UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

UNITED STATES OF AMERICA	:	
	:	Hon. Dennis M. Cavanaugh
v.	:	
	:	Criminal No. 09-369 (DMC)
	:	
PAUL BERGRIN	:	

GOVERNMENT'S BRIEF IN OPPOSITION TO DEFENDANT PAUL BERGRIN'S MOTION FOR AN EVIDENTIARY HEARING INTO ALLEGATIONS OF PROSECUTORIAL MISCONDUCT

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"BB"	refers to the pages the Brief Bergrin filed on August 21, 2012.
"Stephens Cert. ¶_"	refers to the pages of the Certification of Louis F. Stephens, dated August 21, 2012.*

* Unless otherwise noted, all capitalized terms in this Brief bear the meaning ascribed to them in the Government's initial brief.

INTRODUCTION

The Government respectfully submits this Brief in Opposition to Point III of the brief filed by Defendant Paul Bergrin on August 21, 2012. Alleging prosecutorial misconduct, Bergrin makes a series of wild allegations based almost entirely on the contents of a certification that relays double hearsay from sources Bergrin refuses to identify. The motion is procedurally defective for that reason alone. Beyond that, the motion confirms that Bergrin seeks a court-sanctioned fishing expedition.

For example, Bergrin asserts that defense attorney Richard Roberts has counseled four individuals to falsely implicate him. This specious argument presumes causation from coincidence; imputes a nefarious motive to Roberts; accuses Roberts of gross misconduct without any support; and then takes a lyric leap to conclude that the Government either prompted or condoned Roberts's alleged misconduct. Accusations of prosecutorial misconduct require fact, not fiction, to support them.

Bergrin's alleged "Brady violations" are of the same ilk. For example, Bergrin complains that the Government did not disclose that its witnesses agreed to cooperate only after hiring or meeting with Roberts. Of course, that information could be considered exculpatory only if one first accepts the truth of Bergrin's cockamamie theory that Roberts is counseling witnesses to lie at the Government's behest. At any rate, Bergrin has the information and can use it. A hearing would amount to a fishing expedition.

As the First Circuit has observed, "'[d]istrict courts are busy places and makework hearings are to be avoided.'" United States v. Panitz, 907 F.2d 1267, 1273 (1st Cir. 1990) (citation omitted). This Court should deny Bergrin's request to further delay the trial in this three-year-old case with a needless evidentiary hearing.

ARGUMENT

I. Bergrin's Motion Is Procedurally Defective Because It Relies On Unreliable Double Hearsay And Anonymous Sources.

A. Legal Standard.

Pretrial evidentiary hearings are not granted "as a matter of course." United States v. Hines, 628 F.3d 101, 105 (3d Cir. 2010); see Fed. R. Crim. Proc. 12(c) (the court "may" schedule a motion hearing). To the contrary, a "district court does not have to hold an evidentiary hearing on a motion just because a party asks for one." United States v. Sophie, 900 F.2d 1064, 1071 (7th Cir. 1990). Rather, a court should conduct a hearing *only* when the 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. Hines, 628 F.3d at 105 (quoting United States v. Voigt, 89 F.3d 1050, 1067 (3d Cir. 1996)). To be colorable, the motion must contain "'more than mere bald-faced allegations of misconduct.'" Id.

Importantly, moreover, the purpose of a hearing is "not to assist the moving party in making discoveries that, once learned, might justify the motion after the fact." Hines, 628 F.3d at 105. Thus, "[b]are assertions that an as-yet unidentified violation may have occurred, without more, will not suffice." Id. at 106 (citing United States v. Coleman, 149 F.3d 674, 677 (7th Cir. 1998)).

Hines exemplifies an improper defense request for a fishing expedition. Hines filed a motion for an evidentiary hearing and attached various police reports documenting the stop and search that led to his arrest on gun possession charges. Hines, 628 F.3d at

104. Despite conceding that the officers' version of events was true, Hines alleged that the reports raised all sorts of questions and inconsistencies that required a hearing to sort out. Id. Hines further stated that he would formally move to suppress evidence depending on what the hearing revealed. Id. The Third Circuit found that this Court had not abused its discretion in refusing to conduct a hearing because Hines had alleged neither a colorable constitutional claim nor shown genuine factual disputes. Id. at 105-08.

The deficient motion in Hines stood in sharp contrast to the moving papers in Voigt, which the Third Circuit found should have garnered an evidentiary hearing. In Voigt, the defendant complained that the Government had engaged in outrageous government conduct by allegedly using his personal attorney, Mercedes Travis, as a confidential informant against him, resulting in the disclosure of information protected by the attorney-client relationship. 89 F.3d at 1066-67. Voigt tendered a sworn affidavit, an affidavit from Travis, and Travis's grand jury testimony. The Government submitted an affidavit from the FBI agent denying that Travis was acting as Voigt's attorney when she supplied information. Concluding that "the issue is a close one," the Third Circuit held that the District Court should have conducted a pretrial evidentiary hearing. Id. at 1067. The Court nonetheless found the error harmless, because the record allowed the Third Circuit to review (and affirm) the order refusing to dismiss the indictment. Id. at 1068.

Bergrin misreads United States v. Soberon, 929 F.2d 935 (3d Cir. 1991), as requiring only reasonable suspicion of prosecutorial misconduct to justify a hearing. BB31. In Soberon, the trial court dismissed the indictment after concluding that an FBI agent had lied in the grand jury. The Third Circuit rejected the perjury finding, and said

that the district court should have adopted a less sweeping remedy before dismissing the indictment, *i.e.*, by holding a pre-trial hearing. Id. at 941. In *dicta*, the Court said that a such hearing would have been appropriate only had the court harbored a "reasonable suspicion" of Government misconduct. But Hines and Voigt post-date Soberon, directly address the showing required to obtain an evidentiary hearing, and establish a higher burden. But Bergrin's motion fails to satisfy even the "reasonable suspicion" standard.

B. Bergrin's Motion Is Fatally Defective.

Bergrin's request for an evidentiary hearing suffers from a fatal procedural defect: it relies almost entirely on the double hearsay of Louis Stephens, Bergrin's investigator. Nearly every paragraph in Stephens's Certification alleges that a named Government witness said something to an unnamed source, who allegedly repeated it to Stephens.

That is not the "sufficiently specific, non-conjectural, and detailed" motion that the Third Circuit in Hines described, and this Court would be acting well within its discretion to deny Bergrin's request for an evidentiary hearing on that basis alone. 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); United States v. Thompson, 483 F.2d 527, 531 n.3 (3d Cir. 1973) (court limited scope of its inquiry in part given that the "facts alleged in the [defendant's] affidavit supporting the disqualification are double and triple hearsay"); see also 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); United States v. Davis, 60 F.3d 1479, 1484 (10th Cir. 1995) (district court has discretion to refuse to

consider jury consultant's affidavit containing hearsay concerning what jurors had told her); United States v. Allied Stevedoring Corp., 258 F.2d 104 (2d Cir. 1958) (noting that "the affidavit of Joseph E. Potter is patently inadequate to justify a hearing" where it relied on hearsay from available declarant).[1]

Simply put, without affidavits from the defense witnesses who allegedly spoke to Government witnesses, there are no under-oath "facts" in the record supporting the claims Bergrin purports to raise. See Glenn v. Scott Paper Co., Civil No. 92-1873, 1993 WL 431161, at *14 (D.N.J. Oct. 20, 1993) (noting "the reliability problem associated with layering out-of-court declarations on top of other out-of-court declarations") (citing Boren v. Sable, 887 F.2d 1032, 1037 (10th Cir. 1989) (with each additional layer of hearsay, there is a corresponding decrease in reliability)).

But even had Bergrin tendered affidavits from the defense witnesses containing the vague statements Stephens attributes to them, that still would be insufficient to garner a hearing. See generally Hassett v. Kearney, Civ. No. 05-609, 2006 WL 2682823, at *3 (D. Del. Sept. 18, 2006) (denying habeas relief despite affidavit filed by witness stating that

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[1] Accord United States v. Brennan, 129 F.3d 119, 1997 WL 657020, at *2 (7th Cir. 1997) (unreported) (agreeing "that no evidentiary hearing was required before Brennan's motion [for a new trial] could be denied" where "Dye's recounting of what Avery allegedly told him is clearly hearsay," which "does not raise a factual question as to whether Avery actually obtained narcotics while at the Dirksen Building"); Rastelli v. Warden, 622 F. Supp. 1387, 1395 (S.D.N.Y. 1985) (admitting "entirely unsubstantiated double and triple hearsay as the sole foundation for a finding of parole violations crosses the line which separates informality from irrationality"); United States v. Meinster, 488 F. Supp. 1342, 1345-46, 1345 n.3 (S.D. Fla. 1980) (district court had "grave doubts" about affidavit submitted by defendant containing triple hearsay, expressing concern that triple hearsay "leaves the court defenseless against wild and unfounded accusations").

he lied on the stand because the witness should have submitted "a document that specifies every false statement he made, the 'true' version of events, and what the prosecutor threatened.") (internal quotation marks omitted) (quoting State v. Hassett, 2003 WL 21999594, at *2 (Del. Super. Ct. Aug. 25, 2003)).

Beyond that, the reliability of the affiant, Louis Stephens, is suspect. Stephens falsely identified himself as a civil rights lawyer for Government witness Anthony Young in order to secure a written statement from Johnnie Davis, the step-father of murder victim Kemo McCray. See A1971-75 (direct); see also A1984 (Bergrin on cross does not dispute that Stephens misidentified himself in questioning Davis). Further, Stephens has materially misstated the substance of an *ex parte* communication that Judge Martini disclosed to the parties in January 2012. According to the e-mail from Judge Martini's Law Clerk:

> Judge Martini would like to put you on notice that chambers received a phone call today from a woman identifying herself as Julia. She called and asked to speak to Judge Martini. When chambers staff asked the nature of her call, she said she had concerns about the FBI's conduct with regards to her husband, Ramon Jimenez, whom she identified as a witness in the Bergrin trial. Chambers staff did not permit her to speak to the Judge and did not elicit any further information from her about the reasons for her call.

Exhibit A (emphasis added). Stephens's version, however, contains purported factual details about the substance of the call that do not appear in above-quoted e-mail:

> 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 . . . to testify to untruthful statements about Bergrin, or words to that effect.

Stephens Cert. ¶ 139. Stephens thus added facts clearly not contained in the disclosure from Judge Martini's Chambers, which casts a pall over his entire Certification.

II. At Any Rate, Bergrin's Assertions Fall Woefully Short Of Showing A Colorable Claim Of A Constitutional Violation Requiring A Hearing.

Even putting aside the procedural defect, Bergrin's motion still must be denied. Bergrin alleges two forms of prosecutorial misconduct: (1) coaching or coercing witnesses to lie, and (2) Brady violations. BB32-37. Neither allegation establishes a colorable constitutional violation sufficient to justify a hearing.[2]

A. Bergrin Has Failed To Establish A Colorable Claim That The Government Has Encouraged Or Coerced Witnesses To Lie.

Bergin claims that "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." BB31. After setting forth two examples from the prior trial that show Bergrin's penchant for misstating the record, Bergrin relies on the dubious allegations of the Stephens Certification. Bergrin falls far short of establishing "outrageous government conduct," the only claim he raises.

1. Legal Standard.

Although the defense of outrageous government conduct is "often invoked by defendants, [it] is rarely applied by courts." Voigt, 89 F.3d at 1065. Indeed, the defense has been "moribund," United States v. Lakhani, 480 F.3d 171, 180-81(3d Cir. 2007), since the one case in which it has been successfully invoked, United States v. Twigg, 588 F.2d 373 (3d Cir. 1978). The defense of outrageous government conduct can be "invoked

[2] Given that the Stephens Certification relies on double-hearsay from anonymous sources, the Government does not (and, in some cases, cannot) respond to each and every assertion of misconduct Bergrin raises. The Government will supplement its response if this Court instructs it to do so.

only in the face of 'the most intolerable government conduct.'" Lakhani, 480 F.3d at 180-81 (quoting United States v. Jannotti, 673 F.2d 578, 608 (3d Cir. 1982) (*en banc*)). The defense bars prosecution only where the Government's "shocking, outrageous, and clearly intolerable" conduct, United States v. Nolan-Cooper, 155 F.3d 221, 230-31 (3d Cir. 1998) (citation omitted), has "rendered the prosecution of the defendant fundamentally unfair," Lakhani, 480 F.3d at 181. Bergrin's allegations fail to meet this onerous standard.

2. Bergrin's Papers Fail To Show A Colorable Claim That The Government Encouraged Witnesses To Lie.

a. The Trial Record.

Initially, the trial record refutes Bergrin's claim that "the trial evidence showed that, on a number of occasions, the government appears to have encouraged witnesses to lie under oath." BB31. In fact, the two examples Bergrin cites show only that he attempted to mislead the jury and is now attempting to mislead this Court.

For example, Bergrin claims that the Government urged Albert Castro "to go forward with his guilty plea to certain charges even after he told the government 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." BB31-32. Bergrin insinuates that the Government so badly wanted Castro's testimony against Bergrin that it did not care that Castro had pleaded guilty to a crime he did not commit.

But Bergrin attempted to perpetrate a massive fraud on Castro, the jury, and Judge Martini, a fraud the Government exposed during the trial. Yet Bergrin attempts to resuscitate that fraud to obtain a hearing. Specifically, Bergrin's questions asserted that

Castro had falsely stated under oath that he had pointed a gun at a police officer in pleading guilty to a weapons-possession offense. A2531-34. But the tape and transcript of the plea hearing showed that Castro denied having pointed a gun "at" a police officer, and admitted to having pointed a gun "in the direction of" an officer, just as he testified during cross-examination. A3505-11. Bergrin's line of questioning was particularly reprehensible because Bergrin was Castro's defense attorney and had personal knowledge of what occurred at the state court guilty-plea hearing. Far from showing that the Government encouraged witnesses to lie, the Castro episode shows only that Bergrin is willing to embed demonstrably false factual premises in his questions.

Similarly, Bergrin notes that while Ramon Jimenez was on the stand, the Government disclosed an ethics complaint that witness Ramon Jimenez had lodged against his defense attorney, in which Jimenez complained that his lawyer was helping prosecutors interrogate him and that FBI agents allegedly said they need a witness against Bergrin. BB32.[3] But Bergrin fails to relate that Jimenez testified on redirect that he had filed the complaint after learning that his daughter might not be accepted into the witness protection program, A1643-51, but went ahead with his guilty plea and cooperation agreement after learning that his daughter was, in fact, accepted, A1671-72. Jimenez emphatically denied that FBI agents supplied him with information about Bergrin, and clarified that agents told him that anything he knew could be helpful. A1650-51. Once again, Bergrin relates only a tiny fraction of the truth.

[3] The Government's prompt disclosure of this information undermines Bergrin's claims of rampant Brady violations.

b. The Stephens Certification.

Bergrin claims that his investigation "has uncovered further attempts by government agents to elicit false testimony against Mr. Bergrin." DB33. Stephens's double-hearsay allegations fail to show the "specific, non-conjectural, and detailed" facts necessary to make out a colorable claim for relief.

The Stephens Certification accuses the Government of improper conduct with regard to four witnesses: Yolanda Jauregui, Abdul Williams, Thomas Moran, and Ramon Jimenez. Stephens Cert. ¶¶ 31–32, 41–42, 54–55, 87, 131, 147. With respect to Jauregui, Government agents allegedly "'put words in her mouth,'" told her to "'make things up,'" and "promised her" reduced jail time, money, and a home. Stephens Cert. ¶¶ 31, 32, 41, 55. With respect to Williams, the Government allegedly threatened to arrest his father and sister if he "did not cooperate . . . by implicating Bergrin." Stephens Cert. ¶ 87. With respect to Moran, the Government allegedly "attempted to break him" by keeping him in solitary confinement until he agreed "to lie." Stephens Cert. ¶ 131. For Jimenez, the FBI allegedly was "putting words in his mouth," and promised him reduced jail time, money, and a car in exchange for his testimony. Stephens Cert. ¶¶ 57, 147.

The Government has already explained why the procedural deficiency in Bergrin's motion is sufficient basis for denying his request for a hearing. The factual deficiencies in the motion further undermine Bergrin's request for a hearing. For example, Christopher Adams, Esq., a partner in a respected New Jersey firm, attended virtually every one of Jauregui's proffer sessions and flatly denies that anyone on the prosecution team engaged

in the conduct Stephens alleges. Certification of Christopher D. Adams ¶¶ 2–7. Adams's first-hand observations plainly trump the unreliable double hearsay Bergrin invokes.

Particularly specious is Bergrin's theory that Richard Roberts is a *de facto* Government agent who is encouraging witnesses to testify falsely against Bergrin.[4] Stephens Cert. ¶¶ 58–118. Bergrin has purportedly discovered a "recurring pattern of cooperating witnesses who suddenly implicate Bergrin after meeting, being counseled by, or retaining Roberts." Stephens Cert. ¶ 85. But Bergrin's theory neglects to account for the reality that these witnesses in fact had information incriminating Bergrin and were counseled to come forward and testify truthfully against Bergrin in order to reduce their own sentencing exposure, which is perfectly legitimate legal advice. At any rate, the inference Bergrin draws from this supposed pattern, that Roberts is a *de facto* Government agent advising others to lie, has no evidentiary support—*none*. This Court need not convene a hearing "on the basis of speculation in the valley of dreams." United States v. Strozier, 981 F.2d 281, 285 (7th Cir. 1991) (declining to vacate sentence).

At bottom, the Stephens Certification does not clear the very high bar of "outrageous government conduct." Voigt, 89 F.3d at 1065. To the contrary, Bergrin simply seeks to convert an accepted defense strategy into a claim of prosecutorial misconduct. Claims "that the cooperating witness has falsely accused the defendant in

[4] Stephens avers that defense attorney Richard Roberts brought someone employed by this Office (apparently not a member of the prosecution team) to the premiere of "American Gangster." Stephens Cert. ¶ 3. It should come as no surprise to this Court that members of the defense bar and employees of this Office socialize, and it does nothing to suggest that Roberts has "inside information" about this case. See Stephens Cert. ¶ 94.

order to get a better deal for himself . . . are made in virtually every case in which an accomplice testifies for the government under a cooperation agreement." United States v. Spinelli, 551 F.3d 159, 169 (2d Cir. 2008). But the existence of such agreements hardly suggests (let alone proves) witnesses have been instructed to testify falsely.

In fact, the Third Circuit has rejected similar efforts by defendants to convert their defense theories or impeachment strategies into claims of prosecutorial misconduct. In United States v. Stadtmauer, the defendant claimed that AUSAs had violated the Due Process Clause by sponsoring false testimony from a Government witness. 620 F.3d 238, 267 (3d Cir. 2009). Stadtmauer premised his accusation on FBI-302s, which contained statements contradicting the witness's trial testimony. Id. at 267-68. The Third Circuit rejected Stadtmauer's claim, because it falsely assumed that the FBI-302 contained the "truth," and because Stadtmauer had the opportunity to impeach the witness with prior inconsistent statements. Id. at 268-69; accord United States v. Moore, 639 F.3d 443, 446 (8th Cir. 2011) (rejecting claim that prosecutors and agents conspired to fabricate reports given inconsistencies between those reports and the testimony of prosecution witnesses); cf. United States v. Zuno-Arce, 44 F.3d 1420 (9th Cir. 1995) ("Zuno-Arce has offered no evidence whatsoever for prosecutorial misconduct except for the inference from discrepancies," which "is too weak to vacate the district judge's exercise of discretion in denying a new trial").

In sum, subject to the Federal Rules of Evidence, Bergrin can attempt to show at trial that witnesses have been coached or coerced to lie *if he has a good-faith basis for such assertions*. The Government emphasizes that caveat because its own investigation to

date suggests that either Stephens has fabricated some of his assertions or the anonymous defense witnesses quoted in the certification lied to Stephens. In the meantime, "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).

B. Bergrin's Brady Claims Are Baseless.

Bergrin also claims that the Government has violated its obligations under Brady v. Maryland, 373 U.S. 83 (1963), by suppressing exculpatory information. BB31. Bergrin is not entitled to hearing (let alone a remedy) because (1) he possesses any favorable information and can use it at trial (again, subject to the rules of evidence), and (2) the Government did not suppress any favorable information in any event.

1. Legal Standard.

The Government must produce "material, favorable evidence," which includes "evidence that may be used to impeach a witness." United States v. Reyeros, 537 F.3d 270, 281 (3d Cir. 2008); see Giglio v. United States, 405 U.S. 150, 154 (1972). "Evidence is material 'if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.'" Reyeros, 537 F.3d at 281 (quoting United States v. Bagley, 473 U.S. 667, 682 (1985)). "There are three components of a true Brady violation: The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued." Strickler v. Greene, 527 U.S. 263, 281-82 (1999).

When there is "a true Brady violation," ordering a new trial at which the defendant may utilize the information cures the prejudice. E.g., United States v. Pelullo, 105 F.3d 117, 124 (3d Cir. 1997). Belatedly disclosing Brady material may require a continuance; but there is no prejudice if a defendant is convicted after having received the information. See United States v. Kaplan, 554 F.2d 577, 580-81 (3d Cir. 1977); see also United States v. Vella, 414 F. App'x 400, 409 (3d Cir. 2011) (not precedential).

Dismissing charges for an alleged Brady violation is a Draconian sanction warranted *only* when the defendant proves that (1) he suffered prejudice, and (2) the violation was willful. See Gov't of V.I. v. Fahie, 419 F.3d 249, 259 (3d Cir. 2005) ("[T]o merit the ultimate sanction of dismissal, a discovery violation in the criminal context must meet the two requirements of prejudice and willful misconduct, the same standard applicable to dismissal for a Brady violation.").

2. Bergrin's Brady Claims Fail As A Matter Of Law Because He Does Not And Cannot Establish Prejudice.

Section 3 below demonstrates that Bergrin's specific assertions are baseless. But this Court need not address those assertions because Bergrin's moving papers prove that he possesses the information he claims is exculpatory and, thus, cannot show prejudice.

Notably, Bergrin does not and cannot claim any prejudice. For example, he does not claim (let alone attempt to prove) that the previous trial would have ended in an acquittal had the Government disclosed any of the information he now claims was concealed. Bergrin could not make that showing for two reasons. First, Bergrin's theory regarding Richard Roberts is, in a word, specious. Second, as the Government has

explained in prior briefs, the mistrial stemmed from the erroneous exclusion of probative evidence of guilt and from Bergrin's false assertions to the jury, which went unrebutted. Given that Bergrin has and can use the information he claims was suppressed, an evidentiary hearing would amount to a "fishing expedition." Williams v. Beard, 637 F.3d 195, 210-11 (3d Cir. 2011) ("such speculative discovery requests should be rejected").

3. The Government Has Fully Complied With Its Discovery Obligations.

Given the fatal procedural defect plaguing the Stephens Certification, see supra Point I.B, almost all of the Brady violations Bergrin raises are based on incompetent allegations and do not merit a hearing for that reason alone. Nonetheless, Bergrin's claims are specious and, in some cases, completely fabricated.

a. The Information Rasheeda Tarver Provided To Agent Brokos In 2006 Inculpated Bergrin.

Bergrin claims that the Government suppressed information Rasheeda Tarver allegedly provided to FBI Agent Shawn Brokos about Anthony Young in 2006. Bergrin claims that this information was favorable and impeaching because it supposedly contradicted Young's trial testimony about the Kemo Murder. BB32. But Bergrin's claim assumes that the testimony Tarver provided for Bergrin during the 2011 trial mirrored what she told Agent Brokos in 2006. It did not. As Agent Brokos testified during the Government's rebuttal case, Tarver *corroborated* Young's account of the murder. A3988-93. Agent Brokos's only mistake, if it could even be called that, was not documenting that inculpatory information in an FBI-302, a point Bergrin stressed on cross-examination. A3993-4008. To put it bluntly, whether voluntarily or through coercion, Tarver testified

falsely at trial. The fact that Tarver did so hardly shows that she provided that (false) information to Agent Brokos in 2006.

b. Bergrin's Theory That Richard Roberts Is A *De Facto* Government Agent Is Specious.

Bergrin complains that the Government failed to disclose various facts that support (or would have allowed him to investigate sooner) his theory—which the Government first learned about on August 21, 2012—that Roberts is acting as a *de facto* Government agent and is encouraging various witnesses to falsely inculpate Bergrin. BB34 & n.17; see also Stephens Cert. ¶¶ 64–78.

For example, Stephens asserts that Maria Correia twice visited Government witness Albert Castro while he was incarcerated, after which Castro hired Roberts, after which Castro came forward and provided information inculpating Bergrin in the Kemo Murder. Stephens Cert. ¶¶ 58–77. Based on those "facts," Stephens asserts that

> 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.

Stephens Cert. ¶ 78. Relying on that suspicion, Stephens complains that "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." Stephens Cert. ¶ 79.

Bergrin's Brady claim is perniciously circular. That is, Bergrin: *infers* that Roberts is a *de facto* Government agent who is instructing witnesses to lie (an inference based, ironically, on information the Government has produced); implicitly *assumes* that the

Government knew and somehow encouraged Roberts to engage in that alleged conduct (but Bergrin never explicitly alleges that the Government had such knowledge); and *concludes* that the Government suppressed information that would have helped Bergrin develop this theory earlier. "Brady, however, does not require the government to anticipate all possible defenses and provide the defendant with otherwise irrelevant information to bolster one possible factual theory, particularly where, as here, the theory itself ... is demonstrably implausible." Wright v. United States, 559 F. Supp. 1139, 1146 (E.D.N.Y. 1983), aff'd, 732 F.2d 1048 (2d Cir.1984); accord Doan v. Carter, 548 F.3d 449, 462 (6th Cir. 2008); United States v. Runyan, 290 F.3d 223, 248 (5th Cir. 2002).

Apart from (or perhaps because of) the implausibility of Bergrin's theory, Bergrin misstates the record to support it. For example, Bergrin claims that the Government did not disclose information showing that Roberts "represented" Abdul Williams: "At the time of the McCray trial, the Defense was unaware of Roberts' former representation of Williams." Stephens Cert. ¶ 84. Putting to one side that the Government had no reason to appreciate the allegedly exculpatory value of that information, the Government did disclose to Bergrin an FBI-302 documenting a meeting between Roberts and Williams in advance of Williams's testimony at the first trial. See Exhibit B. Further, Bergrin's assertion—that Williams inculpated Bergrin only after meeting Roberts—is belied by the fact that Williams attended four proffer sessions in which he implicated Bergrin in criminal activity *before* meeting with Roberts. See Exhibit C (FBI-302s regarding proffer sessions, which were also produced to Bergrin during first trial).

c. The Assertions Regarding DW-5.

Bergrin alleges that two FBI agents interviewed DW-5; that DW-5 provided information exculpating Bergrin; and that the Government has failed to disclose that information. BB34; see Stephens Cert. ¶¶ 113–21. The Government denies these allegations as it has disclosed to Bergrin all exculpatory information in its possession. Had Bergrin disclosed the identity of DW-5, the Government could have searched its files for records of any conversations agents may have had with DW-5. Once again, Bergrin's reliance on anonymous sources undermines his motion and hampers the Government's ability to respond to it. See supra Point I.B.

d. The Assertions Regarding DW-3.

Bergrin claims that Government witnesses Yolanda Jauregui and Ramon Jimenez told DW-3 that they had been promised various benefits in exchange for their testimony, and complains that "[t]hose promises were not disclosed to the defense." BB34-35; see Stephens Cert. ¶¶ 55-57. Regardless of what DW-3 claims to have heard, the Government represents that no such promises were made to either witness.

e. The Assertions Regarding Jimenez.

Bergrin claims that the Government "has not disclosed any information to the defense regarding its conversation with the wife of Jiminez [sic] after she called the District Court's chambers to complain that the FBI was forcing her husband to falsely testify against Mr. Bergrin." BB35; see Stephens Cert. ¶¶ 139-49. As the Government explained previously, that this assertion falsely assumes that Jimenez's wife contacted Judge Martini's Chambers to complain "that the FBI was forcing her husband to falsely

testify against Mr. Bergrin." See supra Point I.B (citing Exhibit A). Indeed, the Government's inquiry into this matter revealed that Jimenez's wife called to complain about issues relating to the witness protection program, not the FBI's conduct towards Jimenez. Thus, even if Jimenez's wife told *Stephens* that she had contacted the Court to complain about the FBI's treatment of Jimenez, see Stephens Cert. ¶ 147, which the Government's investigation suggests is patently untrue, Jimenez's wife never conveyed that information to any member of the prosecution team. Because the Government cannot disclose information it does not possess, there is no plausible Brady claim here, either.

C. Bergrin's Other Assertions Do Not Merit A Response, Much Less An Evidentiary Hearing.

Bergrin makes other claims, such as that the Government allegedly coerced Moran to testify falsely against Bergrin, that Roberts and FBI agents attempted to coerce DW-5 to testify falsely against Bergrin, and that Agent Brokos allegedly encouraged DW-4 to leak to the press damaging information about Bergrin. Stephens Cert. ¶¶ 122–36, 109, 112, 116, 119–21, 150–56. The Government emphatically denies those allegations. Besides, Bergrin cannot show any prejudice: (1) he can cross-examine Moran at trial (of course, Bergrin is stuck with his concession at the prior trial that "you can believe what Tom Moran said," A4218); (2) DW-5 is not a Government witness; and (3) jury selection will weed out potential jurors who may have read press accounts of this case and cannot agree to put those accounts aside and follow the evidence. See Voigt, 89 F.3d at 1066 (prejudice is a prerequisite to a remedy).

CONCLUSION

For all of the foregoing reasons, the Government respectfully requests that the Court deny Bergrin's motion for an evidentiary hearing.

Respectfully submitted,

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Date: August 31, 2012
Newark, New Jersey

CERTIFICATE OF SERVICE

I today caused the foregoing Brief to be served on Defendant Paul Bergrin by serving a true and accurate copy of same on his stand-by counsel (by prior agreement) addressed as follows:

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I certify that the foregoing is true and correct.

Executed on: August 31, 2012

s/ Steven G. Sanders, AUSA