A This older guy, just this older guy, like, in our neighborhood we would call him "Uncle Pop" because he look like he got high, looked like an older guy that get high but you can't say he get high. He could have been somebody that drink. He just older man though, we call him Uncle Pop.

Q Okay. Tall guy or short guy?
A Well, regular height fairly. My height.
Q And how tall are you?
A I'm five-ten.
Q Now, you see them walking by themselves or were other people with them?
A No, they was walking by they self at this time.
Q And tell the jury what you could actually see. You made this motion --
MR. MINISH: For the record, Judge, I'm leaning to my right.
Q You made that motion before. What could you actually see from that angle?
A We parked in a parking spot on the right-hand side of the street. Rakeem he could see a little bit but he can't see much. But if I lean over, I could see all the way down the sidewalk. If I lean like this his (demonstrating).
Q So what -- explain to the jury what you actually could see that day.
A Well, I could see everything. I could see the house, I could see them going back-and-forth to the dumpster, and I seen when he came out and started to walk toward South Orange Avenue.
Q Could you see them reach South Orange Avenue or at some point did they fall out of your field of vision?

A Well, they fall out and they would come back in because you got trees down this block as you go. So they fall out, then they come back in. And then once they hit the corner and turn I couldn't see them no more.
Q Did you actually see them turn?
A No, you can't see because of the tree. That once you get so far, the big tree, you can't even -- you can't see the whole corner.
Q Okay. A big tree at the end or a big tree near you?
A A big tree near me. But the more they go, the more they fall out of my view.
Q Did you learn which direction they went on South Orange Avenue?
A Yes.
Q Okay. Would you tell the jury how you learned that?
A Well, while we's in the van I said -- the van, the Grand Am, I tell Rak, we going to follow them. And I chirp Hak and I tell them, yo, they coming your way. And him back on the chirp, he was like, we see them. He coming towards us. So --
Q So did that mean they made a right or left on South Orange Avenue?
A A right.
Q Going towards what street?
A Going towards 19th Street.
Q And what was the next step you took?

A The next step was, I told Rak to ride up there so we could see where they going, and at the same time Hakeem chirping me telling me they coming towards his way.

Q Did there come a time when you got out of Rakeem Baskerville's vehicle?

A Yeah.

Q Okay. Could you tell the jury about that?

A Well, we drove to the corner. By this time Kemo and the man was a little past 19th Street, walking. And I'm looking at them, and they walking they walking, and they went in a store.

And Hak chirped me, like, they just went in the store.

And I'm like, I know, I saw them.

So I tell Rak -- there's a store on 19th Street and South Orange Avenue called Big Bites. But I know it's a doorway right there. I tell Rak, I said, I'm going to walk down towards Big Bites and I'm going to stand in that doorway because there was a phone booth -- there used to be a phone booth right there that I used to use a lot. And I said, I'm going stand in the doorway, I said, and on his way back I'm going to hit him.

And he's like, don't worry about it. As soon as you get behind him I'm going to be there. And I'm going to be there to pick you up.

And I was real nervous, real scared. And I'm just telling him, man, just make sure you there to get me because I

can't afford to be running.
Q Now, just so the jury is clear, 18th Street you said is one way. It goes towards South Orange or away from South Orange Avenue?
A Towards South Orange.
Q And how about 19th, is that one way or two way?
A 19th is a one way going the other way, the opposite way.
Q Away from South Orange Avenue?
A Yes.
Q Is that towards Central Avenue?
A Yes.
Q So did you, in fact, get out of the car?
A Yes.
Q Do you know where Rakeem parked his vehicle?
A Right on the corner where he could see me.
Q The corner of what and what?
A He's on South Orange. Like, as soon as you come to the corner of 19th Street, right there, he turned and sit right there where he can see me.
Q So he moved up towards 19th Street?
A Yeah, he did, yeah. And I'm walking already.
Q And if you could say how close -- I know you described the doorway -- how close is that to 19th Street?
A It's right basically on the corner. Five steps and you're right there on 19th Street.

Q So the first part of the buildings that are on the corner of 19th --
A Yes.
Q -- and South Orange?
A There's actually a sandwich store called Big Bite.
Q Did there come a time -- well, did you wait there?
A Yeah, I waited there for some minutes.
Q Did there come a time when you again saw Kemo?
A Yeah, I saw him because I kept peeking my -- like, there's two steps -- actually one, then there's a piece of wood to go into the hallway but there's a door so you can't get through the door. So I stepped up on the step backwards and I stood in the doorway and I kept peeking out the store down there. So I just kept peeking, and then finally I saw him and the man come out the store.
Q You're describing or acting out it seems like a going back in the doorway. Is it similar to, like, the doorway behind you?
A Yeah, but a little deeper.
Q So further set back from the wall?
A Yes.
Q And you said you were peeking but eventually you saw him. Correct?
A Yes.
Q Could you please describe for the jury where they were when

you first saw them?
A When they first saw him he was maybe -- when I first saw him he was maybe five steps out of the store already coming off 20th Street sidewalk.
Q And which direction were they moving; towards you or away from you?
A Towards me.
Q What are you dressed like right now, sir, sitting in that doorway?
A Oh, in the doorway.
Fleece jacket I got. My fleece jacket got a long neck on it, so I got it zipped up to about my lip right here. So it's like a turtle neck. And I zipped it up. Got my hat on pulled low, I got on baseball gloves. I either had on jeans or khakis. I'm not positive.
Q You said hat was pulled down low?
A Yeah.
Q can you point to a spot on your face where it would have been pulled down?
A About my eyebrows. Just pull it low about right here.
Q And why were you zipped up with the collar and down with the hat?
A For nobody can't see much as my face as possible. You could sill see my face but I was trying to cover it as much as possible.

Q Would Kemo know you if he saw you?
A Immediately he would know who I am.
Q Would he know you were associated with the Baskervilles?
A Yeah.
Q So when you finally do see him, how close do they get, the two men, to 19th Street before you do anything?
A Maybe half -- a little more than halfway through the block of 20th Street and 19th, coming towards 19th.
Q So they're half -- they're halfway between 20th and 19th?
A Yes. So what I do is, I come out off the steps, got my hands in my pocket, I got the gun in my hand, both hands in my pocket.
Q In your left hand?
MR. MINISH: I'm saying for the record he was holding it in his left hand.
A I got the gun my pocket, I got my head low and I start walking towards them, both of them.
Q Okay. So you're -- if I'm Kemo --
A Yes.
Q All right? Is the other man, Pop or Unc, to my left or my right?
A Pop is to the left.
Q Your left. I'm sorry. My right.
A Your right, yeah. My left.
Q I'm sorry. I apologize.

So my right.

A Your right.

Q I apologize.

And which side is South Orange Avenue? Is South Orange Avenue past them on this site or past them on this side?

A Right there.

Q So Mr. -- Kemo to his right?

A Yeah.

Q The older man, and to that man's right is South Orange Avenue?

A South Orange Avenue.

Q What do you do now? You see them half way down the block, you're in hiding. What happens?

A I come out the doorway, I got the gun in my hand on the trigger. I'm nervous, adrenaline going. It's wintertime and sweating. And I'm walking towards them with my head down. And it -- it wasn't unnormal for how I was walking because it was cold outside, and I'm fairly ducked low.

And they walk past me. I walk right past them. And soon --

Q Who did you walk past, sir?

A I walked past Unc, the older man on that side, Pop. And I went right part them. As soon as I got past them, Kemo was just about to step off the curb. I grabbed his shoulder --

Q The curb onto what, sir?

A Stepping off of 19th Street curb to across the street.

So as soon as he went to step off the curb, I grabbed him, maybe right here, and I squeezed.

MR. BERGRIN: Judge, I didn't see. I'm sorry. Could we have that one more time?

THE COURT: Go ahead. You grabbed him?

THE WITNESS: I grabbed him about right here.

THE COURT: Which is the right shoulder?

THE WITNESS: Yeah. Right about the right shoulder blade.

THE COURT: You grabbed him by his right shoulder.

MR. MINISH: Next to his head on the right side of the head I suppose.

A (Continuing) So I grab him, stick the gun under his head, and I squeeze. And as I squeeze I'm going forward with him. I let him go.

And I'm talking about, Rakeem was right there. As I'm going down with him I could see Rakeem. He pulled, he stopped. I jump over Kemo, run around the back of the car, jump in the passenger seat and we take off.

Q To the best of your recollection, sir, you said you put the gun to his head or back area, wherever you were pointing at there. How were you --

MR. BERGRIN: Objection, Judge, he never said he put the gun to the neck area. He had him on his head.

MR. MINISH: I apologize. I was making motions to the area --

THE COURT: Okay. Ask the question, Mr. Minish, but don't --

Q How were you holding the gun?

A I grabbed him --

THE COURT: The gun is in his left hand. Correct?

MR. MINISH: Yes.

Q But was it straight like this?

A No, it was like this (demonstrating)..

THE COURT: Mr. Minish, that's leading. Just by you suggesting how he's holding the gun, that's leading. Let him demonstrate. That's a leading question.

Q Demonstrate how you were holding the gun.

A I grabbed him here, and I tucked the gun here. And I squeezed off boom, boom, boom, boom, three or four shots real fast. I let him go.

Q Did you have to pull the trigger a series of times?

A No, just one time.

MR. MINISH: Judge, I'm not sure how we put this on the record.

THE COURT: The jury has had a chance to observe what he did. If you guys can agree on a description of it, fine.

But he was holding his left hand out front, because he's trying to demonstrate just by holding it out front, he was

holding his left hand in an area towards the man's head. That's about the best I can describe it.

MR. MINISH: I apologize --

THE COURT: But the jury saw it and that's what's important.

MR. MINISH: Yes, Judge. And I apologize, I don't mean where on the head area, I meant the angle in which he was holding the gun, is what I was looking for.

THE COURT: He's been asked that a couple of times and he's demonstrated that. Correct?

THE WITNESS: Yes.

THE COURT: Do you want to try it again? Just demonstrate it.

MR. MINISH: I was looking to describe it for the record, not that he has to do it again.

Or he could do it again, Judge, and you can describe it.

THE COURT: I think it best that he just do it again. Because to try to describe it, I'm not sure we could all agree on describing it. So it's best that the jury observe it and see what he's demonstrating.

Go ahead, Mr. Young.

THE WITNESS: Well, like I say, he was about to step off the curb.

THE COURT: Now, you grabbed him with your right hand.

Right?

THE WITNESS: My right hand.

THE COURT: By the right shoulder back behind his neck. Correct?

THE WITNESS: Yeah, the shoulder blade.

THE COURT: Okay. And where were you; behind him?

THE WITNESS: I'm right behind him.

THE COURT: Okay.

THE WITNESS: Standing behind.

I grabbed him, tucked the gun in, like right here in the back of his head on the side, and I squeezed. And you only got to squeeze the gun I had one time. And when I squeeze, three or four shots went off. I was, like, real scared. So I don't remember how many exact went off, but it was three or four quick shots.

As he was falling, I let him go. When I let him go, he fell. I jumped over him. My man Rakeem right here, he's past me now. I run around the back of the car, jump in the passenger's seat and we take off towards the highway.

THE COURT: Okay.

BY MR. MINISH:

Q Do you remember what Mr. McCray was wearing when you saw him walking towards you?

A When he was walking towards me, all I can remember was, when Kemo came toward me, he still had that mask, but he didn't

have it on his face. He had it just like if you see a worker working on a house and they done and they take the mask and pull it down. He had that. And he was smoking a cigarette, and that his bandanna, that's all I can remember.

Q What about his bandanna, do you remember?

A No, just on his head. And he, you know how you -- I don't know if you understand -- like, some people take a bandanna and they tuck it in the back, pull it. He had his open in the back.

Q Let's start at the front. Is the bandanna on the top?

A Yeah, it's on top of his head.

Q I know you described the back. But I'm talking about this area on the top. Is the bandanna covering or is it not covering?

A It's covering but it's open like. It can be open, so the piece is not tucked in the back.

Q So is it tied?

A Yeah, it's tied. But you got a piece of a bandanna, you can put it down into the tie. He don't have that down in there.

Q So could you see his hair or you could not see his hair?

A Yeah, you could see his hair.

Q What of his hair did you see?

A Being it was open in the back you could see part of it was braided and part of it wasn't.

MR. MINISH: Judge, I'm going to show the witness a series of photographs: 2297a, which is in evidence; 2297b; 2297c, 2297d, 2297e, and 2297f, which is in evidence.

Q Sir, just, if you could just review these all in one shot and yes or no whether you recognize what's in there.

A Yes, which is South Orange Avenue.

Q You don't have to describe it now, just flip through them all.

A Okay.

Yes; yes; yes; yes; and yes.

Q In general, sir, what area do those photographers depict?

A South Orange Avenue and 19th Street, 18th Street.

Q Is that the area you just recently described?

A And 19th and 18th.

Q Okay. Does it look similar to the time period that you were talking about earlier today?

A Yes.

MR. MINISH: Judge, I would like to move those all into evidence, or the balance of them into evidence.

THE COURT: There's no objection?

MR. BERGRIN: There's none, Judge, none whatsoever.

(Government Exhibits 2297a, 2297b, 2297c, 2297d, 2297e and 2297f are received in evidence.)

MR. MINISH: If you could put up 2297a.

Q Okay. Mr. Young, that screen in front of you, if you touch

it, it will make marks on the screen so that the jury can see. Okay?

Can you put a line or a dot where 18th Street is in that picture.

A 18th?

Q Yes.

A This is South Orange Avenue.

Q If you know.

A Right here (indicating). Oh, I put the wrong mark, but it's right here on this corner.

Q And does it -- why don't you just draw a line on 18th Street so we know which one it is.

A Right here where the graveyard at.

Q So there's residential houses on one side --

A Just on one side.

Q And what's on the other side?

A Graveyard.

Q And how far down does that graveyard go?

A All the way to Central Avenue.

Q Now, I'll show you how to clear this. To clear the screen you can hit it right there (indicating). Okay?

A Okay.

Q Could you draw a line where South Orange Avenue is.

(Witness complies.)

Q Thank you.

And you can clear that, please.

19th Avenue; draw a line where 19th is.

A 19th Street?

Q I'm sorry, 19th Street.

(Witness complies.)

Q And just a line at 20th.

(Witness complies.)

Q Thank you.

MR. MINISH: Would you put up 2297b.

Q Clear that for me, Mr. Young, please.

Okay. What is the jury looking at here? Where is South Orange Avenue in this picture?

A Yes.

Q Could you put a line where South Orange Avenue is.

A Right there (indicating).

Q Now, from which direction did you travel going on South Orange Avenue from the bottom of the picture to the top, or the top of the picture to the bottom?

A When I was walking?

Q Yes. I'm sorry.

A From the same way I drew the line. From here, from this corner, this way (indicating).

Q And when you were -- when Mr. McCray and the older man, when Kemo and the older man were coming towards you, they were in the opposite direction?

A Yes.

MR. MINISH: We have only have to show one more photograph.

Q I apologize, Mr. Young. Before we take this picture down, if you could point out which one is 18th. Is that depicted in there?

A 18th is right here (indicating).

Q All right.

MR. MINISH: Let's put up 2297. If you could clear the screen, Mr. Young.

"f." I'm sorry. "f."

Q Now, do you recognize what's in that picture, Mr. Young?

A Yes.

Q Can you tell the jury?

A This is 19th Street. This is the corner I shot Kemo McCray. This building right here is -- it used to be called -- actually it was two different stores. It used to be called Blimpy's at one time, then it came from Blimpy's, it became Big Bite.

Q Can you put a circle around the building you're referring to?

A This the building. And right behind these trees right here -- let me see -- this the building, but right behind this tree is a doorway.

Q Okay. About where that dot is that you put?

A Yes, to go up into them apartments.
Q If you could clear that for us, Mr. Young.
Now, you said Mr. Baskerville drove the vehicle --
A Yes.
Q -- to your area.
Can you put a mark, a small circle or an "X" where the vehicle parked before you got into it, after you shot Mr. McCray?
A After I shot him?
Q Yeah.
A He came this way, turned the corner and he was right here (indicating).
Q About where you stopped the line?
A No, a little before. About -- about right there (indicating).
Q And is he closer to the sidewalk at the -- you see there's two vehicles on the street?
A Yes.
Q Okay. Is he closer to the sidewalk where the vehicles are, or closer to the other sidewalk?
A Exactly right there where the vehicles was, out more like he's double-parked. Right where I got the line at is where he pulled up at.
Q And you said --
MR. BERGRIN: For the record, your Honor, the middle

of the street?

MR. MINISH: No.

THE COURT: No. The jury can observe where it is. I'm not even going to try to describe it for the record. The jury can observe where that line is, and that's where the witness says the car was.

Q And if you could clear that for us, Mr. Young.

And finally, if you could put a dot where -- where Kemo was when you jumped over him.

A About right -- right, but closer to the sidewalk, like about here I guess (indicating). I can't get it close enough. But --

Q Close to the sidewalk?

A Yeah, about right there when I jumped over him.

Q And can you put an arrow in the direction that you drove away with Mr. Baskerville?

A We went this way (indicating).

Q And what are the main streets going in that direction?

A First is 13th Avenue and 12th Avenue, 11th Avenue, and Central Avenue.

Q And where did you go -- I'm sorry, we can take this down.

Thank you.

You're now in the vehicle with Mr. Baskerville, Rakeem Baskerville.

A Yes.

Q Describe for the jury what happens.
A Well, we take off, I jump in. Our nerves running, I'm scared.
He all shook. And I'm, like, man, just get us away.
And I'm telling you, he was hauling fast.
He was going so fast whereas though I had to hold the dashboard and tell him to slow down. And he, like I got it, just chill out.
I said, man, whatever you do, just get us away. And --
Q Where did you go?
A We was going to get on 280, a highway called Route 280. That was our destination to get on there.
Q Why was that?
A Because we had to go to South Orange. To get to that area, South Orange and West Orange and that area, you get on 280, you get there quick.
Q Did you have a specific location you were going to?
A Yes.
Q Tell the jury where you were going.
A We was going to the same location where Mr. Curry used to live at a long time ago, which is South Orange. And not the exact same buildings we used to live at, but in that area. I guess he knew a female or something in that area, and there's a bunch of garages in the back. We want to put that car in a

garage.
Q Can you describe the garages? Are they attached to anything?
A No, they's not -- they attached to each other but they not attached to the houses. You have a building out front. When you ride through the back, you have to got to make a quick left, quick right, and then you got a row of garages on each side.
Q Garden apartments with unattached garages?
A Yeah.
Q How did you know which garage to go to?
A Well, I didn't know, Rakeem knew.
Q Did you go to a specific garage?
A Yes.
Q Or did Rakeem drive you to a specific garage?
A Yes.
Q How did you get into that garage?
A Rakeem told me, jump out and open the garage. It was unlocked already.
So I got out, opened the garage, brung the car in the garage and we -- I chirped -- we chirped Hak and told Hak we was there.
Q And did he say anything in response?
A He said, I'm on my way to get you. And then he was -- he's like, I be there in a minute.

So I was like, hurry up, man, we here. And then we waited.

Q Why did you want him to hurry?

A So we could get out that car and get back and see what happened, make sure everything went right.

Q Did anybody see if everything went right?

A Yeah, Hakeem.

Q Tell the jury what Hakeem did.

A After I shot Kemo in the head, Hakeem and Malsey, people not knowing they with us, they rolled up to the scene. Hak said, he got out the truck, out of the van, the burgundy van and looked, and this what he telling me later. He said, man, like, you got him good. But his whole thing, like he's dead, you ain't got to worry about that.

Q Were you or Mr. Curry, to your knowledge, worried about eyewitnesses in the area?

A Well, we wasn't really worried about eyewitnesses because it was a couple of people out there, but we wasn't too much worried.

Q Why not?

A Usually in the hood, like they say, when gunshots is fired, people duck. So you -- you get a good look some time, but a lot of times you don't.

Q How long do you think you were at the garage before Mr. Curry arrived?

A I say about ten minutes.
Q What if anything did you do while you're waiting for Mr. Curry to arrive?
A Well, waiting. Me and Rakeem talking about what just happened. And we take the gun, I sit it on the floor, and I'm looking at myself, see how much blood I got on me. And I see the blood on my arm and on my gloves.
Q Okay. Can you say -- just so the jury can see, where on your arm were you pointing?
A Right here. And a little bit -- but it wasn't a lot of blood, just a little bit.
Q So your elbow, down?
A No, I wouldn't even say that. Far. Like in my elbow area. Just in this foreman area.
Q Forearm?
A Yeah.
Q Did it go down to your hands or --
A Just a little bit, a splatter on my hand, and I might have had some right here. But it wasn't a whole lot of blood.
MR. MINISH: For the record, Judge, pointing to his chest area.
THE COURT: All right.
MR. MINISH: I guess left chest area.
Q What, if anything, did you do besides talking before Mr. Curry arrived?

A Just I was making sure I don't get no blood in this rental car because I know they got to take this rental car back. So I check it. And I had told Rak, I say, any blood in here, we burning this car. We going to burn it up. But I never got no blood nowhere on the car.
Q Did you check the car for other evidence?
A No. Just make sure we ain't leaving nothing. But evidence, no.
Q What were you -- "leaving nothing," meaning what?
A You don't want to leave your hat or nothing, nothing you have with you you don't want to leave. Make sure we got our phones -- our chirps with us, and then we got out.
Q Did there come a time when Mr. Curry arrived at that location?
A Yes.
Q And please describe for the jury what happened.
A Well, he got there, he chirped us again, and he said, yo, I'm pulling in the back now.

So when he said that, we got out the car, lift the garage up and came out.
Q And what did you do?
A Take my fleece jacket off. So --
Q Inside the garage or outside the garage?
A Outside the garage, which the van door and everything open, I'm getting in the van. I take my fleece jacket off, my

gloves, I put inside the fleece jacket and balled the fleece jacket up inside out.

Q Where -- did you sit down in the van or --

A Yeah. I sit in the back in the captain chair.

Q When you say "captain's chair," where was the captain's chair located?

A Well, you got the driver's seat, you got the passenger's seat, then you got two more seats behind them, which they call captain chairs.

Q And do you recall where Mr. Curry was?

A Mr. Curry was driving.

Q And who was in the passenger seat?

A Jamal McNeil.

Q Where did Rakeem Baskerville sit?

A He sat in the other captain chair next to me.

Q Did you -- did the vehicle leave the area?

A Yes.

Q Can you describe for the jury where you went?

A Went back to our vehicles.

Q And where were they located?

A 17th Street and Avon Avenue.

Q And that's the area by Jamal Baskerville's home?

A Yes.

Q What did you observe Mr. Curry do when you arrived at that location?

A At the garages or at 17th?
Q By Jamal Baskerville's home.
A Mr. Curry got out of his -- first he opened the stash box for me so I could put the gun up, because we got to put the gun in the garage under the motorcycle seat. So we opened it up, me, him and Rakeem, went in the garage, stashed the gun, and Mr. Curry got in his car and left.
Q How did the gun get back in the stash box?
A Later on that day.
Q Well, describe, explain for the jury, you had it in your hand.
A Yes.
Q You get in the car with Rakeem Baskerville. Can you just explain what happens to the gun?
A You talking about at the garage?
Q As soon as -- from when you leave Mr. McCray's body to --
A We put the gun back in the stash box at the garage. As soon as we came out the garage and I was balling my fleece jacket up, they was putting the gun in the stash box for me while I was taking my stuff off.
Q So then when you arrive at Jamal Baskerville's house, it's removed from the stash box?
A It's removed from the stash box and put inside the garage under the motorcycle seat.
Q Whose motorcycle seat?

A I don't remember which one of our bikes it was because there's like four or five bikes in there.
Q And did you observe what Rakeem Baskerville did after that?
A Rakeem got in his car, I got in my car, which the van was Rakeem's car, I got in my car, Hakeem got in his car, Malsey got in his car and we went our separate ways.
Q And where did you go?
A I went to Alexander Street and South Orange Avenue, which is --
Q why did you go there?
A That's my drug block that I run.
Q So what did you do when you got there?
A Just go up there and sit down, try to calm myself for a minute. Because like I said, I was nervous, scared. Nerves going. Just wanted to calm -- I sat on the porch, talked to a couple of guys out there. I act like ain't nothing happen. They didn't know nothing. Sitting there. And I talked to them about, you know, the money they was making for me.
Then I got in my car and I went home.
Q Did you mention what you had just done to them?
A No.
Q Why not?
A They don't need to know that.
Q Where were your clothes? You said you had balled up a jacket. Where was that at this point?

A On my back seat of my floor in my Mercedes Benz.
Q So behind the driver seat or behind the passenger seat?
A Behind the passenger's seat on the floor, like almost tucked under the back seat, which would be the front seat, but almost tucked under the seat.
Q Tucked under the seat?
A Almost, not all the way.
Q So you said then you left the Alexander Street area. What did you do then?
A I went to my house.
Q And what did you do at your house?
A I went, grabbed -- I grabbed the stuff out of my car, took it with me, put it in a bag.
Q What kind of bag?
A Just like a little Shop-Rite bag, a little plastic bag, Pathmark, puts it in there, tied it up, stayed in the house for a while. Took a shower. Then I had to meet back up with Rakeem and Malsey.
Q Why did you have to do that?
A Because we had to figure out what we was going to do with that gun.
Q Why did you have to do anything with the gun?
A You can't keep no gun that you just committed a murder with, you got to get rid of it.
Q Why's that?

A Because if you get caught with it, it's evidence.
Q So did you meet with Malsey and Rakeem?
A Yeah.
Q Would you tell the jury what happened?
A Well, I met with them maybe about two hours later. And me, Malsey and Rakeem riding around again, and we trying to decide what's going happen with this gun.

So both of them were saying, let's throw it in Weequahic Park water. I said no, that's where everybody go to get rid of they guns, is in Weequahic Park. That's like obvious spot. A lot of people been convicted from putting stuff in that water.

So we thinking and thinking. So they thinking about other spots to throw it off of a bridge into some water. And then something popped in my head to melt the gun.

Q What do you mean by melt the gun?
A I'm talking about melt it completely into, like, a liquid piece of steel.

So I -- I'm thinking about it. So I said to them, and they look at me like I'm crazy. I'm like, yo, man, I know somebody that could melt this gun.

Q Who did you know?
A A guy named Ben.
Q And who was Ben?
A He's a guy that I've been doing business with for about

maybe about eight years at the time, seven years, like --

Q What type of business?

A I buy cars and sell them. So I might buy a car that had an accident, and Ben would take a torch, just if it's a certain part of the car he can't fix, he take a torch and cut the whole piece of the car off and get that same piece from a junkyard and put it back in and weld it back in and putty it and everything, just -- you would never know it got hit.

So that when I thought about him cutting the cars in half with that torch, I figured he may melt this gun with the torch. And I can trust him because, like I said, I've been doing business with him for about eight years.

Q So what if anything did you do?

A We went past his shop. I told Rakeem, drive down there. And --

Q What happened when you got there?

A I got there, I told Rak, I said, come on, we going inside. Malsey stayed outside.

So I go in. I get Ben. And I say, I need to talk to you. Because he had company in there, two other people.

He said, all right.

So we come outside, and I say, Ben, is it possible you could melt a gun?

And he look at me, he say yeah.

And Rakeem say, I pay you if you melt it.

He said, okay.

He's like, what you did now?

I say, we got ourselves in a little trouble. We need you to melt this gun.

He said, all right, bring it. You got it? First he asked me, did I have it?

I said no.

He said bring it by.

I said we be here tonight, and he said all right.

And we left.

Q Did you come back later that night?

A Yes.

Q And please describe that for the jury.

A Came back, we riding around most of the day, you know, handling our daily business as far as our drug blocks. And later on I left, Rakeem went his way, I went my way, Malsey went his way. And I told Rak I call him in a little while, and I suggested to him that we have Rasheeda drive us down there.

Q And who is Rasheeda?

A My ex-girlfriend.

Q Was she your ex-girlfriend at the time?

A No. Actually at the time she was my fiancee.

Q So why did you suggest involving her?

A Well, I wasn't trying get her involved in a crime, I just was telling her I need her to drive me down there because I

know the police are not going to pull her over because --
Q Why not?
A She's a female, nice car and, you know, it ain't all flashy like our cars.
Q So what type of car did she have?
A She had a white BMW.
Q And what type of car -- why does that not get pulled over?
A Well, she's a female, she's a school teacher, you know. If the police run her plate, they not going to bother her compared to running a plate off of me and Rakeem car and a bunch of criminal charges popped up, or we riding around with cars with 22 inch rims on it.
Q What do you mean by "22 inch rims"?
A Meaning, you know, real flashy cars. Big rims, big cars. Police mess with us a lot in Newark.
Q Around the wheels -- when you say around the rim --
A The whole rim which is inside the wheel.
Q So, did you, in fact, enlist Rasheeda to assist you?
A Yeah, I asked her, could she drive me down there.
Q Did she agree to?
A Yeah.
Q So if you could walk the jury through what happens then.
A Well, I asked her, we was in the house, she was like, all right.

So I call Rakeem. I told him, come up to the house,

which he only live three blocks away from me.

So he come to the house, call me and tell me he outside. Come out. Get in Rasheeda car. He get in the back, I get in the front, and we go to 17th Street to get the gun from under the motorcycle seat.

Q Where is the bag of clothes at this point?

A The bag of clothes is with me in my hand.

Q And who goes out to get the gun?

A Rakeem get out -- both of us get out the car, but Rakeem get the gun from under the seat.

Q And then what did you do?

A Get back in the BMW.

Q And where is the gun?

A In Rakeem's lap, in his hand.

Q Do you go directly to Ben's shop or anywhere else?

A Directly to the shop.

Q Please describe for the jury what happens when you get to Ben's shop.

A Well, it's nighttime now, dark outside. We pull up in front of Ben's shop, get out. There's a center across the street IYO, that was the reason that I had the bag, my fleece jacket with me because they was doing some work over there, and another spot with a big dumpster at with a whole bunch of trash and wood and stuff.

So when we get out the BMW, I walk across the street

and throw the bag inside the dumpster, and I walk back across the street into the shop.

Q Where is Rasheeda at this point?

A She stays sitting in the car.

Q And where is Rakeem at this point?

A Rakeem is standing in front of the doorway of the shop.

So we proceed to walk in. Ben see us. So I look at him because again, he got company in there, his workers. So I ask him, I say, hey, man, are you all right to be standing here when we do this?

He look, he said, my nephews.

So I said, all right.

And he tell one of the nephews to close -- because the garage was halfway up off the ground, it wasn't fully open,

Q You're saying "garage," what do you mean by that?

A The garage door.

Q That's the entrance area?

A Yeah, of the shop.

Q Okay. So maybe like a car garage?

A Yeah. Then you got a door next to it, a steel door. We went through the door though, and the garage door was halfway up.

I told him -- he told them to close it. He closed the garage door down. I take the gun, take the bullets out that was left in there, take it out of the chamber. Ben like, make

sure it's empty because once this torch hit it, you know, we'll have problems if you got bullets in it. So make sure everything empty.

And he tell his nephew to start working.

Q Describe what happened. Who had the gun? Where did the gun go?

A The gun was on the floor in the middle of the garage. And --

Q What type of floor is it?

A Just a regular concrete floor.

And Ben takes the torch first, melt a little bit of it, which melted fairly easy. Then it became a problem because the barrel wouldn't melt. So he tell his nephew, you know, get to work, handle that.

So he take it, he takes the torch, and it took a while for him to melt the barrel.

Q So how many people are actually in the room now, in the garage now?

A Five.

Q Who -- Ben, you, Rakeem. Who else?

A His nephew and some other -- another worker.

Q And who is working on melting the barrel?

A His nephew and the other guy. It took two of them because it took a while to melt that barrel, the inside of the barrel.

Q Can you describe for the jury how they were doing it?

A They had a blowtorch and they was standing over it. I'm talking about fire. I couldn't tell you how hot it was and just going back-and-forth, back-and-forth.

We just standing there, standing there looking. Then the other guy, he tell Ben's nephew, give me the torch. He stand over, he do it for a while. Then you slowly see it starting to melt. Then the guy takes the torch again, he start doing it again. Then the whole pile of steel and -- what you would say, plastic with it, it just turned into liquid.

I take a dust pan and scrape it together to make sure it don't run everywhere. And I kept it together, and when we finish it was a piece of metal about that flat, about that much.

Q Now, what did you do with that piece of metal?

A Put it in a bag, like I think it was a brown paper bag.

Q And where did the brown paper bag come from?

A Just a bag sitting in the shop.

Q So it wasn't something you had brought with you?

A No.

Q What if anything do you do after you put the metal in the brown bag?

A Rakeem paid Ben $200 for melting the gun, and I take the bag and the metal that was left of the gun and I take it and put it in the same dumpster that I put the fleece jacket in.

Q Now, what happens; do you go back to the car after that?

A Yeah, we get back in the BMW and leave.
Q And you drop off Rakeem, Rasheeda drives home?
A No, Rasheeda drive home from there. Rakeem drove to my house, so --
Q I'm sorry.
A We go back to my house, me and Rasheeda go in the house, and Rakeem get in his car and leave.
Q Do you know the date that you shot Kemo?
A If you ask me right now, no. But years ago when I did it, yeah.
Q And do you know about when it was?
A I know it was March, but I can't remember the exact day.
Q Are you aware -- do you know whether Mr. Curry was ever arrested?
A Mr. Curry was arrested days after I killed Kemo.
Q Do you know what the day was when he got arrested?
A Not the exact date, but I know it was days before my birthday because it messed my party up. They had a birthday bash set for me.
Q When was your birthday, or when is your birthday?
A My birthday is March 26th.
Q It was before then?
A And he was paying for a big birthday bash I was supposed to have, and it just messed the whole thing up.
Q And you killed Kemo before Mr. Curry was arrested?

A Yes.
Q How did you become aware of the fact that Mr. Curry was arrested?
A Rakeem.
Q Please describe that for the jury.
A Again, he called me, I don't remember if he chirped my phone or if he called me regular. You know, we got two, three phones apiece, so I can't tell you if he chirped me or if he regular called my phone. But he was like, yo, they got E.T., which is Hakeem Curry.

He like, yeah, they got E.T.

So I say, yeah?

He say, I'm about to come down there.

I say where you at?

He say, I'm at my house.

Q Do you know what that meant when he said they got?
A Yeah.
Q What did that mean?
A The feds.
Q How do you know the feds as opposed to anybody else?
A Ain't no regular cops would lock him up, like just for nothing.
Q Why not?
A It's just something we talked about for years. Like for years we knew we was coming to the feds, it was just when, we

didn't know.

And we had a thing we used to always talk about, we used to say, that when we do get there, he's telling.

Q Meaning?

A Hakeem Curry.

And turned out, he was the one to stand and never told. But we used to say that. But we used to say that, when the feds get us, Hak will tell. But it was a joke, but we were serious because we always thought he was soft. But he was one of the guys that stood up and didn't tell.

Q So now Mr. Rakeem Baskerville has told you that -- has told you that the feds, or, excuse me, they got E.T.?

A He said they got E.T.

Q What did you do?

A And I asked him who? But as soon as he said it I knew would it was. He said they got Hak. E.T.

So I said, yeah? I say where you at?

He said, I'm at my house on 19th Ave.

I said, I'm on my way down there, which is 19th Ave. and 20th Street.

Went down there. Me and him talked, but he was, like, real scared, like, man, I hope they ain't trying to get us. Right?

So I said, I don't know. I hope not. And --

Q What did Rakeem Baskerville do?

A Rakeem Baskerville say he wasn't staying home. He's like, I'm not saying at my house. And I told him, I said, I'm going home tonight. If they come, they come. But I already knew that they wouldn't come to my house where I live at.
Q Why is that?
A Because that's not my address on my IDs. My address is my father and mother house.
Q Just so I understand it. The address on your ID is your home or your parents' house?
A My parents' house.
Q So you're going to a place other than your parents' house?
A I'm going to a place where I live at.
Q And did you, in fact, go there?
A Yeah.
Q Is there anything you observed when you came into that area?
A Well, not that day. May have been a day or two later or more, but not immediately, they didn't bother us.
Q Did you get arrested that day, the next day, the day after?
A No.
Q Did you learn about other members of the organization being arrested?
A Yes, they came looking for Rakeem and them.
Q And how do you know that?
A Well, it was about, maybe about 5:50 in the morning, 6

o'clock, somewhere in that area, coming through a street called West End Avenue. And the reason, I wake up every day at 5:30 in the morning and come out, because like I said, I sell heroin, so --

Q What does that have to do with 5:30 in the morning?

A You got to be out early in the morning to set your area up, to -- you sell most of your heroin in the morning because people that use heroin that got to go to stuff and work like that, they have to have it. So you sell majority of your heroin in the morning.

Q Okay.

A And I'm coming to a block called West End Avenue, which is a block from my drug block and one block from my parents' house. And as I'm coming through, we had parked that Caravan right in front of my mother and father house, like right across.

Q You say "that Caravan," which Caravan --

A The burgundy one with the stash boxes in it.

So I had it, me and Rak had it parked right across the street from my mother and father house with heroin in it. And I'm coming through the block that the van is parked on, and as I'm coming through the block, I see agents getting dressed, but I'm in a Mercedes and it's early in the morning, it may be still dark outside, almost, like just getting light. And as I'm coming through the block, my mother live right here, my

father. And as I'm coming this way, there's agents standing there putting on they stuff.

Q When you say "stuff," what you mean?

A Their guns, they vests, like they go in somebody's house.

So right then and there my phone ring. Rakeem say, hey, they just left my house.

I said, and they about to go to my house right now, meaning my father and mother house. I said I just rolled past them.

He like, yeah?

I say, yeah, they getting dressed to go in my house.

Q So what did you do?

A I jumped on the highway. Actually first I went and got some money.

Q Where did you get money from?

A I went and snatched some money out of my safe out of my house. And grabbed either like 20, 30,000 grand -- 20 or 30 grand. And I come back out, jump in my Mercedes and I jump on the highway to go to Cincinnati. But as I'm doing this, I call my father. And I tell him, I say, the feds about to come up in there looking for me, so, you know, let me know what happen.

So I hung up. Waited. He called me back, 15 minutes. He said they ain't coming in here. He said, they out there, but they ain't coming in here. He said, they in some boy house around the corner.

And when he said it, I said, oh, they ain't coming in there, they coming to Norm house. There's guy name Norm that be with us that live right around the corner, he sell a lot of cocaine.

I said --

Q Do you know Norm's full name?

A No, I don't know Norm full name. But he's a -- he a big cocaine dealer that be with us.

Q When you say "be with us," you mean --

A Yeah, he's in our click.

Norm, my father say -- my father don't know him. My father say they at some guy house, around there they going in but they ain't come in here yet.

So I says, they at Norm house.

He said, who that?

I said, a friend of ours.

He said, but they inside that van. They about to -- they messing with you all van out there, meaning the Caravan.

So I had, wow. But in my mind I say, they not finding the heroin inside them stash boxes. So I wasn't really worried.

So I rode on the highway for about a little while longer and I turned around when I found out that they wasn't looking for me. Because my father called me again a couple of minutes, he say they not coming in here, they ain't looking for

you. So I turned around on the highway, went back, put my money back in the safe and I switched cars. Got in another car, and I met up with Rakeem.

Q Now, did Rakeem eventually leave the area?

A Yeah.

Q And did you stay in the area?

A Yeah, I stayed in the area.

Q Did you go back to dealing drugs?

A Yes, immediately, the same day.

Q If Mr. Curry was arrested and he was giving you the drugs, how were you able to supply yourself?

A Well, I had drugs to last me once Curry was arrested for, maybe a week. And after that I start dealing with a guy named Rasule.

Q Who is Rasule?

A Which is the Baskerville's brother-in-law. He's another big time drug dealer that's part of our -- he's part of our family but not exactly part of the -- the circle, if you want to call it. Because some of them don't like him.

Q Some of who don't like him?

A Some of his brother-in-laws and some of our friends don't like him.

Q So the people you generally have been talking about, when you say "they," that's what you mean?

A Yeah.

Q The Baskervilles?
A Like, Rakeem like him, Hakeem like him but him and Will and them don't get along, Will Baskerville, and Hakeem Curry don't like him. But generally he try to stay away from them, but he be around me a lot.
Q Anal did he start to supply you with drugs?
A Yes.
Q What type of drug was that?
A He give me hundreds of bricks of heroin.
Q Did there come a time -- well, do you know a brother, a Jamal Baskerville?
A Yes.
Q Was Jamal Baskerville arrested in that time, March, that you're describing?
A Jamal? No.
Q So Jamal was out in the street?
A Yes.
Q How about Jamal McNeil?
A McNeil was on the streets, too.
Q Did there come a time when you got into an argument with Jamal Baskerville?
A Yes, later on, which was months, months later.
Q So months go by. What happens -- we'll do it for the balance of the year. We're in '04, March of '04.
What happens for the balance of the year? Do you

continue to sell drugs?
A Just running around making a lot of money and partying. Enjoying life.
Q And now towards the end of 2004 does anything happen? Are you still dating Rasheeda?
A Yes, that's my fiancee at the time. And --
Q Did you share anything with Rasheeda about your criminal activities?
A Well, not about my criminal activity. One night I was talking to her, and I said, damn, I said, that's messed up how Jamal and them killed this kid named Nut girlfriend.

So she looked at me. She say, they the one that did that?

I said, yeah, by mistake though I said.

But I was talking to her which we call pillow talk, you know, we laying in the bed. And I say, man, I know they feel F-ed up they missed Nut and hit her in the head and the neck and kill her.

I said, but I'm not thinking that she would say nothing about it.
Q Is she friendly with Jamal Baskerville?
A Yeah. That's like her brother, too. Because her and Jamal Baskerville's wife, they been friends maybe since they is 5 or 6 years old, best friends.
Q Did there come a time when you and Rasheeda have a fight?

A Yes.
Q Please describe that for the jury.
A Well, we start getting in a lot of fights because I was, like I said, I was out partying all the time, making all this money, you know, dealing with other women, and fights just start happening.

And it's a time, there was a time, one time she tried to tell me, don't move my car. Because my Mercedes was in her name. We had a big fight. I took my car out her name and put it in my father name. Then I had my Cadillac Escalade in her name also. Got in a big fight. She tell me not move that. So I'm trying to get my truck out her name to put that in my father name also.

And we was just having fight after fight.
Q Did any criminal charges result from those fights?
A Yes.
Q Please tell that to the jury.
A Well, one day she was following me in her BMW, and I'll trying to get her away from me, so I pull in front of the house.

And she like, don't move that truck, don't move that truck.

I'm like, would you stop following me?

She jumped in her car to follow me. Right before she put her car in drive I backed up into her car and crashed it,

and then I just pulled off where as though she couldn't move.
Q Were there any other incidents?
A Yeah. Another time, this is after we had a fight, we actually broke up. She moved back to her house that she own and I move to another house that I got.
Q So you had been living together?
A Yeah, we had been living together for a couple of years, almost a couple of years.
Q Were you accused at any point of arson related to Rasheeda?
A I wasn't accused of no arson, but she tried to make a complaint and said that I set her house on fire, but nobody never charged me with nothing.
Q Was there a restraining order against you?
A Yes.
Q Again, filed by Rasheeda?
A By Rasheeda.
Q And did you ever violate that restraining order?
A Yes. Actually I violated it not knowing it was out and we had this big fight. Because when she made the restraining order, she put Jamal Baskerville address inside the restraining order, say I can't go around there.

And because that's her best friend, his wife, and he's my best friend, one of my best friends, and so that I got real mad. And I went down, and went like, man, you need to talk to her. And she put -- after the cop served me the restraining

order, I said, she put her address in here saying I can't come around here. I said, me and her ain't talking, that's fine. But she can't stop me from coming somewhere I grew up at.

And he got talking to her, and she was real pissed offer about what I did. And she told him that I told her about they killed the kid, Nut girlfriend.

Q How did you find out that Rasheeda had told Jamal about what you had said?

A Jamal -- I came around there. Jamal, me and Jamal talk. And Jamal said, hey, man, a lot of pillow talk going on.

That's we call it when we talking to our girlfriend about stuff laying in bed.

So I say, what you mean by that?

He said, no, Rasheeda told me you told her about old boy girl.

So I act like I ain't know what he's talking about first.

He says, you know talking about. He said, Nut girl. Man, you know what we talking about, the chick we killed.

So we almost got in an argument right there, but we going back be a forth.

So I'm like -- but I actually told him, I said, yeah, I told her. I said I was wrong.

He said, you ain't just wrong, he said, you violating, you know, the code of conduct, which we call it in the hood.

And I said --

Q What's the code of conduct?

A Meaning shut your mouth, you shouldn't be talking about stuff that we do to others or to the police. So we call it a code -- unwritten rule, code of conduct. And --

Q So did you leave Mr. Baskerville's presence at that time?

A Yeah.

Q Tell me -- tell jury what happened next.

A Well, I left and I went to her, cursing her out. I'm like, you know, called her everything in the book. Asked her why she do it. And at the time I'm in violation of the restraining order. She called the police on me.

Q And were you arrested?

A Not right then and there because I left the scene.

Q Were you later arrested for having violated the restraining order?

A Yes.

Q Did there come a time when you again had contact with Jamal Baskerville about this same issue?

A Yes.

Q Okay. Please tell the jury about that.

A Later on -- later on that day I got mad, so I called him. So I'm like, yo, man, I need to see you. Because I wanted to know what he was thinking. I know how we all think as criminals.

So I said, I'm coming around your house.
So I got a gun in my pocket, a 357 automatic.
And I go to his house.
He come outside. And I look, I see he got a gun on him.
So I'm like, get in my truck. I'm in my Escalade.
He said, no, I ain't getting in there. You get in the car with me.
I say, all right.
So he get in his car, I get in the car. The whole time I got my gun in my pocket, I got it pointed at him, and I'm talking to him about me telling her about the situation about them murdering the girl.
But we both talking reckless, we arguing now, and I'm talking about a heated argument. Like, man, you ain't right. I'm like man, F you'll, this and that.
So he's like, all right, man.
So I got out the car I got in my truck, I left.
So I didn't know if he told Malsey or not at the time.
Q And again, Malsey is Jamal McNeil?
A McNeil, yeah. Both their name is Jamal, Jamal.
So 25 minutes, 20 minutes later, maybe a half hour, right in that area though my phone ring. It's Jamal Baskerville. So he say, yo, man, we going to see you in the street.

I said we, who?

He said we, you know.

But I all ready knew who he was talking about, him and Malsey.

Q Why did you know that?

A Because without Malsey he's nothing. Like, he's not going to do nothing by his self.

Q Why not?

A That just ain't him. He got to really have somebody with him, because he don't -- he ain't the type to go out starting stuff, like I said earlier. If you back him in a corner he use his gun. But he's not like us, like, just go out and be aggressive unless he really got a problem and you back him in a corner.

Q How about Jamal McNeil?

A Jamal McNeil, yeah, he get you quick.

Q Did he actually say Jamal McNeil or you're just assuming Jamal McNeil.

A I'm just assuming. But I told Rasheeda it was him and Jamal McNeil. I didn't say nobody else. So when he called for me in 25 minutes and he say, we see you in the street, everybody else in jail, Rakeem is on the run, so Curry and all of them in jail, so I knew immediately he was talking about Malsey.

And I just had a feeling when he called my phone,

Malsey was in his presence now.
Q So, as a result of that, did you have any concerns?
A A lot of concern.
Q Please tell the jury what you were concerned about.
A As soon as he told me, we see you in the street, I knew they going to try to kill me.
Q Why is that?
A That's just something -- I just told somebody about a murder they did. That never supposed to have got out about a female like that. Like if it was somebody on the street as far as another drug dealer is different. But they just killed a citizen, a law-abiding citizen by mistake. So that was a big thing. And this murder was investigated for maybe a year, year and a half. They couldn't find out who did it, and I'm finally talking about it to a female.

So now they thinking, you know, we got to get Ant.

So when he said that, to me I knew immediately. Because if I tell him the same thing, he know what I'm saying. If I say, I see you in the street, we handle it. It ain't nothing but kill me.
Q So when you said they were investigating the murder for a year and a half, do you mean Nut's girlfriend?
A Nut's girlfriend.
Q How about at that time, Kemo, had anybody been charged, to your knowledge?

A No, not at that time that I knew of.

MR. MINISH: Judge, is --

THE COURT: Yeah, we'll recess. Is this a good time to recess?

MR. MINISH: It's fine because I think we have an issue to talk about anyway.

THE COURT: We'll deal with that now.

All right. Ladies and gentlemen, we'll recess for the day. Please don't discuss anything about the case. Of course don't listen to anything, if there is anything in the news, paper, TV, radio, of course, and don't begin to develop any opinions yet, you still have more evidence and a lot more to go.

Tomorrow morning, as I indicated, we'll start at 8:30, but probably recess at 1:00 or 2:00. We'll see how the day is going. But no later than 2:00. So for those of you who need something to eat, bring a snack, we'll have a break or two during that time, of course.

Monday and Tuesday we will not be sitting. We will not be sitting. We'll resume after tomorrow on Wednesday morning. Okay? So at least if you need catch up on some personal things you'll have those two days to do that. Okay?

And we are on schedule with the estimates that we had told you about, and then after that we're going to proceed right through after Monday and Tuesday. Okay?

All right. Have a good night and drive safely. It's raining a little, but drive safely and we'll see you tomorrow morning at 8:30.

THE DEPUTY CLERK: Please rise for the Jury.

(The Jury leaves the courtroom.)

THE COURT: Everyong, be seated please.

Mr. Minish, do you need the witness here?

MR. MINISH: No, Judge.

THE COURT: We'll see the witness back here 8:30 tomorrow morning, please. Thanks Marshals.

(The witness is escorted out of the court room by the Marshals.)

(Witness temporarily excused.)

MR. MINISH: Very briefly, this was the area we were getting into that we discussed yesterday about the lawyer, so I was going to inform the Court and Defense Counsel I intended to lead a little bit. And I don't know if there was going to be an objection to that or not, but I wanted to take care of it. I assume there's not.

THE COURT: I don't know if leading is necessary here. Just proceed.

MR. LUSTBERG: I'm sorry, what's the area?

MR. MINISH: The area about his conversation with Mr. Feinberg.

MR. LUSTBERG: I object to leading.

THE COURT: I don't know that it's appropriate to lead. You can ask him if he had conversations with Mr. Feinberg and whatever you want to do in this area. But I'm not going to allow leading questions yet. If I feel it's necessary at some point we'll talk about it then.

MR. MINISH: Fine, Judge.

THE COURT: All right. It's an area that shouldn't have leading questions.

All right. Is there anything else?

MR. MINISH: Nothing from the Government.

THE COURT: How much longer do you think your direct will be? I'm just --

MR. MINISH: I would say probably a couple of hours, Judge.

THE COURT: Okay.

My Clerk indicated to both counsel, I'd like to have at least your proposed charges by the middle of next week so we can see what you have in mind. Okay?

MR. LUSTBERG: So we really don't get Monday and Tuesday off?

(Laughter.)

THE COURT: I'm not really either, it's a judicial conference that I'm told --

MR. LUSTBERG: Mr. Sanders and I will work on that. And I just wanted to maybe just put on the record now, Mr.

Bergrin has authorized me to do the work on the jury instructions for him.

THE COURT: All right. Again, I think the record should be reminded that you've been here and Mr. Bergrin has been present at every step of the way. And as I indicated previously, unless he objects to something, which is the understanding we have, he's in agreement with anything you do, Mr. Lustberg. Okay?

MR. LUSTBERG: Thank you, your Honor.

THE COURT: I have a note here: Mr. Bergrin you want to address something regarding the proposed jury charge?

MR. LUSTBERG: No, no, no, that was just exactly -- I had wanted to put on the record. I just told Mr. Bolton I wanted to put something on the record.

THE COURT: I thought that was premature. But I would like by Wednesday to have at least -- it's not your final proposals, but obviously I would like to see what you have.

Anything else?

MR. MINISH: Judge, I forgot to earlier, we moved in without marking it with a specific number Albert Castro's Proffer Agreement. It's marked now Government Exhibit 7013 --

THE COURT: Wait until tomorrow morning when Ms. Hansen is here.

MR. MINISH: Okay. It's on the record. I'll make sure she gets it.

THE COURT: Make sure she gets it so it's properly marked by her. Okay?

MR. MINISH: Absolutely.

THE COURT: Thanks. See you tomorrow morning.

(At 4:17 p.m., an adjournment is taken to Friday, October 28, 2011, at 8:30 a.m.)

ooOoo

DATE RECORDED	DECEMBER 10, 2003
TIME OF RECORDING	2:42 P.M.
CALL NUMBER	11129
SUBJECTS OF TAPE	HAKEEM CURRY (CURRY)
	PAUL BERGRIN (BERGRIN)
PHONE NUMBERS	CALL FROM (973) 985-0994 TO (862) 205-9273
ABBREVIATIONS	UNINTELLIGIBLE (UI)

1		(Phone Ringing)
2	CURRY:	Hello? Hello?
3	Begrin:	Hey brother, I went and I saw him.
4	CURRY:	Oh, you saw him?
5	BERGRIN:	It's a kilogram and a gun
6	Curry	It is?
7	BERGRIN:	Yeah, so the family putting up the bail now get him out, but I talked to-
8		em. I told him not to trust them. He gave me his green sheets.
9	CURRY:	What do they say on there?
10		Um, possession, possession, with an attempt made for aggravated assault
11		on a police officer.
12	CURRY	Oh, he was fighting him?
13	BERGRIN:	Michael…, Michael…, Michael Lally
14	CURRY:	What type of cop is that, BON?
15	BERGRIN:	He's a fuckin' Newark detective assigned to the um High Intensity,
16		HIDA[PH], Task Force
17	CURRY:	Yeah
18	BERGRIN:	So… [recording fades out]
19	CURRY:	Hello?
20	BERGRIN:	…this kid. Otherwise they would definitely take this federally. You know
21		a key and a gun and fighting with a police officer. But, ah, I'll talk to you
22		when I see you in person but be very, very leery of the telephones. Okay?
23	CURRY:	Yeah

BERGRIN: There…, from what I've been told there are several new wires that went up-

CURRY: Okay

BERGRIN: -in the City of Newark. You know what I mean?

CURRY: Okay

BERGRIN: So I don't know who they're targeting, but be very, very fuckin' careful. uckin' come back to me… [recording is suspended]

[End of recording]

U.S. Department of Justice

United States Attorney
District of New Jersey

Criminal Division

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Deputy Chief

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December 20, 2012

BY ELECTRONIC & U.S. MAIL

Lawrence S. Lustberg, Esq.
Gibbons P.C.
One Gateway Center
Newark, New Jersey 07102-5310

Re: United States v. Bergrin, Crim. No. 09-369 (DMC)

Dear Mr. Lustberg:

While acting as an FBI confidential informant, Maria Corriea recorded numerous conversations, all of which were provided to you in discovery. At present, the Government intends to introduce conversations that occurred on August 13, 2008, August 14, 2008, August 18, 2008, and December 8, 2008.[1] Given that FBI Special Agent Shawn Brokos will authenticate the three August 2008 conversations, the Government encloses herewith a spreadsheet reflecting text messages Agent Brokos sent to and received from Ms. Corriea between August 13 and August 18, 2008, as those texts may contain Jencks material for Agent Brokos. (You will see that in many instances the same message results in multiple, identical entries.)

During trial, the Government may decide to introduce additional conversations recorded by Ms. Corriea if Mr. Bergrin's trial conduct makes them relevant. If any additional text messages contain Jencks material as to Agent Brokos, they will be produced at the appropriate time.

[1] These recordings are marked as Government Exhibits 4147, 4149, 4148, 4150, 4151, 4152, 4155, and 4166.

Finally, please be advised that FBI servers did not preserve any text messages sent or received by Agent Brokos between March 14, 2009 and May 17, 2010 (except for a brief period on April 23, 2009). The last text message involving Ms. Corriea that the FBI captured is one Agent Brokos sent on that day. Although Agent Brokos believes that she exchanged text messages with Ms. Corriea after that date, the inability to retrieve them poses no issue because (1) Agent Brokos will not be testifying about Ms. Corriea's activities after March 14, 2009, and (2) Ms. Corriea is not expected to testify as a Government witness. Thus, those unpreserved text messages did not contain Jencks or Giglio material as to either Agent Brokos or Ms. Corriea. Further, Agent Brokos recalls that text messages exchanged after March 2009 dealt mostly with Ms. Corriea's security concerns, and thus did not contain information favorable to Mr. Bergrin.

Please do not hesitate to contact me if you have any questions.

Respectfully submitted,

PAUL J. FISHMAN
United States Attorney

By: JOHN GAY
Assistant U.S. Attorney
Deputy Chief, Criminal Division

encl.

cc: Bruce A. Levy, Esq.
Amanda B. Protess, Esq.
(by e-mail w/out encl.)

Date	Type	Body
8/13/2008 12:12	Incoming	Yes ill be there
8/13/2008 12:12	Incoming	Yes ill be there
8/13/2008 12:14	Outgoing	Thx!
8/13/2008 12:14	Outgoing	Thx!
8/13/2008 12:14	Outgoing	Thx!
8/13/2008 12:14	Outgoing	Thx!
8/13/2008 12:14	Outgoing	Thx!
8/13/2008 12:14	Outgoing	Thx!
8/13/2008 12:14	Incoming	No problem
8/13/2008 16:35	Incoming	Did you apply for the account online or the 800 number
8/13/2008 16:35	Incoming	Did you apply for the account online or the 800 number
8/13/2008 16:36	Outgoing	No, was going to have her do it in person
8/13/2008 16:36	Outgoing	No, was going to have her do it in person
8/13/2008 16:36	Outgoing	No, was going to have her do it in person
8/13/2008 16:36	Outgoing	No, was going to have her do it in person
8/13/2008 16:36	Outgoing	
8/13/2008 16:36	Outgoing	
8/13/2008 16:37	Incoming	
8/13/2008 16:37	Incoming	Could you let me try doing it onloine
8/13/2008 16:47	Outgoing	Sure will call in a min
8/13/2008 16:47	Outgoing	Sure will call in a min
8/13/2008 16:47	Outgoing	Sure will call in a min
8/13/2008 16:47	Outgoing	Sure will call in a min
8/13/2008 16:47	Outgoing	Sure will call in a min
8/13/2008 16:47	Outgoing	Sure will call in a min
8/14/2008 2:56	Incoming	Witch office and the light is a still red does that mean its still recording
8/14/2008 2:56	Incoming	Witch office and the light is a still red does that mean its still recording
8/14/2008 2:58	Outgoing	It should be flashing, if it is straight red then time is up. The red bank office
8/14/2008 2:58	Outgoing	It should be flashing, if it is straight red then time is up. The red bank office
8/14/2008 2:58	Outgoing	It should be flashing, if it is straight red then time is up. The red bank office
8/14/2008 2:58	Outgoing	It should be flashing, if it is straight red then time is up. The red bank office
8/14/2008 2:58	Outgoing	It should be flashing, if it is straight red then time is up. The red bank office
8/14/2008 2:58	Outgoing	It should be flashing, if it is straight red then time is up. The red bank office

8/14/2008 2:59	Incoming	Oh shit I don't it recorded out side then and yes what time in the morning
8/14/2008 2:59	Incoming	Oh shit I don't it recorded out side then and yes what time in the morning
8/14/2008 3:01	Outgoing	That's ok, I'll be able to tell in am. Can you get there around 815? Exit 109 on parkway
8/14/2008 3:01	Outgoing	That's ok, I'll be able to tell in am. Can you get there around 815? Exit 109 on parkway
8/14/2008 3:01	Outgoing	That's ok, I'll be able to tell in am. Can you get there around 815? Exit 109 on parkway
8/14/2008 3:01	Outgoing	That's ok, I'll be able to tell in am. Can you get there around 815? Exit 109 on parkway
8/14/2008 3:01	Outgoing	That's ok, I'll be able to tell in am. Can you get there around 815? Exit 109 on parkway
8/14/2008 3:01	Outgoing	That's ok, I'll be able to tell in am. Can you get there around 815? Exit 109 on parkway
8/14/2008 3:03	Incoming	Ok ill call you Around seven am is that ok
8/14/2008 3:03	Incoming	Ok ill call you Around seven am is that ok
8/14/2008 3:03	Outgoing	Yes are you still with her?
8/14/2008 3:03	Outgoing	Yes are you still with her?
8/14/2008 3:03	Outgoing	Yes are you still with her?
8/14/2008 3:03	Outgoing	Yes are you still with her?
8/14/2008 3:03	Outgoing	Yes are you still with her?
8/14/2008 3:03	Outgoing	Yes are you still with her?
8/14/2008 3:05	Incoming	Yes
8/14/2008 3:05	Incoming	Yes
8/14/2008 3:05	Outgoing	When will you be home, maybe I can meet you tonite to get rec
8/14/2008 3:05	Outgoing	When will you be home, maybe I can meet you tonite to get rec
8/14/2008 3:05	Outgoing	When will you be home, maybe I can meet you tonite to get rec
8/14/2008 3:05	Outgoing	When will you be home, maybe I can meet you tonite to get rec
8/14/2008 3:05	Outgoing	When will you be home, maybe I can meet you tonite to get rec
8/14/2008 3:05	Outgoing	When will you be home, maybe I can meet you tonite to get rec
8/14/2008 3:07	Incoming	Aoround twelve movie over at 1130
8/14/2008 3:07	Incoming	Aoround twelve movie over at 1130
8/14/2008 3:09	Outgoing	Can I come by at 12?
8/14/2008 3:09	Outgoing	Can I come by at 12?
8/14/2008 3:09	Outgoing	Can I come by at 12?
8/14/2008 3:09	Outgoing	Can I come by at 12?
8/14/2008 3:09	Outgoing	Can I come by at 12?
8/14/2008 3:09	Outgoing	Can I come by at 12?
8/14/2008 3:10	Incoming	Yes
8/14/2008 3:10	Incoming	Yes

8/14/2008 3:15	Outgoing	On my way now
8/14/2008 3:15	Outgoing	On my way now
8/14/2008 3:15	Outgoing	On my way now
8/14/2008 3:15	Outgoing	On my way now
8/14/2008 3:15	Outgoing	On my way now
8/14/2008 3:15	Outgoing	On my way now
8/14/2008 3:16	Incoming	I'm still waiting for the girls shawna I'm sorry
8/14/2008 3:16	Incoming	I'm still waiting for the girls shawna I'm sorry
8/14/2008 3:16	Outgoing	Will take me 35 min to get there, don't have her follow you home
8/14/2008 3:16	Outgoing	Will take me 35 min to get there, don't have her follow you home
8/14/2008 3:16	Outgoing	Will take me 35 min to get there, don't have her follow you home
8/14/2008 3:16	Outgoing	Will take me 35 min to get there, don't have her follow you home
8/14/2008 3:16	Outgoing	Will take me 35 min to get there, don't have her follow you home
8/14/2008 3:16	Outgoing	Will take me 35 min to get there, don't have her follow you home
8/14/2008 3:17	Incoming	Ok
8/14/2008 3:17	Incoming	Ok
8/14/2008 3:18	Outgoing	Let me know when home ill be in area
8/14/2008 3:18	Outgoing	Let me know when home ill be in area
8/14/2008 3:18	Outgoing	Let me know when home ill be in area
8/14/2008 3:18	Outgoing	Let me know when home ill be in area
8/14/2008 3:18	Outgoing	Let me know when home ill be in area
8/14/2008 3:18	Outgoing	Let me know when home ill be in area
8/14/2008 3:19	Incoming	Ok she's talking to oscar on the phone
8/14/2008 3:19	Incoming	Ok she's talking to oscar on the phone
8/14/2008 3:20	Outgoing	Why?
8/14/2008 3:20	Outgoing	Why?
8/14/2008 3:20	Outgoing	Why?
8/14/2008 3:20	Outgoing	Why?
8/14/2008 3:20	Outgoing	Why?
8/14/2008 3:20	Outgoing	Why?
8/14/2008 3:21	Incoming	Oh god just bs with him jesus she's a mess for real god this woman is a mess
8/14/2008 3:21	Incoming	Oh god just bs with him jesus she's a mess for real god this woman is a mess
8/14/2008 3:22	Outgoing	Tell her you have someone, don't use oscar for this
8/14/2008 3:22	Outgoing	Tell her you have someone, don't use oscar for this

8/14/2008 3:22	Outgoing	Tell her you have someone, don't use oscar for this
8/14/2008 3:22	Outgoing	Tell her you have someone, don't use oscar for this
8/14/2008 3:22	Outgoing	Tell her you have someone, don't use oscar for this
8/14/2008 3:22	Outgoing	Tell her you have someone, don't use oscar for this
8/14/2008 3:24	Incoming	Oh don't worry I took care of that one already jose and I are taking care of this one I can't get her off my fucken red phone for gods sake
8/14/2008 3:24	Incoming	Oh don't worry I took care of that one already jose and I are taking care of this one I can't get her off my fucken red phone for gods sake
8/14/2008 3:25	Outgoing	Get her off it, she can't use it
8/14/2008 3:25	Outgoing	Get her off it, she can't use it
8/14/2008 3:25	Outgoing	Get her off it, she can't use it
8/14/2008 3:25	Outgoing	Get her off it, she can't use it
8/14/2008 3:25	Outgoing	Get her off it, she can't use it
8/14/2008 3:25	Outgoing	Get her off it, she can't use it
8/14/2008 3:27	Incoming	She's off god this woman is over powering
8/14/2008 3:35	Outgoing	She can't beat us though
8/14/2008 3:35	Outgoing	She can't beat us though
8/14/2008 3:38	Incoming	I know but shawna I've never met anyone like her in my fucken life ever
8/14/2008 3:38	Incoming	I know but shawna I've never met anyone like her in my fucken life ever
8/14/2008 3:38	Outgoing	I know
8/14/2008 3:38	Outgoing	I know
8/14/2008 3:38	Outgoing	I know
8/14/2008 3:38	Outgoing	I know
8/14/2008 3:38	Outgoing	I know
8/14/2008 3:38	Outgoing	I know
8/14/2008 17:14	Incoming	Ok
8/14/2008 17:14	Incoming	Ok
8/14/2008 17:36	Incoming	Ok
8/14/2008 17:36	Incoming	Ok
8/14/2008 18:38	Incoming	Ok I just met her mob friend named tommy
8/14/2008 18:38	Incoming	Ok I just met her mob friend named tommy
8/14/2008 21:29	Incoming	Almost at the end
8/14/2008 21:39	Incoming	Did you here it is this guuys bday 32779
8/14/2008 21:39	Incoming	Did you here it is this guuys bday 32779
8/14/2008 21:39	Outgoing	That's him
8/14/2008 21:39	Outgoing	That's him

8/14/2008 21:39	Outgoing	That's him
8/14/2008 21:39	Outgoing	That's him
8/14/2008 21:39	Outgoing	That's him
8/14/2008 21:39	Outgoing	That's him
8/14/2008 21:40	Incoming	Ok did you here it yet
8/14/2008 21:40	Incoming	Ok did you here it yet
8/14/2008 21:43	Outgoing	Still going
8/14/2008 21:43	Outgoing	Still going
8/14/2008 21:43	Outgoing	Still going
8/14/2008 21:43	Outgoing	Still going
8/14/2008 21:43	Outgoing	Still going
8/14/2008 21:43	Outgoing	Still going
8/14/2008 21:43	Incoming	Ok
8/14/2008 21:43	Incoming	Ok
8/14/2008 21:45	Outgoing	Is it after the part where you talk about where paul is is his personal business
8/14/2008 21:45	Outgoing	Is it after the part where you talk about where paul is is his personal business
8/14/2008 21:45	Outgoing	Is it after the part where you talk about where paul is is his personal business
8/14/2008 21:45	Outgoing	Is it after the part where you talk about where paul is is his personal business
8/14/2008 21:45	Outgoing	Is it after the part where you talk about where paul is is his personal business
8/14/2008 21:45	Outgoing	Is it after the part where you talk about where paul is is his personal business
8/14/2008 21:46	Incoming	Yes I think so
8/14/2008 21:46	Incoming	Yes I think so
8/14/2008 21:48	Outgoing	Is after th et hak part
8/14/2008 21:48	Outgoing	Is after th et hak part
8/14/2008 21:48	Outgoing	Is after th et hak part
8/14/2008 21:48	Outgoing	Is after th et hak part
8/14/2008 21:48	Outgoing	Is after th et hak part
8/14/2008 21:48	Outgoing	Is after th et hak part
8/14/2008 21:50	Incoming	Yes t think its almost at the end how does it sound so far
8/14/2008 21:50	Incoming	Yes t think its almost at the end how does it sound so far
8/14/2008 21:51	Outgoing	Good you are talking about taking kids to mall and jist gave her your email address
8/14/2008 21:51	Outgoing	Good you are talking about taking kids to mall and jist gave her your email address
8/14/2008 21:51	Outgoing	Good you are talking about taking kids to mall and jist gave her your email address
8/14/2008 21:51	Outgoing	Good you are talking about taking kids to mall and jist gave her your email address

8/14/2008 21:51	Outgoing	Good you are talking about taking kids to mall and jist gave her your email address
8/14/2008 21:51	Outgoing	Good you are talking about taking kids to mall and jist gave her your email address
8/14/2008 21:51	Incoming	Its before that
8/14/2008 21:51	Incoming	Its before that
8/14/2008 21:56	Incoming	Were ever you want just let me know
8/14/2008 21:56	Incoming	Were ever you want just let me know
8/15/2008 2:12	Incoming	Ok
8/15/2008 2:12	Incoming	Ok
8/15/2008 2:32	Incoming	Ok
8/15/2008 2:32	Incoming	Ok
8/15/2008 5:06	Incoming	
8/15/2008 5:06	Incoming	Ok on way home and I'm stuck on stupid with all this my god he was there and then went to funeral as if nothing who does that
8/15/2008 5:08	Outgoing	That is scary. Don't tell him too much
8/15/2008 5:08	Outgoing	That is scary. Don't tell him too much
8/15/2008 5:08	Outgoing	That is scary. Don't tell him too much
8/15/2008 5:08	Outgoing	That is scary. Don't tell him too much
8/15/2008 5:08	Outgoing	That is scary. Don't tell him too much
8/15/2008 5:08	Outgoing	That is scary. Don't tell him too much
8/15/2008 5:08	Outgoing	That is scary. Don't tell him too much
8/15/2008 5:46	Incoming	Oscar just called me saying he was there already for me to get some sleep
8/15/2008 5:46	Incoming	Oscar just called me saying he was there already for me to get some sleep
8/15/2008 5:46	Incoming	Oscar just called me saying he was there already for me to get some sleep
8/15/2008 10:17	Incoming	Yes I am
8/15/2008 10:17	Incoming	Yes I am
8/15/2008 10:19	Incoming	I was getting ready to head down there
8/15/2008 10:19	Incoming	I was getting ready to head down there
8/15/2008 10:20	Outgoing	I'm so impressed don't know how u do it
8/15/2008 10:20	Outgoing	I'm so impressed don't know how u do it
8/15/2008 10:20	Outgoing	I'm so impressed don't know how u do it
8/15/2008 10:20	Outgoing	I'm so impressed don't know how u do it
8/15/2008 10:20	Outgoing	I'm so impressed don't know how u do it
8/15/2008 10:20	Outgoing	I'm so impressed don't know how u do it
8/15/2008 10:21	Incoming	I don't know either just about now to be honest
8/15/2008 10:21	Incoming	I don't know either just about now to be honest

8/15/2008 10:30	Incoming	I have no clue
8/15/2008 10:30	Incoming	I have no clue
8/15/2008 16:04	Incoming	Oscar is flipping out because his ticket is not payed I told him I would make sure its done I'm meeting ulanda a woolabrook male now
8/15/2008 16:04	Incoming	Oscar is flipping out because his ticket is not payed I told him I would make sure its done I'm meeting ulanda a woolabrook male now
8/15/2008 16:07	Outgoing	Ok, almost done mtg - paul told oscar to tell you he is in wisc, I heard it - so he is only doing what paul says
8/15/2008 16:07	Outgoing	Ok, almost done mtg - paul told oscar to tell you he is in wisc, I heard it - so he is only doing what paul says
8/15/2008 16:07	Outgoing	Ok, almost done mtg - paul told oscar to tell you he is in wisc, I heard it - so he is only doing what paul says
8/15/2008 16:07	Outgoing	Ok, almost done mtg - paul told oscar to tell you he is in wisc, I heard it - so he is only doing what paul says
8/15/2008 16:09	Incoming	Is he realy there thow
8/15/2008 16:09	Incoming	Is he realy there thow
8/15/2008 16:09	Outgoing	No not at all
8/15/2008 16:09	Outgoing	No not at all
8/15/2008 16:09	Outgoing	No not at all
8/15/2008 16:09	Outgoing	No not at all
8/15/2008 16:09	Outgoing	No not at all
8/15/2008 16:09	Outgoing	No not at all
8/15/2008 16:09	Outgoing	
8/15/2008 16:10	Incoming	Were the hell is he and does ulanda know the trueth
8/15/2008 16:10	Incoming	Were the hell is he and does ulanda know the trueth
8/15/2008 16:11	Outgoing	Don't know and don't think so
8/15/2008 16:11	Outgoing	Don't know and don't think so
8/15/2008 16:11	Outgoing	Don't know and don't think so
8/15/2008 16:11	Outgoing	Don't know and don't think so
8/15/2008 16:11	Outgoing	Don't know and don't think so
8/15/2008 16:11	Outgoing	Don't know and don't think so
8/15/2008 16:11	Outgoing	
8/15/2008 16:12	Incoming	Oh fuck that's bad are u sure he's not there
8/15/2008 16:12	Incoming	Oh fuck that's bad are u sure he's not there
8/15/2008 16:13	Outgoing	Trying to find out now
8/15/2008 16:13	Outgoing	Trying to find out now
8/15/2008 16:13	Outgoing	Trying to find out now
8/15/2008 16:13	Outgoing	Trying to find out now
8/15/2008 16:13	Outgoing	Trying to find out now
8/15/2008 16:13	Outgoing	Trying to find out now

8/15/2008 16:14	Incoming	Ok
8/15/2008 16:14	Incoming	Ok
8/15/2008 16:15	Incoming	Shit you don't think he went to panama0like she said he wanted too what about this asses ticket
8/15/2008 16:15	Incoming	Shit you don't think he went to panama0like she said he wanted too what about this asses ticket
8/15/2008 16:34	Incoming	Is there anything I need to know before she gets here
8/15/2008 16:34	Incoming	Is there anything I need to know before she gets here
8/15/2008 16:40	Outgoing	Will call in 5
8/15/2008 16:40	Outgoing	Will call in 5
8/15/2008 16:40	Outgoing	Will call in 5
8/15/2008 16:40	Outgoing	Will call in 5
8/15/2008 16:40	Outgoing	Will call in 5
8/15/2008 16:40	Outgoing	Will call in 5
8/15/2008 16:40	Outgoing	Will call in 5
8/15/2008 16:40	Incoming	Ok
8/15/2008 16:40	Incoming	Ok
8/15/2008 17:57	Outgoing	Why the bank, what time, and is she in bently
8/15/2008 17:57	Outgoing	Why the bank, what time, and is she in bently
8/15/2008 17:57	Outgoing	Why the bank, what time, and is she in bently
8/15/2008 17:57	Outgoing	Why the bank, what time, and is she in bently
8/15/2008 17:57	Outgoing	Why the bank, what time, and is she in bently
8/15/2008 17:57	Outgoing	Why the bank, what time, and is she in bently
8/15/2008 17:57	Outgoing	Why the bank, what time, and is she in bently
8/15/2008 17:59	Incoming	Picking up money to take to paul waiting for wire at four and yes has car
8/15/2008 17:59	Incoming	Picking up money to take to paul waiting for wire at four and yes has car
8/15/2008 17:59	Outgoing	Is she mtg up with paul?
8/15/2008 17:59	Outgoing	
8/15/2008 17:59	Outgoing	
8/15/2008 17:59	Outgoing	
8/15/2008 17:59	Outgoing	
8/15/2008 17:59	Outgoing	
8/15/2008 17:59	Outgoing	Is she mtg up with paul?
8/15/2008 18:05	Outgoing	
8/15/2008 18:05	Outgoing	
8/15/2008 18:05	Outgoing	

8/15/2008 18:05	Outgoing	
8/15/2008 18:05	Outgoing	
8/15/2008 18:05	Outgoing	Try to call so I can get details
8/15/2008 18:05	Outgoing	Try to call so I can get details
8/15/2008 18:14	Incoming	She's meeting tommy at bank she knows he's not with oscar because was told last night by tommy and was told she needs to get wire for paul and the reason
8/15/2008 18:14	Incoming	She's meeting tommy at bank she knows he's not with oscar because was told last night by tommy and was told she needs to get wire for paul and the reason
8/15/2008 18:14	Incoming	kid might stay with me is because she doesn't want to take her to panama if that is were she is going
8/15/2008 18:14	Incoming	kid might stay with me is because she doesn't want to take her to panama if that is were she is going
8/15/2008 18:17	Incoming	Do u think he's realy out there
8/15/2008 18:17	Incoming	Do u think he's realy out there
8/15/2008 18:59	Incoming	I'm not sure
8/15/2008 19:32	Incoming	2013037103 could you call me when you get this this is tommy number
8/15/2008 19:32	Incoming	2013037103 could you call me when you get this this is tommy number
8/15/2008 19:32	Incoming	2013037103 could you call me when you get this this is tommy number
8/15/2008 19:34	Incoming	She's on way to bank or so she says I'm following her down 280
8/15/2008 19:34	Incoming	She's on way to bank or so she says I'm following her down 280
8/15/2008 19:34	Incoming	She's on way to bank or so she says I'm following her down 280
8/15/2008 22:06	Incoming	shawna she said she sent tommy out to paul
8/15/2008 22:06	Incoming	shawna she said she sent tommy out to paul
8/15/2008 22:07	Outgoing	Where????
8/15/2008 22:07	Outgoing	Where????
8/15/2008 22:07	Outgoing	Where????
8/15/2008 22:07	Outgoing	Where????
8/15/2008 22:07	Outgoing	Where????
8/15/2008 22:07	Outgoing	Where????
8/15/2008 22:07	Outgoing	Where????
8/16/2008 6:21	Incoming	Shawna I need you to call me first thing in the morning no matter what time it is ulanda just left here she came here on purpose to worn me about oscar t
8/16/2008 6:21	Incoming	Shawna I need you to call me first thing in the morning no matter what time it is ulanda just left here she came here on purpose to worn me about oscar t
8/16/2008 6:21	Incoming	hat paul called her and said to make sure oscar kept thinking he was in wis and that he would talk to her once he was home and she asked him what was wro
8/16/2008 6:21	Incoming	hat paul called her and said to make sure oscar kept thinking he was in wis and that he would talk to her once he was home and she asked him what was wro
8/16/2008 6:21	Incoming	ng and that he said something was up with him and that they don't know shit about this kid and all kinds of shit and that paul said " I need to speak to
8/16/2008 6:21	Incoming	ng and that he said something was up with him and that they don't know shit about this kid and all kinds of shit and that paul said " I need to speak to
8/16/2008 6:21	Incoming	this fucken kids without a dought on tuesday" shawn I'm worried something was not right then while she was here paul called and she put him on speaker wi
8/16/2008 6:21	Incoming	this fucken kids without a dought on tuesday" shawn I'm worried something was not right then while she was here paul called and she put him on speaker wi

8/16/2008 6:21	Incoming	thout him knowing and she was telling him that he needed to speak to me to worn me about oscar since I trusted him so much and paul said not to worry he
8/16/2008 6:21	Incoming	thout him knowing and she was telling him that he needed to speak to me to worn me about oscar since I trusted him so much and paul said not to worry he
8/16/2008 6:21	Incoming	would and that I was ok he would make sure of it I'm worried realy worried something not right here
8/16/2008 6:21	Incoming	would and that I was ok he would make sure of it I'm worried realy worried something not right here
8/16/2008 16:23	Incoming	Paul just texted ashley and I read it he sounds nuts scared the kid half to death
8/16/2008 16:23	Incoming	Paul just texted ashley and I read it he sounds nuts scared the kid half to death
8/16/2008 16:24	Outgoing	What did he say?
8/16/2008 16:24	Outgoing	What did he say?
8/16/2008 16:24	Outgoing	What did he say?
8/16/2008 16:24	Outgoing	What did he say?
8/16/2008 16:24	Outgoing	What did he say?
8/16/2008 16:32	Outgoing	He's either afraid he can't get back in country or is suicidal
8/16/2008 16:32	Outgoing	He's either afraid he can't get back in country or is suicidal
8/16/2008 16:32	Outgoing	He's either afraid he can't get back in country or is suicidal
8/16/2008 16:32	Outgoing	He's either afraid he can't get back in country or is suicidal
8/16/2008 16:34	Incoming	Shawna no offense and don't think I'm a bitch but I don't want him dead I want him to pay but he sounded strang as hell
8/16/2008 16:34	Incoming	Shawna no offense and don't think I'm a bitch but I don't want him dead I want him to pay but he sounded strang as hell
8/16/2008 16:49	Outgoing	No I don't want him dead either, for the sake of his kids. Did yol see the text?
8/16/2008 16:49	Outgoing	No I don't want him dead either, for the sake of his kids. Did yol see the text?
8/16/2008 16:49	Outgoing	No I don't want him dead either, for the sake of his kids. Did yol see the text?
8/16/2008 16:49	Outgoing	No I don't want him dead either, for the sake of his kids. Did yol see the text?
8/16/2008 16:49	Outgoing	No I don't want him dead either, for the sake of his kids. Did yol see the text?
8/16/2008 16:49	Outgoing	No I don't want him dead either, for the sake of his kids. Did yol see the text?
8/16/2008 16:49	Outgoing	No I don't want him dead either, for the sake of his kids. Did yol see the text?
8/16/2008 16:50	Incoming	Yeh I did it was strange
8/16/2008 16:50	Incoming	Yeh I did it was strange
8/16/2008 16:51	Outgoing	Did yolanda see it?
8/16/2008 16:51	Outgoing	Did yolanda see it?
8/16/2008 16:51	Outgoing	Did yolanda see it?
8/16/2008 16:51	Outgoing	Did yolanda see it?
8/16/2008 16:51	Outgoing	Did yolanda see it?
8/16/2008 16:51	Outgoing	Did yolanda see it?
8/16/2008 16:51	Outgoing	Did yolanda see it?
8/16/2008 16:52	Incoming	Were talking now

8/16/2008 16:52	Incoming	Were talking now
8/16/2008 16:56	Outgoing	On phone?
8/16/2008 16:56	Outgoing	On phone?
8/16/2008 16:56	Outgoing	On phone?
8/16/2008 16:56	Outgoing	On phone?
8/16/2008 16:56	Outgoing	On phone?
8/16/2008 16:56	Outgoing	On phone?
8/16/2008 16:56	Outgoing	On phone?
8/16/2008 16:57	Incoming	No were at ihop could I call you in a min
8/16/2008 16:57	Incoming	No were at ihop could I call you in a min
8/16/2008 16:57	Outgoing	Call after 115 if can
8/16/2008 16:57	Outgoing	Call after 115 if can
8/16/2008 16:57	Outgoing	Call after 115 if can
8/16/2008 16:57	Outgoing	Call after 115 if can
8/16/2008 16:57	Outgoing	Call after 115 if can
8/16/2008 16:57	Outgoing	Call after 115 if can
8/16/2008 16:57	Outgoing	Call after 115 if can
8/16/2008 16:58	Incoming	I will
8/16/2008 16:58	Incoming	I will
8/16/2008 17:16	Outgoing	Call when can
8/16/2008 17:16	Outgoing	Call when can
8/16/2008 17:16	Outgoing	Call when can
8/16/2008 17:16	Outgoing	Call when can
8/16/2008 17:16	Outgoing	Call when can
8/16/2008 17:16	Outgoing	Call when can
8/16/2008 17:16	Outgoing	Call when can
8/16/2008 19:03	Outgoing	You are doing a great job hang in there and get some rest
8/16/2008 19:03	Outgoing	You are doing a great job hang in there and get some rest
8/16/2008 19:03	Outgoing	You are doing a great job hang in there and get some rest
8/16/2008 19:03	Outgoing	You are doing a great job hang in there and get some rest
8/16/2008 19:03	Outgoing	You are doing a great job hang in there and get some rest
8/16/2008 19:03	Outgoing	You are doing a great job hang in there and get some rest
8/16/2008 19:03	Outgoing	You are doing a great job hang in there and get some rest
8/16/2008 19:06	Incoming	Thanks ill try but you must be just as tired but it'll be ok in the end

8/16/2008 19:06	Incoming	Thanks ill try but you must be just as tired but it'll be ok in the end
8/16/2008 19:21	Outgoing	Yes it will
8/16/2008 19:21	Outgoing	Yes it will
8/16/2008 19:21	Outgoing	Yes it will
8/16/2008 19:21	Outgoing	Yes it will
8/16/2008 19:21	Outgoing	Yes it will
8/16/2008 19:21	Outgoing	Yes it will
8/16/2008 19:21	Outgoing	Yes it will
8/17/2008 14:53	Incoming	Yes. But it didn't look like a deli it was a little rest. Ill get you address today when I go to target
8/17/2008 14:53	Incoming	Yes. But it didn't look like a deli it was a little rest. Ill get you address today when I go to target
8/17/2008 14:53	Incoming	It was clifton I think or it could be nutly
8/17/2008 14:53	Incoming	It was clifton I think or it could be nutly
8/18/2008 3:58	Incoming	y are having someone at the airport ti see who picks him up please call me
8/18/2008 3:58	Incoming	y are having someone at the airport ti see who picks him up please call me
8/18/2008 3:58	Incoming	y are having someone at the airport ti see who picks him up please call me
8/18/2008 4:12	Incoming	Shawna please call me we have a problem ulanda showed up with some guy from chicago here to see who I was because there checking out oscar oh its bad the
8/18/2008 4:12	Incoming	Shawna please call me we have a problem ulanda showed up with some guy from chicago here to see who I was because there checking out oscar oh its bad the
8/18/2008 4:12	Incoming	Shawna please call me we have a problem ulanda showed up with some guy from chicago here to see who I was because there checking out oscar oh its bad the
8/18/2008 4:33	Incoming	Shawna please for gods sake call me please
8/18/2008 4:33	Incoming	Shawna please for gods sake call me please
8/18/2008 4:33	Incoming	Shawna please for gods sake call me please
8/18/2008 5:18	Incoming	They are comming back to my house I'm turning both recorders on I have no idea if they will work but I don't care at all shawna I'm scared to death I hav
8/18/2008 5:18	Incoming	They are comming back to my house I'm turning both recorders on I have no idea if they will work but I don't care at all shawna I'm scared to death I hav
8/18/2008 5:18	Incoming	They are comming back to my house I'm turning both recorders on I have no idea if they will work but I don't care at all shawna I'm scared to death I hav
8/18/2008 5:19	Incoming	e no clue what to do please call me I don't know what to do I even tryed to call oscar to tell him I have issues and I'm leaving so he could call bob and
8/18/2008 5:19	Incoming	e no clue what to do please call me I don't know what to do I even tryed to call oscar to tell him I have issues and I'm leaving so he could call bob and
8/18/2008 5:19	Incoming	e no clue what to do please call me I don't know what to do I even tryed to call oscar to tell him I have issues and I'm leaving so he could call bob and
8/18/2008 5:19	Incoming	bob could call you but he don't answer either what do I do oh shit I still have that old recorder for the phone you gave me I'm turning that on also may
8/18/2008 5:19	Incoming	bob could call you but he don't answer either what do I do oh shit I still have that old recorder for the phone you gave me I'm turning that on also may
8/18/2008 5:19	Incoming	bob could call you but he don't answer either what do I do oh shit I still have that old recorder for the phone you gave me I'm turning that on also may
8/18/2008 5:19	Incoming	be it'll catch the voices
8/18/2008 5:19	Incoming	be it'll catch the voices
8/18/2008 5:19	Incoming	be it'll catch the voices
8/18/2008 13:43	Incoming	Yes but realy low you have to fix value but I could get ot out of her again

8/18/2008 13:43	Incoming	Yes but realy low you have to fix value but I could get ot out of her again
8/18/2008 13:44	Outgoing	What point do u think it is on tape?
8/18/2008 13:44	Outgoing	What point do u think it is on tape?
8/18/2008 13:44	Outgoing	What point do u think it is on tape?
8/18/2008 13:44	Outgoing	What point do u think it is on tape?
8/18/2008 13:44	Outgoing	What point do u think it is on tape?
8/18/2008 13:44	Outgoing	What point do u think it is on tape?
8/18/2008 13:45	Outgoing	Is it befor or after u call airline
8/18/2008 13:45	Outgoing	Is it befor or after u call airline
8/18/2008 13:45	Outgoing	Is it befor or after u call airline
8/18/2008 13:45	Outgoing	Is it befor or after u call airline
8/18/2008 13:45	Outgoing	Is it befor or after u call airline
8/18/2008 13:45	Outgoing	Is it befor or after u call airline
8/18/2008 13:45	Outgoing	Is it befor or after u call airline
8/18/2008 13:46	Incoming	Oh god shawna I'm not sure I'm sorry
8/18/2008 13:46	Incoming	Oh god shawna I'm not sure I'm sorry
8/18/2008 13:47	Outgoing	No problem
8/18/2008 13:47	Outgoing	No problem
8/18/2008 13:47	Outgoing	No problem
8/18/2008 13:47	Outgoing	No problem
8/18/2008 13:47	Outgoing	No problem
8/18/2008 13:47	Outgoing	No problem
8/18/2008 14:10	Incoming	Make sure they go pay oscors hotel its in his name
8/18/2008 14:10	Incoming	
8/18/2008 17:28	Incoming	Are you getting this
8/18/2008 17:28	Incoming	Are you getting this
8/18/2008 19:25	Incoming	That is why I want to go in first I want to feel him out first and she said he was going to talk to me
8/18/2008 19:25	Incoming	That is why I want to go in first I want to feel him out first and she said he was going to talk to me
8/18/2008 19:40	Incoming	Shawna is everyrthing ok to be honest I can't take much more of this its beginning to get to me realy bad
8/18/2008 19:40	Incoming	Shawna is everyrthing ok to be honest I can't take much more of this its beginning to get to me realy bad
8/18/2008 19:41	Outgoing	Yes, we think paul is playing yolanda and she is doing her own thing re oscar. We can't tie paul to any of this. Paul is lying to everyone
8/18/2008 19:41	Outgoing	Yes, we think paul is playing yolanda and she is doing her own thing re oscar. We can't tie paul to any of this. Paul is lying to everyone
8/18/2008 19:41	Outgoing	Yes, we think paul is playing yolanda and she is doing her own thing re oscar. We can't tie paul to any of this. Paul is lying to everyone
8/18/2008 19:41	Outgoing	Yes, we think paul is playing yolanda and she is doing her own thing re oscar. We can't tie paul to any of this. Paul is lying to everyone

8/18/2008 19:41	Outgoing	Yes, we think paul is playing yolanda and she is doing her own thing re oscar. We can't tie paul to any of this. Paul is lying to everyone
8/18/2008 19:41	Outgoing	Yes, we think paul is playing yolanda and she is doing her own thing re oscar. We can't tie paul to any of this. Paul is lying to everyone
8/18/2008 19:41	Outgoing	Yes, we think paul is playing yolanda and she is doing her own thing re oscar. We can't tie paul to any of this. Paul is lying to everyone
8/18/2008 19:43	Incoming	I don't know anything anymore I just dont
8/18/2008 19:43	Incoming	I don't know anything anymore I just dont
8/18/2008 22:31	Incoming	Ten min away dropping them off and going to pauls he's still not taking my calls
8/18/2008 22:31	Incoming	Ten min away dropping them off and going to pauls he's still not taking my calls
8/18/2008 22:32	Outgoing	Ok need to meet and give rec to u
8/18/2008 22:32	Outgoing	Ok need to meet and give rec to u
8/18/2008 22:32	Outgoing	Ok need to meet and give rec to u
8/18/2008 22:32	Outgoing	Ok need to meet and give rec to u
8/18/2008 22:32	Outgoing	Ok need to meet and give rec to u
8/18/2008 22:34	Incoming	What u mean I have one mike gave me one
8/18/2008 22:34	Incoming	What u mean I have one mike gave me one
8/18/2008 22:34	Outgoing	Ok, call when can
8/18/2008 22:34	Outgoing	Ok, call when can
8/18/2008 22:34	Outgoing	Ok, call when can
8/18/2008 22:34	Outgoing	Ok, call when can
8/18/2008 22:34	Outgoing	Ok, call when can
8/18/2008 22:34	Outgoing	Ok, call when can
8/18/2008 22:34	Outgoing	Ok, call when can

U.S. Department of Justice

District of New Jersey
United States Attorney
Organized Crimes/Gangs Unit

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January 28, 2013

Via Hand Delivery

Lawrence Lustberg, Esq.
Gibbons P.C.
One Gateway Center
Newark, New Jersey 07102
Llustberg@gibbonslaw.com

Re: United States v. Paul Bergrin
Crim. No. 09-369

Dear Mr. Lustberg:

This letter supplements the Government's previous letters regarding discovery in the above-captioned case. This letter provides you with additional discovery materials and Jencks relating to the charges in the above-captioned case. Enclosed please find the following materials:

Item No.	Description	Bates No.
1	Draft Transcripts of CW3 Body Wire recordings: -60802-(CW3-000057)-2008-08-14 -60805-(CW3-000055)-2008-08-12-to 08-13 -60865-(CW3-000063)-2008-08-18 -61673 and 61674-(CW3000140) and (CW3000141) - 2008-12-08 Note that only the transcript for 61673 is enclosed as 61673 and 61674 are audio only and video recordings of the same meeting.	***(located on disc marked Box 67)***

2	Transcripts of proceeding in State v. Peoples marked J-14601 to J-16019	***(located on disc marked Box 67)***

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

Very truly yours,

Paul J. Fishman
United States Attorney

By: John Gay
Assistant U.S. Attorney

TRANSCRIPT OF BODY RECORDINGS

RECORDED ON AUGUST 18, 2008

60865 Session 12

DEA#C3-07-0072

PARTICIPANTS

Cooperating Witness 3 CW3

Yolanda Jauregui Bracero YJB

UNINTELLIGIBLE UI

YJB: You just hope for God's sake [UN 00:00:05] But these people…

CW3 He made it seem like…

YJB: These people…

CW3 And because of who I am…

YJB: Yeah, because of who you are, they believe you.

CW3 They believed it.

YJB: [Birds overlapping] [UN 00:00:18] they're not supposed to be doing all this shit, and then never mind what it was he cared about[UN 00:00:30] a woman, their family, their close ones.

CW3 Well, I told you that.

YJB: They told me that – the guy, these guys. [UN 00:00:41] who the fuck is this fucking guy that let a woman [UN 00:00:46] he knows…

CW3 But see, here's the thing.

YJB: I'm like I don't know what the fuck…

CW3 [Overlapping] I, I went around with him that weekend because Paul told me to. Paul said take care of it, I want to impress him.

I said, okay.

YJB: The reason why was that it was because…

CW3 Of the case…

YJB: Paul doesn't – I want to kill him. I swear to God, I do. Because you know why? He put a lot of people life in jeopardy, if this is the case. I hope [UN 00:01:17] bullshit, we're blowing up the fucking thing. And maybe like they say, maybe it's personal with Paul. Maybe this fucking kid – but Paul's seeing it like he is who he is but he's not taking care of the right thing, the right information, the right time. Why is he not doing that, though? Why? Why is he prolonging it more? That's the question they have. I said, okay, he was saying – 'cause I told him – he is who he is.

CW3 No, that he is. He is who he is. But see, here's the thing. According to him, Vinnie hasn't told him shit.

YJB: But Vinnie spoke to him Friday.

CW3 I don't think they spoke like that. I don't think he would've told him what to, to do.

YJB: Vinnie has a cell phone inside the jail. Paul took him a cell phone. They talk on the cell phone.

CW3 And I didn't know that.

YJB: Oh, you didn't know?

CW3 I didn't know that. I was under the impression he hasn't really spoken to Vinnie yet.

YJB: He spoke to Vinnie on the cell phone . That's what these guys are saying. But why is he prolonging the stuff – if you want more information – usually if you're sent to do something, you do it. No question. If somebody's hiring, asking you, Maria, go take care of this – you're going to go take care of it. That's your job. That's it.

CW3 And George couldn't find out anything in Chicago about him?

YJB: No, he wasn't appearing. Nobody knows about this fucking kid – not in Chicago, not in where he says he's from. Where he says he's from it doesn't fucking come up.

CW3 But this kid George is really from Chicago?

YJB: Yeah. He's from there, born and raised there.

CW3 And nobody knows shit about his kid?

YJB: His corporation he gave to Paul, like, this kid's – he was asking me where the fuck he got this name from. It's not showing up. That's what she told me. she's not lying, she's telling the truth. She went [UN 00:03:15] research. She went on her own research. That's what I told him. I said, she's – we met with the other guy now. There's another kid there who Tommy's sending. Tommy's not here. I thought Tommy was here. Tommy took off.

CW3 Where the fuck did Tommy go?

YJB: With the kid to go get Paul. I thought Tommy was here.

CW3 Well, at least Tommy went. I feel safer with Tommy going.

YJB: Tommy, Tommy doesn't give a fuck. Tommy's so pissed off. He has a big fucking mouth because he doesn't like lies. And he's like, if I do this with you I can't lie to you.

CW3 But, Yo, Paul should know better.

I've never fucked Paul. Never fucked Paul. Why would he not talk to me?

YJB: He should've been open with [UN 00:04:03] Maria. I'm confused. Tell me the truth about this fucking kid. Can you find the information on him for me…

CW3 Because then I would've researched, I would've done what I had to do. He never told me anything, Yolanda. And from what I get from Oscar, he's completely loyal to Paul.

YJB: That's what I told him, too. I told him that, also. And he is. 'Cause, see, Oscar spoke. [UN 00:04:24] you okay? [UN 00:04:26] Oh, I'm fine. [UI] He's 100 percent loyal to Paul.

CW3 He's 100 percent loyal to Paul.

YJB: Then why he's not doing what he's supposed to be doing with Paul? That's why they're concerned. You understand what I'm saying?

CW3 No, I understand what your concern is. And it's my concern.

YJB: Because if you're told…

CW3 [Overlapping] Let me ask you a

question, though. What happened at this meeting? ‘could this kid really fuck everybody.

YJB: Oh, yeah, definitely. Definitely. Everybody and their mother was put down… Everybody and their mother [UN 00:05:13] Fucking Freddie Mancini. Everybody will go down. Everybody and their mother go down. I’m not kidding you.

CW3 What is Freddy Mancini saying about this?

YJB: He doesn’t know.

CW3 Oh, God.

YJB: Nobody knows. The only one that knows is about what’s going on is you. That’s the only one they let know. They don’t even know that you know that much of this. They don’t even know that. All they know is that I’m trying to get information from you on this fucking kid, to see what you know about this kid. You understand?

CW3 I, I can’t believe Paul told you this…

YJB: [Overlapping] You know what? I told him to come there so they could know that I’m not[UN 00:05:45] fucking bullshitting them.

That what you were just saying is true. What you're telling me – you understand? I'm not bullshitting. This is what it is. I don't know who the fuck this kid is. You don't even know who the hell this – of course you know that he's the son, whatever the hell… But that's how far it goes. She's never met this kid I told him. She – the first time she ever met this fucking kid. The first time she went out with this kid was to do Paul a favor. I was honest. You know why? Because, God forbid, these guys think this fucking girl put me up to this shit. She was fucking – you understand? I don't want them to think that about you. God forbid they think about this fucking girl set me up. These are big guys. These aren't little fucking Mickey Mouse guys in the corner…

CW3 And I've never even met them!

YJB: Yeah. So I didn't want them to think this was a setup. You understand? I said, she's never met this guy. [UN 00:06:39]to them it was like, it was good, it was checked out, his background was good and this is what happened.

CW3 But I was under the same

impression.

YJB: Yeah. That's what I told him. I said this girl's got nothing… And they were pissed. They were pissed at Paul. They can't wait to get Paul here. They're going to have a fucking big meeting with Paul tomorrow. And there's not going to be [UN 00:07:02].

CW3 Are they going to go see Vinnie tomorrow?

YJB: Yeah. Oh, yeah. They're going to go see him tomorrow morning, early in the morning.

CW3 Will they get in to see them without Paul?

YJB: Yeah. They'll get in to see without Paul. Because they have – they have a guy that goes in there, like, he's an accountant or whatever the fuck. I don't know what the fuck – I don't give a fuck, but they have to go in there. They're going to go see Vinnie. And Vinnie has to give information, cell phone, private cell phone so Vinnie could talk to him back and forth. They don't even have to go face to face. But they don't want to talk on the phone. They want to go

up and see Vinnie and what the fuck happened.

CW3 Maybe he was – I don't know who the hell… I don't think Vinnie would directly ask for this kid if he wasn't who he is. Maybe he's just being just slow.

YJB: Maybe.

CW3 But I can't picture Vinnie – Vinnie directly asked for him, Yolanda.

YJB: So Vinnie directly asked for him. Maybe Vinnie doesn't know a lot about him. He, he has the rest of these guys. Because, first of all, my life is in fucking jeopardy, your life is in jeopardy, Paul's life is in jeopardy, our kids lives is in jeopardy. They'll take these kids and murder them, and kill them. Let me tell you something [Whispering] These people are vicious fucking killers. they'll take our kids and fucking drop them without fucking blinking an eye.

CW3 What set – Oscar had to do something. What set these people off?

YJB: The way he's treating Paul. The way – it's not supposed to be like that. Business doesn't go down like this. When you talk about

business, if I do business with you…

CW3 [Overlapping] So what the fuck are we going to do with this kid? He's coming here Tuesday.

YJB: [Whispering] I know. I told. I know he's knows he's coming Tuesday but it's better off this kid comes Tuesday, 'cause he's here now.

CW3 I'm fucking dead. Let me tell you something. If this kid does turn out to be what we're thinking he is, I'm fucking dead, Yolanda. I took this kid everywhere.

YJB: Yeah, but Maria as long as – You gotta listen – listen, listen to me. Even if this kid turned out to be a fucked up fed informer, let me tell you something. This kid, I swear to God, will be boxed and sent home. You know what?

CW3 I'm going to have to tell these people. Yolanda, I can't leave my people out there like that.

YJB: You will have to, but after the job is done. You can't afford…

CW3 [Overlapping] I cannot leave my people out there like that.

YJB: But you can't afford – you can't afford to go back… Listen to me, Maria. You can't afford to go back right now

CW3 No, I can't. No. Until we know. But how the fuck are we going to find out 100 percent?

YJB: They'll find out. Tomorrow morning. Tomorrow morning they're going to visit Vinnie. 8 o'clock in the morning, they'll be in the fucking jail. Business starts at 9 o'clock in the morning. They're going to be in jail – 8 o'clock in the morning they'll be there. I had to pick up Paul. And Paul asked – they're going to meet Paul in the office. He's going to have to have to answer questions of those people. A lot of fucking questions. And I feel bad for Paul – yes. But he's fucking risking my life, Maria. My life, your life, our kids lives. He's a man. These girls – who the hell these girls are?

CW3 So what the fuck did he go to Panama to do?

YJB: He's supposed to do this job. Supposed to be done this job. The guy is supposed to Vinnie. Again, Vinnie. I don't know

this fucking guy, Vinnie. I never met him in my life, I don't want to meet this fucking piece of shit. How could you send somebody there who don't take care of him, don't get him picked up…?

CW3 So, wait. What you're telling me is…

YJB: He didn't do shit.

CW3 Wait, what you're telling me is, is the person that was supposed to do this, Oscar, never did it.

YJB: Never.

CW3 So Vinnie sent Paul to do it?

YJB: Correct.

CW3 Is he fucking nuts?

YJB: Yeah. [UN 00:11:15].

CW3 And do it yourself.

YJB: Yep. Just like that.

CW3 Yolanda, he's a fucking lawyer, he's not a killer.

YJB: That's why. I said, what the fuck?

CW3 He's a fucking lawyer, he's not a killer.

YJB: Yeah.

CW3 His job is – there's a big fucking difference between Vinnie telling somebody to do something the way it's been done before than him doing it himself. In a fucking country he doesn't know the language, he doesn't know where the fuck he's going.

YJB: That's right. That's why these guys were pissed. What the fuck got into Paul? What the fuck got into Paul?

CW3 And he really thought he was going to be able to do it? Did he even find the kid?

YJB: I don't know.

CW3 Omigod. And he thought this kid was just going to be running around, as if nothing? Come and get me?

YJB: Come and get me. That's what this guy thinks. He thinks Paul deserves a fucking [UI] These guys were pissed. They were pissed. You see. You know what? Paul was out there.

CW3 Why didn't he leave it up to somebody else?

YJB: Up to these guys. Why the fuck didn't he leave it to us? What the fuck got into Paul? Paul's thinking with his fucking ass?

Paul's never, never…

CW3 [Overlapping] Paul is thinking about money.

YJB: That's what they say.

CW3 No offense. But Paul is thinking about money.

YJB: Yeah.

CW3 And in a situation like this, when you have so many fucking lives involved, you can't think about fucking money. Because right now, nobody knows where the money is! According to Paul, he has no fucking idea where Vinnie's money is.

YJB: Yeah.

CW3 Because I've even asked him.

YJB: He doesn't know.

CW3 Nobody knows. Well, did he automatically miraculously think his money was going to show up once he did it?

[Birds cheeping]

YJB: These guys were pissed, Maria. You don't know how pissed off these guys were. You don't know how pissed off… [UN 00:13:07].

CW3 Yeah, but [UN 00:13:13].

YJB: [UN 00:13:14].

CW3 My main concern right now is these little girls.

YJB: If something happens, what's going to happen?

CW3 Okay. Because my daughter, that's it – I'm it. Her father's doing life. I'm it, Yolanda, do you understand that? I'm it. And, Yolanda, we talk about everything in front of these kids.

YJB: See – yeah…

[End of Audio]

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March 11, 2013

FILED VIA ELECTRONIC MAIL AND HAND DELIVERY

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

Re: United States v. Paul W. Bergrin,
Docket No. 09-369

Dear Judge Cavanaugh:

Please accept this letter on behalf of defendant Paul W. Bergrin in lieu of a more formal application seeking a continuance of the trial until March 19, 2013, or until the soonest date the United States Marshals Service is able to produce two witnesses in federal custody whom the defense has subpoenaed for trial. On Friday, Your Honor expressed the view that, if any of the remaining incarcerated witnesses whom Mr. Bergrin wishes to call cannot be produced by Tuesday, March 12, 2013, then the defense case will likely conclude at that time. Tr. (3/8/13) at 8248-8249. Mr. Bergrin accordingly seeks a continuance of the proceedings to enable two (2) such witnesses to testify on his behalf: Syed Rehman, who is expected to arrive on March 14, 2013, and Rahoo Drew, who is expected to arrive on March 19, 2013. The testimony of each of these witnesses is, as set forth below, necessary to Mr. Bergrin's defense. Please note that, upon consideration, and after we consulted with their counsel, Mr. Bergrin has determined not to call Maria Corriea and Jan Ludvick; we have so informed the United States Marshals Service so that their writs can be cancelled.

This Court has broad discretion to grant a continuance. *See United States v. Alessandrello*, 637 F.2d 131, 147 (3d Cir. 1980). While the public, the Court and the defendant have an interest in an expeditious resolution of the charges, as the Supreme Court has noted, "a myopic insistence upon expeditiousness in the face of a justifiable request for a delay can render the right to defend with counsel an empty formality." *Ungar v. Sarafite*, 376 U.S. 575, 589 (1964). The request for a seven-day delay from the date on which the Court anticipates the end of the defense case is justifiable here, where Mr. Bergrin merely seeks to facilitate the presence of certain key defense witnesses. *See Washington v. Texas*, 388 U.S. 14, 19, 87 (1967) ("The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so that it may decide where the truth lies."); *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973) (right of defendant to present witnesses in his defense is fundamental under the Sixth Amendment and the Due Process Clause).

To that end, Your Honor requested that Mr. Bergrin provide a proffer regarding the proposed testimony of the witnesses at issue. He provides that proffer here.

The testimony of Syed Rehman is necessary to undermine the testimony previously received from Government witness Abdul Williams. While incarcerated together, Williams confided in Rehman, in direct contradiction of his testimony in this case, *see* Tr. (2/14/13) at 3680, that unless Williams lied about Mr. Bergrin, Williams's father and sister would be prosecuted for the sale of cocaine and Williams would be incarcerated for life. Indeed, Williams told Rehman that his testimony about Mr. Bergrin's involvement in drug trafficking was completely fabricated. Rahoo Drew was also present during the conversations between Syed Rehman and Abdul Williams and will, it is expected, corroborate Rehman's account. We are in the process of contacting Mr. Rehman's counsel (A. Paul Condon, Esq., and Christian P. Fleming, Esq.) and Mr. Drew's counsel (Assistant Federal Public Defender Donald J. McCauley), but have not yet spoken to them, to assure that these witnesses will not assert their Fifth Amendment rights.

As discussed above, a brief delay in the proceedings to enable the testimony of these two witnesses is necessary to vindicate Mr. Bergrin's constitutional rights to a fair trial and to compulsory process. If Your Honor has any questions or concerns or require any additional information, please do not hesitate to contact me. Thank you for your kind attention to this matter.

Respectfully submitted,

s/ Lawrence S. Lustberg

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

cc: John Gay, Assistant U.S. Attorney
Joseph N. Minish, Assistant U.S. Attorney
Steven G. Sanders, Assistant U.S. Attorney
Paul W. Bergrin

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45 of 344 DOCUMENTS

The Associated Press State & Local Wire

November 30, 2004, Tuesday, BC cycle

SECTION: State and Regional

LENGTH: 635 words

HEADLINE: Lawyer in Iraq case accused of leaking name of witness who was killed

BYLINE: By WAYNE PARRY, Associated Press Writer

DATELINE: NEWARK, N.J.

BODY:

The lawyer for an Army reservist charged in the Abu Ghraib prisoner abuse case has been accused in an unrelated case of leaking the name of a drug witness who was later murdered.

Lawyer Paul Bergrin represents Sgt. Javal S. Davis, who is originally from Roselle, in the Iraq prisoner abuse case.

The U.S. Attorney's Office is seeking to have Bergrin removed from the drug case of William Baskerville. Bergrin has not been charged with a crime.

The witness, DeShawn McCray, was killed on a Newark street, shot four times in the back of the head.

"Everybody knows this is horse----," Bergrin said Tuesday. He said prosecutors told him they were seeking to remove him from the case to eliminate a potential ground for appeal if Baskerville is convicted. But Bergrin also said he has ruffled some feathers in vigorously defending his clients.

"When you're constantly battling prosecutors and law enforcement officers who are your adversaries, sometimes you make enemies," he said.

On the day Baskerville was arrested in November 2003, Bergrin called Baskerville's cousin, Hakeem Curry, twice. FBI agents, who were investigating Curry, had tapped his cell phone and were monitoring his conversations, according to court documents unsealed Monday.

Prosecutors allege Curry was using Bergrin to find out whether any gang members were cooperating with the government after having been arrested.

According to a transcript of an intercepted call from Bergrin to Curry, the lawyer found out from Baskerville that a

GOVERNMENT EXHIBIT 5002

man known as "K-Mo" had informed against Baskerville.

"I got a chance to speak to William, and he said the informant is a guy by the name of K-Mo," Bergrin said during the conversation, according to a transcript.

"All right," Curry said. "Get detail and detail and call me back."

Bergrin also said he, Curry and Baskerville had nothing to do with McCray's death several months later. McCray, whose nickname was K-Mo, was informing on several drug dealers, and had made plenty of enemies on the streets who had a motive to kill him, Bergrin said.

Bergrin said he passed along the informant's name as part of his duty to evaluate the evidence against his client, including the credibility of witnesses against him.

He also said that although prosecutors did not name the informant, they revealed enough in court documents to make it clear who it was, including the dates he allegedly bought drugs, the quantity of each sale, and the date of his arrest.

"The way the complaint was written, they did everything but give you the name," Bergrin said.

No one has been charged in McCray's killing. Curry was arrested on drug charges three days after the killing.

Assistant U.S. Attorney John Gay told District Court Judge Joel Pisano that Bergrin should be bounced from Baskerville's case because of a conflict of interest.

"Paul Bergrin's conveyance of information from William Baskerville to Hakeem Curry places him squarely in the center of criminal activity," Gay wrote in a motion to have Bergrin disqualified from the case.

"Under the best case scenario, his actions make him a witness, perhaps against his own client, in the murder of a cooperating federal witness. If Mr. Bergrin identified the cooperating witness to Hakeem Curry with the knowledge that it would be used to identify, locate and kill the cooperating witness, then Mr. Bergrin is a knowing participant in criminal activity along with his client."

A spokesman for the U.S. Attorney's office would not comment on why, if the government believes Bergrin was involved in criminal activity, he was not charged.

The judge said he will rule on the disqualification motion after prosecutors detail more information about the case. Baskerville and Curry are scheduled for separate trials next year.

GRAPHIC: AP Photo pursuing

LOAD-DATE: December 1, 2004

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
Criminal Nos. 09-903 and 09-369

UNITED STATES OF AMERICA, :
: TRANSCRIPT OF PROCEEDINGS
v. : (Rule 11 Hearing)
:
YOLONDA JAUREGUI, :
:
Defendants :
- - - - - - - - - - - - - - -x

Newark, New Jersey
April 6, 2011

B E F O R E:

THE HONORABLE WILLIAM J. MARTINI,
UNITED STATES DISTRICT JUDGE

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

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

WALDER, HAYDEN & BROGAN, PA
BY: CHRISTOPHER R. ADAMS, ESQ.
LEIGH-ANN MULREY, ESQ.
Attorneys for Defendant Yolonda Jauregui

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

THE COURT: There's an application before the Court in the matter of United States versus Yolanda Jauregui, Criminal Number 09-369 and Criminal Number 09-903.

This is a joint application between the Government and the Defense Counsel for Yolanda Jauregui, to temporary close the courtroom to the public during the plea hearing; (b) to temporarily seal the record and all documents relating to the plea hearing; and (c) to temporary seal this application and supporting documents.

The Court has received from the Government their Memorandum in support of this application. As far as the legal standard to be applied, our Local Rule 5.3(c)(6) states:

Notwithstanding the above, on emergent application of a party or parties, a judge may seal or otherwise restrict public access to materials or judicial proceedings on a temporary basis.

The Defendant's Sixth Amendment right to a public trial is not in issue here. What is in issue is the First Amendment right of the public to have access to a public trial.

The presumption of openness may be overcome by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest. There's case law which states unequivocally that "witness safety is an overriding interest that can overcome the presumption of openness and justify closure." The

Second Circuit in the matter of Washington Post vs. The Honorable Deborah Robinson supports the proposition that the Government is seeking to seal these proceedings as well as the briefs and to delay putting any entry on the docket whatsoever temporarily until the Defendant here is placed into the Witness Protection Program, which is a process which is ongoing right now and is expected within a few weeks. The Defendant will be in that program, and her family will get the benefit of whatever protections might be necessary by the U.S. Marshals.

The Second Circuit held that delay in the docketing of sealing is an extraordinary situation but is an appropriate remedy when an individual might be at risk in situations in which the Government could show substantial danger which might occur even if the docketing or entry on the record of any type of proceeding would be appropriate upon a specific showing by the Government of a compelling interest in confidentiality. And the example there, as here, is an individual's life or safety may be threatened in such a situation. The Second Circuit held: The trial court may postpone placing any entry on the public docket regarding a motion to seal the Plea Agreement.

As far as the findings in the instant case, the Government has set forth in the Memorandum that the need to seal the courtroom for the entry of the plea of guilty by the Defendant is necessary inasmuch as there's been evidence that

her own well-being could be in jeopardy by Paul Bergrin, a co-defendant, Alejandro Barraza-Castro, and other unnamed, perhaps unknown co-conspirators that are part of a Mexican association of drug trafficking.

Yolanda Jauregui will be implicating the Defendant Paul Bergrin and Alejandro Barraza-Castro and certain Mexican associates in criminal activity during the offer of her plea of guilty. The charge in this Indictment, and very summarily, the Defendant Paul Bergrin and others are charged with a criminal organization specialized in witness tampering, including the murder of a federal witness, as well as drug conspiracy and drug distribution charges.

The Government offers in their Memorandum, alleges that Paul Bergrin and others have been taking steps to ensure that Yolanda Jauregui does not cooperate with the Government. They've been taking steps to keep track of Yolanda Jauregui's family members. The Government sets forth that Mr. Bergrin's cousin, Ron Bergrin, has been making periodic inquiries of the Defendant, Yolanda Jauregui, while she's been in custody. He's visited her in jail, and has made efforts to find out as well when she might be here in the courthouse for what he believes might be proffer sessions. He's been observed at the courthouse on days when there's reason to believe the Defendant Jauregui might have been present for proffer sessions. In addition to Mr. Ron Bergrin, another attorney, Dwight H. Simon

Day, has visited Yolanda in jail and has repeatedly questioned her about cooperating with law enforcement.

There's also evidence that unidentified persons have been conducting surveillance of various members of the Jauregui family, and in as least one incident, the Defendant's niece was in a car with a friend following, and they observed someone, unidentified males following the Jauregui niece. The friend of the Jauregui's niece made inquiry of the unidentified male as to what -- who he was, at which point the male pulled out a handgun, pointed it at the friend and told the friend that it was none of the friend's business and that the friend had better stay away from the Jauregui family.

Understandably, the Government hasn't made full inquiry into this, because if they had done so it would send a red flag to the Defendant Bergrin and others that indeed the Government was involved with the Defendant Jauregui in terms of already beginning to protect her interests in anticipation of a plea of guilty and a cooperation agreement.

I'm advised through the memo by the Government that she has been accepted into the United States Marshals Service Witness Security Program. However, it could take a few more weeks before she's actually transferred into witness security custody and also measures are taken to protect the Jauregui family from any possible threats of harm.

For these reasons, the relief sought by the

Government is granted.

The Order proposed will be entered with one amendment to the Order. All of these proceedings, including the taking of the plea as well, will be sealed. The briefs and memorandums regarding this will be sealed as well, at least temporarily; and they'll be no entries made by the Court Clerk of any proceedings taking place today or of any filing of any briefs or other matters, including orders related to this proceeding. The only amendment to the Order will be from the second paragraph from the bottom, the Court will amend that paragraph to read as follows:

"It is further ordered that this Order and the entry of this Order are sealed until further Order of this Court, but in no event later than May 1st, 2011, unless good cause be shown."

The intent behind that amendment is to encourage the U.S. Marshals and the United States Attorney's Office to expedite the processing of transferring the Defendant into witness protection and also providing necessary measures of protection to the family.

That's the finding of the Court. All right.

We'll put the plea on in court, but the courtroom will be sealed.

(Conclusion of in-chambers proceedings.)

(In the sealed courtroom.)

THE COURT: Good afternoon. Please be seated.

This is the matter of the United States of America versus Yolanda Jauregui.

Could I have the appearances of counsel, please?

MR. ADAMS: Good afternoon, your Honor. Christopher Adams and Leigh-Ann Mulrey from Walder, Hayden & Brogan, for Ms. Jauregui, who is seated to my right.

MR. GAY: Good afternoon, your Honor. John Gay on behalf of the United States Attorney's Office.

MR. MINISH: Good afternoon, Judge. Joe Minish appearing on behalf of the Government.

THE COURT: All right. We're here today to take the plea of the Defendant Jauregui pursuant to a Plea Agreement.

Before we get started with that, the courtroom is sealed on application by the Government. For good cause shown the courtroom is sealed and the actual briefs and the taking of the plea are also temporarily -- are temporarily sealed and they'll be no entries made on the court docket at this time for the reasons that I stated on the record a few moments ago.

But there are people in the courtroom right now, Mr. Gay. So the record is accurate in terms of reflecting who is here, would you please just indicate?

MR. GAY: Absolutely, your Honor. Yes.

There are in the courtroom four -- three FBI

Agents and a Special Agent from the IRS, as well as the paralegal on behalf of the Government.

THE COURT: That accounts for the five people that are sitting in the gallery behind yourself. Correct?

MR. GAY: Correct. If you like, I can put the names on the record.

THE COURT: No, so long as you know who they are I'll rely on your representation. Okay.

MR. GAY: Yes.

THE COURT: Other than that, there are two Marshals in the courtroom.

And there's your associate, Mr. Adams, as well. Correct?

MR. ADAMS: Correct, your Honor.

THE COURT: All right. Ms. Hansen, could we have the Defendant sworn, please.

Y O L A N D A J A U R E G U I, the Defendant, is duly sworn.

THE DEPUTY CLERK: Please state your name for the record.

THE DEFENDANT: Yolanda Jauregui.

THE COURT: Please remain -- well, is she handcuffed?

MR. ADAMS: Yes.

THE COURT: We can have her uncuffed. It's going to be a somewhat long proceeding. So we can have her uncuffed, please.

(The Defendant is uncuffed by the Marshals.)

EXAMINATION BY THE COURT:

Q Ms. Jauregui, if at any time during these proceedings you don't understand something, please so indicate and I'll repeat it or I'll ask you the question another way.

How old are you, ma'am?

A 38.

Q And do you understand and speak English?

A Yes.

Q Do you have any medical or psychiatric condition which interferes with your understanding me today?

A No.

Q Have you taken any medications or any alcohol in the last 48 hours to the extent it's impairing your understanding?

A No.

Q You have an attorney, Mr. Adams. Are you satisfied with his services?

A Yes.

Q And has he provided you with a copy of what's called the Indictments in this case which sets forth the criminal charges against you?

A Yes.

Q There are two Indictments in this case: One is referred to as 09-903 and the other one is 09-369. It's my understanding that you'll be offering a plea of guilty to the charge in Indictment number --

THE COURT: And correct me, Mr. Gay. Follow along, please.

MR. GAY: I am.

THE COURT: Make sure.

Q (Continuing) That you'll be offering a plea of guilty to Indictment Number 09-903, which charges you with distribution and possession with intent to distribute 500 grams or more of cocaine, and then Counts 16, 18, 19, 24, 27 of Superseding Indictment Number 09-369, which charges you with a conspiracy to distribute and possess with intent to distribute 5 kilograms or more of cocaine; Count 16 charges a distribution and possession with intent to distribute 500 grams or more of cocaine or substance containing cocaine; Count 18 charges maintaining a drug-involved premises; Count 19 charges you with wire fraud conspiracy; and Count 24 charges you with wire fraud in the substantive count.

That's a summary of the counts and charges to which I understand you're offering a plea of guilty today. Is that correct?

A Yes.

Q All right. I'll be a little bit more specific now.

Indictment Number 09-903 charges that on or about June 22nd, 2009, in Clifton, New Jersey, you did knowingly and intentionally distribute and possess with intent to distribute 500 grams or more of a substance containing cocaine.

Do you understand that charge?

A Yes.

Q You've discussed it with your lawyer?

A Yes.

Q All right. The Superseding Indictment, Criminal Number 9-369, charges in Count 16, that from on or about January of 2005 through on or about May 21st of 2009, in Essex and Passaic Counties, New Jersey and elsewhere, you, along with Paul Bergrin, Alejandro Barraza-Castro, Alonso Barraza-Castro, and Jose Jimenez, did knowingly and intentionally conspire and agree with others known and unknown to distribute and to possess with intent to distribute 5 kilograms or more of a substance containing cocaine. That's Count 16.

Do you understand that charge?

A Yes.

Q All right. And you've gone over that with your lawyer as well before today?

A Yes.

Q Count 18 of Indictment Number 09-369 charges that on or about December 8, 2008 in Essex County, New Jersey and elsewhere, you, along with Alejandro Barraza-Castro, did

knowingly and intentionally distribute and possess with intent to distribute 500 grams or more of a mixture or substance which contained a detectable amount of cocaine. That's Count 18.

Do you understand that charge?

A Yes.

Q Have you gone over that with your lawyer?

A Yes.

Q Superseding Indictment Number 09-369, Count 19, charges that from at least as early as January 2005 through May 21st, 2009, in Essex County, New Jersey and elsewhere, you, along with Paul Bergrin did manage and control a place; that is, a building located at 710 Summer Avenue, Newark, New Jersey, as an owner and occupant, and knowingly and intentionally rent, profit from and make available for use such place for the purpose of unlawfully storing and distributing a controlled substance.

Do you understand that charge?

A Yes.

Q Have you discussed this with your lawyer before today?

A Yes.

Q All right. Count 24 of Indictment 09-369 charges that from on or about May 19th, 2005 through on or about April 6th, 2006, in Essex County and elsewhere, you, along with Paul Bergrin and Sundiata Koontz, did knowingly and intentionally conspire and agree with each other and others known and unknown to execute a

scheme and artifice to defraud lending institutions and to obtain approximately $509,000 from those lending institutions by means of materially false and fraudulent pretenses, representations, and promises, and to use interstate and foreign wire communications for that purpose, for the purpose of defrauding them.

Do you understand the nature of that charge?

A Yes.

Q And have you gone over that and discussed it with your lawyer before?

A Yes.

Q And Count 27 of Superseding Indictment Number 09-369, charges that on or about July 21st, 2005, in Essex County, New Jersey and elsewhere, you, along with Paul Bergrin and Sundiata Koontz, having devised and intending to devise a scheme and artifice to defraud, and for obtaining money and property by means of materially false and fraudulent pretenses, representations, and promises, which scheme is set forth in Count 24, and for the purpose of executing and attempting to execute such scheme and artifice, did knowingly transmit and cause to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, a writing, sound; namely a wire transfer, from L & C Search and Abstract in the amount of $237,500, in violation of United States Code.

Do you understand that charge?

A Yes.
Q And have you had a chance to go over that with your lawyer as well?
A Yes.
Q All right. Do you understand with respect to the counts here which allege involvement with drugs, cocaine, that that type of conduct, as I've read to you, is made illegal by our federal laws, which say the conduct of conspiring to distribute narcotics or illegal substances or possession with intent to distribute illegal substances like cocaine is illegal. It's a crime.

Do you understand that?

A Yes.
Q Okay. And do you understand that Counts 24 and 27 are what's called wire fraud crimes? In other words, if you perpetrate a fraud, and by perpetrating a fraud you're using the wire transfers or the mails -- but in this case it's the wire transfers -- that's made illegal by a federal statute which says that type of conduct is illegal as well.

Do you understand that?

A Yes.
Q Now, you should understand, if I accept your plea of guilty for a violation of Title 21, United States Code, Section 846, which is charged in Count 16 of the Superseding Indictment, you're faced with a minimum penalty of 10 years and a statutory

maximum penalty of life in prison.

Do you understand that?

A Yes.

Q You're also faced with a fine of up to $4 million.

The penalty for a violation of Title 21, Section 841(a) and (b)(1)(B), which is the count charged in -- which is the charge in Count 18 of Indictment 09-903, has a penalty of a statutory minimum penalty of 5 years and a statutory maximum penalty of 40 years in prison.

Do you understand that?

A Yes.

Q It also has a fine of up to $2 million.

The penalty for a violation of Title 21 United States Code, Section 856, which is what's charged in Count 19 of the Superseding Indictment, has a statutory maximum term of up to 20 years in prison and a fine of up to $500,000 or thereabouts.

Do you understand that?

A Yes.

Q The penalty for a violation of Title 18 United States Code, Section 1349 is identical to the penalty for a violation of Title 18, Section 1343, and those are Counts 24 and 27 in the Superseding Indictment. Each of those Counts has a possible penalty of up to 20 years in prison and a fine of up to $250,000 or thereabouts.

Do you understand that?

A Yes.

Q Those are the penalties you could be faced with by pleading guilty, if I accept your plea of guilty. Do you understand that?

A Yes.

Q You should also understand that those sentences could run consecutive if I thought that was a reasonable sentence.

Do you understand that?

A Yes.

Q In addition to that, you should understand that there's what's called an assessment of $100.00 for each of these Counts that you'll have to pay immediately. Also, I will be required under the law to impose what's called a term of Supervised Release of at least 5 years, which will begin at the expiration of any term of imprisonment that you may have to serve.

Do you understand that?

A Yes.

Q What you should know about Supervised Release is, if you violate any of the terms and conditions of Supervised Release, you'll be brought back before this Court and in all likelihood have to serve additional time in jail.

Do you understand that?

A Yes.

THE COURT: Restitution is mandatory here, isn't

it, under the fraud?

MR. GAY: For the fraud, yes, your Honor.

Q Also, you'll be required to pay restitution to any victims of the offense in terms of monetary amounts of money that they were defrauded of, you will be required to make payments of restitution to them.

Do you understand that?

A Yes.

Q Now, do you understand by pleading guilty today you're giving up -- first of all, before I say that, you should understand, there's not what's called parole in the Federal system, which means if you do receive a jail term or a custodial sentence, you'll actually serve in jail or in a custodial facility 85 to 90 percent of that number.

Do you understand?

A Yes.

Q All right. Now, you should also understand that by pleading guilty here, you're giving up certain rights you have as a Defendant charged with a felony crimes, which these are. You're giving up, most importantly, your right to what's called a jury trial, which would be a trial, a proceeding in a courtroom like this in which 12 citizens of the United States would sit in the jury box and they would listen to the evidence presented by the Government.

Do you understand that?

A Yes.
Q At such a trial you would have the right to have an attorney, and if you couldn't afford one, I would appoint one for you at no charge to you.
Do you understand that?
A Yes.
Q Also at such a trial, you would be presumed to be innocent. And what that means is that the Government has the burden of proving its case against you beyond a reasonable doubt to the satisfaction of all 12 jurors who would have to agree unanimously that they met that burden before you could be found guilty.
Do you understand that?
A Yes.
Q And what that also means is that at such a trial you would not have to offer any evidence in your defense, you wouldn't have to call any witnesses, and you yourself would not have to testify at such a trial in your defense.
Do you understand that?
A Yes.
Q In other words, you could remain silent. And if you were to exercise that right to remain silent, the jury is not permitted under the law to infer any wrongdoing or guilt against you for doing that.
Do you understand that?

A Yes.
Q And I would instruct them accordingly if you wanted me to. Do you understand that?
A Yes.
Q Also, at such a trial, you would, if you chose to put forth a defense, you would have what's called the power to subpoena witnesses on your behalf, and that would mean they would have to come to court if you subpoenaed them to testify.
Do you understand that?
A Yes.
Q And your lawyers at such a trial will have the opportunity to cross-examine the witnesses that the Government puts forth to test their credibility and their truthfulness.
Do you understand that?
A Yes.
Q Now, these are all rights that you're giving up.
Do you understand that?
A Yes.
Q Now, with respect to -- I mentioned to you the Government has the burden of proving the case, these charges against you beyond a reasonable doubt. With respect to the conspiracy to distribute cocaine as charged in Count 16 of Indictment 09-369, here's what they'd have to prove: They'd have to prove beyond a reasonable doubt that the conspiracy described in that Indictment; that is, an agreement to distribute cocaine, was

knowingly and willfully formed and was existing at or about the time charged in the Indictment;

They'd have to prove that you willfully became a party to or a member of that agreement; and

They'd have to prove that you joined the agreement or conspiracy knowing of its object and intending to join together with at least one other alleged conspirator to achieve that objective; that is, that you with at least one other alleged conspirator shared a unity of purpose and the intent to achieve that common objective.

Those are the three elements that they would have to prove beyond a reasonable doubt to a jury of all 12 people before they could find you guilty.

Do you understand that?

A Yes.

Q With respect to the crime of distribution, or possession with intent to distribute, which is the charge in Count 18 of Indictment 09-369, and also which is charged in Indictment Number 09-903, the Government would have to prove the following: That you distributed or possessed with intent to distribute a substance containing a controlled substance stance, okay;

That you distributed or possessed with intent to distribute the controlled substance knowingly and intentionally; and

That the substance was cocaine.

Do you understand that? Those are the three elements of those charges that they would have to prove beyond a reasonable doubt to the satisfaction unanimously of all 12 jurors before you could be found guilty.

Do you understand that?

A Yes.

Q All right. Now, to sustain its burden for the crime of maintaining a drug-involved premises as charged in Count 19 of Indictment 09-369, they would have to prove the following elements beyond a reasonable doubt:

That you managed or controlled the building at 710 Summer Avenue, Newark;

That you did so as an owner, lessee, employee or mortgagee; and

That you knowingly and intentionally rented, leased or made available for use, with or without compensation, the building located at Summer Avenue, Newark, for the purpose of unlawfully storing or distributing cocaine.

That's what they would have to prove beyond a reasonable doubt to the satisfaction of all 12 jurors before you could be found guilty.

Do you understand that?

A Yes.

Q With respect to Count 24 of Indictment 09-369, which is the

crime of conspiracy to commit wire fraud, they would have to prove the following elements beyond a reasonable doubt:

That two or more persons agreed to commit wire fraud;

That the Defendant, you, was a party to or a member of that agreement; and

That you joined the agreement or conspiracy knowing of its objective to commit wire fraud and intending to join together with at least one other alleged conspirator to achieve that objective; that is, that you with at least one other alleged conspirator shared a unity of purpose in the intent to achieve that common objective.

Those are the elements that they would have to prove on that charge beyond a reasonable doubt to the satisfaction of all 12 jurors unanimously before you could be found guilty.

Do you understand that?

A Yes.

Q Now, finally, to sustain a burden of proof for the crime of wire fraud -- what I just read to you was a conspiracy to commit wire fraud -- but for the crime of wire fraud, which is Count 27 of Indictment 09-369, they'd have to prove that you devised a scheme to defraud or to obtain money or property by materially false or fraudulent pretenses, representations, or promises;

That you acted with the intent to defraud; and

That in advancing or furthering or carrying out the scheme, you transmitted by way of wire, any signal or sound of some kind by means of wire through interstate commerce.

Do you understand that's the charge and those are the elements they would have to prove beyond a reasonable doubt as to that charge? Do you understand that?

A Yes.

Q Those are all the elements they'd have to prove beyond a reasonable doubt if you went to trial, or if you decided even now you wanted to go to trial, those are the things they would have to prove to the satisfaction of all 12 jurors unanimously before they could find you guilty.

Do you understand that?

A Yes.

Q Do you still wish to proceed and offer your plea of guilty?

A Yes.

Q Okay. Do you understand all these rights that I just explained to you?

A Yes.

Q Have you discussed them with your lawyer before today?

A Yes.

Q And are you giving these rights up voluntarily, without anybody forcing, threatening or coercing you to do that?

A Yes.

Q Are you a citizen of the United States?
A Yes.
Q You should understand, as a citizen there are certain privileges and rights that you have that will be in jeopardy, you might lose with a conviction like this, such as your right to vote, your right to sit on a jury, your right to hold a government job. Those are some of the privileges you have that would probably be lost by a conviction like this.
Do you understand that?
A Yes.
Q Now, it's my understanding you're offering this plea of guilty pursuant to a Plea Agreement which is set forth in a letter dated March 1st, 2011.
Is that your signature on page 8 I guess it is of that document?
A Yes.
Q And did you sign this Plea Agreement after you went over it, read it thoroughly and discussed it at length with your lawyer?
A Yes.
Q Did they answer any questions you may have had as to what some of these provisions mean?
A Yes.
Q And did you sign it on March 8th, 2011?
A Yes.

THE COURT: Mr. Adams, did you witness her sign it?

MR. ADAMS: I did, your Honor.

THE COURT: All right.

Q And did you sign it voluntarily, without anybody forcing, threatening, or coercing you to sign it?

A Yes.

Q All right. Everything that's in here is very important, but I just want to highlight a few things. First and foremost, you should understand that --

THE COURT: Mr. Gay, is there a separate Cooperation Agreement or --

MR. GAY: Yes, there is, your Honor, which we didn't provide the Court a copy of, we normally don't file it with the Court, but there is a separate Cooperation Agreement, as well as the other supplemental agreement which -- I apologize if I didn't provide a copy of --

THE COURT: I don't think I have that either.

Q The letter agreement, Ms. Jauregui, of March 1st, 2011 that I just asked you questions about, what you should understand is that this is the full and complete agreement between you and the Government unless there's anything else that's in writing.

Do you understand that?

A Yes.

Q And I understand that there is, in fact, a Supplemental

Agreement, it's entitled "Supplemental Agreement of March 1, 2011," which consists of three pages, which you also signed on March 30, 2011.

Is that your signature?

A Yes.

Q All right. And I also understand there's also what's called a Cooperation Agreement between you and the Government which your lawyer is showing you.

THE COURT: What's the date on that, Mr. Adams?

MR. ADAMS: It's dated March 1st, 2011, your Honor, and it's signed on page 4 dated March 8th, 2011.

Q Do you recognize that document as well?

A Yes.

Q All right. These three documents are what's referred to as your full and complete understanding between you and the Government. Do you understand that?

A Yes.

Q What that means is, if somebody verbally, or if there were any writings that preceded March 1st and they're not in -- whatever was in those writings or in those statements are not incorporated into these three documents, whatever was said to you before March 1st, if it's not in these documents, it's of no binding effect between you and the Government.

Do you understand that?

A Yes.

Q All right. You should also understand that when it comes to what the sentence will be in this case, the actual sentence to be imposed is in the sole discretion of the Court; that's myself. And while there are what's referred to as Sentencing Guidelines and other laws and rules and statutes of course that I just read to you, those penalties, the guidelines, the so-called Sentencing Guidelines are not mandatory, they're advisory. I certainly look at them for some guidance, but they're not mandatory. And what that means is, I could, if I thought it was a reasonable sentence, I could sentence you up to the maximums that I just read to you a few moments ago.

Do you understand that?

A Yes.

Q All right. Also, I see that you and the Government have entered into what's called a Schedule A, which is attached and begins on page 9 of the Plea Agreement and goes to page 13 or 14, which are what's called stipulations between you and the Government as to how the Guidelines and other sentencing matters may pertain to you in this case -- in these cases.

Do you understand that?

A Yes.

Q What you should know about those stipulations are, is they're between you and the Government. And while most of the time I'll agree with them, there are instances where I may make a finding that's different than what you've agreed to with the

Government. And if I were to do that in your case and it's contrary to the stipulations in Schedule A, you would not have the right to withdraw your guilty plea.

Do you understand that?

A Yes.

Q Also, in this Schedule A under paragraph 34 and 33, but particularly 34, you're limiting and restricting what's referred to as your right to appeal my sentence. Okay? What that means is, after I sentence you on these charges, you would have a right under the law to appeal that sentence to a higher court for review or reconsideration. However, your right to do that will be restricted as set forth by the language in paragraph 34 in the Schedule A.

Do you understand that?

A Yes.

Q Have you read that paragraph with your lawyer?

A Yes.

Q Has he answered any questions you had about that?

A Yes.

Q Are you giving up or restricting that right of appeal voluntarily, without anybody forcing, coercing, or threatening you to do that?

A Yes.

Q Okay. Did you fill out the Form 11 questionnaire which your lawyer will be showing you right now?

A Yes.
Q Are those your full, complete and accurate answers to the questions in that form?
A Yes.
Q Did you have the benefit of your lawyer when you were going through those questions and answering them?
A Yes.
Q All right. Did you sign that form after you provided all those answers?
A Yes.
Q And did you sign that form voluntarily, without anybody forcing, threatening, or coercing you to do that?
A Yes.
Q You should understand, again, by signing that form you're representing to this Court and to the Government that your answers to those questions are full, complete and truthful answers. Is that true?
A Yes.
Q Okay. Now, in order for me to accept a plea of guilty, I need to know what it is that makes you guilty of these offenses. Please listen to the questions that will be asked of you by Mr. Gay.
Mr. Gay, you can remain seated.
MR. GAY: Okay. Thank you.
THE COURT: You have a long list of questions

here.

MR. GAY: Thank you, your Honor.

THE COURT: Okay. Listen closely to these questions, and depending on your answers I'll determine if I can accept your plea of guilty.

All right. Mr. Gay, go ahead.

MR. GAY: Thank you, your Honor.

Beginning at least as early as the date Norberto Velez was charged with stabbing his wife, were you and Paul Bergrin part of a group that engaged in various criminal activities?

THE DEFENDANT: Yes.

MR. GAY: Do you agree that Norberto Velez was charged with stabbing his wife on or about November 19th, 2001?

THE DEFENDANT: Yes.

MR. GAY: At that time was Paul Bergrin an attorney and a partner in a law firm with Anthony Pope?

THE DEFENDANT: Yes.

MR. GAY: Did the firm Paul Bergrin was in with Anthony Pope later split up, and did Paul Bergrin then open his own law firm?

THE DEFENDANT: Yes.

MR. GAY: Did you and Paul Bergrin each share 50 percent ownership in a corporation named Premium Realty Investment Corp. Inc.?

THE DEFENDANT: Yes.

MR. GAY: In or about 2002, did Paul Bergrin purchase 710 Summer Avenue, Newark, New Jersey?

THE DEFENDANT: Yes.

MR. GAY: Did you later become an owner of 710 Summer Avenue, Newark, New Jersey?

THE DEFENDANT: Yes.

MR. GAY: Did you and Paul Bergrin each share 50 percent ownership in a corporation named Isabella's International Restaurant?

THE DEFENDANT: Yes.

MR. GAY: Was Isabella's International Restaurant located at 710 Summer Avenue, Newark, New Jersey?

THE DEFENDANT: Yes.

MR. GAY: Did the group that you and Paul Bergrin were a part of use Paul Bergrin's law firms in connection with committing criminal acts?

THE DEFENDANT: Yes.

MR. GAY: Did that group also use Isabella's International Restaurant in connection with committing criminal acts?

THE DEFENDANT: Yes.

MR. GAY: Did some of the acts in which you were involved with the group include conducting fraudulent real estate transactions?

THE DEFENDANT: Yes.

MR. GAY: Did you knowingly and intentionally conspire with Paul Bergrin and others to defraud lending institutions to obtain money?

THE DEFENDANT: Yes.

MR. GAY: As part of that conspiracy, did you sell the real estate property commonly known as 13 Edgerton Terrace in East Orange, New Jersey?

THE DEFENDANT: Yes.

MR. GAY: Do you agree that you sold the 13 Edgerton Terrace property on or about July 21st, 2005?

THE DEFENDANT: Yes.

MR. GAY: Prior to July 21st, 2005, did you own the 13 Edgerton Terrace property?

THE DEFENDANT: Yes.

MR. GAY: Was the sales price for the 13 Edgerton Place property in excess of $237,500?

THE DEFENDANT: Yes.

MR. GAY: Did you believe that the sales price for the 13 Edgerton Terrace property was in excess of the fair market value for the 13 Edgerton Terrace property?

THE DEFENDANT: Yes.

MR. GAY: Did you believe that the sale of the 13 Edgerton Terrace property was completed through fraudulent means?

THE DEFENDANT: Yes.

MR. GAY: Do you agree that the sale of the 13 Edgerton Terrace property was completed through fraudulent means?

THE DEFENDANT: Yes.

MR. GAY: Do you believe that the buyer for the 13 Edgerton Terrace property obtained a loan to purchase the 13 Edgerton Terrace property?

THE DEFENDANT: Yes.

MR. GAY: Do you agree that the buyer obtained the loan using false information?

THE DEFENDANT: Yes.

MR. GAY: Do you agree that the false information the buyer used was material to the buyer obtaining the loan?

THE DEFENDANT: Yes.

MR. GAY: Did Paul Bergrin provide an attorney through his law firm to perform the closing on the sale of the 13 Edgerton Terrace property?

THE DEFENDANT: Yes.

MR. GAY: Did you make a profit from the sale of the 13 Edgerton Terrace property?

THE DEFENDANT: Yes.

MR. GAY: Do you agree that the profit from the sale was approximately $149,000?

THE DEFENDANT: Yes.

MR. GAY: Did some of the acts in which you were involved with the group include trafficking in illegal drugs?

THE DEFENDANT: Yes.

MR. GAY: Did you knowingly and voluntarily agree with Paul Bergrin, Alejandro Barraza-Castro, Alonzo Barraza-Castro, Norberto Velez, Ramon Jimenez, an individual known to you as "Jesse," an individual known to you as "Pelon" and others, to distribute in excess of 150 kilograms of cocaine in the Counties of Essex and Passaic, in New Jersey and elsewhere?

THE DEFENDANT: Yes.

MR. GAY: When you entered into that agreement, did you know that the purpose of the agreement was to distribute cocaine?

THE DEFENDANT: Yes.

MR. GAY: Did you do so knowingly and intentionally?

THE DEFENDANT: Yes.

MR. GAY: Is Alonzo Barraza-Castro the brother of Alejandro Barraza-Castro?

THE DEFENDANT: Yes.

MR. GAY: Is Ramon Jimenez your brother?

THE DEFENDANT: Yes.

MR. GAY: To your knowledge, was Jose Jimenez also involved in the conspiracy?

THE DEFENDANT: Yes.

MR. GAY: Is Jose Jimenez your father?

THE DEFENDANT: Yes.

MR. GAY: Did you first get involved in the drug trafficking operation when Ramon Jimenez conveyed a request that you intercede on his behalf with Paul Bergrin relating to a drug transaction?

THE DEFENDANT: Yes.

MR. GAY: Was Ramon Jimenez' request related to a meeting that occurred at Isabella's International Restaurant between Paul Bergrin, Hakeem Curry and a person known to you as "Changa"?

THE DEFENDANT: Yes.

MR. GAY: Did the meeting happen some time after Ramon Jimenez got out of jail in 2003?

THE DEFENDANT: Yes.

MR. GAY: Did Ramon Jimenez tell you that he and Paul Bergrin developed a plan to introduce Hakeem Curry to a drug supplier you knew as "Changa" so that Hakeem Curry could obtain kilograms of cocaine from Changa?

THE DEFENDANT: Yes.

MR. GAY: Did Ramon Jimenez tell you that he and Paul Bergrin were supposed to get a fee for each kilogram of cocaine that Changa sold to Hakeem Curry?

THE DEFENDANT: Yes.

MR. GAY: Was Hakeem Curry a client of Paul Bergrin's law practice?

THE DEFENDANT: Yes.

MR. GAY: Did you observe the meeting in which Paul Bergrin and Ramon Jimenez introduced Hakeem Curry to Changa?

THE DEFENDANT: Yes.

MR. GAY: Did that take place at Isabella's International Restaurant inside 710 Summer Avenue, Newark, New Jersey?

THE DEFENDANT: Yes.

MR. GAY: Thereafter, did Ramon Jimenez tell you that Paul Bergrin and Changa had cut him out of the deal, and that as a result Paul Bergrin and Changa were receiving all of the money and that Ramon Jimenez was receiving nothing?

THE DEFENDANT: Yes.

MR. GAY: Did Ramon Jimenez ask you to speak to Paul Bergrin in an effort to convince Paul Bergrin to allow Ramon Jimenez to receive a portion of the fee earned for each kilogram of cocaine Changa sold to Hakeem Curry?

THE DEFENDANT: Yes.

MR. GAY: Thereafter, did you have conversations with Hakeem Curry in which Hakeem Curry, in substance, confirmed that he was obtaining kilograms of cocaine from Changa?

THE DEFENDANT: Yes.

MR. GAY: Sometime thereafter, was Hakeem Curry arrested?

THE DEFENDANT: Yes.

MR. GAY: Thereafter, did Changa leave New Jersey, apparently because he was afraid of also being arrested?

THE DEFENDANT: Yes.

MR. GAY: Shortly thereafter, in or around July 2004, did you meet an individual named Alejandro Barraza-Castro?

THE DEFENDANT: Yes.

MR. GAY: Thereafter, did you learn from Alejandro Barraza-Castro that Alejandro Barraza-Castro had, in essence, taken Changa's place as the drug supplier for the group?

THE DEFENDANT: Yes.

MR. GAY: A short time after meeting Alejandro Barraza-Castro, did you begin to become more actively involved in the group's drug distribution operation?

THE DEFENDANT: Yes.

MR. GAY: Thereafter, did you learn more about the involvement of Alejandro Barraza-Castro, Paul Bergrin and Ramon Jimenez in the drug distribution operation?

THE DEFENDANT: Yes.

MR. GAY: Did you learn that Paul Bergrin would obtain clients from his law practice to purchase kilograms of

cocaine supplied by Alejandro Barraza-Castro?

THE DEFENDANT: Yes.

MR. GAY: Did you learn that Ramon Jimenez would help Paul Bergrin and Alejandro Barraza-Castro in distributing the kilograms of cocaine, collecting payment from the drug customers, and remitting payment to Paul Bergrin and Alejandro Barraza-Castro?

THE DEFENDANT: Yes.

MR. GAY: Did you learn that a problem developed because Ramon Jimenez was not adequately fulfilling his role in assisting Paul Bergrin and Alejandro Barraza-Castro in the drug operation?

THE DEFENDANT: Yes.

MR. GAY: Thereafter, did you, in essence, take over the role of Ramon Jimenez in assisting with the distribution of kilograms of cocaine and the collection of drug proceeds?

THE DEFENDANT: Yes.

MR. GAY: As part of the agreement, did you assist the cocaine trafficking operation by, among other things, making phone calls to potential customers?

THE DEFENDANT: Yes.

MR. GAY: As part of the agreement, did you assist the cocaine trafficking operation by, among other things, driving Alejandro Barraza-Castro to meetings related to drug

transactions?

THE DEFENDANT: Yes.

MR. GAY: Did those meetings include meetings with Paul Bergrin to discuss obtaining new clients for the cocaine trafficking operation?

THE DEFENDANT: Yes.

MR. GAY: As part of the agreement, did Paul Bergrin provide Alejandro Barraza-Castro with customers to purchase kilogram quantities of cocaine?

THE DEFENDANT: Yes.

MR. GAY: Did Alejandro Barraza-Castro tell you that he paid Paul Bergrin a fee for providing Alejandro Barraza-Castro with customers to purchase kilograms of cocaine?

THE DEFENDANT: Yes.

MR. GAY: As part of the agreement, did you assist the cocaine trafficking operation by, among other things, driving Alejandro Barraza-Castro to meetings with Paul Bergrin during which Alejandro Barraza-Castro paid Paul Bergrin a fee for providing him with customers to purchase kilograms of cocaine?

THE DEFENDANT: Yes.

MR. GAY: From in or about 2002 through at least on or about May 21st, 2009, did you and Paul Bergrin manage and control a building located at 710 Summer Avenue, Newark, New Jersey?

THE DEFENDANT: Yes.

MR. GAY: As a part of the agreement, did you and Paul Bergrin make the building located at 710 Summer Avenue available to use as a location from which to distribute cocaine?

THE DEFENDANT: Yes.

MR. GAY: As mart of the agreement, were kilogram quantities of cocaine stored at numerous locations, including the building located at 710 Summer Avenue, Newark, New Jersey?

THE DEFENDANT: Yes.

MR. GAY: As part of that agreement, did you distribute or assist in distributing cocaine from the building located at 710 Summer Avenue, Newark, New Jersey?

THE DEFENDANT: Yes.

MR. GAY: As part of that agreement, did you sell kilogram quantities of cocaine to an individual named Rondre Kelly?

THE DEFENDANT: Yes.

MR. GAY: Was Rondre Kelly a client of Paul Bergrin's law practice?

THE DEFENDANT: Yes.

MR. GAY: As part of the agreement, did you arrange numerous multi-kilogram sales with Rondre Kelly during phone calls and in-person meetings?

THE DEFENDANT: Yes.

MR. GAY: Did you and Alejandro Barraza-Castro deliver and cause to be delivered multiple kilograms of cocaine to Rondre Kelly?

THE DEFENDANT: Yes.

MR. GAY: Did Norberto Velez assist the group's cocaine trafficking operation?

THE DEFENDANT: Yes.

MR. GAY: Was Norberto Velez a client of Paul Bergrin's law practice?

THE DEFENDANT: Yes.

MR. GAY: Did Norberto Velez previously work for you and Paul Bergrin at Isabella's International Restaurant?

THE DEFENDANT: Yes.

MR. GAY: Did Norberto Velez assist Alejandro Barraza-Castro in, among other things, storing over $400,000 of drug proceeds in Norberto Velez's residence?

THE DEFENDANT: Yes.

MR. GAY: Some time in or about February of 2005, were Alejandro Barraza-Castro and Norberto Velez arrested and charged in Passaic County, New Jersey, for violating criminal laws of the State of New Jersey relating to drug-trafficking?

THE DEFENDANT: Yes.

MR. GAY: As a result, was Alejandro Barraza-Castro detained in Passaic County Jail for a period of time?

THE DEFENDANT: Yes.

MR. GAY: As part of the agreement, during the course of Alejandro Barraza-Castro's detention at the Passaic County Jail, did you continue to assist the cocaine trafficking operation?

THE DEFENDANT: Yes.

MR. GAY: As part of that agreement, did you assist the individual known to you as "Pelon" in trafficking kilogram quantities of cocaine in New Jersey?

THE DEFENDANT: Yes.

MR. GAY: As part of that agreement, did you assist the individual known to you as "Jesse" in trafficking kilogram quantities of cocaine in New Jersey?

THE DEFENDANT: Yes.

MR. GAY: As part of the agreement, did you continue to sell and cause to be sold multiple kilograms of cocaine to Rondre Kelly?

THE DEFENDANT: Yes.

MR. GAY: Sometime after Alejandro Barraza-Castro got out of jail, did you and Alejandro Barraza-Castro continue to sell kilograms of cocaine to Rondre Kelly?

THE DEFENDANT: Yes.

MR. GAY: As part of that agreement, did you also assist the group in distributing kilograms of cocaine to other persons?

THE DEFENDANT: Yes.

MR. GAY: As part of that agreement, did you supply kilogram quantities of cocaine to Abdul Williams?

THE DEFENDANT: Yes.

MR. GAY: Was Abdul Williams a client of Paul Bergrin's law practice?

THE DEFENDANT: Yes.

MR. GAY: Was Abdul Williams also employed by Paul Bergrin's law firm?

THE DEFENDANT: Yes.

MR. GAY: Did Paul Bergrin connect Alejandro Barraza-Castro with Abdul Williams so that Alejandro Barraza-Castro could deliver kilograms of cocaine to Abdul Williams?

THE DEFENDANT: Yes.

MR. GAY: As part of the agreement, did you arrange numerous multi-kilogram deliveries to Abdul Williams during phone calls and in-person meetings?

THE DEFENDANT: Yes.

MR. GAY: And that would be multi-kilograms of cocaine. Right?

THE DEFENDANT: Yes.

MR. GAY: Did you and Alejandro Barraza-Castro deliver or cause to be delivered multiple kilograms of cocaine to Abdul Williams?

THE DEFENDANT: Yes.

MR. GAY: As part of the agreement, on or about December 8, 2008, did you and Alejandro Barraza-Castro sell 1 kilogram of cocaine to an individual named Maria Correia?

THE DEFENDANT: Yes.

MR. GAY: Did you know that the substance you sold to Maria Correia was cocaine and that it weighed approximately 1 kilogram?

THE DEFENDANT: Yes.

MR. GAY: Do you agree that as part of that agreement, in or about May 21st, 2009, Alejandro Barraza-Castro and Alonzo Barraza-Castro and others possessed with intent to distribute approximately 54 kilograms of cocaine?

THE DEFENDANT: Yes.

MR. GAY: Do you agree that the 54 kilograms of cocaine were stored in the building located at 710 Summer Avenue, Newark, New Jersey?

THE DEFENDANT: Yes.

MR. GAY: Between on or about May 27th, 2009 and June 22nd, 2009, did you have a number of conversations with Maria Correia?

THE DEFENDANT: Yes.

MR. GAY: During those conversations, did you discuss distributing cocaine to Maria Correia?

THE DEFENDANT: Yes.

MR. GAY: During those conversations, did you offer to sell Maria Correia a kilogram of cocaine for $35,000?

THE DEFENDANT: Yes.

MR. GAY: On or about June 22nd, 2009, did you and two other persons meet Maria Correia and another person at a location in Clifton, New Jersey?

THE DEFENDANT: Yes.

MR. GAY: On or about June 22nd, 2009, did you receive $35,000 from Maria Correia in exchange for 1 kilogram of cocaine?

THE DEFENDANT: Yes.

MR. GAY: Did you know that the substance you sold Maria Correia was cocaine and that it weighed approximately 1 kilogram?

THE DEFENDANT: Yes.

MR. GAY: Are you aware that the group distributed kilograms of cocaine to other persons, including Malik Frederick?

THE DEFENDANT: Yes.

MR. GAY: Did you perform the acts about which you have been questioned knowingly and intentionally?

THE DEFENDANT: Yes.

MR. GAY: Have you limited your answers to the questions I've asked you here today?

THE DEFENDANT: Yes.

MR. GAY: Are you aware of other facts pertaining to the criminal activity of Paul Bergrin, the criminal organization of which he was in charge, Alejandro Barraza-Castro, and others which you were not asked about here today but about which you could give answers if asked?

THE DEFENDANT: Yes.

MR. GAY: Are you guilty of the crimes -- the crime charged in Indictment Criminal Number 09-903 and Counts 16, 18, 19, 24 and 27 of Superseding Indictment Criminal Number 09-369?

THE DEFENDANT: Yes.

MR. GAY: Your Honor, in addition to the Defendant's allocution, the Government represents that it would be able to prove through witness testimony, recorded conversations and documentary evidence, that on June 22nd, 2009, the Defendant did sell a kilogram of cocaine to another individual; and that the Defendant also, on the dates in question, conspired to sell or distribute 5 kilograms or more of cocaine; that she sold 500 grams of cocaine on December 8th, 2008; and that she engaged in the wire fraud and wire fraud conspiracy as charged in the Indictment.

THE COURT: Thank you, Mr. Gay.

All right. Ms. Jauregui, with respect to the charge in the Indictment Number 09-903, how do you plead: Guilty or not guilty?

THE DEFENDANT: Guilty.

THE COURT: With respect to Counts 16, 18, 19, 24, 27 of the Superseding Indictment 09-369, how do you plead: Guilty or not guilty?

THE DEFENDANT: Guilty.

THE COURT: All right. Based on your sworn answers here in open court today as well as your sworn answers in the Form 11 questionnaire, it's the finding of the Court, in the case of United States vs. Yolanda Jauregui, that the Defendant is fully competent and capable of entering an informed plea as to Counts 16, 18, 19, 24 and 27 of Indictment 09-369 and as to the charge in Indictment Number 09-903.

The Court finds that the Defendant is aware of the nature of the charges and the consequences of the plea, and that the plea of guilty to these charges is a knowing and voluntary plea supported by an independent basis in fact containing each of the essential elements of each of the offenses. The plea is therefore accepted and the Defendant is now adjudged guilty of the charge in Indictment Number 09-903 and found guilty as to Counts 16, 18, 19, 24 and 27 of Indictment 09-369.

All right. We could have a sentencing date but it's not going to be of any --

THE DEPUTY CLERK: No.

THE COURT: So the matter, without objection by

the Defendant, will be carried. Correct?

MR. ADAMS: No objection.

MR. GAY: Your Honor, could we just have a brief sidebar?

THE COURT: Sure.

(Sidebar discussion off the record.)

(In open court.)

THE COURT: The Court made reference, as part of taking the plea, the Court made reference to the fact that there was also a Cooperation Agreement between the Government and the Defendant. Inasmuch as these proceedings are sealed and will be temporarily sealed until further Order of the Court, when the matter is put on the docket, the portion of the plea that refers to the "Cooperating Agreement" will be redacted.

And, Mr. Gay, I'll impose upon you to get a copy of this transcript and make sure that it's redacted, those portions, with Mr. Adams' consent, I'm sure.

Correct, Mr. Adams?

MR. ADAMS: Yes, your Honor.

THE COURT: Yes. That those references by the Court to a "Cooperating Statement" be redacted in a manner that it would not show that something was redacted. Okay?

MR. GAY: I will certainly do that, your Honor.

THE COURT: So you can work with Mr. Perelli as

well to make sure the transcript reads as if it was never even referred to. Okay?

MR. GAY: Certainly, your Honor, I'll do that.

THE COURT: Okay. Just as a remainder to everyone, these proceedings are sealed. They'll be no docket entry made today. Again, the only amendment to the Order -- I have to get an original Order from you as well.

MR. GAY: Yes, your Honor. I will amend the Proposed Order to include the Court's language and make sure I get it to you today.

THE COURT: Okay. If you can, get that to me by tomorrow. Okay?

MR. GAY: Yes, I will certainly will.

THE COURT: So I can sign it by tomorrow.

MR. GAY: Yes, I certainly will.

THE COURT: Anything else, counsel?

MR. GAY: The only thing, your Honor, I just want to make sure the record is clear -- and it's the Government's fault -- I provided the Court with a draft of the plea memo, and due to a pagination error in the printout, the one that the Court had actually had 14 pages and the original has 13. It's the exact same document, it's just that the way it printed out one of the paragraphs got put over onto a separate page by itself. So I just want to make sure that was clear. I think the Court might have referenced that during the plea allocution

and I just wanted to make sure the reference is clear, that it's 13 papers, the Plea Agreement. I apologize, your Honor.

THE COURT: That's fine.

(The Court and the Deputy Clerk confer off the record.)

THE COURT: Okay. All right. Counsel, that completes this proceeding. Thank you.

MR. GAY: Thank you, your Honor.

MR. ADAMS: Thank you, your Honor.

MR. MINISH: Thank you, Judge.

(Conclusion of proceedings.)

ooOoo

FD-302 (Rev. 10-6-95)

FEDERAL BUREAU OF INVESTIGATION

Date of transcription 02/24/2011

On February 2, 2011, RICHARD ROBERTS met with Special Agent (SA) SHAWN A. BROKOS, IRS SA STEPHEN D. CLINE, and Assistant United States Attorneys (AUSA) JOHN GAY and JOSEPH MINISH, at the United States Attorneys Office (USAO), 970 Broad Street, Newark, NJ.

ROBERTS advised that he had met with ABDUL WILLIAMS several weeks ago regarding possible legal representation of WILLIAMS for WILLIAMS' pending Federal charges. ROBERTS advised that during the meeting with WILLIAMS, he mentioned to WILLIAMS that there is a reporter working on a story relating to PAUL BERGRIN. ROBERTS told WILLIAMS that after the Federal trial against BERGRIN is over, ROBERTS would like WILLIAMS to meet with this reporter to discuss WILLIAMS' interaction with BERGRIN.

ROBERTS advised that he has not mentioned the possible book or movie deal related to BERGRIN to any of ROBERTS' other clients. He advised that going forward, he will not mention anything about the topic with any of his clients.

Investigation on 02/02/2011 at Newark, NJ

File # 272B-NK-115490-3985 Date dictated 02/21/2011

by SA Shawn A. Brokos SAB
SA Stephen D. Cline/bah SC

FD-302 (Rev. 10-6-95)

FEDERAL BUREAU OF INVESTIGATION

Date of transcription 11/04/2010

On November 3, 2010, ABDUL WILLIAMS (PROTECT IDENTITY), date of birth Social Security Account number was interviewed pursuant to a proffer agreement at the United States Attorneys Office, 970 Broad Street, Newark, New Jersey. Present as counsel for the defendant was Wanda M. Akin. Special Agents Ajit K. David and Stephen M. Egbert, as well as Assistant United States Attorneys Anthony Mahajan, Robert Frazer, and Joseph Minish, participated in the proffer session. After being advised of his rights under the proffer agreement and the identities of the participants, WILLIAMS signed the agreement and provided the following information:

WILLIAMS acknowledged his reputation for violence, but indicated that, although advantageous for his own security and that of his associates, did not always reflect reality. WILLIAMS has been in multiple "defensive" shootings where he returned fire to protect himself or his family, but which to his knowledge have not resulted in serious injury or death to any person. As a juvenile, WILLIAMS was involved in an accidental "BB" gun discharge for which he was arrested and charged. WILLIAMS has been the aggressor in only one shooting, which resulted in four years of incarceration between 2000 and 2004. An individual known to him only as "MUSH," a Bloods street gang member, had been taunting him shortly after the funeral of his brother EARL FAISON, who had died in police custody in April 1999; WILLIAMS retaliated by shooting him. WILLIAMS later became a suspect when MUSH, who had been rising in the ranks of Bloods, was shot again by someone else. WILLIAMS was himself shot on two separate occasions, at 16 and 22 years of age. The first incident was a robbery for his leather jacket, the second an ambush by a group of younger boys in the neighborhood. WILLIAMS has never been involved in any killings, and has never committed an act of violence at the request of another.

WILLIAMS is familiar with, but does not have intimate knowledge of, organized street gangs or the individuals running them. WILLIAMS grew up with several individuals that later became notorious for their criminal activity, to include HAKIM CURRY, ALQUAN LOYAL, MAURICE LOWE, and the BASKERVILLE family. By virtue of his reputation, WILLIAMS provided CURRY with protection when

Investigation on 11/03/2010 at Newark, New Jersey

File # 9A-NK-117645 Date dictated

by SA Ajit K. David

they spent time together. Although they maintained a close friendship, WILLIAMS never worked for CURRY.

After WILLIAMS was released in 2004, the owner of BROOKWOOD AUTOBODY on South Orange Avenue in Newark, VICTOR LNU, gave him a job detailing cars. While a well-known shop for "trapping-out" cars, WILLIAMS himself never used hidden compartments when transporting illicit drugs. Even though WILLIAMS did not maintain consistent legitimate employment, the money he had earned prior to his incarceration in 2000 kept him comfortable as he re-established himself in the drug trade. Prior to 2000 WILLIAMS moved heroin through the Bradley Court housing project on North Munn Avenue in Newark. WILLIAMS estimates that he could sell a maximum of 150 "bricks" of heroin on a given day. He could obtain approximately 300 bricks of heroin from his supplier as needed. His supply came almost exclusively from New York City; WILLIAMS dealt with an individual named JAY LNU from Washington Heights. In addition to doing business with JAY, he would spend time with him at night clubs. After WILLIAMS was released in 2004, the business of moving heroin had changed significantly and CURRY was making significant progress in advancing his own operation. WILLIAMS was convinced by LOWE to go into business moving powder cocaine.

WILLIAMS met PAUL BERGRIN in 1999 after his brother's death when the family was pursuing a lawsuit against the city of Orange. Although his lawyer at the time was THOMAS ASHLEY, ASHLEY could not represent the family because of his own connections within the city leadership. CURRY referred him to BERGRIN, who had been consistently representing CURRY, and advised him to bring a $3500 retainer to BERGRIN's office. BERGRIN, however, had a conflict of interest, as his partner ANTHONY POPE was representing one of the Orange Police officers to be named in the suit. CURRY and WILLIAMS did not discuss BERGRIN outside of his credentials as an excellent defense attorney.

In June 2005, WILLIAMS was charged in the stabbing and shooting of SHAWN PEARSON, known to him as "DUCK." WILLIAMS had tried to intervene in a gang conflict between Blood members PEARSON and another individual known to him as "DOFF," as their rivalry had brought unwanted police attention to his area of business. Later in the evening, the same day of their conversation, PEARSON was assaulted and WILLIAMS was charged soon after. WILLIAMS believed he was named solely because of his prominence in the neighborhood, and had no involvement in the incident. WILLIAMS retained ASHLEY

to represent him, but decided that he could not risk the parole violation that would result if he was arrested. For nine months, WILLIAMS became a fugitive to avoid going back to jail and facing an inevitable retaliation from other Blood members in jail. WILLIAMS believes it was probably DOFF who was responsible for the assault. The charges were eventually rescinded, although WILLIAMS is not sure why they were withdrawn or how he was charged initially.

During his time on the run, LOWE was killed, likely by people who had been moving cocaine with him. WILLIAMS speculated that, because approximately $400,000 had been seized on a routine traffic stop by police, he was punished for the loss by execution. LOWE left approximately $30,000 in cash at WILLIAMS' residence before his death that WILLIAMS rolled into his own operations. Although left without a "connect" for cocaine, WILLIAMS maintained business by traveling into New York City himself, and in December 2005 began hosting parties at a night club there under the production name "151 TOMBSTONE." WILLIAMS' deceased brother FAISON had created the name when he was making music. If WILLIAMS needed to, he could also purchase 125 to 150 grams of cocaine at a time from other drug dealers in the neighborhood. Occasionally, an individual known to him as "SHAY" would travel from Washington Heights into New Jersey for sales.

WILLIAMS knew of RASHEEM SMALL and his social club on Badger Avenue in Newark. WILLIAMS knew that people would be "set up" if they won too much money, and that gambling operators would take it back by force. WILLIAMS also knows of the rappers JIM JONES and CAM'RON, and particularly of JONES' association with ALQUAN LOYAL. WILLIAMS believes that JONES created a persona that misrepresents who he truly is. JONES' acquaintance with LOYAL gives him credibility and protection in the neighborhoods he travels in.

Prior to his death, LOWE had taken WILLIAMS to visit BERGRIN a few times at his former office on Market Street. WILLIAMS was again referred to BERGRIN by CURRY when he was arrested for violating parole in March 2006 (refusal to report on the PEARSON assault charges). At their first consultation, BERGRIN implied that, as PEARSON had been his client, he had in some way helped remove the assault charges against WILLIAMS. BERGRIN offered WILLIAMS a job in his law firm to assist with a state "Halfway Back" program that would allow WILLIAMS to work while serving his violation of parole. As WILLIAMS had taken a paralegal

class during his incarceration at Northern State Prison, BERGRIN could justify that position to the Parole Board. BERGRIN faxed a statement to WILLIAMS' guidance counselor and advised that a job was lined up for him. After a 60-day waiting period, WILLIAMS was granted permission to enter the program. WILLIAMS admitted that he performed no legal work during his time with BERGRIN.

On August 28, 2006, the day before his release from custody (exit from the program), and approximately one month into his employment with BERGRIN, WILLIAMS was again arrested on a charge of aggravated assault against ROB V. ROYSTER, who had been shot in the neck around the same time that PEARSON had been shot in June 2005. In addition to becoming "the usual suspect" because of his status as a drug dealer in that neighborhood, WILLIAMS came to believe that he was being targeted by the Newark Police Department because of their resentment at former Essex County Prosecutor PATRICIA HURT, who had taken a personal interest in the wrongful death investigation of EARL FAISON. HURT had even visited the family at the WILLIAMS' residence after FAISON's death. BERGRIN represented WILLIAMS on the new charges, which were all later dismissed.

In January 2007, WILLIAMS received a call from MARISOL LNU, BERGRIN's legal secretary, advising him not to come into the office that day because BERGRIN had been arrested on charges of running a prostitution ring. WILLIAMS was unaware that BERGRIN might be involved in such activity, and feared it might reflect badly on him for conditions of supervised release. Even though BERGRIN was released within a few days, WILLIAMS decided to take unemployment and go to truck driving school instead of remain on BERGRIN's payroll. There were no hard feelings, and WILLIAMS had gone with the rest of BERGRIN's employees to show support at his initial appearance in New York. WILLIAMS would continue to visit BERGRIN and his other former co-workers at his office on Park Place in Newark.

In the Spring of 2007, after one such visit, BERGRIN asked WILLIAMS to take a ride with him in his BMW 645. During their drive, BERGRIN offered WILLIAMS "the opportunity of a lifetime." BERGRIN needed a driver to transport significant amounts of cocaine for him, and WILLIAMS expressed interest. WILLIAMS had heard rumors of BERGRIN's involvement in illicit activities, but was shocked to be confronted with it directly. BERGRIN took him to meet ALEJANDRO LNU outside of a restaurant on Summer Avenue in Newark. BERGRIN advised him that the restaurant

was his, and that ALEJANDRO was his supplier, or "connect." BERGRIN would do business with WILLIAMS via two cellular phones, one would be kept by WILLIAMS at all times for business conversation with BERGRIN only, and the other would be provided at pickup for whomever WILLIAMS would be meeting for delivery. BERGRIN advised that he might call at any time on that phone and that WILLIAMS must meet him as requested.

Approximately one week later, BERGRIN called and told WILLIAMS to meet him at his restaurant. WILLIAMS went inside and saw ALEJANDRO along with YOLANDA JAUREGUI; he came to believe that they were related to BERGRIN somehow. While inside WILLIAMS ordered food and took it back to his car, a Cadillac sedan. ALEJANDRO came outside with a duffel bag and placed it in the trunk of WILLIAMS' car. WILLIAMS was instructed to go to TOP'S DINER in East Newark and wait in the parking lot. WILLIAMS was to call a pre-programmed number in the second phone provided to WILLIAMS to make further arrangements for the exchange. If facing the diner entrance from the street, WILLIAMS parked in the left lot and waited. A black Ford Explorer arrived with two occupants who appeared to be Hispanic, an older driver and a younger, heavier passenger. The passenger walked into the diner in a way that identified himself as the contact. WILLIAMS never exited his vehicle; he opened the trunk, saw that bags were exchanged by the older man, and drove back to BERGRIN's restaurant to deliver the new bag. WILLIAMS went to BERGRIN's office the next day, where BERGRIN greeted him, smiled, and paid him $3000 cash. WILLIAMS returned the second phone.

The second exchange was initiated on Washington Street in Newark less than a week later. At that time BERGRIN and JAUREGUI met WILLIAMS and BERGRIN gave him a duffel bag full of cocaine himself, placing it in WILLIAMS' vehicle. WILLIAMS was provided the second phone and proceeded to STAPLES in Clifton. WILLIAMS had rented a car from an ENTERPRISE in Bloomfield. As WILLIAMS' credit and finances improved, he began to rent from HERTZ at Newark Airport, which was more restrictive in its rental agreements. WILLIAMS advised that he periodically changed his vehicle to avoid being pinpointed by both law enforcement and unfriendly criminal competition. After giving the description of his vehicle to the exchange contact, he waited next to a walled section of the lot for them to arrive. The same black Ford Explorer from the first deal arrived and parked directly next to him. This time the younger Hispanic male who was formerly the passenger had driven there alone. The exchange of bags was made in the same way, and WILLIAMS

continued to BERGRIN's restaurant. WILLIAMS called BERGRIN, but JAUREGUI picked up and instructed him to meet her on the block behind the building. She met him there and took the bag from him. The next day, WILLIAMS went to BERGRIN's office for payment and to return the phone. This time he was paid $4000, as this bag was slightly larger than the first. From that point on, WILLIAMS resolved to look at the contents of his duffel bag deliveries and to re-negotiate his fee. The very next deal, WILLIAMS observed that he was delivering 8 kilos of cocaine. WILLIAMS estimates that he made deals in a similar manner approximately 30 times, averaging two deliveries per month.

FD-302 (Rev. 10-6-95)

FEDERAL BUREAU OF INVESTIGATION

Date of transcription 11/12/2010

On November 12, 2010, ABDUL WILLIAMS (PROTECT IDENTITY), date of birth Social Security Account number was interviewed pursuant to a proffer agreement at the United States Attorneys Office, 970 Broad Street, Newark, New Jersey. Present as counsel for the defendant was Wanda M. Akin. Special Agents Ajit K. David and Philip Blessington, as well as Assistant United States Attorneys Anthony Mahajan, Robert Frazer, John Gay, and Joseph Minish, participated in the proffer session. After being advised of his rights under the proffer agreement and the identities of the participants, WILLIAMS provided the following information:

WILLIAMS conducted approximately six to seven additional narcotics transactions with PAUL BERGRIN in the time frame between his office move to Park Place in Newark and the office Christmas party. WILLIAMS recalled being "shocked" that BERGRIN, especially as an attorney, was dealing directly with him. WILLIAMS considered it "sloppy" for BERGRIN to be in the supply chain so directly, as there would be opportunities for people to cooperate against him.

WILLIAMS had picked up his third delivery package from YOLANDA JAUREGUI, who told him his exchange contact would probably be waiting for him when he got the call. WILLIAMS began to meet more often with JAUREGUI because she had no other employment and was more mobile; BERGRIN had to keep appointments for his law practice. WILLIAMS had been advised to keep the bags for these exchanges in the trunk, but WILLIAMS recalled placing the bag in the backseat on the floor because the car had tinted windows. WILLIAMS then met a man in a Lincoln limo at the Burger King at Broad Street and Bloomfield Avenue in Newark, New Jersey. The driver of the limo was a well-dressed, clean-shaven, white male with a close-cropped haircut. WILLIAMS conducted exchanges with this man three to four times, each delivery estimated at between six to ten kilos of cocaine. The man would always pay with larger denominations.

WILLIAMS approached BERGRIN after the third transaction to re-negotiate his delivery fee. BERGRIN denied his request, and explained the benefits of the existing arrangement to him: free counsel; a nice car (a BMW 645 that BERGRIN paid the insurance for); and, most importantly, freedom from the dangers of street-

Investigation on 11/12/2010 at Newark, New Jersey

File # 9A-NK-117645 Date dictated

by SA Ajit K. David

corner dealing. WILLIAMS agreed that the arrangement was fair. WILLIAMS did not realize at the time that BERGRIN likely had multiple people delivering for him. WILLIAMS began to speculate BERGRIN might have a larger operation when he would see new faces at pickup, including a young black male who would appear from time to time. WILLIAMS now believes it was a "carefully orchestrated maze."

WILLIAMS believes he was trusted by BERGRIN because he had been vouched for by associates BERGRIN deemed trustworthy, especially HAKIM CURRY. WILLIAMS was interested in obtaining cocaine from BERGRIN on consignment, but was denied.

WILLIAMS recalls meeting ALEJANDRO LNU at the Red Roof Inn on Route 3 on one occasion. He conducted a transaction with the "limo guy" there.

A common meeting place was a Chinese restaurant in a mini-mall on Bloomfield Avenue.

WILLIAMS recalls having a meeting at a basement apartment maintained by ALEJANDRO and JAUREGUI near Branch Brook Park in Newark, New Jersey. It was near the Forest Hills Apartment complex, and there were tennis courts there.

WILLIAMS also recalls going to meet ALEJANDRO and JAUREGUI at an apartment in Clifton, New Jersey. On one occasion there were two unknown males there that WILLIAMS speculated were Mexican. WILLIAMS has given the money from cocaine transactions to JAUREGUI, ALEJANDRO, and one of the unknown Hispanic males from the Clifton apartment (whom he described as "chubbier" than ALEJANDRO).

In late 2008, WILLIAMS met a younger kid that had been in jail with ALEJANDRO.

Prior to his large quantity deliveries on behalf of BERGRIN, WILLIAMS sold drugs on North Munn Avenue in Newark, New Jersey, near the Bradley Court Housing Project. WILLIAMS would sell across the street from the project to make it easier to escape and throw away drugs if it became necessary.

After being charged with the aggravated assault of SHAWN PEARSON (aka "DUCK"), WILLIAMS went on the run to avoid jail and gang retaliation. WILLIAMS believed his friendship with the likely assailant, "DOFF," may have provoked PEARSON to name him in a

complaint. WILLIAMS also speculated it would have been well-received by law enforcement, who had a special interest in him. WILLIAMS came to learn that PEARSON was represented by BERGRIN on a separate drug possession charge shortly after the shooting. At some point while WILLIAMS was a fugitive in the following months, PEARSON withdrew his complaint. BERGRIN would later imply to WILLIAMS he was a factor in that outcome. WILLIAMS speculates that BERGRIN may have been planning to recruit him into his drug operation ahead of time, and used that opportunity to do so.

WILLIAMS learned that BERGRIN had a history of employing previous clients at his firm, including a man named "DRE" that WILLIAMS had seen previously at parties. WILLIAMS described him as dark, stocky, taller than himself, with a "fade" haircut. WILLIAMS saw DRE at BERGRIN's office at 50 Park Place shortly after BERGRIN's 2007 arrest. DRE warned him to "watch out for PAUL," and clearly harbored negative feelings toward him. DRE was there to meet with BERGRIN on another matter, but advised WILLIAMS that BERGRIN was "a sellout--don't trust him." WILLIAMS later learned that DRE owned an autobody shop.

During his current incarceration at Hudson County Jail, WILLIAMS also met a former Corrections Officer named BRASWELL who had been arrested for drugs. WILLIAMS learned that BRASWELL was working with BERGRIN also, and "was moving heavy with ALEJANDRO and crew."

WILLIAMS would know BERGRIN to speak openly about their operation in front of THOMAS MORAN.

WILLIAMS knew of an individual named MALIK FREDERICK to work in BERGRIN's office in the Summer of 2007.

The relationship between WILLIAMS and BERGRIN grew strained when WILLIAMS began to hear rumors that BERGRIN was speaking negatively about him behind his back, including accusations that WILLIAMS owed him money. WILLIAMS' distrust grew to the point that he began to use VINCENT SKOKA as his attorney instead of BERGRIN. WILLIAMS has heard that BERGRIN would refer to him as "monkey," and "nigger."

WILLIAMS met JAUREGUI's brother RAMON LNU at BERGRIN's Market Street office in Newark, New Jersey.

JAUREGUI has given money to WILLIAMS for delivery payments. At one time in the basement apartment, JAUREGUI pulled out $4-5000 from the purchase money delivery bag WILLIAMS was returning, and paid him directly. When WILLIAMS would see BERGRIN later, he would ask WILLIAMS, "You comfortable? You safe?" BERGRIN would then smile, implying to WILLIAMS that he had protection for those deals, and people watching him. Eventually JAUREGUI became the point of contact for delivery payments to WILLIAMS, and he would be paid from the return bag directly. If JAUREGUI was not there to receive the return bag, WILLIAMS would wait for payment. Although ALEJANDRO LNU was present at every post-exchange return, he never paid WILLIAMS. JAUREGUI was there a majority of the time. Towards the end of their dealings, WILLIAMS would see the "chubby" Hispanic male as well. He spoke better English than ALEJANDRO LNU did.

At drug pickups, WILLIAMS would see the "chubby" Hispanic male, ALEJANDRO LNU, JAUREGUI, and initially, BERGRIN himself. Towards the end of their business dealings, WILLIAMS would also see the young black male bring drugs for the pickups.

On one occasion, BERGRIN and JAUREGUI used WILLIAMS' car to pick up drugs from another location. WILLIAMS met BERGRIN in the parking lot of TOP'S DINER in East Newark, New Jersey, after following JAUREGUI there. WILLIAMS' car was then driven to another location, loaded up with drugs, and driven back to them at the diner.

WILLIAMS later learned that BRASWELL may have been moving 20 kilos of cocaine at a time.

WILLIAMS retained CLIFFORD MINOR for JAMAL MUHAMMAD in his June 2007 gun case because of a reference from SHAWKI ARRINGTON. MINOR was a frequent attorney for ARRINGTON, and WILLIAMS knew ARRINGTON through his Bradley Court drug operation. ARRINGTON, known also as "KIKI," began as a lookout for WILLIAMS, but later dealt cocaine for him. After WILLIAMS was arrested in 2000, ARRINGTON took on more prominence in Bradley Court.

In his independent operation, WILLIAMS was able to move approximately 100 to 150 bricks of heroin per week. He was also able to move about 1.5 kilos of cocaine per week alongside his heroin trade. WILLIAMS often invested his drug purchases with TROY BANKS, with whom he split any profits. WILLIAMS was able to develop a connect for his supplies himself. WILLIAMS operated

freely in 1997 and 1998 until his aggravated assault charge in 1999, when he had to "lay low" from police scrutiny. He would still get financial support from BANKS on the side. By the time he left for his prison sentence in 2000, BANKS and WILLIAMS were no longer on speaking terms.

HAKIM CURRY took care of WILLIAMS while he was incarcerated. WILLIAMS has known CURRY since he was in grade school, when they would play baseball in Vailsburg Park. In 1997, WILLIAMS vacationed in Virgina Beach with CURRY. WILLIAMS also had a friendship with the mother of CURRY's baby as well. CURRY introduced a supplier named "T" to WILLIAMS. MAURICE LOWE introduced an individual from New York named JAY LNU to WILLIAMS who would also supply him with drugs.

WILLIAMS would do small favors for CURRY, but there was little more than mutual respect as far as direct business dealings.

WILLIAMS was also close with ALQUAN LOYAL, with whom he was family friends.

MAURICE LOWE was WILLIAMS' closest friend and business partner, and "brought him into the dope game." LOWE was a heroin distributor, and WILLIAMS would purchase bricks from him. LOWE had the direct connection to a supplier. On some occasions WILLIAMS purchased "weight" from LOWE. WILLIAMS believes LOWE was killed by RASOOL MCCREMIN (ph) for failure to reimburse a significant drug money loss. WILLIAMS was interrogated about the death of MCCREMIN's cousin after he was killed in an apparent retaliation, but denied involvement.

FD-302 (Rev. 10-6-95)

FEDERAL BUREAU OF INVESTIGATION

Date of transcription 11/22/2010

Abdul Williams was interviewed at the Office of the United States Attorney for the District of New Jersey concerning matters related to Paul Bergrin. The interview was conducted under the terms and conditions of a proffer agreement and Williams was represented by his attorney, Wanda M. Akin, 744 Broad Street, 16th Floor, Newark, New Jersey 07102, telephone number (973)623-6834. Also present during the interview were Assistant United States Attorneys: Thomas Eicher, Anthony Mahajan and Robert Frazer and Ajit David, Special Agent, Federal Bureau of Investigation and Task Force Officer (Newark Police Department) Kenneth R. Lee. After having been advised of the nature of the interview and the identities of the writer and Assistant United States Attorney, Thomas Eicher, the following information was provided:

Since Bergrin had been arrested in May 2009, Williams has had no direct contact with Bergrin. On one occasion, there was indirect contact through a letter written by Bergrin. This contact was facilitated by Bergrin's girlfriend, Yolanda Jauregui. Jauregui called Williams and told him that she wanted to meet with him. They may have met at a gas station.

When they met, Jauregui told Williams that she had a letter from Bergrin and there was a message for Williams. Jauregui began reading the letter, but Williams took the letter from her and read it himself. In one part of the letter, Bergrin did have a message for Williams. Bergrin asked Williams to contact "Baskerville" and tell him to "stay strong." Williams' understanding of this was that this request concerned the "KEMO" case.

In this same letter, Bergrin also told Williams to stay strong. However, Williams was upset that Bergrin referred to him as the "Troll."

The part of the letter relating to Williams was on one page at the bottom. Williams tore off that bottom part and kept that portion of the letter. Williams believed that he kept that portion of the letter, but he is not sure what he did with it. He has asked his father and sister to look for that piece of paper, but they have not been able to find it.

Investigation on 11/19/2010 at Newark, New Jersey

File # 272B-NK-115490-C8 Date dictated 11/22/2010

by Charles J. Walkowiak

Williams did not contact Baskerville or his family. He claimed that he did not have a relationship with them so never followed through on Bergrin's request.

Williams recalled reading the letter, but could not recall the content other than Bergrin professing his innocence.

Williams did not know how Jauregui obtained the letter, but thought that it may have come out of jail with Bergrin's attorney.

Williams recalled a conversation that he had with Bergrin in Bergrin's office. During the conversation, Williams asked Bergrin if he thought "Fat Anthony" would talk. He also asked Bergrin if he was innocent in this matter. He remembered Bergrin smiling slightly and stating that it would not be smart for them to implicate themselves.

There was one other time that Williams recalled meeting with Jauregui. This was late in the day in a parking lot in Bloomfield, New Jersey. Williams characterized the meeting as "strange." Jauregui had a short Hispanic lady with her, but she did not want Williams to talk around that lady. At this meeting, Williams was driving a "loaner" which he described as the same vehicle and same color of the vehicle that the short Hispanic lady with Jauregui was driving.

After Bergrin had been arrested, he did not have any debt owed to Bergrin. He did hear talk that Bergrin thought Williams may have been cooperating with the authorities.

Williams had been driving a leased BMW that was returned to the dealer over the allowed mileage. This may have resulted in money being owed on the lease.

Williams had been assisting Bergrin with drug deals prior to his arrest. The last one before the arrest occurred several weeks prior to the arrest. Usually when Williams was involved in a drug deal, he would receive a call and then meet with Jauregui and receive the drugs. He would then make the delivery, receive the payment and then wait for the next call/deal.

Williams was not aware of any threats being made by Bergrin after he was arrested. No information about threats was conveyed to him by Bergrin or anyone else. He was not aware of any

threats against the Young family. In fact, he claimed to have a good relationship with the Young family and would embrace Young's sister whenever he saw her.

Williams may have talked to Bergrin prior to Bergrin's incarceration about reaching out to Young's sister. This contact was not meant to convey any threat.

In addition to the meetings with Jauregui, he also talked to her on the telephone on at least two occasions. During one of the calls, Jauregui asked Williams for money to rent a car. He told her that would try, but never did get her any money.

During the other call, Williams told Jauregui that he was going to surrender to the police and he told her not to worry about him. By this he meant that she did not have to worry about him saying anything to implicate her or Bergrin.

Williams was not aware of any threats being made by Bergrin or Jauregui against an FBI agent.

Williams was asked why his attorneys indicated a fear for their life in representing him. He could not explain why they felt that way other than the perception that existed in the public.

Williams cell telephone number had been (973)280-0140.

Williams was not familiar with the names: LaTanya Carter or Carlos Martir.

After Bergrin's arrest, Williams never had been instructed to find "Oscar." He did not know Oscar.

FD-302 (Rev. 10-6-95)

FEDERAL BUREAU OF INVESTIGATION

Date of transcription 12/13/2010

Abdul Williams, date of birth social security account number presently incarcerated, was interviewed, subject to a proffer agreement, at the United States Attorney's Office, 970 Broad Street, Newark, NJ, 07102. Also present at the time of the interview was AUSA John Gay, AUSA Joseph Minish, AUSA Rob Frazer and Williams' attorney, Wanda Akin. After being advised of the identities of the interviewing agent and TFO and the nature of the interview, Williams provided the following information:

Williams and Ramon LNU were working at Bergrin's office together for 2 - 3 months. Ramon LNU and Williams talked about drugs and selling them on his first day at Bergrin's office. Bergrin had told Williams he could trust Ramon LNU. Ramon LNU told Williams he could get cocaine for him. Williams asked Ramon LNU to give him a price (for cocaine) to beat out other drug dealers and he would find buyers for him. Williams began to meet with Ramon LNU once or twice a month, to conduct drug dealings. These drug dealings (agreeing to price and quantity) were usually set up while they were working at Bergrin's Office.

At some point between September and November, 2006, Williams and Maurice Low, aka "Mo", while in Low's white Cadillac Denali, met Ramon LNU and an older man, FNU LNU, who were in a truck, on a dead end street; approximately one block off of Summer Avenue and near a doggie-park, in Newark, NJ. Williams gave Ramon LNU the drug money in a yellow bag. Ramon LNU took the yellow bag of money, went into the nearby house and came out with the drugs. Ramon LNU got into their Denali, placed the cocaine under their seat, got out, and then left in the truck with his partner. The older man stayed in the truck the entire time. Williams and Low made a U-turn and exited the way they came in. Low was driving at the time.

Yolanda LNU was observed, in a grey Mercedes, by Williams, overseeing his first exchange of drugs. Williams believed Alejandro LNU was with her at the time.

Low took the cocaine and Williams met him later the next day. Williams took his share of the cocaine, but both Williams and Low agreed the cocaine wasn't very good. They agreed to work on

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by SA Todd C. Bina

acquiring a better quality of cocaine, but needed more money to do so.

On a separate occasion, at a Wendy's, Ramon LNU and his brother, FNU LNU, pulled right up next to Williams in their Jeep. The cocaine was in a clear, ziplock bag, which he pulled from the inside of his coat. Ramon LNU got into Williams' car, they exchanged money for drugs (Williams recalled purchasing between 250g - 500g of cocaine) and then all parties left.

Williams imbibed cocaine, sold cocaine, and delivered ("muled") cocaine while working for Bergrin. Williams eventually was able to sell cocaine for himself, and was trying to make as much money as he could. Williams thought Paul Bergrin over-priced the cocaine he had Williams delivering for him.

Williams sold 1 - 1.5 kilograms of cocaine per month; making about $3,000 per month. Williams also worked at an auto shop for a short time. Williams used to rent cars from a friend for $200 per week.

At one point, Bergrin moved his office to a different building. Around the time of the move, Bergrin introduced Williams to Alejandro LNU, in person, in the hallway of Bergrin's office, and explained that he was a "major connect." Later, but that same day, Bergrin drove them to Summer Avenue in his BMW. Bergrin went into a restaurant briefly and then came back out. He told Alejandro LNU, "This is my guy. I'll send him to you." Afterwards, Bergrin and Williams returned to the office. They walked around outside and laid out plans to use Williams to transport or "mule" the drugs. Williams was instructed that he was to pick up the cocaine from Alejandro LNU, deliver it to the customer and bring back their money, and then he would be paid.

Bergrin told him, "bring back the money and I will take care of you." He also pointed out that Williams did not have to be on the corner, looking over his shoulder and that people would be jealous of him. Bergrin gave Williams a phone that he was to call only him on. Yolanda LNU also gave him a phone with the customer he was meeting for the cocaine transaction already programmed in. When he would return with the money, he would return the phone as well.

Bergrin and Alejandro LNU ran the Isabella's Restaurant, where Williams would meet Alejandro LNU to pick up the cocaine and then return with the proceeds.

Williams recalled looking into his delivery bag the 3rd time he was tasked to deliver it to someone. He saw multiple kilograms of cocaine in the bag. Williams told Bergrin he wanted more money, but was told to be grateful for being on the payroll, having a job and getting paid very well.

After taxiing the cocaine shipments for Bergrin around, after the 4th or 5th time, Williams asked Bergrin to allow him to sell his own kilos of cocaine. Williams told Bergrin he wanted to see what he could do to make some more money for himself. Bergrin at first told him to relax and that he was doing a lot for him and needed to just be happy with what he was doing. More conversations occurred about Williams selling on his own, and Bergrin said he would think about it.

Williams went to Ramon LNU's house on Summer, in Newark, NJ, and met LNU, who spoke to Ramon LNU in Spanish, and then left. Williams and Ramon LNU discussed Williams getting cocaine, and at what price, on consignment, and then Williams selling it to make extra money. Williams did not recall the exact pricing that was agreed to at that time. Ramon LNU asked him to pay for cocaine up front, and not sell it on consignment.

A few weeks later, Bergrin gave him the okay and told him to be careful who he talked to. Bergrin vouched for Williams with Alejandro LNU, so Williams was "fronted" a kilogram of cocaine and owed $26,000 for it. Williams also continued taxiing cocaine deliveries for Bergrin and LNU. Williams handled his own drug dealings between taxiing jobs. Williams recalled the most cocaine he ever "moved" at once was four kilograms, and that he had done so at that volume on two separate occasions.

Per Williams, nobody in his family has committed any crimes but him. At some point, Yolanda LNU, girlfriend of Paul Bergrin, went to Williams' home, looking for his father or cousin. Williams' father thought LNU was trying to set Williams up, so he refused to answer the door.

Echo Yankee is one of the three largest drug dealers in the Newark area. "Coon" was a drug dealer whose supply of cocaine had an issue a couple of times, but Williams sold him kilos of

cocaine to help him stay in business. "Rock" was a drug dealer from Atlanta, but Williams was never supplied by anyone in Atlanta.

Williams advised that Bergrin knew Mohamad gave a false story about the gun charges.

FD-302 (Rev. 10-6-95)

FEDERAL BUREAU OF INVESTIGATION

Date of transcription 12/14/2010

On December 14, 2010, ABDUL WILLIAMS (PROTECT IDENTITY), date of birth Social Security Account number was interviewed pursuant to a proffer agreement at the United States Attorneys Office, 970 Broad Street, Newark, New Jersey. Present as counsel for the defendant was Wanda M. Akin. Special Agents Ajit K. David and Carl Priddy, as well as Assistant United States Attorneys Robert Frazer, John Gay, and Joseph Minish, participated in the proffer session. After being advised of his rights under the proffer agreement and the identities of the participants, WILLIAMS provided the following information:

WILLIAMS procured drugs for himself at least 15-20 times during his time as a drug "taxi" for PAUL BERGRIN in order to make sales to his own customers. WILLIAMS estimated he "taxied" for BERGRIN between 30-35 times. WILLIAMS made around 5 or 6 deliveries for BERGRIN once he started his own procurement. WILLIAMS would obtain one, two, or four kilos at a time; never less than one kilo. WILLIAMS would make pickups between the restaurant and the Forest Hill section of Newark, New Jersey. They avoided direct transactions at the restaurant, as they felt it was being watched.

All deliveries made by WILLIAMS were for BERGRIN's customers, not for customers of YOLANDA JAUREGUI or ALEJANDRO LNU. The working relationship was clear, and JAUREGUI and ALEJANDRO LNU were supporting BERGRIN's business.

WILLIAMS could get a discount on cocaine in "weight" if he got enough money together. He later learned that former Corrections Offier BRASWELL was doing this as well.

After WILLIAMS' release in the late Summer/early Fall 2007, WILLIAMS was advised by JAUREGUI to lay low until he had his electronic monitoring bracelet removed. WILLIAMS did not have a direct conversation with BERGRIN about restarting his business.

WILLIAMS reapproached JAUREGUI once the bracelet was removed, and was able to conduct 1 or 2 transactions for himself before resuming the "taxi" service for BERGRIN. WILLIAMS recalls a conversation with BERGRIN one weekend where he effectively said

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they were back to full operating speed and that he should be particularly careful with who he trusted going forward.

WILLIAMS recounted the events of his June 8, 2007 weapons charge as he recalled them.

WILLIAMS was with ISIAH WOODS, aka "DOG" or "WATCHDOG," returning from a wake in his Cadillac sedan. His family was not with him; their direct involvement in the incident was fabricated. They arrived shortly after his arrest.

WILLIAMS had a gun with him for protection because he knew he was going to Munn Avenue. WILLIAMS was speaking with JEROME ELEY when the police officers arrived in their patrol caravan. WILLIAMS immediately tried to drop his gun in the sewer, but it missed and landed on the ground. The arresting sergeant discovered the weapon after realizing he was standing there and had been the only one to walk away.

WILLIAMS posted 10% of his $15,000 bond to HAJ BAIL BONDS. BERGRIN vouched to the bondsman that the money "was good," and WILLIAMS' mother co-signed. WILLIAMS paid the bondsman once he was released.

WILLIAMS was not on BERGRIN's official payroll at that time because of BERGRIN's arrest on New York charges earlier that year.

WILLIAMS told BERGRIN he had "somebody lined up," but BERGRIN wanted reassurance that whoever had come forward would be a "standup guy" and wouldn't change their story under scrutiny. BERGRIN said, "Make sure I see him before we go further."

From what WILLIAMS recalls of the subsequent meetings held while he was incarcerated, JAMAL MUHAMMAD was taken to BERGRIN's office by his first cousin ALEEM GHAFUR. MUHAMMAD met with BERGRIN and his investigator.

After WILLIAMS had recommended MINOR to be MUHAMMAD's lawyer, BERGRIN agreed that MINOR was a "good guy." MINOR implied in a conversation with WILLIAMS that he didn't want to be "tied up in Paul's mess," but agreed to assist.

BERGRIN's only additional involvement after that point was the parole hearing, during which he cross-examined the

arresting sergeant. After no violation was found, BERGRIN recommended immediate release without electronic monitoring, but that request was denied.

WILLIAMS recalled that when he was 15 or 16, he himself had falsely accepted responsibility for a weapons possession on behalf of his older brother. On another occasion in 1997, an individual known to him as MUSTAFA LNU (a lower-level drug dealer working for WILLIAMS) accepted responsibility for drugs in WILLIAMS' car while he was driving. The same happened with an individual named CHUCK LNU in the late 1990's in a car WILLIAMS' was speeding in to New York. A lot of cash and a handgun was seized during a traffic stop, and CHUCK LNU, as a lower-level dealer working for WILLIAMS, accepted responsibility.

After WILLIAMS' arrest for weapons possession in 2008, WILLIAMS could no longer trust BERGRIN and turned to VINCENT SKOKA and DEAN MAGLIONE for legal counsel.

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FEDERAL BUREAU OF INVESTIGATION

Date of transcription 12/20/2010

On December 20, 2010, ABDUL WILLIAMS (PROTECT IDENTITY), date of birth Social Security Account number was interviewed pursuant to a proffer agreement at the United States Attorneys Office, 970 Broad Street, Newark, New Jersey. Present as counsel for the defendant was Wanda M. Akin. FBI Special Agents Ajit K. David and Jason Carley, DEA Special Agents Greg Hilton and Willie Thomas, as well as Assistant United States Attorneys Robert Frazer, John Gay, and Joseph Minish, participated in the proffer session. After being advised of his rights under the proffer agreement and the identities of the participants, WILLIAMS provided the following information:

WILLIAMS was questioned about the nature of his relationship with ex-girlfriend ASIA SMITH. WILLIAMS admitted to several incidents of physical violence, although stating that they were isolated and not characteristic of the relationship overall. WILLIAMS recalls punching SMITH at a New Year's Eve party, slapping her in front of his family, and also at another party in New York. SMITH and WILLIAMS knew each other since 1997, and dated between 2005 and 2008. They lived together for two years at WILLIAMS' home in East Orange, between 2006 and 2008. WILLIAMS admitted to frequent jealousy and suspicion during their relationship.

WILLIAMS recalled four incidents where he shot at and hit someone with a handgun. The first time was when he was between 14 and 16 years old, when an "old head" in the neighborhood tried to rob him. WILLIAMS shot him in the leg.

The second incident was the shooting of DORIAN BRAILESFORD, aka "REXY," a Bradley Court Housing Project hustler. WILLIAMS estimates in approximately 1994 there was a conflict over territory, and BRAILESFORD was shot three times with a small caliber handgun, after which his gun jammed.

The third incident was the shooting of "MUSH," for which he was sentenced to four years in prison.

The fourth was in 2005 of an individual named COREY LNU, from Irvington, New Jersey, which was committed with a .40 caliber Ruger handgun.

Investigation on 12/20/2010 at Newark, New Jersey

File # 9A-NK-117645 Date dictated

by SA Ajit K. David

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
CRIMINAL NO. 03-836

UNITED STATES OF AMERICA :
:
-vs- :
:
WILLIAM BASKERVILLE, : TRANSCRIPT OF PROCEEDING
:
Defendant. :
:
:

Trenton, New Jersey
April 25, 2007

B E F O R E:

THE HONORABLE JOEL A. PISANO
UNITED STATES DISTRICT COURT JUDGE

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

CHRISTOPHER CHRISTIE, U.S. Attorney
BY: JOSEPH N. MINISH, Assistant U.S. Attorney
ROBERT L. FRAZER, Assistant U.S. Attorney
For the Government.

CARL J. HERMAN, ESQ.,
KENNETH W. KAYSER, 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.

Joanne M. Caruso, CSR, CRR
Official Court Reporter

when counsel argues the facts and the evidence to you, you have some idea as to the standards against which to put those arguments and, secondly, because counsel do discuss the evidence, it's more fresh in your minds if you begin deliberations without having that hour and 20 minutes that I just put you through.

That's why I think it's better this way. I could be wrong, I could be right, I don't know, but that's the way we do it.

That being said, I'll now mercifully be quiet.

Mr. Frazer, you may proceed.

MR. FRAZER: Thank you, your Honor.

May it please the Court, counsel, Mr. Baskerville, Mr. Davis, Mr. Minish, ladies and gentlemen, good morning.

Let's start with why did William Baskerville decide to have Kemo DeShawn McCray killed. What motivated him to put in motion such a heinous, despicable act as you heard Anthony Young testify to? What made him, in effect, point Anthony Young at Kemo DeShawn McCray on March 2, 2004?

Now, the evidence is in. You heard the legal instructions and I submit to you that taken together in these last three or three and a half weeks that you heard the testimony, it is overwhelming as to the defendant's participation in a conspiracy.

You've just heard from the Judge what a conspiracy

is. It's no magic legal language. It's simply an agreement.

There's overwhelming evidence of an agreement with others to murder Kemo DeShawn McCray. We'll analyze as we go on into the afternoon the evidence of the conspiracy to murder Kemo DeShawn McCray.

I'm going to spend a brief time this morning talking about some of the drug transactions that we heard through the testimony of Agent Shawn Manson. I submit to you that they're equally overwhelming evidence of counts four through nine, the drug transactions, and of the defendant's participation in a drug conspiracy in count three.

I'm going to spend a little more time on the drug conspiracy than the transactions because while factually the evidence, I submit, is again equally strong, the conspiracy, as you just heard the charge legally, has a couple of different things that you have to keep in mind. That could be confusing, even to lawyers it's confusing. We'll spend a little more time showing you how the facts of the drug conspiracy apply to the law that Judge Pisano just gave.

There should be no doubt by now, based on the evidence, that the defendant distributed crack cocaine between the period in the indictment, January of 2003 to November of 2003, and that he had agreed with others to help him in that unlawful objective.

I want to start, as I said, with the motive for the

murder to answer some of those questions, why, why did this happen? For that, you have to look into the mind of William Baskerville starting on November 25th, 2003.

If you recall Agent Manson's testimony, that day started at about six o'clock in the morning, when her F.B.I. team executed a court-authorized arrest warrant at the defendant's home in a location at 424 Robins Street in Roselle, New Jersey.

This was the culmination of an exhaustive ten-month drug investigation. When the F.B.I. entered his home that day, one thing was clear to the defendant, these were not local law enforcement. This was not the Irvington police, the Roselle police or the Newark Police Department, these were federal agents entering his home that day.

To get a glimpse of the defendant's thinking that morning, start with something that you heard from the witness stand, Rick Hosten. You remember him? He gave the testimony, he was arrested at about the same time the defendant was, the day before. He ended up coming to court with the defendant on the day of the defendant's arrest, November 25th.

Remember what he told you? He, too, was arrested based upon Kemo McCray's purchases of crack cocaine from him. We'll get to that shortly.

He told us something interesting that goes to what was in the defendant's mind in the lockup. Remember in the

marshal cell that he talked about where he first met the defendant? He told us, Rick Hosten told us that he, himself, had never been through the federal system. It was interesting that the very first thing that Rick Hosten interacts, the first time he interacts with the defendant in the marshal lockup before they go see the judge that day, he asks the defendant, have you ever been through the federal system? And the defendant says, no.

So what you get from that is it's unfamiliar territory for Rick Hosten, but it's also unfamiliar territory to the defendant. He was now in the federal system and he hadn't been through that before. You heard evidence that he has, the defendant has two prior drug convictions. That, as the Judge told you, can be used to show his motive. Keep in mind those are state convictions, not federal convictions.

What happens next? At that point the defendant gets a serious dose of reality. The events that ended in Kemo DeShawn McCray's murder were about to begin because remember what Mr. Herman said right from the beginning in the open statement? The defendant was a three-time loser, based on those two felony convictions.

You heard me read yesterday Government exhibit 36. It was the initial appearance when the defendant was first brought before a United States Magistrate. Assistant U.S. Attorney that you heard a lot about, John Gay, who was the

prosecutor at the time, read into the record, he basically told the defendant what he was being charged with and the maximum penalty he faced.

You'll recall, when I read that yesterday to you, Mr. Gay announced that based upon the distribution charge for distributing crack cocaine, the maximum penalty for that charge was 40 years. So right away the defendant knew this was serious business. The prosecutor had just said he was facing a potential sentence of 40 years in prison, substantially the rest of his life.

In fact, as he would learn later at the detention hearing, and that's the second transcript I read to you yesterday, exhibit 37, a few days later he had been indicted by a Grand Jury now for an additional charge, which is the conspiracy to distribute the crack cocaine, which is part of the indictment. That 40-year-maximum sentence now became life in prison without parole.

If that wasn't enough, the defendant found out right there that he would not be going home on bail. He would be what's called detained pending trial. He did -- know matter how much money he would put up, the judge determined that he should remain in jail pending trial.

As we'll see in a moment, that made the defendant angry. Just so you know, bail was not denied because he was poor, as Mr. Herman implied in the opening statement, far from

it. That is a typical thing that happens, detention in the federal system when you're a career offender such as the defendant, you're facing life in prison as the defendant was based upon the maximum sentence possible under that charge and for what could turn out to be, if convicted, his third felony drug distribution.

The defendant was probably not only shocked, he was angry. As you saw in Government exhibit 41, another thing that happened at that initial appearance was he was given his complaint for the first time in the courtroom. He was shown the charges against him. As he saw the complaint, several thoughts, I submit to you, were going through this mind.

Who did I sell these to? Who's this informant? Who ratted me out? Now, Government exhibit 41, the complaint, doesn't say Kemo DeShawn McCray is the informant, obviously. The Government tries to protect as best they can the informants, the F.B.I. informant that was used, but the law does require that some facts be put in the complaint to inform the defendant of the charges.

Included in that complaint, which by the way, all the exhibits you're free to look at, they'll all be sent back into the jury room.

Look at it. Included in the facts in the complaint are simply the words "cooperating witness" and the amount of four of the six drug transactions. By the time the defendant

gets back to the cell and the marshal's lockup after the court appearance where he goes back with Rick Hosten, he sees that complaint and he has a pretty good idea who the informant is.

The reason for that is you've heard throughout the testimony, is that what it turns out, what the Government could not have known at the time, was that he usually sold higher quantities of drugs. You'll recall several of the cooperating witnesses, Rick Hosten, Eddie Williams, Troy Bell, Eric Dock, they all told you that the defendant told them that he figured out who the informant was based upon the smaller amounts of drugs that he sold and he only sold those smaller amounts to Kemo DeShawn McCray.

Rick Hosten confirms that. The defendant says, if you recall the conversation, I know you're from Wainwright. I know you, right, from the block. That's Kemo's block.

Then he asks him a key question. Did you deal with Kemo? This is the defendant asking Rick Hosten. What did Rick Hosten tell you that meant? Did you sell drugs to Kemo? Rick Hosten at that point confirms what's already in the defendant's mind based on the complaint, that the informant is Kemo DeShawn McCray. Rick Hosten said yes, I did deal with Kemo, that's why I'm here, need.

What happens next tells you really everything you need to know about the defendant's state of mind on November 25th, 2003, after his initial appearance in court. I'm going

to read to you the first of several portions of the transcript because what the Judge just told you is true. What I say is not evidence and what Mr. Kayser or counsel say tomorrow in their closing statement, not evidence. That's why you're not taking notes, right?

What's in this transcript is the evidence and what you heard from the witness stand is the evidence and the exhibits we introduce, that's the evidence. I'm going to refer to portions in the summation to certain portions of the transcript.

At page 4278, a question is put to Rick Hosten on direct examination.

"QUESTION: Okay.

"He mentioned small amounts?

"ANSWER: Yeah.

"QUESTION: All right.

Was he upset, was he happy, what was his mood?

"ANSWER: He was upset.

"QUESTION: What did he say about Kemo?

"ANSWER: He said he was away from his family because of a fucking bum.

"QUESTION: He said he was away from his family because of a fucking bum?

"ANSWER: Yes.

"QUESTION: And he was talking about Kemo?

"ANSWER: Yes.

"QUESTION: Did he say that -- was that the end of the conversation?

"ANSWER: No. He kept going on about it. He was basically, he kept saying the same thing over."

"I'm away from my family because of a fucking bum." He doesn't say that once or twice, he says it over and over again. He's upset.

We know this is true because it's at this time that Will Baskerville makes the decision to tell his lawyer, Paul Bergrin, the informant is a guy named Kemo. He doesn't just rely on Paul Bergrin, who, if you recall, lots of testimony about him being the house counsel, by the way, the lawyer that the drug organization, Hakim Curry always calls when a member of the organization gets in trouble.

He doesn't just limit his message about Kemo to Paul Bergrin. What does he do? The moment he gets back to Hudson County, the moment that they get transferred from the marshal's lockup back to Hudson County, Rick Hosten told you, he gets on the phone. You saw photos of the cell and there was a phone there and Rick Hosten's looking at the window and over his shoulder he sees the defendant on the phone.

The first moment he has an opportunity to get to the phone, he does. What does he say? Rick Hosten told you. Page 4325 of the transcript. Rick Hosten says, "I was

standing. The phone was at the wall. I was standing near the door and he seemed to be on the phone and he was saying, you know, when he said the name Kemo, I glanced over. He was over by the phone. He was like, that fucking Kemo, you know."

Who's he calling, ladies and gentlemen? Well, I submit to you the evidence that you heard later on supports exactly what the cooperator said, he was calling his brother, he was calling his brother Rakeem Baskerville, I'm sorry, and he was trying to get in touch with him, as the cooperator said, so that he would tell Hakim Curry to handle it.

Ramaine York tells us exactly that. And that, ladies and gentlemen, that phone call, that communication with Paul Bergrin, it's Kemo, that was the beginning of the agreement, of the plot, of the conspiracy to kill Kemo DeShawn McCray.

So what was it that the defendant decided at that time, November 25th 2003, that he absolutely had to prevent? Something he absolutely could not live with? Well, he was afraid and we know he was angry. He was afraid of spending the rest of his life in prison and he was angry that he was in that situation because of Kemo DeShawn McCray.

He knew right from that moment on November 25th, in Hudson County, when he got back to the bullpen and he was waiting to be assigned to the tier, he knew that he had two choices. It was real simple. Spend the rest of his life in jail because the evidence clearly was going to convict him, or

get rid of the problem, get rid of the informant.

So again, look to his mind. His anger led him to make a calculated decision that day, kill Kemo for what he had done. That fucking bum. I won't be going home to my family. I'm in here because of a fucking bum, a rat, a snitch, right, in his world.

That, ladies and gentlemen, is the basis of count two, the retaliation, to retaliate against a witness for what Kemo had already done, had put him in the position that he was now facing life in prison for these drug charges, all based on Kemo and the purchases of crack cocaine.

His fear of spending the rest of his life in prison, that fear that he would never see the light of day drove him to kill Kemo McCray, to prevent him from becoming a witness in the case against him. That is the basis of count one, the conspiracy to murder a witness.

Because if Kemo had lived, if he did not, if the defendant did not take the actions to insure the defendant -- to insure that Kemo did not become a witness, if he did not do that, Kemo would be alive and where would he be and what role would he play in all this? I submit to you, ladies and gentlemen, he would have been called as a witness in the case of the United States of America v. William Baskerville, in courtroom number one, in Trenton, New Jersey, the Honorable Joel Pisano presiding. Basically, the drug portion of the

case that you heard and the first witness in that case would have been Kemo DeShawn McCray.

If he had lived and the defendant had not made the decisions he did on November 25th, 2003, I submit to you that in that door, after either Mr. Minish or I called him as a witness, he would have walked into that door, he would have come up here just like the other witnesses and he would have gotten up on this witness stand and he would have sworn on this Bible to tell the truth.

And after a few background questions, he would have been sitting in this chair and he would have been asked the following questions: Mr. McCray, tell us why you're here. He would have told you that he had worked with Agent Manson during a drug investigation. And he would have been asked at some point, did you come into contact with a man named William Baskerville? He would have said yes.

Then we would have asked him and tell us how you know Mr. Baskerville. He would have said between March of 2003 and October of 2003, during that conspiracy period, he would have said that he bought crack cocaine from the defendant six times.

We would have asked him to look around the courtroom and identify the person he referred to as William Baskerville and he would have pointed over there and said, he's wearing the brown shirt.

We would have asked the Court and said identifying the defendant, your Honor.

So I don't mean to be overly dramatic by doing that, ladies and gentlemen, but what I think is important, as we go through this, is that is the motive. That is the motive, to keep Kemo DeShawn McCray from doing exactly what I just did, to keep him from coming here and insuring a conviction against the defendant.

Now, you know a little bit, obviously you knew before based on the evidence, I didn't have to tell you, what the motive was. The reason that Will Baskerville decided that Kemo McCray must die, he must be pushed, that's what Eddie Williams told you, he must be handled, that's what Ramaine York and Dock, Mr. Dock and Mr. Bell told you. He must be killed.

Because the defendant knew that if Kemo did take the stand, his fate would be sealed. He would be found guilty and spend the rest of his days in the jail cell, so he wasted no time. He put the word out and entered into what became a very deadly agreement.

As we move through the testimony, keep all that in mind. The defendant made that cold and calculated decision early on, on November 25th, 2003. His motive, again, was a lifetime behind bars and it was in his mind only one way out, no Kemo, no case.

Let's turn to that case, let's turn to the drug case, which is the basis for the plot. Who is Kemo DeShawn McCray? You didn't have the opportunity to actually meet him. You saw a picture of him. That's Kemo DeShawn McCray.

He was a young man from the streets of Newark, grew up on Wainwright Street in Newark, and at the time of his death on March 2, 2004, he was about 33 years old.

You heard he had a family, some kids, he had a mother, a step-father. His mother's name was Delphine Smith and you heard the step-father's name was Johnnie Davis. He also had a close relationship with a stepdad type person by the name of Christopher Spruill. You may recall Agent Manson told you that.

Christopher Spruill, Agent Manson told you, was a F.B.I. long-time informant that helped her on numerous cases over the years prior to William Baskerville and ultimately Kemo McCray, if you recall, meets Agent Manson during this incident about this shotgun that was found in, I believe it was Delphine Smith's home, but it was in Kemo's room. Eventually he took responsibility for that and that's how he came into contact with Agent Manson and, in fact, became much like his step-father, Christopher Spruill, a paid informant for the F.B.I.

Now, Shawn Manson told us that Kemo McCray had a criminal history. We weren't hiding that, that came out on

the direct examination. It wasn't for drugs. He had no drug convictions, but clearly, he was a person who was on the street, who had a relationship through a girlfriend or something with the Crips gang members. He was a guy that could help the F.B.I. based on his contacts, Agent Manson told you.

Despite the best efforts of the defense to paint Kemo as a lying criminal, Kemo, was, in fact, was maybe a little later in his life, but finally came to the realization that he should do the right thing, he should help law enforcement. He risked his life, obviously for basically a few thousand dollars.

He did that, I would submit to you, ladies and gentlemen, to basically help the F.B.I., to help Shawn Manson, to basically, Shawn Manson told you, to win a neighborhood back from the Grape Street Crips, to clear the streets of a violent drug gang.

Now, did Kemo -- you heard evidence through Agent Manson on the direct examination that Mr. McCray made some extra money behind her back. During the investigation, he got some drugs from Rick Hosten and he made about three or four hundred dollars without telling Agent Manson. He violated the rules of the cooperating agreement he had with the F.B.I., the informant agreement.

You heard that he made up some relationship between

Rick Hosten and a guy named Tyrone Cox, who was another drug dealer, so he did do that.

How should you consider that? Did Mr. Hosten come here and tell you he, in fact, sold drugs to Kemo McCray? Yes. Kemo McCray was accurate as to that. Did Tyrone Cox, Agent Manson told you, eventually plead guilty, on the list of the Grape Street Crips? Yes. So Kemo McCray was accurate about that. By the way, he was accurate about 14 or 15 other Grape Street Crips who were arrested based upon his evidence, the buys that he made and so he was accurate about all those.

Kemo DeShawn McCray, he's really not on trial. He's not here to defend himself and it's not about Kemo McCray, because the F.B.I., while they heard certain things from him and they relied on him to some extent, obviously, did not just base their case against William Baskerville on what Kemo McCray said. Everything he said, I submit to you, regarding this defendant was corroborated by other evidence, corroborated by Agent Manson and this corroboration theme, you're going to hear me say "corroboration" about 62 times between now and this afternoon, so bear with me. It's important, it's an important concept to know.

You're not relying on any one person in this case, the testimony of one person, the evidence from one person. Everything those witnesses said from start to finish was corroborated by other evidence.

I asked Agent Manson whether Kemo's actions had any affect on the Will Baskerville investigation, any at all. She said, no. I asked her, was he still going to testify against Will Baskerville, even though he had gone behind her back and he had been cut off under the F.B.I. rules as an informant? Yes, he was obligated to testify, he was ready to testify against anybody, Will Baskerville or any of the others. The others all pled guilty, but he was ready, willing and able and obligated to testify in this case.

So remember, as I said already, not one time in the trial has the Government brought a witness, whether it was the evidence you heard through Agent Manson about Kemo or any of the other cooperators, that was not corroborated by other evidence.

Keep in mind right away that it takes a street person, someone who can talk the talk, Agent Manson said, to catch odd drug dealers. We'll see how that applies to the murder conspiracy from the jail later on.

Will Baskerville first comes to light in the F.B.I. investigation, you'll recall Agent Manson telling you, in the summer of 2002, when he's observed during a surveillance, which is a usual technique the F.B.I. uses, she told you. There was a surveillance on the street in Newark and they see the defendant with his Cadillac Escalade and he's talking to a man named Shelton Leverett, one of the Crips gang members.

This was in the summer of 2002, and later on Agent Manson told you she found out that that was a drug-related conversation.

Now, we get into the transactions and you'll learn -- you learn right away, the first thing you heard about the transactions was something from January 13, 2003. In fact, that's the beginning in the indictment of the first date in the conspiracy, the drug conspiracy. Again, keep in mind what the Judge said about those dates are approximate. You only have to find the conspiracy somewhere in between those approximate dates, January 13, 2003 to November 25th, 2003.

You'll recall that on January 13, 2003, there was a transaction between Kemo and someone by the name of Taquan Singleton or Quanny. The reason that's important, it's during that transaction that we first see the defendant's drugs, we first see Terrell Thomas and we first see Terrell Thomas in this transaction with Quanny and Kemo.

And Kemo purchases an amount of drugs, vials of crack from Quanny and you'll recall that Quanny then says, hold on. He goes over to Terrell and Terrell supplies him with the crack and then Quanny gives Kemo the crack. Later on, we find out that Terrell Thomas is a member of the conspiracy. At that time he is distributing the defendant's crack cocaine.

That's why that was important. We moved ahead to February and that is the introduction, if you recall, sometime in early February, mid-February between Terrell Thomas

introducing Kemo McCray to his man Cheeb, who we now know was the defendant, William Baskerville. Terrell gives Kemo his cell phone number and the defendant gives him his cell phone number and the defendant tells Kemo, if you want to buy crack, call me on this number.

That number, which I think is familiar to you by now is the 862452-1815.

Right away Kemo is showing us and the evidence shows us that the conspiracy is right from the beginning. Terrell Thomas is introducing the defendant as the guy to go to for crack cocaine. And the defendant's giving out his cell phone number. There's an agreement there obviously. In a moment we'll show you more about Terrell Thomas.

I just want to talk briefly that phone number's important and I don't know if you all got the connection with the phones. Just so it's clear, there's a record in evidence, I believe it's 450, and that shows you who that phone was registered to, the 1815 phone. It comes back to a person named Wali Green, W-a-l-i, I believe is that. We made up a little chart and I'm not sure how clearly you're going to see it.

We have copies for the jury. If the Court doesn't mind, we'll hand out copies. While that's being handed out, Wali Green, you'll see from the phone records, I think there are Sprint registers, is the registered owner of that phone.

Later on, you heard from Agent Manson, by the way, that the F.B.I. couldn't find anybody by that name at the address that's given, which is 751 South 16th Street.

Right away they knew there was something suspicious about this phone. Later on you'll see in the second item there is a pager. The connection between the first cell phone and the pager is the pager is recovered upon the defendant's arrest on November 25th, 2003, inside his home. That pager's also registered to Wali Green. That's Government exhibit 38 from the beeper company.

That's how you know that the first phone is connected to the defendant, because the pager registered to the same person, by the way, slightly different address with unbelievably a slightly different spelling, which would give you a hint that no Wali Green exists or he spelled his name wrong on the two items. That connects the first phone.

The second phone, if you move to the right, (908)413 phone which is used in the September 9 transaction and the October 23rd transaction, you see that's registered and the records are in evidence to Annie Williams. You can go to Government exhibit 259, which is on the chart which is the mortgage records, deed records to the home at 424 Robins Street and you heard testimony that Annie Williams is the defendant's wife's grandmother. She actually is a part owner in the defendant's house, according to the records. Okay.

So you know that that phone is also connected to the defendant. There's really no dispute that the defendant is heard on those tapes. There's a stipulation as to that. I just wanted you to be aware of how the phones connect.

Let's go to move forward in the transactions. By the way, you'll be happy to know I'm not going through all the transactions. We're going to look at Terrell Thomas. While I joke, this is important, obviously, that each one of you understand the conspiracy.

Terrell Thomas is out there with Will Baskerville during this February introduction. He's also heard on the very first phone call, and again, we're not going to play the calls. You're invited, of course, to listen to them again. We've cleared up a lot of the interference, we hope. You can do as you please whether you want to listen to the calls.

On the very first phone call, you actually get a glimpse of the knowledge that Terrell Thomas has and his role in the drug conspiracy with the defendant. That's on page two, where Kemo is saying that he sees the defendant in a Yukon. It was some kind of truck, a black Yukon or Caddy. Terrell Thomas says it was a Caddy, he corrects him. Then Kemo says, yeah, with some chrome rims on it?

And Terrell says, yeah.

Later on Kemo says, I don't know if I dialed the right number or not.

Kemo asks, is it (862)452-1815?

Terrell, 862, wait a minute, hold on.

Terrell, 862, yeah, 452, yeah, 1815.

Terrell Thomas is now in a conversation about hooking Kemo up with drugs, is now telling him the defendant's phone number. Because again, he is a distributor of the defendant's crack cocaine. That helps you to understand the relationship.

Right from that first phone call, you're getting a glimpse into how Terrell Thomas fits into the conspiracy, but March 17th, is the first transaction. We told you that first transaction is not part of the substantive indictment charges, the substantive drug transactions four through nine, but it's important again, because it tells you something about count three, the conspiracy.

Again, on March 17th, if you recall, there is a sale set up on the phone that William Baskerville is going to come over and sell crack to Kemo. He actually shows up at the location, but he has a couple of people in the back of his car, Agent Manson told you, and you heard on the call, and so he has to bring these people somewhere. And he tells Kemo, I'll be back in about 45 minutes, hold on. But if you can't wait, basically, he's saying, deal with my man, Rell, my man Terrell.

Why? Because ultimately the money ends up in his hands either way. Because Terrell is fronted the drugs and

when Terrell sells drugs, the defendant's selling drugs. When Terrell profits, the defendant profits.

That's from exhibit 102. Kemo's saying, hello.

Terrell says, hello.

Kemo says, what's up?

What's up? Chilling.

Kemo, yeah, I talked to your man earlier. He told me to tell you.

Terrell, yeah, he told me.

Kemo, huh?

Terrell, huh? It goes on.

He says, Kemo says, he told you?

Terrell says, yeah.

Kemo, well, Rell, yo, you didn't tell me he didn't call you.

Terrell, I'm trying to get that info now. Terrell says, I got to get in touch with him now because somebody else, somebody else want to see him.

Terrell is telling Kemo, you're not the only customer that I have to get to my guy William Baskerville, there are other guys calling me because I'm part of the agreement to sell drugs with Baskerville, there are other guys calling me. Somebody else want to see him.

Terrell on the next page, page three says, so, um, as soon as I get in touch with him, I'm going to see what's up.

I'm going to see if I can get something from him and I'll call you.

Kemo, all right.

Terrell, I already got one thing, but I don't think he got enough to, you know.

Kemo, yeah. Well, man, listen. I need something now.

Terrell, he better, he got to try to best stretch it because the shit fucked up right now.

Kemo, listen, I need something, man.

Again, there's this conversation between Kemo and Terrell to get to the defendant for Terrell to facilitate this sale. There is no question there's a conspiracy at that time, early in March between Terrell Thomas and William Baskerville.

Under the law, as the Judge read it to you, that's it, the defendant's guilty. He had agreed with one other person, he's a member of the conspiracy and he agreed to do something and do something in furtherance of an unlawful act.

That day when he came out and told him deal with my man, Rell, that's an act in furtherance of the conspiracy. It doesn't matter, by the way, that later on the defense may argue that Terrell had other suppliers, okay. He had other suppliers, doesn't mean the defendant left the conspiracy. It doesn't matter that Terrell owed Baskerville money, because remember, he gets fronted money and he's expected to pay it

when he sells it.

You heard the conversations. I'm not talking to Will today because I owe him money. I'm not going near him. Doesn't mean he withdrew from the conspiracy and it's not Terrell's portion we're interested in, the defendant, the defendant's still selling crack.

It doesn't matter that other members of the conspiracy join later on and we'll get to Horatio Joines or Ray-Ray. As the Judge just told you, even if you join later on, you're responsible for all other acts that came before you, okay.

As the Judge also told you, drug conspirators don't sit around the table on the street and announce an agreement to sell drugs. You have to figure out the conspiracies by circumstantial evidence, as the Judge told you. You got to look at all the facts. You're not going to hear anybody, at least for the drug portion, I agree with you to sell crack cocaine.

You do have, though, the defendant's own words on tape on the phone calls. You have evidence that the defendant, from various witnesses, Koby Cuyler and others, that the defendant controlled a whole block. He controlled the area of Avon and 16th. It wasn't just Kemo he was selling to. Kemo was a relatively small customer of his, if you recall. He had runners, he had pitchers, he had managers, he

had packagers.

You heard from Car Wash. He had people cooking up for him, cooking up the raw, because he talks about raw versus crack and he has suppliers. He talks about connects.

So this is not a one-man operation. That would be impossible. It doesn't work that way on the street and you've heard that from several witnesses. Koby told you that, Shawn Manson told you that, Car Wash told you that.

On March 17, if we go back to that, he does this deal with not the defendant, but Terrell Thomas for those black top vials which are exhibit seven and we showed that to you and you're free to look at them during deliberations. We can't give you the drugs, but you can come out to the courtroom and look at them. You heard Car Wash tell you about packaging these types of drugs in the defendant's detailing shop. We'll get to that in a minute.

March 17 sale is not a count that you can consider in counts four through nine but it is part of the conspiracy. It shows a common purpose and scheme between Terrell Thomas and the defendant, shows an agreement, a relationship and a conspiracy.

I want to read to you briefly from page 3515 of the transcript which is Shawn Manson's direct testimony.

"QUESTION:" Line 14, "Did he report to you that he spoke to anybody else related to that?"

She's talking about Kemo.

"ANSWER: He also spoke to Terrell Thomas and in his conversation with Terrell Thomas, Terrell Thomas indicated that he is also waiting on Cheeb for his drug supply.

"QUESTION: And again, that was -- he was telling you he spoke to Terrell Thomas on March 4th?

"ANSWER: Yes.

"He told you this on the sixth?

"ANSWER: Yes, he did.

"QUESTION: Now, at that point what was your understanding of Terrell Thomas' role in the investigation as a target?

"ANSWER: Terrell Thomas was an individual who knew William Baskerville supplied drugs to and Terrell Thomas in turn then sold them to other individuals in his immediate area. So we knew that Terrell and William Baskerville were working together and already had a pre-existing relationship.

"When ever Kemo could not find or could not get ahold of William Baskerville, he would contact Terrell Thomas and try and ascertain where William Baskerville was or to try and pass a message to William Baskerville.

"QUESTION: Agent, was that based on the events of January 13 and then February where Terrell introduced him to William Baskerville?

"ANSWER: Yes, that's based on that. That's how we

determined what the relationship was between Terrell Thomas and William Baskerville. They had already had a pre-existing drug supplier, the drug relationship with one another. When Kemo entered into his dealings with Terrell Thomas, and Rakeem -- I mean, I'm sorry, William Baskerville."

It was apparent to the F.B.I. based on that evidence right away that they were looking at a conspiracy of at least two members. March 18th is the first transaction.

MR. FRAZER: Judge, I don't know if you want to break?

THE COURT: It's up to you.

MR. FRAZER: If the jury doesn't mind taking a few more minutes, we'll get to a logical ending point for the lunch break.

Again, there's a stipulation of those tapes that the defendant's voice is on those tapes. There is no dispute about that.

March 18th, and I know we had some technical difficulties and I think it's been cleared up a lot if you listened to them, so if you want to listen to them again, but the March 18th call was probably the clearest of all the calls that you heard.

That's perhaps the most damming evidence of both counts four through nine and the drug conspiracy. That's at page three of exhibit 104, where Baskerville says, I had 50

grams for you the other day.

You'll recall Agent Manson, he's talking about the day before, March 17th incident. I had 50 grams for you the other day and I put it to the side, but then I had, I had this kid that had wanted it and when Rell told me you didn't want it, I was like fuck it, I gave the shit to the kid, you know what I'm saying? It's crystal clear on the tape.

Right there the defendant's own words. That's rare that you get the defendant telling you about a conspiracy to distribute crack cocaine, but you have it here. He had 50 grams, he was ready to give it to Kemo, but my man Rell told me you didn't really want it, you didn't want to wait the 45 minutes. Remember? So he gave it to somebody else.

Right there he's admitting to selling someone else 50 grams of crack cocaine. The conspiracy is, as I'll talk about, requires that we prove that it's over 50 grams, 50 grams or more of crack cocaine. That's it in one transaction. You have transactions here that total 190 grams just with Kemo McCray, but obviously Kemo McCray is one of the smaller customers.

He goes on to say, and this is the defendant, but I could get the shit from him hopefully like in another week or so. I'm have my own shit, you know what I'm saying, the connect, which Agent Manson told you is the supplier, that I was fucking with at first. Now these niggers, man, they

ain't, I guess with that big ass shit, that big bust, shit, they fucked off. You know what I had no coke, I had no coke, motherfucker since All-Star weekend, which you heard lots of testimony from the cooperators about All-Star weekend, and that corroborates that portion of the testimony.

He goes on to say, but I could get it from him. I'm just trying to get the shit right, whereas though I can get enough of that shit, where you all can have that shit so I can come to connect with mad money and I can get what I want. You know what I'm talking about?

He's telling Kemo he's got this great supplier, that if he gets with, he can make mad money, tremendous amounts of money.

He goes on to say, so, I don't got to worry about this shit, but if you get, like say for instance, say for instance, like if I got it and I just get the shit, before I hit that shit up, make that cook-up, I just put you something aside. You know what I'm saying? But if you want 50, I can get that shit from him all day or more, because I know he, he got it. Know what I'm saying?

Kemo says, true.

He goes on to ask the defendant, the only that you know you have now is cookies, right, meaning crack. For the time being.

Baskerville says, hopefully within the next week, no

later than next week, I should have some raw, though.

Kemo says, all right.

And the defendant says, but I'm going to have cookies, I'm going to have cookies all week.

You have the defendant, from March 18th, talking about sales in excess of 50 grams to various individuals, about a supplier that he calls his connect, right, and talking about his relationship with Terrell Thomas in the conspiracy.

Again, ladies and gentlemen, that's it. If you believe that testimony, which you hear from the tapes, from the defendant's own words, that's sufficient evidence under what the Judge just read you to find the defendant guilty of drug conspiracy, that alone. We're only on March 18th.

Okay. As I said, I'm not going to go through each sale, you'll be happy to know that.

By this time, you heard Agent Manson and you heard the testimony about counts four through nine, the March 18th and March 21st sales, the sales from May 22nd, June 19th, September 9th and October 23rd. We have a board, which I will put up on the easel, but I'm just going to show you. It just summarizes for you counts four, five, six, seven, eight and nine. It gives the dates, March 18, March 21st, May 22nd, June 19th, September 9th and October 23rd and the corresponding counts.

Most took place in the area of Wainwright Street, one

took place when Kemo moved to a different location near south 14th Street and I think it was Madison, the street was.

It gives the weights. Again, you can look at these, just on these, any three of these transactions total more than 50 grams, but you don't have to limit yourself to these transactions. It's during that period he sold to many other people. Even if you put that aside, he conspired with others to sell Kemo DeShawn McCray a total of 190 grams, which is four times what, almost, what the Government has to prove.

We listed the cars, and I'll talk about the Monte Carlo in the moment and the phone numbers which you saw from the chart in front of you connecting the defendant to each and every of the transactions.

You heard Shawn Manson -- I don't mean to minimize the investigation that the F.B.I. did by not discussing the evidence on each count. You heard it, you saw videotapes. This was a sophisticated operation. This was not something that they did willy-nilly. They went out there and they had procedures and they followed those procedures. They had procedures to insure the safety of the evidence, the safety of the informant and the safety of the agents involved. This is dangerous business, right? Surveilling drug transactions in the streets of Newark is dangerous business.

They followed those procedures each and every time. They tried to video where they could. Most of the times they

did, sometimes they couldn't, sometimes the video got blocked, a van came in the way in one video, the defendant pulled into a driveway in the other video, but keep in mind the most important thing. Agent Manson testified that on at least four out of six of them, she directly observed the defendant from her vehicle through his vehicle. And don't buy any arguments about tinted windows, go back and look at the evidence. Manson wasn't that far away from the defendant.

She saw him stop and count money like a bank teller, remember that? He's counting the money like a bank teller and, I submit to you, like a drug dealer would.

So Agent Manson, the foundation is Agent Manson saw him on four of those transactions, with her own eyes, in drug sales with Kemo DeShawn McCray.

You also have video and you actually hear the transactions on the audio. Remember again, there are codes Kemo used. This is the end of the deal. There were codes in case his safety became an issue.

Before the break, I just want to conclude on the drug portion by talking about the Monte Carlo, the car that's in the chart that he used on every occasion but one. On that one occasion, which is September 9th, he used a rented Grand Am, Agent Manson told you. While it doesn't make much of a difference, other than you heard testimony that Grand Ams are used because they're fast vehicles, right, the car of choice

for some drug dealers, it is more than a coincidence, ladies and gentlemen, that the murder vehicle, that his brother Rakeem Baskerville is driving away after Kemo DeShawn McCray is gunned down, happens to be a Grand Am. Think about that.

But going back to the Monte Carlo, you heard from two witnesses, Gabe Rispoli, Rocky, the scent dog and that testimony. He's an expert. There is no doubt that that K-9 showed that there were drugs in the defendant's Monte Carlo.

There are records in there, by the way, of showing when he leased it, the Monte Carlo, and there's DMV records showing he's the registered owner of the Monte Carlo. He drives up in his own vehicle each and every time. It's important to realize that there were drugs in that vehicle.

Detective Rispoli says perhaps as between two weeks and a couple of days before. There was some kind of narcotics present because the dog gave him a positive signal.

You heard from Special Agent Scimeca, the F.B.I. agent that came in with the video of the traps. While there was a lot of electronic stuff that kind of flew over my head with the wiring and how that worked, you'll remember that was a sophisticated system in the defendant's car used, right, to stash drugs.

We know that because inside the trap when it was opened are several things. There are air fresheners, obviously to throw the dog off, there are crack vials.

Remember those two little vials I tried somewhat unsuccessfully to show you on the Elmo and they kept rolling off? Those are crack vials and there are razor blades which are used to cut cocaine, right, drug paraphernalia. Think about that.

There is no doubt, and I know you're probably all saying okay, already, we got it, but there is no doubt that the drug transactions were proven, each and every element of counts four through nine were proven beyond a reasonable doubt that he distributed crack cocaine on those dates, as the F.B.I. watched.

Break.

THE COURT: All right. Let's take a lunch break, folks.

You can go into the jury room and we'll have you back here by 1:00 or so, five after one.

THE CLERK: All rise.

(Jury is excused and the following takes place out of the presence of the jury.)

THE COURT: Let's take a launch break.

MR. FRAZER: What time?

THE COURT: Let's call it 1:00, but the way we have been doing business, it will be more like 1:05 or 1:10.

(Luncheon recess.)

AFTERNOON SESSION

(The following takes place out of the presence of the jury.)

MR. MINISH: Judge, I want to put something on the record.

THE CLERK: All rise.

THE COURT: Mr. Minish handed up some verdict sheets, redacted indictments.

MR. MINISH: And provided defense counsel a copy.

THE COURT: Let's get the jury, please.

THE CLERK: All rise.

(The following takes place in the presence of the jury.)

THE COURT: Take your seats.

Mr. Frazer, you may continue.

MR. FRAZER: Thank you, Judge.

Good afternoon.

When we broke, we finished the drug transactions. I want to go back to the conspiracy, the drug conspiracy and talk about who else participated.

What we have so far is the defendant, William Baskerville, obviously. We have Terrell Thomas, who we heard in the transactions from February and even before that and the transactions in March.

What we also have is a lower member of the conspiracy, someone named James Murphy, who as you remember, was referred to as Car Wash. Remember something the Judge instructed you about the roles of the various conspirators? Car Wash, you'll recall, James Murphy, came to testify and he told you about his experience inside the defendant's car detailing place in Westfield, New Jersey and how he was employed there and he detailed cars.

In a minute, I'm going to read to you from the transcript where he's actually on tape during the June 19th transaction. You'll recall during the June 19th transaction, which is one of the counts, that the agents observed an

individual in the car, and we later find out that is James Murphy or Car Wash. That corroborates obviously his involvement in the drug conspiracy, because obviously he is in the defendant's Monte Carlo during a drug transaction.

Of course, mere presence is not enough, but we have much more than that. Remember what the Judge said about roles. It doesn't matter how minor your role is or how great your role is because you're responsible for all the acts of the co-conspirators, right?

So, what was Car Wash's role? Well, he told you what his role was. First, you can look at the exhibit 115, which is the transcript. If you recall during the June 19th body wire where Baskerville, the defendant, gets on the phone and in the meantime there's a side conversation where Kemo tells him, Car Wash, otherwise it's dirty. I could watch you wash the whole damn block of cars. They're both laughing. We know that's Car Wash because he's talking about Car Wash's ability to wash cars, that's where he got his nickname from.

You know, even though he's identified as unknown male, Shawn Manson told you that was Car Wash. I recognize his voice and obviously she had heard Car Wash after the investigation as well. He was a witness for the Government.

The F.B.I. sees him in there and he tells you his role. That's at page 4,089 of the transcript in his direct testimony with Mr. Minish. The only reason, by the way, he's

a witness in this case, the F.B.I. didn't know who he was at first. They saw him in the car but they couldn't identify who he was, they didn't know James Murphy. They found that out through Koby Cuyler, another person who came here and talked to you, and they found out from Koby that Car Wash is a guy named Jimmy and they got an address from Koby. The F.B.I. went out and found this witness.

He says -- "QUESTION: You said you went into the room, then what happened? Why did you go into the room?"

What they're discussing is what he saw at the defendant's car detailing place, the car wash in Westfield.

"ANSWER: I wanted to see what was going on. Was it over, you know, so I went in the room to see.

"QUESTION: Because you had to wait for the defendant?

"ANSWER: Right. Because that was my way home. Getting there and getting home.

"QUESTION: So you went into the room?

"ANSWER: Yes.

"QUESTION: Once you were in the room, what did you do?

"ANSWER: What did I do? What did I see?

"QUESTION: Well, what did you see, start with that.

"ANSWER: I saw two razor blades, like chopping the drugs in bottles."

You've seen those from the Monte Carlo, razor blades, the crack vials.

"QUESTION: The jury, if you can explain to the jury, so they understand, chopping it up, what did the drug look like while it was being chopped up? Could you describe what the rock form that you saw looked like?

"ANSWER: Rock form, you use razor blades to chop it down, to get it fine enough to put it into the bottles.

"QUESTION: So you're trying to break off little pieces?

"ANSWER: Right.

"QUESTION: And the rock form is a circle, a square?

"ANSWER: A chunk.

"QUESTION: Chunks?

"ANSWER: Okay.

"QUESTION: Now, you saw that, you went in, what was going on in the room, were there tables, chairs?

"ANSWER: Table." He goes onto describe the card table.

"QUESTION: How many people were sitting around it?

"ANSWER: Two at the time.

"QUESTION: And who were those two people?

"The ones I described when I went and looked through the blinds.

"QUESTION: Was the defendant in the room?

"ANSWER: Yes.

"QUESTION: And where was he?

"ANSWER: In the room also."

So the defendant's in the room while they're chopping up crack into smaller rocks to put in those little glass vials and there's two other men in there doing that.

"Did there come a time when you get involved in this drug process?"

This is the top of page 4,091.

"ANSWER: Yes.

"QUESTION: Okay. Explain to the jury how that happened.

"ANSWER: It was after working hours. I wanted to go home. I went in on my own to speed up the process so we could finish it so I can go home. That's how I got involved.

"QUESTION: Okay.

"What did you do, actually do once you got involved?

"ANSWER: I counted the bottles in tens, put rubber bands.

"QUESTION: When you say "bottles," you mean small little bottles that crack is put in?

"ANSWER: Yes.

"QUESTION: Why was it significant to put them in groups of ten?

"ANSWER: Ten bottles, what you call in street term

is a clip.

"QUESTION: A clip?

"ANSWER: Yes."

Remember, back on January 13, they talked about clips from Taquan Singleton. You saw those 40 vials from March 17, Terrell Thomas sold him clips, ten, four clips, 40 vials.

"QUESTION: So you were counting. What were the other guys doing?

"ANSWER: Still packing."

So there's other men inside the defendant's garage packing the drugs.

"QUESTION: So chopping with the razor blades and putting them in the bottles?

"ANSWER: Yes.

"QUESTION:" Further down on the page, "How often was it done at the car wash?

"ANSWER: Maybe three times a week.

"QUESTION: On a regular basis, were their weeks off?

"ANSWER: Yeah. It wasn't regular everyday, you know, like three times a week.

"QUESTION: And you understand the process from making the powder cocaine into the rock form of cocaine?

"ANSWER: Yes."

He goes on to explain that. Boiling water, pouring

the cocaine in, the baking soda, stirring it with a knife or spoon until it turns into rock form. Then it cools off, take it out.

"QUESTION: Did you ever see anybody do that at the garage?

"ANSWER: Yes.

"QUESTION: Okay.

"ANSWER: One time.

"QUESTION: Who did you see do that?

"ANSWER: The defendant.

"QUESTION: How long did this bottling process take?

"ANSWER: Hours.

"QUESTION: Did you ever get paid for the counting and rubber banding?

"ANSWER: He gave me a couple of dollars for doing it. "

Okay. So you have Car Wash and his role was a smaller one, right. He testified here under a no prosecution agreement. Because technically for his packaging of those drugs, he could have been charged. It might have been a minor offense, but he had a right to an attorney, he had a right to get from the Government a guarantee he would not be prosecuted. That is what he got.

Now, did he lie because of that? Did he make up these very detailed statements about seeing the defendant in

his garage in Westfield, having others around the card table in a room packaging clips? Well, no. Why? You don't have to take James Murphy's word for it. We would never expect you to take James Murphy's word for it or any other individual person in this case.

But what you do have is corroboration. As I told you, from March 17, and back in February and the types of drugs and the way they were packaged and Terrell Thomas and all the rest.

The bottom line with all the witnesses is, did it make sense to you? Was it telling the truth?

You have somebody else that was mentioned. I'll call them packagers. There are two other people in that room, maybe employees, he said of the car wash and we don't know their names, but you know what? The Judge just told you a little while ago you don't need to know their names. It's not a requirement we prove who they are.

Are they members of the conspiracy? Absolutely. They're being paid, we know Car Wash is being paid, we can infer from circumstantial evidence that he probably pays the other packagers, they're not doing it for free. This is a drug operation going on in the defendant's legitimate business. You can consider that.

You have minor players in the conspiracy, but they're co-conspirators, nevertheless, whether you know their name or

not. That's why James Murphy was here.

And again, this goes to the weight requirement. There's a lot of stuff being packaged in that establishment for distribution. You can consider those amounts in addition to the drug transactions you know about.

Again, I told you about the weight requirement. I think that's clear, but just the last point on that, the defendant is on tape talking about delivering 50 baggers. Remember that term from the tapes? In one transaction where he's looking to distribute 50 baggers, you could find that we've met the burden on the over 50 grams. This was a fairly large-scale drug operation.

Let's talk about another person that you heard a lot about, Ray-Ray, right? Ray-Ray is Horatio Joines. You saw a picture of him.

How do we know Ray-Ray is the defendant's right-hand guy? Koby says it. Koby Cuyler told you that. We'll get to that in a moment.

Anthony Young told you that. He's also observed by the F.B.I. on that surveillance tape that we finally cleared up the difficulties and got to play it for you, where you see the defendant and Ray-Ray, during the conspiracy period, talking with some of the defendant's brothers by their house and walking across the street. We know that Ray-Ray is present during the some of the transactions. We heard that

from Agent Manson. She actually saw someone who they later learned to be Ray-Ray inside the car during the drug transactions.

You also heard that Ray-Ray was known to drive the defendant's Monte Carlo and you heard Koby say on the street, there's only two people who drive your drug car, right. A family member like your brother or your business partner, your drug associate. Because remember, that car had drugs in it, it had traps in it, right? So not everyone is allowed to drive that car. It's not like a family car.

Let's turn to Koby Cuyler. Koby Cuyler came here and, ladies and gentlemen, he was a drug dealer himself. He told you that right off the bat. Again, who better to know about drug conspiracies and inner city and the streets of Newark than a fellow drug dealer? So what does he tell you? He comes here and he tells you that twice during the summer of '03, the spring and into the summer of '03, perhaps into the fall, but in the time period of the conspiracy, he tells you that the defendant came up to him, that Koby Cuyler himself is driving a Monte Carlo like the defendant's, because he bought it with drug money. He comes there to recruit Koby Cuyler to join his drug organization.

I'll read to you from 4202, "QUESTION:" This is Koby Cuyler's direct by Mr. Minish.

"Now, from what you've said, the defendant never came

out and asked you, do you want come work for my drug business? Is that right?

"ANSWER: Yes.

"QUESTION: How did you know that that's what he was asking you about?

"ANSWER: Because on the street, that's how they talk. Like you know, like if a person asks, if you want to come eat with me, that mean come and get money with me.

"If they ask to get down with them, that means come on their team."

Koby Cuyler is aware that Will Baskerville has a team, he has an organization, he runs a block. That's a conspiracy that the defendant happens to be here.

"And did people know you to be a drug dealer?

"ANSWER: Yes.

"QUESTION: So if someone was recruiting you for work, would they think they were trying to get someone to cut their lawn?" Remember we all laughed at that.

"ANSWER: No.

"QUESTION: Now, did you know the defendant to sell drugs?

"ANSWER: Yes.

"QUESTION: Again, I'm limiting it to this time period.

"ANSWER: Yes.

"QUESTION: And crack cocaine specifically?

"ANSWER: Yes.

"QUESTION: What areas did you know the defendant to sell drugs in?

"ANSWER: 17th and Avon, and --

"QUESTION: Is that Newark or Irvington?

"ANSWER: That's Newark.

"QUESTION: Okay.

"ANSWER: And 18th Avenue and 22nd Street.

"QUESTION: Where is that?

"ANSWER: East Orange -- Irvington."

So there's two locations that the defendant controls.

Now, obviously goes without saying, you can't be in two places at once, right, so you need some help to distribute your crack cocaine when you run these two blocks.

"QUESTION: And when you say you knew him to be dealing drugs, what exactly did you see?

"ANSWER: Well, I seen him a couple of times give something to his little guy.

"QUESTION: To his what?

"ANSWER: To his little guy.

"QUESTION: What's a, when you say "little guy," what do you mean?

"ANSWER: Like on the streets we say runner, but when he gave it to the guy, do something for him. Whatever."

Question later on 4204, he says, "He give it to the guy. He give it to the guy. Runners for him. What I mean by runners, for guys that pitching for him on the streets.

"QUESTION: And did you know any of these individuals?

"ANSWER: Yes.

"QUESTION: Okay.

"And do you know any of them by name?

"ANSWER: It was one guy Ray-Ray.

"QUESTION: Now, I'm going to show Government" -- well, skip down.

"QUESTION: And exactly what did you see between the defendant and Ray-Ray?

"ANSWER: I seen him give Ray-Ray something. He jumped out of the truck and he looked like this. He was nervous, he was looking for somebody to see, to make sure the police were or nobody was watching. Then he took off.

"QUESTION: Now, how is it that you determined that you moved your head back and forth, that he was looking around, that meant somehow drugs?

"ANSWER: Because I be selling drugs for a long time so I already know what situations like if you be in. If you be a motion, you got to look out and see and always make sure that you're safe. Okay.

"By "safe," what do you mean?

"ANSWER: Meaning like you don't want to jump out of the car and you got something on you and and police right there. They watching you, you don't want to get caught like that.

"QUESTION: Okay.

"You didn't actually see drugs, just saw his actions?

"ANSWER: Yes.

"Did there come a time when you spoke with Ray-Ray about the defendant?

"ANSWER: Yes.

"QUESTION: Did he say that the defendant and Ray-Ray were working together in a conspiracy?

"ANSWER: Yes.

"QUESTION: When did you speak with Ray-Ray?

"ANSWER: On the streets around my way.

"QUESTION: And did he -- do you recall the day, the time?

"I can't recall it right offhand.

"QUESTION: Were you discussing drugs with him?

"ANSWER: Yes.

"QUESTION: What did he tell you about the defendant?

"ANSWER: He was telling me that he could get it for me at a better price, get it cheaper than what I was getting it for.

"QUESTION: From whom?

"ANSWER: From the defendant.

"QUESTION: Did you ever see Ray-Ray in the defendant's Monte Carlo?

"ANSWER: Yes, I seen him.

"QUESTION: Tell the jury what you saw.

"ANSWER: I seen him in the Monte Carlo and, you know, like he was by himself so you know that's not going to be unless you're his best friend or brother or something like that. And in that case, I already know his whole family so that wasn't his brother or nothing like that, so it had to be a business partner or such.

"QUESTION: Because he was driving the car?

"ANSWER: Yes.

"QUESTION: What was the price, do you remember the price you were quoted?

"ANSWER: Right off hand, I can't remember.

"QUESTION: But the idea was it was better than Kevin Horton's?

"ANSWER: Yes."

Kevin Horton being another drug dealer.

So you hear from Koby Cuyler, again, the conspiracy involving Ray-Ray. Ray is another front man. Ray-Ray is another runner, another guy who distributes drugs on those blocks for the defendant, okay.

So you now have several individuals involved in the conspiracy. I'm just going to say one thing.

You heard the name Hakim Curry a whole bunch in this case. We'll get to him in the murder conspiracy, which we'll turn to next.

We're not here, ladies and gentlemen, so you're not confused, to prove any other conspiracy, but the one you see here. Okay. What happens above William Baskerville, that's not for you, okay. Hakim Curry was charged with a drug conspiracy, you heard a lot about his organization, but that's up here. Hakim Curry may be like the corporate head, the CEO, right. We're only talking about one franchise here, we're talking about two blocks right in Irvington and, by the way, my handwriting is worse than Eric Dock's or Troy Bell's, so excuse me. And another block in Newark. Two blocks in these two cities.

Now, perhaps Hakim Curry is on top of a bigger drug organization and you heard some organization of Will's involvement and Rakeem Baskerville's involvement and there was a chart Mr. Minish did. I don't think it's in evidence, and Anthony Young told you all about who and where William Baskerville fit into this thing. That's not what we're here for.

We're here to show you between two dates, January of '03 and November of '05, or somewhere in between those dates,

that there was a conspiracy among these individuals to sell crack cocaine in an amount over 50 grams, in these areas. That's it.

Don't be confused if the defense starts talking about all these guys and inconsistent about who was in this level versus that level. Makes no difference. We're talking about the blocks controlled by William Baskerville, where he is the head of the conspiracy.

Let's move on now to the murder conspiracy. That does involve -- I'm just going to push this back. That does involve some members of the Hakim Curry drug organization. It involves Rakeem Baskerville, who you've heard about, also known as Rock. Hakim Curry, also known as E. T. Or Hak, Jamal Baskerville, Malsy, Jamal McNeil you've heard about and Hamid Baskerville.

Because those were the individuals that were at that meeting with the lawyer, Paul Bergrin, the day or so following November 25th, 2003. What you have in the murder conspiracy is three brothers, a cousin and a drug associate of the defendants. Okay.

Now, this Paul Bergrin, you heard some testimony about him and he does play an integral part in this conspiracy. He's the person who first passes along to Rakeem and Hakim Curry, Rakeem Baskerville and Hakim Curry, the information from Will that Kemo is the informant.

He then shows up and has a meeting with these individuals on the street and that's the one where he tells us -- that we hear from Anthony Young that he says no Kemo, no case.

I want to start, ladies and gentlemen, with a couple of things about conspiracy law so that you can kind of put a framework on the murder conspiracy. First of all, we don't have to prove, as I said before, an agreement and a meeting, the Judge read that to you this morning. We don't have to prove that each member of the conspiracy knew each other, not a requirement.

We don't have to prove that the agreement was expressed. It could be implied, which is very important.

Finally, that a conspirator need not know the particulars of the whole conspiracy as long as they understand the nature of the illegal enterprise, and they knowingly agree to further the goal of the conspiracy.

So why is that important? Because on November 25th, when the defendant communicates both to Mr. Bergrin and his brother, Kemo's the informant, he has to be pushed, he has to be handled, we have to knock him off, I'm facing life, he doesn't have to know the details that follow. He doesn't have to know every minute that they're out there looking for Kemo. He doesn't have to know their progress. It ends up he does and we'll talk about. He doesn't have to be in the planning

after that or the details, who's going to shoot him, although we'll find out he knew that as well.

So I just wanted you to keep that in mind and keep in mind tomorrow when you hear the defense summation and question, is that something that the Government has to prove? Constantly ask yourself, is that part of the elements of the offense in the legal charge.

The defendant did not outright tell anybody, you must kill Kemo McCray for me. We don't have it on tape. We don't have it recorded, but that doesn't mean it didn't happen.

He certainly committed an act in furtherance of the conspiracy. He told his brother, and his lawyer, Kemo's the snitch, handle it. He set the plan in motion. He initiated the conspiracy right from the beginning. Without that information, Kemo McCray does not die.

So let's look at the evidence. The defendant tells Bergrin, Paul Bergrin, the lawyer, to tell Curry and Rakeem Baskerville it's Kemo. You heard the defendant's admission to numerous people that he did this, that he told his brother to handle his business, to push Kemo.

Now, I want to talk about it not being recorded because there's been a lot of talk about this ability to record calls and the implication is, well, why isn't this on tape? First of all, we shattered that myth that the defense has been portraying in cross-examination with Bill Cannon

yesterday.

Hudson County, before November, 2006, had no ability to tape calls, period. Okay. That's a non-issue.

Even if they were able to record calls, it was not true, inmates such as the defendant, knew how to beat the system. They knew how to make three-way calls, they knew how to make these relay calls Bill Cannon told you about. They knew the sensitivity and generally how to beat the system. They knew they could get information about.

How about cell phones being smuggled in? Bill Cannon told you yeah, that happens. There's plenty of ways that messages got out, pro visits with lawyers, those are not recorded. Visits with family members, those are not recorded.

So this recording issue, and then this issue about why didn't anybody wire up and go get the information from the defendant? That's fantasy, ladies and gentlemen, that's not real life.

There was a brief attempt by Eric Dock to get wired up, but by July, by the time that happened, the defendant had been told, shut your mouth and we'll get to that. Hakim Curry ordered him, be quiet, people in Passaic County are talking about you committing the murder, stop it.

That's a non-issue. It's a complete non-issue in this case to divert your attention away from the facts.

Now, Anthony Young testifies about the events after

the defendant's arrest on November 25th. He tells you that he's informed by Deidra Baskerville, his wife, that he and Rakeem Baskerville are told by Deidra about the arrest that morning, the warrant executed by the F.B.I. This takes place, by the way, in Rakeem Baskerville's van when they're told that. That's the testimony.

This is the first time that Anthony Young and Rakeem Baskerville find out about the arrest. They then meet up with Hakim Curry. The first thing they do when they hear this from Deidra Baskerville, they meet up with Hakim Curry and he's driving the blue Range Rover. And we know that's true because Agent Hilton told you that's what he drove in that time period. That part is corroborated.

The conversation ensues where, after the initial appearance, right, that we talked about, Rick Hosten, Kemo's a fucking bum, we know that the message got out. The message got out to Paul Bergrin and he was on the phone with Hakim Curry and we know that's corroborated because we have the phone record in evidence. You can look at it. I tried to put it up. You can look at it.

Agent Hilton told you Hakim Curry's cell phone number which is an 862 number and we have a record that Paul Bergrin's cell phone called him on the afternoon of November 25th, which gels with the timing of the initial appearance and Paul Bergrin meeting with his then client, the defendant.

So Bergrin tells Hakim Curry, because Hakim Curry is relaying to Anthony Young as the phone call is happening, he tells them the specifics about the complaint that was received in court that day and he tells them about the various sales.

Then he said that Will told him the informant is a guy named K-Mo. Now, the lawyer screwed up the pronunciation. He said K-Mo. Then what happens? Anthony Young and Rakeem Baskerville, Young tells you, said K-Mo, no, you mean Kemo. Okay. Can you imagine Anthony Young making that up, that detail?

We know that the call happened. How did Anthony Young know the call was going to be on the phone record? How did he know that Hakim Curry was driving a blue Range Rover? Again, we don't rely on the witness himself, we rely on the other evidence.

Let me read to you from 4350. This is a fairly long passage, ladies and gentlemen, but this is the crux of Anthony Young's testimony as to these very crucial conversations in the murder conspiracy.

4350, "QUESTION: Where did this conversation take place?

"ANSWER: Inside Hakim's truck.

"QUESTION: What kind of truck does he drive?

"ANSWER: A Range Rover.

"QUESTION: Set the scene for the jury. Where was

everybody sitting?

"ANSWER: I was sitting in the back seat, Rakeem Baskerville was in the passenger seat, Hakim Curry was in the driver's seat.

"QUESTION: And how did this conversation take place?

"ANSWER: On cell phones.

"QUESTION: Explain to the jury what happened during the conversation.

"ANSWER: During the conversation, Hakim Curry asked Paul Bergrin, check on Will. Find out what was going on, cause the F.B.I. got him.

"Paul Bergrin was talking to Hakim. I couldn't hear Paul Bergrin, I could here Hakim Curry. Hakim Curry said he wanted to know everything was going on and see if he can get him bail.

"QUESTION: Did Curry pass along any information to you guys? By that I mean you and Rakeem sitting in the vehicle?

"ANSWER: In a later conversation.

"QUESTION: And he goes on to say, to tell us about the later conversation.

"ANSWER: He was talking to Paul Bergrin again on another, different phone call.

"QUESTION: Where was that?

"ANSWER: Inside the truck, the same truck, sitting in the truck."

Now, Curry has numerous cell phones so we don't know if it was on, when he says, "the different conversation", whether it was the same phone, but there's a conversation.

"QUESTION: Where was that?" I read that.

"QUESTION: Now, you're sitting in the truck. Is it riding around. "

"ANSWER: No, parked.

"QUESTION: Is it the same Range Rover?

"ANSWER: Yes.

"Where is everybody sitting in this conversation?

"ANSWER: Same spot.

"QUESTION: Okay.

"And Curry's on the cell phone with Paul Bergrin?

"ANSWER: Yes.

"QUESTION: Tell the jury what happened during the course of that conversation.

"ANSWER: He asked him did he find anything out.

"QUESTION: That's Curry speaking?

"ANSWER: Yes. I know he told Hakim Curry that a person that told on Will is guy named Kemo. Actually he said K-Mo, he didn't say the name correct.

"QUESTION: Who didn't say the name correct?

"ANSWER: Paul Bergrin.

"QUESTION: How do you know that?

"ANSWER: Because Hakim said K-Mo and he didn't -- because Hakim said K-Mo and he don't know him.

"QUESTION: Just so the jury is clear, Curry is repeating things --

"ANSWER: Yes.

"QUESTION: -- to you guys?

"ANSWER: What Paul Bergrin was saying on the phone?

"QUESTION: He turned and said K-Mo.

"ANSWER: He said somebody named K-Mo is the informant.

"QUESTION: What, if anything, did you say after that?

"ANSWER: Me and Rakeem came to the conclusion that the informant was Kemo, not K-Mo.

"QUESTION: And that was based on what?

"ANSWER: Based on that we know who he is.

"QUESTION: So it was just a name pronunciation?

"ANSWER: Yeah. He made a mistake and said K-Mo instead of Kemo.

"QUESTION: Did -- was any information about the actual charge passed along?

"ANSWER: Yes.

"QUESTION: Tell the jury what was passed along.

"ANSWER: Hakim ran down some of the sales that were

made, said something about he sold 20 something grams this day, sold 14 grams to this person this day, which was still the guy Kemo. And we came to the conclusion it was Kemo who was the informant.

"QUESTION: So this information is going from Paul Bergrin to Curry and he's in turning repeating?

"ANSWER: Yes.

"QUESTION: Now, Mr. Young, you told the jury that the name was passed along as K-Mo?

"ANSWER: Yes.

"Tell the jury what that meant to you.

"ANSWER: As soon as the name is passed along from whoever Paul got the name from, which would be Will Baskerville, that means if you cross the Baskerville's and somebody gives you the name who did it, get rid of him.

"QUESTION: What does "get rid of him" mean?

"ANSWER: Kill him.

"QUESTION: And why do you think it was a demand?

"ANSWER: Because if this guy still around and one of the Baskerville's go to prison.

"QUESTION: And what was defendant -- again, this period of time I'm talking about, would have been when he's locked up.

"What was his position, meaning the defendant's, within the organization, was he an important guy, unimportant

guy?

"ANSWER: Very important."

Of course, ladies and gentlemen, he was very important, because he's Hakim Curry's cousin's, right. He was Rakeem Baskerville's brother.

He was an important member of that drug organization.

"QUESTION: Did you find out," we're on 4358. "Did you find out about how much time? Again we're talking about the same day, the day the defendant was arrested, that the defendant was facing during those conversations?

"ANSWER: Yes, sir.

"QUESTION: Okay.

"Do you recall what kind of time he was facing?

"QUESTION: How did you find out about how much time, who told you?

"ANSWER: Hakim Curry.

"QUESTION: And what did he tell you?

"ANSWER: He said that the defendant was facing life in prison.

"QUESTION: Okay.

"Did you have another discussion or meeting about this a few days later?

"ANSWER: Yes.

"QUESTION: Tell the jury when and where that took place.

"ANSWER: 17th Street and Avon Avenue.

"QUESTION: Again, that's Jamal Baskerville's house?

"ANSWER: Yes.

"QUESTION: And using the date the defendant was arrested as a starting point, how many days later did that meeting take place?

"ANSWER: About four or five days.

"QUESTION: Who was at that meeting?

"ANSWER: Rakeem Baskerville, Jamal Baskerville, Jamal McNeil, myself and Paul Bergrin.

"QUESTION: Was Hakim Curry there?

"ANSWER: Yes.

"QUESTION: Before Paul Bergrin showed up, what were you discussing with those guys?

"ANSWER: Just general talking about how much time Will Baskerville was facing.

"QUESTION: And at some point Paul Bergrin showed up?

"ANSWER: Yes.

"QUESTION: Tell the jury what the conversation was when Paul Bergrin, what did he say?

"ANSWER: He was telling us that Will was never going to get bail because his criminal history and that the crack that he sold would give him life in prison."

Ladies and gentlemen, each point you have to be

asking yourself, how did he know that? If he did not live that, how did he know that? If he was not told that, that day, how did he know that?

"QUESTION: Tell the jury what the conversation was from Paul Bergrin, what did he say?

"ANSWER: He was telling us that Will was never going to get bail because of his criminal history. It goes on. If somebody was to testify against him, being the person that bought the drugs off of him and if we didn't get rid of that person, that Will Baskerville would never see the streets again in his life."

Again, the lawyer, a co-conspirator is telling them, it's Kemo. If you don't do something, did you don't get rid of him, then Will is never getting out of jail.

"QUESTION: And you said if someone testified, did you have anybody in particular in mind?

"ANSWER: Kemo.

"QUESTION: There was nobody else?

"ANSWER: No.

"QUESTION: And did he speak, Mr. Bergrin that is, speak about any other additional evidence, recordings perhaps?

"ANSWER: Yeah. He said they have video recordings of Will's call and one or two audios."

How did he know that? Did the F.B.I. share that with him? I don't think so.

"QUESTION: Did Paul Bergrin say anything about or make any promises if Kemo was taken care of?

"ANSWER: He said if there was no Kemo to testify against Will, there would be no case.

"QUESTION: Did he say whether or not he would be able to get William Baskerville out of jail?

"ANSWER: He said he was for sure.

"QUESTION: Did Mr. Bergrin ask about any payment?" It continues on, a few lines down.

"QUESTION: Tell the jury what he did, I guess.

"ANSWER: He just said if Kemo was dead, that Will Baskerville would definitely come home from jail.

"QUESTION: What I'm talking about specifically is payment for legal services.

"ANSWER: Oh, yes, he did."

And they discuss payment for legal services.

"QUESTION: Now, at some point did Mr. Bergrin leave the group?

"ANSWER: Yes.

"Describe for the jury what, if anything, was said?

"ANSWER: When he left, he said remember what I said, no Kemo, no case.

"QUESTION: How long did that meeting take place?

"ANSWER: About 20 minutes."

Twenty minutes there is a discussion out on the

street between the co-conspirators discussing who the informant is, that they have to get rid of him if they ever hope to see their brother, cousin, drug associate come home. And it was made clear without this information, Will comes home, Paul Bergrin assures that. You get rid of him, I'll get him home and they'll be no case.

"QUESTION: Tell the jury who else was involved.

"Me, Jamal Baskerville, Rakeem Baskerville, Jamal McNeil and Hakim Curry.

"And what was discussed?

"ANSWER: It was discussed that we got to start looking for this guy, to get him off the street so he couldn't testify against Will."

The motive is there, the reason is there. You got to keep him off that stand so he wouldn't testify against Will.

"QUESTION: Were you concerned whether you would be able to find him?

"ANSWER: Yes.

"QUESTION: Why was that?

"Because he was F.B.I. We thought they probably would be hiding him.

"QUESTION: Did anybody speak about any payment to take care of Kemo?

"ANSWER: Yes."

Again, an agreement, there's an agreement among the

co-conspirators about how it's going to be done, about the details. But Will Baskerville doesn't have to be part of that. Because Will Baskerville is not out on the street talking about payment, talking about how we're going to find him, talking about no Kemo, no case, he is still responsible for the conspiracy under the law. Okay.

He agreed with them to put this plan in motion.

"QUESTION: Tell the jury what happened with respect to that conversation.

"ANSWER: Well, they asked me and Jamal McNeil.

"QUESTION: Who is they?

"ANSWER: Rakeem Baskerville, Hakim Curry.

"QUESTION: Okay.

"ANSWER: Who wanted to get paid $15,000 to kill Kemo -- I'm sorry.

"QUESTION: Okay.

"ANSWER: Who wanted to get paid 15,000 to kill Kemo.

"QUESTION: And how were the payments going to be made?

"ANSWER: Through Hakim Curry and Rakeem Baskerville.

"QUESTION: Who was going to put up money?

"ANSWER: Hakim, 7500 and Rakeem, 7500."

Now, a few days after November 25th, right, or right

around November 25th and already there's an agreement in place to kill Kemo DeShawn McCray based upon Will's demand.

"QUESTION: At that point on that day, had it been determined if Kemo was found who would actually shoot him?

"ANSWER: No.

"QUESTION: Why not?

"ANSWER: Because either Jamal McNeil was going to do it or I was going to do it.

"QUESTION: Why wasn't it decided? Like why wasn't it decided absolutely you or him?

"ANSWER: Because if he was seen and one of us wasn't around, the other one had to do it."

Finally, it's asked, "During these discussions, after the defendant was arrested, were there ever any discussion about whether or not the defendant would cooperate with the Government against you or other members of the group?

"ANSWER: No, we knew that would never happen."

If you remember, Anthony Young seemed surprised that the question was even asked. He cooperate against his brother, against his cousin? No way, never going to happen, wasn't even a concern.

Why is that important? It's important to combat any argument that may be made that somehow Hakim Curry and Rakeem Baskerville did this all on their own. They had no motive to do this, but don't believe for a second that they were

motivated in anything other than to keep Kemo off the witness stand. Okay.

They weren't concerned that they were going to be in trouble because they knew that Will would never rat them out, not in a million years. You just don't do that.

"QUESTION: And why not?

"ANSWER: We always looked at him as a real stand-up guy.

"QUESTION: I'm sorry, a real what?

"ANSWER: Stand-up person.

"QUESTION: What do you mean by stand-up?

"ANSWER: Like he would never tell on nobody."

Okay. Keep that in mind.

The only motive for Rakeem Baskerville and Hakim Curry was to help Will in his request and his demand to get Will out of trouble. They weren't concerned that we better knock this guy off because Will was going to cooperate and get them in trouble.

So again, how do we know Anthony Young didn't make this up, he didn't exaggerate this, didn't lie about this? Think about this, he told these details, he told this to Shawn Manson as early as January of 2005. We'll talk about how he came in in a minute. The very beginning of the plot.

Again, how is this corroborated, what I just read to you? The phone record, right. It's exhibit 453, Paul

Bergrin's records from his cell phone to Hakim Curry's cell phone. It was a call that afternoon, after he would have gotten the information from Will.

Second, Rick Hosten tells us about the conversations which I already have been through with the defendant on that date, that fucking bum Kemo.

You have the record of the November 25th initial appearance where he was denied bail and that he was facing a lifetime in jail.

You have the fact that Greg Hilton tells you Paul Bergrin is not just any lawyer. He's the organization's lawyer, he's Hakim Curry's lawyer, okay. He furthers the interests of the conspiracy, of the drug organization. Don't think how could a lawyer do this? I hope you're not thinking that. He was in on it, ladies and gentlemen, there is no doubt about it.

When you say no Kemo, no case and you tell that to Rakeem Baskerville and Hakim Curry, you know what's happens. He's a member of the conspiracy like the others.

Next, you have the statements made by Eric Dock and Troy Bell that Will repeats over and over in a legal context what happens if I don't have an informant, what happens to my case? Well, why wouldn't he have an informant? Is he going to disappear? Perhaps.

Eddie Williams tells you very eerily similar things

that Anthony Young tells you that the defendant tells Eddie Williams, well, without a witness, there is no case, which is very similar to what Paul Bergrin told them on the street, no Kemo, no case.

Ramaine York tells you just days before the murder, if you remember this incident, he's watching TV and Baskerville, the defendant, gets off the prison phone and he comes over and tells Ra-Ra, I just got in touch with Rakeem and Rakeem is getting Fat Ant to go after the witness, to handle it. Critical testimony.

Do you see how everything Anthony Young says is corroborated by information from other people, some of which he doesn't even know?

Perhaps a tremendous piece of corroboration is Devon Jones. Devon Jones, the guy from the garage, the hard-working man who has nothing what so ever to do with this case, except that he works in the garage and one night he tells us, Anthony Young and Rakeem Baskerville come to him, talks to his boss and he agrees for 20 bucks or $30 to melt down a gun.

Now, does Devon Jones have any reason to lie? He, need, was given a no prosecution agreement because technically he melted down the gun, technically that could be charged with it. He could be charged with it, he's never going to be charged with it and he was entitled to that. So we could put words in his mouth? So we could ask him to lie and

corroborate Anthony Young? I don't think so.

What does he tell you? He tells you through a photo array that the agent showed him, oh, yeah, the guy in that photo array, Anthony Young, he came in the shop all the time, I worked on his cars. He came in that night with the gun.

This other guy, who happened to be Rakeem Baskerville, in the second photo array, I'm pretty sure, not 100 percent positive, but that looks like the guy that came with him. Ladies and gentlemen, right there, Anthony Young is corroborated. He came in that night with a gun to melt down after the murder. You have independent evidence that what he's telling you is true on that account.

Next, you've got something else, which is critical evidence, need. Government exhibit 32 is the visitation records, okay, to the Hudson County Jail. The visitation records and I showed you this yesterday, show that on March 3rd, 2004, March 3rd, the day after the murder, right, the murder takes place about 2 p.m. on March 2nd. Less than 24 hours later, right, at 9:11 a.m., I think it is and you can look at the records, exhibit 32, take it back in the jury room and look at it. Who visits the defendant? His wife, Deidra Baskerville. So the defense is going to say, so what, his wife came to visit him? All right. That's fine.

Go down an hour later, about 10:20 a.m. Who visits him at 10:20 a.m. the morning after the murder? His brother

Rakeem Baskerville, uses his own name, writes it in, it's on there. I tried to show it to you yesterday.

Who else? His partner in the drug business, Horatio Joines, Ray-Ray.

Can you imagine that conversation? Kemo McCray is assasinated on the streets of Newark on March 2nd, two p.m. and who's there the next morning? Rakeem Baskerville.

You'll notice in the records, he doesn't visit often. He doesn't use his name most often, but he's there and imagine that conversation? We got him, right? We took care of your business, we got him for you, he's dead.

He was probably also saying, by the way, I got to go on the run now, I'm out of here. Good luck, brother. I took care of the business and now I'm going, because you heard from Bill Cannon, Greg Hilton, he was a fugitive, no one could find him. He took off after the murder and so he was probably going to say good bye to his brother.

And again, you know what Anthony Young is saying is true about Rakeem Baskerville being part of the conspiracy because Government exhibit 31 tells you that, and that is the discovery material found in Rakeem Baskerville's house on March 8th, by the Drug Enforcement Administration during their investigation of Hakim Curry's drug gang, right?

Look at that material. It's a letter from the United States Attorney's Office and it actually has early transcripts

in this case, some of the same transcripts that are in that book, that's exhibit 31, says Paul Bergrin and it's from AUSA John Gay. It's material relating to this case given over to the defense under the law, right, discovery material. But where is it? In Rakeem Baskerville's on his dining room table I think the testimony was.

Why? Of course, it's there so he can look through and try to get some hints as to where this guy Kemo is. Where does the F.B.I. have him stashed? We're looking for him, we need information on him, right.

So it all corroborates what Anthony Young is telling us. He didn't make up Rakeem Baskerville and Hakim Curry were in the conspiracy and paid him to kill the witness. The conspiracy is put in motion and again right there, in the early days after November 25th, under the law as far as the defendant, it's complete. Didn't even matter if it was successful. If they just agreed to kill him, if the defendant agreed with others, one other to kill him and they never actually found him, he's still guilty of the conspiracy under the law.

Remember the testimony gives you, Rakeem -- the conspiracy does go on, it doesn't end there. They're looking for him everywhere. They're looking and sending out feelers. In Bradley Court I think they had a site, in Irvington, but they're looking for him. They're looking for him from until

November until March.

Ironically, even Kemo McCray tells us something about a part of the conspiracy, though he wasn't here to testify. Shawn Manson, you may recall, tells us that on February 26, Kemo McCray sees Rakeem Baskerville's van, right. That is a moment where he changed from, well, I don't think I need to relocate to, oh, my God, I better get out of here, they're going to kill me.

You heard evidence of that from Shawn Manson. Ironically also, or not coincidentally, that's the day before Ramaine York tells you that telephone incident where he says I got in touch with my brother and he's getting Fat Ant to do it. That was at the end of February. It's all at the same time and it all corroborates each other.

Ladies and gentlemen, the members of the conspiracy I think are obvious. Again, this was not Curry and Rakeem Baskerville acting on their own, they had no motive.

This was a concerted effort by those individuals to find Kemo and kill him. Ladies and gentlemen, if you believe Anthony Young, again, the defendant is guilty. Because what does he say about Jamal McNeil and while this was not a necessary part of the conspiracy, it's an important part.

Jamal McNeil is the conduit, he's the guy, one of the guys anyway, there's probably plenty of communications through the three ways and cell phones and visits and family members,

but one way we know that Will Baskerville was not only involved with the conspiracy but pushing hard to get Kemo killed was through the testimony about Jamal McNeil and going back and forth to the jail. I just want to read that to you. It's from 4375 in the transcript.

"QUESTION: During the course of time from whenever it was you started looking through up until March," this is the direct examination of Anthony Young. "During the course of time from whenever it was you started looking through up until March, when you actually found Kemo, were there any communications with the defendant?

"ANSWER: Not verbally through me, no.

"QUESTION: Okay.

"You personally didn't have any?

"ANSWER: No."

Again, the defense played that, you never personally spoke to Will? You never spoke to him in all this time? Again, ladies and gentlemen, read the definition of conspiracy. He doesn't have to personally communicate the agreement with the person who eventually kills Kemo McCray. Don't get side tracked by that. That's why I'm spending a lot of time on conspiracy because it is confusing. Okay.

The defendant didn't even have to know the roles of the people, so the fact there was no direct communication between Anthony Young, right, and the defendant means nothing.

They were communications sent both on November 25th and thereafter.

"QUESTION: Did any member of the group have any contact with the defendant?

"ANSWER: Yes.

"QUESTION: Okay.

"Who was that.

"ANSWER: Jamal McNeil.

"QUESTION: How did he have contact with the defendant?

"ANSWER: He used to go visit him.

"QUESTION: Visit him where?

"ANSWER: Hudson County Jail.

"QUESTION: How often did he go to visit him?

"ANSWER: About every two or three weeks.

"QUESTION: So over the period of time from November until March, pretty consistent every couple of weeks?

"ANSWER: Yes.

"QUESTION: And what information did the defendant give to Jamal McNeil?

"ANSWER: Told Jamal McNeil to tell us that we got to hurry up and get rid of the CI, which is Kemo, and he needed to be dead quick or he was going to spend the rest of his life in prison.

"QUESTION: Did he mention anything about a speedy

trial?

"ANSWER: Yes.

"Tell the jury what he said.

"ANSWER: He said if the CI, Kemo, is dead, he would put in for a speedy trial and come home quick.

"QUESTION: Did he ask for updates on the search for Kemo?

"ANSWER: That's what Jamal McNeil told me, yes.

"QUESTION: What did he tell you?

"ANSWER: Just ask me, did we see the guy yet, has anybody heard anything?"

Now, again, go back to that visitation log. I assume the defense is going to stand up there and say, where is Jamal McNeil on the visitation log? I'll tell you what, he's not there. I mean, he may be there once, but he's not there the eight or ten times Anthony Young says. That was explained to you, that was explained by Bill Cannon, by Anthony Young.

First of all, all these guys, Jamal McNeil, the others, have multiple photo I.D.'s they use. It's not unusual. Anybody can get into the Hudson County Jail to visit anybody if they show a photo I.D. Bill Cannon told you that, the marshal himself told you that.

Just the fact that he's not in the log, obviously he's not going to go use his name, his real name during a murder conspiracy, where he's there to communicate about

taking a CI's life, cooperating witness' life, right. He's obviously going to use one of his fake I.D.s. I think there was testimony about the group telling him, you shouldn't even visit him at all. It's too dangerous. They didn't even want him to do because it was too dangerous. He's not going to write in big bold letters, Jamal McNeil.

The difference on the third is the murder is done. He's going on the run. Don't get caught up in the defense argument that where is he on the visitation logs? I'm telling you, he's not going to be there for that reason.

Again, the conspiracy, there's really no issue that a conspiracy existed, okay. The defendant was a part of it and they all had the common goal to kill Kemo.

Clearly, again, much like the drug conspiracy, it wasn't a one-man operation. All the witnesses said at the very minimum there was a get-away driver in the car. Remember that? Which corroborates that there is a conspiracy. There's a second guy. This is not someone coming up, killing him, Anthony Young doing it by himself, right.

There's a concerted plan, there's a plan in place, a well thought-out premeditated plan.

We also know that Rakeem was with him at the gun melting. There is no question about Devon Jones' testimony. Those are acts in furtherance of the conspiracy. The get-away driver, melting the murder weapon are key acts that go to the

conspiracy.

When you go back to deliberate, it's not that a matter of was there a conspiracy. There clearly was.

There's been some talk about Anthony Young was not the shooter. There seemed to be early on in the cross-examination some implication that this guy William Lattimore was the shooter because of the mystery dreadlock man, remember that? There was some implication that Jamal McNeil was the shooter. I'll talk a little bit about that.

Again, another side issue. We'll talk about why it's clear that Anthony Young was not only present but was the shooter on March 2nd. Just to go back to the legal issue, it doesn't even matter legally whether the shooter was Anthony Young or was Jamal McNeil or another member of the Curry organization, William Lattimore, perhaps. Legally it makes no difference. Once that agreement is made, it doesn't matter who the shooter was. We're not here to prove the murder of Kemo DeShawn McCray. We're here to prove the agreement to murder Kemo DeShawn McCray. Clearly someone in the group shot him and clearly there was a conspiracy. Again, side issue, don't get bogged down on that.

Let's clear that up right now. First of all, this William Lattimore thing. Johnnie Davis saw, he told us three seconds. He's the step-father who was beside his stepson when he was shot down. Johnnie Davis says the whole thing took

three seconds. I heard shots, I turned, I saw the shooter put the gun in his pocket and I saw Kemo lying on the ground and then I saw the shooter jump into the car that sped off.

Three seconds. So he hears the shots, he turns and sees the body on the ground, he sees the shooter. I don't know which order, put the gun in the pocket, sees the body on the gun and sees the guy speed off in three seconds. Did he get a chance to see him? I submit to you, no.

Doesn't really matter legally, but factually it's just silly. He tells you that he picks out this guy William Lattimore because he has dreadlocks, he's about 30 percent sure and no one takes that seriously. Newark P.D., Detective Sabur told you no, that wasn't an I.D., you couldn't rely on that. Manson said no, that wasn't an I.D., we didn't interview the guy, that was nothing.

William Lattimore is not the shooter.

The defense shifts to how about Jamal McNeil because he has dreadlocks so he must be the guy. Remember, Anthony Young, we'll talk in a minute, reversed his role for a period and said Jamal was the shooter. Again, it doesn't matter. You should be convinced by now Anthony Young was the shooter for many years we'll talk about, but Jamal McNeil -- Anthony Young was shown a picture of Jamal McNeil by the defense. It's in evidence, from 1997.

Why is that silly? Because Anthony Young told you he

hadn't met the guy until 2003. Yet the defense says, Mr. Young, here's a picture. Does that look like the guy, the way Jamal McNeil looked around March of '04? Anthony Young says yeah, I guess.

He doesn't know it's from 1997, but there's another picture that we put in from 2002, okay. Much closer to the time of the murder. He doesn't have any dreadlocks in 2002. Anthony Young even tells you, I've never known him to have dreadlocks.

Don't go down that road because a picture was put in front of Anthony Young and he said, yeah. It doesn't matter, ladies and gentlemen who's the shooter.

We know Anthony Young is being truthful when he tells you that he, himself, shot Kemo DeShawn McCray. First of all, think about the chilling detail that he gave you of every aspect of that day. There was this map. Frankly; ladies and gentlemen, I was going to go through it again, but he gives detail after detail, if you remember about the murder. I hope you can all see it. I'm not going to mark it up, but he told you the exact positions of every member.

Hakim Curry was up on 20th Street, right. That they waited on 18th by the house that Kemo was doing construction work on for hours. He told you about the car, about the plan with the license plates, how the three cars would drive so the middle car wouldn't be seen by the police. He told you he was

there and waiting for a couple of hours. Hakim Curry chirped him and said let's go somewhere so anybody passing by wouldn't be suspicious. They're on communication devices that he told you about, the direct connects.

He tells you detail after detail of the plan. He tells you about the nine millimeter gun, he tells you about the trap in Rakeem Baskerville's car. He tells you how he pulled up, how they were at the house -- I'm sorry, on 18th Street and how when finally around 1:30, Johnnie Davis and Kemo leave, which turns out to go get some cigarettes up in the store on 20th Street.

How Hakim Curry's up by the store. How him and Rakeem move out, Rakeem pulls the Grand Am with the no license plates to the corner and how he gets out and walks north on South Orange Avenue, right up to the place he's hiding in the doorway, I think it's a restaurant or store.

I mean, think about that detail that he gives you. He doesn't come in here and say, yeah, I saw Kemo and they told me to shoot him, so I shot him. Every single detail, right, which, by the way, we know is corroborated by the witnesses. We'll get to that in a minute.

He tells you how Curry chirps him, says he's coming. He waits in the doorway and as he crosses paths with him on that sidewalk by 19th Street, he comes around and shoots him with his left hand.

So he knew where the cars were parked, he knew what type of communication devices, he knew what type of gun. That's corroborated, because you heard from the crime scene, you heard from Detective Sabur, he knew it was a nine-millimeter. That information wasn't shared with him, ladies and gentlemen.

He told you, I never saw the autopsy pictures, I couldn't even recognize them when shown by the defense. He's never seen them before. Obviously, law enforcement is not going to share their crime scene reports, autopsy reports or any other reports with Anthony Young.

He knew there was a doorway at 19th Street. He knew how they prearranged the whole thing and agreed afterwards, even afterwards how they arranged to meet at a garage to stash the gun. He knew about the traps in Rakeem Baskerville's van. We even showed you that van that was taken by Agent Hilton during a search warrant, right, on March 8. Sure enough, there were traps in the van, exactly where Anthony Young said they were. To hide the nine millimeter gun on the day of the murder. How did he know that?

He knew that because he knew Rakeem Baskerville's van and he knew that's where the gun was kept on the day. That's independent corroboration for what he was saying, that the gun was hidden in a trip. He even told you where it was in the front dashboard. You can look at that. It's an exhibit in

evidence.

By the way, they're very similar traps to the Monte Carlo that the defendant had. They have the same mechanism, you can see it in the picture.

Now, he also told you that a Grand Am was used, which is really quite extraordinary because you know from another witness, Mr. Williams, just a witness, just a guy working on a car across the street, no motive to lie, he tells you I heard the shots, I looked across and he knew his cars, ladies and gentlemen. Remember that? We all laughed because he described the way the bumper is shaped on a 2002 Grand Am or something like that. He knew his Grand Am, no doubt about it, no one questioned him about that. He didn't see any plates.

So we know the car didn't have plates. Exactly what Anthony Young said. Independent corroboration of what Anthony Young said. There is no other way he could have known that.

He also knew details that were among the Grand Am, but other details that Shawn Manson told you were never made public and law enforcement does that on purpose so we know when someone is telling the truth when they come forward. The key detail there is the cigarette that he had, which the ME told you about. There's a bloody cigarette recovered and the mask, that dust mask that he had.

How did Anthony Young know that? He hasn't seen the crime scene, hasn't see the autopsy photos, but he tells you,

yeah, when I shot him, he had this dust mask and he had a cigarette.

He also knew the body was face down. How did he know that? That's true, you could see the crime scene photos, the body is face down.

He also knew the number of shots. He said in his testimony there were three or four shots fired. Four shell casings, four shots. He only hit him three times.

He also knew he hit him in the head. I mean, how did he know that? He could have said, I hit him in the chest, right. He could have said, I hit him in the leg. He knew he hit him in the head and he knew not only that but he knew it was a left-handed shooter. Left side, right.

The ME tells you that -- Anthony Young said it was -- consistent with the evidence. Dr. Shaikh told you that. I did that demonstration. I couldn't reach up over my partner's head to get the angle right, but he told you left side, front to back, totally consistent with what Anthony Young described to you.

He knew the Grand Am. He also knew the direction it took off. I know I'm going on and on, but again, you believe Anthony Young, case is over, the defendant's guilty. He is corroborated every which way 'til Tuesday, on every fact that he told you.

We don't bring in a cooperator and expect you to

believe a cold-blooded killer. We expect you to look and not say he's a cold-blooded killer, I can't believe anything he said. That's what the defense wants you to do. You can't believe a word what this guy says, he's a cold-blooded killer, right, or he's got a long record or he's a drug dealer?

The bottom line, ladies and gentlemen, you determine the credibility of the witness and you have to do that by not looking just at what the witness says or just what his background is or his criminal record is, but does it make sense? How did he testify? Let's talk about that.

Anthony Young got on the stand and he looked you in the eye, he answered the questions directly, he thought about the questions. No sympathy, he is a cold-blooded killer, there is no excuses for that. Okay.

The Government doesn't take lightly coming in here and putting a cold-blooded killer on the stand, okay. But you have to look at what he said and you have to listen and you have to look at all the independent corroboration and there's just a tremendous amount of it where it concerns Anthony Young.

How did he come in, in the first place? Why is Anthony Young a witness in this case? Remember, he's not like all the other witnesses, the Koby Cuyler's and Eric Dock's and guys who had been arrested for other charges and now cooperating. He came in voluntarily, in January 14th of 2005,

he dialed 4-1-1. Can I have the number of the F.B.I. please?

Before January, 2005, the F.B.I. had no idea who the shooter was in the case with Kemo DeShawn McCray, no clue. They had their ideas, they thought maybe it was someone in the Curry gang. They certainly had an indication who was involved, they certainly knew the defendant had ordered it, but they didn't know who the shooter was. Anthony Young comes in.

Now, he comes in, by the way, he tells you, ironically because of a dispute with the defendant's brother Jamal Baskerville and Jamal McNeil. They get into a dispute because I think he tells his girlfriend something about a murder and now they think he's cooperating. You can read that testimony. The important thing is he came in here and he told you, I feared for my life, I thought they were going to get me, too.

So I called the F.B.I. and I told them I wanted to come in. Self preservation, he thought he was going to die. That's in the transcript at 4569.

"QUESTION: What happened after you told your girlfriend whatever it was that Jamal McNeil or Jamal Baskerville told you?

"ANSWER: Me and her got into a big fight one day.

"You and the girl?.

"ANSWER: Yes, me and the girl.

"QUESTION: Okay.

"ANSWER: And we broke up and her being Mr. Baskerville's wife's best friend, she went back and told what I told.

"QUESTION: Which Mr. Baskerville are you talking about?

"ANSWER: Jamal.

"QUESTION: Now, was there a reaction from Jamal Baskerville?"

There was another question. "Did Jamal Baskerville say anything to you?

"ANSWER: Yes.

"QUESTION: Okay.

"What did he say to you?

"ANSWER: He told me one night in the car that I talk too much and what else have I told?

"QUESTION: Okay.

"Anything else?

"ANSWER: Told me to get out of the car.

"QUESTION: Was there a later conversation on the telephone?

"ANSWER: Yes.

"QUESTION: Okay.

"Can you tell the jury about that?

"ANSWER: We was arguing on the phone one day and he

said, when I see you in the streets, you'll be taken care of.

"QUESTION: What did you do as a reaction to those comments by Mr. Baskerville, again, Jamal Baskerville?

"ANSWER: I got in touch with the F.B.I.

"QUESTION: Do you recall when you contacted the F.B.I.?

"ANSWER: Sometime in January.

"QUESTION: How exactly did you get in touch with the F.B.I.?

"ANSWER: By phone.

"QUESTION: How did you get the number?

"ANSWER: By calling 4-1-1."

Corroborated by Shawn Manson. That is exactly how he came in to the F.B.I., the switchboard gets the call, he says I got some information about the killing of a federal informant, a computer check is run and Agent Manson gets in touch with him.

Anthony Young wouldn't be here, we wouldn't know Anthony Young if he hadn't dialed 4-1-1 that day, so consider that when you consider whether he's telling you the truth.

Before January 14th, 2005, by the way, even without Anthony Young's testimony, Agent Manson told you something interesting. Remember, the Government already had spoken to Eric Dock, right, had already gotten his log in May of 2004, had spoken to Rick Hosten, had Williams as a cooperator so

Agent Manson told you even before they knew who the shooter was, they had enough for the agreement, for the conspiracy, to charge him in an indictment and they were actually going forward with the indictment at the time.

Anthony Young, in effect, was icing on the cake, right. Because again, you have to separate the murder, who killed him, from the conspiracy which the defendant is charged with.

So the defense, and I forget if it was Mr. Kayser or Mr. Herman, for awhile on cross-examination, there were numerous questions kept asking, isn't it true, Mr. Young, for a year and a half, you lied to the F.B.I.? You lied to the F.B.I. for a year and a half?

What that concerned was, of course, ladies and gentlemen, that Anthony Young came in and told in detail the facts I've just gone over in great detail, all right, the type of gun, the car, the whole thing, but he did reverse his role.

He did that because his lawyer told him whatever you do, don't implicate yourself, go in and talk to them, cooperate, but don't implicate yourself. He made a decision to tell everything, but he put himself in the car up on 20th Street, right, where Jamal McNeil and Hakim Curry were. He said I'm that guy and Jamal McNeil is the shooter.

Okay. That's true. He lied, there is no question about it. He lied about that one detail. He minimized his

role. Does that mean that you should disregard all the other corroboration and everything else he said? Is it a lie with any meaning in this case? I submit to you, as I said, no, it is not. Legally, it doesn't matter who the shooter is in this case.

Again, if the witness is lying about all the other details, which is what the defense wants you to think, does it make -- use your common sense. Does it make sense that a person of Anthony Young's background could come in here, make up all those details, some of which are corroborated independently? I kept thinking he would have to be the great American crime novelist. He should go write a book about crime because these details about scooping up the hot metal after the gun was melted, but this is not fiction, ladies and gentlemen, he lived it. That's why he knows the details.

Now, the final reason why you know Anthony Young is the shooter and is part of this conspiracy with the defendant is because he actually came into a court, this very court and he admitted his guilt to being the shooter to the very charges to the conspiracy to murder Kemo McCray, the very charges you're considering. He said in court under oath, I'm the shooter, I plead guilty.

For that, he is facing a mandatory life sentence, mandatory life sentence under the law. Now, did the Government say we would not seek the death penalty against

him? Certainly. You can consider that.

He came in and in March of '06, he had a new lawyer and he tells the F.B.I., and the new lawyer tells him, you better tell them everything, tell them everything.

He then tells them, okay, I'm the shooter. I lied about reversing the roles, but that's it. Everything else from January of '05 has been consistent. There's simply no logical reason that you can come up with why he would admit his guilt as the shooter in this heinous crime unless he really was. Why would he admit to something that potentially could get him the rest of his life in jail?

Now, ultimately, like the others, if he cooperated and if he testified truthfully, he would get this thing that you've heard about so many times in this case, the 5K letter, the mysterious 5K letter that the Government writes. Some of them refer to it as the big 5K.

What is this? You actually have one you can look at, but it's in evidence. I forget the number, as to one of the cooperators. There was one already written for him regarding another case that he cooperated on.

It's not a mystery, ladies and gentlemen. Take a look at it. All it is, is a letter from the Government to the sentencing judge, saying this is what the guy did. He gave us information, he told about this guy, he came in and testified against this guy, he testified truthfully and he provided

substantial assistance to the Government, right, against a defendant in another case.

That goes to the Judge. It's not up to the Government what the sentence is, if the sentence gets reduced for those who were sentenced already or if the sentence gets lowered for those who haven't been sentenced yet. But in this case, in Anthony Young's case, Judge Pisano at some point will see a 5K letter from the Government saying the defendant got up on the stand and cooperated and did and gave information in a very important case.

That's it. Okay. So will he get life in prison? We don't know. He might. No obligation by the Judge to consider the 5K letter. Will he get somewhat less than life in prison? He might, we don't know. But there is no guarantees and yet, he still came in here and told you, even though he's facing that sentence, exactly all the details that he told you.

That, ladies and gentlemen, is indisputable proof that Anthony Young is the shooter and involved in this murder conspiracy with the defendant.

So keep going?

THE COURT: If you think this is a logical point, it doesn't appear you'll finish.

MR. FRAZER: If the Court wishes, I'm now going into another area.

THE COURT: Let's break for the day. This has been

a long time of people talking to you.

We're going to break for the day. We'll come back tomorrow and finish up closing statements and see how far we get.

Please, again, at the end of the case it's very critical for you to remember my daily instructions. Don't begin forming an opinion as to what your verdict will be until you've heard everything. Keep an open mind, don't discuss the case with each other, don't permit anyone to discuss it with you.

Travel safely, we'll see you tomorrow morning.

THE CLERK: All rise.

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. **DECLARATION OF ANDREW D. KOGAN, AUSA**

Pursuant to 28 U.S.C. § 1746, I hereby declare as follows:

1. I am an Assistant U.S. Attorney and have been with the U.S. Attorney's Office for the District of New Jersey since 1999.

2. I am the lead prosecutor assigned to an investigation and prosecution of Richard Roberts.

3. Based on a review of my e-mails, my first investigative step regarding this investigation of Mr. Roberts occurred in or about November 2013.

4. Based on a review of this Office's internal records, this Office opened an investigation concerning Mr. Roberts in November 2013.

5. Based on a review of my e-mails, on or about July 7, 2016, this Office told Mr. Roberts, in substance and in part, that he was the "target" of an ongoing federal criminal investigation.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

Executed on this 28th day of November 2017.

ANDREW D. KOGAN, AUSA

U.S. Department of Justice

United States Attorney
District of New Jersey

Organized Crimes/Gangs Unit

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August 24, 2011

Via Federal Express

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

Dear Messrs. Lustberg, Adams, Iacullo, McGovern, and Glazer:

This letter supplements the government's previous letters regarding discovery in the above-captioned case. This letter is to provide you with additional discovery materials and early Jencks relating to the charges in the above-captioned case. Enclosed please find the following materials:

Item No.	Description	Bates No.
1	Alejandro Castro Sprint Records	ALECASTRO_SPRINT-000080 - ALECASTRO_SPRINT-000093 ***(located on disc marked Box 50)***
2	Abdul Williams Jailhouse Calls - 2 calls	AWJAILCALLS-CD-2
3	Transcript of Proceeding in Parol Revocation Hearing for Abdul Williams and reports	AWPAROLE-000473 - AWPAROLE-000491 ***(located on disc marked Box 50)***
4	Exhibits 20 and 21 and audio recordings	BASK-CD-5
5	Letters between Vicente Esteves and CW1 (one previously produced in redacted form)	CW1-000001 - CW1-000005 ***(located on disc marked Box 50)***
6	***Redacted*** CW1 Continental Airlines travel records	CW1CONTINENTAL-000001 - CW1CONTINENTAL-000038 ***(located on disc marked Box 50)***
7	Certified records from the Motor Vehicles Commission	DMVCERTRECS-000001 - DMVCERTRECS- 000017 ***(located on disc marked Box 50)***
8	Documents pertaining State v. Edward Peoples	EP-000479 - EP-000544 ***(located on disc marked Box***
9	Inmate records from Hudson County Jail	HCJINMATERECS-000088 - HCJINMATERECS-000091 ***(located on disc marked Box 50)***
10	Hiram Ortiz and Alfred Kaufman signature cards for PNC account	HOAKPNC-000001 - HOAKPNC-000002 ***(located on disc marked Box 50)***
11	Trial transcripts of State v. Norberto Velez for 6/24/2003 and 6/25/2003 and additional documents from the Essex County Prosector's Office case file	NVELEZ-000445 - NVELEZ-001139 ***(located on disc marked Box 50)***
12	Ocean County Jail Professional Visitors Log	OCJPVL-000001 ***(located on disc marked Box 50)***
13	Letter from Ohio Savings Bank to Paul Bergrin with attached mortgage history	PB45MORT-000422 - PB45MORT-000423 ***(located on disc marked Box 50)***
14	Paul Bergrin's Continental Airlines travel records	PBCONTINENTAL-000001 - 000016

		(located on disc marked Box 50)
15	EZPASS records for Paul Bergrin	PBEZPAY-000011 - PBEZPAY-000025 ***(located on disc marked Box 50)***
16	Disc containing EZPASS records for Paul Bergrin	PBEZPAY-CD-2
17	Lease agreement between Paul Bergrin and the Robert Treat Hotel	PBLEASE-000001 - PBLEASE-000053 ***(located on disc marked Box 50)***
18	Paul Bergrin Marriott Hotel Records	PBMARRIOTT-000003 - 000010 ***(located on disc marked Box 50)***
19	Paul Bergrin Western Union Payments from Popular Financial	PBPCB-000001 - PBPCB-000003 ***(located on disc marked Box 50)***
20	Paul Bergrin's USAA automobile insurance records	PBUSAAINSUR-000001 - PBUSAAINSUR-000052 ***(located on disc marked Box 50)***
21	Canceled checks and deposited items for Pope, Bergrin & Verdesco Attorney Cost Account	PBVACA-000335 - PBVACA-000638 ***(located on disc marked Box 50)***
22	Paul Bergrin and Barbara Bergrin - Wachovia National Bank statements, checks and deposited items from 6/30/2005 - 10/23/2007 for account number 10100110451321	PBWACH_4-000001- PBWACH_4-000207 ***(located on disc marked Box 50)***
23	Passaic County case on Alejandro Castro and Norberto Velez	PCREPORTS-000029 - PCREPORTS-000054 ***(located on disc marked Box 50)***
24	Rondre Kelly Sprint records for phone number (973) 583-1079	RKELLY-CD-2
25	Alejandro Castro Sprint Records for (973) 847-3152	ALECASTRO-CD-1
26	Certified incorporated records from the State of New York for NY Confidential Escorts, Inc.	NYCERTRECS-000001 - NYCERTRECS-000008
27	Litton Loan Servicing Documents relating to 710 Summer Avenue, Newark, NJ	LLS710SUM-000001 - LLS710SUM-000455

In its June 21, 2011 discovery letter, the government informed you that Certified Blue Ribbon copies of tax documents that were previously produced without certification were currently available for your review. It appears that the transcripts, although available for your review as of our last discovery letter, were not in fact previously provided to you in hard copy.

We have, however, provided copies with this letter:

Item No.	Description	Bates No.
1	Transcript for Paul and Barabara Bergrin, Form 1040 for 2003	PBBBTAXES-000117 - PBBB TAXES-000119 ***(located on disc marked Box 50)***
2	Transcript for Paul and Barbara Bergrin Form 1040 for 2004	PBBBTAXES-000120 - PBBB TAXES-000122 ***(located on disc marked Box 50)***
3	Transcript for Paul and Barbara Bergrin Form 1040 for 2005	PBBBTAXES-000123 - PBBB TAXES-000126 ***(located on disc marked Box 50)***
4	Transcript for Paul and Barbara Bergrin Form 1040 for 2006	PBBBTAXES-000127 - PBBB TAXES-000129 ***(located on disc marked Box 50)***
5	Transcript for Paul and Barbara Bergrin Form 1040 for 2007	PBBBTAXES-000130 - PBBB TAXES-000132 ***(located on disc marked Box 50)***
6	Transcript for Law Office of Paul Bergrin, P.C. for 2004	LOPBTAXES-000045 - LOPB TAXES-000047 ***(located on disc marked Box 50)***
7	Transcript for Law Office of Paul Bergrin, P.C. for 2005	LOPBTAXES-000048 - LOPB TAXES-000050 ***(located on disc marked Box 50)***
8	Transcript for Law Office of Paul Bergrin, P.C. for 2006	LOPBTAXES-000051 - LOPB TAXES-000053 ***(located on disc marked Box 50)***
9	Transcript for Law Office of Paul Bergrin, P.C. for 2007	LOPBTAXES-000054 - LOPB TAXES-000056 ***(located on disc marked Box 50)***
10	Transcript for Premium Realty Investment Corp., Inc. for 2004	PREMREALTAXES-000107 - PREMREALTAXES-000109

		(located on disc marked Box 50)
11	Transcript for Premium Realty Investment Corp., Inc. Form for 2005	PREMREALTAXES-000110 - PREMREALTAXES-000112 ***(located on disc marked Box 50)***
12	Transcript for Premium Realty Investment Corp., Inc. 2006	PREMREALTAXES-000113 - PREMREALTAXES-000115 ***(located on disc marked Box 50)***
13	Transcript for Pope, Bergrin & Verdesco, PA for 2003	PB&V_TAXES-000022 - PB&V_TAXES-000024 ***(located on disc marked Box 50)***
14	Transcript for Pope, Bergrin & Verdesco, PA for 2004	PB&V_TAXES-000025 - PB&V_TAXES-000027 ***(located on disc marked Box 50)***
15	Transcript for Pope, Bergrin & Verdesco, PA for 2005	PB&V_TAXES-000028 - PB&V_TAXES-000030 ***(located on disc marked Box 50)***
16	Transcript for Pope, Bergrin & Verdesco, PA for 2006	PB&V_TAXES-000031 - PB&V_TAXES-000033 ***(located on disc marked Box 50)***
17	Transcript for 572 Market Holding LLC for 2003	572MHTAXES-000045 - 572MHTAXES-000047 ***(located on disc marked Box 50)***
18	Transcript for 572 Market Holding LLC for 2004	572MHTAXES-000048 - 572MHTAXES-000050 ***(located on disc marked Box 50)***
19	Transcript for 572 Market Holding LLC for 2005	572MHTAXES-000051 - 572MHTAXES-000053 ***(located on disc marked Box 50)***
20	Transcript for 572 Market Holding LLC for 2006	572MHTAXES-000054 - 572MHTAXES-000056

		(located on disc marked Box 50)
21	Transcript for Pope and Bergrin, PA 1999	P&B_TAXES-000024 - P&B_ TAXES-000026 ***(located on disc marked Box 50)***
22	Document Stating No Return Filed for Isabella's International Restaurant for Form 1120 for 2003	ISABELASTAXES-000095 - S ABELASTAXES-000097 ***(located on disc marked Box 50)***
23	Document Stating No Return Filed for Isabella's International Restaurant for Form 1120 for 2004	ISABELASTAXES-000098 - ISABELASTAXES-000100 ***(located on disc marked Box 50)***
24	Document Stating No Return Filed for Isabella's International Restaurant for Form 1120 for 2005	ISABELASTAXES-000101 - I SABELASTAXES-000103 ***(located on disc marked Box 50)***
25	Document Stating No Return Filed for Isabella's International Restaurant for Form 1120 for 2006	ISABELASTAXES-000104 - I SABELASTAXES-000106 ***(located on disc marked Box 50)***
26	Document Stating No Return Filed for Isabella's International Restaurant for Form 1120 for 2007	ISABELASTAXES-000107 - I SABELASTAXES-000109 ***(located on disc marked Box 50)***

As when initially produced, the tax documents will only be available to the relevant taxpayer or business principal. In this case, the records have only been provided to Mr. Lustberg. Mr. Adams, if you wish to review tax records for Isabella's International Restaurant or your client's personal tax records, please contact me.

We have also previously provided notice of our intent to use expert witnesses at the upcoming trial. Below is an additional expert witness the government intends to call, along with the bates numbers for her curriculum vitae and corresponding report(s):

Item No.	Expert No.	Bates No.
1	Curriculum Vitae for Sue Grant with attached reports	GRANT-000001 - GRANT-00 0010 ***(located on disc marked Box 50)***

Finally, the government has in its possession one box of records from Fidelity National Law Group related to Chicago Title Insurance Company and the property 46 Eaton Place. Many of those records were previously provided to you as part of Box 5 and Box 46 and were bates numbered 46EATON-000749 - 46EATON-001223 and 46EATON-001334.

It appears, however, that this box of records may contain additional documentation relating to the property 46 Eaton Place. The records have not been bates numbered or scanned, as the mortgage counts have been dropped from the Second Superseding Indictment. They are, however, available for your review. Please contact me to arrange a convenient time for your to review them.

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

Very truly yours,

Paul J. Fishman
United States Attorney

By: John Gay
Assistant U.S. Attorney

United States District Court for the District of New Jersey

UNITED STATES OF AMERICA
v.
PAUL W. BERGRIN

Hon. Dennis M. Cavanaugh
United States District Judge

DEFENDANT EXHIBIT LIST

EX. NO.	DESCRIPTION
D-5	Newark Police Department Administrative Submission by Det. Rashid Sabur
D-7	Hassan Miller/Anthony Young recording dated 8/3/05 (see Government Exhibit 4213)
D-10	Yolanda Jauregui recording dated 11/21/05, session 278
D-11	Yolanda Jauregui recording dated 11/22/05, session 382
D-12	Yolanda Jauregui recording dated 11/27/05, session 741
D-13	Yolanda Jauregui recording dated 11/28/05, session 864
D-14	Yolanda Jauregui recording dated 11/30/05, session 1074
D-15	Yolanda Jauregui recording dated 12/9/05, session 1897
D-16	Yolanda Jauregui recording dated 12/31/05 (11:43 am), session 3507
D-18	Certified Weather Report of March 2, 2004 for Newark, NJ
D-19	Stipulation #22 regarding Certified Weather Report of March 2, 2004 for Newark, NJ
D-20	Stipulation #21 regarding Record of Fee Arbitration Determination in *Baskerville v. Bergrin*

D-21	Stipulation #40 regarding testimony of Ignatius Benjamin ("Ben") Hohn
D-24	Record of Fee Arbitration Determination in *Baskerville v. Bergrin*

U.S.	:	TRANSCRIPT
VS.	:	OF
BERGRIN	:	RECORDING

D A T E:

August 3, 2005

T I M E:

7:00 p.m.

P L A C E:

Hudson County Jail

D-7

TRANSCRIPT ORDERED BY:

Kimberly Brock, Paralegal
Gibbons, P.C.
One Gateway Center
Newark, New Jersey 07102-5310

425 Eagle Rock Avenue - Suite 201
Roseland, New Jersey 07068
(973) 618-2310
www.audioedgetranscription.com

SPECIAL AGENT MANSON: This is Special Agent Shawn Manson. The time is approximately 7:00 p.m., August the 3rd, 2005 at the Hudson County Jail.

. . .

Track 1

ANTHONY YOUNG: . . . they commit a murder. They want the triggerman. The triggerman got to go. You testify against the triggerman now you get witness protection program. You know what I mean? The only reason I'm getting out because of Hak -- any way -- if it wasn't his status, everybody would be testifying against me. You feel me? Me and Rak. They'd be testifying against us and getting the witness protection. But they want Hak.

. . .

Track 2

HASSAN MILLER: Yeah. Then he's saying I was there (indiscernible).

ANTHONY YOUNG: I know. I was there. But the only thing on my case they don't want the triggerman. They want Hak. They want the mother fucker -- see, this is how it start, it start from conspirator, being you with me, right? Then they go to the triggerman.

And the triggerman, you know the highest point, the person that paid for it. Now if they ain't nobody that paid for it, then the triggerman is the person they want. Feel me? That's how my ladder is. Robber, trigger, pay, Hak. The mother fucker that paid for a murder is the one they want. If there ain't nobody that paid for a murder just happens the triggerman.

. . .

Track 3

UNIDENTIFIED SPEAKER: That (indiscernible).

HASSAN MILLER: So I'm sitting there telling them, I'm like how is they going to give me witness protection program --

ANTHONY YOUNG: Yeah.

HASSAN MILLER: -- if they saying I actually did the (indiscernible). He said listen, they want this guy this bad, man.

ANTHONY YOUNG: You know, they ain't going to believe him because he already went against them. They ain't going to believe him saying you did the shooting so you gottta sit down now and say yo, I was out there when it happened, ba, ba, ba. He did it. He shot the mother fucker.

. . .

Track 4

HASSAN MILLER: Yeah.

ANTHONY YOUNG: If he -- that lawyer talking about -- if they said you shot him that's bullshit. Don't go over there and tell crackers that shit. You better to stick to no he shot him, I was out there. He shot the nigger. It ain't like I ran with him. I went another way. You know what I mean? He shot him. This nigger shot him. And they are charging --

. . .

Track 5

HASSAN MILLER: Oh man.

ANTHONY YOUNG: They give you witness protection quick. Hell yeah. They gonna to give it to you. If you say he shot him, they give it to you. They got to.

. . .

Track 6

HASSAN MILLER: . . . I'm like just -- hold up how you all gonna give me, you know what I'm saying, the witness protection program if they saying that I did it?

ANTHONY YOUNG: They can do it. They got -- them prosecutors are devious, man. You know how much shit we did that old boy didn't do?

. . .

Track 6 Extended

HASSAN MILLER: . . . I'm like just -- hold up how you all gonna give me, you know what I'm saying, the witness protection program if they saying that I did it?

ANTHONY YOUNG: They can do it. They got -- them prosecutors are devious, man. You know how much shit we did that old boy didn't do?
Huh? But they know he the boss. They know he calling shots. They want his ass. They want his ass -- so much shit I don't tell you all man. When I go over there my lawyer told me so much shit the other day. It's like --

HASSAN MILLER: But I'm talking about they saying--

ANTHONY YOUNG: That you did it.

HASSAN MILLER: If I was there on robbery, this mother fucker is saying that I'm the one.

ANTHONY YOUNG: That shot him.

HASSAN MILLER: But he like listen, he said Mr. Miller man, we don't care about that. They already -- I talked with them, they don't care about that. They want him.

ANTHONY YOUNG: Well if he telling you that --

HASSAN MILLER: He's involved with the gang shit, you know what I'm saying?

ANTHONY YOUNG: If he --

HASSAN MILLER: They can give you witness protection program.

ANTHONY YOUNG: What? He a Blood?

HASSAN MILLER: Yeah.

ANTHONY YOUNG: Oh man, you got to testify against him. They don't get a fuck.

HASSAN MILLER: Yeah, but --

ANTHONY YOUNG: He a leader in the Bloods?

HASSAN MILLER: Yeah.

ANTHONY YOUNG: All right, man. That's why.

HASSAN MILLER: Well how is they --

ANTHONY YOUNG: It doesn't matter. I wouldn't give a fuck if you shot at nigger. He's the influence. That's what he's telling you.

HASSAN MILLER: But I --

ANTHONY YOUNG: No matter what you did.

HASSAN MILLER: But yeah, that's what I'm talking about. Well how can they give me -- help me out, you know what I'm saying, if they're saying they want him how can they help me the fuck out?

ANTHONY YOUNG: They going to put you wherever you want to go.

. . .

Track 7

HASSAN MILLER: I don't --

ANTHONY YOUNG: You really don't have no choice, man. You really don't have no choice but to go against that nigger like that. I would stick to my guns and say yeah I was there but he shot him and I keep saying he shot him. I keep saying it. He did it, he did it, he did it. He did it. Yeah they give you witness protection. I ain't know . . .

. . .

Track 8

ANTHONY YOUNG: . . . When I went over there when that mother fucker prosecutor somebody came over here and talked to us and said bah, bah, bah, this and that. He said Ant, shut your mouth and I shut up.

. . .

Track 9

ANTHONY YOUNG: And that exact shooter, Hass. Now, one thing you got to tell them was that exact shooter. During that shooting did you sit down and tell him there was a shoot out, I shot, he shot but I don't know who hit him and he died?

HASSAN MILLER: I said it was a robbery . . . .

. . .

Track 10

HASSAN MILLER: . . . he was going to say --

ANTHONY YOUNG: You good, man. You good. I'm thinking you didn't tell him. As long -- look, when they grabbed me --

. . .

Track 11

ANTHONY YOUNG: How you think I'm getting money? How you think I'm getting witness protection? You know what it's called, keep him, let him go.

. . .

Track 12

HASSAN MILLER: . . . they might backfire on me.

ANTHONY YOUNG: No it can't. If you signed your paper.

HASSAN MILLER: Yeah.

ANTHONY YOUNG: All right then.

HASSAN MILLER: But I signed that shit before, man.

ANTHONY YOUNG: It doesn't matter. You still signed it. You signed it before ahead of time saying you cannot be charged now nor later. My shit -- this is what they told me and my lawyer is sticking to our guns, I'm sticking to mine.

. . .

Track 12a

ANTHONY YOUNG: . . . They said we don't care what you did. We want Hak. That's it. And we want

Rak because he's Will's brother. They said now if you don't -- if you leave anything out, anything --

. . .

Track 12b

ANTHONY YOUNG: . . . anything --

HASSAN MILLER: So you're saying if I go over -- when I go over there next week and they said like I murdered this mother fucker but I signed the thing, you know what I'm saying but they want him --

ANTHONY YOUNG: They can't charge you.

HASSAN MILLER: But how can they --

ANTHONY YOUNG: They can't charge you.

HASSAN MILLER: -- (indiscernible) with a murder. That's what I'm trying to say --

. . .

Track 13

ANTHONY YOUNG: Uh-uh. Uh-uh. You going to be a witness against a dude that they want bad as hell. And you --

HASSAN MILLER: I don't know. I'm kind of nervous with that one because they say that's a body, man.

ANTHONY YOUNG: It doesn't matter, man. Man, we got seven of them. We got two CI's, we got Fat Kev --

HASSAN MILLER: Yeah but --

UNIDENTIFIED SPEAKER: -- (indiscernible).

HASSAN MILLER: If they know that I did it, would that shit still (indiscernible)?

ANTHONY YOUNG: They know I did it. I'm sitting here. You got to go over there and snitch your things, man. Snitch your things. You -- as long as you didn't tell -- you see the whole thing is lying, man. That's what they crackers don't like, lying. When you lie they're going to fuck you. I'm telling you now. If you lie -- I'm going to tell you if you lie to them --

HASSAN MILLER: I didn't, man. I didn't.

ANTHONY YOUNG: As long as you . . . .

. . .

Track 14

ANTHONY YOUNG: -- all you have to do is say I don't know which bullet hit him because all of us were shooting.

. . .

Track 15

HASSAN MILLER: They're making -- no one is making it look like a stick up because I got the (indiscernible).

ANTHONY YOUNG: Yeah. But it ain't going to hurt you because they want this nigger.

HASSAN MILLER: That's what I'm trying to do, right?

ANTHONY YOUNG: Yeah.

. . .

Track 16

ANTHONY YOUNG: He got status. When you got status they want to blow smoke up your ass. So the whole thing is you know what you do, boom, boom, boom, I don't know what happened but however it happened, as long as you told them before --

. . .

Track 17

ANTHONY YOUNG: Here go my words again. If you told them about the murder and you told them you was there --

HASSAN MILLER: I said --

ANTHONY YOUNG: -- you good.

HASSAN MILLER: (indiscernible) got hit.

UNIDENTIFIED SPEAKER: Yeah.

UNIDENTIFIED SPEAKER: I don't know.

ANTHONY YOUNG: That's all you need to say. That's all you needed to say. I don't know what happened.

HASSAN MILLER: That (indiscernible).

. . .

Track 18

HASSAN MILLER: That (indiscernible).

ANTHONY YOUNG: I told you, you ain't know what's going on. But the whole thing is, you know, I'm keeping it real. If you told them about the Savoy shooting --

HASSAN MILLER: I did.

. . .

Track 19

ANTHONY YOUNG: That's how the game goes man. They ain't want a nigger -- he Crip, man. I be like we shot him because he Blood. He wanted him dead. He was robbing him, he was trying to get him. But he's getting him because he's Blood, he Crip. He ain't like him.

HASSAN MILLER: I knew something was wrong. I was waiving to him. You know what I'm saying?

ANTHONY YOUNG: That's what I'd tell him. That's what I would tell him. I would be like, yo --

. . .

Track 20

ANTHONY YOUNG: Guess what it's called, premeditated. He premeditated the murder. That's who they want. Hey man, you got to sit back and read, Hass. Start reading this little bit o shit, man. You know what I mean? Start reading how these crackers work, man. Dang. They want the mother fucker that premeditate the murder.

HASSAN MILLER: Are you telling me . . . .

. . .

Track 21

ANTHONY YOUNG: . . . murder. That's who they want. Hey man, you got to sit back and read, Hass. Start reading this little bit o shit, man. You know what I mean? Start reading how these crackers work, man. Dang. They want the mother fucker that premeditate the murder.

HASSAN MILLER: Are you telling me that he -- you know when I --

ANTHONY YOUNG: Yeah, they going to give you witness protection if you --

HASSAN MILLER: But I just was trying to look at him like, yo --

ANTHONY YOUNG: Trying to get me in --

HASSAN MILLER: Yeah, like --

ANTHONY YOUNG: I thought the same thing.

HASSAN MILLER: -- how can I get this? How can you -- how are you going to tell me that I'm going to get witness protection and help from the government --

ANTHONY YOUNG: Because he's saying --

HASSAN MILLER: -- and you telling me that I actually killed this man and -- but you're telling me that they want them.

ANTHONY YOUNG: It doesn't matter.

HASSAN MILLER: How can that happen for me? That's what I want to figure out. That doesn't sound good.

ANTHONY YOUNG: Yeah it do. Now he going in, he premeditated the murder. The dude was a Crip. You even better on that. He a Blood. They know you ain't Blood, right?

HASSAN MILLER: No. Hell no.

ANTHONY YOUNG: They know that. Okay. They know he Blood, right?

HASSAN MILLER: They try -- they try that before asking me I was like hell no.

ANTHONY YOUNG: All right. So they know you ain't Blood, they know dude a Crip that died, right? Hell he premeditated the murder. I would go sit in there and say yeah well you know before we robbed him ahead of time you know he kept saying the dude was a slob or whatever and bah, bah, bah. You know, he was Crip, bah, bah, bah this and that, let's get him. He just premeditated a murder.

. . .

Track 22

ANTHONY YOUNG: . . . her job.

HASSAN MILLER: She's expensive as hell.

ANTHONY YOUNG: And I'm on -- I'm on top of my mother fucking prosecutor's ass. Anytime I go to him bah, bah, bah. You know, you got nothing to worry about, man.

. . .

Track 23

ANTHONY YOUNG: . . . that's it.

HASSAN MILLER: So if I go and tell him that, yo, you know what I mean, (indiscernible) you know what I mean, I didn't know that the dude died.

ANTHONY YOUNG: Yeah.

HASSAN MILLER: But they want him. He telling me that they want him.

ANTHONY YOUNG: That's all they want then. That's all they want. Go ahead.

HASSAN MILLER: For a murder, man?

ANTHONY YOUNG: Yeah.

HASSAN MILLER: That's why I can't -- if my shit ain't right I (indiscernible), man.

ANTHONY YOUNG: Sure it is. It is -- he in organized crime. He a Blood. That's organized crime. Same shit. He might not have as much money.

HASSAN MILLER: No, none.

ANTHONY YOUNG: It doesn't matter, it's still organized crime, man. Organized crime. That's an organization, the Bloods. I'd go in there and say that mother fucker said, man, we got to get he a Crip. And me being with them, I followed the lead. We start robbing and start shooting. I never knew dude died.

. . .

Track 24

ANTHONY YOUNG: Look, man, I'm just -- you know, I'm guaranteeing --

HASSAN MILLER: (indiscernible)

ANTHONY YOUNG: How the prosecutor gave it to me. I'm about to go this week.

HASSAN MILLER: I'm good.

. . .

Track 25

ANTHONY YOUNG: . . . status.

HASSAN MILLER: They give me that?

ANTHONY YOUNG: Hell yeah they're going to give it to you.

HASSAN MILLER: If I hurt the dude, you know what I'm saying?

ANTHONY YOUNG: Huh?

HASSAN MILLER: They going --

ANTHONY YOUNG: It doesn't matter, man. It doesn't matter, man. It doesn't matter, man. He's the head of the organization, that's what they want. That's who the fuck they want. Like they want Hak, they want Rak. They want Rak because its Will's brother. You know what I mean? They want Hock because he's the head of everything, him and Sheik.

That's all they want. They can knock them down and kick you in your ass.

. . .

Track 26

ANTHONY YOUNG: I'm like Hass, they -- just they been trying to send my father out. My father just like nah, he ain't ready to leave. He -- that's the first thing they're going to do. They just like 20, 30 grand to send him down and wherever they want to go. They been askin my father --

HASSAN MILLER: Murder.

ANTHONY YOUNG: Yeah. They been askin my father.

. . .

Track 27

HASSAN MILLER: Right.

ANTHONY YOUNG: That's how it be, man. I felt like that too when I came here but then I started looking, understanding and you know what I mean, knowing what these white folks want, you know what I mean? And my whole philosophy was give them what they want. My lawyer sit down, I don't even talk to her.

. . .

Track 28

ANTHONY YOUNG: You go over there and do what you got to do. I told you the truth and nothing but the truth so help me God.

. . .

Track 29

HASSAN MILLER: . . . Kevin something.

ANTHONY YOUNG: You didn't know he died. You just knew there was a shooting. You told the truth. As long as you told the truth. You ain't know the dude died. And you got to tell him the truth. That's it. That's it. 100 percent.

HASSAN MILLER: But this is . . . .

. . .

Track 30

HASSAN MILLER: (indiscernible)

ANTHONY YOUNG: The shooting and the shit that I told them about. I don't know what the fuck happened afterwards. You know what I mean? I don't know what happened afterwards. Yeah man we fucking all this mother fucker and they was fucking over here and I don't know what happened. You know what I mean?

. . .

Track 31

HASSAN MILLER: . . . I'm fucking nervous, man.

ANTHONY YOUNG: Fuck that. I'm their CI. Their number one CI. Fuck that. Nothing but the truth so help me God. Hak going to jail, Rak going to jail, Mals going to jail, Sheik going to jail. Get the mother fuckers to stand on their ass and point this happened, blah, blah, blah, this is what I know.

HASSAN MILLER: What if they try to verify and say he did the one that did the murder.

. . .

Track 32

HASSAN MILLER: . . . he did the one that did the murder.

ANTHONY YOUNG: They're trying to do that on you. They don't want you, they want him. I'm telling you that. You told ya'll did a shooting. You didn't know what happened. You told them ya'll did a shooting. You didn't know what happened, now you know he died.

HASSAN MILLER: I can't (indiscernible) stress the fuck out.

. . .

Track 33

ANTHONY YOUNG: Now why would you start shooting? I don't trust this mother fucker, he's a nut, he'd kill me. I'm scared now. Testify. Don't worry about that, witness protection, man. You know what I mean? It ain't going to be witness protection program it's going to be we'll move you here, we'll move you there, that's what it is. Go where you want. Write your family name.

. . .

Track 34

ANTHONY YOUNG: . . . They want dude. That's how the game go, man. All they want is the truth, man. And who they want is who they want.

HASSAN MILLER: Even if I hit this mother fucker? You say they kill (indiscernible) don't worry (indiscernible) fuck out. Straighten the fuck up.

ANTHONY YOUNG: I want that mother fucker to say my ammo start blazing. Why? Because he told me start shooting this dude, Crip. And he Blood. He's a sarge, he's a lieutenant, whatever the fuck he is. Whatever, I'm not safe.

. . .

Track 35

HASSAN MILLER: Yes, but nobody is trying to fuck with you. They know you as wild mother fucker.

ANTHONY YOUNG: It doesn't matter. Why won't you think -- it ain't that -- it ain't that they won't try, Hass, it's that -- it's just that they not cocky-

. . .

Track 36

ANTHONY YOUNG: Man, I don't trust nobody. I don't trust the mother fucker. I used to do too many robberies, Hass. I'm a car thief, dog. I'm a car thief. All I used to do was rob. Rob, rob, rob. Hotman Hak, that's my man. Right? Carlstein (phonetic) took his car. Run that mother fucking CRX, nigga. I got to get high.

. . .

Track 37

ANTHONY YOUNG: I tell John Gay (indiscernible) It be like this, that I forgot about. You know what I'd do? I'd go straight to the phone (claps). Charm him. I was sitting back thinking, you know, this shit happened a couple of years ago, ba ba ba. Let me write that down. Send it to John Gay, like hey, it's

nothing, man. I don't want nobody getting knocked off and start pointing to say Ant did and Ant did and Ant did and if they do they lying. It ain't going to stick because they lying.

. . .

Track 38

ANTHONY YOUNG: I'm out -- on Friday. Between now and Friday. My lawyer came Monday. She's like this week or next week, you'll be outta here.

HASSAN MILLER: I called (indiscernible).

ANTHONY YOUNG: Maybe, maybe not, she said might be a little minute, but maybe, maybe not, but I called Shawn today, the FBI lady, gave her small shit.

. . .

Track 39

HASSAN MILLER: They don't get mad if they know that you were innocent?

ANTHONY YOUNG: You down with a clique man. You got to tell them everything that you know.

. . .

Track 40

ANTHONY YOUNG: They want that Blood shit out of here, man. The Bloods are serious though. And if it's a Crip that died --perfect excuse.

HASSAN MILLER: I didn't know Twee's old ass ...

. . .

Track 41

ANTHONY YOUNG: But, you better go over there and tell them mother fucking crackers everything. The truth, nothing but the truth so help you God.

. . .

Track 42

ANTHONY YOUNG: . . . so help you God.

HASSAN MILLER: (indiscernible)

ANTHONY YOUNG: Go over there and do what you gotta do.

HASSAN MILLER: (indiscernible). You know what I mean? You ain't tell me that shit.

. . .

Track 42a

ANTHONY YOUNG: (indiscernible) But, as long as you told them doesn't matter who you told.

ANTHONY YOUNG: A lot of shit I didn't tell y'all, but I know John Gay know. John Gay know everything I did, everything I was around, everything. I don't care if I was a block away looking at it, he know about it. I don't care if me and Hak was in the car together and another nigger did the shooting. I told him about that too.

HASSAN MILLER: Yeah?

ANTHONY YOUNG: One time, me and Hak was sitting there, look at the murder like this. Boom, boom, boom, boom boom. First car leave, the rear pull up. I get out and look it. Make sure the nigger dead. Went back in with him.

HASSAN MILLER: You had the radio on.

ANTHONY YOUNG: (indiscernible) cracker.

ANTHONY YOUNG: And I get back in the van. Car in the van with Hak, we haul ass. A lot of times I didn't get out. Get back in the car, look over the body, damn, the dude fucked up. Get back and Hak like, he dead? I'm like hell yeah he's dead. Three bullets to the head, man. He finished.

. . .

Track 43

ANTHONY YOUNG: Now you know how I feel. Did nine years in the joint. I'm always the one to go down, come home, some dumb shit happened, this and that. I'm out for a year and a half, at a year I didn't get locked up, thinking I'm chilling and here they come (whoop noise). Nope. No you ain't. You ain't going nowhere. Won't be moving that furniture.

. . .

Track 44

ANTHONY YOUNG: Right. I don't leave nothing out man, don't never leave nothing out. Because guess what, it'll backfire on you down the line. Two years -- even if I got to sit here another year at least I know I told them mothers the truth so I won't worry. I sit here and sit here 'til it's time for Hak, Rak and them to go to trial. Will. I mean, I may be going to trial with him.

HASSAN MILLER: (indiscernible)

ANTHONY YOUNG: Sit there, you said this. And your dude's gone.

. . .

Track 45

HASSAN MILLER: I'm saying I'm trying to hold on--

ANTHONY YOUNG: I got a family to go home to, Hass. That's all I'm worried about. I don't care about nobody else. I'm going home to my family. They going to jail.

. . .

Track 46

ANTHONY YOUNG: Paul going to jail too if it come down to it. Yeah. Paul told us the names, Paul told us that if he die--

HASSAN MILLER: He probably -- he probably -- he probably -- he could probably represent his mother-fucking self.

. . .

Track 46a

HASSAN MILLER: He probably -- he probably -- he probably --he could probably represent his mother-fucking self.

ANTHONY YOUNG: He is. Or, Pope can represent him, Anthony Pope. His partner. It ain't his partner no more. But, I'm going against his ass too. I'm

going to tell them, Paul came on Avon, well I already told them. Said this, said that. Did like this, said this, said that. Yeah. He did it. Everything you know is 12 times [(indiscernible)/Will sold] to him. Paul yeah, told 'em everything. They said yeah? Paul told you how to do -- Paul told you to do this? Yeah Paul told us to do that. Did he say this? Yeah, Paul said that. Yeah because we got this type of conversation with him and Hak on the phone, yeah, it's in reference to us. Yeah. Paul going to jail too, unless he turn state on Hak. And that's what he going to do, because he ain't gonna fuck his career. Yeah. Where Hak money at? Paul got it, yeah -- They said, we heard he's got a whole lot of -- yeah, Paul got his money. Yeah. Bought Paul a brand new Corvette.

HASSAN MILLER: Aziz knew that, a couple people (indiscernible)

ANTHONY YOUNG: Yeah, brand new. Bought his daughter a car. Fucking his daughter. Helped her through college. He was fucking her for a long time. I told 'em everything. Check her house, there might be some of his money in there. I ain't miss nothing, Hass. Uh-uh. I ain't lying to them white folks, man. Your life is in their hands. 100 percent in their hands, man. [Earn that life/I'm not lying].

HASSAN MILLER: Everybody is (indiscernible) --

ANTHONY YOUNG: I'm not lying to the white folks, boy. I give 'em all they want. If they want, Hass, I will sit over there and take a lie detector test (noise). And guess what, it's gonna come out positive. Positive that he's not lying all the way across. Yeah I told John Gay. I'd take a lie detector test if you want me to.

. . .

Track 47

ANTHONY YOUNG: (indiscernible) I said this on Monday, but, I switched the whole thing around. I say yeah -- ba ba ba, this and that.

HASSAN MILLER: So at least the (indiscernible)

. . .

Track 48

ANTHONY YOUNG: But, never tell nobody your story correct. Even when I tell ya'll my stories, they don't be correct. I say it one day and told Sheed, Turtleman, you, yeah, left-handed this, left-handed. You ain't never in your life saw me use my left hand, ever. I'm not left-handed. (indiscernible)

. . .

Track 49

ANTHONY YOUNG: He like, he like, you ain't left-handed. I said nah. That's because from boxing. Playing basketball. But, I never used my -- I can't, I don't even probly know how to shoot a fucking gun with my left hand. Never tried. (indiscernible) You ever see me bullshit I be like (indiscernible). Right handed, 100 percent. You don't tell these niggers your story right. Nuh-uh. Uh-uh. Put it off. Keep everybody in amazement.

. . .

Track 50

ANTHONY YOUNG: . . . If you look now, they like, ask me shit, I be like, man I be giving 'em extra shit that they don't even need to know about. But I know if they find out later it's going to be a problem. So I tell 'em about it. There, take that. Even shit when I wasn't there. Yeah. This murder happened through our clique. I know exactly how it happened, I know what gun was used, they be looking like -- they investigate that shit, car, our car, everything turn out good.

HASSAN MILLER: I'm going to call . . .

. . .

Track 51

ANTHONY YOUNG: You go over there and do what you got to do. Fuck that nigga. (indiscernible)

. . .

Track 52

ANTHONY YOUNG: . . . One day I be sittin' by (indiscernible). We talking 'bout bowling. I'm like, I (indiscernible). He like, left-hand, right? I started laughing because that's all he remember. That's all they remember that I said I was left-handed. Know what I mean?

(Private conversation ends when the two participants walk into an open room with music and talking)

(Conclusion)

* * * * *

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 26, 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)

A L B E R T C A S T R O, called as a witness, having been first duly sworn, is examined and testifies as follows:

THE DEPUTY CLERK: Please state and spell your name for the record.

THE WITNESS: Albert Castro. A-l-b-e-r-t; C-a-s-t-r-o.

THE DEPUTY CLERK: Thank you. You may be seated, sir. Just talk into the microphone.

DIRECT EXAMINATION

BY MR. MINISH:

Q Mr. Castro, if you could slide your seat forward and move the microphone towards your mouth.

Sir, where were you born?

A Newark.

Q And did you spend most your life in Newark, or have you spent most of your life in Newark?

A Yes.

Q Did you live anywhere else besides Newark?

A No. I lived in Elizabeth for about two years.

Q Besides that?

A No.

Q Could you give the jury the benefit of how far you got in the school system?

A Ninth grade.

Q And what did you do after ninth grade?
A Quit school, started stealing, getting high selling drugs.
Q During the course of your life have you held any legitimate jobs?
A Yes.
Q Can you tell the jury briefly what those were?
A Worked in a gas station, drove a truck, drove a roll-off.
Q What's a roll off?
A It's a truck that drops containers off.
Q Now, as you've already stated, you at some point in your life got involved in criminal activity. Is that correct?
A Yes.
Q And spent time in jail as a result of that?
A Yes.
Q Okay. Now specifically, back on August 31st of 1988, were you convicted of possessing cocaine?
A Yes.
Q And did you receive a Conditional Discharge for that once?
A Yes, I did.
Q And so the jury understands, did you spend any jail time?
A No.
Q And then moving forward to the following year, were you charged and pled guilty to receiving stolen property on June 25th of 1989?
A Yes.

Q And did you receive a sentence, a jail sentence for that?
A No.
Q How about further along in 1989, were you charged with possessing marijuana?
A Yes.
Q Was that charge dismissed?
A Yes, it was.
Q But did you actually have the marijuana?
A Yes.
Q Moving further along, in 1989 were you charged and convicted of possession with intent to distribute cocaine?
A Yes, I was.
Q And did you receive a sentence of three years?
A Yes.
Q Moving ahead to 1990, specifically January 15th, were you convicted of a robbery?
A Yes, I was.
Q And did you receive a sentence of seven years?
A Yes.
Q Moving forward to 1997, were you convicted on January 21st, 1997 of possession with intent to distribute drugs in a school zone?
A Yes, I was.
Q And did you receive a sentence for that?
A Yes.

Q And what was that sentence?
A Three years.
Q Was it three years with one year of parole ineligibility?
A Yes.
Q Who was your lawyer on that case?
A Paul Bergrin.
Q Moving forward to now March 3rd of 2007, did you get convicted of harassment?
A Yes, I did.
Q Did you do any jail time?
A No.
Q Who represented you on that case?
A Paul Bergrin.
Q More recently, in May of 2008, were you charged in Essex County with offenses related to drugs and guns and drug-trafficking?
A Yes.
Q And who at least initially represented you on that case?
A Paul Bergrin.
Q Was there a time when you got out on bail on that case?
A Yes, there was.
Q And how long were you out on bail before you were arrested again?
A Six days.
Q And during that time, when you got picked up again, were

you arrested and charged with another robbery?
A Yes.
Q And who represented you at least initially on that case?
A Paul.
Q And when you say "Paul," you mean --
A Paul Bergrin, correct.
Q So the jury is clear, could you identify him in court today? Do you see him in court?
A He's sitting in the front table, first person.
MR. BERGRIN: I would stipulate the identification, your Honor.
THE COURT: All right. The identification has been made.
Q All right. And as of today, sir, are you, in fact, incarcerated?
A Yes, I am.
Q You made mention initially that at some point in your life you started using drugs. Could you explain to the jury about when that was?
A In the '80s.
Q And what did you do, what sort of drugs?
A Smoked weed, sniffed coke.
Q And did that result in any time --
A -- and crimes --
Q -- or incarceration?

A Burglaries, stealing.
Q And as a result of that, did --
A No, no time.
Q So besides the ones we've gone through, there are other crimes in your life you've committed?
A Yes.
Q Did there come a time when you did go to jail while you were a drug user?
A No, not while I was a user.
Q Explain to the jury how you transitioned from a drug user to a drug distributor.
A My last time I went -- the first time I went to prison, when I came home I sniffed a couple grams of coke, said never again, and I started selling.
Q So when you said never again, you mean never again what?
A Using drugs.
Q So it wasn't never again committing crimes?
A No, not committing crimes.
Q And when you say "coke," if you could explain to the jury, do you mean crack or powder coke?
A Powder cocaine.
Q When you initially start as a dealer, how old are you, or the years that you started?
A My late 20's.
Q Okay. Do you remember when that was? How old are you now?

A 41.
Q Okay. So can you approximate for the jury when that would have been?
A Probably about 25, 26.
Q No. Okay. Was it into the '90s?
A Yes.
Q And during that time, if you can explain to the jury how you got your drugs and what you did with them.
A I'd just go to New York, pick it up, bag it, and drop off. Phone ring, call me, I go drop it off.
Q So you would buy cocaine in New York?
A Yes. Bring it back here, bag it up and distribute it.
Q I'm sorry, sir, you have to speak up.
A I would go to New York, buy it, bring it back here, bag it up and distribute it.
Q Okay. When you say "bag it up," what do you mean by that?
A Put it in little bags.
Q So the larger bag you'd break into smaller bags?
A Yes.
Q And where did you sell these drugs?
A In the Ironbound section of Newark.
Q And why there?
A That's where I'm from.
Q So you sold in the area where you lived?
A Yes.

Q And did that continue for years?
A Yes, it did.
Q And during the course of that time did you become a larger scale drug distributor?
A Yes.
Q Okay. Explain to the jury what happened, or how that happened.
A Well, I just bought little quantities, and then it progressed, and then I bought more, and I just kept progressing buying more coke and became bigger than what I was.
Q So you would -- you started to have more customers?
A Yes.
Q Okay. And actually selling more cocaine?
A Yes.
Q Which led you to be able to buy more cocaine?
A More cocaine and distribute it more.
Q Now, before you got -- you got arrested in 2008, and that's what you've been incarcerated for.
A Yes.
Q By the time, from the '90s when it started to 2008, from the time in which you were arrested, how much money do you think you were making a week as a drug dealer?
A About 50,000 a week.
Q And did you buy anything that would -- how did you spend your money?

A Cars, jewelry, property.
Q What kind of cars?
A Mercedes, Bentleys, trucks.
Q Now we're going to get to this period of time in a minute, but you said in 2008 you're making about $50,000 a week. In 2003, about how much were you making a week?
A About 20,000, average.
Q Average you said?
A Yes, about 20 grand, 20, 25.
Q Now, were you making money during this period of time by any other illegal activity besides selling drugs?
A Yeah, stolen property.
Q Okay. Would you explain to the jury how you did that.
A I was buying construction equipment or trading off for drugs, and reselling it.
Q Were you the one actually stealing?
A No, I was just buying it and reselling it.
Q Now, at some point your operation grew beyond just you personally being involved?
A Yes.
Q Okay. Would you explain to the jury what happened or how that happened?
A As far as --
Q How did your operation expand, your drug-trafficking operation?

A Just more clientele and buying more coke.
Q Let me ask it this way: Who else worked with you in your drug-trafficking?
A Me and my daughter and a couple of friends.
Q Okay. And which daughter?
A Stephanie Castro.
Q And who were the friends?
A One was that her boyfriend, another friend was Anthony; Michael.
Q Anybody else?
A No, that's -- my kid's mother.
Q And what's your kid's mother's name?
A Laura McGrath.
Q Now you say they assisted in the operation. What exactly did they do?
A Deliveries.
Q Deliveries.
A Phone rang, they went dropped off.
Q Again, if you could just make sure, if you can explain to the jury what that means: "Phone call, dropped off." What exactly is that?
A People called, told us where to meet them, and they went and dropped it off.
Q And "it" being cocaine?
A Yes.

Q Did there come a time -- well, ultimately, can you tell the jury when you first met Paul Bergrin?
A '96 or '97 with for my drug conviction, when I got caught with drugs.
Q And you've already discussed the times he's represented you. Did you ever direct other individuals to Mr. Bergrin for representation?
A Yes.
Q Okay. Were there any people involved with drugs?
A Yes.
Q Okay. Could you tell us who they were?
A Carmen DeSilva; I believe Miguel Sorreno; and my daughter's boyfriend. It was a few people. I don't remember names exact, but...
Q Was Stephanie ever sent there -- sent to him? I'm sorry.
A I believe Stephanie went to him but Dana Scarillo represented her.
Q How about Laura?
A Paul represented Laura.
Q And were those related to drug-trafficking?
A Yes. I believe Paul represented Laura.
Q Now, why did you send these individuals or recommend Mr. Bergrin to these individuals?
A Because he was a good lawyer, had a lot of respect in the courthouses, a lot of pull. My only opinion is, maybe you give

one today -- get a conviction today, tomorrow you let the guy go.

Q And is that the only reason?

A Yes.

Q Did there come a time where that charge that you said you had pending, Mr. Bergrin was representing you in 2008 in Essex County, did there come a time when you had a falling out with Mr. Bergrin?

A Yes.

Q And this was during the time when he was representing you on that case.

A Yes.

Q Could you explain to the jury what happened?

A I don't think he defended me in a proper way. He didn't subpoena a lot of surveillance and stuff for me to win my case. He tried sleeping with my daughter, and took some money from plea.

Q What do you mean, took some money from you?

A I got a check back from the state. He said it was a mistake. He kept the money.

Q Okay. And were you happy with those things?

A No.

Q So you were angry?

A Yes.

Q And as a result of being angry, what did you do?

A Fired him and hired another attorney. And I got in touch with the -- Joe Minish.

Q Well, let's not skip too many steps ahead.

You got another attorney. Who was that attorney?

A Richard Roberts.

Q And did you have discussions -- without telling us what it was -- did you have discussions with your attorney about your case?

A Yes.

Q And did you ultimately make a decision that you wished to come to speak to the Federal Government?

A Yes, sir.

Q And you went through your counsel?

A Yes.

Q And did there come a time when you actually did come to have a meeting at the U.S. Attorney's Office?

A Yes, I did.

Q And present at that meeting was myself and Agent Shawn Brokos?

A Yes.

Q Now, I'm going to show you, sir, on that day, were you given any document to review by members of law enforcement?

A Just the proffer.

Q Okay.

MR. MINISH: Judge, I'm showing the witness what's

been marked J01603 through 04. I think there's a copy on the Court's bench.

Q Do you recognize what that is, sir?

A Yes.

Q Okay. Would you tell the jury what that is?

A It's a proffer. The only thing I'm to do is tell the truth and nothing could be used against me. If I lie to you I get charged for perjury. So I'm here to tell the truth.

Q Okay. So that's an agreement you reviewed on that day?

A Yes.

Q And did you sign that agreement?

A Yes, I did.

Q And did you have the opportunity to speak with your lawyer about that agreement?

A Yes.

Q And when you were talking, was there anybody in the room besides you and your lawyer?

A No.

Q When members of law enforcement came back into the room, did you tell us anything on that day?

A No, I got cold feet.

Q And why did you get cold feet?

A A little scared, nervous.

Q Scared and nervous about what?

A Because of Paul.

Q You have to -- can you explain that to the jury?
A I was scared he would have came after me, so I didn't do anything that specific day.
Q Did there come a time when you came back again to the U.S. Attorney's Office?
A Yes, there was.
Q And again, did you come with your counsel?
A Yes.
Q Do you recall how much time after that first meeting it was?
A If I can recall, probably a couple of weeks.
Q Okay. Does March 31st sound about right?
A I'm not too sure, but it was a couple of weeks afterwards.
Q But it was 2009?
A Yes.
Q And did you, in fact, speak on that day and provide information to members of law enforcement?
A Yes.
Q Prior to that time, to whatever you were going to tell the jury, had any member of law enforcement told you we were looking for information about Paul Bergrin?
A No.
Q Had you told us anything about what you were going to ultimately provide us?
A Not at that specific time I don't believe.

Q Ultimately, yes --
A Yeah.
Q -- but I'm talking about at that time.
A No.
Q Can you tell the jury what you told us on that day?
A That I was called into Paul's office. He wanted to speak to me. He offered me ten grand to do a hit.

I asked him who?

And he told me a guy named Kemo.

I thought it was all a joke because I don't -- I never killed anybody. I did drug selling, stolen property.

So later on into the conversation he told me Kemo made a sale or something and Paul was arrested.

So I basically told him it was a joke -- I thought it was a joke. I never had no other conversation with him after that.
Q So if we could just break that down.

You say you got a call from Mr. Bergrin or you called him?
A No, he called me, told me to come and speak to me.

I go into the office. I sit down.
Q Okay, sorry. Could we just do it sort of step-by-step? You have to wait for a question.
A Okay. I'm sorry.
Q Where was the meeting held?

A In his office.
Q And when you say "his office," you mean his personal office or somewhere in the law firm?
A In his office, his personal office.
Q And who was that at that meeting?
A Me and him. Me and Paul.
Q Anybody else? Anybody else?
A No.
Q All right. Was the door opened or closed when you had that meeting?
A It was open when I went in. He closed it after I was in.
Q And where did you sit down?
A On the other side of his desk.
Q And where did Mr. Bergrin sit?
A In the front of his desk.
Q In front of his deck or behind his deck?
A Well, he sat on one side of his desk, I sat on the other.
Q Was there any small talk?
A No. It was just, you know, how are you doing, Paul? How are you doing? That was it.
Q Do you recall when this meeting occurred?
A About the second week in December.
Q How is it you are able to remember that?
A Because my daughter's birthday is December 19th, so it was before that. I don't know the exact date, but it was before

that. So around the second week.
Q Why did you go down to the office just because Mr. Bergrin asked you?
A To see what he wanted, see what it was about.
Q So after the small talk, as best as you can remember, what is the first thing related to a hit that Mr. Bergrin said to you? Exact words.
A If I wanted to make $10,000.
Q Okay. And --
THE COURT: No, Mr. Minish. Why don't you just ask him what he remembers was said, that's all. We don't need to...
You know, you sat down. Tell us what was said. I think you did already, but tell us what was said?
THE WITNESS: I was offered ten grand to put a hit on somebody. I asked him who.
He told me the guy's name, Kemo.
Later on I found out it was because he made a transaction or a sale and he was arrested.
BY MR. Minish:
Q Okay. And who told you that?
A Paul.
Q And what specifically did he tell you?
A That he made a transaction, a drug deal to E.T. Hak or a member --

Q A member of what?
A E.T. Hak's crew.
Q And who was E.T. Hak?
A I believe he was a kingpin.
Q Okay.
A A big drug dealer.
Q You believe that, why?
A Because his name was well-known.
Q Prior to that conversation with Mr. Bergrin or because of what Mr. Bergrin said?
A No, prior to the conversation. All drug dealers basically hear of each other. If I'm selling drugs -- not necessarily know each other but, if I'm selling, you're selling, we all know of each other.
Q Had you ever met -- or have you ever met E.T. Hak?
A No.
Q Now, after Mr. Bergrin said this to you, what was your answer?
A I never killed anybody, and I thought it was a joke, and that was the end of the conversation.
Q Did you say anything to him about the money --
THE COURT: Don't lead anything in this area. Don't lead in this area. That was a leading question. As far as I'm concerned that's a leading question.
MR. MINISH: Okay, Judge. And again, I don't want to

say anything in front of the witness that the Court doesn't want, but I think if we're heard briefly --

THE COURT: No.

MR. MINISH: Okay.

Q Was there anything else discussed that you provided --

THE COURT: That's all. That's a good question.

Was there anything else discussed that you recall?

THE WITNESS: Just that I made 20 to $25,000 a week and I didn't need the money.

BY MR. MINISH:

Q Now, I apologize and I don't mean to be repetitive, I know you said the second week in December, but do you recall the year?

A 2003.

Q After you rejected the offer, what happened?

A I left. I left his office.

Q Was it amicable?

A Excuse me?

Q I'm sorry. Was it -- was there an argument or did you just get up and leave?

A No, I just left.

Q Now, if you had wanted at that time in your life to make a hit happen, could you have?

A Yes.

Q And how could you have had that done? Would you have done

it personally?

MR. LUSTBERG: Objection.

THE COURT: I'll see you at sidebar on this whole area.

(At the sidebar.)

THE COURT: You object?

MR. LUSTBERG: Yes, we object to that.

THE COURT: Okay. Where are you going, Mr. Minish?

MR. MINISH: I'm not sure what the basis of the objection is.

THE COURT: I want to know where you're going, I stopped you.

MR. MINISH: Oh, well, okay. If the Court wants to know, certainly.

The area we're going into is that he could have made this happen. He was not just some slob out on the street. He could have made this happen.

THE COURT: That may be appropriate for redirect if Mr. Bergrin were to imply that, you know -- he already said he never made a hit before. Right? He's never made a hit.

MR. MINISH: Yeah. And this further explains --

THE COURT: What is he going to explain? What is he going to say?

THE WITNESS: That based on my stature in this community and the people I know, if I needed to have this done,

fault of the Government.

MR. LUSTBERG: No.

THE COURT: They didn't seek to bring it out.

MR. LUSTBERG: Agreed.

THE COURT: He said he was afraid, so leave it like that right now.

MR. LUSTBERG: We haven't decided what we're going to do.

THE COURT: I don't imagine you're going to go into it. But if you do, then you could always on redirect say: We put you in. You know, it's no big deal. It will come out one way or the other if it comes out. Okay?

(In open court.)

THE COURT: All right. You can proceed, Mr. Minish.

BY MR. MINISH:

Q Sir, I apologize,

Now, did you also meet with the Government on one other occasion fairly soon after the meeting, the story you just told the jury?

A Yes.

Q And was your lawyer present for that?

A Yes.

Q And during this time, was that state charge that you discussed with the guns and the drugs and robbery, was that still pending?

A Yes, it was.
Q Ultimately did you plead guilty to that charge?
A Yes.
Q Okay. And did you take full responsibility for all the things that you were charged with?
A Yes, I did.
Q And your daughter was charged with you. Is that correct?
A Yes.
Q And during the course of the negotiations, the plea negotiations with the Essex County Prosecutor's Office, did you consider whether or not you would take responsibility for what she may have done, or that she would take responsibility for what you may have done?
A She was willing to take responsibilities. So she would go to jail for lesser time because of my third strike, and if I was home I could take care of the rest of the family and take care of her also. With me being in prison and her being home she can't do that.
Q Did you discuss that possibility with Mr. Bergrin?
A I don't remember. I don't recall if I did or didn't.
Q Ultimately what did happen?
A I took full responsibility of everything.
Q So you took the weight for her?
A Yes.
Q And was this done pursuant to a plea agreement with the

Essex County Prosecutor's office?
A Yes.
Q Did the U.S. Attorney's Office or any members of federal law enforcement have any influence with respect to that plea agreement?
A No.
Q With respect to what you were offered?
A No.
Q Were there any discussions about us getting you any sort of deal?
A As long as I told the truth, they would write a letter to the state judge, state prosecutor.
Q Well --
A But there was no promises.
Q Well, let me say, at the time you signed the plea agreement, was there anything that --
A No.
Q So you signed that plea agreement, and were you ultimately sentenced?
A Yes.
Q All right. And what was the sentence you received?
A A 15 with a five.
Q Would you explain that to the jury?
A Which means I had a mandatory minimum of five years before I'm eligible for parole.

Q And that's a state sentence or a federal sentence?
A A state sentence.
Q And, sir, I'm going to show you a series of photographs that are in evidence and I just want to see if you recognize who these individuals are.
MR. MINISH: Is this okay?
THE COURT: Mr. Minish, do we have a date when he pled guilty? Do we have a date?
MR. MINISH: It is, I believe Judge, May -- do you want me to ask the witness?
THE COURT: Yeah, ask the witness.
Q Do you know, sir?
A I believe it was May 15th.
Q Of what year?
A '09.
THE COURT: All right.
Q Sir, I'm going to show you what's been marked Government Exhibit 2258 in evidence.
MR. MINISH: If we can put that up.
Q Do you know who that person is?
A No, I don't.
Q I'm going show you what's been marked Government Exhibit 3050. Do you know who that is?
A No, I don't.
Q 2257, please. Do you know who that is?

A No.
Q 2255?
A No.
Q Do you know who that is?
A No, I don't.
Q 2263?
A No.
Q You don't know who that is?
A No, I don't.
Q 3066. Do you know who that is?
A No.
Q And finally, 3073.
A No.
Q Now, sir, so the jury is clear, have you faced any federal charges in your life?
A No, I haven't.
Q And you've already been sentenced on the state charge. Correct?
A Yes.
Q And that's the 15 with five?
A Yes, it is.
Q And during this process of speaking with the Government, you've always had access to an attorney?
A Yes.
Q Now, what is your -- you started to explain to the jury

about a letter. Can you -- after you provided us with information, did we come to an agreement or provide you with a verbal agreement of what we might be willing to do if you talk to us?

A As long as I told the truth, they would write a letter to the state prosecutor to try to reduce the sentence.

Q And what would the state prosecutor do if we wrote that letter?

A It's up to him if they grant it or not.

Q But does the state prosecutor change your sentence?

A No; the judge.

Q Which judge?

A The state judge.

Q Okay. And what is your obligation -- let me say this: Is there an actual formal written agreement?

A No, there's not.

Q And what is your obligation, your understanding of your obligation of this agreement?

A As long as I tell the truth, hopefully I get lesser time.

Q Are there any guarantees that have been made to you?

A No.

Q And if you don't tell the truth, what happens?

A Everything is canceled.

Q Meaning what?

A The deal -- well, the verbal agreement, and I could be

charged with perjury.
Q Tell this jury why you're testifying today?
A Because I think it's the right thing for me to do.
Q Are you hoping to get less jail time?
A Yes, I am.
Q How much more jail time do you think you're facing?
A Eighteen months.
Q And you're hoping for that to be reduced?
A Yeah, if possible.
MR. MINISH: I have no further questions, Judge.
THE COURT: All right. Mr. Bergrin, cross-examination.
MR. BERGRIN: Yes, your Honor, thank you.

CROSS-EXAMINATION

BY MR. BERGRIN:
Q You said before you went into the FBI we had a falling out?
A Yes, we did.
Q And the falling out made you angry. Correct?
A Yes, it did.
Q It made you upset. Correct?
A Yes.
Q You said that I was hitting on your daughter or I tried to have a relationship with your daughter?
A Yes, you did.
Q Can you describe your daughter to this jury?

A It's Jennifer McGrath, she's 21.
Q About 350 pounds?
A She's not 350.
Q How much does she weigh, Mr. Castro?
A At that time, probably 200.
Q And she's about five foot?
A Probably a little taller than that.
Q Now, you also said that we had a falling out before you went into the FBI and decided to do the right thing about money. Correct?
A It was really about you not doing right thing in court to defend me.
Q Now, you in that particular case, you were accused of taking a gun during a search while the police came to your house, putting it under the bullet-proof vest of a police officer and pulling the trigger. Correct?
A That's what I was charged with.
Q And you wanted to lie and get the police officer in trouble and say that they stole money from you. Correct?
A I didn't lie.
Q Oh, you're telling us the police officer stole money from you?
A If you would have did your job and subpoenad the bank surveillance like you was asked to, we would have found out the truth about that.

Q So you were angry at me that I didn't subpoena the bank records to show the police officers were lying?
A And the surveillance that they stole off my house.
Q And the surveillance they stole off your house. You were angry and upset about that. Correct?
A Yes.
Q As a matter of fact, the demeanor of this low key -- the way you're talking now, that's not the way you act. Right? You're very, very loud and boisterous. Correct?
A No, I'm not loud.
Q Usually?
You're telling us that you're calm like this at all times?
A I'm not a loud person.
Q Now, you were making, when this conversation between us supposedly happened, you were making 20 to $25,000 a week. Right?
A Yes.
Q That's a million dollars a year. Correct?
A Correct.
Q And you were showing it. You were driving around in nice cars. Correct?
A Yes, I was.
Q And you were wearing really nice jewelry?
A Yes.

Q And living way, way -- like an individual who is making a million dollars a year. Right?
A Yes, I was.
Q And here I come and offer you $10,000 to do a hit. Correct?
A Yes.
Q Now, you had no -- no acts of violence in your past. Right?
A No.
Q Now, you talked about a check. You say I stole a check from you. I stole money from you?
A Your secretary called my kid's mother in the --
Q You can answer that question, sir.

MR. MINISH: He's trying to answer the question.

THE COURT: I'll allow it. Go ahead.

MR. BERGRIN: All right, Judge. Thank you.

A Your secretary called my kid's mother in the office, said there was a check there for her to come and sign for.

She then called you -- this is what my kid's mother told me. And you said it was a mistake, don't release the check to her.

Q You don't know what happened with that check, isn't that a fact? You're hearing this from your wife or your kid's mother. Correct?
A Exactly.

Q Now, you didn't know that Tom Fennley from the Essex County Prosecutor's Office along with Assistant Prosecutor in charge of the Forfeiture Section, Kevin McCartle had sent that check to me. Correct?
A Correct.
Q And you know nothing about that check, other than the fact that you had accused me before you decided to go into the FBI of stealing $20,000 from you. Right?
A Why would your secretary call my kid's mother and tell her to come and sign for the check?
Q You accused me of stealing that $20,000 check from you, isn't that a fact, before you went into the FBI?
A Yes.
Q Now, when you went to talk to them, the FBI, isn't it a fact that you had hopes of getting this 15-year sentence reduced. Correct?
A Not when I first went to speak with them.
Q You're telling us that went out there out of the goodness of your heart?
A That's why I spoke to them. Then I found out later on that I could probably get my sentence reduced.
Q And you're telling this jury, as an individual who has had multiple, probably about ten arrests and run-ins with the law, that you didn't know how to get your sentence reduced? Is that what you're telling us?

A The only way to get a good sentence is hire a good attorney.
Q And you don't know about cooperation? You knew nothing about cooperation?
A I never had a reason to cooperate.
Q You're telling us as you testify under oath that you didn't know that through cooperation you could get your sentence reduced. Is that what you're telling us?
A I didn't know that.
Q Do you understand that you're under oath now?
A Yes, I do.
MR. BERGRIN: Just give me one second to organize, please, your Honor.
THE COURT: Yes.
MR. BERGRIN: Excuse me one second. Thank you.
Q Mr. Castro, Mr. Minish went over your criminal history, correct, while you were sitting here?
A Yes, he did.
Q And that's your total criminal history. Right?
A Yes.
Q In 19 -- excuse me -- on August the 31st of 1988, you were arrested for possession of cocaine and received a Conditional Discharge in January 19th of 1989. Correct?
A Yes.
Q And I didn't represent you there. Correct?

A No, you didn't I don't believe.
Q Isn't it a fact that I was in the United States Attorney's Office at that time?
A I don't know when you became -- I don't know when you was an attorney in the '80s. I didn't have money, so I couldn't have an attorney represent me, that's why I went to prison.
Q In June 25th of 1989, you pled guilty to receiving stolen property. Correct?
A Yes.
Q And you received a three-year State Prison term. Correct?
A Yes.
Q And isn't it a fact that John Stevenson, Jr. represented you on that case?
A Yeah, it was a court-appointed attorney.
Q It was a court-appointed attorney, but it wasn't Paul Bergrin?
A No, it wasn't.
Q And then your third run-in with the law was a case that was dismissed; a possession of marijuana case. Right?
A Yes.
Q And that was back in 1991. Right?
A Yes.
Q And then you had a pool attorney when you pled guilty to possession of cocaine in 1991, where you received three years in State Prison. Correct?

A Yes, it was seven with a three and a third for the robbery.
Q They all ran together. Correct?
A Correct.
Q And again, you had a pool attorney and the pool attorney's name was John Stevenson, Jr.. Correct?
A I believe that was him.
Q And then the next time you got arrested was, you also had a receiving stolen property case in 1991. Correct? May of 1991 that Mr. Minish asked you about?
A Yes.
Q And that ran with the -- that ran together with the robbery case. Correct?
A Correct. I was found guilty at trial for the robbery.
Q Now, you said that I represented you for the first time in 1997. That was your testimony. Right?
A Yes.
Q And that was a case involving possession with intent to distribute within a thousand feet of a school?
A Yes. My home was --
Q And possession of a controlled dangerous substance?
A Correct.
Q And receiving stolen property?
A Correct.
Q And you're about as sure about that about all your testimony in this case, right? That I represented you?

A Yes.

MR. BERGRIN: May I approach the witness, your Honor?

THE COURT: Go ahead.

Q I show you what's been marked D-20 for identification.

MR. GAY: Paul, could we see this before -- I don't know what this is.

(Counsel confer off the record.)

Q I show you what's been marked D-20 for identification, Mr. Castro. Is that a computer printout of Case Number 97, the year 001014?

MR. MINISH: Judge, I don't object to the document but Mr. Bergrin has to ask the question the right way. He has to ask him: "Do you know what it is?"

THE COURT: He just asked him if that's a computer printout of that number.

Now next question. Go ahead. Let's hear the next question.

Q Is that a computer printout of that?

A Yes.

Q And that's the case where you received three years in New Jersey State Prison that you talked about. Correct?

A I didn't receive -- I didn't do a three year, I never did three years. I did a seven with a three and a third.

Q A seven with a three and a third.

So you're telling us -- isn't it a fact that that case

represented the robbery, the possession with intent?
A Yes.
Q And isn't it a fact that the lawyer that is listed is Joseph Ferrante, Jr.?
A I didn't use Joseph I don't believe because he wanted me to ride out in an unmarked car and point people out, and I got rid of him.
Q So you're telling us that this is incorrect?
A I believe so.
Q Isn't it a fact that the computer records clearly show that --
MR. MINISH: Objection.
THE COURT: Okay.
MR. MINISH: He cannot just read things in the record when there's no basis for anything.
THE COURT: Sustained.
Q Isn't it a fact that you used Joe Ferrante on your case and received a three-year sentence?
A I don't believe I used him. I gave him a retainer fee. I never went back to retain him as an attorney.
Q And I'm not listed anywhere on that case, isn't that a fact, in any of the court records anywhere?
A I don't see it on there.
Q Isn't it a fact that in 2000, the next arrest occurred from 1997, the next time that you were arrested and did any kind of

time was in -- you were arrested in 2007. Correct? From 1997 when you did the State Prison time and you got out, the next time you were arrested was in 2007. Isn't that a fact, sir?

A For the assault? The aggravated assault or something.

Q But you were charged -- it ended up being a harassment case, correct, that you pled guilty to. Right?

A Correct.

Q And that was, you were arrested on March the 3rd of 2007. Isn't that a fact?

A Yes.

Q And you pled guilty on January the 11th of 2008. Correct?

A I can't recall the exact date but I did plead guilty to it.

Q And I was your attorney on that. Correct?

A Yes.

Q And isn't it a fact that's the first time I ever represented you, in 2007, March 2007, when you originally were charged with aggravated assault, and I got it reduced to harassment. Isn't that a fact, sir?

A I don't believe that was the first time you represented me.

Q You don't believe?

Isn't it a fact, sir, that there's not a computer record anywhere on earth that I ever entered an appearance on --

MR. MINISH: Objection.

MR. MINISH: How could he possibly answer that?

THE COURT: Sustained.

Q Isn't it a fact that when you represent somebody you enter an appearance on their behalf. Correct?

A Yes.

Q And when you go to court there's court records in reference to me representing you. Right?

A Correct.

Q I have to stand up before the judge and say: Paul Bergrin on behalf of Albert Castro. Right?

A Correct.

Q Isn't it a fact that Joe Ferrante stood up and represented you in 1997 when you received the State Prison term?

A I don't believe he represent me. I don't believe I went with him as the attorney.

Q You said you "don't believe"?

A I never went back to see him after the retainer fee.

Q Well, you didn't hire me. Isn't that a fact?

A I'm pretty much sure I hired you.

Q Pretty much sure? What does "pretty much sure" mean?

A I'm pretty sure I did hire you as an attorney.

Q So if the court records depict --

THE COURT: Okay, Mr. Bergrin, you've covered this area.

Q Now, on March the 27th of 2008, you were arrested, correct, on a very serious first degree case?

A March 27th?
Q On September the 27th of 2008 you were arrested on a very serious offense. Correct?
A It was for robbery that never happened.
Q But you pled guilty to a robbery that never happened?
A You was my attorney. I had to listen to what you told me, that's why I paid you for the case.
Q And you stood up and your put your hand on the Bible and you swore to the judge that you're telling the truth. Correct?
A Yes, it was.
Q And the judge asked you questions as to whether you're telling the truth. Right?
A Correct.
Q And in front of the judge, I didn't put -- I didn't put words in your mouth, the words came out of your mouth. Correct?
A Correct.
Q That's the case that you were riding around with an informant planning a robbery of a store, a restaurant on Ferry Street. Correct?
A Not Ferry. On New York Avenue.
Q New York Avenue.

And they tape-recorded you planning the robbery on tape with somebody else. Correct?
A Correct.

Q So you're telling this jury that I put the words in your mouth and made you lie? Isn't that what you just said?
A No, I didn't say you put the words in my mouth.
MR. MINISH: Objection.
THE COURT: No, No, I'll allow it. Go ahead.
Q Isn't that what you just said, Mr. Castro?
A I didn't say you put the words in my mouth, but I hired you as an attorney to represent me.
Q And you pled guilty to second degree, facing 5 to 10 years, conspiracy to commit robbery. Correct?
A Correct.
Q And you swore to the judge that what you told the judge was that done knowing on your part. Correct?
A Correct.
Q Intelligent. Correct?
A Yes.
Q Voluntary?
A Yes.
Q And that you are -- you're pleading guilty because you are, in fact, guilty. Isn't that what you said?
A I was guilty about talking about it. There was never an attempt.
Q You pled guilty to that offense. Didn't you?
A Correct.
Q And you were arrested again on May the 2nd, of 2008.

Correct?
A May the 2nd was the first arrest.
Q The first arrest, I'm sorry. And the first arrest involved first degree manufacture, when you were facing 10 to 20 years. Correct?
A Correct.
Q But because you're a career criminal, a third time looser, you were facing life in prison, right, under the extended term career criminal statute?
A I don't remember a life plea. I don't know what I was facing.
Q You don't remember it being explained to you, Mr. Castro, that if you get convicted of first degree manufacturing and distribution of drugs? You don't remember, Mr. Castro --
A That was 25 years I was facing.
Q You were facing 25 years. Correct?
A Correct.
Q And you knew that when you pled guilty. Right?
A Correct.
Q And you also were accused again of attempted murder of a police officer by putting the gun underneath his vest and pulling the trigger. Right?
A Anybody in their right mind who believes that, I wouldn't be sitting here today.
Q So you're telling us that the police officer completely

fabricated that and made that up about you?
A Correct.
Q You read the charge sheet, correct, what they call the "request to recommend disposition" that lists all the charges?
A Yes.
Q And isn't it a fact it's listed under there that you're eligible for no Early Release Act because defendant placed a handgun against the abdomen of a police officer and attempted to shoot the officer? You remember reading that. Correct?
A Correct.
Q And you pled guilty, as a matter of fact, in pointing the weapon at the police officer, a fourth degree aggravated assault. Right?
A I pled guilty to that because you got it downgraded to first degree pointing.
Q And you told the judge that you pointed the gun at the police officer. Right?
A I told him that that's not true at all. I was arguing with him about a lot of things in my case and got two charges dismissed on my own, about four to five doors and cameras for selling drugs which was never true.
Q When you pled guilty to the judge about pointing the gun at the police officer, the judge asked you if you're doing it voluntarily. Correct?
A I was listening to you.

Q The judge was talking and addressing you personally. Isn't that a fact, Mr. Castro?
A Yes.
Q And you put your hand on the Bible on that day and you swore to tell the judge the truth. Right?
A Exactly.
Q And he asked you if you're doing it knowingly. Correct?
A Yes.
Q Voluntarily?
A Yes.
Q Of your own free will?
A Yes.
Q "Is anybody forcing you to take the plea?" And you said "no."
A No.
Q "Have you had enough time to discuss the case with your attorney?" Correct?
A Yes.
Q "Do you have any questions of the Court?" And you said "no" in reference to those two charges. Correct?
A Correct.
Q And "You understand what you're doing," and you said "yes."
A Yes.
Q And "Nobody is forcing you, coercing you or threatening you?" Correct?

A Didn't I go over the whole case with you before I even took a plea bargain?
Q Are you telling us now that you pled guilty and swore to all those facts as being true, and you were lying to the judge? Is that what you're telling us?
A First degree pointing was never true. I did get caught with weapons, drugs, stolen property. I never pointed a gun at a cop.
Q But you said that to the judge after being advised of your rights?
A I did say that.
Q So you're saying that you lied to the judge in open court?
A I didn't lie. It got downgraded from attempted murder on a police officer, first degree pointing, so I copped out to it.
Q You said you didn't lie.

When you tell the judge that you did something and now you tell this jury that you didn't do something, you're telling us it's not a lie?
A Was you trying to fight the case for me?
Q Are you telling us that's not a lie?
A Maybe it is a lie. But I only took the plea because of you.
Q When you went before the judge, the judge was directing his questions to you personally. Correct?
A Did I discuss the case with you beforehand?

MR. BERGRIN: Your Honor, could you please instruct the witness to answer my question, Judge?

THE COURT: All right. Mr. Castro, try to listen to the question and answer the question that's asked.

THE WITNESS: I'm listening to it.

THE COURT: All right.

Q When you were in court, the judge said, I'm going to direct the questions to you, Mr. Castro, personally. Correct?

A Correct.

Q And you answered the questions in court, not me. Right?

A You're right.

Q You put your hand on the Bible, not me?

A You're right.

Q And you told the judge that you pointed the gun at the police officer. Correct?

A Correct.

Q And are you telling us now that you deliberately, intentionally and knowingly lied to that judge?

A I never pointed a gun at a cop. I took it because it was a lesser charge on a plea bargain because he didn't defend me, like I said, at first. If he would have done what he was supposed to do I probably wouldn't be going through this today.

THE COURT: I'm going to ask: There was a charge initially that you did, in fact, point the gun at the police officer and the police officers are the ones who made that

charge. Correct?

THE WITNESS: Yes.

THE COURT: Okay.

Q And the police officer swore out the complaint against you. Correct?

A Yes.

Q And you also pled guilty to distributing drugs within a thousand feet of a school. Correct?

A Yes.

Q Now, where were the drugs found?

A In Stephanie Castro's house.

Q And who is Stephanie Castro?

A My daughter.

Q And how old was your daughter at the time?

A She's 25, three years -- I believe 21.

Q And had no prior record. Correct?

A Correct.

Q Now, isn't it a fact, sir, that you pled guilty to a 15 year sentence?

A Yes.

Q For the robbery, the drugs, the guns, the conspiracy, even possession of the handgun by a convicted felon? Correct?

A Correct.

Q And with all your convictions, you had approximately eight or nine convictions totally by then. Correct?

A Yes.
Q And isn't it a fact, sir, that on a 15 year sentence, there's no way you're being paroled after five years. Isn't that a fact?
A I can't say that's a fact.
Q You know the system, Mr. Castro. Right?
A I know the system, but parole just don't hit you for any reason.
Q You were convicted of a first degree drug case. Correct?
A I understand, yes.
Q And you were convicted of guns with drugs. Correct?
A Correct.
Q And you were convicted of a crime of violence in that you pointed a gun at a police officer under the Graves Act. A serious offense. Correct?
A Correct.
Q The Graves Act means that you serve a certain amount of time before you're eligible for parole. Correct?
A Yes.
Q And you had a prior robbery conviction. Right?
A Yes.
Q And a prior drug conviction. Correct?
A Correct.
Q And a prior receiving stolen property conviction?
A Yes.

Q As a matter of fact, you had multiple robbery convictions because you pled guilty on that day also to another robbery. Right?
A To another robbery?
Q To a robbery where you had planned a robbery while being recorded, that you say now that you didn't commit?
A Correct.
Q Now, isn't it a fact, sir, that you knew that you were not being released after five years with the 15 and the five sentence that I negotiated for you?
A There's no way for me to say I definitely knew that. Because it's up to parole when I go in front of them to release me or not release me.
Q And you're telling us as you testify today that you didn't suspect or believe in your mind of yours, being involved in the system and this being your third strike, that you're going to be released after your first eligibility for parole? Is that what you're telling us under oath?
A I can't say that I know for sure I was going to get released. If you do good in prison, they'll probably grant you parole; if not, they give me a hit.
Q Now, you said -- and if you get a hit, you could spend up to 12 or 13 years in State Prison. Isn't that right?
A It's only if you really get into a lot of trouble. Parole is not going to max you out. That's the max time. They don't

usually do that unless you are a real pain in the ass in prison.

Q Now, your record in prison was not a good record either. Correct?

A Why wasn't it?

Q You had that a lot of disciplinary action in prison, didn't you?

A No.

Q Now, you testified that I represented Laura McGrath, the mother of your children?

A I'm pretty sure you represented her on her case.

Q Pretty sure? What year was that?

A I don't recall the year.

Q What month was it in?

A I don't remember.

Q You said that I represented Carmen DeSilva?

A Carmen DeSilva got raided. I did send him to see you because you told me to watch out with him. So how would you tell me that if he didn't go see you?

Q Isn't it a fact that Carmen DeSilva never retained me to represent him?

A I don't really know if he retained you or not. I did send him to you.

Q Then why did you tell jury that I represented him?

THE WITNESS: Well, I sent him to him. I don't know

if he represented him or not.
Q And isn't it a fact also -- who else did you send to me?
A Michael Castro, my nephew went to you.
Q And did I represent Michael Castro?
A I can't --
THE WITNESS: I don't remember if he represented him or not.
Q But you remember a conversation that happened back in, what year is it?
A 2003, because that's something that you can't forget.
Q Now, you talked about a David Perara. Did you know a David Perara?
A I talked about --
Q Do you know David Perara?
A No, I don't.
Q You don't know David Perara?
A I never spoke about a David Perara.
Q Do you know a David Perara?
A No.
Q Do you know an individual who you went to talk to the FBI about in 2007?
A The only people I spoke to the FBI about was the police.
Q And that was in 2007. Correct?
A I believe so, because they came looking for me at my job, and I was scared so I went down to the office and I spoke to

them.
Q And did you agree to cooperate with the FBI back in 2007?
A About the police, yes.
Q And when you spoke to the FBI, you spent a lot of time with them. Correct?
A I didn't spend a lot of time with them, I spent a decent amount of time with them.
Q So you essentially were cooperating with the FBI since March the 6th of 2007. Correct? Or even earlier than that, I'm sorry, since February 23rd of 2007. Right?
A I believe that's right.
Q And when you went to the FBI, you're telling us they didn't ask you about a Perara?
A I don't recall the names.
Q And you're telling us that you don't know a Mr. Perara?
A No, I don't.
Q An individual who was involved in pornography. David Perara.
A Oh, yeah. I don't know his last name. I believe -- not to -- I believe I told Shawn and Joe Minish about him but I didn't know his last name.
Q But you went to the FBI specifically, and one of the things they were asking you about is David Perara. And you agreed to cooperate and assist the FBI. Isn't that a fact?
A That's not true.

Q When you went to the FBI in February the 23rd of 2007, you're saying that you didn't know the name David Perara?
A I did not know his last name.
Q You knew David. Right?
A I know David. I never knew his last name.
Q Now, when you went to talk to them, you agreed to cooperate with the FBI. Correct?
A I went to speak with them for one thing only, and that was the corruption of the police in Essex County.
Q And when you talked to them, did you ever tell them about this conversation that we had in 2003?
A No, I didn't.
I had no reason to speak upon that.
Q Well, you had a robbery charge over your head. Correct?
A Correct.
Q And you were facing heavy State Prison time as a third-time offender then. Correct?
A You're right.
Q And as a matter of fact, your wife also went down to the FBI before you began to cooperate. Right?
A Correct.
Q And your wife went down to the FBI before you came up with this statement, and you spoke to Mr. Minish about it. Correct?
A Correct.
Q And as a matter of fact, you are the one who reached out

for Mr. Minish. Right?
A Correct.
Q When you reached out for him, you didn't know that he'd be helping yourself. Right? Is that what you told this jury? You had no idea whatsoever that you'd receive leniency?
A I did not know I would get less time.
(Counsel confer off the record.)
Q Do you remember testifying before a Federal Grand Jury on May the 12th of 2009?
A Yes.
Q And that was only approximately a week after you went in to speak to them. Correct?
A I went to see them three times.
Q Well, the first time you ever talked to them was on April the 31st of 2009. Correct?
MR. MINISH: Judge, that's incorrect, that's not what he testified to.
THE COURT: Yeah.
No, Mr. Bergrin, rephrase that question.
Q The first time that you ever gave information to the FBI was on April the 31st of 2009 during a proffer session. Correct?
THE COURT: Wait. You just asked him questions about a prior going to the FBI in 2007.
MR. BERGRIN: Yes, your Honor. Now I'm talking about

something else.

THE COURT: All right. Well, you said "the first time he ever went to the FBI."

MR. BERGRIN: I'm sorry.

THE COURT: The first time he ever went to the FBI was in 2007.

Q Right. You went do the FBI to cooperate with them back in February of 2007. Correct?

A Correct.

Q And you spoke to them and you said, I'll be a cooperator of yours. Correct?

A I never told them I'd be a cooperator of theirs. I went to speak with them about Michael Lolly, Richie Webber, Dennis Reilly, the police, the corruption in Essex County.

Q And isn't it a fact you advised the FBI that you're willing to cooperate with their investigation?

A Exactly.

Q And then you went back by contacting them, correct, on April, in April the beginning of April. Correct?

A Yes.

Q And you said you got cold feet. Right?

A Yes, I did.

Q You got cold feet because they advised you of your rights and told you that if you're lying that you're going to be prosecuted. Right?

A No.
Q Now, you went back to them on April the 31st, that's the next meeting you have, right, of 2009?
A Yes.
Q And for the first time you reveal this statement about this meeting that we had at my office. Right?
A Correct.
Q And then about a week -- a little over a week later you testify before a Federal Grand Jury. Correct?
A Correct.
Q And you're telling us that within that one week period, that you had no knowledge whatsoever about you getting a reduced sentence and helping yourself?
A They never told me about -- I never knew that until after I spoke with them, with Joe.
Q Joe. Are you on a first name basis with Joe?
A Joe Minish. Joe Minish.
MR. BERGRIN: May I approach the witness?
THE COURT: Yes.
Q I show you what's been marked D-21 for identification.
Is that your testimony before a Federal Grand Jury on May the 12th of 2009?
A Yes.
Q I ask you to look at page 4, line 17.
A I did say that before. But there's no guarantee. I told

the jurors that earlier, that I'm testifying --

THE COURT: First of all, there's no question pending. You just looked at that.

Now, if there's a question, go ahead, Mr. Bergrin.

Q Isn't it a fact that you went to the meeting with the prosecutor's office approximately two weeks, when you first revealed this statement, two weeks before you were about to be sentenced to a 15 year term with a five-year period of parole ineligibility to State Prison, you went to the Government and the U.S. Attorney's Office. Isn't that a fact, sir?

A Yes

Q And isn't it a fact that you then testified before a Federal Grand Jury on May the 12th, approximately one week before you were about to be sentenced to a 15 years in State Prison?

A Correct.

Q And isn't it a fact, sir, that you testified with the hopes of obtaining a reduction in your state sentence?

A Nothing was promised. Yes, that's why --

Q Isn't it a fact, sir, that you went there with the hope of receiving a reduction in your state sentence?

A That's what I was told, yes.

Q So why did you tell us a couple of minutes ago that you didn't expect it or you had no belief in it?

A After they told me. I never knew before I went to them.

That's what I said.
Q And you're telling us as you sit here that you had no expectations, no hopes, or no beliefs that you were going to receive a state reduction --
MR. MINISH: Judge, Mr. Bergrin has to be more specific with his period of time in his question because the witness has answered it two different ways for two different periods of time.
THE COURT: Sustained.
Mr. Bergrin rephrase the question.
Q Are you telling this jury under oath that when you spoke to the prosecutors on April the 31st, for the first time in your life, of 2009 in reference to this statement, over six years after this alleged statement was made, that you had no expectation, hope or belief of receiving a reduction in your state sentence of 15 years?
A That is correct.
Q Now, you talked about the fact that you were angry with me. Correct?
A Correct.
Q You accused me of selling you out. Right?
THE COURT: Mr. Bergrin, let me interrupt you for a moment. You have a ways to go?
MR. BERGRIN: Yes.
THE COURT: Because it's 4 o'clock and we have to

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

UNITED STATES OF AMERICA,

v.

PAUL W. BERGRIN,

Defendant.

TRANSCRIPT OF PROCEEDINGS
- Trial -

Newark, New Jersey
November 4, 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

MR. GAY: May I inquire, your Honor?
THE COURT: Yes, you can.
MR. GAY: Thank you.

DIRECT EXAMINATION

BY MR. GAY:

Q Mr. Fennelly, by whom are you employed?
A The Essex County Prosecutor's Office.
Q How long have you been a member of the Essex County Prosecutor's office?
A A little bit less than 21 years.
Q What is your current position?
A I'm Chief Assistant Prosecutor overseeing several of the investigative units.
Q Can you briefly describe what your prior positions have been with the Essex County Prosecutor's office?
A I started out as a regular Assistant Prosecutor, I was in a screening unit; then assigned to Juvenile Unit; and then General Trial Section; and then assigned to the narcotic -- Major Narcotics and Narcotics Task Force; and then my current position, overseeing the Homicide Unit and the Narcotics Unit and a couple of the other investigative units.
Q Were you a supervisor in the Narcotics Unit?
A Yes, I was.
Q Can you briefly describe your educational background?
A I have a law degree from Seton Hall University and a

bachelor's degree from St. Peter's College.
Q Are you admitted to practice law in any state?
A New Jersey.
Q Were you working as prosecutor on January 15th, 2009?
A Yes, I was.
Q Were you the person, the prosecutor assigned to prosecute the case of Alberto Castro and others?
A Yes.
Q Who was Mr. Castro's lawyer at the time, if you recall?
A Mr. Bergrin.
Q Had you seen Mr. Bergrin prior to that? Did you know Mr. Bergrin --
A Yes, I did.
Q -- prior to that time?
A Yes, I did.
Q And do you see Mr. Bergrin in court today?
A Yes, I do.
Q Can you indicate an article of clothing he's wearing?
MR. BERGRIN: I'll stipulate identification, your Honor.
THE COURT: All right. The Defendant is identified.
Go ahead.
Q Now, did you attend a plea hearing on January 15th of 2009?
A Yes, I did.
Q Was a, what's known as a plea bargain, worked out prior to

that plea hearing?
A Yes, at some point, yeah.
Q Can you briefly describe how the plea bargain is worked out? Again, briefly.
A Generally speaking, once a matter gets into court -- this was a post-indictment matter. After the initial court appearance there's arraignment. Then there are several -- one or more status conferences set, and there are usually discussions between the prosecutor -- the prosecution and the defense side. The matter is set for a status -- I believe a status conference probably on that day, and we had come to an agreement as to a plea.
Q Now, do you recall as you sit here today exactly what charges Mr. Castro was willing to plead to on that date?
A There were numerous charges in the Indictment. I believe there were several narcotics -- possession, what we call possession of CDS -- actually possession of narcotics with intent to distribute; there was conspiracy charge; two weapons charges; and an aggravated assault charge.
Q Okay. Now, had Mr. Castro been charged with an attempted murder --
A Yes, he had.
Q -- initially?
And you mentioned that during the plea bargain there was an assault charge?

A Yes. He was -- that charge was amended to a charge of aggravated assault by pointing.
Q Now, is that a more serious or less serious charge than the attempted murder?
A Less serious. It's a lower degree.
Q Now, when this plea was worked out, did anyone from the Federal Government contact you or in any way influence your plea bargain decisions for the plea that you offered Mr. Castro?
A No.
Q Why did you give him a plea to a reduced charge?
A Well, there were numerous counts in that indictment, and it had been worked out that he was to receive a 15-year -- what we call 15 with five; a 15-year sentence in pleading to a first degree drug count -- two first degree drug counts.

As the evidence was reviewed and looked upon, and the officer, fortunately, wasn't injured in that particular case, the charge of aggravated assault by pointing a firearm was the -- may have been the more appropriate charge and it still carried what we call the Graves Act offense.
Q Now, you mentioned that you did actually attend a plea hearing on January 15th of 2009. Is that correct?
A Yes.
Q Do you recall who else was present for that plea hearing?
A The defendant at the time, Mr. Castro; Mr. Bergrin, defense

attorney; and Judge Bernstein; and several other court staff members.

Q Just so it's clear, can you describe what happens at a plea hearing, just generally speaking?

A All right. Generally speaking, the case will be called by the court or the court clerk. The attorneys approach the table. In that particular case I believe Mr. Castro was in custody so he was brought out by the Sheriff's Officers.

The judge calls the case. They call it by the name, State v. Albert or Alberto Castro. The attorneys enter their appearance for the record, they say their names, and then the judge normally says: What are we doing here today, or something to the effect: Is this a plea?

The lawyers answer, yes, or you know, appropriately. And then the terms of the plea agreement are put on the record.

Q Now, are these proceedings recorded; and, in fact, was this proceeding recorded?

A Yes, it was.

Q And is it an audio recording?

A That particular day was an audio recording.

Q I'm going to show you Government Exhibit 70113b and 7013 and ask you first: With respect to 7013b, do you recognize that?

A Yes. This is -- it's actually an envelope containing -- well, it's a CD, an audio disk inside an envelope, and I do

recognize it and my initials are on it.
Q Did you listen to that audio disk before coming here today?
A Yes, I did.
Q And what is contained on that audio disk?
A It is a recording -- it's the recording of the courtroom proceedings that day pertaining to the Albert Castro matter.
Q If you could take a look at 0713 also in front of you, if you recognize that.
A Yes. This is a printed transcript pertaining to the same matter; the plea agreement, and it's the written transcript of what's on the audio.
Q And when you listened to the audio did you compare it to what's in the transcript?
A Yes, I did.
Q And first of all, is the recording itself a fair and accurate recording of what occurred during that plea hearing?
A Yes, it is.
MR. GAY: Judge, I'd ask that 7013b be entered into evidence at this time.
THE COURT: All right.
MR. BERGRIN: There is absolutely no objection, your Honor.
THE COURT: No objection? It's in evidence.
(Government Exhibit 7013b is received in evidence.)
BY MR. GAY:

Q Also 7013, did you look at that as well as you were listening to the tape?
A Yes, I did.
Q And is that a fair and accurate transcription of what occurred?
A Yes, it is.
Q Okay. And does that include -- by the way, people were speaking on this tape. Is that correct?
A Correct.
Q And were you able to recognize the voices?
A Right, I recognized -- yes, I was. I recognized my voice, I recognized Mr. Bergrin's voice, Judge Bernstein, the Judge's voice, Judge Bernstein, as well as Mr. Castro.
Q And in the transcript, does it fairly and accurately attribute the person speaking as it appears on the tape recording?
A Yes, it does.
MR. GAY: Judge, this is actually a certified transcript so I think this could come into evidence.
THE COURT: There's no objection to the transcript, is there?
MR. BERGRIN: There is none at all.
THE COURT: So it's in evidence.
(Government Exhibit 7013 is received in evidence.)
Q Now, Mr. Fennelly, before we listen to this tape, is there

a portion of the plea hearing known as the "factual basis"?
A Yes.
Q Can you briefly describe what the factual basis portion of the plea hearing is?
A That is where the defendant, in this case Mr. Castro, or in any matter, when a defendant is entering a plea where he or she has to give a factual basis establishing that they are, in fact, guilty of the -- that they can make out an adequate -- tell what happened and establish the fact that they're guilty of the charges they're pleading guilty to.
Q And is the judge present for this factual basis questioning?
A Yes, he or she presides over it.
Q Do you recall who did the questioning for factual basis in this plea?
A The initial -- as to the factual basis, the initial questioning was done by Mr. Bergrin.
Q And did you at some point also ask some questions?
A Yes, I did.
MR. GAY: Okay. I guess -- Judge, first I'm going to hand out the transcript.
THE COURT: All right.
(Documents are distributed to the Jury.)
MR. GAY: Everybody have one?
BY MR. GAY:

Q Now, Mr. Fennelly, do you have a copy of the transcript?
A Yes, I do.
Q Okay. If you could take -- if you could take a look at 7013, if you could turn to page 12, lines 19 through 21.
A Yes.
Q Is that where the factual basis portion of the plea takes place?
A Yes.
MR. GAY: Okay. I'm going to ask if everybody can turn to page 12 beginning on lines 19, 19 through 21, and give you a moment to put on your headsets because we're going to play this tape now.
And if I can, make sure everybody turns on the green button, so the green button is on. Okay.
(Audiotape is played; audiotape is stopped.)
BY MR. GAY:
Q Now, Mr. Fennelly, I want to ask you a couple of questions about what was going on during the transcript here during the recording.
If you could turn to page 12, lines 19 through 21.
When the Court said: "With the assistance of your attorney, I'm going to ask that you give a factual basis." Is that what happened, do you recall happening?
A Yes. Yes, I do.
Q And then you described what the factual basis is after

that. Is that correct?
A Correct.
Q And who was doing questioning initially during the factual basis?
A Mr. Bergrin.
Q Okay. I'm now going to refer you to page 14, beginning on line 25 at the bottom, and then going to the next page, page 15, lines 1 through 9.
Can you describe, what did that -- what were those questions related to, if you know?
A I'm sorry. Starting at what line, please?
Q Starting at line 25 on page 14 where the question is:
"In reference to the May 2nd, 2008, were you in possession of the 9 millimeter handgun?
"ANSWER: Yes, I was.
"QUESTION: Did you have a permit to have possession of that weapon?
"ANSWER: No.
"QUESTION: At the time that you had possession of that weapon, did you point it at or in the direction of a police officer that was entering the premises?
"ANSWER: Yes."
A Right.
Q Do you know what those related to?
A Oh, yes, I do.

Q And what counts did those relate to?
A The numbers I believe now were 26, 27, 28, but the counts had to do -- were the amended charge of the aggravated assault by pointing, the unlawful possession of a weapon, and possession of a weapon for unlawful purpose.
Q So those questions established the basis for those charges?
A Yes.
Q Now, I'm going to turn your attention now to page 19, and again, we're going to go through, beginning on lines 13 where I believe you're doing the questioning at this time. Is that correct? Again, we'll start at I guess line 10, page 19, line 10. And that's when you're doing some questioning.

Is that correct?

A Yes, that is correct.
Q And you ask the question:

"Front of the house on that. So, if you, in fact, you that -- if the police were coming, you would be aware of that fact. Correct?"

And the answer is: "I'm not going to stand here and admit that the surveillance system was for police because it was for the protection of my family and it was through ADT and it was a monthly payment. So you're not going to get me to stand here and admit to that. It had nothing to do with selling narcotics."

And then you questioned: "Did you know that was a

police officer who entered your house on that day, the 18th?".

The answer: "Did I know it was the police? Yeah, when he broke down the door."

"QUESTION: And then you pointed the gun at him after that point?

"ANSWER: Yes.

"Why don't you get the -- why don't you subpoena the surveillance system and then you can see what happened.

"Come on, I'm not acting like an ass hole but you want me to stand here and say something that's not true."

And you said, "Can I have a moment with counsel, your Honor?"

And the court said, "Sure. Off the record."

Do you remember that?

A Yes.

Q And do you remember, you were asking questions about him pointing the gun during that time frame?

A Yes, initially, and also questions about the video, establishing -- so if we were going to establish the fortified premises charge --

Q Was it your opinion that he was having difficulty admitting --

MR. BERGRIN: Objection, your Honor. I request he be able to finish his answer.

MR. GAY: I'm sorry. I apologize. I apologize for

that, Judge.

THE COURT: Go ahead. Did you finish the answer, Mr. Fennelly?

THE WITNESS: Sure.

A (Continuing) I was initially -- I believe he was -- I was going at the cameras to establish the fortified premise charge, and then work right into the fact that he still knew it was an officer coming in and he still pointed the gun at him. So further establishing the pointing charge and the weapons possession.

Q And is it your opinion from being present there that he was having difficulty admitting that he pointed a weapon at the police at this time?

A Not -- no, I don't believe, because he mentioned it, he had alluded -- he had answered "yes" to that when his attorney had questioned, and then he was still admitting it now. He said, "I had it."

I think he may have been, in my opinion -- questioning the circumstances as to how the officer -- you know, get the video, look and see how it really happened. But I don't think he was denying that he had the gun that day or that he pointed it in the direction of the officer.

Q Okay. Pointed it in the direction of the officer?

A Correct.

Q Not at the officer?

A Correct. I mean, the statute that he pled to, the aggravated assault by pointing, I believe -- I don't have it in front of me -- but I believe indicates that the pointing --

Q Is there anything to refresh your memory about the statute?

MR. BERGRIN: Please let him finish the answer.

THE COURT: Yes. Let him finish, Mr. Gay.

A I believe, without having the statute in, front of me, it indicates that you have -- you can be held responsible or guilty of that statute if you point a gun at or in the direction of a person.

Q Okay. Okay, fine.

Now, after this colloquy you say: "Can I have a moment with counsel, your Honor?"

And do you remember what happened after that? This is again now if you turn to page 20, lines 6 and 7.

A I don't remember specifically what words were said or exactly what happened. I believe Mr. Bergrin and I spoke, and as a result of that I agreed to drop -- or take Count 25, the fortified premise count out of the requirement that he plea to that.

Q Now I'm going to turn your attention to -- I'm sorry -- it's now page 23, and this is just on the transcript, lines 18 through 22.

Where the Court says: "Counsel, are you satisfied the defendant's plea of guilty is voluntary and that he set forth a

factual basis for the plea?"

Mr. Bergrin says, "Yes, your Honor."

And the Court says: "Mr. Fennelly?"

And you say, "Yes, your Honor."

Did that happen at the plea, as far as you recall?

A Yes, it did.

Q Now, was Mr. Castro later sentenced, as far as you know?

A Yes, he was.

Q Do you remember approximately when it was that he was sentenced?

A The plea took place in January 2009, and he was sentenced I believe some time in May 2009.

Q Okay.

MR. GAY: Just one second.

(There is a pause for Mr. Gay.)

Q Just one more thing.

Mr. Fennelly, when you said that you accepted the factual basis, what did that mean, as far as you understood it?

A It meant that I believe that a sufficient -- he laid out a sufficient ground -- where the defendant laid out a sufficient groundwork that the plea would withstand scrutiny if the defendant attempted to pull back his plea or appealed for whatever reason.

Q Okay.

MR. GAY: I have no further questions at this time.

THE COURT: All right. Cross-examination.

CROSS-EXAMINATION

BY MR. BERGRIN

Q Mr. Fennelly, we had spent a good amount of time negotiating this plea. Correct?

A Yeah. I don't remember exactly the -- how much time, but, yes.

Q But we went over the charges together. Correct?

A Yes.

Q We went over the allegations against Mr. Castro?

A Yeah.

Q And this was your best offer after negotiations and after bargaining and after time spent reviewing it. Correct?

A Correct.

Q It wasn't a fast or hasty decision; it was done over several months. Correct?

A Yes. Probably either -- as when the indictment came down to the point that we got to the plea day.

Q And Mr. Castro was charged in a 41-count indictment. Correct?

A Yes.

Q And you had a chance -- you were the supervisor of the particular unit that made the entry into the house that day of Mr. Castro. Correct?

A I believe the Newark -- I was the supervisor of the County

Prosecutor's Narcotic Task Force. The actual entry was made by I believe the Newark Police Department.

Q And there were other agencies also involved in the entry and the investigation of this case. Correct?

A It was primarily the Newark Police. Most of the officers involved were the Newark Police. There may have been detectives from other -- detached from other agencies involved.

Q The allegation was -- and you had a chance to review the reports in this case. Correct?

A Yes.

Q The allegation was that at the time of the entry there was a surveillance system that could observe the police entering the house. Correct?

A It was my understanding that there was a surveillance system there, yes.

Q And at the time of the entry, the allegation was that Mr. Castro took a 9 millimeter handgun, put it underneath the bullet-proof vest of the entering police officer, I believe it was Detective Smith, and pulled the trigger and the gun misfired. Correct?

A I believe it was Officer Orby, but --

Q Officer Orby, you're correct. I'm sorry.

And there were several other officers who observed that action. Correct?

A There were several officers involved. Officer Orby, my

recollection, was not part of the investigation, he was more on the entry team, the raid.

Q Correct.

A The ERT entry team, emergency team.

He went in. They have a whole procedure, a form how they go into a building, how they raid a building. I don't know what other officers saw; who was where when he went through the door.

Q But the allegation in the police report and the allegation that the police officers were willing to swear to on the complaint and testified at the -- testified at grand jury, even at trial if it went that far, was that Castro pulled out a gun or had a gun in his possession at the time the team entered, and he put the gun underneath the bullet-proof vest, pulled the trigger, and the gun misfired. Correct?

A Yes.

Q And you had no reason to doubt that officer's allegation pertaining to that. Correct?

A No.

Q Now, we bargained or we negotiated for the pointing. Correct?

A Yes.

Q And before you gave a negotiated plea in this case of 15 years with five years of parole ineligibility, you had an opportunity to review the charges as well as consider Mr.

Castro's prior criminal history. Correct?
A Yes.
Q Do you remember what his criminal history was?
A I know he had been arrested a number of times. I do not know right now exactly the extent or, you know, what the number of prior convictions were. But I know he was arrested numerous times.
Q This was not the only case that was negotiated for disposition at that particular time either. Correct?
A As to Mr. Castro?
Q Yes.
A Correct. He was -- after he was arrested on this charge, the narcotics case that he pled to, he was released on bail at some point, and there was -- I believe he was charged with a robbery or related -- either conspiracy or relating to a robbery that was being planned.
Q And the plan was recorded, correct, by an informant or an agent of the Essex County Prosecutor's Office. Correct?
A I believe there was a recording at some stage. There were other defendants in that matter. I know at some point something was recorded.
Q And one of the conditions of this particular plea was that he also enter a plea to that particular charge. Correct?
A Yes.
Q And there was also another indictment for a second degree

criminal attempt, second degree conspiracy, third degree possession of CDS, third degree possession of CDS with the intent to distribute, and third degree possession with intent to distribute within a thousand feet of a school. Correct?

A I'm not sure. I know there was -- on the day that he pled, he pled to the indictment -- charges in the indictment for the narcotics case as well as conspiracy on the robbery. There was another indictment I believe -- I don't know what that -- I don't have that in front of me, I don't know. I thought that was a convicted felon. I'm not sure.

Q There was a convicted felon indictment.

MR. BERGRIN: May I approach the witness, your Honor?

THE COURT: Yes. Go ahead.

Q Would a Request to Recommend Disposition signed by yourself refresh your recollection, sir (handing document)?

A I'm sure.

(After pause) All right. I believe that the second matter that you spoke to was included in -- when he was arrested on the robbery or the planned robbery, that is the criminal attempt charge listed here, and that's actually not an indictment, that's under an accusation number, which I believe is 09010061. And that included charges of second degree criminal attempt, which would have been the robbery; the second degree conspiracy; and third degree possession of CDS.

I believe -- I do not have those reports in front of

me. I believe he may have been charged with some possessory CDS offenses when he was arrested in connection with the planned robbery.

Q And what is an accusation as compared to an indictment?

A Yeah, it was accusation.

Q What is an accusation? Can you explain that to the jury, please?

A An accusation is generally a charging document. Normally when a person in state court is arrested, he or she is often charged by way of criminal complaint. The matter will then be presented to a grand jury, and if the grand jury determines if there's evidence to go forward they return what we call -- what's known as an indictment.

In the event that somebody worked out a charge pre-indictment or prior to it going to the grand jury, what is drafted in the state system is what's known -- a document that's known as an accusation. It's effectively the same as a -- it becomes a charging document. And in it there's documents -- the person waives his right to have the matter presented to the grand jury and it's a mechanism in which somebody can plea out pre-indictment.

Q Mr. Fennelly, who put the plea through, Paul Bergrin or Richard Roberts?

A Paul Bergrin. You did, sir.

Q And did Richard Roberts have anything to do with putting

the plea through and negotiating that plea?
A No.
Q Now, the home of Mr. Castro, did you also find multi-kilograms of cocaine at a second home?
A There were three locations tied to the investigation. There were two addresses on Tichenor Place or Tichenor Street, and one --
Q Pulaski.
A Pulaski, in the Ironbound, yes.
There were items found at different -- all three locations and --
Q Who lived at the other locations? You have Mr. Castro's house. Isn't it a fact that his daughter, his youngest daughter, lived at another location?
A I know a daughter lived at one of the locations on Tichenor. I'm not sure if she was the youngest daughter or how -- where she fit in that. But I believe she may have been in a separate apartment or separate house on Tichenor. I believe there were two houses, 42 and 44 probably right next door to each other.
Q And there were narcotics found in that house, correct, the daughter's house? Do you remember that at this particular time?
A I believe -- there were narcotics found on Tichenor. My best recollection is they were found in both locations on

Tichenor.
Q And do you remember who represented the daughter? Was it Dana Scarillo?
A It quite possibly could have been. I know that Dana Scarillo, an attorney, represented the daughter, a Stephanie Castro at some point. It may have been in connection with the second incident, I'm not sure. It could very well have been Dana Scarillo.
Q Now, several of the comments that Mr. Castro made, the recording in the court was put on and the recording was shut off during several stages of this proceeding. Correct?
A At least at the one stage when we're trying to get -- when he was being questioned and the issue of the videotape came up.
Q Do you remember what his attitude or demeanor was -- Mr. Castro -- when the recording was shut off or in front of the judge or when being led out of the court? Do you have a independent recollection of that now?
A I believe -- he was not -- as I was questioning him about the surveillance system and the videotape and he could see the police coming in, and his voice was raised or his demeanor did appear to change, and he was -- you could say he was becoming hostile.
Q And when he left the court, do you remember what he said to the judge? Do you remember his comment: "This is bullshit," and slamming his hand on the table?

A I do not -- I remember him being upset. I don't remember specifically. I believe -- I thought he was actually handcuffed so I don't know if he could slam his hand. But I know he was muttering -- he was saying something. The exact words, I don't know. But he was -- he was not happy.
Q And he was not respectful either. Isn't that a fact?
A No, he was not.
Q Did there come a time during this investigation when money was seized, to your memory, from Mr. Castro?
A Yes.
Q Do you remember approximately how much money? Not to a specific dollar, approximately.
A I believe it was over a hundred thousand dollars. I believe it was -- I would -- a substantial amount of money.
Q Your Request to Recommend Disposition may refresh your memory.
A Actually on the copy I have I don't believe it does -- oh, I stand -- yeah. The defendant agree -- on the Request to Recommend Disposition there's a mention of $700,000.
Q Now, do you know if Mr. Castro made any allegations against the police involved in this investigation, the entry or the seizure of the money?
A Do I specific -- specific allegation?
I did not hear that from Mr. Castro. I believe at some point during or -- there may have been an allegation.

Q And did you believe the allegations that he made? Did you have any evidence to support the reliability of the allegations that he made?
A No.
Q Now, did Mr. Roberts -- there came a point in time when Mr. Roberts substituted in for me and Mr. Castro fired me. Correct?
A I know Mr. Roberts substituted in. Whether Mr. Castro actually fired you, I wasn't privy to that. But I know Richard Roberts did substitute in on the case.
Q At any time did Mr. Roberts ever file a motion to withdraw the plea of guilty?
A At some point, and I'm not sure if it's when you were representing him or when Mr. Roberts was, but there was -- I do have a recollection of some motion -- some talk at least of a motion to withdraw the plea.
Q Was a motion ever filed, to the best of your memory and recollection?
A I don't -- I don't recall. I know it was definitely spoken of and the sentence was put off.

I don't know. Actually I don't have that in front of me, but I don't know.

Q The judge in this particular case you say was Judge Bernstein?
A Yes, that's correct.

Q Isn't it a fact that Judge Bernstein made an independent finding on the record that he was satisfied and finds the defendant understands the nature of the charges?
A As part of the --
Q As far as the plea acceptance.
A Yes.
Q And that Mr. Castro understood the consequences?
A Yes, the judge did make that finding.
Q And he also found that he had -- that he was satisfied the defendant had the benefit of competent counsel and legal advice. Correct?
A I believe that finding was made in the course, and that's in the transcript.
Q And Mr. -- Judge Bernstein also found that Mr. Castro made a knowing, intelligent, understanding, and voluntary plea. Correct?
A Correct.

MR. BERGRIN: I have no further questions.
Thank you very much.
THE COURT: Mr. Gay, any redirect?
MR. GAY: Nothing, Judge.
THE COURT: All right. Thank you.
Mr. Fennelly, thank you, you can step down.
(Witness excused.)
THE COURT: Ladies and gentlemen, we'll take a break

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 III (pp. 1233–1642)

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RME-000003

FD-302 (Rev. 10-6-95)

FEDERAL BUREAU OF INVESTIGATION

Date of transcription 09/30/2010

On July 30, 2009, RONDRE KELLY, date of birth [redacted] Social Security number [redacted] was interviewed at the ALLEGHENY COUNTY JAIL by Special Agent Shawn A. Brokos and Assistant United States Attorney Joseph Minish pursuant to a proffer agreement executed by KELLY. Present for the interview were KELLY's attorneys, RICHIE ROBERTS and MAURICE SNIPES. KELLY provided the following information:

In 2005, KELLY purchased a house in Newark from PAUL BERGRIN. KELLY paid BERGRIN $60-70,000 in cash for the house, but BERGRIN reflected $30,000 on the HUD-1 because he did not want to show that he had make a profit on the sale.

KELLY subsequently attempted to sell the house, and realized that BERGRIN had not conveyed a clean title to him. As a result, KELLY spent approximately $13,000 in litigation to obtain clean title. KELLY complained to BERGRIN. As a consolation for the title issue, BERGRIN offered to sell KELLY kilograms of cocaine for $20,000 each, and KELLY agreed. KELLY made an initial purchase of 10 kilograms, and picked up the drugs from BERGRIN's law office located at 572 Market Street, Newark, NJ. KELLY began dealing with BERGRIN approximately every two weeks to purchase approximately 10 kilograms at a time. Eventually, KELLY started dealing with BERGRIN's girlfriend, YOLANDA LAST NAME UNKNOWN (LNU), and FIRST NAME UNKNOWN LNU, also known as FLAT TOP. KELLY did some drug pick ups at the restaurant that BERGRIN and YOLANDA owned on Summer Avenue, Newark, NJ. This arrangement continued until March, 2007 when KELLY had a falling out with both YOLANDA and BERGRIN.

Investigation on 07/30/2009 at Pittsburgh, PA

File # 272B-NK-115490-2882 Date dictated n/a

by SA Shawn A. Brokos/sab

001 CNT: 2C:35-10 DEG: 3 POSSESSION/USE OF CDS

DISPOSITION: DISMISSED
001 CNT: 2C:35-7 DEG: 3 CDS ON SCHOOL PROPERTY

AGGREGATE SENTENCE DATE: 02/01/1994

COURT: NJ007053J ESSEX CO SUPERIOR COURT
CONFINEMENT PROBATION 2Y
SUSP DIVER LIC 1Y AMOUNT ASSESSED $ 1,100

AGGREGATE RESENTENCE DATE: 08/15/1994 PROBATION REVOKED-SENT JAIL

COURT: NJ007053J ESSEX CO SUPERIOR COURT
INCARCERATION: COUNTY JAIL
CONFINEMENT 364D JAIL TIME CREDIT 6D
AMOUNT ASSESSED $ 0

RECEIVED 09/20/1996 AGENCY CASE NO: 68293
AGENCY: NJ007013C ESSEX CO ANNEX/PEN

********** ARREST 002 **********
ARRESTED 04/06/1994 AGENCY CASE NO: 232045
AGENCY: NJNPD0000 PD NEWARK ESSEX
OFFENSE DATE: 04/06/1994
001 CNT 2C:35-10A(1) POSSESS CDS OR ANALOG
001 CNT 2C:35-5 MANUFACTURE/DISTRIBUTE CDS
001 CNT 2C:35-7 CDS ON SCHOOL PROPERTY

INDICTMENT/ACCUSATION PROMIS/GAVEL NO: ESX94002921-001
NO: ESX940602102I DISPOSITION DATE: 10/28/1996
AGENCY: NJ007053J ESSEX CO SUPERIOR COURT

DISPOSITION: GUILTY FELONY CONVICTION
001 CNT: 2C:35-7 DEG: 3 CDS ON SCHOOL PROPERTY

DISPOSITION: DISMISSED
001 CNT: 2C:35-10A(1) DEG: 3 POSSESS CDS OR ANALOG

DISPOSITION: DISMISSED
001 CNT: 2C:35-5B(3) DEG: 3 DISTRIBUTE HEROIN/COCAINE

AGGREGATE SENTENCE DATE: 12/02/1996

COURT: NJ007053J ESSEX CO SUPERIOR COURT
INCARCERATION: STATE PRISON
CONFINEMENT 4Y JAIL TIME CREDIT 3D
SUSP DIVER LIC 1Y AMOUNT ASSESSED $ 175

********** ARREST 003 **********
ARRESTED 10/12/1995 AGENCY CASE NO: 244142
AGENCY: NJNPD0000 PD NEWARK ESSEX
NAME USED: MURREL, SHAWN DOB USED: 12/15/1974
OFFENSE DATE: 10/12/1995
001 CNT 2C:29-3 HINDERING APPREHENSION
001 CNT 2C:35-10 POSSESSION/USE OF CDS
001 CNT 2C:35-5 MANUFACTURE/DISTRIBUTE CDS
001 CNT 2C:35-7 CDS ON SCHOOL PROPERTY

ARREST 004
ARRESTED 02/23/1996 AGENCY CASE NO: 249736
AGENCY: NJNPD0000 PD NEWARK ESSEX
OFFENSE DATE: 02/23/1996
001 CNT 2C:12-1B AGGRAVATED ASSAULT
001 CNT 2C:13-1B KIDNAPPING
001 CNT 2C:15-1 ROBBERY

INDICTMENT/ACCUSATION
NO: ESX960802769I
AGENCY: NJ007053J

PROMIS/GAVEL NO: ESX96001724-002
DISPOSITION DATE: 10/28/1996
ESSEX CO SUPERIOR COURT

DISPOSITION: GUILTY
001 CNT: 2C:12-1B(1) DEG: 3
FELONY CONVICTION
AGGRAVATED ASSAULT

DISPOSITION: GUILTY
001 CNT: 2C:13-2 DEG: 3
FELONY CONVICTION
CRIMINAL RESTRAINT

DISPOSITION: DISMISSED
001 CNT: 2C:15-1 DEG: 1
ROBBERY

AGGREGATE SENTENCE DATE: 12/02/1996

COURT: NJ007053J ESSEX CO SUPERIOR COURT
INCARCERATION: STATE PRISON
CONFINEMENT 4Y JAIL TIME CREDIT 6D
AMOUNT ASSESSED $ 300

RECEIVED 12/17/1996 AGENCY CASE NO: P286617
AGENCY: NJ011045C NEW JERSEY STATE PRISON

********** ARREST 005 **********
ARRESTED 02/04/1999 AGENCY CASE NO: A 236581
AGENCY: NJ0070000 ESSEX CO SHERIFF'S OFFICE ESSEX
NAME USED: OLIVER, EDWARD F. DOB USED: 12/21/1974
OFFENSE DATE: 02/04/1999
001 CNT 2C:35-10 POSSESSION/USE OF CDS
001 CNT 2C:35-5 MANUFACTURE/DISTRIBUTE CDS
001 CNT 2C:35-7 CDS ON SCHOOL PROPERTY

INDICTMENT/ACCUSATION
NO: ESX990802826I
AGENCY: NJ007053J

PROMIS/GAVEL NO: ESX99001171-002
DISPOSITION DATE: 03/10/2000
ESSEX CO SUPERIOR COURT

DISPOSITION: GUILTY
001 CNT: 2C:35-10A(1) DEG: 3
FELONY CONVICTION
POSSESS CDS OR ANALOG

DISPOSITION: GUILTY
001 CNT: 2C:5-2 DEG: 3
FELONY CONVICTION
CONSPIRACY
MANUFACTURE/DISTRIBUTE CDS

DISPOSITION: TO BE DISMISSED
001 CNT: 2C:35-5B(3) DEG: 3
DISTRIBUTE HEROIN/COCAINE

DISPOSITION: TO BE DISMISSED
001 CNT: 2C:35-7 DEG: 3
CDS ON SCHOOL PROPERTY

****

CUSTODY STATUS (AS TRACKED WITHIN NJ DOC OBCIS SYSTEM): 1

INMATE NUMBER: Y130813 STATUS DATE: 09/14/99
STATUS: DISCHGD
LOCATION:
PAROLE VIOLATIONS: 001 ESCAPES: ISP: N

CRIMINAL HISTORY DIVERSION PROGRAM AND FELONY CONVICTION SUMMARY

PRE-TRIAL INTERVENTION: 000
CONDITIONAL DISCHARGE: 000

THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
CRIMINAL NO. 04-280 (FSH)

UNITED STATES OF AMERICA,	:	TRIAL
-vs-	:	TRANSCRIPT OF PROCEEDINGS (TESTIMONY OF LACHOY WALKER)
HAKEEM CURRY, et al.,	:	
Defendants.	:	

Newark, New Jersey
May 24, 2006

B E F O R E: HONORABLE FAITH S. HOCHBERG, U.S.D.J.

AND A JURY

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

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For the Government

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TROY ARCHIE, ESQ.,
Attorney for the Defendant Baskerville

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

JOHN KEVIN STONE, C.S.R.
Official Court Reporter.

Q You're on Center Street looking at the complex.
A If you were -- it was on Center Street, that building would be sitting to the left.
Q Okay.
And does that block the view of the walkway from the street?
A Yes.
Q Can we see the next photograph.
What is that a photograph of?
A The walkway to "The Dungeon".
Q And is that from the opposite side?
A Yes.
Q Picture, photograph taken from the driveway of the walkway?
A Yes.
Q Towards "The Dungeon"?
A Yes, from the driveway.
Q Can we see the next photograph, please, if there is one.
Is that the last one? Okay.
Mr. Walker, who paid the rent and the other expenses for "The Dungeon"?
A Hakeem Curry.
Q Whose name was on the paperwork for the "The Dungeon," if you know?
A His cousin, Aquila Zupa.

Q What was the reason for this?
A He didn't have any credit. We was all doing illegal things, so when you doing illegal things you tend to put -- to put your properties in other people's names to protect yourself from law enforcement.
Q Were you aware, based on your dealings with Mr. Curry, of any other things that he's put in other persons' names?
A Cars, his own cars, rent-a-cars, cell phones, things of that nature.
Q And apartments as well?
A Yes.
Q And would those be apartments that he used to store drugs?
A Yes.
Q What's the reason for this?
A To protect yourself from law enforcement. If you do it yourself, you got to show where you get this money from. So since we all selling drugs, we tend to pay somebody, put that property in their name so we could get that property to protect yourself from law enforcement.
Q Now, who had access to "The Dungeon"?
A At one time I had access to "The Dungeon," Malik Sutton had access to "The Dungeon," Tytheed Mitchell had access to "The Dungeon," and William Lattimore had access to "The Dungeon" besides Hakeem Curry.

Q Do you know who else knew about "The Dungeon" other than those people you just discussed?

A Ishmael Pray, Hamid Baskerville, Jarvis Webb, Maurice Lowe, Keith, that's it.

Q Could anybody enter "The Dungeon"?

A No.

Q What was the reason for this?

A Because it was a stash house and he didn't want -- he didn't want everybody knowing where it was at. So these were the particulars he wanted to know where it was at, these are the particulars that he trusted.

Q Do you know whether anyone ever stayed at "The Dungeon"?

A Yes.

Q Do you recall who was staying there in 2003?

A In 2003 I stayed there, Malik Sutton stayed there. William Lattimore, he stayed there off and on.

Q Do you recall whether Tytheed Mitchell ever stayed there?

A Yes.

Q Do you know what the reason was Tytheed Mitchell was staying there?

A Well, Tytheed Mitchell was a fugitive from the law, he was a fugitive from murder, and that's where he was staying at, Hakeem housed him at "The Dungeon" to hide from law enforcement.

Q As far as you knew, you mentioned an individual named Norman Sanders --

A Yes.

Q -- earlier in your testimony?

A Yes.

Q As far as you knew, did Norman Sanders know about "The Dungeon"?

A No.

Q Do you know what the reason for that was?

A He -- Hakeem didn't really trust him too much.

Q What quantities of cocaine was Hakeem Curry selling at that time, this is now in the 2002?

A He was selling kilos of cocaine, multiple kilos of cocaine.

Q Were you ever present when he received kilos of cocaine or stored them at "The Dungeon"?

A Yes.

Q Do you recall what quantities, how many kilos was he receiving at that time?

A Anywhere from 25 to 50.

Q Approximately how often was he receiving those kilos of cocaine?

A 10 days, every 10 days, every 12 days.

Q To whom did he distribute those kilos?

A He distribute those kilos to Ishmael Pray, Jarvis Webb,

Maurice Lowe, Hamid Baskerville, Rakim Baskerville, Will Baskerville and various others.

Q Do you know approximately how much -- how many kilos he distributed to each one of those persons at a time?

A Well, from my knowledge he distributed 10 kilos to Jarvis Webb, 10 to 15 kilos to Ishmael Pray. A kilo or two to Hamid Baskerville. Half a kilo to Rakim Baskerville, half a kilo to William Baskerville. He would supply Keith with maybe two or three kilos. That's it.

Q How about you mentioned Maurice Lowe. Do you recall how much he was distributing to Maurice Lowe?

A One -- one to two.

Q Do you know the price he obtained the kilograms for?

A No, I don't.

Q Do you know how much he sold them for?

A 23,000 a kilo.

Q You recall any particular incident when you assisted Mr. Curry either with kilograms --

THE COURT: Excuse me, for a minute, Mr. Gay.

It's about three minutes before we're going to take the lunch break. If you're getting into a new area perhaps we should just break.

MR. GAY: This is probably a good time to break.

THE COURT: All right.

We're going to take the lunch break, ladies and

gentlemen.

Thank you for sitting through a long morning without a break, appreciate it very much. You're going to take a lunch break, as I always tell you at every break and the end of everyday, please do not talk to each other about the case, please do not talk to anybody about the case, and I instruct you not to see or read or hear anything about this case. Thank you very much.

Your lunch should be here shortly. Thank you.

We're adjourned for lunch.

THE CLERK: All rise.

(Jury exits).

THE COURT: All right.

We're going to take a very brief lunch break.

Please come back at 1:05.

(After a luncheon recess court resumed)..

THE COURT: Be seated, please.

Going to get --

MR. GAY: Your Honor, before we bring the jury, one quick thing.

THE COURT: Yes.

MR. PLAISTED: You do whatever you want.

MR. GAY: Your Honor, we are getting to the point in the testimony where the call that we have to redact is going to be played. It's probably, have at least another

hour's worth of testimony before that's going to happen. The problem is we're having difficulties getting the audio done properly. So when I get to that point --

THE COURT: Can't we just stop it at that point?

Just stop it, just hit the end button and by the time the call itself goes down on the jury it will be done. Right?

MR. FRAZER: We could give --

THE COURT: I don't want to break. I want to move.

MR. GAY: Judge --

MR. FRAZER: But there's no way to do it.

MR. GAY: I don't know that that's --

THE COURT: Mr. Gay, can't we just stop it?

MR. GAY: Stop it and do what though? It's got to get forward to the next part.

THE COURT: So --

MR. GAY: There's not a end of the call, there's a portion in the middle that's going to be --

THE COURT: What are you --

MR. GAY: I'm requesting, Judge, I'm going to work -- I have at least, I mean I may be able to go to the end of the day with what we have now.

THE COURT: I don't want to waste time. I don't want to try to just fill time.

MR. GAY: No, no, Judge.

Just to be clear, I'm not filling time.

THE COURT: That's the worst.

MR. GAY: What I'm saying --

THE COURT: How about if I say this, when you get to that spot, saying that a particular phone call that would ordinarily be played in this spot, we are not going to play it because a portion of it is being redacted.

You don't want to do that. Okay. I won't do that.

What do you want to do? It's a pretty inflammatory section of conversation. Obvious, it should have been raised a lot sooner but it wasn't.

MR. GAY: Can we -- is there anyway we can -- I just don't want to do this in front of the jury.

THE COURT: But do it --

MR. GAY: If we can excuse them quickly for five minutes, while we get it to the next part. In other words, this is what I'm saying, we go to the part that is the objection --

THE COURT: Fine. Stop.

MR. GAY: -- take a break, they go out.

THE COURT: We get it back at the point --

MR. GAY: -- they go out, no one else goes out.

THE COURT: Okay. We'll give them five minutes.

MR. GAY: We'll have to get our act together here. We'll get him over, I still have a good amount of time

before we're going --

THE COURT: Get the I-T guys here now. I don't want any wasted time.

MR. GAY: I will do everything in my power not to waste Your Honor's --

THE COURT: No, get the I-T guys.

MR. GAY: I -- he will be here.

THE COURT: I want them waiting and not us.

MR. GAY: He will be here.

MR. PLAISTED: We've two agreements, one which we should put on the record, but one before the jury comes in, if we could, Your Honor.

THE COURT: What is it now?

MR. PLAISTED: We're working better, between hours in a way to --

THE COURT: Speed it up. Come on, we're moving. I just want to hear what the agreement is. Both of you --

MR. PLAISTED: The agreement is Yakima Johnson, although they made it a little more likely she might be a witness, they agree she would be sequestered --

THE COURT: She's not exempted from my sequestration order and she's going to be -- is she going to be a witness or not?

MR. PLAISTED: I don't know.

THE COURT: If she's going to be a witness she's

sequestered, if she's not going to be a witness she's not sequestered.

Mr. Nuzzi has been made a special exception, I have entered an order.

MR. PLAISTED: I was going to ask Your Honor to exempt her. The Government was consenting, they said they could cross her on the fact she was here and that satisfied them, so I was going to ask if Your Honor would except her. I cannot say she is going to be a witness.

THE COURT: Is there topics she's going to be a witness on that we can do a partial sequestration like we are with Mr. Nuzzi?

MR. PLAISTED: We could.

I asked the Government, I said to them exactly that I would be glad -- they were most concerned about anything specifically relating to the money laundering charges.

THE COURT: Are you going --

MR. PLAISTED: When they get to that she'll leave.

THE COURT: -- are you asking that she in fact packed in bags 25 to 40, 45,000 cash, what --

MR. PLAISTED: I have to talk about that with her, I did not know about that testimony.

THE COURT: Obviously, there's an issue of Fifth Amendment self-incrimination.

MR. PLAISTED: All sorts of issues.

THE COURT: Right. It needs to happen. I mean you need to have -- you need to talk to her.

MR. PLAISTED: Anyway, could we have that exemption that the Government's agreed to?

THE COURT: I don't know what it is.

MR. PLAISTED: Exempt her from the sequestration order, they're going to cross her on the fact she's been present, if there's anything coming up to money laundering, they'll tell me and she'll leave.

MR. FRAZER: Judge --

THE COURT: That's the only topic?

MR. PLAISTED: No, I opened on what I thought I might put her on, they introduced a couple other topics in this case now and so --

THE COURT: Yes, Mr. Frazer.

MR. FRAZER: Judge, I did agree that since she is his wife she could stay. However, I said that with the agreement that I received reciprocal discovery of her testimony.

THE COURT: Where is the recip -- where is -- Mr. Nuzzi was here today, has he produced his reciprocal discovery?

MR. GAY: Your Honor, I spoke to Mr. Nuzzi yesterday, he told me he has absolutely no paperwork or documentation of any kind relating to this.

THE COURT: How can he not have any paperwork reflecting the money he got to represent somebody?

MR. GAY: I'm only repeating what he told --

THE COURT: All right.

I want Mr. Nuzzi here. I have more questions for Mr. Nuzzi.

All right. What is going on? How about any reciprocal discovery from Miss Johnson?

MR. PLAISTED: Like what?

THE COURT: I don't know.

MR. FRAZER: Like, Judge --

THE COURT: Is there any --

MR. FRAZER: I'll list them for him if he really needs me to.

THE COURT: She would not necessarily have it, it's not like Mr. Nuzzi's situation. He would have to have records of cash or check or whatever he got.

MR. PLAISTED: Yeah, I don't have anything presently. I don't even know what I put --

THE COURT: Even if it's a bookkeeping entry.

MR. PLAISTED: Other than what I opened and what the Government has now raised --

THE COURT: All right.

If the Government has agreed -- have you agreed to that form of sequestration order with respect to Yakima

Johnson?

MR. FRAZER: Meaning when --

THE COURT: Meaning --

MR. FRAZER: Limited --

THE COURT: -- what I'm hearing is when you get to the subject of money laundering you will say to Mr. Plaisted we are getting to the topic of money laundering, please ask Miss Johnson to leave.

MR. FRAZER: Except there is -- there are portions of his testimony that will involve jewelry and other things just like they have --

THE COURT: So how are you proposing to implement this? I'm not going to have side bars every five minutes.

MR. FRAZER: Judge, I told Mr. Plaisted I don't care if Miss Johnson is in the courtroom, or I'll cross-examine that she listened to all the testimony and tailored it, if that's the case.

MR. PLAISTED: That's fine with me.

MR. FRAZER: But again, it's with the understanding that we need to know if she is a witness, financial records, you know, everything to do with --

MR. PLAISTED: Whatever he tells -- we'll talk outside the court --

MR. FRAZER: -- jewelry, registration --

MR. PLAISTED: He tell us what they think --

MR. FRAZER: Can I finish a sentence?

MR. PLAISTED: I'm sorry. I was trying to cut time.

MR. FRAZER: You asked what reciprocal discovery might be.

THE COURT: Quickly, yes.

MR. FRAZER: So registration about cars, payment for cars, financial records. Jewelry --

THE COURT: Cars, jewelry, cash. Cash, where any cash is --

MR. FRAZER: Apartments, etcetera.

Exactly. I want to know where any cash is, any records of any cash that she has, cars, jewelry, etcetera. That would be reciprocal discovery.

MR. PLAISTED: All right.

THE COURT: No matter in whose name it is held and no matter who claims beneficial ownership.

MR. FRAZER: That is the material issue in this case, Judge.

THE COURT: All right.

MR. PLAISTED: I got it. I wrote it down.

THE COURT: Okay.

Are you with -- are you representing she'll stay only if that is being provided? If that's not being not being provided, sequestration is not being granted, are you

going to represent it will be?

MR. PLAISTED: I have to talk to her. I have to go through --

THE COURT: Okay.

Until you talk with Miss Johnson, if you're here, please leave until he can have a chance to talk to you. Thank you.

Let's bring in the jury and let's proceed.

We have got to move this along.

Mr. Gay, when you put in an exhibit you don't have to say, now I would like to show the witness exhibit such and such. You can say Exhibit 123. Every sentence you can say crisper and faster saves time.

Thank you.

MR. GAY: Certainly, Your Honor.

(Witness already resumed stand).

THE COURT: And then just say move the admission of Exhibit 123. You don't need to say, now, Your Honor, at this time I'd like to move exhibit --

MR. GAY: Okay. Certainly.

Trying to do it in a formal way, Judge.

If we want to speed ti up, Mr. Plaisted is fine --

THE COURT: No, please. I move the admission of Exhibit 123 is good enough for the purposes of this record.

MR. GAY: Okay.

THE COURT: It's done that way all the time.

MR. GAY: Okay.

THE COURT: All right.

I'll tell you what, Mr. Plaisted. You want to take this opportunity now to talk to Miss Johnson, since it's taking a little while to get the jury, maybe we can get -- is the jury here?

THE CLERK: Yes.

THE COURT: Sorry. The jury is now here.

MR. PLAISTED: I will.

THE COURT: All right.

THE CLERK: All rise.

(Jury enters).

THE COURT: Thank you.

You may all be seated, ladies and gentlemen.

I know I sat you for a long, very long morning without break. This afternoon we will have a very brief break just for you. It will come in the middle of the afternoon.

You may proceed, Mr. Gay.

MR. GAY: Thank you, Your Honor.

BY MR. GAY:

Q Mr. Walker, when you left off in your testimony I asked you whether you recalled any particular incidents when you assisted Hakeem Curry with kilograms of cocaine or money in

"The Dungeon."

A Particular incidents I --

Q Let me rephrase the question.

You testified that you assisted Hakeem Curry in the distribution of kilograms of cocaine in "The Dungeon." Correct?

A Yes.

Q You also, did you ever assist him with any money at "The Dungeon" as well?

A Yes.

Q What was the largest amount of money you ever saw or assisted him with at "The Dungeon"?

A 850,000.

Q Can you briefly describe to the members of the jury that incident?

A Well, at the time when I was living at "The Dungeon," was staying at "The Dungeon," he came down one morning, he called me on the cell phone, said he was on his way. He pulled up in the driveway where we seen earlier on the photos. He pulled up at the driveway by "The Dungeon," got the large laundry bag full of money out the out the back of the car, and I assisted him with carrying the money into the house.

Q What happened then?

A He said -- well, at the time Malik Sutton was at "The

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY
CRIMINAL NO. 04-280 (FSH)

UNITED STATES OF AMERICA Transcript of Proceedings

vs.

HAKEEM CURRY and
RAKIM BASKERVILLE,

Defendants.

Tuesday, May 30, 2006
Newark, New Jersey

B E F O R E: HONORABLE FAITH S. HOCHBERG, USDJ

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.

JACQUELINE KASHMER
Official Court Reporter

JACQUELINE KASHMER, C.S.R.
OFFICIAL COURT REPORTER
P. O. Box 12
Pittstown, NJ 08867
(609) 656-2595

A. 2001. He pitched with me some in '99, 98.
Q. I'd like to show you government exhibit number 190 for identification. Do you recognize that?
A. Yes.
Q. Who is that a photograph of?
A. Edwin Baldwin.
Q. Is that a fair and accurate depiction of Mr. Baldwin as he appeared when you knew him?
A. Yes.
MR. GAY: Your Honor, I'd ask that this exhibit be entered into evidence.
THE COURT: Any objection? Just say the exhibit number.
MR. GAY: 190, your Honor.
THE COURT: Any objection to 190?
MR. PLAISTED: None other than we had the other photographs, your Honor, you may remember --
THE COURT: 190 may come in.
(Exhibit 190 is marked in evidence.)
MR. GAY: Okay. Doesn't look like it's coming up on the big screen but there are the screens on the side there.
Q. Mr. Walker, the photograph up on the screen now, is that Mr. Baldwin?
A. Yes.

Q. Mr. Walker, you testified that you sold drugs for approximately 14 years. Is that correct?
A. Yes.
Q. During that time you made money selling those drugs?
A. Yes.
Q. Did you ever file taxes for any of the money you made selling drugs?
A. No.
Q. What was the reason for that?
A. Drugs is illegal so illegal, I don't think you could file taxes for selling drugs.
Q. You also testified that you held two other legitimate jobs briefly during that time period?
A. Yes.
Q. Did you ever file taxes on any of those?
A. No.
Q. What was the reason for that?
A. At the time, both times I was a fugitive from the law, so, it wouldn't have been in my best interest to file taxes.
Q. Can you explain that please?
A. Being a fugitive from the law, if I would have filed taxes, I would have been on government's radar.
Q. Mr. Walker, you gave some testimony about Rakim Baskerville during the course of the last week. Do you know, Mr. Walker, whether or not Mr. Baskerville ever kept a

legitimate job while he was conducting business with the organization?
A. Yes.
Q. Do you know where it was he worked?
A. I believe he told me a Pathmark.
Q. Did he say anything about what shift he worked, if you recall?
A. From my recollection I think he told me like the graveyard shift.
Q. What would the graveyard shift be, if you could explain the hours as you understood it?
A. From maybe midnight to seven in the morning, something like that.
Q. During the time that you knew him to have this job, did he continue to sell drugs as you discussed in your earlier testimony?
A. Yes.
Q. Mr. Walker, I want to talk about March 4, 2004?
A. Yes.
Q. Were you an arrested by the DEA on that date?
A. Yes.
Q. Briefly describe what you were doing prior to your arrest?
A. I was in the house. I woke up. I woke my girl friend up. She was getting ready for work. She got in the tub.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW JERSEY

UNITED STATES OF AMERICA :	Criminal No. 04-280 (FSH)
v. :	
HAKEEM CURRY, a/k/a "Ibn," a/k/a "E.T. Hak," a/k/a "Eddie," a/k/a "Dough Boy," a/k/a "Gore," and RAKIM BASKERVILLE, a/k/a "Roc," :	TRANSCRIPT OF TRIAL PROCEEDINGS
Defendants. :	

Newark, New Jersey
June 7, 2006

BEFORE:

THE HON. FAITH S. HOCHBERG, U.S.D.J.

Reported by
CHARLES P. McGUIRE, C.S.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.

CHARLES P. McGUIRE, C.S.R.

the name Goom appear in that ledger as well?
A. Yes, it does.
Q. Now, turning to page seven, six lines from the bottom, where Hakeem Curry says "They all outta here -- none of them guys. I'll tell you now I'm getting out of that motherfucking dungeon this week," and Ishmael Pray says, Yeah, you've got to give it a go, yo. Quila, Quility want to see Suddie?" And then two lines down from that, there's another reference to Quila.
Now, when you executed the -- when the search warrant was executed at the Dungeon, were there any PSE&G records recovered?
A. Yes, there were.
Q. And I'm going to show you Government Exhibit 385C.
Tell me whether or not you recognize that.
A. Yes, sir.
Q. And what is that?
A. These are PSE&G records for 353 South Center Street, first floor.
Q. Is that the location of the Dungeon?
A. Yes, it is.
Q. And was that record actually recovered inside the Dungeon?
A. Yes, it was.
Q. And is it in the same condition now, approximately, as

it was when it was recovered during the search warrant on March 5th, 2004?

A. Yes, sir.

MR. GAY: I'd ask that this be entered into evidence at this time.

MR. FRAZER: It's already in.

MR. GAY: Oh, it is? I didn't realize that. I'm sorry.

THE COURT: Exhibit number?

MR. GAY: 385C.

BY MR. GAY:

Q. Special Agent Hilton, who is --

THE COURT: Is 385C in evidence?

THE COURT CLERK: I don't even have it on my list.

MR. GAY: It's in evidence.

MR. FRAZER: Judge, the contents of 385 have all been, without objections, put in.

THE COURT: All right.

MR. FRAZER: He submarked it.

THE COURT: Okay. Fine.

MR. PLAISTED: I was under the impression, Judge, we were going to submark all of the documents for clarity's sake.

MR. GAY: Yes.

Q. Special Agent Hilton, are you able to see the -- not

the greatest -- if I can -- there we go.

Are you able to see the name on the records there?

A. Yes, sir.

Q. Who is that?

A. Aquila Suber.

Q. Now, moving on to page 10, first line, Ishmael Pray says, "I'm trying to think who else, you know. You could holler at um, I know you ain't probably want to fuck with Sheed. Oh, Shawny, too, Eddie, holler at Shawny."

First of all, with respect to Sheed, who is Sheed?

A. Rasheed Moss.

Q. Now, is Rasheed Moss referenced in prior calls that you testified about yesterday?

A. Yes, he is.

Q. That would be specifically calls 1008 and 1014; is that correct?

A. Yes, sir.

Q. And in 1008, Rasheed Moss asked Ishmael Pray to squeeze two for him; correct?

A. That is correct.

Q. And in 1014, he agreed to meet at BJ's; is that correct?

A. Yes, sir.

Q. And then surveillance followed that call; is that correct?

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

UNITED STATES OF AMERICA, v. PAUL BERGRIN, ET AL.	Hon. Dennis M. Cavanaugh Case No. 09-369 (DMC) **CERTIFICATION OF CHRISTOPHER D. ADAMS, ESQ.**

I, CHRISTOPHER D. ADAMS, being of full age, hereby certify as follows:

1. I am an attorney at law in the State of New Jersey since 1999 and a partner in the Roseland, New Jersey law firm of Walder, Hayden & Brogan, P.A.

2. I am the attorney of record for Ms. Yolanda Jauregui, a co-defendant in the above-captioned matter, and have been so since her arrest and initial appearance on May 20, 2009. I am responsible for the daily handling of this matter, familiar with the facts of the case, and competent to provide the within certification. This certification is provided in the knowledge that the court may rely upon it when deciding certain pretrial motions.

3. I have been provided a portion of the Certification of Louis F. Stephens, which was filed *in camera*. Specifically, I was provided and have reviewed pages 4 through 8 of the certification, which includes ¶¶17 – 55.

4. In that certification, Mr. Stephens makes reference to more than thirty meetings between the government and Ms. Jauregui. During the course of my representation of Ms. Jauregui, at least one attorney from my office was present at every such meeting with the government. I personally attended approximately all but one meeting, and was required to leave before the meeting ended on two other occasions. On those occasions when I was absent, Leigh-Anne Mulrey, Esq., an associate in my firm who has been employed here as an attorney since 2006, was present with Ms. Jauregui. In other words, Ms. Jauregui never attended a meeting with the government unless accompanied by Ms. Mulrey or me, and, in many circumstances, was accompanied by both of us.

5. Also in his certification, Mr. Stephens generally claims — or reports that certain defense witnesses have stated — that government officials pressured, coerced, and encouraged Ms. Jauregui to testify falsely against or otherwise "make things up" about Mr. Bergrin and "put words in her mouth."

6. As to the meetings where I was present, the government did not pressure, coerce, or encourage Ms. Jauregui to testify falsely against Mr. Bergrin. The government also did not "put words in her mouth" or ask her to "make things up" or otherwise lie about Mr. Bergrin.

7. I have shown the same portion of the Stephens Certification to Ms. Mulrey for her review. As to the meetings where I was not present and Ms.

Jauregui was accompanied solely by Ms. Mulrey, she too states that the government did not pressure, coerce, or encourage Ms. Jauregui to testify falsely against Mr. Bergrin. She further states that the government did not "put words in her mouth" or ask her to "make things up" or otherwise lie about Mr. Bergrin.

8. I am aware that if any of the foregoing is knowingly false, I am subject to punishment.

Respectfully submitted,

WALDER, HAYDEN & BROGAN, P.A.
5 Becker Farm Road
Roseland, New Jersey 07068-1727

By: _____
CHRISTOPHER D. ADAMS

Dated: August 30, 2012

FD-302 (Rev. 10-6-95)

FEDERAL BUREAU OF INVESTIGATION

Date of transcription 11/22/2010

On November 16, 2010, RAMON JIMENEZ, date of birth [redacted] social security number [redacted] was contacted at MID-STATE CORRECTIONAL FACILITY, Wrightstown, New Jersey by Special Agent Shawn A. Brokos and Michael J. Farina. JIMENEZ, who was familiar with the nature of the interview and the identities of the interviewing agents, provided the following information:

JIMENEZ advised that PAUL BERGRIN was upset when he found out that JIMENEZ was selling drugs to ET HAK (known to law enforcement as HAKEEM CURRY). BERGRIN told JIMENEZ that had he known, he would have warned JIMENEZ that ET HAK was under federal investigation.

BERGRIN first met JOSE LAST NAME UNKNOWN, also known as CHANGA, in early 2000 at JIMENEZ's niece's baptism. CHANGA was dating JIMENEZ's sister, MARIA JIMENEZ, at the time. BERGRIN came to the baptism with JIMENEZ's other sister, YOLANDA JAUREGUI. CHANGA had a car dealership in Orange, NJ at the time. In 2004 or 2005, CHANGA moved to Florida. JIMENEZ believes that CHANGA is still in Florida. BERGRIN helped CHANGA close on the house he bought in Florida. JIMENEZ advised that family friend NORBERTO VELEZ was also present at the baptism.

JIMENEZ introduced drug customers to CHANGA. CHANGA sold kilograms (kilos) of cocaine, and JIMENEZ received approximately $1,000 per kilo for his referrals. JIMENEZ advised that he had a dispute with CHANGA over a customer named "MORALES". CHANGA sold MORALES eight kilos, but he never paid JIMENEZ his $8,000 share.

Sometime during 2002, JIMENEZ spoke to ET HAK at BERGRIN's law office about supplying ET HAK with kilos of cocaine. ET HAK said that he needed 50 kilos at a time, and wanted to make sure that JIMENEZ could make it happen. JIMENEZ spoke to CHANGA about it, and CHANGA brought ALEJANDRO (CASTRO) from Los Angeles, California to further discuss it. JIMENEZ met CASTRO at a bar on the corner of Broadway and Verona, and they talked about supplying ET HAK. JIMENEZ brought CASTRO to meet his family, and they spent a week hanging out at the bar and other clubs, to include HEARTBREAKERS. CASTRO seemed comfortable with the arrangement with ET HAK, so JIMENEZ set up a meeting with ET HAK and CHANGA at JAUREGUI's restauraant to talk about the specifics. CASTRO did not

Investigation on 11/16/2010 at Wrightstown, NJ

File # 272B-NK-115490-2597 Date dictated n/a

by SA Michael J. Farina MJF
SA Shawn A. Brokos/sab SAB

272B-NK-115490

attend the meeting because he did not speak English, plus, he did not want to meet the buyer.

ET HAK showed up at the meeting in a silver BMW. There was a black male in the car with ET HAK. HAK came in to the restaurant and they sat at the second table by the window with CHANGA. The black male from the car did not come in to the restaurant. BERGRIN walked in and spoke to them at the table, and then walked to the back of the restaurant to see YOLANDA. Shortly thereafter, CHANGA, HAK, and JIMENEZ got up from the table. BERGRIN spoke to CHANGA privately by the back of the restaurant. All four then went outside to leave, and HAK yelled to BERGRIN that he would talk to BERGRIN later. For every kilo sold to HAK, JIMENEZ was supposed to get $1,000 and CHANGA was $1,500 per kilo. JIMENEZ believes that HAK paid approximately $22,500 per kilo.

JIMENEZ advised that both ET HAK and MUTALIK concealed cash in shoe boxes whenever they paid for the drugs.

Regarding the robbery of MIGUEL PADILLA, JIMENEZ initially denied robbing PADILLA to BERGRIN when BERGRIN came to see PADILLA in jail. BERGRIN came back approximately a week later and said that he watched a video recording from the restaurant where the robbery occurred, and that he saw JIMENEZ do the robbery. JIMENEZ came clean to BERGRIN, and said that cousin JOSE BRACERO was also involved in the robbery. JIMENEZ did not tell BERGRIN that PADILLA owed JIMENEZ money for a half of a kilo that BRACERO and JIMENEZ had sold to PADILLA. BERGRIN told JIMENEZ that he would try to use a misidentification defense to show that JIMENEZ was innocent, but he said that the video would make that defense very difficult. When YOLANDA came to see JIMENEZ in jail, he spoke to her over the phone in the visitation area. He told her that he, "messed up, it's not what you think." He did not explicitly tell her what happened in case someone could overhear; but he opined that BERGRIN told her the truth. Per JIMENEZ, YOLANDA knew that JIMENEZ owed CASTRO for the half of the kilo, and that she probably "put two and two together" to figure out why JIMENEZ robbed PADILLA.

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FEDERAL BUREAU OF INVESTIGATION

Date of transcription 11/09/2010

On November 5, 2010, RAMON JIMENEZ, date of birth [redacted] social security number [redacted] was contacted at MID-STATE CORRECTIONAL FACILITY, Wrightstown, New Jersey by Special Agent Shawn A. Brokos and Michael J. Farina. JIMENEZ, who was familiar with the undersigned agents and the nature of the interview, provided the following information:

JIMENEZ advised that his sister, YOLANDA JAUREGUI, could provide first hand information on PAUL BERGRIN's illegal activities. Per JIMENEZ, only JAUREGUI was privy to what BERGRIN did. JIMENEZ believes that she knows everything, and that she would talk to agents with some convincing from JIMENEZ. BERGRIN never confided in JIMENEZ.

JIMENEZ advised that he had an idea that ALEJANDRO CASTRO and JAUREGUI started selling kilograms (kilos) to DRED (known to law enforcement as RONDRE KELLY) after JIMENEZ stopped selling to DRED. JIMENEZ stopped selling to DRED because he no longer wanted to go through CASTRO to get the kilos because CASTRO had brought his sister in to the drug business. He was mad at CASTRO and wanted to take business away from CASTRO. JIMENEZ started getting supplied by a Peruvian male from Paterson. JIMENEZ tried to sell to DRED with his Peruvian connection, but DRED stood him up at least three times. Shortly thereafter, JIMENEZ saw DRED at JAUREGUI's restaurant with CASTRO, and he knew that CASTRO was supplying DRED. JIMENEZ did not know how JAUREGUI or CASTRO contacted DRED after JIMENEZ stopped dealing with CASTRO, but JIMENEZ said that JAUREGUI had met DRED at BERGRIN's office many times and that she knew DRED before JIMENEZ met him.

JIMENEZ met MUTALIK (known to law enforcement at ABDUL WILLIAMS) at BERGRIN's law office on Market Street in Newark in 2004 or 2005 when MUTALIK came home from prison. JIMENEZ approached MUTALIK privately in one of the conference rooms and asked MUTALIK if MUTALIK knew any one interested in "buying weight." JIMENEZ told MUTALIK that the price per kilo was approximately $24-25,000. MUTALIK gave JIMENEZ his cell phone number and told JIMENEZ to call him. JIMENEZ then gave MUTALIK his cell phone number and told MUTALIK to call him if he wanted to do business. Shortly thereafter, MUTALIK called JIMENEZ and they met at BERGRIN's office; BERGRIN was not there. They agreed to do

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by SA Michael J. Farina MJF
SA Shawn A. Brokos/sab SAB

business, and the first transaction occurred on Heller Parkway in Newark. MUTALIK purchased 12 kilos of cocaine from JIMENEZ. JIMENEZ had gotten the kilos from CHANGA LAST NAME UNKNOWN (LNU), who was getting them from CASTRO. MUTALIK paid cash up front for the kilos. MUTALIK was driving a grey Chrysler wagon with tints, possibly a Magnum. JIMENEZ said that MUTALIK may have been with "BABY FACE".

JIMENEZ dealt with MUTALIK for approximately five weeks. Each week, MUTALIK bought approximately 12-15 kilos of cocaine. JIMENEZ advised that MUTALIK's father was also involved in the drug transactions. MUTALIK still owes JIMENEZ money for the last transaction they did. JIMENEZ again tried to cut CASTRO out of the loop because he was mad at CASTRO for involving JAUREGUI in the drug business. CASTRO knew JIMENEZ was dealing with MUTALIK because JAUREGUI told CASTRO. JIMENEZ told MUTALIK there was a "drought" and that JIMENEZ could no longer get cocaine. MUTALIK came by JAUREGUI's restaurant looking for JIMENEZ but did not find him. Shortly after that, JIMENEZ saw CHANGA with MUTALIK and JAUREGUI and thought maybe they were doing business together.

Per JIMENEZ, word on the street was that if someone was looking for a drug supplier or "connect", he or she could come to BERGRIN's law office. JIMENEZ had access to cocaine, heroin, and crystal meth.

JAUREGUI knew all of the people that JIMENEZ supplied. They sometimes came to her restaurant to negotiate drug deals. JIMENEZ paid her $800-$1,000 per week for looking out for him.

If BERGRIN knew details about JIMENEZ's drug business, he knew through JAUREGUI. JIMENEZ believes that BERGRIN put the pieces together when he saw JIMENEZ with CHANGA and ET HAK (known to law enforcement at HAKEEM CURRY).

JIMENEZ said that he felt very guilty for getting JAUREGUI involved in the drug business. He did not personally involve her, but he brought CASTRO to the family's home on Little Street, and introduced CASTRO to JAUREGUI. JIMENEZ feels guilty for bringing CASTRO around the family.

JIMENEZ dealt with the following people:

FARAQUAN and FARAQUAN's cousin - at least eight times
DRED - approximately six to ten times

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BABY FACE - three months, 20 kilos per week
MUTALIK - approximately five times, 12-15 kilos per week
ET HAK - approximately five times, 50 kilos every two weeks

JIMENEZ told JAUREGUI that BERGRIN was cheating on her with other women. JAUREGUI confronted BERGRIN and BERGRIN yelled at JIMENEZ.

JIMENEZ knew that both JAMES CORTOPASSI and BERGRIN were involved with running the brothel in Manhattan. JIMENEZ did not want to be involved with the brothel. He could not understand paying $1,000 for a hooker. JIMENEZ went to the brothel once with CORTOPASSI and BERGRIN. CORTOPASSI and BERGRIN met with JASON ITZLER, ITZLER's girlfriend, NATALIA, and an older lawyer. The meeting was to talk about business. JIMENEZ was not part of the meeting. JIMENEZ never had sex with the girls, but he believed that BERGRIN did. He was not sure about CORTOPASSI. JIMENEZ told JAUREGUI about BERGRIN's "girls", and JAUREGUI confronted BERGRIN. BERGRIN then yelled at JIMENEZ. Per JIMENEZ, that was the last time he told JAUREGUI anything about BERGRIN cheating on her.

JIMENEZ did not know the details of CASTRO's arrest in Paterson, NJ. JIMENEZ was not part of the case.

JIMENEZ knew that JAUREGUI was trying to make a deal with MIGUEL PADILLA for PADILLA to drop the armed robbery charges against JIMENEZ. JAUREGUI offered to financially compensate PADILLA for the jewelry that JIMENEZ took from him if PADILLA dropped the charges. JIMENEZ is not sure what the outcome of the deal was. JIMENEZ also sent word through the LATIN KINGS to have PADILLA, a member of the LATIN KINGS, drop the charges in exchange for a reimbursement on PADILLA's jewelry. JAUREGUI knew that JIMENEZ was trying to work a deal through the LATIN KINGS.

JIMENEZ explained that JAUREGUI could provide key information on BERGRIN, but she could not cooperate against the MEXICAN MAFIA because they would kill her. JIMENEZ was very concerned for JAUREGUI's safety if she talked to agents.

JIMENEZ agreed to talk further to the agents at a later date to provide more information.

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FEDERAL BUREAU OF INVESTIGATION

Date of transcription 07/22/2011

On July 21, 2011, RAMON JIMINEZ met with Assistant United States Attorney (AUSA) John Gay, AUSA Joseph Minish, Internal Revenue Service-Criminal Investigation (IRS-CI) Agent Steve Cline and Federal Bureau of Investigation (FBI) Special Agent (SA) Michael J. Farina in the presence of his assigned counsel, John Azzarello. After meeting with his counsel, JIMENEZ provided the following information:

JIMENEZ stated that he attempted to setup drug deals with ET HAK (real name HAKEEM CURRY), DRED (real name RONDRE KELLY), MUTALIK (real name ABDUL WILLIAMS), FARRAKHAN (real name unknown), BABY FACE (real name MAURICE LOWE), SHIEK (real name ALQUAN LOYAL), CHANGA (real name unknown) and ALEJANDRO CASTRO. Some deals included multiple players and some deals included only one of the above mentioned names.

JIMENEZ advised that he asked BERGRIN to speak to his clients and ask them to front JIMENEZ drugs. BERGRIN told JIMENEZ "I(BERGRIN) am gonna talk to somebody I(BERGRIN) know". BERGRIN eventually came back and instructed JIMENEZ to buy his drugs from DRED. BERGRIN vouched for DRED and approved for JIMENEZ to use him as a supplier.

JIMENEZ recalled that DRED supplied him directly on two occasions. In the first instance, DRED met JIMENEZ at a store in the Plaza in Belleville. The two men started talking normally and DRED began walking away. JIMENEZ wondered why DRED walked away and DRED told JIMENEZ he would speak to him later and the "stuff" is already in the car. JIMENEZ stated that the "stuff" DRED mentioned referred to the cocaine. On the second instance, JIMENEZ retrieved a red well folder from PAUL BERGRIN's office which BERGRIN said was from DRED. The red weld contained cocaine for JIMENEZ to sell.

JIMENEZ stated that he attempted to broker a 10 Kilo cocaine deal between CASTRO and DRED. Before he brokered the deal, he told BERGRIN about it and BERGRIN said okay. BERGRIN vouched for DRED to CASTRO through JIMENEZ by telling JIMENEZ that DRED was not under investigation and was "good" people. JIMENEZ spoke to DRED at a warehouse near the HOLLYWOOD AUTO SHOP in Newark and informed him that he had someone who could supply him drugs.

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by SA Michael J. Farina:mjf MJF

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JIMENEZ did not provide a name, but DRED agreed anyway, so JIMINEZ went to CASTRO who also agreed.

When DRED never called JIMENEZ, he realized that DRED, CASTRO and BERGRIN had separate discussions about the deal and JIMENEZ was getting cut out. JIMENEZ stated that BERGRIN and CASTRO were both "messing with his sister(YOLANDA JAUREGUI)" and he didn't want to question it, so he distanced himself. JIMENEZ noted that DRED always dealt through BERGRIN.

JIMENEZ recalled that he routinely carried duffel bags belonging to BERGRIN from the office to BERGRIN's car. The bags were normally 2ft long and black. Sometimes the bags were closed and sometimes they were open. When they were open, JIMENEZ normally saw sneakers, gym clothes, hygiene items and other miscellaneous items. JIMENEZ advised that he regularly carried bags from the office at the request of secretaries, ANTHONY POPE and BERGRIN, because his job in the office was to handle those types of errands.

JIMENEZ approached ET HAK about "moving weight", or dealing cocaine, in BERGRIN's office. JIMENEZ thought BERGRIN would be "pissed" about JIMENEZ approaching BERGRIN's clients, but when JIMENEZ told BERGRIN he did not seem upset. JIMENEZ stated that BERGRIN did tell him that if JIMENEZ was going to deal with BERGRIN's clients he would have to go through BERGRIN.

JIMENEZ advised that he attempted to setup a deal between CHANGA and MUTALIK after he had approached ET HAK but before he became involved with CASTRO. JIMENEZ met MUTALIK at BERGRIN's office because MUTALIK had just came out of jail and was frequently at the office. MUTALIK told JIMENEZ that he was interested so the two setup a second meeting. The second meeting took place at PUEBLO on Prospect Avenue near the train tracks in Newark. MUTALIK gave JIMENEZ a cell phone with MUTALIK's number and told him to call him. JIMENEZ informed CHANGA about MUTALIK and asked him if he could supply him. CHANGA agreed. The transaction took palace on the corner of Hello Parkway and Lincoln Avenue. JIMENEZ noted that he only dealt once with MUTALIK and CHANGA because CASTRO came onto the scene shortly afterwards.

JIMENEZ stated that BERGRIN knew about the MUTALIK and CHANGA deal, because JIMENEZ told BERGRIN about the deal. JIMENEZ told BERGRIN, because BERGRIN had previously instructed JIMENEZ to "clear all [drug] deals" through him. JIMENEZ advised that BERGRIN

wanted to know about the deals because he wanted to be involved and he wanted money. JIMENEZ stated that he never paid BERGRIN for any of the deals, so BERGRIN must have been paid by the dealers whether it was DRED, MUTALIK, CASTRO, CHANGA or others.

JIMENEZ stated that he met FARRAKHAN through FARRAKHAN's uncle. The uncle told JIMENEZ that his nephew would be interested in dealing with JIMENEZ. JIMENEZ advised that FARRAKHAN's father was a well-known drug dealer in the area. JIMENEZ met FARRAKHAN outside BERGRIN's office. JIMENEZ described FRAKAHON as 5"7 young, black male with dreds. FARRAKHAN asked JIMENEZ for 8 Kilos of cocaine but he wanted the cocaine on consignment. JIMENEZ stated that he never approached CASTRO about the deal because he knew that CASTRO would not provide any cocaine on consignment. The deal ended up never going through. JIMENEZ noted that he never told BERGRIN about the deal.

JIMENEZ advised that he met SHIEK through BERGRIN because SHEIK was BERGRIN's client. When SHIEK came into the office, BERGRIN pointed to him and told JIMENEZ, he can "do business" with him. JIMENEZ stated that "do business" meant deal drugs and BERGRIN knew that SHIEK was well connected. The second time SHIEK came into BERGRIN's office, JIMENEZ approached him at the entrance and told him he can "get some weight". JIMENEZ gave SHIEK a price range for the deal and the two men exchanged numbers. SHEIK called JIMENEZ two weeks later and the two agreed to meet at JIMENEZ's house. JIMENEZ told SHIEK that there was a "drought" and he could not find any suppliers. The deal never happened between SHIEK and JIMENEZ. JIMENEZ informed BERGRIN that the deal never went through and he said okay.

JIMENEZ stated BERGRIN told him about SHIEK because BERGRIN did not want JIMENEZ to miss the chances with the big drug dealers. BERGRIN also had a relationship with the drug dealers because most dealers were also his clients. JIMENEZ advised that BERGRIN had also pointed out DRED and MUTALIK as dealers to JIMENEZ and told him to do business with them.

JIMENEZ stated that he met BABY FACE in the office when BABY FACE came with his "buddy", ET HAK, who was meeting with BERGRIN. JIMENEZ described BABY FACE as a young, tall black male. When ET HAK was speaking with BERGRIN, JIMENEZ approached BABY FACE in the conference room and asked him if he "wanted to move some weight". BABY FACE gave JIMENEZ his number, but soon afterwards he was called away by POPE to run errands for the law firm. JIMENEZ

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stated that he left BABY FACE's number on the conference room desk and when he returned from running the errands he couldn't find the number. Without the number JIMENEZ had no way of contacting BABY FACE, so a deal never happened.

JIMENEZ noted that he approached BABY FACE before he was cut out of the deal between ET HAK, BERGRIN and CASTRO. JIMENEZ recalled that he was "doing all the running and talking for nothing", because he kept getting cut out of the deals.

JIMENEZ stated that he overheard a conversation between ET HAK and BERGRIN when he was working in BERGRIN's office. JIMENEZ recalled that ET HAK came in about twice a month usually after 5:30pm. This particular meeting took place after hours in the summer of 2003 because it was hot outside. JIMENEZ stated that the case files were primarily stored in BERGRIN's office and he was working on some of the files when ET HAK came in to speak with BERGRIN.

When ET-HAK entered JIMENEZ had just answered a call on his cell phone from his wife. When he hung up the phone he overheard BERGRIN say to ET HAK, "There's no witness, there's no case". After BERGRIN made this statement, ET HAK looked at JIMENEZ and then back at BERGRIN. BERGRIN told ET HAK, "that's 100%". JIMENEZ advised that BERGRIN was describing JIMENEZ as "100%" and he was reassuring ET HAK that JIMENEZ would never talk about anything he heard.

JIMENEZ advised that ET HAK and BERGRIN were discussing the case against ET HAK's cousin. JIMENEZ knew that was the case because he had previously handed BERGRIN a file related to ET HAK and BERGRIN told JIMENEZ that the file had to do with ET HAK's cousin. JIMENEZ could not recall the cousin's name but thought it started with "D" or "B" and sounded like "VILLE".

JIMENEZ stated that he did not recall the real names for DRED, MUTALIK, FARRAKHAN0 or BABY FACE, but if presented with a picture of the men he would be able to recognize them.

JIMENEZ stated that he has used cocaine since age 15 and he quit whenever he was sent to prison. JIMENEZ has not used cocaine in 4 years. JIMENEZ did use cocaine while working for BERGRIN. JIMENEZ noted that he smoked "weed" several times but stopped at age 17, and only used Ecstacy when he was 33 years old. JIMENEZ stated that he did not take any other narcotics.

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JIMENEZ offered concern about the safety of his family and he provided the following information on his family members:

- JULIA JIMENEZ
- ROSA ALLEAGA(PH)
- CHARO ELLEGA(PH)
- ALEJANDRA JIMENEZ
- GIOMANNY JIMENEZ

[redacted]

JIMENEZ stated that his step-daughter was born in Peru and he currently is attempting to finalize adoption papers and citizen papers but he needs to clarify with his wife on their status.

JIMENEZ does not know whether his wife's sister is a citizen.

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FEDERAL BUREAU OF INVESTIGATION

Date of transcription 05/12/2011

On May 12, 2011, RAMON JIMENEZ, date of birth [redacted] social security number [redacted] met with Special Agent Shawn A. Brokos, Internal Revenue Service Special Agent Stephen D. Cline, Assistant United States Attorney (AUSA) John Gay and AUSA Joseph Minish at the United States Attorney's Office, District of New Jersey, pursuant to a proffer agreement. JIMENEZ's attorney, JOHN AZZARELLO, was present on behalf of JIMENEZ.

AUSA Gay asked JIMENEZ if he had any safety concerns, and JIMENEZ replied no.

JIMENEZ advised that he began working for PAUL BERGRIN's law office when he got out of jail in May, 2002. JIMENEZ began reading the files of BERGRIN's drug-dealer clients and made notes as to who may be interested in purchasing drugs. JIMENEZ specifically read the files of MUTALIK (known to law enforcement as ABDUL WILLIAMS), ET HAK (known to law enforcement as HAKEEM CURRY), DRED (known to law enforcement as RONDRE KELLY), SHIEK (known to law enforcement as ALQUAN LOYAL), AL-TARIQ HOLMES, and First Name Unknown BASKERVILLE.

JIMENEZ recalled that HAK used to come visit BERGRIN a lot at night at the office. JIMENEZ was supposed to leave around 5p but stayed until 6 - 6:30pm, when HAK typically showed up. The only people who were usually left in the office at that time were BERGRIN, and possibly JAMES CORTOPASSI.

JIMENEZ recalled a time when HAK came to the office to talk about his cousin, BASKERVILLE's, case.

After approximately six months, JIMENEZ decided to approach HAK regarding purchasing drugs. JIMENEZ spoke to HAK in the office, BERGRIN. JIMENEZ asked HAK if he knew of anyone interested in "getting weight" (meaning purchasing kilograms of cocaine). HAK said he was interested and asked for 25 kilos. HAK added that if JIMENEZ could successfully get him 25 kilos, the next time he would come back for 50 kilos. JIMENEZ said that he would "check it out" and get back to HAK.

Investigation on 05/12/2011 at Newark, NJ

File # 272B-NK-115490-2976 Date dictated n/a

by SA Stephen D. Cline
SA Shawn A. Brokos/sab

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JIMENEZ spoke to his supplier, CHANGA, and asked CHANGA if he could get him 25 kilos. CHANGA responded by saying, "that's Feds," meaning it was a set-up by the police. Only "Feds" buy that kind of weight. CHANGA said he'd like to meet the buyer; JIMENEZ said no and added that the buyer did not want to meet CHANGA. JIMENEZ explained that he told CHANGA that because he did not want CHANGA to meet HAK and deal directly with HAK because that would cut JIMENEZ out of the deal. JIMENEZ was planning to make $1,000 off of each kilo for being the "connect".

Per JIMENEZ, CHANGA was selling kilos for approximately $20,000-$21,000 a piece. JIMENEZ did not pass on the pricing to HAK. JIMENEZ gave it a few days, and then called HAK to see what HAK wanted to do, but HAK did not answer the call.

Shortly thereafter, BERGRIN called JIMENEZ in to his office, and asked JIMENEZ if he had called someone about buying some kilos. BERGRIN then specifically asked if JIMENEZ spoke to HAK about buying kilos. JIMENEZ said yes. BERGRIN told JIMENEZ that he could not go directly to his (BERGRIN's) clients to broker a drug deal; BERGRIN told him, "you need to go through me." BERGRIN then asked JIMENEZ if could really get 25 kilos. JIMENEZ said that he didn't know, that he had to talk to CHANGA. BERGRIN knew CHANGA through JIMENEZ's family as he was a family friend. BERGRIN told JIMENEZ to talk to CHANGA. JIMENEZ explained to BERGRIN that CHANGA is skeptical of the deal, because of the large amount of weight HAK wanted to buy.

JIMENEZ advised that he was having a hard time getting in contact with CHANGA, so he asked his sister, YOLANDA JAUREGUI to have CHANGA call him when she next saw him at her restaurant, and CHANGA did. JIMENEZ added that CHANGA frequently hung out at her restaurant. JIMENEZ did not tell JAUREGUI what is was about.

When CHANGA called JIMENEZ, they agreed to meet at the bar located at the corner of Broadway and Verona. They met and CHANGA said that he was still leery of the deal because of the quantity. JIMENEZ told CHANGA that he could trust JIMENEZ's word that the buyer is not "a Fed." JIMENEZ said that the buyer's name was ET, and that he had read ET's "file" at BERGRIN's office. CHANGA said he would get back to JIMENEZ.

A few days later, JIMENEZ saw CHANGA at BERGRIN's office. CHANGA met with BERGRIN briefly, approximately 15 minutes. Prior to that incident, JIMENEZ had never seen CHANGA in the office.

JIMENEZ said hello to CHANGA, and CHANGA said that he was there to see BERGRIN regarding a real estate closing. JIMENEZ did not believe CHANGA so he looked for a client file on CHANGA or a pending real estate deal involving CHANGA but could not find anything.

JIMENEZ advised that before CHANGA came to BERGRIN's office, CHANGA knew that JIMENEZ was working for BERGRIN. JIMENEZ explained that before their encounter in BERGRIN's office, JIMENEZ took his car to CHANGA's car shop on Clifton Avenue by Orange Street, and CHANGA approached him and said, "I hear you are working at Paul's office."

Since CHANGA had not committed to sell to HAK, JIMENEZ spoke to "some Peruvians in Paterson." The people he spoke to could not do the deal.

JIMENEZ did not hear back from HAK so he started doing some smaller drug deals with other people. He gave up on HAK, CHANGA, and the Peruvians. After about a month of trying to broker the HAK/CHANGA deal, JIMENEZ met ALEJANDRO CASTRO. JIMENEZ met CASTRO at the bar on the corner of Verona and Broadway; CHANGA introduced them to one another. CASTRO initially gave JIMENEZ a different name, and JIMENEZ didn't know what CASTRO was about. He did not learn CASTRO was a drug dealer until their second meeting.

JIMENEZ recalled a time in which he was in BERGRIN's office and BERGRIN got a call from HAK. JIMENEZ knew the call was from HAK because the secretary announced the caller's name on the intercom. JIMENEZ was putting files by BERGRIN's desk. BERGRIN said to put HAK's call through to him. JIMENEZ heard BERGRIN tell HAK to meet him at the restaurant later that day. A few minutes later, BERGRIN asked JIMENEZ for CHANGA's number. BERGRIN couldn't find it after searching his desk for it. JIMENEZ said that didn't have it because it was stored in his cell phone, and he didn't have his cell with him. BERGRIN called JAUREGUI and asked her to get in touch with CHANGA and have CHANGA meet him at the restaurant; he gave her a time. JIMENEZ said that he was very suspicious of this meeting, so he decided to follow BERGRIN to the restaurant to see what was happening.

As JIMENEZ pulled up to the restaurant, he saw BERGRIN, HAK, and CHANGA seated at the second table closest to the front door. As JIMENEZ parked the car, he saw BERGRIN, HAK, and CHANGA

stand up from the table. As JIMENEZ entered the restaurant, they all shook his hand. JIMENEZ glared at CHANGA because he felt that CHANGA had betrayed him. As JIMENEZ walked towards the soda machine, he saw HAK, CHANGA, and BERGRIN walking out the door towards their cars. He then saw JAUREGUI walking to the front of the restaurant from the kitchen. He looked outside and saw HAK talking to someone, he could not see who. BERGRIN came back in to the restaurant after HAK and CHANGA left. JIMENEZ recalled getting a call from his wife, then leaving; he was very angry.

Per JIMENEZ, the meeting at the restaurant occurred in 2003. JIMENEZ remembers that it was 2003 because he had been out of jail for some time and his bills were stacking up on him. He was living at 89 Broadway. JIMENEZ added that he got out of jail in May, 2002, and immediately started working at BERGRIN's office. JIMENEZ approximated that around Christmas, 2002, he had the first conversation with HAK regarding buying kilos.

JIMENEZ was angry because CHANGA cut him out of the deal with HAK. JIMENEZ surmised the deal happened because of (1) the fact that CHANGA, BERGRIN, and HAK were acting guilty at the restaurant (2) CHANGA coming to the office to see BERGRIN when he had no case with BERGRIN (3) BERGRIN saying to go through him for the drugs and (4) BERGRIN's clients telling JIMENEZ that BERGRIN "was the man, the connect." Regarding number (4), JIMENEZ explained that one time when he was in the office conference room with one of BERGRIN's clients, the client said that, "you are with the man now, he is the connect." JIMENEZ understood that to mean that BERGRIN connected clients to drug dealers.

JIMENEZ explained that a few days after the meeting at the restaurant, he ran into CASTRO at the PLAYER'S CLUB, located on the corner of Verona and Summer Avenues. This was JIMENEZ's second meeting with CASTRO. They had a few drinks and talked, and ended up going to HEARTBREAKERS in Bloomfield. They began talking about the drug business, specifically people in Los Angeles who brought in drugs from Mexico. CASTRO said that he dealt drugs. CASTRO said that he knew about JIMENEZ's drug history through CHANGA. JIMENEZ asked CASTRO if he could get him a kilo, and CASTRO agreed. CASTRO said that he had recently done a deal with someone; CASTRO stated the name of the person but JIMENEZ could not hear it. JIMENEZ asked CASTRO if he said HAK, and CASTRO said yes. JIMENEZ asked CASTRO how he got to meet HAK; CASTRO said through CHANGA. CASTRO said that the deal went down for 25 kilos, and that they were about to do a 50 kilo deal. CASTRO then offered to get

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JIMENEZ kilos for a cheap price. JIMENEZ did not feel comfortable telling CASTRO that CHANGA had screwed him.

U.S. Department of Justice

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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.

GOVERNMENT EXHIBIT 7000

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

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

MR. GAY: Yes, your Honor.
THE COURT: All right. Let's bring out the jury.
(Jury present.)
THE COURT: All right. Everybody, please be seated.
All right. Mr. Gay, you have a witness on the stand.
Sir, please be seated.
THE DEPUTY CLERK: Judge, I have to swear him in.
THE COURT: Oh, you have to swear him in. Okay.
Please do.
THE DEPUTY CLERK: would you call your witness,
please.
MR. GAY: Yes.
The Government calls Ramon Jimenez.

R A M O N J I M E N E Z, called as a witness, having been first duly sworn, is examined and testifies as follows:

THE DEPUTY CLERK: Please state your name for the record.
THE WITNESS: Ramon Jimenez. R --
THE DEPUTY CLERK: Thank you. You may be seated.
THE COURT: Mr. Jimenez, please pull your seat closer to the microphone and speak into the microphone, please.
Go ahead.
MR. GAY: May I inquire, your Honor?

Thank you.

DIRECT EXAMINATION

BY MR. GAY:

Q Mr. Jimenez, how old are you?

A 41.

Q Where were you born?

A Newark.

Q Have you spent most of your adult -- most of your life in Newark?

A Correct.

Q Generally, where have you lived in Newark?

A In the North Side, Mount Prospect, Summer Avenue, Verona and Broadway, Burnett. You know, them parts.

Q Mostly in the north part of Newark?

A Exactly.

Q Briefly describe what jobs you have held.

A Carwash, I did movement, a movement company thing, warehouse, security guard and worked for a law firm.

Q Okay. Which law firm was that?

A 572 Market Street.

Q Was that for Paul Bergrin?

A Correct.

Q Now, did you also get engaged in selling drugs?

A Yes.

Q Approximately how old were you when you began selling

drugs?
A About 16.
Q Briefly describe, what drug did you say sell at that time?
A Codeines. Codeine.
Q And how long did you sell drug -- that codeine for? Approximately how long; from what age to what age?
A From about 16 to about to 18. Between 18 --
Q How often did you sell drugs during that time frame?
A Twice a week.
Q Mr. Jimenez, in or about 1989, did you get arrested for a robbery in New York?
A Correct.
Q Did you later plead guilty to first degree robbery in New York State Court in connection with that charge?
A Yes.
Q Did you receive a sentence of two to four years in State Prison?
A Correct.
Q Do you recall when you got released from jail on that charge?
A Some time in 90 -- '91 I think it was.
Q Could it have been November of 1991?
A Correct.
Q What did you do when you got out of jail at that time?
A I started looking for jobs, signing applications and that's

basically when I was doing.
Q Did you ultimately connect with a person you knew as Papao?
A Yes.
Q Briefly describe what happened then.
A Well, the time I was at the -- I was on the corner waiting for a bus going downtown, Papao comes by with a car, he asked me where I was going. I told him I was going downtown, sign some applications. So that he gave me a ride.
Q So what happened then?
A He offered me a position in one of his drug things.
Q Okay. So Papao was a drug dealer?
A Right.
Q And he offered you a position in his organization with his business?
A Correct.
Q What was the position he offered you.
A To make sure the -- the delivery gets there safe.
Q Can you briefly, briefly describe Papao's business?
A He was -- he would get the drugs, put it in a bag, put it in the car, and basically I have to make sure it gets to a certain location, to a stash house.
Q What is a stash house?
A A stash house is a place where you keep the drugs at, break it down, and then from there you take it out, distribute it.
Q And that was part of Papao's business?

A Correct.
Q Did you get paid in connection with working for Papao?
A Yes.
Q Do you remember approximately how much you were getting paid at that time?
A Between seven to $800 a week.
Q Did there come a time later when Papao increased your salary, so to speak?
A Yes.
Q How much were you making at that point?
A 1500.
Q Other than what you just described, did you do anything else for Papao in connection with the drug business?
A Yes.
Q Let me focus in on 1992. Did you get arrested in Pennsylvania in 1992?
A Correct.
Q And were you working for Papao when you got arrested?
A Correct.
Q Briefly describe what happened.
A I was -- I was to do basically the same thing, make sure the drug gets to the place safe, and when -- when that was happening, we was going to Pennsylvania, we got pulled over in Pennsylvania and got arrested for the drugs that was in the car.

Q So were you charged eventually with those drugs?
A Correct.
Q What happened with that case?
A I took it to trial and lost.
Q Why did you take it to trial?
A I felt like I could win the case.
Q Were you in fact guilty of the crime?
A Correct.
Q But nonetheless you took it to trial?
A Correct.
Q Were you convicted?
A Yes.
Q Did you receive a sentence?
A Yes.
Q How long -- what was the sentence you received in connection with that conviction?
A Twenty-three years.
Q That would be in Pennsylvania State Prison?
A Correct.
Q How long did you actually serve in State Prison for that conviction?
A Ten years.
Q Did you also plead guilty in 1993 to receiving stolen property?
A Yes.

Q And was that for an arrest that took place in 1989?
A Correct.
Q So, in other words, you pled guilty to that while you were serving your sentence in Pennsylvania, but the actual incident you pled guilty to occurred prior to your conviction in Pennsylvania?
A Correct.
Q Did you get out of jail on the Pennsylvania conviction?
A Yes.
Q Do you remember approximately what date it was that you got out of jail?
A Some time in 2002.
Q Is it possible it's around May of 2002?
A May.
Q On April 27th of 2004, did you plead guilty to a contempt of court violation?
A Yes.
Q On about June 23rd, 2010, did plead guilty to a hindering apprehension charge?
A Yes.
Q And in or about October 13th of 2009, did you plead guilty to distributing cocaine?
A Correct.
Q Did you receive a sentence in connection with that conviction?

A Yes.
Q Was that a five-year sentence?
A Correct.
Q Mr. Jimenez, you've been arrested by the police a number of times as you just testified. Is that correct?
A Correct.
Q Did you ever use a fake name when you were arrested by the police?
A Yes.
Q When you got out of jail in 2002, what did you start doing?
A I started working for Paul Bergrin.
Q How did you get that job?
A Through my sister and Paul.
MR. GAY: Your Honor, I'm going to show the witness Government Exhibit 3073 which the Defense has a copy of.
THE COURT: Okay.
Q Mr. Jimenez, do you recognize who that is?
A It's my sister.
Q And what's your sister's name?
A Yolanda.
Q The last name?
A Jauregui.
MR. GAY: Your Honor, I ask that this get published to the jury.
THE COURT: There's no objection, it's in evidence.

MR. BERGRIN: No, there's no objection,

(Government Exhibit 3073 is received in evidence.)

Q What is your sister's relationship to Mr. Bergrin?

A Girlfriend.

Q What type of work did you do in Paul Bergrin's office?

A I would file papers, get the files ready for the -- for him and for other lawyers, and do a little research, breakdowns of the cases.

Q What days did you work?

A Five days a week.

Q Monday through Friday?

A Yes.

Q Did you ever work on weekends?

A No.

Q What hours did you work?

A From 8:00 to 5:30.

Q Did you ever work hours in addition to 8:00 to 530?

A Yes.

Q Where was the office located that you worked in at that time in 2002?

A 572 Market Street.

Q Is that here in Newark?

A Correct.

Q Can you briefly describe the physical structure of the office, the building, the office building?

A It's a two-story building; the windows in the front and the conference room in the back. On the first floor, far right is the mail room, the center is the reception area, and in back of that is a secretary area.

MR. GAY: With the Court's permission, I'm going show the witness Government Exhibit 3282.

THE COURT: All right.

Q Do you recognize that, Mr. Jimenez?

A Yes.

Q What is that a photograph of?

A 572 Market Street.

Q Is it a fair and accurate depiction of 572 Market Street as you knew it, the building itself?

A Correct.

MR. GAY: Your Honor, I would ask that this be moved into evidence.

THE COURT: Without objection,

MR. BERGRIN: There is no objection, Judge.

THE COURT: It's in evidence.

(Government Exhibit 3282 is received in evidence.)

MR. GAY: We could publish this one to the jury.

(An exhibit is published to the Jury.)

Q Now, Mr. Jimenez, what was on the first floor of 572 Market Street? Can you give a brief description of that?

A To the far left is the conference room on the first floor;

the middle was the reception area; and the far right is the mail room. Upstairs is -- on the far left, to the right -- I mean far left to the front is Anthony Pope's office; above the reception area is Paul Bergrin's office; and the far right is Annette Verdesco's office.

Q So on the second floor was primarily lawyers working. Is that Correct?

A Yes.

Q And on the first floor would have buy been primarily support staff?

A Correct.

Q What lawyers were working on the second floor do you recall, at the time?

A Paul Bergrin, and Pope, Annette Verdesco; Gary Cavelli; Artie Arujo (phonetic); and Ron Sampson.

Q What about the support staff that you said that they generally worked on the first floor. Is that correct?

A Correct.

Q Do you recall anybody else from the support staff who worked on the first floor other than you?

A Marisol, Rosemary, Gladys, Gloria.

Q Okay, that's fine, Mr. Jimenez. That's what you remember today. Right?

A Right.

Q Okay. Where was your office within the structure?

A Towards -- all the -- the back, far to the back.
Q That would have been on the first floor. Is that correct?
A Correct.
Q Where was Paul Bergrin's office within the structure?
A Above the reception area in the front.
Q That would have been on the second floor?
A Second floor.
Q What was Paul Bergrin's position within the office, if you know?
A He was the boss.
Q Do you know what type of law Mr. Bergrin practiced?
A Military and criminal.
Q What was his primary area of practice, if you know?
A Criminal.
Q Who assigned you work when you were working at the office?
A Paul Bergrin.
Q What percentage of your workload would you say you did on Paul Bergrin's cases?
A Forty -- I mean, it was 60/40.
Q Sixty percent being what?
A Meaning that I -- that's what I would -- that's the percentage I would, you know, put into his work.
Q So you worked -- 60 percent of your work you spent on Paul Bergrin's cases?
A Correct.

Q And the other 40 percent would have been doing work for some of the other lawyers in the office?
A Right.
Q Can you describe briefly the types of jobs that you had while you were working in Paul Bergrin's office?
A I was filing papers, making sure the files were being -- in everybody's office, the caseloads that they had to do in court, at times Paul would ask me to give him a little breakdown on something about a case, and, oh, prepare it for trial.
Q Did you ever sit in on client meetings?
A Yes.
Q Can you briefly describe the clientele of the office, what types of people came to the office?
A Basically people -- clients that was charged with criminal offense, and sometimes -- basically criminal offenses.
Q Did you ever meet any clients while you were there?
A Yes.
Q Did you ever meet a client named Hak?
A Yes.
MR. GAY: I'm going to show Government Exhibit 2258 to the witness.
Q Mr. Jimenez, do you recognize the person depicted in that photograph?
A Yes.
Q Who is that?

A That's Hak.
Q Did you later learn Hak's true name?
A Correct.
Q What would that be?
A Hakeem Curry.
Q Okay.
MR. GAY: Your Honor, I'm going to ask that Government Exhibit 2258 be entered into evidence at this time.
THE COURT: All right. Without objection it's in evidence.
MR. BERGRIN: There's no objection, Judge.
(Government Exhibit 2258 is received in evidence.)
MR. GAY: Can you publish it to the jury, please.
(An exhibit is published to the Jury.)
Q Now, after you began working in Paul Bergrin's office, how long was it, approximately, before you first saw Mr. Curry?
A About two months.
Q And when you saw him it was in the office?
A Correct.
Q Did you learn anything about Mr. Curry while you were working in Paul Bergrin's office?
A Yes.
Q What is it that you learned?
A That he was a high roller, big time drug dealer.
Q Did you ever speak to Mr. Bergrin about Mr. Curry?

A Yes.
Q And what if anything did Mr. Bergrin tell you about Mr. Curry?
A He said it's one of his best clients.
Q Did he say anything else about Mr. Curry?
A Yes.
Q What did he say?
A That he was one of the big guys in Newark.
Q One of the "big guys," meaning what?
A Drug dealer.
Q How often did you see Mr. Curry in Paul Bergrin's office?
A Like once every two weeks in the beginning, something like that.
Q After you saw Mr. Curry, did you come up with a plan?
A Correct.
Q What was that plan?
A The plan was to put something together, see if he was interested in -- going to buy some weight.
Q Now, when you say "put something together," what would that "something" be?
A A drug deal together.
Q When you say "buying some weight," what would weight be?
A Large amount, quantity -- a large quantity, amount of drugs.
Q Was there a particular drug you had in mind?

A Yes.
Q What was that?
A Cocaine.
Q Now, did you yourself have cocaine, "weight," at that time?
A No.
Q So what was your plan with respect to obtaining the cocaine at that time?
A I knew somebody and I was going to go talk to him.
Q Who was that that you knew?
A Changa.
Q Do you know Changa's real name?
A No.
Q I'm going to show you Government Exhibit 3524. Do you recognize the person depicted in that photograph?
A Yes.
Q Who is it?
A Changa.

MR. GAY: I'd ask, your Honor, that 3524 be entered into evidence at this time.

MR. BERGRIN: There's no objection, Judge.

THE COURT: Okay.

(Government Exhibit 3524 is received in evidence.)

MR. GAY: If we can publish it for the jury, too please.

THE COURT: It's in evidence.

(An exhibit is published to the Jury.)

Q Mr. Jimenez, how do you know Changa?

A He's a long time friend the family.

Q Do you know what Changa did for a living?

A Yes.

Q What did he do?

A Sell drugs.

Q What quantities of drugs did you sell?

A Large.

Q "Large," meaning what?

A Meaning kilos.

Q Multiple kilos?

A Multiple kilos.

Q Okay. What level of kilos would he sell?

A Ten, better.

Q "Ten or better," meaning what?

A Ten -- ten keys or more.

Q Now, you came up with this plan that you were going to introduce -- well, withdraw the question. Explain how that fit into your plan.

A Changa was the supplier. So my plan was to talk to Hakeem, see if he would agree to something, then I would go back to Changa and talk to him to see if he could supply me with what I need.

Q Can you briefly describe what the difference is between

what Changa does in the drug business and what Hakeem Curry did in the drug business, as you understood it then.

MR. BERGRIN: I have to object, Judge, based on his knowledge.

THE COURT: All right.

Go ahead, I'll allow it.

Q Do you want me to ask the question again?

A No.

Q Okay, go ahead.

A Changa was a supplier, Hakeem was the distributor.

Q And that's why you thought if you hooked these two guys up together it would be a match?

A Correct.

Q Were you expecting to get anything out of this?

A Correct.

Q What?

A A couple thousand, a few thousands.

Q And how were you expecting to make your money off of this, if you can describe it.

A By adding another point to it. A point is another thousand on each key.

Q So for every kilogram of cocaine that Changa sold to Hakeem Curry, you expected to make a thousand dollars?

A Correct.

Q Did you eventually approach Hakeem Curry?

A Correct.
Q Can you briefly describe -- well, first of all, how long after you began working in Mr. Bergrin's office did you approach Hakeem Curry?
A Less than a year.
Q Can you briefly describe what you did when you approached Hakeem Curry?
A He was -- he came in and --
Q When you say "he came in," let's back up for a minute.
Where were you at the time you first approached Hakeem Curry?
A I was in the office by the conference room.
Q That's Paul Bergrin's office?
A Correct.
Q Okay.
A I seen Hakeem --
Q Described what happened.
A I seen Hakeem Curry coming in, and he went through the conference room, started talking to the reception area -- to the reception, I believe it was Gladys or Marisol. And I told Hakeem Curry if he could step into this conference room so I could talk to him for a minute.
Q What did he do?
A He agreed.
Q Can you describe what happened next?

A Then I sat down, we sat -- well, I sat down; he stood up. And then I told him, if he knew anybody that was interested in buying some weight. And --

Q What was "weight"?

A Weight, means cocaine, large amount of cocaine --

Q What was his response?

A -- quantity of coke.

His response was like, yeah. You know, he knows somebody and that he was interested.

Q What happened next during the conversation?

A Then he says, if I could supply him or get him 25 keys or better, then we could talk.

Q What did you understand "25 keys or better" to mean?

A It would be 25, either 25 or more.

Q Twenty-five what?

A Kilos.

Q Of what?

A Cocaine.

Q What was your response?

A My response was, like, I got -- I'll get back to you. I have to get back to you on that.

Q Why did you give him that response?

A Because I didn't know he was going to go that high.

Q "That high," meaning what?

A The cocaine on the kilos.

Q What were you expecting before you spoke to him about the amount of drugs he might be asking for?
A Between eight and ten.
Q Kilograms of cocaine?
A Correct.
Q So when he said 25 or better, what did -- why did that create a problem?
A It throw me back a little bit because it was -- it's a lot, and it's something that, you know, I wasn't sure of.
Q You weren't sure of what?
A Of get -- that I could get my hands on 25.
Q Okay. Now, what else happened after that in the meeting?
A He said that he needs a new supplier, he looking for a new source.

And we exchanged numbers. And I told him I'd call him as soon as I find out if I can get my hands on that type of weight.

Q Now, did he mention anything about what might happen if this initial transaction was successful?
A Right.
Q What did he say?
A He said if this goes through good, he'll get 50 next time.
Q Fifty what?
A Fifty keys.
Q Of what?

A Cocaine.
Q Now, let's talk a little bit about the conference room.
Can you briefly describe the conference room where this meeting took place?
A Yes. It's a big room with a large table with about 12 or more seats. It's a conference table.
Q Was anybody else in the conference room with you when you had this conversation with Mr. Curry?
A No.
Q So only you and Mr. Curry?
A Correct.
Q Was the door to the conference room opened or closed?
A Closed.
Q Did you believe anybody could hear you when you were having this conversation?
A No.
Q Now, when you first approached Mr. Curry and asked him whether he knew anybody was interested in buying weight, can you describe what his demeanor was when he responded to you?
A His demeanor was like, it's like, he was surprised a little bit but --
Q What happened after that?
A He just -- he kept on saying -- after I told him, he got thrown back a little bit, but he was kind of surprised when I told him if he wanted to buy some weight. And then he just

said that if I could get 25, then we could talk.
Q Now, prior to that you had met Mr. Curry in the office. Is that correct?
A Correct.
Q Do you remember any conversations that you had in the office with Mr. Curry or any conversations you were present for between Mr. Bergrin and Mr. Curry prior to you approaching Hakeem Curry at this time?
A Yes.
Q And just briefly describe what those conversations or that conversation was.
A Can you repeat that question again?
Q Sure. Let me try to rephrase the question because that was a little broad.

Did you have any -- were you present for any conversations in which Mr. Bergrin and Mr. Curry discussed your criminal past in your presence?
A Yes.
Q Can you briefly describe that?
A Paul Bergrin introduced me to Hakeem Curry. He said that's my -- that's my brother-in-law, he just got finished doing 10 years.
Q Did he say -- do you remember what he said you got finished doing 10 years for, what type of crime?
A No.

Q Now, at the conclusion of the meeting you said that you and Mr. Curry exchanged numbers. Is that correct?
A Correct.
Q That would be telephone numbers?
A Correct.
Q What was the reason for that?
A To be in touch to see to find out, to see if everything is good.
Q "Everything good," meaning what?
A If everything was good on my side, if it was a go, if I could, you know -- was able to get my hands on that type of -- type of weight on the cocaine.
Q Meaning 25 kilograms or more?
A Correct.
Q What did you do after the meeting with Mr. Curry?
A Left. We just left it like that. After we talked and we exchanged numbers, finished talking, we left.

Paul came in at the time, Curry went upstairs, and I went to do what I had to do.

Q Did you do anything after you left work that day?
A Yes.
Q What did you do?
A I contacted Changa.
Q And what happened then?
A And we met at the bar.

Q Okay. What bar would that be?
A Broadway and Verona.
Q Do you remember how it was that you came to meet Changa at the bar.
A I called him up and he told me he would meet me at the bar.
Q I'm going to show you Government Exhibit 3258 for identification. Do you recognize what's depicted in that photograph?
A Yes.
Q What is that?
A That's the corner bar, Broadway and Verona.
Q That's the one that you met Changa in?
A Correct.
Q And is that a fair and accurate depiction of the bar as it existed, the outside of the bar as it existed when you had met Changa?
A Correct.

MR. GAY: Your Honor, I would ask that Government Exhibit 3258 be entered into evidence.

MR. BERGRIN: I have no objection whatsoever, Judge.

THE COURT: Okay. It's in evidence.

MR. GAY: We'll publish it to the jury, please.

(Government Exhibit 3258 is received in evidence.)

(An exhibit is published to the Jury.)

Q Mr. Jimenez, that bar that's now up on the screen, that's

where you met Changa. Is that correct?
A Correct.
Q Can you briefly describe what happened at that meeting?
A I spoke to Changa and I told Changa that I have somebody that was interested in buying 25 keys.
Q What did Changa say in response to that?
A Changa was surprised, he looked at me crazy, and he said that --

MR. BERGRIN: Objection as to what Changa said.
MR. GAY: Your Honor, if you want a sidebar --
THE COURT: I'll hear you at sidebar briefly.
(At the sidebar.)
THE COURT: What's the objection?
MR. BERGRIN: I'm going to withdraw my objection.
THE COURT: It's a co-conspirator's statement. Correct?
MR. BERGRIN: Yes. I withdraw the objection.
(In open court.)
THE COURT: Is overruled. The objection is withdrawn.
MR. BERGRIN: Thank you.
MR. GAY: May I proceed, your Honor?
THE COURT: Yes.

BY MR. GAY:
Q Mr. Jimenez, what did Changa say in response to your question?

A He said, you might be talking to an informant or feds. He said, he was scared. He got shook a little bit. He said, that's feds.
Q Did he explain why he thought it might be feds?
A Because it was too much.
Q Too much what?
A Too much weight for somebody to just ask for 25 keys just like that.
Q And what was his concern?
A His concern was the feds, meaning either an informant or some law informant.
Q So that feds could mean law enforcement?
A Correct.
Q He was concerned about getting caught by law enforcement if he engaged in this type of transaction?
A Correct.
Q And was that because he believed that this person could have possibly been working for law enforcement?
A Correct.
Q What did you say in response to that?
A I said, man, that's impossible. I know the guy's background already. I've -- I know him very well I told him.
Q Did you explain how you knew the guy's background?
A Yes.
Q What did you say?

A I told him I read his file, he's from -- he's one of the clients in the office, and that he deals with that type of weight.
Q And when you said "one of the clients in the office," what were you referring to?
A Paul Bergrin's office.
Q Continue. What did you say?
A And he says -- well, then we just started talking some more about the case -- about the -- he wanted to know Hakeem Curry's name.
Q Okay. Did you tell him Hakeem Curry's name?
A No.
Q Okay. During that conversation at all was a name brought up of who the person was that you wanted him to supply with cocaine?
A No.
Q What was the reason for that?
A The reason for that was, because I didn't want -- I didn't want to put -- I didn't want to give him the name because I know that people have the bad habit of trying to go back-door you and going straight to the person and then put you to the side.
Q Okay. And "putting you to the side" means what?
A I didn't want to lose -- it's going -- it's like going over your head, like going to the top.

Q So if somebody went directly to the customer, what could that mean for you as far as whether you were going to make any money off of the deal?
A I'd be out of the 25,000.
Q Did you discuss any prices with Changa during that meeting?
A Yes.
Q Please describe.
A I told Changa that if he could supply me with that and if he's interested and is fine with that, to give me a good price.
Q And what did he say?
A He said, 20. He says, all right, he gave me 20,000 on each key.
Q So 20 -- the price he gave you was $20,000 per kilo?
A Correct.
Q And did you tell him anything about what price you were going to sell them to your client or your person at?
A Correct.
Q What was that?
A Twenty-one.
Q $21,000 per kilogram?
A Correct.
Q And why was that, that you were going to sell them for more?
A Because that's how I make my money.
Q You were going to make $1,000 off each kilogram?

A Correct.
Q For a total of $25,000?
A Correct.
Q And that's just for this first -- this deal?
A Correct.
Q Each deal thereafter did you expect to also make the same amount of money?
A Correct.
Q Now at this meeting with Changa at the bar, how long after you approached Hakeem Curry did you meet with him, Changa that is, at the bar?
A Repeat that again.
Q You testified earlier about a meeting you had with Hakeem Curry.
A Correct.
Q And you also testified about a meeting you had with Changa after that meeting with Hakeem Curry.
A Correct.
Q My question is: How long after the first meeting with Curry did the second meeting with Changa take place, if you know, or if you remember?
A The second meeting?
Q No, no, no. The meeting with Changa -- all right, let me withdraw the question and see if I can rephrase it.
You testified earlier that you met with Hakeem Curry

and asked him whether he wanted to buy weight.
A Right.
Q Is that correct?
And that some time after that you met with Changa to see whether he would supply that weight.
A Right.
Q My question is: How long after meeting with Curry did you meet with Changa to ask him whether he would supply the weight?
A I believe it was that same night.
Q So when you left the meeting with Changa, what was your understanding of what Changa was willing to do for you?
A Supply me with the 25 kilos.
Q What happened after that meeting?
A We left after we finished talking, we got everything clear, the price clear.
I says, all right, I'm going to get back with you as soon as I'm -- I'll talk to the source that's willing to buy the 25 keys.
Q And what did you do after that?
A I call Hakeem.
Q That would be Mr. Curry?
A Correct.
Q And what if anything did you say to Mr. Curry?
A I told him that it's a go, that --
Q Meaning what?

A Meaning that I could get my hands on 25 keys.
Q What did he say?
A He said he'll meet me at the office.
Q What was the office, which office was he referring to?
A 572 Market Street.
Q Paul Bergrin's office?
A Correct.
Q Did you go to work the following day at Paul Bergrin's office?
A Correct.
Q And did you meet Mr. Curry?
A Correct.
Q Where did you meet him?
A Conference room.
Q That same conference room that the first meeting took place in?
A Correct.
Q Can you describe what happened at that meeting?
A I told him that I could get my hands on the 25 keys and that the price will be at 21.
Q What was his response?
A His response was that it was too much money.
Q Now, when you said 21, what did "21" mean?
A Twenty-one thousand.
Q And when you said, I can get my hands on the 25 keys, what

did "25 keys" mean?
A Twenty-five kilos of cocaine.
Q Of what?
A Of cocaine.
Q So what did you respond to Mr. Curry after he said the price -- and he wanted a better price?
A I said the pricing ain't going to go down no more than 21. That's a good price and that's -- that's where it's going to stay.
Q What did he reply to you?
A He replied to me that if I could come down a little bit.

I said no.

Then he say he'll get back to me, that he got to get some -- his money was short, that he had to gather up a little bit more money.
Q Now, you testified that this took place inside the same conference room as the first meeting. Is that correct?
A Correct.
Q Was the door to the conference room opened or closed when this meeting, the second meeting with Mr. Curry took place?
A It was closed.
Q Was there anybody else in the conference room besides you and Mr. Curry?
A No.
Q Did you believe anybody else could overhear your

conversation?
A No.
Q After that meeting, did you believe Mr. Curry was still interested in purchasing the 25 kilograms of cocaine?
A Correct.
Q What did you do next?
A I went on -- I went on, you know, minding my business in the office.
Q So you worked for the balance of the day?
A Right.
Q What did you do after that?
A I went home -- no, I called -- I called Changa. I told Changa to meet up in the bar again.
Q And would that be the same bar where you met with Changa the last time?
A Correct.
Q Okay.
MR. GAY: We could publish the photo again.
Q Is that the bar that you met with Changa the second time?
A Correct.
MR. GAY: Again, referring to Government Exhibit 3258, your Honor, for the record.
Q What happened at this meeting?
A I wanted to make -- I wanted to make sure that Changa could, you know, supply me with the 25, it's going to be there,

you know? Not to let me down, because if this guy is going to get the money, I didn't want to, you know, be empty-handed still.

Q So what happened then? What did you say to Changa?

A So I told Changa: Are you sure you can get me that 25?

He said yes.

Then we started talking some more. Then I told him who the person was because it was -- when the deal goes down he has to know who the person is then.

Q So at that point did you give Changa the name of the person you were going to supply with the cocaine?

A Correct.

Q Do you remember what you told him?

A I told him his name was Hak. They call him Hak in the streets.

Q Do you remember mentioning anything about Paul Bergrin's law office at that time?

A Correct.

Q What did you say?

A I told him he's one of the big time drug dealers that -- one of Paul Bergrin's clients.

Q And what did he say to that?

A He was not -- he was like really interested.

Q What do you mean by "really interested"?

A Like, he was -- now he really was going forward with it,

like. He was, like, okay, like more -- more open to the -- to the situation.

Q Now, you had mentioned previously that he had expressed concern at the first meeting that this person you were going to introduce to him was going to be a fed.

A Correct.

Q Did he appear -- what if anything -- did he appear to have that same concern after this conversation?

A No.

Q What happened at the end of that meeting?

A At the end of that meeting, Changa -- we left it like that. Changa told me as soon as he's ready, you will call me and we put it to work.

Q Now, and what did that mean, "put it to work"?

A That means that when everything is ready on one side, then everything else will fall into place.

Q Meaning the deal would take place?

A Correct.

Q Did you go to work the following day at Paul Bergrin's office?

A Correct.

Q At some point during that day did you meet with Paul Bergrin?

A Correct.

Q Briefly describe the circumstances of that.

A He called me upstairs to the office and told me -- I closed the door. He asked me if I ever spoke to anybody about making any -- any deals.
Q What did you believe that was a reference to at that time?
A I believed that that was -- automatically it was Hakeem Curry, in reference to what I was --
Q What deal would that be?
A The 25 keys.
Q What did you respond?
A I was shocked. I mean, my response -- I said, yes.
Q So you told him that you were going to do a deal with Hakeem Curry?
A Correct.
Q And what was his response to that?
A His response was that if I was to talk to any of his clients, that I got to go through him first.
Q And that was in reference to the drug deal?
A Correct.

MR. LUSTBERG: Judge, we would request an appropriate curative instruction at this time.

THE COURT: All right. Do you have another question, Mr. Gay?

MR. GAY: Another -- well...

THE COURT: Go, go ahead.

MR. GAY: Okay. I mean, it's fine if you want to give

the instruction now, Judge.

THE COURT: No, I will.

Ladies and gentlemen, listen closely, if you would, please. You just heard testimony that the Defendant was involved with other persons in a conspiracy to distribute cocaine. Now remember, the Defendant is not on trial for this alleged involvement with a drug conspiracy. You may only consider this evidence for the purpose of deciding whether the Defendant had a motive to commit the acts charged in this Indictment in this trial. Do not consider this evidence for any other purpose. Of course, it is for you to determine whether you believe this evidence, and if you do believe it, whether you accept it for the purpose offered; motive.

You may give it such weight as you feel it deserves, but only for the limited purpose that I describe it to you. You may not consider the evidence of these other acts as a substitute for proof that the Defendant committed the crimes charged in this Indictment. You may not consider this evidence as proof that the Defendant has a bad character or a propensity to commit crimes. Specifically, you may not use this evidence to conclude that because the Defendant may have been involved in a drug conspiracy -- and that's for you to determine -- he must also have committed the crimes charged in this Indictment.

All right. So I will instruct you on this further during the course of the trial or at the end of the trial. But

this evidence with respect to an alleged drug conspiracy involving the Defendant is not what he's on trial for now, and it's only being offered as possible motive for the charges that he's on trial for right here. All right?

MR. LUSTBERG: Thank you, Judge.

MR. GAY: May I continue, your Honor?

THE COURT: Yes.

MR. GAY: Thank you.

BY MR. GAY:

Q Now, Mr. Jimenez, this conversation you just testified about, where did it take place?

A Paul Bergrin's office.

Q And when you say "his office," you discussed his office a couple of times. Meaning the overall building?

A Correct.

Q Did this take place in a specific place -- a specific office within that building?

A His private office.

Q Was the door opened or closed at the time?

A It was closed.

Q Was there anybody else in the room besides you and Mr. Bergrin when this conversation took place?

A No, just me and him.

Q Can you describe Mr. Bergrin's demeanor when he was discussing this topic with you?

A His regular demeanor, serious.
Q What happened after this conversation completed?
A I left the office, went downstairs, did what I had to do.
Q Continued to do your work?
A Continued doing my work.
Q Now, what happened after that in connection with any drug business?
A After that, a couple of days WENT by, I started to call Hakeem Curry. And he told me -- he picked up the phone, he told me that he had something -- he got something in play right now.
Q What did that mean, in your opinion, he had "something in play"?
A That means that he has drugs, you know, out there right now, you know. It's, like, if he was -- if I was to tell him the same thing -- you know, it's just a street slang that we understand.
Q Explain, Mr. Jimenez. He said he had something in play. How was that going to impact on any deal that you were going to do with Mr. Curry, or how did you understand it to impact on any deal?
A Well, my understanding, that as long as he got something in play, until that's done, then, you know, the deal can't go through. So that's -- that was my understanding.
Q Now, Mr. Jimenez, can you briefly describe, if a drug

dealer receives kilograms of cocaine what happens after that; they then distribute them?
A Yes.
Q Okay. Do they have to then wait for the money to be collected from that sale before they can purchase new drugs?
A Correct.
Q So is that what this conversation was about?
A That's correct.
MR. BERGRIN: Objection, your Honor, to the leading nature and putting words in his mouth.
MR. GAY: Withdrawn, Judge.
THE COURT: All right.
MR. BERGRIN: I ask that it be stricken.
THE COURT: No, I won't strike it.
But, Mr. Gay, don't lead in this area.
MR. GAY: I will not, Judge.
BY MR. GAY:
Q How long was it that you called Mr. Curry before you finally got through to him?
A How long did I call him?
Q Yeah. Did you call him one time and he answered the phone, or did you have to do more than that?
A No, I had to do more than that.
Q Okay. Very briefly describe that.
A I called him, like, about four, five times. And --

Q What happened those four or five times?
A I got the answering service, then I got the other thing that he cannot be reached because he's out of range, you know.
Q Now, during the time that you're having this -- trying to reach Mr. Curry, are you still working in Paul Bergrin's office?
A Correct.
Q And at any time during that time period do you see Changa?
A Correct.
Q Briefly describe that.
A I was in the reception area talking to Gladys, and I seen Changa coming in the office. He says -- I asked him, what is he doing here.

And he says that he's here to see Paul for some property, for property or something like that.

Q Had you ever seen Changa in the office before?
A No.
Q Do you know whether Changa and Paul know each other, or did you know whether they knew each other at the time?
A I believe Paul probably met Changa through the family members.
Q And that would have been through?
A My sister.
Q Your sister?
A Yes.

Q But you had never seen Changa in the office prior to that day?
A No.
Q Do you know whether Changa saw Mr. Bergrin on that day?
A Yes.
Q Would you briefly describe how you know that.
A Gladys went upstairs and let Paul know that -- she called him Jose something -- that he's here.

And Paul said -- I guess Paul would tell her to wait a minute or something, to have him wait in the reception area, and I was still talking to Gladys, and she hangs up the phone.

Then Paul Bergrin calls back down and he let her know that, tell him to come upstairs.
Q What did you see after that?
A After that --
Q What did you see Changa do after that?
A Go upstairs.
Q Now, did this take place before you actually had a conversation with Mr. Curry, the one that you talked about --
A Yes.
Q -- where Mr. Curry said he had something else going on?
A Correct.
Q Did you later learn that a meeting was going to take place between Paul Bergrin, Hakeem Curry and Changa?
A Correct.

Q Can you briefly describe how you learned that that meeting was going to take place?
A I overheard Paul on the phone that -- well, they called -- Hak -- I believe Hakeem called the office, and I was -- I was by the office with Paul. And Gladys was upstairs, and she calls Paul. Paul calls her on the conference speaker and she say, Hak is on the -- on the phone for you.
Paul picks up the phone, says, I'll be at the restaurant, and that's how I know.
Q Now, was there a time given that they were meeting?
A There was a time, but -- I know -- I know there was a time but I just -- I cannot remember exactly the time.
Q Okay. Did you understand that the meeting was going to happen later that day?
A Correct.
Q And it was going to be at the restaurant you said?
A Correct.
Q Which restaurant was that?
A Isabella's.
Q What is Isabella's?
A It's sort of like a fast foot restaurant.
Q Who owns Isabella's, or owned it at the time at least?
A Paul Bergrin and Yolanda.
Q Your sister Yolanda?
A Correct.

Q What else did you learn about this meeting, if anything, before the meeting took place I'm saying? Were there any -- let me rephrase it. Were there any other telephone conversations that you overheard relating to this meeting?
A Yes.
Q Briefly describe what you heard.
A That as far as Changa, he -- he -- well, at the time he was looking for the phone -- phone number, Changa's phone number.
Q "He" is who? Who is look for the phone number?
A Paul Bergrin.
Q And what happens? How do you know he was looking for a phone number?
A He asked me if I knew Changa's phone number.
I said, no.
Q This was after the conversation that you overheard with Mr. Curry?
A I think it was -- I think it was after or before.
Q It was around the same time?
A It was around the same time.
Q Okay. So what happens then? He asks you for the number. And what do you say?
A I say I don't have it.
Q What happened next?
A He got on the phone, I believe he called somebody. I don't know if he was talking to my sister, I'm not sure if he was

talking to anybody that I know. But he said that, let Changa know that I be in the restaurant. Something to that nature.

Q Okay. And you could -- you overheard this conversation?

A Correct.

Q You could only hear the one side of it, Mr. Bergrin's side of the conversation?

A Right.

Q Okay. Now, you talked about these two conversations. Where were you when you overheard these conversations?

A Upstairs, second floor, Paul Bergrin's office.

Q Were you actually inside the office during these conversations?

A Right, coming in -- in and out from the -- from his office to -- to the front -- to the front door where his secretary is at. It's not far, it's right there, coming in and out.

Q You say it's right there. Could you describe the distance, approximately?

A Like three -- maybe five feet away.

Q Okay. Well, you were between Paul Bergrin's office and another location five feet away from Paul Bergrin's office?

A Right.

Q And you were going back-and-forth at this time?

A Right.

Q And that's where you were when you overheard both of these conversations?

A Right.
Q Now, after you heard these conversations, what were you thinking?
A I was, like, you know, like this shit is really going down. I mean -- excuse my language -- it's really going down, like, you know, they putting this together now without me being in the middle.
Q So what did you believe was going to happen at this meeting, at the restaurant later?
A He was going to meet -- Changa was going -- I definitely knew Changa was going to meet with Curry, you know, and that it was being put together.
Q Okay. What was being put together?
A The deal that I had already established with Changa and Curry.
Q Were you invited to the meeting?
A No.
Q So what did you conclude from that?
A I conclude that they already pushed me to the side.
Q You say "pushed you to the side." What do you mean by that?
A Back-doored me.
Q What does "back-door" mean? What did you expect was going to happen with your role in this transaction that you were trying to negotiate?

A I expected it was going to go down -- I mean, they was going to put it together themselves.
Q Did you expect that you were going to receive any money out of this deal at this point?
A No.
Q Previously you expected that you were going to receive money out of it?
A Correct.
Q And now you believed you were not going to receive money out of this?
A Correct.
Q Describe how you felt about that.
A I felt -- I felt upset. I felt really upset, mad, angry. Inside it was killing me. It was like -- it was just killing me. It was like -- my focus was on Changa, I really wanted to strangle him basically.
Q All right. So now you learned that this meeting is going to take place and you're upset about it.
A Correct.
Q What do you do?
A I try to hurry up, finish what I have to do in the office so I can go hurry up and catch Changa and everybody else, and I just want to see the impression on they face.
Q In the act of doing what?
A Putting the meeting together, sitting down, talking about

whatever it is.
Q Now, at that point was Paul Bergrin still in the office?
A No.
Q Paul Bergrin's office.
Okay. Let me back up and rephrase the question.
When the conversations that you overheard regarding this meeting are taking place later that night, was Paul Bergrin in the office when those conversations took place?
A Correct, yes.
Q Okay. You were also in the office when those -- when those conversations took place?
A Correct.
Q After the conversations took place, what did you see Paul Bergrin do, if anything, that night?
A Put the phone down. He did -- he did what he had to do. Whatever he had to do on the desk he did. I don't -- I knew I left the office and went to do what I had to do so I, you know, be able to get to the office -- I mean, to the restaurant as well.
Q Do you know whether Paul Bergrin left the office at some point after those conversations?
A Yes.
Q And were you still in the office when he left?
A Correct.
Q What did you do then?

A I finished -- I was trying to finish up as much as I can of what I had to do so I could leave and hurry up to the restaurant as well.
Q So did you finish doing your work?
A Yes.
Q And did you go to the restaurant?
A Yes.
Q Describe -- how did you get to the restaurant, first of all?
A In a car.
Q In a car?
A Right.
Q Can you describe the speed with which you drove to the restaurant?
A It was pretty fast.

MR. GAY: I'm going to show the witness Government Exhibit 3000a and 3001.

THE COURT: Mr. Gay, indicate when you think it's a good time to break for lunch.

MR. GAY: Okay. This is actually not -- this is going to be a little bit on this meeting so it may not be a bad time to do it now.

THE COURT: All right. Ladies and gentlemen, we'll break for lunch. We'll see you back here at 1:35. Please enjoy your lunch. Don't discuss anything about the case and

that's fine.

THE COURT: That's okay.

MR. GAY: I want to make sure we're not -- okay.

(In open court.)

THE DEPUTY CLERK: Please rise for the Jury.

(Jury present.)

THE COURT: All right. Thank you very much for your patience, ladies and gentlemen. Please be seated.

Mr. Gay, you can continue.

MR. GAY: May I continue, your Honor?

Thank you.

DIRECT EXAMINATION CONTINUES

BY MR. GAY:

Q Mr. Jimenez, before the lunch break you had discussed what you had learned about a meeting that was to take place between Paul Bergrin, Hakeem Curry and a person known to you as Changa at Isabella's Restaurant. Is that correct?

A Correct.

Q And is Isabella's Restaurant -- were is that located?

A On Summer Avenue, between Summer -- Summer, Elliot and Grafter.

Q I don't know if you can move the microphone closer or --

THE COURT: He can't but he can move his seat closer.

Q Please do so if you can.

Now, you mentioned that you learned of the meeting and

that you drove to the meeting?
A Correct.
Q I'm going to show you what's about that previously been marked as Government Exhibits 3000a and 3001 and ask you if you recognize what's depicted in those photographs. Please look at both of them.
A It's the restaurant, Isabella's on Summer Avenue.
Q And does that fairly and accurately depict Isabella's Restaurant, the front of the building as it was on the date of the meeting?
A Correct.
MR. GAY: Your Honor, I'd ask that these be admitted into evidence at this time.
MR. BERGRIN: There's no objection, Judge. Thank you very much.
THE COURT: 3000a and 3,000?
MR. GAY: 3000a and 3001, Judge.
(Government Exhibits 3000a and 3001 are received in evidence.)
THE COURT: Okay. They're both in evidence.
MR. GAY: In we could publish first 3000a, and then also 3001.
(Exhibits are published to the Jury.)
MR. GAY: Could we go back to 3000a, please.
Thank you.

Q Now, Mr. Jimenez, is that photograph that's up there now a picture of the front of Isabella's Restaurant?
A Correct.
Q And is that the spot that you drove to on the night that you're talking about?
A Yes.
Q Can you briefly describe what happened when you arrived at the location?
A As I'm driving up Elliot Street, which is the front of the restaurant, Paul Bergrin's car is in front of the restaurant. Changas car I think was behind. Anyway, I seen three people inside of the restaurant through the window.
Q You say you could see them through the window, is this window are you talking about on the photograph itself?
A Right at -- the front of the -- right -- that big window (indicating).
Q The large picture frame window --
A Right.
Q -- on the front?
And the doorway to Isabella's, is that also a glass doorway?
A Correct.
Q So you could see through that as well?
A Correct.
Q So where were you when you see this?

A I was outside. I was in the car still. Then I parked the car. After I parked the car I start to observe Bergrin, Changa and Hak in the restaurant.
Q And what did you see them do, if anything?
A Shaking hands.
Q Do you know where -- can you describe where inside the restaurant they were when they were shaking hands?
A Towards the back.
Q I'm now going to show you Government Exhibits 3005, 3006 and 3007. If you could take a look at those and tell me if you know, what do those photographs depict?
A This is the front of -- this is --
Q Don't show it. Just tell us describe what they are.
First let me hand you 305. Well, let me ask you this first:
What, just generally, what do these three photographs show?
A Inside the restaurant.
Q Okay. And that's the restaurant, Isabella's?
A Correct.
Q Okay. And if you could take a look at 30005, what is that a picture of?
A That is the inside of the restaurant.
Q Okay. And can you see if somebody is standing, where would the person be standing, at the front of the restaurant or the

back of the restaurant taking that picture?
A Back.
Q Okay. Standing at the back looking to the front of the restaurant?
A Right.
Q Now that's 30005.
How about 3006; what is that a view of?
A That's behind the counter.
Q Okay. So was that somebody standing at the front of the restaurant or the back of the restaurant taking that picture?
A The back of the restaurant.
Q And what about 3007, what is that a picture of?
A It's the back of the restaurant.
Q And where would somebody be standing when they took that picture?
A The top of the steps.
Q Okay.
A Some steps.
Q And you see there's a doorway, a doorway in there. What does that lead to in that picture?
A Restroom.
Q Okay. These fairly and accurately depict the inside of Isabella's Restaurant as it was on the night of the meeting?
A Correct.
MR. GAY: Okay. Judge, I'd ask that these be admitted

into evidence at this time.

THE COURT: 30005, 6 and 7?

MR. GAY: Correct, your Honor.

MR. BERGRIN: There's no objection, your Honor. Thank you.

THE COURT: All right, they're in evidence.

(Government Exhibits 3005, 3006 and 3007 are received in evidence.)

MR. GAY: I'm going publish to the jury.

This is 30005.

(An exhibit is published to the Jury.)

Q And if you could tell the members of the jury what that depicts.

A That is the inside of the restaurant towards the back.

Q Okay. So this would be a person standing toward the back of the restaurant looking towards the front of the restaurant?

A Correct.

Q Okay. Now you see in that picture there are a couple of windows at the very end of the picture, the very front part?

A Correct.

Q Are those the windows that are in the very front of the restaurant?

A Yes.

Q Where, if you see in this picture, approximately were Mr. Bergrin, Mr. Curry and Changa when you saw them shaking hands?

A Towards the -- towards right here.
Q Okay. Now, if you can, there are a number of -- do you see the red booths, the seats or the booth?
A Right.
Q Do you see if you count from the front of the picture on the left-hand side to the back, so going from the back of the restaurant to the front, do you see the booths there?
A Right.
Q Okay. Where approximately -- which booth would they have been standing next to, if you know?
A Between the third and the fourth.
Q Now, when you saw this, were you inside or outside of the restaurant?
A Outside of the restaurant.
Q How close to the restaurant were you?
A Across the street, coming towards the restaurant.
Q And --
A -- on the street.
Q Is the inside of the restaurant lit at that time?
A Yes.
Q I'm now going to publish 3006 for the jury.

THE COURT: What are the red marks on the screen?

MR. GAY: That's just -- I'm sorry, Judge. When he touches the screen, it --

THE COURT: Yeah, I know. Can we erase those, please?

THE DEPUTY CLERK: It's in the corner, gentlemen.
MR. GAY: What do I have to do?
THE DEPUTY CLERK: In the corner.
The other corner I guess.
THE COURT: Okay.

Q Now, Mr. Jimenez, looking at 3006, what is that a view of?
A That is the view of behind the counter.
Q And this is, again, you're standing at the back of the restaurant looking towards the front of the restaurant?
A Correct.
Q But this is behind the counter as opposed to the hallway where --
A Correct.
Q Okay. Now let's look at 3007. And what does that depict, what view of the restaurant?
A That's the back of the restaurant.
Q Okay. So if somebody is standing all the way in the back of the restaurant looking to the front of the restaurant, this is what would occur to their left?
A Correct.
Q Now, you were outside the restaurant, you could see inside the restaurant. And you've already described what you could see.
A Correct.
Q What did you do after that?

A I walked in the restaurant, Hak was walking out towards -- coming towards me walking out.

He said, hey, Ramon.

I keep walking. He was says, hey, Ramon.

I pass him. I see Changa towards the back where the soda machine is at.

I look at him, I don't say nothing to him. I grabbed a soda, turned around. Paul is starting to walked towards the outside entrance door, and Changa starts walking out.

Q Okay. Now, when you said you walked -- when you first walked in you saw Hak walking out; who is Hak?

A Hakeem Curry.

Q Now, I'm going to go back and show you again 30005.

Do you see in there approximately where it was that you walked when you went inside the restaurant?

A Where I walked?

Q Yes. Where you walked once you got inside the restaurant.

A I walked -- I came in through here, came through here, through here, through here to the back.

Q Okay.

MR. GAY: Judge, indicating that --

Q Well, let me ask you this, Mr. Jimenez. Do you see anything, a red carpet in there in the photo?

A Yes.

Q And is that basically where you walked when you went

inside, on that red carpet?
A Correct.
Q Okay. Now you understand -- what did you do when you got in there?
A I walked all the way towards the back where the soda -- soda machine is at.
Q Okay. I'm going to put up 3007 once again.
And do you see the soda machine --
A Actually it's a -- it's a refrigerator, soda refrigerator.
Q A refrigerator?
A Right.
Q Well, you see the refrigerator that you got the soda out of in this picture?
A Yes.
Q Can you describe where it is in the picture?
A It's right -- this (indicating).
Q Okay.
MR. GAY: Judge, indicating for the record there is something that looks like a front wood panel and there's a white statue on top of it.
Q And that's where the sodas were?
A Correct.
Q Going back to 30005, when you walked in, where was Mr. Curry? Can see from this photo?
A Curry, when I walked in, he was walking out towards the

soda -- towards the entrance, this way (indicating).
Q Okay. Now, Mr. Jimenez, on this sign in this picture, do you see a sign in the upper right-hand corner that says "exit"?
A Correct.
Q Is that the exit to get out of the restaurant --
A Yes.
Q -- right below that?
A Yes.
Q Okay. So where was Mr. Curry in relation to that exit sign when you saw him, approximately?
A Somewhere underneath the -- walking towards underneath the sign.
Q Okay. Where was Mr. Bergrin at the time?
A Bergrin was towards the middle.
Q Okay.
A Middle of the restaurants.
Q So now when you see the booths there on the left-hand side in this photo, which booth would you say he was closest to, approximately?
A Third.
Q Third or fourth? Third booth from the back or the front? I'm sorry.
A From the front.
Q Counting -- okay.
And where was Changa?

A Changa was past -- a little bit past the fourth booth towards the back.
Q I'm going to show you Exhibit 3007. Does that photo depict the area that Changa -- does that depict the area Changa may have been in at that point?
A Right here.
Q Can you show where? Okay.
So he's directly behind the booth that's in the picture on the right hand side. Is that correct?
A Correct.
Q Okay.
Now, can you describe what kind of mood you were in when you walked inside the restaurant?
A Bad mood, real bad mood.
Q When you say a "bad mood," what do you mean?
A I was upset, angry, I felt mad, betrayed.
Q Why did you feel betrayed?
A You know, I was loyal to them, you know?
Q Well, what did you think had happened during this meeting? You didn't see the meeting itself, you saw them shaking hands.
A Right.
Q What did you believe happened?
A I believed that the deal was made.
Q Which deal was that?
A The 25 kilos, cocaine.

Q Who was the deal made between?
A Changa, Curry and Paul.
Q Do you remember whether there was anyone else inside the restaurant at that time?
A There was somebody else, I just -- I wasn't focused on that. My focus was on Changa.
Q Why was that?
A I was -- I was very upset.
Q Okay. Why were you upset at Changa in particular?
A It's 25,000 that I was losing out of my pocket. Or not my pocket; it was going into my pocket. And at that time I really needed the money, so I was really upset.
Q Okay. But why Changa in particular?
A Changa was the one that I really trusted, you know, after I gave him the -- Hakeem Curry's name, and he's a long time friend of the family.
Q Now, you said you were upset. Is that correct?
A Correct.
Q And you were upset because you felt you had been cut out of a deal?
A Correct.
Q Did you ever say anything to Hakeem Curry about being cut out of the deal?
A Absolutely not.
Q Why not?

A I really didn't know his whole background like that. Like, somebody that standing in the drug game, you cannot, you know, create bad blood.
Q Okay. You don't want to create bad blood between yourself and Mr. Curry?
A Correct.
Q What about Mr. Bergrin, did you ever confront Mr. Bergrin about being cut out of the deal?
A Absolutely not.
Q Why not?
A Because he was my boss, I was working under him. He did a lot for me in the past, so...
Q Well, what did you fear was going to happen if you confronted Mr. Bergrin?
A A loss of job.
Q Did you need your job?
A I needed it.
Q What about Changa, did you ever confront Changa?
A At one point I did. Not that -- not as deep, but I let him know that, you know, he betrayed me.
Q Now, did you ever say anything to anyone else, particularly your sister, about being cut out of this deal that you remember?
A I might have, I'm not sure. I'm not denying it, but I might have.

Q Okay. But it's clear you were very upset that night. Is that correct?
A Very.
Q What did you do after the meeting was done, after you saw them leave, what did you do?
A I called my wife, I told her I'm coming home.
Q What happened after that?
A I went home, that was that.
Q Did you soon thereafter meet an individual named Alejandro?
A Yes.
Q I'm going to show you Government Exhibit 3052. Do you recognize the person depicted in that photograph?
A Correct.
Q Who is that?
A Alejandro.
Q Do you know Alejandro's last name?
A Castro.

MR. GAY: Judge, I would ask that Government Exhibit 3052 be entered into evidence at this time.

MR. BERGRIN: No objection whatsoever, Judge.

THE COURT: Okay.

(Government Exhibit 3052 is received in evidence.)

MR. GAY: We can publish that for the jury.

THE COURT: It's in evidence.

(An exhibit is published to the jury.)

Q Is that a picture of Alejandro?
A Correct.
Q How long after this meeting that you just described took place did you meet Alejandro, approximately?
A I say about maybe a week, two weeks later.
Q How did you get introduced to Alejandro?
A Through Changa.
Q Do you recall where it was that you first met Alejandro?
A At the bar on the corner of Broadway and Verona.
Q that would be the same bar that you earlier met Changa at?
A Correct.
Q Okay. I'm going to show you 3258. Do you recognize that?
A Yes.
Q And is that the bar that you met Changa at -- I'm sorry -- Alejandro at?
A Yes.
Q All right. And you said again, Changa was the one that introduced you to Alejandro at that bar?
A Correct.
Q Did you have any discussions with Alejandro after you met him that day?
A Yes.
Q Would you describe what those discussions were?
A That he didn't know I speak Spanish -- I mean English, just Spanish, and that he wanted to, you know, learn how to get

around.
Q And what did you say?
A I said, sure, I got no problem, you know, showing you around, where to go, how to meet people.
Q Now, when you first met him, Alejandro, did he tell you what he was doing for a living?
A No.
Q Did you have any meetings with him after that?
A Yes.
Q How long after that?
A I say about -- I believe it could have been the same week, the same weekend. I mean, it's like -- probably the same week.
Q Okay. So some time the same week is your memory --
A Right.
Q -- you saw Alejandro again?
A Right.
Q Do you remember where you saw him this time?
A Players Club. We met at the Players Club.
Q What is the Players Club?
A The Players Club is some like -- it's a little club. It's like entertainment.
Q Is it a place you can get drinks?
A Correct.
Q So how did you meet him then?
A I told him how to get there, that I'll be there like in

five minutes. And he wasn't that far, he was living on Summer.
Q And when you got there, what did you guys do?
A We stepped inside the place, the club, and we bought drinks. We was drinking for a few hours. We started talking.
Q Did he have drinks?
A Yes.
Q Did you have drinks?
A Yes.
Q Okay. What did you talk about?
A Started talking about -- he started talking about what he could do.
Q Meaning what? What could he do? What did he say he could do?
A That he could supply me.
Q Supply you with what?
A With some coke, as much as I want when I want.
Q All right. Now, you said that Changa had introduced you to Alejandro. What was the relationship between Changa and Alejandro?
A Friendship I believe it was at that time.
Q Was there any type of a business relationship between the two of them that you either knew about then or became aware of?
A Well, I became aware there was more than that on that night when he said this to me.
Q All right. So explain further what the conversation was.

He's telling you he can supply you with cocaine?
A Correct.
Q What is your response?
A My response was like, great, I mean I could use that.
Q Okay. And what did he say after that?
A He said that whenever -- whenever I wanted that, you know, just call him and he'll have it for me.
Q "Have it," meaning what?
A Meaning that he'll have whatever I ask. If I asked him for a kilo, two keys, three keys, he'll have that for me.
Q Did he say anything else to you during that conversation?
A No, not that I remember.
Q Was there any discussion about any deals that he had recently done?
A Yes.
Q And please discuss that.
A He had said that -- the second time, he had said that -- we met the second time, this is another time --
Q So there was another conversation you had. I apologize for not being clear on this. You had another conversation with him at another -- on another occasion?
A Correct.
Q When did that occur in relation to the first two?
A That occurred the following week.
Q Okay. So during that conversation, where does that

consideration take place.
A The same place.
Q The Players Club?
A The Players Club.
Q Are you having drinks?
A Correct.
Q Is he having drinks?
A Correct.
Q Describe the conversation, please.
A This day he was really happy and, you know, I, like -- he was -- he was happy, he was glad. So he said that I just got -- he just got finished doing a 25 deal -- 25 keys on the deal.
Q Did he describe anything else about who he had done the deal with?
A At that time it was Changa.
I said, was Changa involved?
He said, yeah.
I said, who did you sell the 25 keys to?
He said, I don't know. It was a black guy.
I said, do you know his name?
He said no.
I provided the name.
Q What name did you provide?
A Curry, Hakeem. I said Hak. Hak.

Q What did he say?
A He said I might -- he thinks that was it. He wasn't too sure but he thinks that was it.
Q Did he discuss anything about any other deals he was doing or getting ready to do?
A Yes.
Q What did he say?
A He said that the next deal is supposed to be like 50 keys.
Q Now, when you heard that, what did you think?
A I said, wow, you know, I was -- I felt kind of upset but I -- I let it go.
Q Why were up upset?
A Because that was the deal that I was planning to get from Curry.
Q So what did you learn about the relationship between Changa and Alejandro?
A I learned that they was working together.
Q Working together to do what?
A To sell kilos.
Q Of what?
A Cocaine.
Q Now, at that point you had learned or you believed at least that Alejandro was now part of the deal that you had been cut out of -- Correct?
A Correct.

Q -- did you ever say anything to Alejandro about being cut out of the deal?
A Absolutely not.
Q Why not?
A Again, I didn't want no bad blood between him, me, Changa or anybody else. Just leave it as that. Take it as it comes.
Q What would have been the problem with bad blood between Alejandro and you at that point?
A Well, I'm pretty --
Q What did you feel?
A I feel if I say anything to Alejandro they was going to say something to me. They would put something else in his head, tell them something about me to either hate me, push me to the side or just ignore me.
Q When you say "push you to the side or ignore you," what do you mean by that?
A Just not deal with me at all.
Q Deal with you in what capacity?
A In the cocaine, kilo, 2 kilos.
Q So you believed if you had made an issue of this, what was going to happen with respect to Alejandro?
A If I was to initiate it?
Q Yes. If you were to say something to him, complain that you had been cut out of a deal, what was your concern that he was going to do? What was going to be the result?

A The result was -- nothing would have happened between me and him. It would have ended right there. The relationship would have ended. If I -- and then if I would have needed something, like a key, two keys, there's nowhere to get it.
Q Let me ask you this: You were -- Alejandro in the previous conversation asked you -- told you he could supply you with kilograms of cocaine?
A Right.
Q Did you expect to make money off of him supplying you with kilograms of cocaine?
A Correct.
Q So if you had bad blood with him, he was not going to supply you with kilograms of cocaine?
A Correct.
Q And therefore you would not make any money. Is that correct?
A Correct.
Q So what did you decide to do instead of making a fuss over being cut out of the deal?
A I let it be.
Q Now, did you eventually come into -- get charged with your activity relating to this, the drug activity you just talked about?
A Yes.
Q And did you eventually plead guilty to your involvement in

this activity?
A Correct.
Q I'm going to show you Government Exhibit 7001. Do you recognize that?
A Yes.
Q What is that?
A The Plea Agreement.
Q And is that the Plea Agreement that you signed in this case?
A Correct.
Q The case that you pled guilty to?
A Correct.
Q Do you know what charge it was you pled guilty to?
A Possession of CDS, possession to distribute, something like that.
Q Okay. If you could look on this there, highlight it and please take a look at and read it and see what it was, what charge is on the agreement.
A Trafficking, conspiracy.
Q Any particular drug?
A Cocaine.
Q Okay. Now, when you signed this agreement you had a lawyer?
A Yes.
Q Prior to signing this agreement did you speak to any agents

from the FBI?
A Yes.
Q Was that prior to you actually being charged with any crime in this case?
A Correct.
Q And when you first spoke to the FBI agents, did you tell them the truth the first time you spoke to them?
A Nope.
Q How many times do you remember speaking to them before you got a lawyer, if you remember?
A About two or three times.
Q Two or three times.
And when you spoke to them those two or three times, did you tell them the truth?
A No.
Q Did you later get a lawyer?
A Correct.
Q Did your lawyer and you meet with the Government?
A Correct.
Q And did you eventually come in and speak to the Government?
A Correct.
Q After that, did you agree to plead guilty to the charges that you just discussed in Government Exhibit 7001?
A Correct.
Q And did you also agree at that same time to cooperate with

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

happens if you tell a lie when Mr. Bergrin is questioning you?
A No agreement.
Q Now, Mr. Jimenez, you testified that you had -- you worked in Mr. Bergrin's office for a period of time. Is that correct?
A That's correct.
Q And do you recall what years -- you said you started some time in 2002. When did you stop working for Mr. Bergrin, if ever, if you recall?
A Some time in 2005.
Q And was that because you went to jail on another charge?
A No.
Q No? Okay.

During the time you were working with Mr. Bergrin, while you were working in the office, did you attend any meetings between Mr. Bergrin and Mr. Curry other than the ones you've already discussed in this case?
A Yes.
Q And was there any particular meeting where they discussed a cousin's case?
A Yes.
Q Can you briefly describe that meeting?
A This day I was -- I was upstairs, Hakeem Curry comes upstairs, I was with Paul in the office. Hakeem Curry comes in, sits down. I was doing some -- I was doing something for Paul, and I got on the phone with my wife.

Because I'm, you know -- so I finished the conversation with my wife. I hear Paul telling Hakeem Curry: If there had been no witness, there would have been no case.

Q Now, let me back up.

Do you know what topic they were discussing at the time?

A Yes.

Q Okay. Now, prior to the meeting or during the meeting -- well, let me rephrase the question.

How do you know what they were discussing?

A Hakeem sat down and said what was going on with his cousin's case.

Q And after that happened, what if anything happened next?

A After that happened, that's -- I mean, it went into a little more -- more, you know, conversation. But I was on the phone. As I'm getting off the phone with my wife -- the only thing I heard was -- the last thing I heard was that.

Q All right. Now, do you recall whether or not you got sent for any files, to pick up any files during that meeting or prior to that meeting?

A During that meeting.

Q Okay. Would you explain that?

A I was down -- Paul sent me downstairs to get four files. Hakeem Curry and I believe Baskerville was one of the files.

Q Okay. And how sure are you that one of the files was

Baskerville?
A I'm 85 --
Q Sorry?
A -- 85 percent sure.
Q I'm sorry. I didn't hear what you said.
A I'm probably about 85 percent sure it was that file.
Q All right. Now, was Baskerville someone that you knew?
A Not personally.
Q So I'm just trying to get the timing of this down.
You said Hakeem Curry goes into Paul Bergrin's office. Is that correct?
A Correct.
Q And they're having a conversation?
A Correct.
Q When is it in relation to that conversation that you go get the files?
A Right after -- right after I got -- right after I got off the phone and I heard that, I went to get the files.
Q Okay. So that you get the files after the conversation takes place or before the conversation?
A After the conversation takes place.
Q Who else is in the office at this time?
A It was --
Q When I say "the office" -- well, let me back up and make sure I make this clear.

Where does this conversation take place?
A Inside Paul Bergrin's office.
Q Who else is in the office?
A Me, that's it.
Q Just you and Paul Bergrin?
A Right.
Q Was Hakeem Curry also in there?
A Yes, Hakeem Curry was there.
Q So where is Paul Bergrin at the time he's making -- having this conversation with Hakeem Curry?
A Sitting behind his desk.
Q And where is Hakeem Curry?
A Sitting right in front of him.
Q And where are you?
A I'm right next to them, right -- I was towards the window.
Q What distance away from --
A Probably a foot.
Q When you heard Paul Bergrin say this, again what did you say?
A There would have -- if there had been no witness, there would be no case.
Q And when he says that, what happens next?
A I got off the phone and I stood there and I was looking at Hakeem Curry to see what he was going to say. And he looks at me crazy.

Q Okay. When you say you looks at you crazy, describe what you mean by that.
A Like that serious look. Like, what am I -- you know, what am I doing? Like, if I'm staring at him, like.
Q Okay.
A Like, what are you looking at? I don't know.
Q All right. And what happened next?
A Then Paul says: Don't worry, he's all right.
Q Who does he say that to?
A He says that to Hakeem Curry.
Q And who was he saying that about?
A About me.
Q All right. Now, I just want to make sure I'm clear on one thing. When Paul Bergrin said the phrase that you just talked about regarding the witness in the case, are you on the phone or you're off the phone at that point?
A I'm off the phone.
Q Okay. So you just -- you were on the phone with your wife?
A Right -
Q -- during part of the conversation?
A Right.
Q You hang up the phone with your wife?
A Right.
Q And that's when you hear Paul Bergrin utter that phrase?
A Correct.

Q And what is it that he says?
A He says something to the effect that, if there would have been no witness, there would be no case.
Q And it was some time after that that he sent you to get files?
A Right.
Q And what files did he send to you get?
THE COURT: I think you've asked this, Mr. Gay.
MR. GAY: Okay, all right. I was just trying to clarify the chronology of it, Judge.
THE COURT: He said after he heard that he went and got certain files. Go ahead.
MR. GAY: Okay.
Q What did you do after you got the files?
A I came upstairs with them, and I left.
Q You dropped them off?
A Correct.
Q Who was in the office at that time?
A Hakeem Curry and Paul Bergrin.
Q Now, this conversation that you just talked about, do you remember when that occurred in relation to you trying to broker the deal between Hakeem Curry and Changa? Was it before or after?
A It was after.
Q Were you also present working in Paul Bergrin's office when

Hakeem Curry brought something into Paul Bergrin's office?
A Yes.
Q Would you describe what happened with that?
A It's a tracking device. I can't -- at this day I was in the office after hours with Paul. We hear something. The door opens downstairs, because it's got a little beep, beep, beep beep, beep when you open the door. But then there's another door that you have to go through that we keep locked and you can't get into the offices. So...
Q What did you do?
A So I go downstairs to see who it is. It's Hakeem Curry and somebody else.
Q Did you recognize the other person?
A No.
Q Can you describe the other person?
A Kind of tall, heavy guy.
Q Okay. And do you remember anything about hair style, skin tone, anything? Race?
A He was -- he was -- he was African.
Q Okay. And you said he was tall. How tall would you say he was, approximately?
A He was about six -- 6-foot two, something like that.
Q What happened. You let them in, and what happened?
A I let them in, I followed them straight upstairs. They was carrying something in -- in their hands.

Q Who was carrying something?
A The heavy set guy.
Q Who was with Curry?
A Correct.
Q Did you see what it was they were carrying?
A At first it looked like a bomb device.
Q Okay. Can you describe what the device looked like to you?
A It was -- it was like box. It was (demonstrating) --
Q If you can, you have to hold your hands a little higher so everybody can see it.
A It was like this (demonstrating).
MR. GAY: Indicating for the record, Judge, approximately 12 to 14 inches.
THE COURT: Yeah. In width.
MR. GAY: In width?
A Right.
Q How about in -- how about --
A And maybe about like that (demonstrating).
MR. GAY: That's about, say, eight to 10 inches?
THE COURT: That's correct.
Q And how about in height, about how high was it?
A Probably like that thick.
MR. GAY: Okay. Indicating two and a half to three inches for the record.
Q Do you remember what color it was?

A It was black.
Q Could you see what it was made of?
A It had -- there was batteries, big batteries in it.
Q What happened after they walked in with this -- with this device, where did they go?
A Straight into Paul's office, Paul Bergrin's office.
Q Did you follow?
A Yes.
Q What happened when you got in the office?
A As soon as we got in, Curry stated that they seen somebody putting something -- a white person putting something up underneath his car. Paul looked at it one time and he says, that's the feds. Put that shit back up in your car, put it back where you got it from or get it out of my office.
Q And what did you understand that device to be that they brought into the office?
A It was a tracking device.
Q Have you ever seen anything like that before?
A Not really.
Q What did you see anybody do with that tracking device at that point?
A He walked out with it, the heavy set guy, the one that was with Hakeem Curry.
Q What happened to Curry at that point?
A Hakeem, he -- he stood in the office with Paul.

Q What did you do after that?
A I continued doing what I was doing throughout the office.
Q Okay. Now, this tracking device that you just talked about, when did that incident occur in relation to the drug deal you tried to broker and the conversation you had about the -- if there would be no witness, there would be no case?
A Right after.
Q Did you learn that Mr. Curry was arrested?
A Correct.
Q And when, in relation to those other events that you talked about, did you learn of Curry's arrest, before or after?
A After.
Q After the tracking device?
A Correct.
Q How did you learn that Mr. Curry was arrested?
A He came in the office, and the girls, the receptionist, the secretary, they was all talking about it.
Q Did you later speak to Changa about Hakeem Curry's arrest?
A Correct.
Q And where was it that you spoke to Changa about Hakeem Curry's arrest?
A In his garage.
Q What if anything did Changa tell you about that?
A He was concerned about Hakeem Curry.
Q Did you tell him Cury was arrested, or he --

A He heard it.
Q He already knew?
A Yeah.
Q So what does he say?
A He said, what do I think about Hakeem Curry.
And is he going to start telling on people now or what's -- I mean, do you think that they're going to start -- or do you think they're going to start rounding people, you know -- arresting people.
I said, I don't know.
Q So he said he's concerned about Curry, and that Curry was going to do what?
A Is he going to start talking.
Q Talking about what?
A About the deals, you know, just --
Q What deals?
A The deals that they had.
Q What kind of deals?
A Cocaine.
Q So she's concerned about Curry talking to who about those deals?
A To the feds.
Q The "feds," being?
A FBI.
Q What did you say when he expressed that concern?

A I told him, I don't know.
Q Did he say anything else to you about Mr. Curry's arrest?
A No.
MR. GAY: Judge, I have no further questions at this time.
THE COURT: All right.
Mr. Bergrin, cross-examination, please.
MR. BERGRIN: Judge, could we have a five-minute break, please, so I can use the men's room?
THE WITNESS: I have to use it, too.
THE COURT: All right.
Ladies and gentlemen, we'll take just a short break and then we're going to continue a little later today. Thank you. If you could please step into the jury room.
Everyone, please be back in ten minutes promptly, please. Okay?
(The Jury leaves the courtroom.)
THE COURT: He has to use room. Okay?
Mr. Bergrin, if you're going to use the men's room, let's have him taken -- no, no, I thought he was -- okay, thank you, Marshal.
(Witness temporarily excused and escorted out of the courtroom by the Marshals.)
(A recess is taken.)
(Proceedings resume - Jury not present.)

R A M O N J I M E N E Z, resumes, testifies further as follows:

THE COURT: All right. Let's resume.
MR. BERGRIN: Thank you very much, Judge.
THE COURT: All right, everyone, please be seated. Go ahead, Mr. Bergrin.
MR. BERGRIN: Thank you.
THE DEPUTY CLERK: Please rise for the Jury.
(Jury present.)

CROSS-EXAMINATION

BY MR. BERGRIN:

Q Mr. Jimenez, when you came to my office to work, you were coming off a 10-year sentence that you had just did. Correct?
A Correct.
Q And your sister, Yolanda, in front of you asked me, essentially she pleaded with me to give you a job. Correct?
A Don't remember if she pleaded.
Q She asked me to hire you because you had no job. Correct?
A Correct.
Q And you had no prospects at employment?
A Correct.
Q You didn't even have a place to live or any food or any clothing to wear. Correct?
A Correct.

Q And Yolanda said in front of you: Please give my brother a job. He doesn't intend to ever go back to prison. Correct?
A Correct.
Q And you made me a vow and a promise that you would do nothing wrong and not get in trouble. Correct?
A Correct.
Q You said you're never going back again as long as I live. Isn't that what you said to me?
A Correct.
Q Give me a chance, give me the last chance I'm asking from you in my life. Correct?
A Correct.
Q And you started at 8:30 in the morning, and I made sure you were there at 8:30. Correct?
A Correct.
Q And you had to wear a shirt and a tie?
A Correct.
Q And you worked all day until 5 o'clock at night?
A Correct.
Q You did the mail room. Correct?
A Correct.
Q You did filing?
A Correct.
Q At the time that you came to work for me and for the first probably year, isn't it a fact that you took either a bus or

somebody picked you up?
A Correct.
Q And you couldn't afford even to buy a car or even pay transportation. Correct?
A Correct.
Q So when you told this jury after this meeting a couple of months, or within six months into your work at my place that you got into your car and you drove very fast to Isabella's, isn't it a fact that you were not being accurate?
A I don't think so.
Q Now, you said that you worked at my office. Correct.
A Correct.
Q And isn't it a fact that Marisol Perez, who lived in Belleville, was picking you up because you were living at Yolanda's and your mother's house?
A Correct.
Q And she would have to take you to work every day and drop you off on the way home. Correct?
A Correct.
Q And Marisol worked until 5 o'clock at night. Right?
A Right.
Q Now, you couldn't afford a car. Isn't that correct?
A At that time, that's a fact.
Q And at the time of the Changa meeting, isn't that a fact?
A No.

Q You said the Changa meeting occurred within the first six months of you working at my office. Didn't you testify to that a little while ago?
A Correct.
Q And isn't it a fact that you just testified that for a year you had taken public transportation and couldn't afford a car. Isn't that what you just said? The words that came out of your mouth a few minutes ago before this jury.
A Repeat that over again.
Q You just testified that for about a year into working at my office you could not afford a car. Isn't that a fact?
A I don't remember the whole year I could not afford a car. I had to have a car.
Q Isn't it a fact -- excuse me, I'm sorry for interrupting. Go ahead.
A I got car within the first six months through Changa.
Q Isn't it a fact that you just told the jury that for the first year you didn't have a car, you had to take transportation, somebody had to pick you up and drop you off? Isn't that what you said? Isn't that the words that came out of your mouth?
A That might have been the words that came out of my mouth but I really didn't understand the question. I need to understand the question that -- I understood at the beginning I didn't have the car when I first started working in the office.

But for a fact, within the first six months I did have the car. It was a Mitsubishi Mirage 2001.

Q And you had a driver's license also?

A No.

Q So you're telling us that you were driving around without a license?

A Correct.

Q What about insurance?

A I had insurance.

Q You had insurance?

A Correct.

Q Whose name was the car registered to?

A To Hannah Carroll.

Q Now, when you started working at my office you had specific job duties and you had specific times you had to report there. Correct?

A Correct.

Q Now, you testified that you were looking through files for names. Correct?

A Yes, that's what I do.

Q And you said that you noticed that there was a Hakeem Curry file?

A Yes.

Q What was Hakeem Curry charged with?

A I believe it was drugs, something. I mean, I looked at all

files. I mean, it was so -- it was too long, it's a long time ago and I ain't going -- I can't remember specifics. But I know --

Q Isn't it a fact that Hakeem Curry had no charges and had no file during the entire time that you worked in the office, sir?

A No, it was a Hakeem Curry file in that office.

Q What were the charges? Tell us about the charges. You're so familiar with Hakeem Curry, tell us.

A I cannot remember the charges at the time, exactly the charges. I couldn't tell you because it's been too long.

Q But you could remember messages and what recording said on his telephone eight years ago, that's what you could remember. Correct?

A Correct.

Q Now, you said that you were cut out of the deal. Correct?

A Absolutely.

Q And you said that you heard me asking for Changa's number, and I did it in front of you as a matter of fact. Isn't that right? Isn't that what you testified to?

A Yes.

Q And you also heard me saying to Changa or somebody to meet them at Isabella's at a certain time. Right? You can't remember the time. Correct?

A Correct.

Q This is in front of you where you had just been cut out of

a deal, I'm going say that in front of you where you had just been cut out of a deal?

A What do you want me to say? That's what I heard.

Q You testified that I left the door open and that you went in my office. Correct?

A Well, I'm in your office all the time. You know that.

Q You were in my office, coming in and out of my office. Correct?

A That's correct.

Q And I'm planning a meeting at Isabella's cutting you out of a deal with you coming in and out of my office in front of you?

A Correct.

Q When my office door is closed you can't come in. Correct?

A I can go in. I can go in when you in there when the door is closed.

Q Oh yeah? And you listened to --

A I'm not --

THE COURT: All right, all right, all right. No "oh yeah," and no back-and-forth.

Listen to the question. Answer the question.

And give him a chance to answer the question, Mr. Bergrin.

A Every time I knock on your door and I come in. You know that.

Q You come in even when I'm with a client, correct, having a

private conversation with a client?
A At times, sometimes if you said, come in, I come in. If you with a client, I'm not just going to go in there. Like, I knock. If you said it's okay. I come in. If you say, you know, wait a minute, then I just wait.
Q And my door has a lock on it also. Correct?
A Correct.
Q And when my door is closed, isn't it a fact that you are not allowed in there when my door is closed unless I give you permission to come in there?
A Correct.
Q Now, you said that you wanted to strangle Changa. Correct?
A Absolutely.
Q And you were so mad at Changa that you didn't want anything to do with him again. Correct?
A Correct.
Q You didn't have any words with me. Right?
A No, correct.
Q You said absolutely nothing me whatsoever. Right?
A Correct.
Q Now, you said there came a time when Changa came to my office and you had never seen him there before. Correct?
A Correct.
Q By the way, what's Changa's name?
A Jose something. I -- I mean, I wasn't never interested in

his last name, first name. I just knew him as Changa. A long time friend of the family. I got to really meet him when I was maybe -- as a matter of fact, I got to really meet him when I came home.

Q So you never met him before? A long time friend of the family?

A I heard of Changa but I never got to really meet him. He was doing fed time.

Q And when you met Changa, you never got to know his name, ever?

A You ain't going to say ever. I just don't remember.

Q But you can remember conversations that you had and specific places people were at a restaurant nine years ago?

A The reason for that is, because at the time --

Q You can answer the question "yes" or "no." I asked you a question.

A Yes.

MR. GAY: Your Honor, he didn't -- he can answer however he's going to answer. Mr. Bergrin asks a question. This witness should be able to answer however the question calls for.

THE COURT: Mr. Gay, you can have redirect. Okay?

MR. GAY: But --

Q Now, you said that Changa was there for a real estate closing. That's what he told you. Correct?

A Correct.
Q And isn't it a fact that according to a statement that you gave to the FBI, you looked for his file?
A Correct.
Q And what name did you look for the file under?
A Like I said, at the time I knew it, I just don't remember it.
Q How many hours did you spend preparing for your testimony with the U.S. Attorney?
A I never did.
Q You never met with the U.S. Attorney to prepare your testimony?
A Of course I met when the U.S. Attorney, but I don't know --
Q I just asked you a simple question. You said you never did. How long did you -- I guess you didn't understand that question either. Correct?
THE COURT: Mr. Bergrin, just ask him a question.
MR. BERGRIN: I'm sorry. I'll ask the questions.
Q How long did you spend with the Assistant U.S. Attorney to prepare for your testimony here?
A I don't know what you mean by "prepare," but about maybe a half hour, 20 minutes.
Q Twenty minutes to a half hour? When was that?
A Twenty minutes. I'd say half hour.
I don't have no watch, I don't have no time -- I can't

tell you exactly how much time we spent together.
Q And when was that?
A That was a couple of days ago maybe.
Q It's your testimony under oath that you didn't speak to him yesterday?
A Yesterday, did I speak to him?
Yes, I spoke to him yesterday.
Q So then why did you tell the jury "a couple of days ago"?
A Because I was here yesterday to testify. Before I was -- I was here before that. I was --
Q How many times have you spoken to the Assistant U.S. Attorney?
A About four times.
Q About four times?
A Yes.
Q And how long did you meet with him during the first session?
A The first session, like two hours.
Q The second session?
A About the same.
Q The third time?
A I'm not sure about the third.
Q And do you remember the dates or how long ago was the first meeting?
A I had -- I had them written down. I mean, I don't have

them now. I can't -- you know, I would tell you the first meeting is -- wow. I wrote it down somewhere.

Q What about the last meeting?

A The last meeting was -- it was in between the 15th -- let me see. I -- I didn't think it was that important to keep the dates in mind.

Q How long ago? How many months ago?

A The last meeting?

Q Yes.

A It was not too long ago. This month.

Q This month?

A Yeah. I would say probably last -- a few days ago maybe.

Q You just said you met with him yesterday. So the last meeting was now two days ago or yesterday?

A Yesterday I was here for court.

Q Did you speak to the U.S. Attorney yesterday while you were waiting to go to court?

A Yes.

Q So then the last meeting that you had with the U.S. Attorney was not two days ago, correct, it was yesterday?

A Correct.

Q Now, isn't it a fact that Changa was a relative of yours?

A No.

Q Then why did you tell the FBI that he was a relative of yours?

A He's like a relative.
Q Isn't it a fact that you said that Changa is a distant relative? Not "like a relative"; Changa is a distant relative? Not "like a relative." Isn't that what you said, the words that came out of your mouth?
A No -- I might have said that, I'm not denying it. It might have been true, I just don't remember that.
Q Now, your testimony was that I didn't know Changa. Correct?
A I don't remember saying that.
Q Didn't you testify that you don't know whether Paul Bergrin ever met Changa? Wasn't that your testimony a couple of hours ago, a short time ago?
A No.
Q You don't remember that? You don't remember those words coming out of your mouth: "I do not know whether Paul Bergrin ever met Changa before"?
A No. I actually said that you met -- you might have met Changa through my sister, through relatives. You don't -- I didn't know -- I didn't know if -- if you knew him prior to when I knew him, when I was out there, but I knew that you knew him through family members.
Q But then why did you tell the jury that Paul Bergrin may not have ever met Changa before? Why did you say that and why did those words come out of your mouth?

MR. GAY: Judge, objection. That's not what he said.
THE COURT: Well, ladies and gentlemen, it's your recollection that counts as to what was said by the witness. Okay?
So the objection will be sustained right now. But it's your recollection as to what you remember the witness has said before and what he might be saying now and whether they're consistent/inconsistent. It's up to you to make those kinds of determinations. Okay?
Q Prior to the meeting at Isabella's that you talked about, isn't it a fact that you had never seen Changa in the office?
A What do you mean, "prior to the meeting?" Before the meeting?
Q Before the meeting.
A Yes, I seen him in the office before the meeting.
Q You saw Changa in the office before the meeting?
A Correct.
Q Isn't it a fact that you testified that you had not seen Changa in the office before the meeting?
MR. GAY: Objection. That's not what he testified to.
MR. BERGRIN: It absolutely is, Judge.
MR. GAY: Judge, objection.
THE COURT: Mr. Bergrin, nobody --
MR. GAY: He can't --
THE COURT: Okay. I'll allow the question, but

instead of saying, "isn't it a fact," Mr. Bergrin, just ask him the question: Did he testify before to this effect.

Q Did you testify before that Changa, prior to the meeting at Isabella's, that Changa had not been in the office?

A Absolutely not.

Q Now, you testified that I asked you for Changa's number. Is that what you testified?

A Correct.

Q And did you give me the number?

A No.

Q Here you're being cut out a deal, according to you, and I'm asking you for Changa's number to set up the meeting to cut you out of the deal. Is that what you're testifying to?

A Correct.

Q Now, you testified in reference to doors being opened, doors being closed when you had the conferences with Hakeem Curry.

A That's correct.

Q Did anybody else walk into those rooms during the meetings with you and Hakeem Curry to see him?

A Absolutely not.

Q So you could go into a closed door and nobody would walk in, but you could walk into my office with the door closed?

A I mean, if you put the lock on it, nobody is coming in. If you don't put the lock on it, it's a possibility somebody would

knock and go in.
Q So now you're telling us that you remember locking the doors?
A No, that's not what I'm saying. I'm just answering the question that was asked.
Q Now, prior to you having the meeting in the conference room with Hakeem Curry, you had never spoken to Mr. Curry. Correct?
A I spoke to Mr. Curry twice, maybe -- yeah, twice.
Q Twice?
A Three times maybe.
Q And you can remember that you spoke to him twice or three times eight years ago?
A Correct.
Q And prior to you speaking to Mr. Curry and proposing to Mr. Curry about the cocaine deal, isn't it a fact -- well, tell us about the conversation that you had with him before that, before proposing the cocaine deal in the conference room. What did you talk about?
A That was the first conversation.
Q That was the first conversation you ever had with Mr. Curry, according to you?
A Well, besides the time you introduced us.
Q Now, I introduced you to Mr. Curry as Ramon, and then I said, you just finished 10 years for a drug case. Is that what I said?

A Right. You introduced me as your brother-in-law, Ramon, and that I just got finished doing 10 years, something like that.
Q So I'm going to tell Mr. Curry, according to you, about your background and you having a 10 year sentence and just finishing it. Is that what you said, the first I ever introduced Mr. Curry to you?
A Absolutely.
Q So it's your testimony that I introduced you to Mr. Curry and I said, by the way, he just finished a 10 year sentence?
A Absolutely.
Q Now, the first conversation that you have with Mr. Curry in the conference room -- correct?
A Correct.
Q -- how many times had you seen Mr. Curry prior to that?
A Quite a few times. I'm not going to say a specific number because I don't remember the number, so I know it was quite a few times.
Q And you never had any conversations with him. Correct?
A During the time that I was seeing him in the office?
Q Yes.
A No, just hi and bye, how are you doing? That's it.
Q And you walk up to Mr. Curry, you ask him to follow you into the conference room. Correct?
A Correct.

Q And never having a conversation with him before other than hello and good-bye, you propose a multi-kilogram deal. Correct? Is that your testimony?
A Correct.
Q Fifty, 25 kilograms. Correct?
A Well, he -- he's the one who said the number. I never said a number. I just said "weight."
Q And he proposed to you, never having a conversation with you before in your life, a 25 kilogram deal, and according to your price, at $21,000 a kilo?
A Correct.
Q Never meeting you before he proposed a $500,000 deal with Ramon Jimenez?
A That is correct.
Q And you never told me about that. Correct?
A That is correct.
Q And to the best of your knowledge, Hakeem Curry never told me about that. Correct?
A Best my knowledge, I mean I never seen him telling you that. No, you right.
Q So the answer is, no, he never told me about it. Correct?
A I'm not going to say he didn't tell you about it because I don't know. I mean, I don't know if he did or I don't know if he didn't. I mean -- I mean, if you approach -- I mean, you told me -- you call me up in the office, you telling me that,

did I ever talk about a deal with any of your clients.

I said yes.

Q Now, Mr. Jimenez, what was your telephone number back then?

A I just remember 484, that's the first three numbers I remember.

Q And do you remember what number you called Mr. Curry at?

A Absolutely not.

Q Do you remember what number you called Mr. Changa at?

A Absolutely not.

Q Were you ever shown any telephone records between you and Mr. Curry, any calls between you and Mr. Curry?

A Absolutely not.

Q Were you ever shown any telephone records of you and Mr. Changa?

A Absolutely not.

Q Did you ever turn over telephone records of yours back then?

A Absolutely not.

Q Now, you proposed this deal with Mr. Curry. Correct?

A Correct.

Q And you proposed it at, your testimony was, 21,000?

A That is correct.

Q Now, you talked to the FBI about this. Correct?

A Correct.

Q And I'm sure you told them about that. Right?

A Right.
Q And do you remember what price you told the FBI that you were proposing Mr. Curry?
A At 21.
Q And you're sure about that. Correct?
A Correct.
Q Because your memory is so perfect. Right?
THE COURT: Mr. Bergrin, we don't need that kind of a question.
Q Isn't it a fact that you told the FBI that you proposed a deal to Mr. Curry for $15,000 a kilogram?
A I don't remember that. I'm not denying it. I might have said that. I'm not -- I just don't remember.
MR. BERGRIN: May I have one minute, Judge? I'm sorry.
THE COURT: That's all right. Go ahead.
(There is a pause for Mr. Bergrin.)
MR. BERGRIN: May I approach the witness, your Honor?
THE COURT: Yes.
MR. BERGRIN: May I have an exhibit marked, please?
THE COURT: Mark it as D-9.
MR. LUSTBERG: Yes, your Honor.
MR. BERGRIN: Yes, Judge.
I'm showing the witness what has been marked D-9 for identification. It's a FBI 302 dated October 28th, 2010.

May I approach?

MR. GAY: Judge, I'm not clear what the purpose of this is.

THE COURT: Are you trying to refresh his recollection, is that it?

MR. BERGRIN: That's 100 percent accurate.

MR. GAY: Okay.

THE COURT: Ask him to read it and see if that refreshes his recollection as to whether it was 21,000 or 15,000.

BY MR. BERGRIN:

Q I ask you to look at paragraph 2, the ninth sentence down.

MR. GAY: Judge, also there's a "J" number at the bottom of it. If he could just put that on the record, what that number is.

THE COURT: Let's do that. As soon as he gets it back we'll do that.

(There is a pause for the Witness.)

A Yes.

Q Does that refresh your recollection?

A Absolutely.

Q So when you told the jury that you proposed a $21,000 price, were you mistaken?

A Absolutely not.

Q So then you lied to the FBI. Correct?

A Absolutely.
Q And isn't it a matter of fact that even when you began cooperating, you never changed that figure 15 to $18,000, and you never told the FBI, hey, you know what, I lied to you before I was cooperating? The amount of the price I proposed was 21,000 instead of 15 to 18, what I told you. Correct?
A In the beginning did I lie? Yes.
Q My question was: Even when you began cooperating, you didn't tell the FBI that you had lied to them and changed the amount from 15,000 to 21,000, as you say that you allegedly proposed the deal to Mr. Curry. Correct?
A I don't -- I don't get the question. I mean --
Q Did you ever tell the FBI after you became a cooperator -- you understand so far, sir?
A Yes.
Q After you became a cooperator, did you ever tell the FBI that, you know what, I lied to you about the $15,000 price per kilo, it was actually 21,000?
A After I started cooperating, yes, I came -- I came truth after that.
Q And that would be in the 302, correct, after you began cooperating?
MR. GAY: Objection, Judge. How does he know it's in a 302?
THE COURT: I agree. Sustained.

Q Now, you testified that there came time when I called you into my office. Correct?
A Correct.
Q And I said that you ad to go through me if you're setting up a deal. Correct?
A Something to that effect, correct.
Q And that's with Mr. Curry. Correct?
A That's the only one that I knew then that I spoke to.
Q And isn't it a fact that you never came back to me to set up any deals with Mr. Curry?
A That's correct.
Q And I never asked you or proposed anything to you, according to your testimony. Correct?
A Correct.
Q And I never received a dollar, according to your testimony, or according to what you told the FBI. Correct?
A That is correct.
Q But you continued to meet with Mr. Curry and propose deals. Correct?
A Meet with him? Again, I mean, I don't -- I never met with him again. The only time I seen him was that one time again in the office when he came to see you.
Q Well, your testimony was that you tried to call him several times. Correct?
A Exactly.

Q And you tried to call him to set up cocaine deals. Correct?
A That is correct.
Q And you didn't go through me like you testified, right? Correct?
A No, I did not go through you. That is correct.
Q Now, you testified that I was the boss. Is that what your testimony was?
A You the boss in the office. I mean, I was -- you my boss, you was my boss, I mean.
Q Wasn't Anthony Pope the managing partner of the firm?
A Correct.
Q And you testified in reference to clients. Weren't at least half our clients police officers and police unions?
A Half your clients?
Q Yes.
A I know -- I don't know if it was half the clients, but I know you had -- I know you had a case -- you had caseloads of law enforcements.
Q Now, your memory, name one police officer who we represented?
A I don't even remember. I don't -- I know the East Orange Police, one of the East Orange police, I know one of those. I know Bloomfield cops. I mean, this -- you had corrections officers. I mean, but I just don't remember.

Q Name one soldier that I represented.
A Sergeant Jamar Davis.
Q And you worked on that case. Correct?
A Correct.
Q Now, you testified in reference to the Baskerville file. Correct?
A Correct.
Q That I asked you to get the Baskerville file. That's what you said. Correct?
A That might have been what I said. But I know at the time you told me a lot of file -- I mean, you told me to get these files. I'm sure --
Q But your testimony before this jury was -- and it wasn't even that long ago --
A Right.
Q -- was that I asked you to get the Baskerville file. Wasn't that your testimony?
A That is my testimony, yes.
Q When you were interviewed by the FBI in this case after you became a cooperator, isn't it a fact that you didn't know the name of Hakeem Curry's cousin? Isn't that a fact, sir?
A At the point I didn't know -- I didn't remember his name. All I know, that his name started either with a "D" or "B" with a "V" in it. That's the only thing that I knew. I was always trying to remember what was that name in that file.

Q Now when you testified today you said the name "Baskerville."
A Exactly, that's what I said.
Q Who taught you the name Baskerville?
A That's funny, but I was -- I was remembering when my little son -- my little son -- (pause for the Witness).
THE COURT: Did you understand the question, Mr. Jimenez?
THE WITNESS: Yeah.
THE COURT: All right. Can you give us an answer?
THE WITNESS: Yeah.
THE COURT: All right.
THE WITNESS: I remember my little son and playing with my little son shooting a basket.
Q You named your little son "Baskerville"?
MR. GAY: Judge, if he can answer the question, please, without interruption.
THE COURT: No, no, no. He said he saw his son shooting a basket or something?
THE WITNESS: I used to play basketball with my son, and me remembering that the name "Baskerville" came to my mind, that's how I remember.
THE COURT: And when was that?
THE WITNESS: The other day.
THE COURT: What's that?

THE WITNESS: That was the other day.
THE COURT: The other day?
THE WITNESS: Yeah. The other day I remembered the name "Baskerville" by remembering playing with my son in Belleville, you know, shooting baskets.
BY MR. BERGRIN:
Q But whether the FBI interviewed you several months ago, you couldn't give them the name, you didn't remember the name. Isn't that a fact?
A That's a fact.
Q And as a matter of fact, how old is your son now?
A 6.
Q And you've been gone for the last five and a half years in prison. Correct?
A Correct.
Q Almost six years. Correct?
A (No response).
Q So how were you playing basketball with your son when, he was three months old?
A He was two.
Q Two months old?
A It's only been four years.
Q So you were playing basketball with your son at the age of 2?
A Right. I was showing him how to shoot the ball.

Q What kind of file was the "basketball" case?
A The "basketball" case?
Q The Baskerville case; what kind of file was it? What kind of case was it?
A I don't know. It could have been a drug case or it could have been a homicide case, I really don't remember. I mean, I looked through so many, I really don't remember.
Q Was it a federal or state case?
A I'm not sure.
Q Now, you testified that when you spoke to Mr. Curry, correct, that he not only proposed 25 kilograms to you but he asked you for 50 kilograms. Correct?
A Repeat that again.
Q You testified that not only does Mr. Curry tell you that he needs 25 kilograms from you, but then he said that he needed another 50 kilograms. Correct?
A He said if the deal goes through then he'll -- then there will be 50 after that.
Q And that would be a million dollars, correct, after meeting you and talking and having one conversation with you?
A It would be something like that.
Q And is that your testimony?
A Yeah, that is correct.
Q Now, you talked about your plea in Pennsylvania. Correct? And that -- excuse me. You took the case to trial. Correct?

A Correct.
Q Isn't it a fact that you always professed your innocence, saying that you didn't know that the cocaine was in the luggage?
A Yes.
Q So it's not a matter of you beating the case or believing, you claimed that you were innocent. Correct? That the cocaine was in somebody else's luggage. Isn't that what you told me and your sister; that you had no knowledge, that you were innocent?
A I might have said that. I don't remember it though. I'm not denying it, but like I said, I just don't remember.
Q You don't remember the case?
A I remember my case, I just don't remember telling you that, or my sister that.
Q You always professed your innocence on that case. Correct?
A Yes, that's why I took it to trial.
Q And you believed that you were innocent. Correct?
A I didn't believe I was innocent, I believed that I could have beat the case.
Q Didn't you just tell the jury ten seconds ago that you professed your innocence and you agreed? Isn't that what you just said? Isn't that the words that just came out of your mouth, not mine?
A Well, if I'm going to trial I'm -- I'm going to still

continue to be -- you know, stick with my rights as being innocent, but technically I wasn't innocent.

Q Do you know the difference between being innocent and protecting your rights

A Well, you innocent until you proven guilty, ain't it?

Q Isn't it a fact that you just said a couple minutes ago that you believed you were innocent because you had no knowledge of the cocaine in the trunk of the car?

A I had knowledge of the cocaine being in the car.

Q Then why did you say that a couple of minutes ago in front of this jury?

A I didn't say that.

Q Now, at the restaurant the only thing that you ever observed, according to your testimony -- and, by that the way, what month was this in, the meeting at the restaurant with Changa?

A I do not recall.

Q You don't recall the month?

A No.

Q What year was it?

A Some time in 2003.

Q 2003?

A I think it's around 2003.

Q 2002?

A '3.

Q 2003. Early in 2003 or late in 2003?
A I don't recall. I don't remember.
Q The only thing, according to your testimony, and you observed it from, according to you, across the street. Is that what you were saying, as you walked toward?
A Correct.
Q So -- and Summer Avenue is a two-way street. Correct?
A Correct.
Q And there's cars parked on the sidewalk and usually cars parked right in front of Isabella's. Correct?
A Correct.
Q And there's usually cars even double-parked. Correct?
A Correct.
Q And you could observe a meeting in the back of the restaurant from across the street, across Summer Avenue going two ways with cars parked on the curb, you could observe the back of the restaurant. Is that what you're telling us?
A Well, at the time there wasn't no double-parked cars.
Q And you remember that now?
A I know that. I mean, I see your car clearly in the front of the -- the restaurant.
Q My car was in front of the restaurant and you're across the street, then my car is blocking your vision --
A No.
Q -- into the restaurant. Isn't that a fact?

A No.
Q Now, you could see all the way to the back of the restaurant and you could see me back there from across the street?
A Yes.
Q And you don't remember when this meeting occurred. Correct?
A Correct.
Q Do you know what time it occurred?
A It occurred -- after hours.
Q And you're saying "after hours." Are you saying after 6:00, after 7:00?
A Yes, between that. Probably after 6:00.
Q And you testified that as you walked in the door, the first thing that you saw is Hakeem Curry coming out. Correct?
A Correct.
Q So then you couldn't see me shaking hands with Hakeem Curry if he's coming out of the door. Correct?
A Before I came through the door I seen you from a distance shaking hands.
Q You just testified a couple of seconds ago that the first thing that you observed was Hakeem Curry coming out of the door. Isn't that the words that just came out of your mouth?
A As I coming in the restaurant.
Q Now, you saw me shaking hands with who?

A With Changa, Hakeem Curry.
Q And where did this occur?
A Back, towards the back of the restaurant.
Q And this is when you observe it from across the street. Correct?
A Correct. As I'm walking to the restaurant, yes.
Q And then the next thing you know is you see Hakeem Curry coming out of the door. Correct?
A Correct.
Q You had no conversation whatsoever. Right?
A None.
Q You don't know how long any of the parties had been there. Correct?
A That is correct.
Q You don't even know if I just walked in, saw them and shook their hands. Correct?
A Correct.
Q Yes?
A Yes.
Q Now, Isabella's had video. Correct?
A Correct.
Q Did you ever ask anybody to obtain the video for you?
A No.
Q And this is after hours, so approximately 7:00, 8:00 o'clock at night?

A I won't say 7:00 or 8:00 o'clock at night. I mean, I know it was after hours. I don't recall the time.
Q And you don't recall the month, you don't know if it's dark at night. Correct?
A It's a little dark.
Q It's a little dark?
A It's a little shady. You could see the lights is on, you could see clearly.
Q From across the street?
As a matter of fact, you wear glasses, don't you?
A No.
Q Didn't you need glasses, Ramon? Are you telling us that you never wore glasses?
A For reading, yes, but I never wore glasses.
Q Isn't it a fact that you need glasses for distance?
A Actually for reading, yes.
Q For distance my question is. Are you telling us that didn't need glasses for distance?
A I don't know if I need glasses for distance now, but at the time I needed glasses for reading.
Q Now, you said that you were in a very bad mood. Correct?
A Correct.
Q And you were very upset?
A That is correct.
Q You felt betrayed. Correct?

A That is correct.
Q Yet, you continued in to have a soda and to hang out there?
A I think -- I think -- I think -- I didn't -- my plan wasn't to hang out. Like I say, my -- at the time I felt like grabbing Changa and strangling him, just like that.
Q But you didn't?
A But I didn't.
Q And you didn't even have one word between you and Changa. Correct?
A That is correct.
Q You proceeded --
A Well, not one word, I won't say one word, because he said something to me, and I just tell said, psssssss, you know, like -- I don't know if you call that a word, but...
Q And you didn't tell anybody about it, you just held it inside yourself. Correct?
A Correct.
Q And it was your testimony that you met Alejandro Castro two weeks later. Correct?
A I won't say two, exactly two weeks later, maybe in between that.
Q So that it could have been less time?
A It could have been less time.
Q Then why did you tell jury that you met him two weeks later through Changa?

A I didn't -- I don't -- I don't recall telling them two weeks. I recall saying between a week, two, maybe a week and a half.
Q So between one and a half weeks and two weeks you met Alejandro Castro?
A Yes.
Q And you met him at the Players Club, according to your testimony. Correct?
A Nope.
Q You met him at a bar. Excuse me.
A Correct.
Q Never having seen him in your life. Correct?
A Correct.
Q Never having been introduced to him in your life you met him. Correct?
A (No response).
Q Who introduced you to Alejandro?
A Changa.
Q Here you're doing cocaine business with Changa, according to your testimony. Correct?
A Correct.
Q And Changa is going to introduce you to somebody else so that you do business with him and not Changa?
A That's how it went down.
Q Now, when you met Alejandro, you said you were drinking

with him in a bar. Correct?
A Correct.
Q And that was the first time that you met him. Right?
A Correct.
Q And then when did he propose to you doing multi-kilogram cocaine deals?
A Who, Alejandro?
Q Alejandro.
A He didn't propose making deals with me, just told me that if I needed anything as far as kilograms, if I needed anything, let him know, he'll get it for me.
Q And that's not proposing a deal to you?
A Well, you said "multi-kilograms."
Q He said, whatever you need he'll get, according to you. Correct?
A Correct.
Q As many kilograms as you need. Correct?
A Basically.
Q And this is right after meeting this guy named Alejandro, correct, right after meeting Alejandro. Correct?
A That is correct.
Q And Alejandro knows nothing about you or your background. Right?
A Well, I'm not sure if he knew anything about me or my background, but I couldn't answer that.

Q Well, you had only spent a few -- not long with him. Correct?
A Yes, but people have a habit to, you know, talk still. Like even Changa, you know, Changa could have say something about me, I don't know.
Q Well, he acted -- did he act like he knew you?
A He acted really friendly. I mean...
Q But he mentioned nothing about Changa mentioning anything about you. Correct?
A Not that I recall.
Q And Changa was your supplier. Right?
A Correct.
Q So Changa was making money off of you. Right, Mr. Jimenez?
A Correct.
Q And you were giving Mr. Changa good business. Correct?
A That is correct.
Q And you were making a lot of money with Mr. Changa. Correct?
A That is correct.
Q Then how come you couldn't afford a car?
A Changa was the one who gave me the car.
Q And that was an old beat up 2001 Mitsubishi, as you testified to. Right?
A Right.
Q And isn't it a fact that you were having trouble paying

your rent for your family, that you had to live with your mother in Yolanda's -- your sister's house?

A Absolutely.

Q And you're making all this money on kilograms like you just testified, what a big supplier like Changa, according to you. Correct?

A I wasn't making -- Changa was making a lot of money off of me, I was making the peanuts.

Q Oh, so Changa is supplying you with all kinds of cocaine and multi-kilograms and you're only making peanuts. Is that what you're testifying to?

A That's exactly what I said.

Q So that you're going to take the risk of dealing multi-kilograms of cocaine and you're only going to make peanuts, according to you, to the point where you can't even afford your own apartment, you have to live at home?

A I didn't say that I was making multi-kilograms with Changa. I said I was making the peanuts with Changa. Changa was making the money. Before I ever met E.T. Hak I was small time.

Q Isn't it a fact that change Changa only dealt in kilograms, according to your testimony? Isn't that what you told this jury, that - Changa --

A Changa --

Q Excuse me. Let me ask the question, please.

Isn't it a fact that you told the jury that Changa

deals only in multi-kilograms, he was a big drug dealer? Isn't that what you told this jury under oath?
A Exactly, that's what I said.
Q So now you're telling us that you were dealing in small amounts with Changa?
A If I -- if I -- if I needed 300 grams, I needed 200 grams, I need a half -- if I needed five ounces, I get it from Changa. Changa ain't got no problem breaking something down for me back then. I wasn't moving a lot of keys like you explaining it now.
Q Did you ever tell the FBI that you were moving 5 kilograms a week for Changa? Isn't that what you said?
A Like, I said, I might have said that in the beginning.
Q Isn't that what you said to the FBI, that you were moving at least 5 kilograms a week with Changa?
A I might have said that in the beginning but that was part lie.
Q That would have meant a lot of trouble for Mr. Changa. Right? If you're telling the FBI that this individual is supplying you with multi-kilograms, 5 kilograms of cocaine every week, correct, 10,000 grams a week, you tell them that, he's facing a lot of trouble. Right?
A Might, might be facing a lot of trouble.
Q You're telling us that you don't know that?
A Might be facing a lot of trouble.

Q So you're trying to get Mr. Changa into trouble with the FBI by saying that about him. Correct?
A No.
Q Then why did you tell them that?
A It's the truth.
Q It's the truth?
A That is the truth.
Q That you were moving 5 kilograms with Changa every week?
A No, that Changa is a drug dealer.
Q But you told the FBI that you, Ramon Jimenez, was moving 5 kilograms a week through Changa. Isn't that what you told them? Isn't that the words that came out of your mouth, Ramon Jimenez?
A I don't recall. I might have said that, I just don't recall.
Q Would it refresh your memory if you were to read the report on it?
A Yes, it will.
MR. BERGRIN: May I have one moment, your Honor?
THE COURT: Yes.
(There is a pause for Mr. Bergrin.)
MR. BERGRIN: Excuse me a second.
Your Honor, I'll move on.
THE COURT: Let us know if you have that 302 report.
Q Now, you kept getting cut out of deals. Correct?

A What you mean, "keep getting cut out of deals"?
Q Well, you got out of a deal with Changa. Correct?
A Correct.
Q You got cut out of a deal with Alejandro. Correct?
A Correct.
Q Everybody is cutting Ramon out of deals, is that your position?
A I don't understand the question.
Q Now, the second time, the second time you meet Alejandro Castro, he tells you -- second time or the third time at a bar, the Players Club -- he tells you that he just got finished doing a 25 kilogram deal. Correct?
A That is correct.
Q Was that the first time or the second time you had met?
A That is the second time we met at Players Club.
Q So the second time, this drug dealer meets Ramon Jimenez at the Players Club -- correct?
A That is correct.
Q -- you have no knowledge as to the fact that he knows anything about you. Right?
A We -- well, from the first time we hung out all night to the next day, I mean we spoke a lot on the first day.
Q He knows nothing about your background other than meeting you one time at a bar. Correct?
A From the beginning in the bar at Broadway and Verona?

Q Yes.
A I'm not sure if he did; I'm not sure if he didn't.
Q And he's going to reveal to you, not knowing you for a very long time, that he just did a 25 kilogram, a 50 pound deal of cocaine. Isn't what you're telling us under oath?
A Repeat that question, again, please.
Q Not knowing you for a long time, this big drug dealer is going to reveal to Ramon Jimenez that he just did a 25 kilogram, 50 pound deal. Is that what you're telling us?
A Yes.
Q And you say to him -- he says with a black guy. Correct?
A Correct.
Q And you say to him the name.
What name did you say?
A Hak.
Q And he says he thinks that's it. Is that with what you're telling us?
A That is the truth.
Q So the second time that you ever meet with this guy, you're drinking with him and he's going to tell you about a 25 kilogram deal, and he's going to tell you who he sold the kilograms of cocaine to?
A That's actually the -- yes, the second time that we went out, yes. But technically it's the third time from the bar. But without counting the bar it would be the second time, yes.

Q The second time. And he's going to tell you who his customer is, a big drug dealer?
A Well, he wasn't too sure who he -- who he really was.
Q Well, he sold him 25 kilograms of cocaine, according to you. Correct?
A Correct.
Q So that's at least a half a million dollar deal. Right?
A Correct.
Q And he's not sure about who he is, he's selling cocaine to individuals for half a million dollars and doesn't know them?
A He went through Changa.
Q And where was Changa at the time?
A I'm not sure.
Q Changa was still around. Correct?
A Correct.
Q And according to you, Changa -- Hakeem Curry was Changa's customer according to you. Correct?
A Repeat that again.
Q According to you, Changa was Hakeem Curry's customer, not Alejandro Castro. Correct?
A Correct. That's -- I mean, that's -- later on that's what -- that was my understanding.
Q Now, you said that you attended a meeting. I invited you to a meeting between me and Hakeem Curry. Is that what you're saying? Upstairs in my office when you were on the phone with

your wife.
A It wasn't no invitation. I was there.
Q You were there?
A I was there.
Q And in front of you, you hear me say: If there had been no witness, there would be no case. Correct?
A Correct.
Q When did that -- when did that occur?
A When Hakeem came up and he asked you -- well, I'm not sure of the time limit, I'm not sure how many minutes went by. When he came in, he sat down and started talking to you. I was on the phone. Got off the phone. The last thing I heard was you saying that.

The reason I remember that, because of the Hakeem look that he gave me that day.
Q And that was eight years ago that you remembered that. Correct?
A Absolutely.
Q And for eight years you had said nothing to anybody. Correct?
A Correct.
Q You kept it inside of you all these eight years. Right?
A There was nothing to think about. I mean, why would I want to keep -- I mean, it was something that -- it wasn't something that I wanted to remember, it was just something -- his face

made me remember certain things that day, that's it.
Q As a matter of fact, you had had at least four to five meetings with the FBI prior to that memory being jogged. Right?
A Repeat that again.
Q You had had at least four to five meetings with federal agents trying to help yourself out and your sister out prior to your memory being jogged, correct, and you remembering the "no Kemo" -- excuse me -- the words: No witness, there would be no case?
A Yes, that probably would be accurate.
Q And you had spent hours upon hours with them. Correct?
A Hours upon hours?
Hours? I don't know how many hours. I probably say like two hours, two and a half hours.
Q Wasn't each meeting like three hours?
A I couldn't say three hours. I couldn't --
Q At least two hours. Correct? Is that fair?
A At least two hours.
Q So you had spent a lot of hours with them before your memory was jogged. Correct?
A I -- I don't know if that's what I would say, but it would be close to that.
Q Was the fact that you're a career criminal facing very extensive periods in custody, maybe the rest your life, did

that jog your memory a little bit?
A Spending a lot of time in prison. I don't know about the rest of my life.
Q Well, you were doing a five-year term at Midstate Correctional Center. Correct?
A Correct.
Q For drugs. Correct?
A Correct.
Q And here you are, you were moving multi-kilograms, according to your testimony. Correct?
A I won't say moving multi-kilograms. I mean, I know the people that could supply me to move that type of weight, yes.
Q Well, you were moving heavy weight. Correct?
A What's "heavy weight" to you? I mean, I don't understand.
Q I'm asking you.
You were moving weight. Correct? You told the FBI you were -- you told the FBI you were moving multi-kilograms. Right?
A If -- if I -- if I could get somebody to buy multi-kilograms and if I could get the multi-kilograms for them, yes, I could move that for them.
Q You told the FBI that you were moving multi-kilograms of cocaine, correct, with Changa?
A In the beginning I said a lot of things.
Q So you kept lying and lying and lying. Correct?

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.

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:

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- and -
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for the Defendant

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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

need to. I thought about this, but we'll have more time.

MR. GAY: Absolutely.

(Mr. Jimenez is escorted into the courtroom by the Marshals.)

R A M O N J I M E N E Z, recalled as a witness, having been previously duly sworn, is examined and testifies further as follows.

THE COURT: All right. We're ready?

We'll bring out the jury.

Okay.

THE DEPUTY CLERK: Please rise for the jury.

(Jury present.)

THE COURT: Please be seated. Welcome back. Good morning.

All right. Mr. Bergrin, you're on cross-examination.

MR. GAY: Your Honor, if I could just ask the witness to make sure moves up closer to the microphone so everybody can hear what he says.

Thank you.

THE COURT: All right.

CROSS-EXAMINATION CONTINUES

BY MR. BERGRIN:

Q Good morning, Mr. Jimenez.

A Good morning.
Q Now, yesterday I had asked you about the fact of your first meeting with federal agents was on October 28th, correct, of 2010?
A Yes, correct.
Q Now, did you take notes during that meeting?
A Yes.
Q And I'm sure you provided those notes to the Office of the United States Attorney. Correct?
A No.
Q What did you do with those notes?
A I kept it in the cell.
Q Where are those notes today?
A They either in my papers or I might have maybe thrown it away.
Q Did you take notes of any of the other meetings?
A I wasn't there actually taking the notes, but I was taking notes in my head and then going back, writing down as much as I could remember.
Q And you were writing down what they told you as well as what you told them. Correct?
A That is correct.
Q And you're telling us that you might have thrown those notes away?
A Right. Because I ain't needed them no more. I mean, I

really didn't -- I might have kept maybe a few notes.
Q Well, you knew that you were testifying today. Correct?
A Correct.
Q Did you ever tell the Assistant United States Attorney, Mr. Gay or Mr. Minish, that you had notes pertaining to any of these meetings and conversations?
A Absolutely not.
Q Did you tell your attorney?
A Absolutely not.
Q So you kept these notes to yourself all this time for the last year?
A Correct.
Q Now, when you were visited by federal agents on October the 28th, did they tell you that you should be truthful?
A Correct.
Q And they told you that you should be up front and honest with them. Correct?
A Correct.
Q And they made you certain promises. Correct?
A Correct.
Q Well, they mentioned to you that they wouldn't charge you with any crimes. Right?
A Right.
Q And they said that they wouldn't charge you for all the drug-dealing that you had done. Correct?

A Correct.
Q And you believed them. Right?
A Right.
Q And you also told them that you're going to be honest with them because you want to help your sister, Yolanda. Correct?
A That is correct.
Q And, of course, you love your sister. Correct?
A Correct.
Q The same as you love your family. Right?
A Correct.
Q And you are very close with your sister as you are with your family. Right?
A Right.
Q And you wanted the best for her. Right?
A Right.
Q And you knew that one way that you could help her is by speaking to the agents on that date of October the 28th of 2010. Isn't that a fact, sir?
A Correct.
Q Now, you knew that if you lied to them, that you could potentially face new federal charges, correct, lying to a federal agent in the course of an investigation. Right?
A Run that by me again, please.
Q Yes, sir.
You knew that you had to be open and honest and

truthful with the agents on October the 28th when they came to see you. Correct?
A That is correct.
Q And you knew also that you could have faced additional charges if you had lied to them. Right?
A Well, I didn't think I was going to face additional charges for this for lying.
Q So you thought that you could just get away with lying and saying anything that you wanted to the interviewing people?
A Exactly, yes.
Q And that you could say anything that you want at any time with them, correct, because you had multiple meetings with them?
A No. I mean, I ain't think I could just say anything, but at the time I lied.
Q And you kept lying. Correct?
A Well, to one point I didn't.
Q Now, you had a lot of meetings with them. Right?
A In the beginning?
Q Yes.
A I don't know what's "a lot." I mean, three, two -- about three meetings in the beginning.
Q And during those three meetings, each time you told them that every word out of your mouth is the truth and the whole truth, so help you God. Correct?

A No.
Q You told them that you're being honest and truthful with them, didn't you?
A Basically. Not like that, but I just kept talking.
Q You told them that you're being honest. You didn't tell them that you're lying to them. Correct?
A Correct.
Q And they told you and they kept repeating that "we want the truth." Correct?
A At times they would say that.
Q And at times they would say, "don't tell us the truth"?
A No.
Q So that they would tell you that all the time then. Correct?
A You could say that.
Q How did you know when to tell them the truth and how did you know when to lie to them?
A The reason I lied was because I just wanted to get out the room, I just wanted them to leave me alone.
Q You just wanted them to leave you alone?
A Exactly.
Q Then how come on November the 1st of 2010, three days later, you called them to ask them to please come back and see you again?
A Three days later?

Q Yes, three days later.
A After what meeting is that?
Q That's after the October the 28th of 2010 meeting. Didn't you call them back approximately three days later, four days later on November the 1st?
You're saying that you didn't call them?
A I might of have. I just don't remember for what reason I did that.
Q Well, you're saying now that you just wanted to get out of the meeting so you lied and made things up. Correct?
A That is correct.
Q And that was during a three-hour session. Right?
A Maybe about that. I don't know.
Q And that's during the fact that they're telling you that you could help your sister, and you're saying that you want to help your sister. Correct?
A Correct.
Q And that's after them telling you that you could be charged with a federal crime of drug-dealing where you face a lot of additional time, and then promising that they're not going to charge you or arrest you. Correct?
A Run that by me again.
Q You knew that when you met with them the first time that they had promised you and guaranteed you that you're not going to be charged with the federal crimes of drug-dealing that you

were involved in?
A I didn't know, I don't know about the guarantee. But they -- they definitely told me that I wasn't being charged, investigated or things to that nature.
Q And that's representations that they made to you. Correct?
A Correct.
Q And that's only if you talked to them. Only if you talked to them. Correct?
A I don't understand, "only if I talked to them."
Q They told you that they will not charge you with the federal crimes of drug-dealing only if you talk to them or cooperate with them. Correct?
MR. GAY: Judge, if we could be clear on what meeting we're talking about here.
MR. BERGRIN: I'm talking about the first meeting, Mr. Gay, October 28th.
MR. GAY: Okay. Thanks.
MR. BERGRIN: And that's J04032.
MR. GAY: No, I don't need that, I wanted to make sure it was clear what meeting you were talking about.
A I mean, if that's what I wrote down, then that might have been it. But I just didn't remember off --
Q Well, that meeting was only approximately -- that meeting was approximately less than a year ago. Correct? It was on October 28th of 2010, less than a year ago?

A That is correct.
Q And you don't remember less than a year ago what was said or what was done during that meeting?
A That's why I wrote it down. I wasn't going to remember, worrying that words.
Q That's one of the problems you've always had; you don't have a good memory. Correct?
A I have a good memory but not remember everything word by word. I mean, the memory -- it's just certain things that clicks, you know? Certain things, certain things that makes it clicks. It ain't something that you want to remember, but it's going to -- it's going to be there.
Q You had that meeting less than a year ago, as we established. Correct?
A Correct.
Q And when you had that meeting, were you asked: Do you want to cooperate?

And did you say that it will incriminate me in criminal activity, but agreed to do so for the sake of your sister?

A It will incriminate -- what? What was that again?
Q Did you agree to cooperate to help your sister?
A Correct.
Q And you agreed to cooperate to help yourself also. Correct?

A That is correct.
Q So that when you sat down with the agents on this day of October the 28th of 2010, less than a year ago, you knew that the information that you gave -- and please tell me, Mr. Jimenez, if I'm not making myself clear or you don't understand, please, sir -- the information that you gave would help your sister and also help yourself?
A Correct.
Q Now, you were in jail in Mid-State Correctional Facility. Correct?
A That is correct.
Q Doing a 5 year term at New Jersey State Prison. Correct?
A That is correct.
Q You had multiple, multiple convictions, some of them involving violent offenses. Correct?
A Violence?
Q Yes, violence.
A I -- I won't call it violent. I mean --
Q Well, you don't call robbery violent?
A Yeah, I would call that violent.
Q Oh, you wouldn't call it violent.
A But you say "multiple."
THE COURT: He said he would call -- you would call robbery violent. Correct?
THE WITNESS: Yes.

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?

A That is correct.
Q Now, you used the name Michael Jimenez?
A Yes, I did.
Q Raymond Jimenez?
A Yes, I did.
Q Ramon row -- Roman Jimenez?
A I don't never -- I don't recall using that name. That might -- I might have had spelled it wrong, but it was always Ramon Jimenez.
Q How about Herrberto Garcia?
A Correct.
Q Huberto Garcia?
A Who?
Q Huberto, H-u-b-e-r-t-o, Garcia?
A No, just Herrberto Garcia.
Q How about Garcia Herriberto?
A No.
Q So if those appeared on your criminal case history, those would be inaccurate?
A Possibly. I don't recall. I don't --
Q You understand you're under oath. Correct?
A Correct.
MR. BERGRIN: Your Honor, may I approach the witness?
THE COURT: Yes.
MR. BERGRIN: This is J04561, sir.

MR. GAY: What's the purpose of this, Judge, to refresh his recollection?

MR. BERGRIN: Yes, to refresh his recollection.

THE COURT: Go ahead.

MR. BERGRIN: Thank you, your Honor.

Q I'm going to show you what's been marked J04561, Mr. Jimenez, and ask you to look at these names that appear on your history.

THE COURT: Is that going to be D-10?

MR. BERGRIN: It would be D-10, sir.

THE COURT: D-10.

(There is a pause for the witness.)

Q And that has your Social Security number, correct, and your name?

MR. GAY: Judge, if it's to refresh his recollection, I don't understand what this question is about.

THE COURT: I agree. Sustained.

You can look at that. And does that refresh your recollection about whether or not you used any of the names that you don't have a recollection of having used?

THE WITNESS: I only recall using Huberto Garcia once.

I mean, that's a lot of times. It's like four times. I never used it four times.

Q So you may have used it but you just don't recall as you testified today. Correct?

A It's a possibility. But from my recollection, I know I used it once.
Q Now, yesterday you testified that you had only been down for four years. Correct? Isn't that what you said?
A Four and some change.
Q Now, isn't it a fact that you had been down in prison or in jail since October the 7th of 2006 when you were arrested in Belleville, New Jersey?
A No, I was out on bail.
Q You were out on bail?
A Correct.
Q And then you picked up another charge and you were arrested again. Correct?
A Correct.
Q And how much time passed from that one arrest to the other?
A Something like eight months. I don't know, I can't remember.
Q Now, you also testified that -- how old is your son Goimanny?
A He's going to be 7 December 1st.
Q He's going to be 7.
So you spent about a year and a half with him being out of jail?
A From what time to what time?
Q From the date that you were arrested on October of 2006

until now.
A If that's the calculation, possibly.
Q And --
A He was 2 years old when I left him.
Q Of course you want to get home as quick as possible, correct, to be with your son?
A That's correct.
Q And to be with your family. Right?
A That is correct.
Q When you spoke to the agents on October the 28th of 2010, one of the things that you had in your mind is getting home as quick as you can to your family. Right?
A Yes.
Q Now, when you spoke to them on October the 28th of 2010, you said that they had made certain promises to you. Did you ask them for those promises in writing?
A I'm not sure. I'm not sure. Maybe I did, maybe I did. I just don't recall.
Q Now, when you talked to them on October the 28th of 2010 at your first meeting, you gave them certain information. Correct?
A Correct.
Q And you gave them certain information that would hurt your sister. Correct?
A No, I don't -- I don't recall.

Q Well, didn't you tell them that you were paying your sister or giving your sister 800 to a thousand dollars every two weeks from drugs, and that you let her know about it?
A I don't recall.
Q Didn't you tell your sister that you were dealing drugs and that you're going to help her out?
A I don't recall.
Q Didn't you tell them that your sister got involved in the drug business through Alejandro Castro?
A Yes.
Q So you're telling them things about your sister less than a year ago, and you're telling us that you don't recall that?
A Correct.
Q And these are things that would hurt your own sister that you love. Correct?
A That is correct.
Q And you're also telling them things about yourself and the fact that you essentially were dealing drugs and involved in drugs. Correct, sir?
A That is correct.
Q Now, you're not going to lie to them about your sister being involved in drugs and about you being involved in drugs. Correct?
A Correct.
Q Now, you told them other things about your involvement.

Correct? And they asked you questions about me because they said that they're there to find out about Paul Bergrin. Correct?

A That is correct.

Q And they said that they need a witness against me and that you're their man. Correct?

A That could be accurate.

Q Can it be accurate or is that what was said to you? I'm not asking, "can it be accurate?"

A That -- that is correct.

Q So when you said to us a couple of seconds ago "that could be accurate," why did you say that?

A Because I remember -- I remember certain things to that nature. I mean, if I read it I would know for sure.

Q Now, before you testified today you had a chance to speak to the Assistant United States Attorney. Correct?

A Correct.

Q And you had a chance to -- did you review the notes that you had taken about these meetings when you went back to your cell before you came here to testify?

A No.

Q Did you at any time review the reports that had been written about you?

A No.

Q Now, you testified yesterday that Changa was a family

friend. Correct?
A Correct.
Q But you told federal agents on that date of October the 28th that he's a relative of your family. Correct?
A I don't remember saying a relative of my family. I'd say he's like a relative to the family.
Q But that's not what you told the agents. And I showed you that yesterday. Isn't that right? You told them he's a relative of the family. Isn't that a fact?
A That's way it says in the report, but I still do not recall just saying a "relative to the family."
Q And, so you don't remember saying that?
A I remember saying he's "like a relative" to the family.
Q So you're telling us that this report is incorrect about what it says?
MR. GAY: Objection, your Honor.
THE COURT: All right. Sustained.
Q Now, you also told the agents that you had been selling 5 kilograms a week in the Newark area of cocaine. Correct?
A That is correct.
Q And you also told them that you believed that I hired you as a favor to your sister. Right?
A Correct.
Q And you told them that you had begun reviewing files, client files of mine behind my back to determine who the

biggest drug dealers were so you could expand your drug business. Correct?

A I don't recall.

MR. BERGRIN: May I approach the witness, your Honor, with J04032.

THE COURT: Yes. Is that marked as an exhibit.

MR. BERGRIN: It is marked as D-9, sir. Can I approach, your Honor?

THE COURT: Yes, please.

BY MR. BERGRIN:

Q I'm going to show you, sir, what has been marked as D-9 for identification, and I ask you to look at the second paragraph, the part I just pointed out, sir.

A All right.

Q Have you had an opportunity to review it, Mr. Jimenez?

A Yes.

Q Thank you.

Did you say that to the agents or didn't you?

A If it's written, I might of have said that, yes.

Q And if it's written, you might not have said it. Correct?

A I just do not recall it. I mean --

Q So you don't recall what you said or what words came out of your mouth to the agents less than a year ago. Is that what you're telling us?

A You got to remember, in the beginning --

Q I'm just asking you -- I asked you a question --
MR. GAY: Judge, he's trying to answer the question.
THE COURT: All right. I'll allow it.
Go ahead, Mr. Jimenez. Go ahead. In the beginning, being when, Mr. Jimenez?
THE WITNESS: The first meeting on the 28th. I said part truth and then there was part lie.
Q But you had --
A The part lies I cannot remember because they was lies, it was something that just popped up. And I, like...
Q So you felt it was okay to just, whatever popped into your head to say to the agents, whether it was the truth or not?
A Well, it was just because I wanted to leave. I wanted to get out the room at the time.
Q You wanted to get out of the room at the time although you gave them information that essentially hurt your sister real bad. Correct?
A The information -- if it was a lie they could have went and investigate the information. The information was going to come back with nothing. I mean, even if I did lie, I wasn't -- I wasn't thinking that they could charge me for lying. The lie is a lie, and that's the way I was just thinking. I would just say, well, if they come back, they go investigate, it's not going to come back -- it's going come back with no results.
Q So in your mind you gave them information that hurt your

sister alleging that she was heavily involved in drug-dealing, and you didn't think that it was any big deal?

A At the time, no.

Q And you gave them information about what you were thinking about your drug-dealing because you didn't think would it hurt you either. Is that what you're telling us?

A That's exactly right. It's just like I say, they could go out investigate it, it's not the truth, you cannot prove something that is not -- is not there.

Q They told you that they're going to rely upon what you tell them. Correct? And it has to be the truth. Isn't that a fact, sir?

A That is a fact.

Q And you understood the words that came out of their mouths. Right?

A Correct.

Q Yet, you gave them facts that you just didn't care about, just made up out of the clear blue sky?

A It wasn't no fact, it was just a lie.

Q Now, you also told them that you had approached E.T. Hak, known as Hakeem Curry. Correct?

A Correct.

Q And isn't it a fact that you told the agents that Hak said that he would need not 25 kilograms a week like you testified yesterday, but he proposed to you that he wanted -- that you

sell him 50 kilograms a week the first time you ever met him, the first time you ever proposed this to him?
A Again, part true, part lie.
Q And didn't you tell him also that you contacted -- that Changa contacted Alejandro Castro. Isn't that what you told him?
A Run that by me again.
Q Didn't you also tell them during this first meeting of October 28th, that Changa contacted Alejandro Castro and Castro said his crew could provide 50 kilograms a week?
A I might have said that, yes.
Q And that was a complete lie also. Correct?
A I won't call it a complete lie. I mean -- that's a difference there.
Q On October 28th of 2010 when you spoke to the agents, you were dealing with Changa. And according to your testimony yesterday you hadn't even met Alejandro Castro. Isn't that a fact, sir? Isn't that what you testified under oath sworn on that stand yesterday?
A Run that by me again, please.
Q You told the agents on October the 28th of 2010 that Changa contacted Alejandro Castro, and Castro said that his crew could provide that quantity. Isn't that what you told the agents on October 28th of 2010?
A I might have -- yes, I might have said that. I just don't

remember it, but if it's on there, yes.
Q You told us yesterday though, when you spoke to Changa you hadn't met Alejandro Castro for at least three to four weeks after that. Correct?
A Three to four weeks?
Q After the meeting at Isabella's Restaurant. Isn't that a fact? Isn't that what you testified to yesterday?
A I met Alejandro after -- yes, it was after the fact.
Q So then when you proposed this to Mr. Curry, the deal, before the first meeting at Isabella's Restaurant, Changa hadn't even had any contact with Alejandro Castro. Isn't that a fact?
A Before I proposed that to Hakeem Curry?
Q You told the agents that on October the 28th of 2010 at the meeting. You understand so far, sir?
A Correct.
Q You told them that you had a meeting with Hakeem Curry. Correct?
A Correct.
Q And you said during this first meeting with Hakeem Curry that Hakeem suggested to you 50 kilograms of cocaine. Correct?
A He might of have said that.
Q Was that the truth or was that a lie?
A It's part lie.
Q Part lie and part truth?

A Yes.
Q Isn't it a fact that you proposed to Hakeem Curry dealing drugs?
A I proposed to him on the weight, he provided the number.
Q Well, you went to Hakeem Curry first. Correct?
A Correct.
Q So Hakeem Curry didn't come to you and propose any drug deal. Correct?
A Correct.
Q And according to your testimony yesterday, you proposed a 25 -- 25 kilograms. Correct?
A I proposed the weight. He provided the number 25.
Q Then why did you tell the agents that when you spoke to Hak he said he needed 50 kilograms? Why didn't you just tell them the 25 kilograms if that was true?
You're making a face. Can you just answer, please?
A It was, it was like -- it was part true and part lying. The first time was 25. If it goes through, the second time was going to be 50. So I didn't see no difference, 25 or 50.
Q But it never went through --
A If the 50 would have sounded better, then that's what I said, it was 50.
Q But it never went through. Correct?
A Correct.
Q And you had only talked about the 25 kilograms. Correct?

And 50 if it went through. Correct?
A Correct.
Q Then why did you tell the agents that Hakeem told you that he'd need 50 kilograms?
A Again, if the 25 -- the 50 sounds better than the 25, I said the 50.
Q So you wanted to sound -- you wanted to make it bigger and better to the agents. Correct?
A That's correct.
Q So you'd get more credit so you'd get out quicker. Correct?
A Part -- part of it, yeah, is correct.
Q You also told the agents that you suggested a price. Correct?
A Correct.
Q And yesterday you testified that your price during this meeting with Mr. Curry, as you swore to yesterday, was 21,000 per kilogram. Right?
A That is correct.
Q But you told the agents that that was the price that you said that you gave Mr. Curry. Correct?
A That is correct.
Q Then why did you lie to the agents and told them that you could get the kilograms for 15 to 18,000 per kilo?
A Part lie.

Q To make yourself look better to the agents?
A No.
Q Wouldn't it look better if you're getting more money per kilo?
A Again, the time I start lying, it was because -- I needed to get out the room, and that-- I was giving them what they want to hear.
Q You were giving them what they want to hear. Correct?
A At the time, yes.
Q And who they want to hear about. Right?
A No.
Q Now, you also told them that there was a meeting at the restaurant. Correct?
A Correct.
Q And you told them that you had not told me about the meeting. Correct?
A I don't understand the question.
Q You told them that there was a meeting at the restaurant, right, Mr. Jimenez?
A Which meeting is you talking about?
Q The meeting that we talked about yesterday at the restaurant, Isabella's.
A Correct.
Q And you told them that you never told me about the meeting. Correct?

A I still -- I mean, the meeting that you was -- that you was at the restaurant?
Q Yes. You told them that you never told me, being Paul Bergrin, about this meeting. Correct?
A Then I never spoke -- I don't --
Q Did you tell the agents that you never spoke to me or invited me, asked me, informed me about this meeting at the restaurant?
A I don't recall.
MR. BERGRIN: May I confront the witness, again, your Honor, with the same Exhibit, D-9?
THE COURT: Go ahead.
Q I'm showing you paragraph 3, I'm asking you to look at the second line where my finger is.
THE COURT: Is this a 302 of the meeting of October 28th?
MR. BERGRIN: Yes, your Honor, marked as D-9.
Q Did you tell the agents that you never told me about the meeting?
A It says --
Q Is that what you told -- does that refresh your memory, that document?
A (Mumbling/reading document) I mean, that's what the report says. I mean --
Q So the report may be inaccurate as to what you told them?

A Could be accurate, the report. But I just don't recall it.
Q So you don't recall less than a year ago telling the agents that. Is that when you're telling us the?
A At the time, like I say, again, if I did said it, it was a lie, and a lie that I don't remember.
Q You also told the agents on that date that you tried to hide the fact that he was selling kilograms to Bergrin's clients from Bergrin. Isn't that what you told the agents on that date?
A That he was what?
Q Isn't it a fact that you told the agents that you tried to hide the fact that you were selling kilograms to my clients from me. Isn't that what you told the agents, you hid that fact from me?
A That is correct.
Q Now, you also talked to them, as Mr. Gay asked you yesterday, about a tracking device, correct, that came in and you saw it in the office?
A Correct.
Q As a matter of fact, you described it before the jury pretty particularly. Correct?
A Correct.
Q And when that tracking device came in, do you remember what day it was or what month it was?
A No.

Q Was it before this meeting at Isabella's, the first meeting?
A It was right after the meeting I believe. Right after that meeting.
Q So approximate Christmas time, November 2003?
A Maybe. I don't recall.
Q You don't recall what month it was in?
A No.
Q You don't recall if it was hot or cold outside?
A It was probably chilly outside at the time. I'm not sure.
Q And when that tracking device came in, you told me that you were upset. And for the first time you told me -- I asked you why you were upset, and you said because you had been supplying E.T. Hak with cocaine. Is that what you told the agents?
A Like I said, I might of have told them. I'm not sure. I don't recall. I said a lot of things that I don't recall.
Q If it was in the report, do you think that's what you told them, if it was in the report?
A If it's in the report, then that's what I said. Again, the lies that I says, I don't recall, I don't remember.
Q Now, as I stated before and I asked you before, you gave them information, detailed information about your sister's involvement with drugs. Correct?
A I don't recall details.
Q You gave them information about your sister's involvement

with drugs on that date of October 28th. Correct?
A I might of have. I mean, I never -- I mean, I don't remember implicating her in drugs like that.
Q You read the report. Correct? You had a chance to read it and review it as you sat there?
A The part that you gave me?
Q Yes.
A Yes.
Q Did you tell agents on that day of October 28th, that your sister, Yolanda, was impressed by the easy money you were making drug-dealing, and that you began to pay her every few weeks for looking out for you?
A I might of have said that, yes.
Q You might have; or did you say that?
A Like I said, if it's in the report, I might of have said it. I mean...
Q Now, on this day of October 28th, you said you wanted to get out of there. Correct?
A Correct.
Q And you would have said anything to get out of that meeting. Right?
A That's correct.
Q Even if it meant hurting your sister?
A No.
Q Is that what you're telling us?

A No.
Q Then why did you give them -- explain to us: Then why did you give them information hurting your sister?
A I don't recall implicating her.
Q You don't recall implicating her?
A Exactly. Not -- not like the way you describing it.
Q If I was to show you a report, would it refresh your memory and recollection?
A Sure, it will.
MR. BERGRIN: May I approach again, your Honor, with D-9?
Q I ask you to look at, bottom of page 2.
A Where?
Q Excuse me. I'll ask you to look at page 3 at the top, and then look at the second paragraph, please.
(There is a pause for the Witness.)
A I don't see where -- what you just stated. I mean, I don't see it in there, I mean.
Q Didn't you tell them, Mr. Jimenez, that you recall that she, meaning your sister, was impressed by the easy money and that you would pay her 800 to a thousand dollars every few weeks for looking out for him. Isn't that what this report say?
Does that refresh your memory as to what you just read?

MR. GAY: Objection to the what the report says.
A Yes.
THE COURT: I'll allow it,
MR. BERGRIN: Thank you, Judge.
THE COURT: He's read it and he doesn't -- go ahead, Mr. Jimenez.
A That's what it says.
Q And isn't it a fact that the report says -- and you told them -- Jauregui, meaning your sister Yolanda Jauregui, did become, did become involved with the drug business through Alejandro Castro, and that Jimenez believed that Castro used Jauregui to deal with drug clients because she spoke English and he did not?
MR. GAY: Your Honor, if we're going to quote from the report, why don't we enter it into evidence?
THE COURT: All right. I'm just going to ask you: Do you recall saying that to the FBI agent when they interviewed you? Do you recall saying that?
THE WITNESS: Yes, I recalled that. But I didn't read the bottom, I read the top. I mean I recall that.
Q Well, I ask you to read the first two paragraphs. Correct?
A No, you told me to read the first paragraph on the top.
Q And isn't it a fact that you told the FBI that you were upset about this, and you told Castro to keep her out of the business, but Castro did not listen?

A Correct.
Q And as a result, you stopped doing business with Castro?
A Correct.
Q Was that the truth or was that a lie?
A That is the truth.
Q In reference to the tracking device, are you telling us now that you don't remember when that conversation occurred at the office, or if it occurred at the office?
A At the time it didn't even mean nothing me then, I didn't really care.
Q You didn't care?
A Absolutely not.
Q So you weren't upset that the feds might be investigating you for your drug-dealing?
A Absolutely not.
Q Now, on October -- excuse me -- on November the 1st of 2010 at approximately 2:50 in the afternoon, did you call Special Agent Shawn Manson Brokos from the Mid-State Correctional Facility?
A I might have. I'm not sure.
Q That's about 11 months ago. Correct?
A Correct.
Q And you don't remember whether you called the FBI to come back to speak to you?
A I remember calling either Mike or Shawn.

Q You were on a first name basis with them?
A Excuse me?
Q You were on a first name basis with them?
A Correct.
Q Who is Mike and Shawn?
A The FBI agents.
Q Did they leave you a card?
A Left me their number.
Q They left you their number and they said, please call Mike or Shawn?
A Right.
Q That's what happened?
A I think I called them in reference to my sister. I don't think -- I'm not sure why, but I think it was something to that nature.
Q In reference to your sister?
A I believe so.
Q Were you going to give them more evidence damaging your sister?
A No.
Q Isn't it a fact that you called them and said that you could provide information about me, you said "that guy." You said that to them, referring to Paul Bergrin?
A I might of have, yes.
Q You might have, or you did?

A If it's on there then that's what I said.
Q I'm asking you if you remember it, sir.
A Could have been. I'm not sure.
Q When you met with the FBI on October 28th and you called them on November 1st, a short time later, isn't it a fact you mentioned absolutely nothing to them in reference to the statement that you heard, "No witness, no case," or if they didn't have a witness they would have no case, as you stated yesterday? You mentioned nothing about it on October the 28th, you mentioned nothing about it on November 1st?
A That is correct.
Q And by now you're preparing notes when you get back to the cell to make sure you don't forget information that they've given you and what you want to say to them. Correct?
A That I'm preparing notes for what?
Q For your next meeting with the FBI.
A I just kept notes because -- that's -- I needed -- I needed to keep notes. I mean, I need to remember. Yeah, that's part true what you're saying, yes.
Q What part of it is false?
A That I was preparing for the next meeting or -- I was just keeping it because it was part of my safety net, put it like that. Saying that if I say this, if I said that, then I could say, no, I didn't say this, no, I didn't say that.
Q Well, you just told us a couple of minutes ago when you

testified before the jury that you just made things up, so why would you have to write down what you had made up if you're lying to them?

A It was only the important parts that I was writing down.

Q Oh, now just the --

A The lies -- the lies really didn't mean nothing to me. You could investigate a lie all you want, you can't -- you know, what, prosecute me? Because can't prove nothing on a lie.

Q What's safety net, I don't know what a safety net is.

A A safety net, it's part of the truth that I was writing down. If I said this, then that's what I said. If I didn't say that then that's not what I said.

Q In your notes, did you write down what you said about your sister Yolanda?

A No.

Q In your notes, did you write down what you had told them about you dealing drugs?

A Yes.

Q And what did you write down in your notes?

A I can't tell you about detail. I mean, I got -- I got the notes -- I might have the notes there or I might not. I mean, I can't remember off my head what I said.

Q And as you sit here today, from less than a year ago you don't even remember whether you destroyed your own notes. Is that what you're telling us?

A I had a lot of papers. I mean, it could be there. I mean, right now I can go -- I could come back tomorrow and show you the notes. If I have them I'll show them to you.
Q My question to you is: As you sit here today, you can't recall whether you even destroyed your own notes or not. Is that what you're telling us?
A Correct.
Q And that's less than a year ago. Right?
A I throw away a lot of papers, too, that's why I'm not sure if I throw it away or I did. If I did, I'm not sure.
Q Do you throw away papers that you don't read?
A I throw away papers that I really don't need anymore. I mean, if it's -- if it was something that I already dealt with, that it doesn't even matter to me anymore.
Q Well, you knew you'd be a cooperating witness. Correct?
A Correct.
Q So you're telling us that you threw away the notes of a cooperating witness that you took down to make sure you have a safety net?
A That wasn't going to -- I mean, I didn't even think that was going to come into play like that, I mean, into this trial.
Q Well, you needed notes to help your memory. Right?
A Part of it, yes.
Q Yet, you threw those notes away?
A Yes -- well, I could of have. Maybe I still have probably

two or three notes, I don't know.
Q Two or three notes or two or three pages of notes?
A I'm not sure what I have. I can't tell you if it's two or if it's three, but I can say it's probably around that range. It's long pieces of paper.
Q And the other ones you threw out?
A I'm not sure. I'm not sure.
Q On November 1st when you called the FBI, your friends Shawn and Mike, are you telling us that you don't remember what you said to them? This is November 1st of 2010.
MR. GAY: Haven't we gone through this already, Judge? This has been asked and answered at least three times as far as I can remember.
THE COURT: We're getting a little repetitive, Mr. Bergrin.
MR. BERGRIN: I'm sorry.
THE COURT: I think you might have covered this.
Q Did you leave a message or did you speak to the agents on that day?
A I believe I spoke to the -- I'm -- I believe I probably spoke to them that day.
Q Did they come back to see you again?
A Yes.
Q And this is a meeting that you asked for. Correct?
A I'm not sure if I asked for the meeting, I just -- I mean,

if I said something, I made it clear on the phone. I don't see why I needed to ask for the meeting. I mean, I don't recall.

MR. BERGRIN: May I show him J04042? Then I'll move on to another area, Judge.

THE COURT: Yes.

MR. BERGRIN: Thank you.

THE COURT: Is that a new exhibit or is that --

MR. BERGRIN: It's the J number, your Honor. I have it marked as an exhibit. If you want me to mark --

THE COURT: Exhibit what?

MR. BERGRIN: J-10.

THE COURT: J-10? No, that's the criminal sheet. It's D-11.

MR. BERGRIN: D-11?

THE COURT: Is it another 302 report?

MR. BERGRIN: It is, Judge, a 302 of November 1, 2010.

THE COURT: Okay.

MR. BERGRIN: It's marked D-11, sir.

May I approach the witness, please?

THE COURT: Yes.

BY MR. BERGRIN:

Q Please read that very carefully, Mr. Jimenez.

(There is a pause for the witness.)

A All right.

Q Have you had a chance to read it, sir?

A Yes, I did.
Q Does that refresh your recollection?
A Yes.
Q Now --
A Yes, it does.
Q You asked the FBI to come back and see you. Correct?
A Correct.
Q Your friends Shawn and Mike?
A Correct.
Q And at that time you told them that you had information on me. Correct?
A Correct.
Q So you'd want to be honest with them, correct, because now you're smelling your freedom. Right?
A Correct.
Q Now, when you spoke to the FBI, sir, on November the 5th, isn't it a fact that you told them that I, meaning Paul Bergrin, never confided in you and never trusted you? Isn't that what you told them on the meeting that you asked for?
A Don't recall. If you show me that on the paper, then...
MR. BERGRIN: It's J04037, Judge, the meeting of November 5th, 2010.
THE COURT: November 5th?
MR. BERGRIN: Yes, sir.
THE COURT: Okay.

THE COURT: D-12?
MR. BERGRIN: Yes, sir.
MR. BERGRIN: May I approach the witness, sir?
THE COURT: Yes, you can.
(Counsel confer off the record.)
MR. BERGRIN: I'm looking at paragraph 2, Mr. Gay.
MR. GAY: Which page?
(Counsel confer off the record.)
MR. BERGRIN: May I approach this witness, sir?
THE COURT: Yes.

Q Mr. Jimenez, I'm going to ask you to look at page 1 and paragraph 2. And also -- just review that, please.
A This one?
Q Yes.
A Paragraph 2?
Q Yes.

(There is a pause for the Witness.)

MR. GAY: Judge, I'm sorry. Could we have a brief sidebar on this? I apologize, but I think --
THE COURT: All right.
(At the sidebar.)
MR. GAY: I want to make sure I'm looking at the right paragraph here.

Is Mr. Bergrin about to ask about whether Jimenez told the FBI that Yolanda could provide them firsthand information

about his illegal activities?

MR. BERGRIN: No.

MR. GAY: That's what the second paragraph is.

THE COURT: Is that page 1, second paragraph?

MR. GAY: Yes.

MR. BERGRIN: "Bergrin never confided in Jimenez."

MR. GAY: No, but this is -- you can't put that in without saying the first part of it.

THE COURT: Let me see that.

All right. You're going to withdraw the question?

MR. BERGRIN: Yes.

THE COURT: Thank you, Mr. Gay.

MR. GAY: Sure.

(In open court.)

THE COURT: Is the question withdrawn?

MR. BERGRIN: It is withdrawn, Judge. Thank you.

THE COURT: All right.

BY MR. BERGRIN:

Q Now, when you called the FBI, you were trying to help yourself. Correct?

A Correct.

Q And you were also trying to help your sister. Right?

A Correct.

Q So you were going to be honest with the FBI?

A Correct.

Q When you spoke to the FBI, isn't it a fact that you told them again this second time that your sister is dealing at this time kilograms of cocaine?
A Correct.
Q So you wouldn't do anything, you wouldn't lie and make facts up to hurt your sister. Right?
A I believe that I said that she might have been -- she might be, have been dealing kilograms cocaine with Alejandro. I didn't say that -- I didn't -- I said something to that effect. But it wasn't nothing that -- I didn't say that she was hand-to-hand dealing.
Q You said that she was dealing with Alejandro. Correct?
A Right.
Q And this is Alejandro Castro?
A Alejandro Castro.
Q And isn't it a fact that you also told the FBI that you were dealing again, behind my back?
A Yes.
Q And that you were guilty -- you felt guilty for getting your sister involved in the drug business?
A I felt guilty about introducing Alejandro to her.
Q And getting her involved. Correct?
A Well, you could say yes.
Q And you knew that your sister was having a relationship with Alejandro. Correct?

A That is correct.
Q An intimate relationship. Correct?
A I'm not sure.
Q And that was behind my back?
A Correct.
Q Now, you also told the agents that you were dealing with Changa. Correct?
A Correct.
Q And you were dealing kilograms of cocaine from Changa. Correct?
A That is correct.
Q Is that true or is that false?
A That is true.
Q Now, I asked you yesterday, you told the agents that you set up a meeting at the restaurant with Changa and Hakeem Curry. Correct? And that you had read the Hakeem Curry file behind my back. Correct?
A Yes.
Q Now, I asked you yesterday: What Hakeem Curry file was in the office?
A What you mean, what Hakeem Curry file --
Q Hakeem Curry was not charged with anything. Correct?
A Hakeem Curry had a file in the office, it's that thick (indicating).
Q And you're about as sure about that as you are about all

your testimony today, aren't you?
A Yes.
Q And what was contained in that file?
A I don't recall everything that was contained in that file. I know it had something to do with some probably drugs or something.
Q Had to do with drugs.
Isn't it a fact that up until that point, that Hakeem Curry had no drug offenses in his history at all?
A I'm not sure. I know it had "Hakeem Curry" written on that file.
Q Was it State vs. Hakeem Curry or United States vs. Hakeem Curry?
A I'm not sure.
Q But you're sure there was a Hakeem Curry file. Correct?
A That is correct.
Q Now, after this meeting you then called the FBI again. Correct? This meeting of November the 5th, this second meeting that you had. You had a -- did you have a third meeting with the FBI?
A I might of have. I'm not sure.
Q You're not sure if you had a third meeting with the FBI, is that what you're telling us?
A If you give me the paper I can recollect. I mean, I know I had a third meeting. But calling them? I mean, I'm not sure.

Q And how long, by the way, how many hours did you spend with the FBI during that second meeting?
A I wasn't sure. I know it was a long time. Maybe an hour, two hours.
Q Three hours? Four hours?
A I'm not sure.
Q Now, during this third meeting that you had with the FBI, do you remember what you told them?
A No, not offhand, no.
Q Did you mention anything about Hakeem Curry and you being under investigation or Hakeem Curry being under investigation?
A Might have said something about him being under investigation for that tracking device.
Q Isn't it a fact that you told the agents that you were very upset that -- that I was very upset because you told me that you were dealing drugs with Hakeem Curry --
A Yes.
Q -- and that I had told you at that time -- and when, when did I become upset with you, November 2002, November 2003? When did I become upset with you?
A I'm not, I'm not -- I don't recall the dates, the year. I mean, don't recall.
Q Were you being honest with the FBI when you spoke to them on this third occasion?
A No, not really.

Q Not really?

You had called them to speak to them on the prior occasion of November 1st, correct, to help yourself and to help your sister. Right?

A Correct.

Q And you're still lying to the FBI?

A Part of it.

Q Here you are trying to help yourself, reduce your time, get yourself out of being charged with narcotic trafficking, and you're telling us that you're continuing to lie. Correct?

A When I called the FBI that time, I called them to let them know that I could talk to my sister, convincing her to cooperate to the -- to whatever they need to know about you, because she was -- she was the one who was with you at all times, 24 -- maybe 20 hours a day, maybe less, I don't know. But she lives with you. She -- she was living with you, she was spending time with you, she was going everywhere with you. I mean --

THE COURT: All right. Mr. Jimenez, it wasn't completely responsive to that the question.

Go ahead.

A That was the reason why I called the agents. That's what I told them. I would talk to my sister to see if I could convince her to cooperate.

Now, would that help -- would that help her out as

well if I was to do that? Would you guys be a little lenient with her? And that was that. I don't know about that part.

That was the meeting -- that was the purpose for me calling them for that meeting. It wasn't me giving them information about you, because at all times I was just holding back.

Q And -- but you weren't holding back against your sister, right? Here, here you're saying to this jury that you're trying to tell the FBI that you want to help your sister to get her out of trouble, but at the same time you're essentially burying her with information about her drug-dealing and drug-trafficking. Correct?

A I won't say that.

Q You won't say that?

Well, didn't you tell the FBI that she was dealing multi-kilograms of cocaine with Alejandro Castro?

A Multi? I don't recall.

Q You said kilograms. That's more than one. Correct?

A That's correct.

Q That's heavy charges. Correct?

A That is correct.

Q So here you're trying to help your sister out by telling her to cooperate against me, but at the same time you're giving information and evidence against your sister. Right?

A I won't call it evidence, because I wasn't sure, and that's

what -- and I made that clear.
Q Isn't it a fact that on November the 1st when you called the FBI as compared to what you just told this jury, you told them that you could provide information on "that guy," meaning me?
A When was that?
Q That was on November 1st.
A That was the second meeting?
Q That was before the second meeting. The second meeting was November 5th.
A That was probably based on the same thing, with my sister.
Q You met with the FBI on November 16th, correct, in another meeting. Right? Do you remember meeting them the middle of November?
A Correct.
Q Were you truthful with them during that third meeting, the fourth time that you had contact with them?
A Might have been. I'm not sure.
Q Well, when you say you might have been, what does that mean?
A That means I don't know what we said. I mean, I don't remember.
Q Did you at any time tell them that on that meeting of November 22nd, that you at that time informed me -- that you informed me -- excuse me -- that you had been dealing with

Hakeem Curry, and that I became very upset with you, telling you something to the effect of: You've got to be crazy. He's under investigation.

Do you remember telling that to the FBI, me becoming very upset at you?

A Yes.

Q And isn't it a fact?

A And that time you called me up to the office. That's what you referring to. Right?

Q Yes.

A Okay.

Q But you weren't dealing with Hakeem Curry. Correct?

A I was about to set up a deal with Hakeem Curry. I had just got finished talking to Hakeem Curry not too long ago before you called me upstairs. I mean right after I finished talking to Hakeem Curry, like a day or two later, you called me upstairs to your office telling me: Why am I talking to your clients behind your back.

Q Isn't it a fact, sir, that you told the FBI that you informed me for the first time that you were dealing with Hakeem Curry?

A Run that by me again, please.

Q Isn't it a fact that you advised me that you had been dealing with Hakeem Curry, according to the 302?

A When you -- when you asked me the question, I say yes. I

say yes, that I had spoke to Hakeem Curry.
Q That's not my question.
Did you tell the FBI on November the 16th of 2010 that you advised me that you were dealing with Hakeem Curry?
A I might of have said that. I'm not sure, I don't recall the words, the exact words. I don't think I put it like that, but I recall something like that. I'm not denying it.
Q But you had not sold even an ounce of any drugs to Mr. Curry. Correct?
A Again, I don't recall saying them exact words. I recall saying -- telling them that I -- I was putting a deal together. I don't recall saying that I was dealing with him. If I did, might have been part lie.
I don't know. I'm not denying it, if it's there, it's there.
Q So you're telling us that even during the third meeting and the fourth contact with the FBI you're still lying to them. Is that what you're telling us?
A That's not what I'm telling you. But I'm telling you if it's there I might of have said something that may -- might of have. I'm not sure.
Q Did you ever tell the FBI that I told you that Hakeem Curry was under investigation?
A You didn't need to say that. The day that he brung in the tracking device we knew that he was under investigation.

Q Did you tell the FBI -- my question is: Did you ever tell the FBI that I told you that Hakeem Curry was under investigation?
A If I did it was referring to that.
Q Isn't it a fact that you told the FBI that you told me for the first time that you're dealing drugs with Hakeem Curry, and I became very upset with you telling you essentially, what are you doing, Hakeem Curry is under investigation?
A I might of have said that, yes.
Q And isn't it a fact, sir, that I had told you to stay away from Hakeem Curry, that Hakeem Curry is under investigation?
A That I said that?
MR. GAY: Judge, this is unclear whether he's saying whether he ever said that or whether Bergrin ever said that to him, or is this what Mr. Jimenez said to the FBI?
MR. BERGRIN: I'll clear it up.
THE COURT: Rephrase the question, please.
Q You tried setting up a meeting with Hakeem Curry, correct, at Isabella's Restaurant. Correct? And Changa?
MR. GAY: Again, Judge, is he saying -- this is unclear whether he's saying, did he tell the FBI this or is he saying this is --
THE COURT: No, the question wasn't unclear. He said, he asked him: You tried setting up a meeting.
Is that the question?

MR. BERGRIN: It is, Judge, and I think the witness understands the question. If Mr. Gay doesn't, I'm sorry.

MR. GAY: I apologize.

THE COURT: That's okay, Mr, Gay, that's fine. But the question is: Did you try to set up a meeting at Isabella's Restaurant?

Q With Hakeem Curry and Changa?

A I never -- I never specifically set up a meeting in the restaurant. I never did that or said that.

Q Didn't you try to set up a meeting -- didn't you testify multiple times under oath --

A I don't understand that --

MR. GAY: Excuse me. Let me ask the question.

THE COURT: Just a moment. Don't answer until he finishes the question, okay, Mr. Jimenez?

Finish the question, Mr. Bergrin.

Q You tried to set up a meeting at Isabella's Restaurant with Hakeem Curry and Changa, as you testified to?

MR. GAY: Objection, Judge, that's not what he testified to.

THE COURT: I know. Sustained.

Whether or not he's testified to -- ladies and gentlemen, it's your best recollection as to whether he testified to setting up such a meeting or not.

So eliminate that -- go ahead, Mr. Bergrin.

Q Did you ever try to set up a meeting with Hakeem Curry and Changa at Isabella's Restaurant?
A I tried to set up a meeting with Changa and Hakeem Curry, but not at Isabella's Restaurant.
Q Where did you try setting it up?
A It wasn't going to be at Isabella's Restaurant, it would have been a different location at the time.
I don't know. I don't know exactly at the location but it definitely would be a different location.
Q And the meeting never occurred. Correct?
A The meeting with me never occurred.
Q The meeting with you never occurred. Correct?
A Correct.
Q Now, at that time when the meeting never occurred, you stopped dealing or stopped contacting and having any contact with Mr. Curry. Correct?
A Well, after awhile I stopped -- I stopped trying to contact Mr. Curry.
Q And how much time lapsed before you stopped trying contact Mr. Curry?
A I'm not sure, but it was a lot of calls.
Q When you say "a lot of calls," how many does that mean?
A Like four or five. Maybe more.
Q Over how long a period?
A Probably a week.

Q That's a long time to you?
A Yes.
Q Four or five calls over a week?
A Yes, that's a long time.
Q So after a week of no meeting occurring with you, then you stopped calling Mr. Curry and having contact with Mr. Curry. Correct?
A That is correct.
Q And when did you stop having contact with Changa?
A I didn't.
Q You continued to have contact with Changa?
A Yeah, Changa was still around. Everywhere I went he was there, or he'll pop up somewhere, all the time.
Q And you weren't upset with him?
A Exactly, I was very upset.
Q And you were still having meetings with Changa?
A No, that's because he was there doesn't mean I needed to talk to him, exactly. He could be there, he could try to talk to me all the time. He try to talk to me. If we in a bar, if we meet up in a bar, he try to buy me a drink. I decline, I don't want it. I buy my own drinks. That's just the type -- that was the relation then.
Q Were you still doing drug business with him?
A Absolutely not.
Q You were doing no business with him at all. Correct?

A Correct.
Q And no business and no contact with Hakeem Curry. Right?
A That is correct.
Q Now, Changa was dating your sitter Maria Jimenez. Correct?
A Correct.
Q And your sister Maria lived in Kearny, New Jersey?
A Correct.
Q So you still had to have a relationship with Changa. Correct?
A I don't know if you would call it a relationship, but...
Q Did you introduce --
A That's basically the reasons why I didn't put my hands on Changa, because it wouldn't look right, bad blood. I wasn't trying to, you know...
Q And Changa also owned a car dealership?
A Correct.
Q And where was that located?
A I think it was on Orange Street.
Q In where?
A In Clifton.
Q What was the name of it?
A I'm not sure. I don't -- I don't recall.
THE COURT: Mr. Bergrin, we'll take a break for the morning.
Ladies and gentlemen, we'll be back at 11:15. So

please don't discuss anything about the case and we'll see you back here in about 15 minutes.

THE DEPUTY CLERK: Please rise for the Jury.

(The Jury leaves the courtroom.)

THE COURT: All right, everyone, please be seated.

Twenty after, promptly. Okay? And we'll have -- close the door, thank you.

We'll have the witness on the seat at 20 after, please, Marshals. Okay?

Thanks.

(Witness temporarily excused and escorted out of the courtroom by the Marshals.)

THE COURT: We'll see you 20 after. Thanks.

(A recess is taken.)

(Proceedings resume - Jury not present)

(Mr. Jimenez is escorted into the courtroom by the Marshals.)

R A M O M J I M E N E Z, resumes, testifies further as follows:

(Proceedings resume - Jury not presence.)

THE DEPUTY CLERK: Please remain seated.

THE COURT: All right, everyone, are we all set?

MR. BERGRIN: Yes, sir.
THE COURT: Bring out the jury, please.
THE DEPUTY CLERK: Please rise for the Jury.
(Jury present.)
THE COURT: All right, everyone, please be seated.
Mr. Bergrin, go ahead.
MR. BERGRIN: Thank you.
Could I have permission to approach the podium?
THE COURT: Yes.

CROSS-EXAMINATION

BY MR. BERGRIN:

Q Mr. Jimenez, you testified a few minutes ago before the break that Changa owned a car dealership. Correct?

A It wasn't a big car dealership, a few cars.

Q But it was in Clifton. Right? Is that what you told the jury a couple minutes ago?

A No, I said it was in Orange -- in Clifton. This is Clifton; this is Orange.

Q And had you been there?

A Correct.

Q How many times had you been there?

A A few times.

Q So you knew how to reach Changa at his car dealership, correct, if you needed to reach him?

A Yes.

Q Now, you were doing business with Changa, correct, as far as the cocaine dealing?
A Right.
MR. GAY: Time frame, Judge. What time frame is he talking about?
THE COURT: Yes.
Q 2000 -- when did you start dealing about Changa?
A Some time in 2000.
Q Some time in 2000?
A 2002, some time --
Q 2002?
And when did you speak to Hakeem Curry?
A Some time, either it's between -- between 2002 or 2003. I know it's between there.
I'm not sure. I don't -- you know...
Q Now, while you were doing business with Changa, you were making -- how much were you making per kilogram?
A I was making a G.
Q A thousand dollars?
A Exactly.
Q And how many deals had you done with him?
A Depends. It wasn't all the time a kilo. It wasn't all the time a kilo. If I wanted -- if I wanted five ounces, if I wanted a hundred grams, I wanted, you know, something smaller, I get it. So --

Q So there came a time when you had another meeting, a third meeting with the FBI, like I asked you, in the middle of November, correct, and that was on approximately November 16th of 2010?
A Correct.
Q And do you remember how long you met with them?
A Not exactly, but I can tell you that it was for a while.
Q "A while," meaning approximately three to four hours. Correct?
A I won't say four hours. I don't know if it's three hours. It could have been maybe two hours, maybe two and a half hours. I don't know.
Q Did you prepare any notes of that meeting when you got back to your cell?
A I might of have taken some notes.
Q And again, those notes are, who knows at this time. Correct?
A My, like I say, I might of have kept some, I might of have had thrown some out, I'm not sure. I mean, if I was to look, I would know.
Q So this is your third meeting with the FBI. Right?
A Correct.
Q And not including the contact that you called them saying that you had information, the fourth time that you had contact with them. Correct?

A The contact meeting? I don't understand that.
Q You had three meetings and one phone call. Correct?
A Correct.
Q So it was the fourth time that you had contact with the FBI?
A If that's what you say, yes.
Q No, I'm asking you the question, sir.
A Yes. I mean, if that what's con -- yes.
Q Now, you knew that you didn't have to meet with them. Correct?
A Correct.
Q It was voluntary on your part. Right?
A They say they was coming back regardless. They said they was coming back. So, I mean, even if I did call them or if I didn't call them, they was going to come back anyway.
Q My question to you is: You did not have to meet with them, and you knew that you didn't have to meet with them. Correct?
A At the time I didn't -- yes, that's correct, yeah.
Q Well, you were hesitating. What is the truth? Did you know that you didn't have to meet with them or didn't you know that?
A Well, when they -- when they -- when they came up to see me I didn't know that I could decline, I mean, at the time. I didn't know I could say, like, I ain't going over there.
Q And you're telling us that they never informed you that you

didn't have to meet with them, it was totally voluntary on your part --

A The first time --

Q -- is that what you're telling us, sir?

MR. GAY: He was answering the question.

THE COURT: Excuse me, Mr. Bergrin, let me give him a chance to answer before go to the next question.

MR. BERGRIN: Yes, your Honor, of course.

THE WITNESS: The first meeting, from the first meeting?

Q Yes, from the first meeting on, from the first meeting they came to see me, they don't tell you who's -- who's waiting for you or who's in the interview room or none of that. When you go in that interview room is when you're going to know who's in there.

A After that I didn't know if I could decline, I didn't know if I could turn back around. I sat down and we had the meeting.

Q So you're telling this jury on this day under oath that you didn't know that you could walk out and not meet with the FBI. Is that what you're telling us?

A That's exactly what I'm telling you.

MR. BERGRIN: Your Honor, may I approach the witness with D-9 for identification?

THE COURT: Yes.

MR. BERGRIN: D-9 IS J04032, Mr. Gay, sir.
Q Mr. Jimenez, I'm going to ask you to please read paragraph number two.
MR. GAY: What's the purpose of this, Judge?
THE COURT: Well, let's see if it refreshes -- I don't know.
MR. GAY: He didn't say his memory needs refreshing.
THE COURT: Okay, you're right. Sustained.
MR. GAY: What's the purpose of this?
THE COURT: Go ahead.
BY MR. BERGRIN:
Q Did the agents -- please read --
THE COURT: No, Mr. Bergrin. Step back for a moment, Mr. Bergrin --
MR. GAY: No --
THE COURT: Okay. He said, "That's exactly what I'm telling you" in response to your question. So ask another question or rephrase it or ask another question.
BY MR. BERGRIN:
Q Did the agents ever tell you that; did they ever explain to you that your assistance was voluntary and that you did not have to talk to the agents?
A They might of have said that. I don't remember.
Q Well, you just told the jury a few minutes ago that you did not know, you did not know -- isn't that the words that came

out of your mouth -- you did not know that you had to -- that you could decline talking to them? You did not know that you did not have to talk to them. Is that what you just told us?

A Exactly what I said.

Q So as you testified before this jury you now admit that you lied to the jury; that you knew that it was voluntary and that you didn't have to talk to them?

A Again --

THE COURT: Sustained.

MR. GAY: That's not what he said.

THE COURT: It's getting argumentative, Mr. Bergrin. It's an inappropriate question.

Q Did the agents on October 28th of 2010, the first time that they talked to you, tell you that your meeting with them is voluntary and that you do not have to talk to the agents?

A Again, I do not recall. They might have had said that, but I don't remember.

THE COURT: Next question.

Q Would it refresh your memory if you were to see the report pertaining to that meeting of October 28th?

A It wouldn't. I mean if that's -- if that's what it said that you just said, again, I do not remember.

THE COURT: All right.

Q And this is a meeting that occurred less than a year ago to this date?

THE COURT: Is that a question?

MR. BERGRIN: Yes.

Q This is a meeting that occurred less than a year ago from today's date?

A If that's the calculation, yes.

Q Now, are you telling us that you didn't know that -- you didn't know that you could refuse meeting them and walk out the next time they came back for your second meeting? Is that what you're telling us?

A Right.

Q And you're telling us under oath today in front of this jury that you didn't know that you could decline and refuse to meet with them on the third time that you talked to them. Is that what you're telling us?

A Well, then I really need -- it wasn't -- I couldn't decline, just decline, I mean, because I already had said things to the FBI, you know? It was like if I, you know --

Q You knew that you did not have to meet with them. Isn't that a fact?

A No.

Q You had been told you that didn't have to talk to them. Correct?

A Again, I do not remember.

Q Now, you had another meeting, like we talked about, on November the 16th. This is your third meeting. Correct?

A Correct.
Q And during that third meeting you talked to them again, a third time about this meeting that was set up allegedly at Isabella's Restaurant. Correct?
A Might have had said something like that.
Q Do you remember being asked questions about the meeting at Isabella's Restaurant a third time at this third meeting with the FBI?
A I don't remember, but might have had said something about it.
Q Now, this is -- during this third meeting you're trying to help yourself. Correct?
A Yes.
Q And you're trying to help your sister. Right?
A That's correct.
Q And you're trying to get home. Right?
A That is correct.
Q Did you ever set up a meeting at Isabella's? Did you ever set up a meeting at Isabella's Restaurant with E.T. --
MR. GAY: That's been answered at least three times.
MR. BERGRIN: This is the third time --
MR. GAY: He's not asking what he said at the meeting --
THE COURT: Sustained, unless it's a new question. Sustained.

Q Did you tell the FBI on November 16th of 2010 that you set up a meeting at the restaurant, Isabella's Restaurant, with E.T. Hak and Changa?
A I might have had said that. Like I said, if I said a lie to the FBI, I do not remember the lies.
Q And this is the third time that you had met with them and the third time that you're trying to help yourself, but you're lying still. Correct? Is that your testimony?
A Yes, that's -- that is.
Q As a matter of fact, did you ever tell the FBI on November 16th that Castro, Alejandro Castro was invited to this meeting at Isabella's but he didn't come because he didn't speak English?
A That is correct.
Q Was that the truth or was that a lie?
A That was a lie.
Q But you remember now that you told them that lie. Correct?
A I don't remember mentioning Castro.
Q The question to you was: Did you ever tell the FBI that Castro didn't attend the meeting with E.T. Hak and Changa because Castro didn't speak English?
A I remember the name Castro being -- being mentioned.
Q Well, then why did you just answer "yes" to the question that I asked?
A I just answered you, I just said that I remember the name

Castro being mentioned.
Q Now, did you ever -- were you ever questioned on this third meeting about the kilograms and the quantity of the deal that you were setting up with Hakeem Curry?
A Did I what?
Q Do you remember ever being questioned a third time during this third meeting by the FBI in reference to the amount of kilograms that Hakeem Curry told you that he needed?
A I remember -- I don't remember on the third. I mean, I remember mentioning it but I don't know what meeting, third, second, first.
Q You were asked almost every time that you met with them the same questions, correct, or similar questions, pertaining to Hakeem Curry and Changa in the meeting. Correct?
A No.
Q Do you remember telling the FBI on this third meeting that in 2002 you spoke to Hak, E.T. Hak at Bergrin's law office about supplying E.T. Hak, and E.T. Hak said he needed 50 kilograms at a time?
A Again, 25, 50. I mention the 50 because it sound better. I don't know.
Q So you don't know why you would lie again to the FBI. Correct?
A That wasn't a lie.
Q But you never mentioned anything about 25 kilos. Correct?

A I think I did mention 25 somewhere.
Q On the third meeting?
A I'm not sure which meeting.
Q Now, you said you showed up, you testified yesterday that you showed up at the Isabella's Restaurant. Correct?
A That is correct.
Q And when you showed up, Hakeem Curry was walking out the exit door. Correct?
A That is correct.
Q Now, what kind of car was Hakeem Curry driving?
A Probably a silver car, probably a little Honda or something. I'm not sure if it was a Hyundai. My focus wasn't on the car or really on Hakeem Curry, my focus was on Changa.
Q Was there anybody else with Hakeem Curry?
A Not that I recall.
There may be.
Q Why did you tell the FBI that there was another black male in the car?
A In the restaurant there was nobody else. To me, maybe they could have been somebody else in the car, maybe not, I wasn't sure.
Q My question to you is: Why did you tell --
A That was -- that was -- that was what I said to the FBI.
Q So that was a lie also?
A I don't know. I don't know if it was. If you would call

it a lie. I don't know if you would call it a -- maybe "mismemory." I don't know. However you want to call it.

Q Was there a third, was there another black male with Hakeem Curry?

A Like I said, there could of have been. Maybe. I don't know.

In the restaurant was only Hak, you and Changa.

Q And you saw him pull up in a silver Hyundai or small car?

A I didn't see him pull up in nothing. I seen him getting into the car.

Q During this third meeting when you're supposed to be cooperative and truthful to the FBI to help yourself, do you know why you would tell them that Hakeem, E.T. Hak showed up at a meeting with a silver BMW2 if you didn't see the car? Why would you tell them you saw him pull up in a silver BMW?

A I never said they pulled up. The car was already there.

Q And you saw a BMW?

A I never said a BMW. If I did -- maybe I said it, maybe -- I'm not sure. But it was -- it was a silver car.

Q And you couldn't remember if there was another individual in the car. Correct?

A Correct.

Q Then why did you tell the FBI that there was a black male in the car?

A Like I say, could have been, it could have been somebody

else in the car and maybe not.
Q Why did you tell the FBI, then, that you saw a black male in the car?
A That's exactly what I said. What part you don't understand?
Q Why did you tell them that?
A I just said -- I just told you that's that's exactly what I said to the FBI. There could have been somebody in the car. I don't know, I'm not sure.
THE COURT: All right. Get into another area, please.
MR. BERGRIN: Yes, your Honor. I'm sorry.
Q Now, you had never done any drug deals at all with Hakeem Curry. Correct?
A Correct.
Q So you didn't know how Hakeem Curry paid for drugs, correct, or where he kept his money. Correct?
A Correct.
Q Then why did you tell the FBI that Hakeem Curry concealed his money in shoe boxes?
A Like I said --
MR. GAY: Judge, could we have a sidebar on this one?
THE COURT: Okay.
(At the sidebar.)
THE COURT: Okay.
MR. GAY: Judge, I believe what he's referring to is a

THE COURT: Do you want to persist in this area? Because I think it's in context, and I think if you bring it up you may very well be opening the door to that.

MR. BERGRIN: I'll withdraw the question.

MR. GAY: I'll just say one more thing. This is the last time I'm doing this. The next time he does this, the door will be opened and I'm just going to start asking questions.

THE COURT: Be careful.

I appreciate you bringing it to our attention, Mr. Gay.

But it's things like that, Mr. Bergrin, there's a good chance on redirect he'll be able to get the full context of that kind of a statement that was made.

MR. BERGRIN: I just didn't know how Mutalib will come in if he said both of them kept money in shoe boxes.

THE COURT: I think the Government can make a fair argument that that might give completeness to the statement. They might be able to argue they he made a full statement about what he knew. All right.

MR. BERGRIN: I withdraw the question, Judge.

(In open court.)

THE COURT: The objection is sustained and you can withdraw the question, Mr. Bergrin.

MR. BERGRIN: I'll withdraw it, Judge.

Bear with me, sir. I'll move on to a different statement.

BY MR. BERGRIN:

Q Now, did you have another meeting, a fourth meeting with federal agents in May of 2011?

A Might of have. I don't -- I had -- --

Q At that time did you have an attorney --

THE COURT: Mr. Bergrin, just let him finish. He was still finishing.

MR. BERGRIN: I'm sorry. I thought he was --

A I might of have. I do not recall.

Q Did you have an attorney by the name of John "Azalino"?

THE COURT: Azzarello.

MR. BERGRIN: Azzarello. Excuse me.

A Yes.

Q And was he present during any meetings that you had?

A Yes.

Q And do you remember when that meeting occurred?

A Not exactly the date. I mean, I got it written down somewhere, but I don't remember.

Q And are those the notes that you might have thrown out?

A Might have been.

Q Do you remember what month it occurred in?

A No.

Q Does the month of May sound familiar to you of 2011?

A Could have been.
Q And that's only a short time ago. Correct?
A Correct.
Q And you didn't remember the month, you didn't remember when the meeting was?
A No.
Q Now, when you had this meeting with your attorney, was it the first meeting that you had with your attorney and the FBI?
A Yes.
Q And at that particular time you knew that your sister was a cooperating witness. Correct?
A Correct.
Q Now, Mr. Jimenez, how much visitation had you had with your family from the last meeting that you had with the FBI in November until this next meeting, which was in May of 2011?
A How much visitation?
Q Yes. How often would they visit you?
A Every two weeks.
Q Every two weeks?
And who would come to visit you, usually?
A My wife, my kids, my --
Q Mother?
A No, my mother's sick.
Q Now, when you had the meeting with your attorney and the FBI, did you ask for anything in writing in reference to you?

A I might of have asked for something, I'm not sure.
Q Were you ever told that you were going to be charged for narcotic trafficking?
A Was I ever told what?
Q Were you ever told or informed that you were going to be charged for narcotic trafficking?
A No.
Q Is your testimony that you were never informed of that?
MR. GAY: Judge, are we referring to a specific meeting, or just whenever in his life?
THE COURT: I think he's asking in general first.
MR. BERGRIN: Yes.
THE COURT: Okay. Go ahead.
A At one point I was told.
Q And when was that?
A Down towards the last meetings.
Q How did that make you feel?
A It made me feel -- I don't know.
Q That the FBI had lied to you?
A Maybe toward the beginning.
Q Toward the beginning? And only toward the beginning?
A I don't know. It was weird the way everything was happening.
Q Did you feel betrayed by the FBI?
A Some point, some -- you know.

Q Now, they had made promises to you. Correct?
A I wouldn't say promises, but at first that's what I was led to believe.
Q And you were led to believe it until you were actually charged. Correct?
A That's correct.
Q And you weren't charged until the end. Isn't that a fact? Your last meeting you were told you were being charged. Correct?
A That's correct.
Q So from the first meeting until just about your last meeting you believed that you were not being charged. Correct?
A Correct.
Q And you believed it based upon the information that you were given. Correct?
A Correct.
Q Now, during this meeting with your attorney, you testified during direct examination by Mr. Gay that at that time you began to be honest with the FBI, correct, or the Government? Is that what you testified to yesterday?
A Run that by me again, please.
Q When did you start to be honest, completely, a hundred percent?
A When -- I think I believe at one point they said that -- maybe if this is not true, if you tell us -- if you don't tell

us the truth now, from now on out, then we'll charge you.

I don't -- I don't remember what date, I don't remember what time, I don't -- I don't recall. But I know it was something to that point, from that point on out I was going to be honest.

Q And they still charged you. Right?

A That's correct.

Q So the FBI, you're telling us, the Government said to you, if you don't -- if you're not honest, we're going to charge you. Is that what you're telling this jury that they said to you?

A Yes, that's what they said.

Q Now, who determines if you're being honest or not; the Government?

A I guess, yes, it's the body, right, the whole body. The Government, the feds, the FBI. I don't know.

Q They determine whether you're being truthful and the information is good that you're giving them. Correct?

A That's correct.

Q Now, on this May 12th you had your attorney, like you testified, and he was sitting next to you as you gave information. Right?

A Correct.

Q And do you remember testifying yesterday that you gained credibility with Changa as far as him dealing drugs with you

because you told Changa that you were working at my office?

MR. GAY: Objection, Judge. I mean --

A No, I don't recall that.

MR. GAY: Judge --

THE COURT: Just a moment, there's an objection.

What's the objection?

MR. GAY: The objection is, if he's --

THE COURT: Simply.

MR. GAY: He's got to do this the right way. If there's a prior transcript, he needs to cite to something in the prior transcript and that's the way it's done.

THE COURT: All right. Just object. I understand.

That's an inappropriate way to ask the question, Mr. Bergrin.

MR. BERGRIN: Yes, your Honor.

Q Did you ever tell Changa that you were working at my office?

A I don't think I needed to tell him. He knew already.

Q Did you ever tell Changa that you were working at my office?

A Yes, I did.

Q Why did you tell him that if he already knew it?

A He asked me.

Q Changa asked you if you were working at my office?

A Exactly.

Q And that's the only reason you told him?
A Yes.
Q And when was that?
A I can't recall the date, time.
Q Now, you said that you had looked for a real estate file. Correct?
A That is correct.
Q And that you couldn't find it. Right?
A Right.
Q And you concluded that Changa was lying as to his motivational purpose for being in my office because you couldn't find the real estate file on Changa. Right?
A No, that's not what I said.
Q What did you say?
A I just said that I can't -- I couldn't find a real estate file on Changa.
Q And, you -- and the reason that you looked for the real estate file on Changa was to see as to whether Changa was telling the truth as to why he's at my office. Correct?
A No.
Q Didn't Changa tell you that -- you saw Changa at my office for the first time, correct, when you were trying set up this meeting at Isabella's, according to your testimony yesterday?
MR. GAY: Objection, Judge, that's not what he testified to.

THE COURT: Yeah. Again, Mr. Bergrin, don't recharacterize his testimony. That's for the jury to determine. Okay?

Q Did you see Changa at my office?

A Yes, I did.

Q When did you see him at my office for the first time?

A I do not recall the date or time.

Q Was it about the time that you were setting up this meeting with Changa and Hakeem Curry?

A Yes.

Q And did you ask Changa why he was there?

A Yes, I asked him what -- what is he doing here. I mean, I thought he was in trouble.

Q And how did he respond to you?

A He said, no, I'm going to see Paul about some property. I need to talk to him about a property.

Q And when you heard that, what did you do?

A Nothing. It was like nothing to me.

Q Did you then look up to see if Changa has a file?

A No, not then. Not right away.

Q But there came a point in time that you looked up to check to see if Changa has a real estate file. Correct?

A That is correct.

Q And you looked for a real estate file. Right?

A Right.

Q And I asked you yesterday what name you looked under. Correct?
A That's correct.
Q And did you look under the name "Changa"?
A Jose something. Gladys knew his name. The reception. I asked her.
Q Well, you didn't say that yesterday. Right?
A You didn't ask.
Q Now, did you find a file with the name that Gladys gave you?
A No.
Q And what did that make you believe?
A It made me believe that -- I was putting something together.
Q As far as what?
A As far as the drug deal.
Q Now, on May the 12th, if you believed that, why did you tell the FBI that I did a real estate closing for Changa then?
MR. GAY: Judge, again, he's not doing this properly.
THE COURT: All right. Sustained.
Q Do you remember speaking to the FBI on May the 12th of 2011?
A Did I remember --
Q With your attorney, John Azzarello? Do you remember speaking to the FBI?

A Correct.
Q And do you remember asking them -- do you remember them asking you about a real estate closing for Changa?
A Don't remember exactly. Do not remember exactly. Maybe they -- there was something mentioned to that, but I don't remember.
Q Well, you just testified that -- that I had -- that you checked for real estate files. Correct?
A That is correct.
Q And you couldn't find it. Right?
A Right.
Q Did you ever tell the FBI that I did a real estate closing for Changa in Florida? Did you ever tell them that?
MR. GAY: Asked and answered.
A I don't believe they asked that, Judge.
THE COURT: I'll allow that one more time. Go ahead.
Q Did you ever tell the FBI that I did a real estate closing for Changa in Florida?
A I don't recall.
Q Would anything refresh your memory as far as that?
A Yes.
MR. BERGRIN: If I could have the Court's indulgence for one minute, Judge.
THE COURT: Go ahead.
(There is a pause for Mr. Bergrin.)

MR. BERGRIN: Excuse me one minute, please, Judge. That.

THE COURT: Mr. Bergrin, if you don't have it right now, go on to another area or question and then see if you can find something, if there is.

MR. BERGRIN: There is Judge -- I'll have my associate -- I'll have counsel look for it.

Okay.

Q Now, in setting up this meeting at Isabella's, did you ever ask Yolanda, your sister, to have Changa call you?

A Again, I never set up the meeting at Isabella's.

Q Did you ever tell the FBI that you asked Yolanda to call, to call Changa for you and contact Changa for you to set up this meeting?

A I do not recall.

Q Would anything refresh your memory on that?

A Yes. I mean if -- if you show me where it says it maybe it will refresh my memory. But as of now, I mean I'm not denying it, I'm not saying it's not there, I just don't recall.

Q Did you ever hear me ask Yolanda to call Changa and to have Changa call me?

A Well, I remember you at one time on the phone wanted to know Changa's number. I don't know if you was talking to my sitter or you was talking to somebody else.

Q Did you ever tell the FBI that Bergrin called Jauregui --

meaning your sister -- and asked her to get in touch with Changa and have Changa meet him at the restaurant?

A Again, I said you might have had called my sitter. I'm not sure. I don't know who he dialed, but he got the phone for somebody -- phone number for somebody.

MR. BERGRIN: May I approach the witness, your Honor?

MR. BERGRIN: With J04113

(Counsel confer off the record.)

Q I ask you the to look at the fourth sentence up on this last paragraph on page 3.

(There is a pause for the witness.)

Q And this is on May the 12th of 2011. That's date of that report. Correct?

A That is correct.

Q And this is a meeting that you had with the FBI with your attorney there. Correct?

A That is correct.

Q And you didn't know who I was asking the number to, the number of Changa. Correct?

A Correct.

Q And you didn't know who was on the other end of the line. Is that correct?

A That is correct.

Q Then why did you tell the FBI that I called your sister and asked your sister to contact Changa and tell --

MR. GAY: Objection, Judge. This is not the right way to do this.

THE COURT: All right. I'll allow it. Go ahead.

MR. BERGRIN: Thank you, Judge.

A Again, when I -- I didn't -- I didn't specifically say that you was calling her, I said that you might of have been calling her for Changa's number, or you been -- or it could have been somebody else. But most likely it would have been my sister. And I mean, she probably the only one that know the number.

Q Well, your other sister was just about living with him; Maria. Correct?

A There you go, maybe she could have gaven you the number, but I wasn't sure. I didn't -- I didn't explain this to them like if I was a hundred percent sure, it was just a guess.

Q It was just a guess.

Didn't you tell them specifically that I called your sister specifically? Didn't you tell it to the FBI on May the 12th, that I called your sister Yolanda Jauregui and told her to get in touch with Changa to set up the meeting at the restaurant?

A Again, you might of have been calling my sister, or somebody else. Most likely it would have been my sister.

THE COURT: All right. Next question.

Q If you're only guessing, then why did you tell them it was your sister?

A Who else would I tell them? I mean, who else could I come up with? Who else could have known the number? Either my sister, my other sister, or Yolanda. They're both my sister.
Q Does that refresh your memory, that report, as to what you told them?
A Not exactly. But it's just tell like I said, I said it exactly as I'm telling you.
Q Now, you testified yesterday before this jury that what you observed at the restaurant about this meeting is you saw me, Changa and Curry shaking hands in the back, correct, from across the street? Is that what you testified before this jury under oath?
A Yes, that's what I said.
Q And then as you approached the restaurant, Curry was walking out the door. Correct?
A As --
MR. GAY: Objection, Judge, that's not the testimony. And again, if he's going to do this properly --
THE COURT: To his best recollection, I'm going allow it.
MR. BERGRIN: Thank you, Judge.
A As I walked in the restaurant, Hakeem Curry came past me.
Q Came past you. Okay.
A Correct.
Q You never saw anybody seated at a table. Isn't that a

fact? Correct?
A Correct.
Q Then why did you -- did you ever tell the FBI on May the 11th -- excuse me -- May 12th of 2011, with your attorney present, with your attorney present, that you saw all of us seated at a table closest to the front door?
A Again, they asked me if I seen you seated.
I say, they might have been seated, but when I got there they were standing. And maybe in the beginning I might have said that, I'm not sure.
Q On May the 11th, Mr. Gay asked you -- excuse me, I'll withdraw that question.
Mr. Gay asked you yesterday about what you observed at the restaurant. Correct?
A That is correct.
Q And he also asked you about the fact that you became truthful when you had your attorney present. Correct? Do you remember being asked that question and saying, yes, I became truthful when my attorney was present?
A That's correct.
Q And while you were under oath yesterday, you testified about what you observed specifically at that restaurant. Correct?
A That is correct.
Q With your attorney present on May the 12th of 2011, didn't

you tell Mr. Gay, Mr. Minish and the FBI, the Government, that you saw us seated at a table closest to the front door? Isn't that the words that came out of your mouth?

A No.

Q I ask you to look at page 3 of the statement that's right in front of you dated May the 12th.

A Page three?

Q Yes, sir.

A Where it's highlighted?

MR. BERGRIN: May I approach the witness, your Honor?

THE COURT: Sure, go ahead.

MR. BERGRIN: Thank you, sir.

Could I have that back, please, sir.

I'm sorry. The last paragraph. It's still highlighted, sir.

A (After pause) I don't know. They might of have gotten it mixed up or confused. But that's not what I said.

Q So they were confused, not you?

A Like I said, somebody might have been -- I never said "in the front."

I might have said -- I might have said "from the front" -- I might have -- they might have had misunderstood when I said the front has got a -- the large glass window --

Q The statement -- I'm sorry.

A -- that you could see inside. But other than that Changa

was sitting towards the front, I mean, even the restaurant is not that big. I mean, even the back, if you look at the back, it's not that far from the front anyway. I mean, either way.

But I don't remember saying the front. I remember saying "towards the back." Maybe towards around the middle, the center.

But that is kind of towards the back, midway when you look at the pictures.

Q Yesterday when you testified you didn't see anybody sitting at any tables. Correct?

A Correct.

Q And your testimony yesterday, was it truthful to this jury?

A That is correct.

Q On May the 12th of 2011 when you spoke to the FBI, isn't it a fact, with your attorney present, with your attorney present, you told the Government you saw all of us seated at a table?

A They asked me if they were seated. I said they probably would have been seated, but when I seen yous out there when I came up, they were standing, you shook hands and that was that.

Q That's not what it says in the statement. Correct?

THE COURT: Enough, Mr. Bergrin. Go into another topic. You explored that enough.

Q On May the 12 of 2011 during this conference, you said that -- excuse me -- let me take that back. Strike that question.

On May -- during this conference, you said -- excuse me -- you had testified that the only thing you saw was Hakeem Curry walking out the door. We shook hands in the back. Correct? And then --

THE COURT: Mr. Bergrin, that's a very confusing question.

MR. BERGRIN: Let me clear it up.

THE COURT: "You said yesterday," and -- so clear it up.

Q When you entered the restaurant, where was Hakeem Curry?

A Hakeem Curry was walking towards the exit door.

Q And was he walking out the door?

A Exactly.

Q So when you walked in the restaurant, who was left inside the restaurant?

A You and Changa. Changa was in the back, you was towards -- towards the center.

Q Now, do you remember being asked that question on May the 12th?

A Yes, I was asked something to that.

Q Did you tell the Government on May the 12th that we were all inside and that we all shook your hand?

A No. You shook hands with Changa, you shook hands with Hakeem Curry. You didn't shake hands with me. It was, hi, Ramo.

Q Look at page 4 of that statement.

Does that refresh your recollection in reference to you telling the Government that we were all there and shook your hand?

A I don't see page 4 on here. I see page 3, page 2.

MR. BERGRIN: I'm sorry, Judge. I have page 4.

Q I'm sorry, Mr. Jimenez. I'm so sorry.

I ask you to look at page 3 into page 4, please.

Did you tell the Government, Mr. Jimenez, on May of 2011 with your attorney present, that when you walked in the door, we all got up from the table, walked up to you and shook your hand?

A I don't recall stating that you shook my hand. I remember stating that you all shook hands.

Maybe it was misunderstood, I'm not sure.

Q Does reading that statement refresh your memory at all in reference to --

MR. GAY: He already answered this question, whether it refreshes his memory.

THE COURT: He's looked at it and he's given his answer again, Mr. Bergrin. It doesn't seem to refresh his recollection.

Q Were you being truthful during this May 11th meeting --

A Correct.

Q -- with the Government?

A Correct.
Q If you were being truthful, then why did you tell them that you saw us seated at a table?
MR. GAY: Objection, Judge.
THE COURT: I'll allow it.
Go ahead.
MR. BERGRIN: Thank you, your Honor.
A Again, I said you'll might have had been seated. When I got there you'll shook hands and that was that.
THE COURT: All right.
Q In you're being truthful, then why did you tell them that when you walked in, we got up from the table --
THE COURT: All right, Mr. Bergrin, we've covered this. Okay? It's getting argumentative and...
Q Did you ever deal with Peruvians for drugs?
A Correct.
Q And when did you deal with the Peruvians?
A 2002 some time, 2003, 2004.
Q And how much quantity, how much drugs did you buy from the Peruvians?
A Not much, a small amount.
Q How much is a small amount to you?
A 200 grams, 150 grams.
Q How many times?
A A few times.

Q And who was the Peruvians?
A What do you mean, "who was the Peruvians"?
Q What was his name?
A They go by the first name: Robert, Pedro.
Q And where, where did you deal with them?
A In Paterson.
Q Now, you had met Alejandro, according to your testimony yesterday, Alejandro Castro, a short time after that failed meeting at Isabella's. Correct?
A That is correct.
Q And during the second meeting with Alejandro, he offered to deal cocaine to you. Correct?
A That is correct.
Q And as you testified yesterday, in any quantity. Correct?
A That is correct.
Q And you were still dealing with Peruvians after meeting Alejandro?
A It doesn't matter who you deal with. You just don't got one supplier, you got more than one supplier. You got plenty of supplier. You go to any corner out there, you could connect with anybody. So it's not that I need just Alejandro. I cut Alejandro off at one point. He didn't cut me off, I cut him off.
Q Now, did you ever tell the FBI that since Changa had not committed to selling to Hak, that you went to the Peruvians?

A Come back again.
MR. GAY: Can you identify the time frame of this?
THE COURT: Yes, please. Go ahead, try to set a time.
Q In May of 2011, did you ever tell the FBI and the Government that when Changa wouldn't commit -- Changa would not commit to selling to Hakeem Curry, that you went to the Peruvians?
A I don't recall that part.
Q Look at the report in front of you.
A What page is that?
MR. BERGRIN: May I approach, your Honor?
THE COURT: Yes, go ahead.
Q I ask you to look at page 3 of the May 12th, 2011 statement that you gave to the FBI and the Government. I ask you to look at the third paragraph -- the first, the second, and the third sentence.
A The first paragraph, the third sentence?
Q Where it says "Peruvians" in the margin.
(There is a pause for the witness.)
Q Have you had a chance to read it, Mr. Jimenez?
A Yes.
It might of have --
MR. GAY: Judge, is there a question here?
THE COURT: Yes, what is the question, Mr. Bergrin?
Q Did you tell the FBI and the Government on May the 12th of

2011, with your attorney present when utter these panics of honesty, that you were -- since Changa would not commit to Hakeem Curry, you went to the Peruvians?

A No. I went to the Peruvians --

Q I'm asking you a question. Did you tell that to the --

MR. GAY: He's trying to answer the question.

THE COURT: No. No.

Did you tell that to the FBI on that date?

THE WITNESS: No, not exactly that. I never said none of that.

THE COURT: Next question.

Q Does this report, and reading the report and what's contained therein, does it refresh your memory?

A No.

THE COURT: All right. Next question.

Q Did you then have -- by the way, on all these meetings, even the May 12th meeting with the Government, with your attorney present, isn't it a fact that you never mentioned that statement that you allegedly heard from me to Curry: If there is no witness, then there is no case, or words to that effect?

A Correct.

MR. GAY: Judge, what's time frame of this? If we could -- is he saying up to this meeting or is he saying ever?

Q Even in this meeting on May the 12, 2011.

THE COURT: May 12th I think.

MR. GAY: I just wasn't sure about that.
Q So you never mentioned --
A May 12th?
Q Yes.
A I don't know when the meeting took place. It wasn't -- it wasn't on this day, was it?
Q Do you remember when the meeting took place in May?
THE COURT: This is May 12th, 2011. Right?
MR. BERGRIN: Yes, sir.
Q A short time ago, May 12th 2011, do you know where the meeting took place?
A I don't know. Maybe it could have taken place over here or Mid-State. I think it was over here.
THE COURT: "Over here," being what?
THE COURT: U.S. Attorney's Office?
THE WITNESS: Right.
THE COURT: Okay.
Q Now, you had the meeting on October 28th of 2010, correct, that we talked about. Right?
A Right.
Q And you never mentioned anything to them whatsoever about the, "if there is no witness, there is no case." Correct?
A That's correct.
Q Then you called them on November the 1st, right, and you never mentioned anything about that over the phone?

A That's correct.
Q Then you have another meeting on November 5th for more hours and you never mentioned anything to them. Correct?
A Run that by me again.
Q And then you have another meeting with them on November the 5th after you make the telephone call and say that you have information, right?
A Right.
Q And you never mentioned anything about "no witness, no case." Correct?
A Correct.
Q Then you have another meeting with them for more hours and hours on November the 16th of 2010, and never mention anything about it. Correct?
A That's correct.
Q Then you have another meeting with your attorney on May the 12th of 2011 and never mention anything about it. Correct?
A I did mention it to my attorney at one point.
Q Did you mention it to the Government on May the 12th of 2011, your fifth meeting?
A I'm not sure when I mentioned it but I know I mentioned it.
Q Now, isn't it a fact that you mentioned it for the first time on July the 21st of 2011?
A If that's what that report says, then that's the date.
Q When did you learn that you were going to be charged with

narcotic trafficking?
A Probably some time in June. I'm not sure.
Q So some time in June you learned that you were going to be charged with drugs, and then for the first time, after hour upon hour up and down hour of meeting with the FBI, you mention anything about this statement. Correct?
A I'm not sure. What was the question? I mean, before that?
THE COURT: Repeat the question. Go ahead. You can repeat the question.
MR. BERGRIN: Thank you, sir.
Q You had many, many meetings with the FBI, correct, and the Government?
A Right.
Q You spent a lot of hours with them. Correct?
A Correct.
Q And as a matter of fact, you took notes to make sure that things stayed fresh in Ramon Jimenez' mind. Correct?
A That's correct.
Q And you even took notes about what you wanted to talk to them about, correct, to refresh your memory so you didn't forget?
A No, I didn't take notes of what I would -- what I wanted to talk to them about.
Q You had meetings on October 28th; you called them on November the 1st --

THE COURT: That's 2010.

MR. BERGRIN: This is 2010. I'm sorry, your Honor.

Q You had a meeting on November the 5th of 2010, you had a meeting on May the 12th of 2011. Correct?

A Correct.

Q You had spent at least, at least 12 to 15 hours with them. Correct?

A If that's the calculation, yes.

Q And not once during any of these meetings, even with your attorney present, up to July the 21st of 2011 did you ever mention anything to them about hearing me say the words with Hakeem Curry present, "if there is no witness, there would be no case"?

A Correct.

Q And that's after learning that you're going to be charged with narcotic trafficking and face a lot of years in federal prison. Correct?

A That's correct.

Q And that is after knowing on the first meeting, October 28th of 2010, that you're there to help yourself and to help your sister?

A Correct.

Q Now, while you worked in my office, do you remember reading articles, correct, in reference to the shooting of the witness?

A No.

Q Are you telling us that you had no knowledge of that whatsoever?
A I read a lot of things. I wasn't -- I didn't even knew -- I don't know -- the people you're talking about I don't even know. I mean, the shooting, I don't even know.
Q You don't even know?
A Exactly.
Q You never heard of it before you talked to them on July of 2011?
A At that time I wasn't thinking nothing of this. Nothing.
Q Are you telling us that you didn't read any newspaper articles and that you had no talk or learned nothing about it?
A I -- I read a lot of articles, I read a lot of reports, I read a lot of files, I seen a lot of names. I don't remember everything.
Q Now, you said that -- you were asked a specific question about that, what you heard, correct, on this July 21st meeting with the FBI?
A Correct.
Q And your attorney was present?
A Correct.
Q And you wanted to make sure that you were honest. Correct?
A Correct.
Q And you wanted to make sure that you were completely up front about it. Right?

A Correct.
Q And, of course, Ramon Jimenez wouldn't tell them something that wasn't true. Right?
A Correct. My, I mean in the beginning I wasn't honest.
Q Now, you told them that -- they asked you for a time frame of when you heard this statement, right, in that July meeting?
A Time frame? I don't remember no time frame.
Q Do you remember being asked -- so you're telling us that they never asked you when it occurred, when you heard this statement being made?
This is during the July 21st, 2011 interview.
A They asked the date, time I believe, but I don't remember -- I didn't remember it.
Q Well, one thing that you remember is that it was summertime. Correct?
A It could have been part summer, spring; I'm not sure.
Q And you remember it's summer because it was hot outside. Right?
A I don't -- like I say, I'm not sure if it was hot at that time, warm. Spring? I'm not -- I don't recall. I mean --
Q You have no memory of it?
A The weather?
Q The weather.
A Like I say, it could probably have been warm. I don't know. I'm not sure.

Q So you don't know. Correct?
A Correct.
Q So if you don't know, then you definitely would not have told the FBI that it was the summer of 2003, isn't that right, because you're not sure? You wouldn't say something like that because it wouldn't be true. Right?
A Like I say, if it was hot, warm, or springtime, I'm not sure. I wasn't sure. I never --
Q And my question to you, Mr. Jimenez is: If you weren't sure, then obviously you would not have told that to the FBI because it wouldn't have been true. Right
A Is that what the report says?
THE COURT: Don't answer until he finishes the question, please.
A Is that what the report says?
Q Please answer my question.
A Is that what the report says?
THE COURT: No, no, you don't ask the questions. There's a question pending.
MR. GAY: Judge, perhaps if he reasked it because since there was an interruption, I'm not sure --
THE COURT: He asked the question.
That's fine. But you don't ask questions back, Mr. Jimenez.
Q You're not sure, as you testified today, as you just

testified, as to when that statement was made. Correct?
A Right. I --
Q You're not sure whether it was the summer, the winter, or what month. Correct?
A That is correct.
Q you're not sure of what season. Correct?
A That is correct.
Q You're not sure about what the weather was outside. Correct?
A That is correct.
Q And you're not sure about what time this incident occurred, correct, this statement?
A Around the time?
Q Yes.
A I don't know the time, the date, probably the year, maybe. But not the time of day.
Q And what year was it?
A Probably some time in 2003.
Q Now, in you had told the FBI that you remember it occurring in the summer, you would never have said that, correct, because you're not sure, you have no idea about the day, the season?
A I just asked you that question, I wasn't sure.
Q And you definitely would not have told them that it was hot outside, because you don't remember whether the weather was like. Correct?

A I just said I wasn't sure.
Q And if you had told them that, you would have been lying. Right?
A Yes.
MR. BERGRIN: May I approach the witness, your Honor?
THE COURT: You may.
MR. BERGRIN: Thank you. J04088?
MR. GAY: I have it. Thank you.
MR. BERGRIN: Thank you.
THE COURT: Is there an exhibit number yet?
MR. BERGRIN: No, Judge, but I would like this marked.
THE COURT: Mark it, please. D-13 I believe it is.
MR. BERGRIN: I have D-12, sir.
THE COURT: Is it D-12?
MR. BERGRIN: It's 13?
THE DEPUTY CLERK: D-13.
MR. BERGRIN: Thank you.
THE COURT: The date of that?
MR. BERGRIN: It's investigation on 7/21/2011. The date of transcription, your Honor, 7/22.
THE COURT: Okay. Thank you.
MR. BERGRIN: May I approach this witness, your Honor?
THE COURT: Yes, you may.
MR. BERGRIN: Thank you very much, sir.
Q Mr. Jimenez, I'm going to ask you, sir, to look at page 4.

I'm going to ask you specifically to look at line 1, 2, 3 -- line 5. Okay? It's in yellow highlight. Please read it very carefully.

(There is a pause far the witness.)

A It says it took place in the summer --

MR. GAY: Judge, is this to refresh recollection?

THE COURT: Ask him a question.

Q Did you tell the FBI and the Government, Mr. Gay, Mr. Minish with your attorney present, that it took place, you heard this statement made by me in the summertime when it was hot outside?

A Like I said, it might have been hot outside --

THE COURT: No, no, no, no. The question is: Did you say that to the Government --

THE WITNESS: I do not recall.

THE COURT: Wait. Don't talk when I'm talking.

THE WITNESS: Oh.

THE COURT: The question is: Did you say that to the Government in July, whatever date it was, 2011, which is only a few months ago?

THE WITNESS: Right.

THE COURT: Did you tell the Government: It was warm out and hot, whatever was in that report that you just read? Did you tell them that? Yes or no.

THE WITNESS: I might of have said that. But --

THE COURT: Was that true or not true?
THE WITNESS: It was part true because it wasn't -- it wasn't -- I didn't have no coat at the time.
THE COURT: Let me see the report, please.
THE WITNESS: I didn't have no --
THE COURT: Please hand it to me.
MR. BERGRIN: Should I give him --
THE COURT: You can hand it to the Clerk, and then I would like to read it.
MR. BERGRIN: Yes, sir.
THE DEPUTY CLERK: Here.
THE COURT: Did you say this particular meeting took place after hours in the summer of 2003 because it was hot outside? Yes or no.
THE WITNESS: Don't remember saying them particular words.
THE COURT: All right.
BY MR. BERGRIN:
Q And if you --
THE COURT: No, no, wait. Let him finish.
THE WITNESS: I don't remember. I don't remember saying them particular words, but I do remember that I wasn't wearing no coat at that time and I said that it might have been summer, spring, or it was warm out. That's what I said. Those are my words.

THE COURT: All right. Go on to the next question.

MR. BERGRIN: Thank you.

BY MR. BGERGRIN:

Q The last question in this area is: If you had said that it was summer out and you remember it specifically in 2003 because it was hot outside, you would have been lying to the FBI because you had no memory. Correct?

A That's correct.

Q Now, you had never paid me or given me any money for these drugs that you were dealing. Correct?

A That is correct.

Q And you had been using cocaine for multiple years?

A That is correct.

Q And smoking crack?

A Once in a while, yes.

Q And this is all the time -- when did you start using cocaine, Mr. Jimenez, by the way?

A Some time -- I was about 18.

Q When you were 18?

A 18, 17, somewhere around there.

Q And how many years did you use it?

A I used it on Friday, Saturday -- only on the weekends, all the way to like 19 years old.

Q And then you were smoking crack. Correct?

A No.

Q Then why did you just tell the jury that you were smoking crack?
A Because that's afterwards.
Q Oh, that's afterwards.
When did you start smoking crack?
A Probably some time in '06.
Q And how long did you smoke crack?
A Probably like a month.
Q So you only used cocaine from -- until you were 19 years old?
A Correct.
Q Did you ever tell the FBI that you were using cocaine while working for me?
A Yes.
Q And this was on July the 21st of 2011 when you were supposed to have these mental pangs of honesty because your attorney is present?
A What do you mean?
THE COURT: Rephrase that question, Mr. Bergrin.
MR. BERGRIN: I will, Judge. I'm so sorry.
Q You just testified before this jury sitting there under oath --
A Right.
Q -- that you used cocaine for two years. Correct?
A Corrects.

Q You said 17 through approximately 19 years of age. Correct?
A Right.
Q You weren't work for me when you were 19. Correct?
A Correct.
Q How old were you when you worked for me?
A 32.
Q 32?
Did you ever tell the FBI and the Government, on July the 21st of 2011, of 2011, that you were using cocaine while working for me?
A 2011?
THE COURT: No, no. Did you tell the FBI in the meeting in July of 2011 that when you were working for Mr. Bergrin you were using cocaine?
THE WITNESS: Yes.
Q Was that true?
A Yes.
Q Then why did you just tell this jury that you stopped using cocaine at the age of 19?
A I didn't say I stopped. You said, when did you start. And then you started smoking crack?
I answered those questions.
You didn't say, when did you -- did you ever stop snorting cocaine.

I said I stopped at that time because I did time in New York and I did time in Pennsylvania. I came home, worked for you --

Q And while worked for me you were using cocaine and smoking crack. Correct?

A Not smoking crack.

Q Using cocaine?

A Using cocaine.

Q Were you using any other drugs?

A Drink.

Q Drink. And how often would you drink?

A Weekends.

Q And where did you get the money for this cocaine and drinking?

A What you mean?

Q Where did you get the money?

A I get it from the checks that you give me. Either that, or if I don't have it, I go to Changa, go to the Peruvians.

Q And they give it to you for nothing?

A Yeah.

Q So you had such good contacts with the Peruvians that they would give you cocaine for free?

A Well, I needed -- I don't need a big quantity, amount of cocaine to do. All I need is a half a gram, half a gram to a 20. That don't take much.

Q And these Peruvians would give you drugs, and you'd be able to use them for free?
A Why not?
Q And so would Changa. Correct?
A I don't understand the question.
Q This is the Changa that you are so upset with that you broke off your relationship with after he did a deal behind your back?
A That was before that.
Q That was before that.
A Correct.
Q This is this Changa that you were so upset with that you wouldn't even talk to him about anything? This is the Changa?
A That was before any, any of that happened.
Q When did you go to Changa for cocaine, to use, for your personal use?
A When?
Q Yes.
A When I didn't have it. Like, if I didn't have it, if I needed it, I used to go to him. If he wasn't around I go to the Peruvians.
Q And these are the Peruvians that you only know their names that you would meet on the street corners?
A Right.
Q And you'd go up to them and say, hey, I'm Ramon Jimenez,

could I have some cocaine for my personal use? And they would give it to you without charging you.

A No, it's not like that. It's not like that. It's not like I just met you today and we bud/buddies. It's not like that.

Q Were you buddy/buddies?

A I won't call it buddy/buddies. I say associates.

Q Associates?

A Yes.

Q How close were you with these associates?

A Pretty close.

Q And how often would you buy from the Peruvians?

A It depends. It just depends.

Q Just depends?

A Yes, depends.

Q Now, you had filed an attorney ethics grievance against your attorney. Correct?

THE COURT: Are you going be a while longer?

MR. BERGRIN: Yes.

THE COURT: We should take a break for lunch.

All right, ladies and gentlemen, we'll be back in one hour. Please don't discuss anything about the case or anything about the matter. Enjoy your lunch and we'll see you back here in about an hour.

Thank you very much.

THE CLERK: Please rise for the Jury.

have been the fall, it could have been the spring, it could have been the summer. And we all know the time of year when this alleged statement was made is of some importance to this case.

MR. GAY: I do not --

THE COURT: So I'm giving him latitude.

We'll see you at 20 of two.

MR. LUSTBERG: Thank you, Judge.

MR. LUSTBERG: Thank you, Judge.

(A luncheon recess is taken.)

A F T E R N O O N S E S S I O N

(Trial are resumes - Jury not present.)

THE COURT: We're going to bring out the jury.

THE DEPUTY CLERK: Please rise for the jury.

(Jury present.)

THE COURT: All right, everyone, please be seated. Welcome back.

Mr. Bergrin, let's proceed.

MR. BERGRIN: Thank you, reason.

CROSS-EXAMINATION CONTINUES

BY MR. BERGRIN:

Q Mr. Jimenez, I'm just going to ask you two short questions on something I couldn't find before.

I asked you about a closing for Changa. Correct?
A Yes.
Q And you said that you had no knowledge whatsoever of me ever doing a closing for Changa. Correct?
A That is correct.
Q And you said that you looked -- you looked for the file and couldn't find the closing file on Changa after being given the name by Gladys the receptionist. Is that correct?
A That is correct.
Q Did you ever tell the FBI on November the 22nd of 2010 that Paul Bergrin did a closing for Changa for a house that he bought in Florida?
A 2010?
Q Yes, sir. November 22nd, of 2010.
A I don't -- I don't recall. I might of have said it then in the beginning.
Q Was that also a lie, just made up? Totally made up by --
A Towards beginning, if that's what I said then it was a lie.
Q And that wasn't the first meeting that you had with the FBI. Correct?
A Correct.
Q That was the fourth meeting. Right?
A Correct.
Q Now, yesterday when you testified for Mr. Gay and the prosecution under direct examination, he asked you to describe

the black male that was with Hakeem Curry. Correct?
A That is correct.
Q And before this jury you were able to give a description of this black male. Correct, sir?
MR. GAY: Judge, could we say which incident this is related to?
MR. BERGRIN: I'm sorry. I'll clear it up, Judge.
THE COURT: Go ahead, please.
Q This was in reference to the meeting, this supposed meeting at Isabella's Restaurant with Hakeem Curry walking out the door and you seeing us shaking hands from across the street.
MR. GAY: Objection, Judge, that's not what the testimony was.
THE COURT: All right. Again, ladies and gentlemen, it's your recollection of what his testimony was. And if Mr. Bergrin misstates it, then it's up to you to correct it. Also you should know, the questions of the lawyers, whatever the lawyer says is not evidence. The evidence is what the witnesses say from the witness stand. Okay?
Go ahead, Mr. Bergrin, you can restate the question.
Q Was there anybody with Hakeem Curry when you showed up at the meeting at Isabella's Restaurant with Changa?
A I didn't see him showing up at the meeting. I just seen him there. He was already there when I got there.
Q And this was this black male with Hakeem Curry?

A I said it -- I'll say it again. At the time I was asked if there was anybody else with Hakeem Curry, I said there might of have been. I'm not sure because I didn't -- you know, I wasn't sure.

Q When you testified yesterday, did you give a description of a black male?

A No.

Q Now, you filed an ethics complaint against your attorney. Correct?

A Correct.

Q And this was approximately six days before you pled guilty. Correct?

A Correct.

Q A short while before you pled guilty. Right?

A Right.

Q And who was your attorney at the time?

A John.

Q John who?

A Azzarello.

Q And when you filed the grievance, you knew the effects and the consequences of what would happen to that attorney by filing an attorney's ethics grievance complaint. Correct?

A What do you mean?

Q You know that he could be disciplined or punished for unethical action?

A I know something like that, yes.
Q And this was back in September while you were a cooperating witness. Correct?
A That is correct.
Q And you made allegations against him that he was in conflict of interest along with Attorney General John Gay and "Assistant Joe." Is that what you said?
A That's what I said.
Q As a matter of fact, you typed out -- you had the form written and then you had statements that were typed. Correct?
A Correct.
Q Now, where did these statements come from, what the FBI said and what you said?
A From my notes.
Q The notes that were destroyed?
A I'm not sure if they're all destroyed. Like I said, they might some be destroyed, some might not.
Q By the way, you reference in that grievance form a letter that you sent to Mr. Gay. Correct?
A Correct.
Q Where is that letter?
A Might be in the cell somewhere.
Q So you never sent the letter?
A I sent the letter. It was -- it was a copy.
Q A copy?

A Right.
Q A copy of the grievance, the attorney grievance form?
A I have a copy of that.
Q The letter that you sent to Mr. Gay, did you keep a copy of it?
A Yes.
Q And what did that letter say?
A I couldn't -- I couldn't -- I can't tell you word for word because I don't have it.
Q But this was back in September of 2011?
A I'm not sure of the date, but it could be.
Q It was when you sent the grievance form. Correct?
A Did I send it to Gay?
Q Yes.
A No.
Q When did you send the letter to John Gay?
A Way before all this happened.
Q "Way before," meaning when?
A Some time probably in early 2010.
Q Early 2010.

The first time you ever met whether the U.S. Attorney -- excuse me -- with the FBI was on October the 28th of 2010. Are you selling us that you sent a letter to John Gay before that?

A It wasn't -- it wasn't directly to his office, it was

another address that I had. So I'm not sure if he did receive it or if he received -- I'm not sure if he received it or not.

Q I'm not asking, you sir, if he received it or not.

When did you send -- you just testified that you sent --

A I'm not sure of the date, the time, I'm not sure.

Q But it was early 2010?

A It was some time in 2010.

Q You just testified that it was early 2010. Is that accurate or not?

A It's some time in 2010.

Q And what address did you send it to?

A I think it was some -- what's the back of that street? Halsey Street? Somewhere just on Halsey Street. I'm not sure.

Q Did the letter ever come back to you?

A No.

Q Did you ever ask Mr. Gay when you met with him whether he received a copy of your letter?

A No.

Q Now, when you filed the grievance against John Azzarello, your attorney, you accused him and you accused Mr. Gay and Mr. Joe, his assistant, correct, of being in conflict of interest against you. Right?

A Right.

Q And you told -- you wrote the Ethics Committee against all

three of them. Correct?
A That is correct.
Q And in that letter you also quoted the FBI reference to promises that they made to you. Right?
A That is correct.
Q And this was not even long, this was only a couple months ago. Right?
A That is correct.
Q And what you did is you told them that this grievance is in reference to your sister's case. Is that what you said?
A No.
Q So that would be false --
A That's what the letter says.
Q What's that?
A I said, that's what the letter says.
Q That's what the letter says?
A That's what the letter that I sent John -- John Gates.
Q John "Gates"?
A I mean John -- John Gay.
Q So you're telling us that the letter that you sent to the Ethics Committee had nothing to do with your sister. Correct?
A It had something to do with my sister, but that's how it started.
Q Did you at all send a letter to the Ethics Committee in

reference to your sister, Yolanda Jauregui?
A Run that by me again.
Q Did you send a letter to the Ethics Committee in reference to your sister, Yolanda Jauregui?
A The complaint was part of the letter. I mean, the letter was part of the complaint. Against the attorney -- against my attorney.
Q And isn't it a fact that you said that in reference to your sister, your sister's case, Yolanda Jauregui?
A That's what the letter states.
Q This was only a couple of months ago, Mr. Jimenez. Are you telling us you don't remember?
A The letter that I wrote -- the letter that I supposedly wrote to John Gay, that's what the letter states that's in the grievance.
MR. BERGRIN: May I approach the witness, your Honor, and have an exhibit marked, please?
THE COURT: You may.
MR. BERGRIN: It would be D-14, your Honor. The Attorney Ethics Grievance Form with all the attachments.
THE COURT: Okay.
MR. BERGRIN: May I approach this witness, please?
THE COURT: Yes.
MR. BERGRIN: Thank you very much.
Q I'm going to show you what has been marked D-14

collectively, and I'm going to ask you to look at this letter that says Wednesday, 28, 2011, Cynthia S. Earl, Esq., Secretary, District III Ethics Committee, Morristown, New Jersey.

A Right. Which part do you want me to read?

Q I want you to read the first couple of paragraphs.

(There is a pause for witness.)

A It states what I stated in the first -- in the letter that I send to John Gates. That's what I'm stating in these grievance right here. I'm starting from the beginning of how it started of how I became involved with this case. That's what it states in this letter.

Q My question to you, sir: Isn't it a fact that this says: This is in reference to my sister Yolanda Jauregui's case?

A That's exactly what it says, but it's --

Q So when I asked you that question probably about two minutes ago, you didn't remember that you wrote a letter in reference to your sister's case? And doesn't it say exactly --

THE COURT: Wait. He didn't answer that question.

MR. BERGRIN: I'm sorry, sorry. so sorry, Judge.

THE COURT: You have to answer the question, Mr. Jimenez.

A few moments ago when he asked you: Did you write a letter in reference to your sister's case --

THE WITNESS: I was stating that I wrote the letter

but it's part of the grievance, it's not in the Ethic Committee --

THE COURT: Okay.

THE WITNESS: -- that this is part of my sister's case. I'm stating of how it started, how I started in this case.

THE COURT: Okay.

Q The letter that you wrote and you signed is addressed to Cynthia S. Earl, Esq., Secretary, District III, Ethics Committee, Morristown, New Jersey. Correct?

A That is correct.

Q It starts out: "Sister case, Yolanda Jauregui. What I stated in that brief letter was as follows:"

And then the next paragraph -- two paragraphs down, excuse me, it says: "I am writing to you reference of my sister's case, Yolanda Jauregui, Case Number 09-369."

Is that what you said?

A That's exactly what I said in the letter.

Q And doesn't it say, "I believe that I can be of help to you as well as to my sister"? Is that what it says in there?

A That's what it says.

Q "If you're interested in hearing of what I have to say"; is that what you said?

A That's what I said.

Q And that was addressed to the Ethics Committee. Right?

A Right.
Q And is that also the letter --
THE COURT: Mr. Bergrin, if I'm reading this correctly, it would appear he's recounting to Ms. Earl of the District Committee a letter that he wrote, a summary of a letter that he wrote to Mr. Gay. And when he begins, "I'm writing to you in reference to my sister's case," I believe that he's -- that is what he's saying he wrote to John Gay.
Because if you go on and finish that paragraph, it says: "I will be calling you early next Thursday 1:00 p.m. to know if you are interested. I don't wish to speak to anyone else but you or Joe."
So this paragraph you're making reference to, this is an account, what he's telling Ms. Earl, of what he wrote to Mr. Gay, and everything that follows is his best recollection of what was in the letter that he wrote to Mr. Gay.
MR. BERGRIN: Yes, your Honor.
THE COURT: That's how I believe that letter --
MR. BERGRIN: I agree with you.
THE COURT: So there's no confusion here.
MR. BERGRIN: I agree with you 100 percent, Judge.
THE COURT: He starts off: My name is Ramon Jimenez. I'm presently incarcerated in Mid-State. I would very much like the opportunity to speak with you, and I'm appreciative of your time in 'difference' to your busy schedule and I shall be

brief."

MR. BERGRIN: Yes.

THE COURT: And then he's relating to her what he recollects to be what happened and what he believes or may have said to or wrote to the Government and/or Mr. Gay.

So take it from there so there's no confusion as to what this is.

MR. BERGRIN: Yes.

BY MR. BERGRIN:

Q And what you did is you recounted to the Ethics Committee what you had wrote to Mr. Gay in your letter. Correct?

A That is correct.

Q But you sent it to the Ethics Committee to inform them of what you had sent to Mr. Gay. Correct?

A That is correct.

Q Now, you're telling Mr. Gay in this letter that you wanted to cooperate. Correct?

A That is correct.

Q And that you had that information for them, and this was right after the meeting of October the 28th of 2011 -- 2010. Correct?

A Wrong.

Q Well, in the letter to Mr. Gay that's attached to the ethics complaint, you said that you were interviewed on October the 28th of 2010. Correct?

A That I was interviewed?
Q Yes.
A No.
THE COURT: All right. Give him a copy of this letter and let him have it in front of him.
MR. BERGRIN: Yes, Your Honor.
MR. GAY: Judge, we have no objection to entering this into evidence if it will avoid confusion.
THE COURT: Let's see where the question goes, Mr. Gay.
A I'm recounting everything that happened to the Ethics Committee up to now.
Q But you're telling them --
A But this is not what I wrote -- this never -- the letter happened first to Mr. Gay.
Q And then --
A Later on down -- later on, the same year two FBI agents came to see me. The first meeting was in 2010, 10/28 from what I see.
Q So you're telling us that you sent the letter to Mr. Gay telling him that you're willing to cooperate before the October the 28th meeting?
A Right.
Q But didn't you testify a little while ago that you wanted to get out of that meeting on October 28th and you didn't want

to speak to the agents?
A Correct.
Q So then why do you send a letter to Mr. Gay telling him that you want to cooperate and that you could help yourself and your sister if you didn't want to be in the meeting?
A Because in the beginning I wanted to cooperate, but when I put myself in that position, it was, like, now I wanted to get out because the way the questioning was going.
Q But you do admit that you sent the first letter?
A Correct.
Q So when the FBI agents came to see you, then why did you tell them that you have no idea as to why they were there to see you?
A Because that's -- I never requested to speak to any FBI agents.
Q Oh. You wanted to speak directly to the U.S. Attorney?
A Right.
THE COURT: Can I see you at sidebar, please?
(At the sidebar.)
THE COURT: Mr. Bergrin, I don't know if it's your intent to confuse or what, but this Ethics Committee Grievance Form is dated Wednesday the 28th. I assume that's September 28th, 2011.
MR. GAY: Yeah. Well, the front page is dated --
THE COURT: What's that?

How could he could have no idea as to why they were there if he asked to speak to --

THE COURT: Okay. I don't know if it's coming across that way, that's all. Because even I --

MR. LUSTBERG: It's confusing.

THE COURT: Even I was -- you know, I think what you have to do is: This was the grievance, and he was recounting a letter. And then this is -- from here --

MR. BERGRIN: Okay.

THE COURT: This was his best recollection of the letter he sent Mr. Gay. And in that letter he -- and I was trying to tell you this -- in that letter he said something: I will be calling you early next Thursday and wish to speak -- I don't want to speak to anyone else but you. And then the FBI agents showed up. Okay? And this is what they said here.

MR. BERGRIN: I'll clarify it.

THE COURT: But I think you have to go through this. I'm not going to allow you to just confuse everything here --

MR. BERGRIN: No problem.

THE COURT: -- with the dates and the everything else. Okay?

(In open court.)

THE COURT: The witness is asking -- Mr. Gay, would you just step forward? Mr. Gay, the witness is referring to something. Could I see --

THE WITNESS: It starts here. It's confusing --

MR. GAY: No, no, that's not for me, that's for Mr. Bergrin and the Court.

THE COURT: Go ahead. Go ahead.

BY MR. BERGRIN:

Q Before the FBI ever came to see you, did you send a letter to John Gay?

A Correct.

Q How did you get John Gay's name?

A Through library, the law library upstairs.

Q How did you get his assistant, Joe's name?

A The same way.

Q And when you were in the law library, what were you looking up?

A I had the paralegals there, they have librarians upstairs that pull out books. You tell them what you need. They go straight to it. And they said this is the Attorney General -- this is the Attorney General's address.

Their names I already had from my family, but the address I had looked up. The Attorney General's address, on -- I think it's Halsey Street, I'm not sure. It's a Halsey Street address, I remember Halsey Street, not the address but I know it's Halsey Street, a P.O. Box.

Q So you asked -- I'm sorry.

A It's a P.O. Box address. I don't remember the exact number

but I know it's somewhere on Halsey Street.
Q So your questioning your family in reference to who the prosecutors are in this case?
A My family tells me who's the prosecutor. I mean, they talked about it, they said that it's a guy name John and a guy named Joe.
Q And based upon that you sent them a letter, correct, telling that you want to cooperate for you and your sister. Correct?
A No. I just kept on talking to my family and we spoke. I spoke to my wife. My wife came out -- my wife found out that it was John, the last name, Gay. I forget Joe's last name. I didn't even use his last name. But that's when I sent the letter.
Q And you were the first to contact them before the FBI ever came to see you. Correct?
A That is correct.
Q And when the FBI came to see you, you didn't want to talk to them, right, according to your testimony?
A I talked to them.
Q But you were -- you testified that you didn't want to talk to them, you just wanted to get out of it, that's why you were lying to them and telling them things. Right?
A Well, when I sat down and I started talking to them, I didn't like the questioning was going in the beginning, because

in the -- well the beginning wasn't that bad. It was just later on down -- down the road it was like -- it was getting too...

Q Now, you testified today that you didn't know how long they met with you the first time. Correct?

A I said, I could estimate like two hours. Maybe two hours, a little more.

Q In the letter that you sent to the grievance committee, you said they met with you from -- and you had a specific time -- from 10 o'clock a.m. to 1:30. Correct?

A That's what I got from the officer in the correction -- in the Mid-State.

Q So that when you testified before this jury, you knew exactly how many hours they met with you. They met with you for three and a half hours. Right?

A Personally I didn't know, I just wrote down what the officer told me how long I had been gone, how long it took for me to get back. That's what I used.

Q You were asked on the witness stand if you knew how much time you spent with the FBI, and you said "no." Isn't that what you testified to?

A Exactly.

Q And you said it might have been one hour, it might have been two hours. That was the testimony that came out of your mouth. Correct?

A That's what I said.
Q It was actually three and a half hours. Right?
A Again --
THE COURT: Did you put in your letter, in this grievance report that "I was interviewed by two FBI agents by the names of Mike and Shawn at Mid-State Prison from 10:00 a.m. to 1:30 p.m."? Did you write that?
THE WITNESS: Right, because that's -- that's what the officer --
THE COURT: Okay.
THE WITNESS: -- that is the time the the officer give me. But personally me, I didn't know the time.
THE COURT: Okay. Next question, Mr. Bergrin.
MR. BERGRIN: Yes, your Honor.
Q Did you tell the grievance committee in your typed statement that the FBI told you: "We need a witness and we are looking at that witness"?
A Correct.
Q Did you tell them -- did they also tell you that we are not look to arrest or charge you?
A Correct.
Q But they did arrest you and they did charge you with this offense. Correct?
A Correct.
Q Did you tell the grievance committee that they talked to

you about the fact that you are facing a parole violation and they could work something out with you in Pennsylvania?
A Correct.
Q And that was for your parole that was being held over your head. Correct?
A Correct.
Q Now, when they came to see you, you knew exactly how much time you were facing, right, in parole?
A Yes.
Q And they also told you that you hold the fate of your sister, Yolanda, in your hands, it's up to you, correct, or words to that effect? It's up to you?
A Something to that effect.
Q That you could save your sister. Is that the words that they used?
A No.
Q What words did they use?
A I'm not are -- I don't recall. If I look at the report, I mean, where you -- to recollect my mind.
Q When you spoke to them and you spoke to the FBI, they told you that they had built a drug case against you. Correct?
A When was this?
Q According to your grievance form, did you tell the grievance committee that the FBI promised you that although they have a drug case against you, that they're not going to

charge you?
A Although they have a drug case against me?
I don't remember writing that, but...
Q Did they tell that you they would take care of you?
A Possibly they might have said that. I'm not -- I mean, if you could direct me to where it's at, I mean maybe I could remember.
Q Did they tell you that they are not here exactly to charge or investigate you?
A Yes.
Q And at that time did you know that you were facing serious charges?
A At that time did they tell me that I'm facing serious charges?
Q Did you know that you were facing serious drug charges?
A Well, I had a little feeling but I wasn't too sure.
Q Did they tell you that we're only here to see if you could be a witness against Paul Bergrin?
A Run that by me again.
Q Did they tell you exactly, according to your grievance form, that we are only here to see if you could be a witness against Paul Bergrin?
A Correct.
Q And did they tell you to trust them?
A Correct.

Q And that they will support you?
A Correct, something like that.
Q And when you heard that on October the 28th, you felt that they're there to help you. Correct?
A Well, I wasn't too sure still, so, you know, it's a little -- I couldn't trust it that much at the time.
Q Did you ask them about John Gay?
A Not personally, no.
Q Isn't it a fact that you told them, me, how do I know or what guarantee do I have that John Gay is not going to charge me if he doesn't want to give me immunity? Did you use those words exactly?
A I used those words exactly but --
Q So then you did ask them about John Gay?
A They asked me. They told me first about John Gay, that they work for John Gay and that's how I -- that's how the conversation -- that's how that conversation came about.
Q Then you talked to them about John Gay. Correct?
A Yes.
Q And as a matter of fact, they told you that John Gay is a very good friend of theirs. Right?
A Right.
Q And that he always -- that they worked cases together. Right?
A Right.

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: Judge, that's what he's trying to do.
THE COURT: No.
Answer the -- well, go ahead, Mr. Bergrin. Restate that question.
Q Did you tell the Ethics Committee that John Azzarello, your attorney, in a room next to John Gay, questioned you back-and-forth for 30 minutes and kept asking you the same questions over and over and over again about Paul Bergrin?
A I don't see it, but --
Q Do you remember saying that -- do you remember writing that? Excuse me.
A I remember saying something to that effect but I don't think --
THE COURT: Did you write that in the grievance?
THE WITNESS: I wrote -- I wrote that. I wrote that in the grievance but I don't remember using John Gates' name in there --
Q Let's talk about --
THE COURT: Wait, wait.
This is your written grievance. Correct?
THE WITNESS: Right.
THE COURT: You wrote -- and you made reference to a letter to John Gay. Correct?
THE WITNESS: Right.
THE COURT: Okay. And this was with regard to a

meeting that was taken -- that was held on November 30th, 2010 in the U.S. Attorney's Office, according to your own written typed letter?

THE WITNESS: Correct, correct.

THE COURT: Correct?

THE WITNESS: Right.

THE COURT: And you were saying at that meeting, Mr. Azzarello was going in and out of the meeting with Mr. Gay?

THE WITNESS: Correct.

THE COURT: And talking to you, coming back out every 15 minutes or so, and started interrogating you about what you knew about Paul Bergrin. Correct?

THE WITNESS: That's correct.

THE COURT: And that was going back-and-forth for a half hour or so?

THE WITNESS: Correct.

THE COURT: And then at some point -- go ahead, Mr. Bergrin. At some point you did what?

BY MR. BERGRIN:

Q And as a matter of fact, you told the Ethics Committee that John Azzarello, as he was going back-and-forth to Mr. Gay, was asking me the same question about Paul Bergrin only in a different form for about 30 minutes. Correct?

A That's correct.

Q And this was back in November of 2010, right, when Mr.

Azzarello was appointed as your attorney?
A That's correct.
Q And that is the truth, isn't it, that he was asking you the same question about me over and over and over again for 30 minutes. Correct?
A That is correct.
Q And did you also tell the Ethics Committee that in the meetings that you had with the U.S. Attorney, with the Government, with your attorney, with the FBI and with these prosecutors on April 6th of 2011, April 25th of 2011 and May the 12th of 2011, that they were confrontational and intimidating to you?
A Correct.
Q And that's true also, isn't it, Mr. Jimenez?
A Yes, it is.
Q They were intensely cross-examining you, asking you the same questions over and over and over again, and to you it was intimidating. Correct?
A Yes.
Q Now, there came a time when you entered into a plea agreement. Correct?
A Correct.
Q And in the cooperating plea agreement and your plea agreement you pled guilty to narcotic trafficking. Correct?
A Correct.

Q Between 500 grams of cocaine -- excuse me -- approximately 3.5 kilograms of cocaine or more. Correct?
A That is correct.
Q And you're facing five years and up to 40 years imprisonment?
A Correct.
Q But you're also facing a minimum of at least five years. Correct?
A Correct.
Q And the only way that you could get out of that minimum of that five years is through the United States Government. Correct?
A Correct.
Q And they have to send a letter to the judge asking that you not be sentenced to the minimum term of imprisonment. Correct?
A Correct.
Q And they have to also send a letter if you want less time than what you're facing saying that you cooperated. Correct?
A That is correct.
Q And it's the United States Government that makes the determination whether you're telling the truth or not. Correct?
A Not only up to them, I mean -- from my understanding it's also up to the judge.
Q So that it's your -- isn't it a fact that the United States

Attorney makes the determination whether you have cooperated substantially, and they send the letter to the judge?
A Yes.
Q Wasn't that explained to you?
A Yes, that was explained to me.
Q So they determine whether you're telling the truth and then the judge decides what your sentence is. Correct?
A Correct.
Q I just want to clear up a few things with you, Mr. Jimenez.

The meeting at Isabella's Restaurant that you showed up when Hakeem Curry was walking out the door, you stayed for about you said -- how long did you stay for, five minutes, two minutes; very quickly?
A It was real quick.
Q Just grabbed a soda and left. Correct?
A About maybe three, four minutes maybe.
Q And you've kept inside of you -- you never spoke to anybody about that meeting. Correct? You kept it inside of yourself?
A Yes.
Q You just let it be. Correct?
A I let it be. I spoke to Changa about it one time but it wasn't nothing like, I wasn't trying to make bad blood, you know?

MR. BERGRIN: I have no further questions, your Honor. Thank you.

afraid. So there's contrary evidence as to his fear. I understand that was earlier.

MR. GAY: I can say this --

MR. BERGRIN: It was in May.

MR. LUSTBERG: It was in May actually.

MR. GAY: -- I have no problem with that. One of the things we did discuss potentially with this was that I was going to lead him through this. And if you don't want me to I'm fine without leading him through and you can get up and recross.

THE COURT: Don't lead on it for now. If I suggest you do, go ahead with it.

Let's get some more time in before we break.

MR. GAY: I'm sorry. Did I intend to address this as my first question. I was going to go through this right away because I think it's the most important thing to redirect on.

THE COURT: Okay.

(In open court.)

MR. GAY: May I inquire, your Honor.

THE COURT: Yes, you may.

REDIRECT EXAMINATION

BY MR. GAY

Q Mr. Jimenez, you testified about an October 28th, 2010 meeting with the FBI?

A Correct.

Q That was the first time you met with the FBI?
A Correct, yes.
Q Had you ever cooperated with the Government in any matter prior to that?
A Never.
Q When the FBI called you down, did you expect that they were going to be there? Did you know who it was you were going down to see when they called you down?
A Absolutely not.
Q When they came down, what was your attitude towards them initially?
A I was taken back. I was surprised a little bit.
Q Why were you surprised?
A Because I wasn't expecting no FBI to come and see me.
Q And did the FBI question you at that time?
A Correct.
Q And did they question you extensively at that time?
A Correct.
Q During that meeting, that discussion you had with the FBI, did your attitude change at all?
A Yes.
Q How did your attitude change?
A I felt uncomfortable answering a lot of questions, and I just didn't feel -- I didn't feel secure, I didn't feel right after I said a few things that I, you know, that I said.

Q And what were the things that you said?
A Things that was incriminating me in the drug case.
Q Now, when you wrote the letter to Mr. Gay, to me, you indicated you were going to -- you wanted to help out your sister. Is that correct?
A That is correct.
Q And your sister was charged at that time?
A Correct.
Q So when the FBI came to speak to you -- well, let me rephrase the question. You thought somebody was going to come and speak to you at some point. Right?
A That's correct.
Q And you hoped somebody would?
A (No response).
Q And what did you expect you were going to be talking about when somebody came to meet with you then?
A I was suspecting John Gay or Joe.
Q Did you think you were going to be talking about your sister's case or your case?
A My sister's case.
Q So the FBI came to see you on the 28th, and did they ask you about your sister's case or your own activity?
A About my sister's case.
Q Did they also ask about your own activity?
A Correct.

Q And when they started asking you about your own activity, how did you feel about that?
A I felt uncomfortable a little bit.
Q And at that point did you tell them the truth about your own activity, the complete truth about your own activity?
A Correct.
Q You told them the truth at that time about you --
A I told them part truth about my own activity, but then I exaggerated a little bit and I looked at their face, and I say, I didn't want to get in too deep, so I exaggerated on a lot of things.
Q And why did you do that?
A Because if they was to investigate it, like I said, if they was to investigate what I was telling them this was going to come back with no good information if they was trying to confirm it. And I didn't think that I could be charged for lying or exaggerating.
Q Now, at that point during the questioning, were you trying to cooperate?
A I was.
Q So why is it that you lied then?
A Because I was -- at the time I asked for the immunity thing I wasn't being reassured that I was going get that, so that's why I started lying. I wanted to get up out of there. And I gave them what basically would probably convince a lot of other

people, you know?
Q Let me see if I got this straight. You first go down, talk to the FBI and you're surprised that's the FBI that you see. That's correct?
A That's correct.
Q They start questioning you?
A Correct.
Q And you start giving them information?
A Correct.
Q At some point the FBI begins to question --
MR. BERGRIN: Objection, your Honor, as to the manner of the questioning. These are all leading questions.
THE COURT: I didn't even hear the question yet. But go ahead.
Q At some point -- at some point the FBI begins to question you about your own activity. Isn't that what you just testified to?
A That is correct.
Q And you then become uncomfortable. Is that what you just testified to?
A That is correct.
Q And that's when you begin to think about immunity for yourself. Is that correct?
A That is correct.
Q And at that point had the FBI promised you whether or not

they would give you immunity?
A No.
Q What did they say?
A They said that they would have to speak to the Attorney General because they just don't give out immunity to everybody. It just depends on the -- the cooperating information that I give to them, they'll take back and they will see if they can give me immunity.
Q So hearing that, what did you think?
A I thought, you know, that it was a bunch of crap really. The first time I just said, that's a bunch of bull, because, you know, if I was to say something now, how am I going to be reassured later on you ain't going to come back and charge me?
Q So is it at that point that you begin to tell partial lies to the FBI?
A Exactly.
Q And what was the reason you told partial lies to the FBI at that point?
A I wanted to get up out of there.
Q Because they weren't going to give you immunity?
A Right, I wasn't being reassured.
Q Now, during the next meeting that took place with the FBI, is that also in prison?
A Correct.
Q And at that point had the FBI told you they would give you

immunity?
A No.
Q And at that point, what was your attitude towards speaking to the FBI?
A I told them, why is they avoiding the immunity thing? If they want me to become a witness why can't you just give me immunity and then we could just talk?
And they kept on telling me other things, I don't remember every single word. But I still felt uncomfortable. So --
Q So at that point did you tell the FBI the complete truth without getting a guarantee of immunity?
A Absolutely not.
Q Let's talk about the next meeting you had with if FBI.
On the third meeting, did the FBI guarantee you any kind of immunity?
A Nope.
Q And what was your attitude during the third meeting with the FBI?
A The same attitude; kept on lying and felt uncomfortable. Then I stated that I need -- I want a lawyer.
Q And at that point did you get a lawyer?
A Yes, I did.
Q So the next meeting you had, was it still in jail?
A No.

Q Did you come up to court and get a lawyer appointed to you?
A Correct.
Q Did you speak with your lawyer?
A Correct.
Q And after speaking to your lawyer, did you still have concerns about immunity?
A Correct.
Q So what happened then? Did you speak to the Government immediately after that, if you recall?
A Yes.
Q And is that -- during that period of time, is that when you said in your grievance letter that you and your lawyer were, for lack of a better word, going back-and-forth about things?
A Correct.
Q And at that point did you trust that the Government was going to provide what you had asked; immunity or anything like that?
A At that point, somewhat.
Q Now, were there any other concern besides immunity that you had relating to cooperation?
A My family.
Q Can you explain that, please?
A I was concerned of my family being protected, my wife and my kids.
Q Protected from what?

A From harm's way.
Q Harm's way from whom?
A From Paul Bergrin and people he knows.
Q Okay. Was there also as part of what you were talking to the FBI about, were you talking about Changa at that point?
A Correct.
Q Were you also talking about Alejandro at that point?
A That's correct.
Q And did you know them to also be dangerous people?
A Correct.
Q And were you concerned for your safety and your family's safety relating to the information you gave about them?
A Absolutely.
Q And at that point had the Government assured you that you would be -- you and your family would be protected?
A Absolutely.
Q They assured you of that?
A Absolutely.
Q Okay. At some point did you learn that all of your family members may not qualify for Government protection?
A Absolutely.
Q Who was that at that time that you felt would not qualify for Government protection?
A My stepdaughter.
Q Now, during this time frame when you spoke to the

Government next with your lawyer, would that have been on May 12th, 2011?
A Correct.
Q If you recall?
A That's the last meeting. Mid-State?
Q No, this would have been the first meeting you had with your lawyer I believe, when your lawyer was present.
A The first meeting?
Q Yes.
A Yes.
Q Now, at that point had you been charged with a crime, the first meeting with your lawyer?
A No.
Q Do you remember when you were charged with a crime specifically?
A Probably some time in June, I'm not sure.
Q Okay. I'm going to show you -- is this marked?
MR. GAY: I apologize, Judge. Okay. That's 7002.
Q I'm going to show you Government Exhibit 7002 and ask you whether you recognize that?
A Yes.
Q Okay. What is that?
A It's a complaint.
Q That is the complaint charging you?
A Correct.

Q What date is that signed. You can see at the bottom.
A May 20, 2011.
Q Thanks.
So was that the date -- does that refresh your memory about the date you were charged in Federal Court?
A Yes.
Q And what date was that?
A May 20, 2011.
Q Now, so you would have a meeting prior to that, May 12th, 2011, before you were ever charged in which it was you and your lawyer. Is that correct?
A That's correct.
Q And also with the Government?
A That's correct.
Q And then after that date, after the 12th and after you were charged, you had another meeting with the Government. Is that correct?
A Correct.
Q And that would have been on June 22nd of 2011, if you recall?
MR. GAY: If I may show something to refresh memory.
THE COURT: Yes.
Q Does that document refresh your memory about what date the meeting was with the Government and your lawyer, the next date?
A 7/21/2011.

Q Thank you.
THE COURT: What exhibit was that, Mr. --
MR. GAY: I'm sorry. Oh, I guess we'll make this, Judge, 7003. I apologize, I didn't want --
THE COURT: That's all right. Is it a 302 report?
MR. GAY: It's a 302 report, yes.
MR. LUSTBERG: The J number?
MR. GAY: It's J04086.
MR. LUSTBERG: Thank you.
Q Now, after this meeting on the 22nd, do you recall whether or not you learned that your daughter would not be accepted into the WITSEC program, into the protection program?
A Correct.
Q And did you -- how did you get informed of that?
A Through my lawyer and John Gay.
Q And when you were informed of that by your lawyer, how did you feel?
A I felt like -- I felt like shit, man. I mean, I felt bad.
Q Why did you feel like shit?
A Because I was putting my family under -- you know, I was putting my family in danger just by me taking the stand.
Q And you had initially believed that the Government would be able to provide protection for all of your family. Is that correct?
A Correct.

Q And now you learned that -- or you believed at that point --

MR. BERGRIN: Objection as to leading questions, your Honor.

THE COURT: All right. Go ahead.

Q What did you believe at that point after you learned that?

A At that point I believed that, you know, I got to start, you know, either minimizing it, pull back a little bit because I can't go through with it.

Q Okay. And is that the time when you filed the Attorney Ethics Grievance Form?

MR. GAY: And I'm going to mark this Exhibit 7004?

Q Is that when you filed the Attorney Ethics Grievance Form against your lawyer?

A That is correct.

Q And what was the reason you did that at that time?

A My attorney told me clearly that she won't be able to -- my daughter, my stepdaughter won't be able to get?

So I said, well, if she can't be able to get in, then there's no need for me to talk to them anymore.

Q And why did you ask for a new lawyer at that point and file that against your lawyer?

A Because I wanted to speak to somebody new to see if he could make something happen for that.

Q "Make something happen," meaning what?

A Get my daughter in.
Q Okay. Now, is this -- I'm going to show you 7004 again. Is that the Attorney Ethics Grievance Form that you filled out against your lawyer?
A That is correct.
Q And is your signature on that? It may be on the next page.
A Yes.
Q Is your signature on the second page?
A Correct.
MR. GAY: Judge, I'd ask that this be admitted into evidence at this time.
THE COURT: All right. There's no objection, it will be in evidence.
(Government exhibit 7004 is received in evidence.)
MR. LUSTBERG: No objection.
Q Now, Mr. Jimenez, I'm going to show you 7004. Now, in this ethics complaint I'm going to start off from the beginning. Initially the first few paragraphs, what are you talking about there?
A The first few paragraphs I'm talking about the letter that I sent to John Gay.
Q And this would be relating to what? What do you say in that letter, or what do you say about that letter in this document?
A I'm referring to my sister's case, that I would like --

that I have some information. If you interested about the information, I would be calling you on that Thursday.

Q So at this point when you sent this letter you were trying to help your sister out?

A Correct.

Q And then you talk about a meeting that you have with the FBI on 10/28 of 2010. Is that correct?

A That's correct

Q You talk about the agents telling you that they were here because they wanted a witness against Paul Bergrin. Is that correct?

A That is correct.

Q Did the FBI agents give you any information about Paul Bergrin at that time or tell you specifically any facts about Paul Bergrin at that time?

A Absolutely not.

Q I'm going turn to the second page.

Did you say to the FBI agents: "Everything that you know can help us in the case will be helpful." You see that?

A Yes

Q What are you referring to there?

You may have to look back at the prior page to get your question first for that response.

Let me --

A I asked them, what is it that they need to know about Paul

Bergrin.
Q And what was their summons?
A Their response: "Everything that you know can help -- can help us in the case would be helpful."
Q And did you then ask for immunity?
A Correct.
Q Did you also ask for protection for your wife and kids?
A Correct.
Q And what did the FBI tell you in response to those two requests by you?
A We can give you -- we can give you -- we can give your family -- we can give your family and you all the protection -- all the protection, but we cannot give you immunity privilege right at this moment because that's not the way -- that's not way it works.
Q So at that point you believed that your wife and family would -- could be protected?
A Correct.
Q But that you would not have immunity?
A Correct.
Q And at that meeting you then did not tell the entire truth to the FBI. Is that correct?
A That is correct.
MR. GAY: Sorry, Judge. I think I'm missing a page in this.

All right. I'm sorry, Judge, I appear to be missing a page on this.

Q Can I see 7004 real quick to make sure it's a full duplicate?

MR. GAY: And I apologize, your Honor.

Q Okay. This one does have it. I'm going to ask a couple of questions off of this.

No, never mind, enough with that exhibit now.

Okay. Mr. Jimenez, let's go back to the initial meeting that you had, the 10/28 meeting. And this was, again, before you had thought you were going to get immunity and before you were telling the FBI the entire truth.

Do you remember telling them anything about you setting up, trying to set up this deal between Hakeem Curry and Changa?

A On 10/28?

Q The first meeting. You need something to refresh your memory?

A Yes.

MR. GAY: I'm not sure which defense exhibit this is, if you can help me out.

MR. LUSTBERG: D-9.

MR. GAY: Okay? D-9.

Q If you could read the first highlighted portion and the second -- well, the first highlighted portion.

(There is a pause for the witness.)
A Okay.
Q Okay. Does that refresh your memory about whether or not -- if I could have it back -- during the first meeting, the one where you were not telling the FBI the entire truth, did you tell them that you tried to set up a deal between Hakeem Curry and Changa?
A Correct.
Q Do you recall telling the FBI at the first meeting anything about a meeting at a restaurant after that?
A No.
Q I'm going to show you this --
MR. GAY: What is it, D what? The same document?
MR. LUSTBERG: 9.
Q I'm going to show you D-9 again?
A The second paragraph?
Q Correct.
(There is a pause for the witness.)
A Correct.
Q Does that refresh your memory about whether or not you told the FBI anything about a meeting at Isabella's?
A Correct.
Q Does that meeting, is that meeting related to the drugs transaction between E.T. Hak and Changa?
A Correct.

Q And did you tell the FBI at that point anything about Mr. Bergrin relating to that meeting, if you recall?
A If I said anything about Bergrin?
Q Yes.
A Yes.
Q And what did you say?
A I said that he showed up.
Q You said he was at the meeting?
A Right.
Q Now, do you recall telling the FBI anything about, at the first meeting, the tracking device, a tracking device found in Hakeem Curry's car?
A At the first meeting? Might of have, I'm not sure.
Q Okay. Let me show you D-9 again, and I'll point up out to the third paragraph. Does that refresh your recollection after reading it? Just let me know, yes or no.
A Yes.
Q And did you tell the FBI at the first meeting about the tracking device?
A Yes.
Q And what did you tell them about the tracking device?
A That Hakeem Curry came to the office with a tracking device.
Q And did you mention anything about Mr. Bergrin at that time relating to the tracking device?

A I believe I did.
Q Do you need to refresh your memory again?
A Yes.
THE COURT: Leave it in front of him.
MR. GAY: Okay, sure.
Q Yes, third paragraph.
A Yes, I did.
Q And what did you say?
A I said that Bergrin said that's a tracking device, that's feds. Get that out of my office, put I back up underneath your car. Get it up out of here.
Q And you said that on the first meeting with the FBI?
A I said exactly that, Bergrin said something to the effect that now --
Q Okay. I know what you testified to, Mr. Jimenez, I'm not asking you about that.
A Okay. Yes.
Q What I'm asking you is to confirm: Was that during your first meeting you had with the FBI?
A Correct.
Q Okay. I'll take that back.
Now let's talk about the second meeting you had with the FBI, November 22nd of 2010.
Do you remember whether you ever told the FBI that Paul Bergrin was upset when he found out that you were selling

drugs to Hakeem Curry?
A Correct.
Q And what was that in relation to? Can you describe what you were telling the FBI about when you made that statement?
A That was in relation to when I approached Hakeem Curry at the conference room, and we never got to make the deal, but that was reference to that.
Q And was that -- well, this is a reference now, you said you told them about Paul Bergrin being upset. What was Paul Bergrin being upset a reference to?
MR. BERGRIN: Objection, your Honor. He doesn't know, he can't tell my state of mind.
MR. GAY: Judge, I'm talking about when he was telling this to the FBI, what did he mean when he said that? That's the question. I apologize if I didn't make that clear.
Q When you referred to Paul Bergrin being upset, when you said that to the FBI on November 22nd, what were you referring to?
A To Paul Bergrin's attitude.
Q About what?
A About me approaching Hakeem Curry.
Q And can you describe when it was that that attitude -- when was he upset? Describe the circumstances of that incident.
A He -- he was upset because I was talking to Hakeem Curry about making a deal with drugs. So he said that I cannot go

through his client but I can confirm something with him.
Q And you said that to the FBI -- or at least you said Mr. Bergrin was upset on November the 22nd, 2010?
A Correct.
Q Now, do you recall whether you said anything about -- anything more about the deal at that point that was supposed to happen between E.T. Hak and Changa during the 11/22 meeting?
A Do I recall saying anything about the deal?
Q Yes.
A Might of have said something. I'm not -- I can't recall.
Q Do you recall whether or not you said you spoke to E.T. Hak in Paul Bergrin's office in anticipation of that deal. First, yes or no. Do you remember that?
A I don't remember that.
Q Okay. Is that report -- if the report refreshes your recollection, let me know. If not, please let me know that, too.
(There is a pause for the witness.)
A Yes.
Q Okay. And did you tell the FBI on November 22nd that you had tried to set up a deal with Hakeem Curry for kilograms of cocaine and that you had spoken to him in Paul Bergrin's office?
A Correct.
Q Now, you were questioned before about whether or not you

ever told the FBI that you were aware that Mr. Bergrin may have closed a house for Changa. Is that correct, you remember that testimony before?

A Right.

Q I'm going to refer you to the 11/22 --

MR. GAY: Which one is this, Larry, I'm sorry? It's not D-9. Is it D-10? 11/22--

MR. LUSTBERG: I think it's D-10.

MR. GAY: Okay. D-10.

Q The second paragraph, highlighted portion.

A Yes.

Q Does that refresh your memory about whether you told the FBI about any kind of a closing that Mr. Bergrin would have done with respect to Changa?

A Not that I see.

Q Not that you see? Okay. That's fine.

That spot -- is it clear you're looking at that section there? I'm just asking whether it refreshes. I may not have pointed to the right spot.

A Yes. Oh, yes, I see it now.

(Mumbling/reading) Yes.

Q And do you recall what you said about the date of that closing?

A No, not really.

Q Okay. Refresh your memory, if it does.

(There is a pause for the Witness.)
Q If it doesn't refresh your memory, that's fine, Mr. Jimenez. It doesn't refresh --
THE COURT: Next question.
Q Now, Mr. Jimenez, you also testified that prior to being charged, but after you got a lawyer, you met with the Government on May 12th, 2011. Is that correct?
A That is correct.
Q Do you recall whether you had any discussions on that date about the drug deal between Hakeem Curry and Changa?
A It might of have, I'm not sure.
Q Let me show you --
MR. GAY: This is the...
(Counsel confer off the record.)
Q Let me show you D-12 and ask you whether that refreshes your memory about whether you told the FBI about any drug deal between Hakeem Curry and Changa.
A Yes.
Q And do you recall what you told them?
A Yes.
Q What did you tell them?
A I told them approximately about six months I decided to approach Hakeem Curry in the office, bring him into the conference room and spoke to him about the drugs.
Q Do you recall whether you told him about an amount of drugs

that you and Hakeem Curry negotiated for during that session?
A Yes.
Q What did you say?
A I told him if he was interested in some weight.
Q All right. And what was -- ultimately was there an amount that was agreed upon?
A Twenty keys.
Q And that's what you told the physician --
A Correct.
Q In that May -- may I see that back, please?
Did you also tell them what you did after that at the May 12th meeting?
A Correct.
Q What did you tell them?
A That I contacted Changa.
Q And what did you tell them after that? You contacted Changa and did what?
A And we came to an agreement that he would provide the 25 keys at the price at 20 and I would add the 21.
Q Do you remember telling the FBI at this May 12th meeting anything about Mr. Bergrin at that point?
A No.
Q I'm going to show you the same exhibit, D-12, and highlight that paragraph there.
(There is a pause for the Witness.)

A What was the question?
Q I'm asking first whether that refreshes your memory about whether you told the FBI anything about Mr. Bergrin on that May 12th, 2011 meeting with your lawyer, you, and the Government?
A I mean, I did say something about Paul Bergrin.
Q Okay. And do you remember what it was that you said?
Well, let me rephrase the question. Do you recall saying anything to anybody about a meeting you had with Mr. Bergrin in his office relating to your attempting to sell drugs to Hakeem Curry?
A Correct.
Q And what did you tell the FBI?
A That Bergrin called me upstairs to his office, closed the door behind me and he told me that if I had spoken to any -- to any of his clients about making a deal.
I say yes.
And we was referring to E.T. Hak. So after I said that, he said that before I talk to any of his clients I got to go through him.
Q And that happened on the May 12th 2011 meeting. Is that correct?
A That's correct.
THE COURT: Do you have much more on redirect?
MR. GAY: A lit bit, yeah, Judge. Do you want to take a break?

THE COURT: We'll stay here for a while.

THE REPORTER: Judge, May I have just a minute to change my paper?

THE COURT: Ladies and gentlemen, we'll recess for about 10 or 15 minutes and we'll be back here in that amount of time.

Please don't discuss anything about the case.

THE DEPUTY CLERK: Please rise for the Jury.

(The Jury leaves the courtroom.)

THE COURT: Mr. Jimenez, do you have to use the men's room?

THE WITNESS: No.

THE COURT: Mr. Bergrin, do you have to use the men's room?

MR. BERGRIN: No, Judge.

THE COURT: All right. Then we'll just stay here and we'll start in ten minutes, that way the Marshals don't have to bring you down and bring you up, and we'll probably go to 4:15, 4:30.

I'd like to wrap up this witness today.

MR. GAY: I will do my best, Judge.

MR. MINISH: May I ask before you leave, will we be getting to a second witness today, another in addition?

THE COURT: I don't know, that's Mr. Gay's redirect and I don't know if Mr. Bergrin has any limited recross.

MR. BERGRIN: Yes, Judge, I do.
THE COURT: Well, it will be limited, and also redirect should be limited to what it has been. But let's keep it limited to what you opened up.
MR. GAY: Yes, I will, Judge.
THE COURT: Okay. We'll be back -- I'll be back in six, seven, eight minutes, that's all.
(There is a pause in the proceedings.)
THE CLERK: Please rise for the Jury.
(Jury present)
THE COURT: if everybody would please be seated, thanks.
Go ahead.
MR. GAY: Thank you, your Honor.
BY MR. GAY
Q Mr. Jimenez, again, we're discussing the May 12th, 2011 meeting you had with the Government, your lawyer and yourself. Do you recall whether or not you told the Government anything about a meeting at Isabella's on that occasion?
A I believe I did.
Q Do you recall whether or not you said anything about how you learned of the meeting at Isabella's?
A Correct.
Q And what did you tell the FBI as far as you remember on the May 12th, 2011 meeting about that subject?

A I overheard Paul Bergrin on the phone, that he would be at Isabella's meeting certain individuals.
Q Mr. Jimenez, I'm sorry to interrupt, but if you could pull your chair up and speak into the mic so everybody can hear you.
A I overheard Paul Bergrin on the phone. I don't know who he was talking to, but -- exactly who he was talking to, but I overheard him say that he would be in the restaurant to meet these individuals.
Q And who were those individuals?
A E.T. Hak and Changa -- I mean, yeah, Changa.
Q And do you remember telling the FBI anything about what you did after learning that information? Again, this is back on May 12th, 2011.
A That after that I just went in, I was trying to finish up what I had to do in the office. I just tried to hurry up and get to the restaurant?
Q Do you recall telling the FBI anything about being suspicious when you heard Mr. Bergrin setting up the meeting --
A Yes.
Q -- at Isabella's?
Do you remember whether you said anything about actually going to the restaurant?
A Yes.
Q Do you remember what you told the FBI at that point?
A That he would be there? It was a certain time that he

said, I just don't remember the time that he said that he would be there, and that he will meet Changa there at the restaurant.

Q And what happened? Did you tell them anything about what happened when you got there?

A No.

Q You don't remember?

A Oh, did I say anything to Paul when I got there?

Q No, no. Did you say anything to the FBI -- let me be clear on this.

On the May 12th, 2011 meeting, you testified you discussed the meeting at Isabella's?

A Right.

Q I'm now asking you questions about what you told the FBI on May 12th, 2011 about what you observed at Isabella's.

A Correct.

Q Do you remember what you said to the FBI about what you observed at Isabella's at that meeting?

A I was coming up -- as I was driving up to the restaurant coming up Elliot Street, the restaurant is right in front of me, you could see right -- you could see clearly inside the restaurant when you get to the corner. The top of the corner, you see clearly inside of the restaurant. I seen Paul Bergrin, Changa and I believe it was E.T. Hak at that time, but --

Q Okay. And that's what you believed, it was, E.T. Hak, because at that point you were far away?

A Right.
Q Or relatively far away.
Did you tell them anything else about what happened after that?
A Parked the car. As I'm walking -- I'm on the street. So I'm walking towards the restaurant and I still could see inside the restaurant.
They shook hands. As I'm going in through the doors, E.T. Hak is coming out. I'm passing him. Go straight to the back, pass Paul, pass Changa.
Q Did you tell them anything about what you observed the individuals doing inside the restaurant when you saw them?
A Correct.
Q And what did you tell them?
A They shaking hands.
Q Did you say anything about whether or not you were angry at observing this meeting?
A Correct.
Q And did you tell them why you were angry?
A Correct.
Q Do you recall what it was you said about why you were angry about observing this meeting?
A Betrayal, betrayed.
Q Do you remember telling them anything about specifically what it was --

A $25,000. I was being cut out of $25,000.
Q Did you tell the FBI on May 12th, 2011 anything about why you believed you had been cut out of a deal, if you recall?
A I believe that --
Q Do you need something to refresh your memory?
A Correct.
Q I'm going to show you D -- I believe it's 12. If you could take a look at that paragraph there (indicating).
(There is a pause for the witness.)
A What was the question?
Q The question is: Does that refresh your memory about whether or not you told the FBI anything about why you believed you had been cut of the deal -- of a deal.
If it doesn't refresh your memory, sir, that's fine, I'm just asking whether it refreshes your memory.
A No. I believe that -- I don't know.
Q Well, does it refresh your memory first? Yes or no.
A No.
Q Okay. That's fine.
Do you remember whether you told the FBI anything on May 12th, 2011 about meeting Alejandro Castro?
A When I was -- come back again.
Q Do you remember whether or not you told the FBI anything on May 12th, 2011 about meeting Alejandro Castro, when you met Alejandro Castro?

A Correct.
Q And do you recall what you said to them?
A Castro at the meeting? Oh --
Q When you met Castro. Do you recall --
A Yeah, I recall meeting Castro, and I told the FBI that I met Castro at -- at Broadway and Verona, the corner bar with --
Q Do you recall whether you told the FBI about any other conversations you had with Mr. Castro after that?
A Correct.
Q What did you tell them?
A I told them that me and Castro was at Players Club, went out on the thing, I believe it's Friday or Saturday, one of those two days.
Q Did you tell them anything about any conversations you had with Mr. Castro at that time?
A Yes.
Q What did you tell them --
THE COURT: Mr. Gay, can I see you and the attorneys at sidebar?
MR. GAY: Sure.
(At the sidebar.)
THE COURT: To move this along, do you have any objection if he were to lead instead, you know, just say --
MR. GAY: That's fine. I'm more than happy to do it.
THE COURT: You can follow through the 302 and see if

it's in there or not, and if you can summarize: Did you tell the FBI at this time the following. This is all related to May 12th --

MR. LUSTBERG: We have no problem with that. The thing I did not want him to lead on was the thing he did not lead on on the security issue.

THE COURT: You know what, do you know what I mean? Didn't you say? Didn't you say? And if it's not in there, then object.

MR. LUSTBERG: Okay.

THE COURT: It will move things faster.

MR. GAY: That's great. Not a problem.

(In open court.)

MR. GAY: May I continue, your Honor?

THE COURT: Yes, go ahead.

BY MR. GAY:

Q Mr. Jimenez, do you recall telling the FBI at the May 12th meeting that you had met Castro at the Players Club?

A Correct.

Q And do you recall telling the FBI that Castro told you he was a drug dealer?

A Correct.

Q And do you recall telling the FBI that Castro said he had just completed a deal for 25 kilos and that they were about to do a 50 kilo deal?

A That is correct.
Q And do you recall telling the FBI that you asked -- that you inquired about whether he had done the deal with somebody named Hak?
A Correct.
Q And that Castro had said indeed he did?
A Correct.
MR. BERGRIN: Objection, Judge, it doesn't say that. It does not say that.
Q Okay. Then I'll read it word for word here.
Do you recall telling the FBI that you asked Mr. Castro if Hak had done -- if -- do you recall telling the FBI that Castro told you he had recently done a deal with someone?
A Correct.
Q Did Castro -- do you recall telling the FBI that Castro stated the name of the person, but you could not hear it?
A Yes, it might have been that.
Q And do you recall telling the FBI that Castro told you he got to meet Hak.
A Correct.
Q And that was in relation to the 25 kilo deal?
A Correct.
Q And the 50 kilo deal that he was about to do?
A Correct.
Q Now, it wasn't until after this meeting on the 12th that

you signed the cooperation agreement. Is that correct?
A That is correct.
Q Did you sign the cooperation agreement on October 6th of 2011?
A Correct.
Q I'm going to show you Exhibit 7000.

Now, between May 12th, 2011 and the time you signed the cooperation agreement, you met with the FBI on another occasion at least. Right?
A Correct.
Q And that was with your lawyer?
A Correct.
Q And did you tell the truth on that occasion?
A Correct.
Q Some time after that meeting but before you signed this cooperation agreement, is that when you learned that your daughter would not be going into the WITSEC program?
A That is correct.
Q And that is when you decided not to cooperate anymore. Right?
A That is correct.
Q That is when you filed that grievance letter?
A That is correct.
Q At some time after that you learned that your daughter would be accepted into the WITSEC program. Is that correct?

A That is correct.
Q And thereafter you signed the cooperation agreement. Is that correct?
A That is correct.
Q And you're testifying here today pursuant to this agreement?
A That is correct.
Q And what is your understanding of what's going to happen to you if you do not tell the truth for any question that I ask?
A There's no agreement.
Q And what is your understanding of what happens to the agreement if you tell a lie to any question Mr. Bergrin asks you?
A Same, no agreement.

MR. GAY: No further questions.

THE COURT: Is it just some limited recross?

MR. BERGRIN: Yes, Judge.

THE COURT: All right. Keep it to the redirect.

MR. BERGRIN: Thank you very much.

RECROSS-EXAMINATION

BY MR. BERGRIN:
Q And as a matter of fact, Mr. Jimenez, it's the Government that determines whether you're telling the truth. Correct?
A Correct.
Q Now, you testified that you had fear and safety concerns.

Right?
A Correct.
Q And that's why you weren't telling the truth, that you were lying. Right?
A Part of it.
Q Isn't it a fact that on May the 12th of 2011, you were asked specifically, May the 12th, 2011, after you had had an attorney, after you had multiple meetings, you were asked the specific question by Mr. Gay if you had any safety concerns, and you replied "no"?
A He was talking about myself.
Q Oh, you were talking about yourself.
You were asked if you had any safety concerns, and you said "no"?
A I still believe he was talking about myself. We already had established about the family thing.
Q Now, your family -- your cooperation means you getting out. Correct?
A That is correct.
Q And your cooperation means you getting a house that you can't afford. Correct?
A I'm not sure of all the procedures.
Q You're not sure of the benefits that you're going to gain?
A I was -- I was only concerned about the protection of my family, I wasn't concerned about all that.

Q So protective that you even want your sister-in-law to come with you. Correct?
A If it was possible, because she was staying with my -- with my wife. She was living with my wife as -- as of today. I mean -- not today, but to the time whenever it took place.
Q And besides your sister-in-law you want your mother-in-law. Correct?
A They were still living with my wife at the time.
Q And you wanted money from the Government. Correct?
A No.
Q And you wanted a house from the Government. Correct?
A No.
Q Now, the grievance that you filed, it was filed on September the 28th. Correct?
A Yes, some time there.
Q Only a few short months ago. Right?
A Right.
Q And in that grievance you outlined clearly that on April 6th of 2011, April 25th of 2011 and on May the 12th of 2011 you were confronted in a confrontational interrogation. Correct?
A That's correct.
Q And you were intimidated. Isn't that a fact?
A That's correct.
Q And the attorney that was representing you was appointed by the Government. Correct?

A That's correct.
Q And he got paid by the Government. Correct?
A That is correct.
Q And you said that they, for 30 minutes during these three occasions, went back-and-forth to you, screaming, intimidating and threatening you in a confrontational manner about Paul Bergrin. Correct?
A I won't say screaming. It was -- it was just direct interrogation type --
Q Direct interrogation and direct intimidation. Right?
A Somewhat.
Q And that's what the attorney, Mr. Azzarello, going back and forth with the prosecutor, John Gay, and then coming back in to you and intimidating and confronting you. Correct?
A At the time I felt that way, yes.
Q Well, you sent the letter only a few short months ago. Correct?
A Correct.
Q So it must have been fresh in your memory. Right?
A Right, because it was -- that -- that was a moment that it was real "tensive" for me. It was like, something that you ain't never going to forgot, like, you know.
Q You're never going to forget the way you were treated with questions and threats and intimidation over and over and over, the same question, Paul Bergrin did this, Paul Bergrin did

that. Right? Correct?
A I mean, it was questions about, yeah, Paul Bergrin but --
Q And as a matter of fact, up until that point, to May 12th, you had said absolutely nothing about me in that phone call or that conversation -- excuse me -- that you overheard with me and Hakeem Curry. Isn't that a fact, sir?
MR. GAY: Which --
MR. BERGRIN: Please let me finish the question.
THE COURT: Wait. What's the objection, Mr. Gay?
MR. GAY: Can he clarify which conversation he's talking about?
THE COURT: Okay. Up until -- go ahead, rephrase the question. Up until?
Q Even up through, up and through May the 12th, eight months into your cooperation or meetings with the Government, multiple meetings, you had said absolutely nothing in reference to hearing my and Hakeem Curry or me say to Hakeem Curry if there wasn't any witness there would be no case. Correct?
Isn't that a fact? You had never told the Government that?
A I'm not sure when I said it. I mean, on what exact date that I said it on, but I know that I had it.
Q Now, you were even with an attorney on April 6th, April 25th and May the 12th, correct, Mr. Azzarello?
A Right.

Q And you said nothing to the Government in reference to that statement. Correct?
A The only -- during through one of those meetings I did say something. I mean, like I said, I'm not sure, I'm not sure when.
Q Isn't it a fact, Mr. Jimenez, that the first time that you make any mention of that is on July the 21st of 2011?
A Then that's the date. Because I don't remember the date, I just know that I said it.
Q And by that time you believed that you were getting witness protection, correct, for you and your family?
A Mainly for my family.
Q For you also, Mr. Jimenez. Correct?
A Me also yes, but my main concern was my family.
Q So you were getting out of jail. Isn't that right? Your time was being reduced and you weren't worried about -- you thought that they weren't going to charge you federally for all the offenses that you committed. Right?
A That's correct.
Q And not only that, you had had that confrontational three sessions with Mr. Azzarello before that. Correct?
A Correct.
Q And the first time you make any mention whatsoever, and you hear nothing at all in reference to the conversation, only the words "If there wasn't any witness, there wouldn't be any

case." That's the only thing you hear in that whole conversation. July, after all these meetings, all these conversations, all these sessions with the Government. Isn't that a fact, sir?

A Yes, it is.

Q And you had been with your attorney at least, at least four meetings with the Government prior to that. Correct? At least.

A Possible. I'm not sure.

Q And as you sit here today under oath before this jury in this courtroom, are you telling us that you didn't read any newspaper articles and had no idea about the allegations in this case against me?

A Absolutely.

Q You had no idea?

A I had an idea -- I mean, it ain't that I had an idea, it's that the family -- my family already knew what was your case. I personally didn't know who was involved in your case, only my sister, my father, and, you know --

Q But you knew the allegations, correct, against me?

A I know about the drug allegations.

Q You knew the allegations in the Kemo case, too, didn't you?

A In the Kemo?

Q You knew the allegations in the witness case also?

A Right. But that's -- that's -- I know about that when me

and you -- when I was working for you over there.
Q So you knew about it back in 2004. Correct?
A No, you only spoke about it briefly to me one time. I mean, you spoke -- you told me briefly one time, they trying to get me for tampering with a witness or something like that. That's what you said to me.
Q So you knew about the allegation in the case. Correct?
A I didn't know this whole facts of the case, I didn't know no names, I didn't know faces. You know that, Paul. Come on.
Q You knew the allegations in this case because you had read about it and it had been talked about in the office between me and the partners and everybody else. Correct?
A No.
Q Now, you testified in reference to the tracking device, and your statement of October the 25th of 2005, correct, to the FBI?
A Absolutely.
Q And you said that when Hakeem Curry brought in the tracking device, isn't it a fact that you were upset?
A That I was upset?
Q Yes, you were upset.
A I wasn't upset.
Q Well, then why did you tell the FBI that you were upset, because at that time for the first time you informed me that you had been dealing drugs to Hakeem Curry?

A You said that I was upset because Hakeem Curry came with a tracking device.
Q Didn't you tell the FBI on October the 28th that you were upset about the tracking device because you told me for the first time that Hakeem Curry and you had engaged in narcotic transactions? Aren't those the words that came out of your mouth, Mr. Jimenez, to the FBI?
A What day was that?
Q October the 28th of 2010 during the first meeting with the FBI.
A That was a lie.
Q And you continued to lie to them throughout the entire meetings. Correct?
A Yes, to some point, yes.
Q And you're telling this jury in this courtroom that you lied to them about something simple like the tracking device, but gave heavy testimony against your sister and involvement in a narcotic trafficking scheme? Is that what you're telling us? You'd lie about simple things but go after your own sister, your own flesh and blood about her involvement in heavy narcotic trafficking?
A I never, I never, I never did implicated my sister from hand-to-hand doing trafficking of narcotics.
Q You said that your sister was involved in dealing drugs because of the easy money. Correct?

A I said there was a possibility that she could be involved because of the easy money and because of Alejandro was the -- was always with her.
Q On October the 28th, Mr. Jimenez, isn't it a fact that you told the FBI that Jauregui, meaning Yolanda, your sister, did become involved with the drug business through Alejandro Castro? Isn't that a fact? Didn't you say that?
A If I said that, it must have been a lie because I don't remember it.
Q And you also said Jimenez believed that Castro used Jauregui to deal with drug clients because she spoke English and he did not. Isn't that a fact, sir?
A I said that.
Q So you're lying to the FBI about your sister being involved in heavy drug-trafficking without Alejandro Castro, is that what you're telling us? You made that up about your sister?
A Part of it was made of, up, part of it was true.
Q Instead of protecting your sister, you're lying to hurt her?
THE COURT: All right, Mr. Bergrin, do you have much more?
MR. BERGRIN: Five minutes, Judge, please.
THE COURT: All right.
Q Now, you testified in reference to the November the 16th -- Mr. Gay kept referring to as the November 22nd -- FBI

meeting, and you said that Bergrin was upset; was upset because he wanted you to go through him in dealing the drugs. Correct?

A That is correct.

Q Isn't it a fact that on November the 16th when you spoke to the FBI, you specifically told them that Bergrin was upset when he found out that you were dealing drugs because I had told you that Hakeem was under investigation? Isn't that what you said?

A What date was that?

Q November 16, 2010.

A That I said that?

I might of have said that, yes. I probably said that.

MR. BERGRIN: Could I just have one more minute, your Honor?

(There is a pause for Mr. Bergrin.)

MR. BERGRIN: Thank you very much, your Honor.

THE COURT: All right. No further examination?

MR. GAY: No, Judge.

THE COURT: All right. Can I see counsel at sidebar? We don't need it on the record I don't think.

(Sidebar discussion off the record.)

(In open court.)

THE COURT: Ladies and gentlemen, we're going to call it a day. Again we'll see you back here Monday at the same time, same place. And again, let me just remind you of a few things. Please don't discuss this at home over the weekend

with any friends, relatives or anyone at all. And, of course, if there's any newspaper accounts or radio or television accounts, disregard them and turn them off if you start to hear something that sounds familiar. And again, also don't predetermine or redecide the case. We have more obviously to go through.

So with those comments, have a good weekend. We'll see you back here Monday promptly to begin. Okay?

THE DEPUTY CLERK: Please rise for the Jury.

THE COURT: Thank you very much.

(The Jury leaves the courtroom.)

THE COURT: All right. The witness can be -- thank you.

(Witness excused - and escorted out of the courtroom by the Marshals.)

THE COURT: All right. Is there anything else for today? I don't think so.

MR. GAY: Not today, Judge, no.

THE COURT: Okay.

MR. LUSTBERG: Thank you very much, your Honor. Have a good weekend.

THE COURT: Everyone, have a good weekend. We'll see you back here on Monday.

Thanks.

(At 3:58 p.m., an adjournment is taken to Monday,

U.S. Department of Justice

United States Attorney
District of New Jersey

MEMORANDUM OF INTERVIEW

Date: February 23, 2011

Time: 10:21 A.M.

Interviewee: Eugene Braswell

Reporting Agent(s): Thomas Mahoney, Criminal Investigator
Joseph Minish, Assistant U.S. Attorney
John Gay, Assistant U.S. Attorney

Results: Memorandum this date identifies that Eugene Braswell was interviewed at the U.S. Attorney's Office located at 970 Broad Street, Newark, New Jersey. Also present was Braswell's attorney, Brian Mason. Braswell provided his date of birth, [redacted]

When asked if he was introduced to Paul (Bergrin) who wrote the letter, Braswell said yes. When asked if it was not true that it was not legal fees and instead the money was to buy a house, Braswell said yes. He went to Bergrin to get money from deferred comp for legal fees. The money was used to buy a house and Bergrin wrote the letter.

When asked when he got arrested for shoplifting, Braswell said it was close to the same time as the house. He bought the house May 31, 2003. The shoplifting was before that. He was locked up in December 2002 and stabbed in January 2003. Braswell remembered he was locked up during a big snow storm. He was stabbed a couple months later. Braswell got Bergrin involved with his case and it winded up getting dismissed. Bergrin said to tell on the guy who did it but he didn't. When asked if Bergrin was in court with him when it got dismissed, Braswell said yes. The lady in court said it wasn't Braswell. He paid Bergrin $3,000 in cash. Braswell told Bergrin that he had to come to court so he started coming.

Braswell was suspended from his job as a Correctional Officer (CO) due to the shoplifting. He had started in 1998 as a CO. His suspension for the shoplifting lasted 7-9 months and it started in December 2002. There was no co-defendant for the

shoplifting. The guy who took the pocketbook took off and ran so Braswell was the only one arrested.

Tammy said to use Bergrin. The shoplifting was the first time Braswell used Bergrin but they had been in contact before. He could not remember when but he knew Bergrin before the shoplifting. He heard about Bergrin through his father's ex-girlfriend named Boz and another individual named Jamad. Braswell recommended Reynaldo Chavis to go to Bergrin.

When asked if he saw Chavis in Northern State, Braswell said yes. When asked if Chavis was connected to Sayed, Braswell said yes. Braswell got hooked up with Sayed through Chavis. When asked if he put Chavis and Bergrin together for an appeal that Chavis had, Braswell said that Chavis agreed to pay Bergrin. Bergrin was supposed to pay the Essex County Prosecutor and the Judge. The prosecutor died and it didn't go through. Chavis was then looking at Braswell. Chavis wrote Bergrin a bunch of threatening letters. When asked if Chavis was pissed that he gave $50,000 to Bergrin, Braswell said yes. Bergrin kept telling Braswell that he would get it done. When asked if Chavis told Sayed to cut him off and that he would get no more kilos, Braswell said yes. When asked when that happened, Braswell thought it was 2005-2006.

When asked if he went to Bergrin and told him that his supplier was cut off and that Bergrin had screwed him, Braswell said yes. When asked if Bergrin asked about the supplier, Braswell said yes. Bergrin introduced Braswell to Ramone at his office. Ramone and Braswell spoke. Braswell came back and was shown a cord of yarn with a kilo inside. When Braswell went back to the office there were two Peruvian guys and he got two more.

When asked if he first hooked up with Ramone the same day Ramone gave him a kilo, Braswell said yes. When asked how long it was between when he got the first quarter kilo and them the other three quarters, Braswell said three or four days. The second time he got two kilos. Ramone got locked up days later.

Braswell was dealing with his ex in 2005 or 2005. It was around the time that Jersey Gardens opened up. When asked if it was sometime around then and Ramone getting arrested, Braswell said yes. When asked if it was in 572 Market, Braswell said it was in Paul's office across from the park.

Ramone said that the two guys were Peruvian. If Braswell had a photo he could identify them. Ramone had the cones in his book bag and he transferred them to Braswell's bag. One of the Peruvians had a backpack on him. They came up, opened the bag up

and the residue fell on the table and floor. Braswell had his backpack but he carried it like a book bag. Braswell put the cones in his backpack. He remembered that the guy pulled out the cones and wanted to go through them. Braswell told him he didn't have to but he wanted to go through the motions. Braswell believed that the first meeting was an intro and then Ramone came to his house with the other three quarters.

The first time Ramone pulled out a quarter kilo or one cone was in Paul's office in a separate area. The second time when they pulled out the other three cones was in Paul's office. During the second meeting they discussed numbers, price and quantity. Braswell was trying to get a better deal than Sayed. The Peruvians had three cones. Ramone came to Braswell's house with the other two kilos. They cut up cones at both the meeting with the Peruvians and the meeting at Braswell's house.

The first time that Braswell saw the cones was in a conference room in Paul's office. One cone was cut open at that meeting. They brought four cones which equals one kilo. They took a Pathmark plastic bag and cut open one cone in it. They put the three other cones in the same plastic bag and then into Braswell's book bag. Braswell had the cones at that point and he paid them in Paul's office. Braswell believed the going rate for a kilo at that time was $19,000. Sayed may have been paying $17,300.

The Peruvians left and Ramone followed Braswell to his house. It was Braswell, Ramone and Sayed at his house. They talked about Sayed getting supplied by Braswell. Ramone and Sayed went back and forth and Ramone opened up a cone to show Sayed. They started talking numbers and Sayed said that he was not interested. It was more than he was paying and he did not want to pay up front.

When asked why he went to Sayed with all this, Braswell said so he could get to supply Sayed. When asked why he took Ramone there, Braswell said that he had never dealt with sleazy people. He wanted him to see for real. Braswell was going to take on his own price. Sayed would buy from Ramone and Braswell would tack on his own. He would help Braswell out for helping him. Braswell was going to have Ramone re-negotiate with Sayed and not tell him. He would re-negotiate with a higher quantity. When asked if Sayed could move 50K, Braswell said yes. Braswell could make points on the Ramone end but it didn't work out.

For the second transaction, Braswell met Ramone at Paul's office where he ordered two kilos. Ramone then came to Braswell's

house. Ramone drove a red Grand Cherokee. Braswell later learned from Paul that Ramone was arrested.

When Paul asked Braswell if he was okay, Braswell took that to mean cocaine. Braswell told Paul he had something else in Miami. Braswell still referred clients to Paul and Paul hooked Braswell up with some rooms at a hotel. Braswell was arrested on state charges on July 24, 2008. He wanted to hire Paul but he could not. Braswell's two underlings were also arrested.

Paul called Braswell to go to the Robert Treat Hotel to meeting Alehandro. They were sitting in two chairs in the lobby. Braswell was not sure if Paul said the kilo was in the hotel. When Paul introduced Braswell to Alehandro, he said that he was serious and had a whole bunch of kilos. Braswell said that he couldn't at the moment because he was with his girlfriend.

Braswell went to Paul's office the next day. It was the weekend and there was no receptionist. It was just Paul and Alehandro. Paul opened the door and they went into a conference room on the right. Braswell was not really comfortable. Paul said that Alehandro was his guy and he trusted him with his life. Braswell said that he would have to see and he got Alehandro's number. Braswell didn't say how much he wanted, just that he wanted to see it. Paul said that he had a lot and that he would give Braswell what he wanted. When asked if he left with the impression that he would be supplied with what he needed pure, Braswell said yes. When asked if he said he would beat any number, Braswell said that Paul said that but he did not give a price or quantities that day. Paul said that Alehandro's number was better than what Braswell could get. The number came up later.

Braswell hooked up with Alehandro at McDonalds and got into his car. They went to Isabella's and Alehandro showed Braswell a kilo. He gave Braswell a number in the thirties, possibly thirty-four, and Braswell said that he would get back to him. Braswell was not comfortable. Braswell went to his guy and then to Paul to re-negotiate. Braswell dealt with Paul in November 2008. It was before Thanksgiving and Christmas and he was pretty sure of the time. Braswell was locked up in 2008 and a whole year had not passed yet. Braswell was still with his ex-girlfriend. It was before the holidays and his ex had a temporary tag on a car she just got. It was a CLS. Brasell went to court for his state case in October 2008 and it occurred after that. Paul got all of his girlfriend's numbers. Braswell was like damn how did he get all those numbers. Paul never called the house phone.

When asked about a bar on Scotland Road, Braswell said there was a Bravo Supermarket across the street. You come up Central Avenue, take a left on Scotland Road and it is the first bar on the right side of the road.

When asked if Boz cut him off after the arrest, Braswell said he never said that, Jarrad cut him off because he got locked up. He did his own thing. They party together but after the state arrest they cut-off. Jarrod changed his number and he won't come around. He acted like they were okay but his actions show different. Braswell heard that Jarrod said, "I told him, he hot, I ain't getting caught up in his shit." Braswell considered him his brother until he distanced himself.

When asked if Paul introduced Ramone as like his son, Braswell said Paul made the claim. When asked if Ray put him in connection with Sayed, Braswell said yes. When asked who was Braswell's source when Paul asked him about the drug business, Braswell said Sayed.

When asked why he complained to Paul about the situation with his Miami connection, Braswell said he had to travel to Miami to get the drugs here (Newark). There was less risk here because he did not have to travel. The drugs were $19,000 here and $15,000 in Miami. Braswell could not remember when he rented the house in Fort Lauderdale.

When asked what prompted Paul to call him about Alehandro, Braswell said it was probably because he knew he could move a lot. They hadn't seen each other in a while, about a couple weeks, and Paul called him out of the blue. When they did see each other prior to Alehandro they didn't talk about drugs.

When asked how he learned about feeling cocaine for oil, Braswell said his man Reese probably showed him. Braswell also tested the cocaine on his tongue to see if it went numb a little. When asked how much money he brought when Paul said he could get the cocaine for $32,000, Braswell said he brought all $32,000. Paul said he thought it was $32,000. Paul played a lot of games and he knew the price ahead of time.

When Braswell came back to see Paul, he brought the suitcase back. The suitcase was what a lawyer would use. Braswell brought it back to Paul with money in it. The next time he got six, but he was not really sure. When asked what floor he met Paul on at the hotel, Braswell said once it was the 4th floor and once it was the tenth floor. Both times when you got out of the elevator you had to go right and it was a room on the left.

Braswell's girlfriend was complaining about him keeping shit at her house.

When asked about Sharrod Walton, Braswell said he was a co-defendant. Braswell paid Paul to represent Walton and Brayton. Braswell paid for it so they would not cooperate. Braswell became a co-defendant later on. Secara said Braswell was working for them.

Prepared By:
Thomas Mahoney, Criminal Investigator
United States Attorney's Office - District of New Jersey
Date Prepared: April 8, 2011

SEND IN TRIPLICATE
(Including Attachments)

ATTORNEY ETHICS GRIEVANCE FORM

Please Type Or Print Legibly All Information

A. GRIEVANT: Mr./Mrs./Miss./Ms. (Circle One)

JIMENEZ — RAMON — L
LAST NAME — FIRST — MIDDLE

MID-STATE C.F — P.O. BOX 866 RANGE Rd.
ADDRESS — STREET/P.O. BOX

WRIGHTSTOWN, N.J. 08565
CITY — STATE — ZIP — COUNTY

TELEPHONE: DAY (____) _____ EVENING (____) _____

B. THE SPECIFIC LAWYER YOU ARE COMPLAINING ABOUT IS:

AZZARELLO — JOHN — A
LAST NAME (INCLUDE SR., JR., III, ETC.) — FIRST — MIDDLE

560 MAIN STREET
OFFICE ADDRESS — STREET/P.O. BOX

CHATHAM — N. J. 07928
CITY — STATE — ZIP — COUNTY

(1) IS THE SPECIFIC LAWYER COMPLAINED ABOUT YOUR LAWYER? ✓ YES ___ NO
(2) IF SO, DOES THIS LAWYER STILL REPRESENT YOU? ✓ YES ___ NO
(3) IF NOT, DO YOU HAVE A NEW LAWYER? ___ YES ✓ NO
(4) IF SO, WHO IS YOUR NEW LAWYER? _____

C. THE TYPE OF CASE HANDLED BY THE LAWYER WAS: (CHECK ONE)

___	Admiral/Maritime	(V)	___	International Law	(I)
___	Adoption/Name Change	(A)	___	Juvenile Delinquency	(J)
___	Bankruptcy/Insolvency/Foreclosure	(B)	___	Labor	(L)
___	Collection	(H)	___	Landlord/Tenant	(Q)
___	Contract	(K)	___	Negligence (Personal Injury) Property Damage	(N)
___	Corporation/Partnership Law	(X)	___	Patent/Trademark/Copyright	(P)
___	Criminal, Quasi-Criminal and Municipal Court	(C)	___	Real Estate	(R)
___	Domestic Relations (Divorce, Support, Custody)	(D)	___	Small Claims Court	(S)
✓	Estate/Probate	(E)	___	Tax	(T)
___	Federal Remedies/Civil Rights	(F)	___	Workers' Compensation	(W)
___	Government Agency Problems (Local thru Federal)	(G)	___	Other Litigation (specify)	(Y)
___	Immigration/Naturalization	(M)	___	Other Non-Litigation (specify)	(Z)

IS THE CASE HANDLED BY THE LAWYER STILL PENDING? ✓ YES ___ NO

(This Section for Secretary's Use Only)

DOCKET NUMBER _____ DATE DOCKETED _____

** COMPLETE BOTH SIDES **

GOVERNMENT EXHIBIT 7004 1627

D. OTHER RELATED COMPLAINTS OR LITIGATION:

(1) Have you filed a complaint regarding this matter with law enforcement authorities or any other state or federal agency? ____YES ✓ NO If yes, please state:

Name of Agency: _____

Contact Person: _____ Date Filed: _____

Result: _____

(2) Is the matter you are complaining about the subject of a pending civil law suit? ____YES ✓ NO
If yes, give name of Court _____

Docket Number: _____ County: _____

E. NATURE OF GRIEVANCE:

State what the lawyer did or failed to do which may be unethical. State all relevant FACTS including dates, times, places and names and addresses of important witnesses. Attach copies of important letters and documents.

THIS GRIEVANCE COMES BEFORE YOU BECAUSE OF A CONFLICTING LOYALTIE THAT WAS CREATED BY MY ATTORNEY JOHN A. AZZARELLO AND ATTORNEY GENERAL JOHN GAY AND HIS ASSISTANCE JOE.

SOME TIME LAST YEAR 2010 I WROTE A BRIEF LETTER TO ATTORNEY GENERAL JOHN GAY AND JOE, IN REFERNCE OF MY

(Use Additional Sheets if Necessary)

F. INVESTIGATIVE CONFIDENTIALITY

The Supreme Court of New Jersey has held that persons who file grievances "may speak publicly regarding the fact that a grievance was filed, the content of that grievance, and the result of the process." Since disciplinary officials are required by *Rule* 1:20-9(h) to maintain the confidentiality of the investigation process and may neither speak about the case nor release any documents, until and unless a formal complaint is issued and served, you must also keep confidential any documents you may receive during the course of the investigation of your grievance.

To protect the integrity of the investigation process, we recommend that you, as well as all witnesses, not speak about the case other than to disciplinary officials while the matter is under investigation. So long as you maintain the confidentiality of the investigation process, you have immunity from suit for anything you say or write to disciplinary officials. However, the Supreme Court has stated that you "are not immune for statements made outside the context of a disciplinary matter, such as to the media or in another public forum." *R.M. v. Supreme Court of New Jersey, 185 N.J. 208* (2005).

Date: 9/28/2010 SEND IN TRIPLICATE (Including Attachments) Ramon L. Jimenez
Signature

PLEASE REVIEW THE PAMPHLET "INFORMATION ABOUT GRIEVANCE PROCEDURES AND DISCIPLINE OF LAWYERS" PROVIDED BY THE ETHICS SECRETARY.

PLEASE NOTIFY DISTRICT SECRETARY OF DISABILITY ACCOMMODATION NEEDS.

OAE 03/06

Wednesday, 28 of 2011

Re: Cynthia S. Earl. Esq.
Secretary, District III Ethics Committee
Moorestown, NJ

Sister case **Yolanda Jauregui** what I stated in that brief letter was as follow:

My name is Ramon Jimenez; I am presently incarcerated at Mid-State C.F. I would very much like the opportunity to speak with you, and I'm appreciative of your time in difference to your busy schedule I shall be brief.

I am writing to you reference of my sister's case **Yolanda Jauregui**, case number: **09-369(WJM)**. I believe that I can be of help to you as well as to my sister. If you're interested in hearing of what I have to say; I will be calling you early next Thursday 1:00 pm to know if you are interested. I don't wish speak to anyone else but you or Joe.

On 10/28/2010, I was interview by two **FBI** Agents by the names of Mike and Shawn at Mid-State Prison from 10:00 am until 1:30 pm. When I first entered the room, they introduced themselves as **FBI** and we begin a dialog:

F.B.I Agents: Do you know why we're here?

Me: No.

FBI Agents: We are not here to arrest or charge you. We are here because of **Paul Bergrin**, we need a witness and we are looking at that person right now. We know that you're facing sometime in PA; which is 6 years for a Paroled Violation and we can work something out with the time in PA. We also know that your sister Yolanda is part of the case, however things could still be worked for here as well but it's up to you.

Me: What is it that you need to know about Paul?

F.B.I Agents: Everything that you know can help us in the case will be helpful.

Me: I will need immunity privilege against self-incrimination if you want me to be a witness, and protection for my **Wife and Kids**.

F.B.I Agents: We can give your family and you all the protection; but we cannot give you immunity privilege right at this moment because are not the way it works. NO immunity

Me: Than tell me how it works so we can make it happen, because without immunity privilege you can forget about me cooperating.

F.B.I Agents: Listen Ramon, we understand you're concerned in incriminating yourself, and feeling uneasy to talk to us. But you have to keep in mind; we are not here to charge you or trying to investigate you. We are only here to see if you could be a witness in our case against **Paul Bergrin**.

Me: If you want me to become a witness against **Paul Bergrin**, than do what you have to in getting me immunity privilege against self incrimination

F.B.I Agents: Ramon, everything you tell us in this room is confidential, we are not trying to make your time any longer or harder on you; you have to trust us.

Me: If you want me to become a witness, then why are you guys avoiding the immunity against self-incrimination?

F.B.I Agents: We are not trying to avoid anything here Ramon, we just can't give you or anyone immunity because not how it works, there is a process that is done before anyone is given immunity, and this is part of that process and the way it works is, anything you tell us that's corroborating evidence to our case we take back that information to the **Attorney General John Gay** and inform him that the information you have knowledge f is evidence to our case and that you are asking for immunity, and we both will support you on that if you give us corroborating evidence to our case.

Me: How do I know or what guarantee do I have that **John Gay** is not going to charge me if he doesn't want to give me immunity.

F.B.I Agents: You have us, and **John Gay** is a very Good Friend of Mine and we always make sure when working a case together our witnesses are well protected, and if you going to be witness, we stand by **One Hundred percent**.... However if

you are not in our side as a witness, and your name comes up through another person stating that you played a part in the case, than there will be nothing we can do for you.

This whole interview back went and forth as is stated above until, I finally believed that they will not charge me. I stated some information that is incriminating me in this case; which I got charged on 06/08/2011. Both **F.B.I Agents** Mike and Shawn interview me 3-times and in neither one was my rights ever read to me, I never signed any paper waiving my rights.

On 11/15/2010, during the interview I asked for a lawyer because I did not like the way the questioning was going.
On 11/30/2010, I was taken to U.S district court in Newark front of a female judge who appointed MR. **John A. Azzarello** as my counselor. I was then taken in to a room next to John Gay's Office.

In this room I stated everything to MR. **John A. Azzarello** as I stated in this grievance. I made it clear to him that never waived my rights. He stated that I did by writing the letter to **John Gay**; He then stepped out the room for about 15-minutes, came back in the room and started interrogating me about **Paul Bergrin**. We went on like this back and forth for about 30-minutes, and then He would step-out again for about 10-minutes come back and started asking me the same question about **Paul Bergrin** only in a different form. We started arguing because I felt that my rights were being deprived, so I told him that I no longer want or need him as my lawyer.

I also informed both **F.B.I Agents** and Joe that I do not want **John Azzarello** as my lawyer anymore.
On 04/06/2011, I was taken back to **U.S. District Court in Newark** front of the same female Judge to be reappointed **John A. Azzarello** as my counsel. The later meetings on 04/25/2011 & 05/12/2011; the questions involved was more confrontational and intimidating as well on 04/06/201.
On 05/12/2011, John A. Azzarello gave me a form that stated if I was to give untruthful statements on this day that I will be subject to possible prosecution, I signed it and gave a truthful statement. I was never advised by my lawyer that this same statement we will be prosecution against me. proffer agreement
On 06/08/2011, I was taken back to **U.S.D.C** for initial appearance for charges on the statement. I gave on 05/12/2011.

U.S. Department of Justice

United States Attorney
District of New Jersey

970 Broad Street, Suite 700
Newark, NJ 07102

973/645-2700

November 23, 2009

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

Dear Messrs. Lustberg, Ruhnke, Adams, Iacullo, McGovern, Glazer, Turano, Koribanics and Feinstein:

This letter supplements the government's previous letters regarding discovery in the above-captioned case. This

letter is to provide you with additional discovery materials relating to the charges contained in the Superseding Indictment. In addition, this letter provides discovery of materials that were previously the subject of a discovery protective order issued by United States District Court Judge William J. Martini on November 9, 2009.

As you are aware, 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.

As discussed in prior discovery letters, please note the following. It is your responsibility to order the discovery items that you wish to obtain from Document Technologies, Inc. If you are only ordering certain materials you must specifically enumerate which items you are requesting. Document Technologies, Inc. has copies of all of the discovery letters the government has sent to you. Accordingly, please use them as a reference when describing the items you want copied. Document Technologies, Inc. cannot process a vague request. It is also your responsibility to make arrangements with Document Technologies, Inc. to pay the costs of copying. If you have not made sufficient payment arrangements, Document Technologies, Inc. will not fulfill your request. It is also your responsibility to provide Document Technologies, Inc. with clear instructions regarding the location to which you would like the copies delivered. Finally, I would request that if you have any problems obtaining copies of the discovery materials from Document Technologies, Inc., please contact me immediately so that I can assist in resolving those issues.

The below listed materials are currently at Document Technologies, Inc at 60 Park Place, Newark, New Jersey:

a. 205 compact discs containing audio recordings of consensually monitored conversations made by a confidential witness (CW3-000001 through CW-3-000205).

b. 4 compact discs containing audio recordings of consensually monitored conversations made by an undercover law enforcement agent (UC-000001 through UC-000004).

c. 8 compact discs containing audio recordings of consensually monitored conversations made by a confidential witness (CW6-000001 through CW6-000008).

d. 99 compact discs containing audio recordings of consensually monitored conversations made by a confidential witness (CW4-000001 through CW4-000099).

e. 1 compact disc containing documents relating to the New York prostitution business (NYDA-000001 through NYDA-001773).

f. 2 compact discs containing video recordings relating to the New York prostitution business(NYDA-CD-1 and NYDA-CD-2).

The government will provide additional discoverable materials to Document Technologies, Inc. in the near future.

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

Very truly yours,

PAUL J. FISHMAN
United States Attorney

s/John Gay
By: John Gay
Assistant U.S. Attorney
(973) 297-2018

cc: Honorable William J. Martini
Christopher Henry

FEDERAL BUREAU OF INVESTIGATION

Confidential Human Source (CHS) Reporting Document

Reporting Date: 2/20/2009

Case ID #: 272B-NK-115490 (Pending) 1209
270D-NK-114615 (Pending)

Contact Date: 02/19/2009

Type of Contact: In Person

Location: Newark, New Jersey, U.S.A.

Writer: SA Shawn A. Brokos
Witness(es): IRS SA Stephen Cline

Source Reporting: CHS, who is in a position to testify, was provided with a recording device to record a meeting with PAUL BERGRIN at the Law Offices of PAUL BERGRIN, 50 Park Place, Newark, New Jersey (NJ) and then a meeting with MIGUEL PADILLA at PIZZA HUT, 720 Washington Avenue, Belleville, NJ. The purpose of the meeting was to get the $500.00 payment from BERGRIN to provide to PADILLA as requested by BERGRIN.

The below listed times are approximate:

4:37 p.m.	Special Agent SHAWN A. BROKOS activates recording device for CHS. CHS proceeds to 50 Park Place followed by SA's BROKOS and CLINE.
4:49 p.m.	CHS parks in front of 50 Park Place.
5:05 p.m.	CHS advises that he/she is waiting to see BERGRIN.
5:22 p.m.	CHS advises that BERGRIN is in a closed door meeting with the DENTES.
5:35 p.m.	CHS advises that THOMAS MORAN is going into BERGRIN's office to get the money.

5:38 p.m.	CHS advises that MORAN is getting the cash from MARISOL PEREZ.
5:41 p.m.	CHS exits 50 Park Place and returns to CHS vehicle.
5:45 p.m.	CHS meets Agents on Fulton Street and turns over $500.00 to Agents. Recording device deactivated by SA BROKOS.
6:00 p.m.	CHS follows Agents to the area of PIZZA HUT, 720 Washington Avenue.
6: p.m.	SA BROKOS activated recording device and proceeds with CHS, in CHS's vehicle to PIZZA HUT.
6:24 p.m.	SA BROKOS and CHS in front of PIZZA HUT.
6:26 p.m.	SA BROKOS pays PADILLA $500.00 in front of PIZZA HUT entrance. Recording device deactivated. Surveillance terminated.

CHS advised that BERGRIN was in a closed door meeting with the DENTES. CHS waited outside of BERGRIN's office and spoke to CHRISTINE CANEV who was counting a large stack of cash that a client had given her. CHS spoke to MORAN about PADILLA, and MORAN went into BERGRIN's office to retrieve the $500.00. MORAN then came back and then went to see MARISOL PEREZ. PEREZ handed MORAN $500.00. MORAN then gave the $500.00 to CHS to give to PADILLA.

Administrative:

Prior to meeting PADILLA, CHS met with SA's BROKOS and CLINE and provided them with the $500.00, which was all in $20 denominations. SA BROKOS photographed and recorded the serial numbers as follows:

GK47914509C

ED90457078B

IF22142029B

GB43686293A

IC01714318C

IH16642112A

BG41110410F

AL51430936A

IC70292246B

CG08475317C

CL16473773D

IC42971914A

CB38959959A

GB41423039B

EC82211781F

IB74799815D

GE05962217D

EB94517683I

CF46851257D

EF25875652B

IF45830889B

CF37548375A

GJ22549784A

GF70776676D

GC27724424A

This conversation occurs on disc between 17:22:30 and 17:39:51 and between 18:25:45 and 18:26:37.

♦♦

FEDERAL BUREAU OF INVESTIGATION

Confidential Human Source (CHS) Reporting Document

Reporting Date: 09/18/2008 671

Case ID #: 272B-NK-115490 (Pending)
270D-NK-114615 (Pending)

Contact Date: 09/16/2008

Type of Contact: In person

Location: Newark, New Jersey, U.S.A.

Writer: SA Shawn A. Brokos

Source Reporting: CHS, who is in a position to testify, was provided with a recording device to record a meeting with PAUL BERGRIN at the law offices of PAUL BERGRIN, 50 Park Place, Newark, New Jersey (NJ).

The recording device was activated at approximately 5:25 p.m., and CHS proceeded to the law offices. The meeting with BERGRIN concluded at approximately 6:45 p.m. and the recording device was deactivated. The recording device was subsequently submitted as evidence by Special Agent (SA) SHAWN A. BROKOS.

CHS advised that they spoke about the closing on the house and about finding someone to do the INDEPENDENT CLEANING deposits. CHS also advised that BERGRIN showed him/her an article from the Asbury Park Press about his current trial (a copy of the article is in the 1A section of the main case file). BERGRIN told CHS that ALBI was getting out soon and asked CHS if he/she thought there would be a turf war between ALBI and JOSE. BERGRIN said that he was going to meet ABDUL (JENKINS) later that night.

Administrative:

This conversation occurs on disc between 18:30:38 and 18:44:03.

♦♦

FEDERAL BUREAU OF INVESTIGATION

Confidential Human Source (CHS) Reporting Document

Reporting Date: 09/24/2008

Case ID #: 270B-NK-115490 (Pending)
270D-NK-114615 (Pending)

Contact Date: 09/23/2008

Type of Contact: In person

Location: Newark, New Jersey, U.S.A.

Writer: SA Shawn A. Brokos

Source Reporting: CHS, who is in a position to testify, was provided with a recording device to record a meeting with ABDUL JENKINS and PAUL BERGRIN at the law offices of PAUL BERGRIN, 50 Park Place, Newark, New Jersey (NJ).

The recording device was activated at approximately 5:45 p.m. and CHS proceeded to 50 Park Place, Newark, NJ. The meeting concluded at approximately 6:45 p.m. and the recording device was deactivated. The recording device was subsequently submitted as evidence by Special Agent (SA) SHAWN A. BROKOS.

CHS advised that he/she met with JENKINS regarding the closing on the house. Per JENKINS, he is working hard on getting it closed, and offered to speak to JOSE if there were any issues. CHS then spoke to THOMAS MORAN about the problems with JENKINS not getting the house closed and the money cleaned.

CHS then met with BERGRIN and removed $7,000 from the cash that BERGRIN is holding for CHS. BERGRIN concurred with paying MARIE LAST NAME UNKNOWN (LNU) fifteen percent to clean CHS's money, and advised that CHS continue with the bank deposits as well as using MARIE's company to clean the money. CHS placed the cash in MORAN's office in a special folder he made for CHS to conceal the money.

Administrative:

There was a problem with the recording device and it had to be sent to the manufacturer for repair. CHS advised that before

he/she got the money, BERGRIN asked CHS to translate for an Ecuadorian client. After the clients left, CHS then talked to BERGRIN and got the money.

♦♦

CERTIFICATE OF SERVIVCE

I today caused the United States' Memorandum In Opposition to Paul W. Bergrin's Motion to Vacate, Set Aside, or Correct his Sentence under 28 U.S.C. § 2255 to be served on Movant Paul W. Bergrin, by Federal Express Overnight Delivery, addressed as follows:

Legal Mail
Paul W. Bergrin
Reg. No. 16235-050
U.S. Penitentiary Ad-Max
5880 Highway 67 South
Florence, Colorado 81226

I certify under penalty of perjury that the foregoing statements are true and correct.

Dated: Newark, NJ
November 30, 2017

s/ Steven G. Sanders
STEVEN G. SANDERS, AUSA