Paul W. Bergrin
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VIA HAND DELIVERY

August 7, 2013

Honorable Dennis M. Cavanaugh, U.S.D.J.
United States District Court, District of New Jersey
U.S. Post Office and Federal Courthouse
Federal Square
Room 451
P.O. Box 999
Newark, New Jersey 07101-0999

Re: *United States v. Bergrin*
Docket Number 09-369 (DMC)
Defendant Paul Bergrin's *Pro Se* Motion for Reconsideration

Dear Judge Cavanaugh:

Defendant hereby submits this motion for reconsideration of the Honorable Court's Opinion and Order, dated July 23, 2013. Moreover, defendant hereby submits additional points for ruling and reconsideration. Please take notice that Defendant was not provided with a copy of this Court's ruling and opinion until July 30th, 2013.

Defendant hereby incorporates by reference all legal arguments and filings previously made.

I. A MANIFEST INJUSTICE WOULD RESULT IF THIS COURT DID NOT RECONSIDER ITS RULINGS DENYING JOA ON THE MCCRAY COUNTS. THE GOVERNMENT HAS GROSSLY MISLED THE COURT ABOUT THE EVIDENTIAL VALUE OF THE RECORDINGS BECAUSE THOSE RECORDINGS PROVE BERGRIN'S ACTUAL INNOCENCE OF THE MCCRAY CHARGES AND THAT THE GOVERNMENT RELIED UPON TESTIMONY IT KNEW OR SHOULD HAVE KNOWN WAS PERJURED.

The Court erred in adopting the government's intentionally deceptive allegation that Bergrin was "cherry picking" recordings in footnote three, (Opinion p. 8) and in finding that Bergrin would have

opened himself up to other recordings that incriminate him.[1] The absolute fact remains that there is not a shred of credible evidence to support this contention. The Government has not offered sufficient facts about the content of from its review of the entirety of the recordings upon which this Court should base this conclusion. The Government's claims are baseless and meritless. *See* footnote 1 herein. The July 15, 2013 supplement delineates the inaccuracy of this allegation and this Court must find that the recordings are diametrically opposed to Anthony Young's testimony and prove Bergrin's "actual innocence" of the McCray murder charges.

The seminal point pertaining to the Curry Title III intercepts and recordings that has been ignored and repeatedly distorted by the government is that, from the date of William Baskerville's (hereinafter Baskerville) arrest on November 25, 2003, until the termination of the Curry wiretap, there is not a recording or scintilla of evidence to corroborate the underlying premise of the government's entire theory of the "Kemo" case, *to wit,* that McCray was murdered because Bergrin informed the Curry group or William Baskerville's associates that Baskerville was facing life in prison and that Baskerville would go free and Bergrin would win the case if McCray was not a witness.

More disturbing is that *the recordings prove that Young falsely swore* that the organization had absolutely no knowledge that Baskerville *was facing a life sentence until Bergrin* met with them on the streets of Newark, either before or after Thanksgiving, depending on Young's date of testimony and proffering. *See* footnote 1.

The ardent fact remains that the recordings clearly, unequivocally and categorically prove, without an iota of dispute, the complete opposite. None of Baskerville's associates believed he was facing life imprisonment. Indeed, the recordings confirm the incredulousness of the government's sole witness

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1 During the trial of *United States v. William Baskerville*, AUSA John Gay testified that Bergrin and other co-conspirators were not charged because the Government did not "…feel we can prove the case beyond a reasonable doubt at trial." (May 8, 2007, transcript pages 6277:1 to 6277:25). Moreover, AUSA Minish's statements in the *Baskerville* case contradict the Government's claims other evidence existed beyond Young's uncorroborated testimony of Bergrin's alleged complicity in the McCray murder. AUSA Minish stated:

> …***Let's put an end to this Paul Bergrin thing***. Defense counsel's argument, taken to its logical conclusion, is this: Paul Bergrin gave him bad legal advice, that if you kill this guy, somehow or another you'll get off so, therefore, the fact that he actually did it should be excused; that because he made a decision, which ***by the way, we have no idea if that was the advice, there is zero testimony to say that was even advised prior to giving up the name, prior to the defendant making a call to Rakeem Baskerville***, but somehow or another, having bad legal advice is to excuse this act? Or the fact these other men have not been charged yet...***This is a full three years after the crime was committed***...while John Gay is my boss, I can tell you right now, it doesn't matter a whole heck of a lot to whether or not he's convinced what he believed…whether back in his office he believes or in his personal opinion he believes people are involved does not get you a conviction. {***emphasis added***}.

(May 10, 2007, *United States v. William Baskerville*, 6707:17-6709:3). Moreover, AUSU Robert Frazer noted, "…others responsible for contributing to the death of Kemo have not been charged with murder or any other crimes associated with this murder….John Gay told you why. Because we only charge people that we can prove - - where we can prove the case beyond a reasonable doubt…***Anthony Young told us about the other co-conspirators and the whole plan and their roles, but Anthony Young by himself, by himself does not equal beyond a reasonable doubt***. If we had come in here without Eric Dock, Rick Hosten and Eddie Williams and all the others, just put Anthony Young up there, could we have expected you to vote this case beyond a reasonable doubt based on Anthony young's lone testimony? No….***We're not going to put one person up there without corroboration***. {emphasis added}. (May 10, 2007, *United States v. William Baskerville*, 6660:16-6661:10)

against Bergrin and that the government knew or should have known that Young perjured himself as to Bergrin's involvement in the case.

As the Government is well aware, it is crystal clear from the recordings that Baskerville's associates knew the evidence against Baskerville was overwhelming, independent of McCray, and that Baskerville was realistically and practically only facing between 12 and 13 years of imprisonment, not life imprisonment as asserted by the government. Based on the recordings, the government also knew or should have known the physical whereabouts of Curry almost at all times --arguably exculpatory alibi evidence which refuted Young's claims-- and that there were never any meetings between Bergrin and anyone in the area of Avon Avenue in Newark, neither before or after Thanksgiving 2003.

To clarity the defense's position: 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 *Pro Se* defendant and his defense team received the recordings. Furthermore, it would have been impossible to listen to them in the time consuming manner the recordings were formatted -- many of which were unable to be opened when they were first provided -- along with the fact that the recordings encompassed a majority of hang ups, calls to voice mail and immaterial and irrelevant conversations. Additionally, the call files were not named, itemized or indexed, and complete transcripts were not provided. As such, it was impossible to identify the parties involved and would have been like trying to find the proverbial "needle in a haystack." Moreover, defendant had been assured by others that the calls were not incriminating and that it would be a waste of time to review.

The government should have been candid and forthright to the defense and accentuated the magnitude of the exculpatory nature of the recordings, which clearly established that Young fabricated evidence and lacked credibility as to material facts. This is especially so because the only direct evidence upon which the McCray murder conviction and related counts were based was the sole uncorroborated and incredulous testimony of Young, a witness who gave three different contradictory accounts of the murder, all of which consistently contradicted the irrefutable and uncontestable evidence. Clearly, the prosecution knew or should have known Young's testimony was perjured.

Yet, instead of upholding its constitutional oath to seek the truth and pursue justice, the government intentionally and knowingly attempted to deceive the Court in its reply submission by claiming that the alleged Bergrin meeting occurred on December 4, 2003. There can be no question that this was an attempt to subvert justice because the government believed and relied upon the fact that Bergrin had not and would not review the recordings. The fact remains that the recordings have now been reviewed post-trial and the interests of justice compel this Court to set aside the verdict.

This court is not powerless to act to prevent such a gross miscarriage of justice when presented with proof of actual innocence. Indeed, this court has a constitutional duty to ensure a fraud was not perpetuated upon the tribunal. Consistent with that purpose, this court should implore the Government to reinvestigate the facts that gave rise to the McCray murder charge against Bergrin and the exculpatory evidence set forth in the recordings. See *Friedman v. Rehal*, 618 F.3d 142, 155-56 (2d Cir. 2010) (addressing the question of actual innocence by urging the prosecution to reinvestigate case based on new and material evidence that established a reasonable likelihood that an injustice may have occurred because of proof defendant was actually innocent despite fact that the underlying legal claim was procedurally and substantively defective).

II. GIVEN THE COURT'S PERSONAL AND PROFESSIONAL RELATIONSHIPS WITH PARTIES ACCUSED OF MISCONDUCT IN THE CASE, A REASONABLE PERSON, WITH KNOWLEDGE OF ALL THE FACTS, WOULD CONCLUDE THAT THE COURT'S IMPARTIALITY MIGHT BE REASONABLY QUESTIONED.

Subsequent to Bergrin's first trial before the Honorable William J. Martini, Judge, United States District Court, Newark, New Jersey, the government moved for reassignment of Judge Martini, claiming he was not fair and impartial and the Government feared it could not receive a fair retrial. In so moving, the Government cited 28 *U.S.C.* 455(a) and 28 *U.S.C.* 2106 and *United States v. Bertoli*, 40 F.3d 1384, 1411 (3rd Cir. 1994), arguing that a Judge should no longer preside over a case when a "reasonable person, with knowledge of all the facts, would conclude that the Judge's impartiality might be reasonably questioned." *United States v. Wecht*, 484 F.3d 194,213 (3d. Cir. 2007).

Defendant is aware that the apparent bias must be derived from an extrajudicial source, meaning something above and beyond judicial rulings or opinions formed in presiding over the case. See *Liteky v. United States*, 510 *U.S.* 540, 555 (1994).

In the case *sub judice*, the blatant appearance of partiality begs for the District Court to immediately recuse itself from this case, seek judicial reassignment and forego further rulings.

In pretrial filings, the defendant articulated the dire need for an evidential hearing relevant to governmental misconduct and improprieties which substantially affected defendant's chances of receiving a fair and impartial trial. Defendant submitted a sworn Certification from retired Federal Bureau of Investigation Agent and licensed Private Investigator, Louis Stevens which espoused a plethora of illegalities; acts of professional misconduct and improprieties infringing upon Bergrin's Due Process rights; and acts committed by various Attorneys, government representatives and parties to the case (hereinafter Certification). The Certification, 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.

What has now been ascertained is the inherent intrapersonal and professional relationship's this Honorable Court had with each one of these legal representatives. As set forth herein, the facts show that the public would perceive an overwhelming appearance of impropriety and partiality by this Court in presiding over this matter.

Shortly after being assigned this matter, the defense provided this Court with the Stephens' certification. The certification raised serious questions about the conduct of Richard Roberts, the attorney who represented several cooperating witnesses, solicited former Bergrin clients and sought movie rights from at least two cooperating witnesses. After trial, the defense learned that this His Honor and His Honor's close family members have close personal ties with Roberts.

Specifically, attorney Roberts attended Seton Hall Law School with His Honor from 1970 to 1972. Both His Honor and Roberts were employed by the State of New Jersey in the County of Essex from

approximately 1973 to 1977. Although they worked in different offices, they forged a genuine friendship and bond based upon their innumerable interactions. Roberts worked for the Essex County Prosecutor's Office for almost ten years and His Honor for the Essex County Public Defender's Office.

During Roberts' employ as an Assistant Prosecutor, he was promoted to supervisory positions and established a life-long relationship with his former boss the Essex County Prosecutor, Joseph Lordi. Lordi is His Honor's father-in-law. Roberts has publicly and repeatedly referred to Lordi as having been "like a second father to him." See Waldron, Mary. *The Life and Career of Richie Roberts Practicing Criminal Defense Attorney and Inspiration for the Movie "American Gangster.*" http://www.lawcrossing.com/article/3768/American-Hero-Richard-Richie-Roberts.

As Roberts' second father, Lordi and His Honor shared a similar bond and relationship as that between Lordi and Roberts. Although unknown to the Defendant until after trial, these relationships apparently were public knowledge as is the fact that Roberts is also a close friend with His Honor's wife, Linda Lordi Cavanaugh. The relationship between Roberts, His Honor and Mrs. Lordi Cavanaugh date back approximately 30 years.

His Honor also was a partner in the Law Firm of Whipple, Ross and Hirsch from 1987 to 1992, the firm that presently employs attorney John Azzarella; the representative for Ramon Jimenez and the attorney against whom Bergrin and Jimenez asserted ethical violations. His Honor remains extremely close personally and professionally with multiple partners in that firm.

Attorney Vincent Nuzzi, the attorney for cooperating witness Eugene Braswell, as well as the former attorney for Hakeem Curry and Jarvis Webb, as well as multiple members of the Curry Organization, has been one of His Honor's closest friends and supporters for the past 30 years. Not only did His Honor work at the Office of the Essex County Public Defender with Nuzzi but His Honor considers Nuzzi one of his closest friends.

Christopher Adams is a partner in the firm of Joseph Hayden, Jr., a firm with which His Honor shares a close intrapersonal relationship for more than 30 years with its senior partners, Justin Walder and Joseph Hayden, Jr. It must also be noted that His Honor served his first Judicial Clerkship with Judge Francis Hayden, in New Jersey Superior Court, Essex County, New Jersey.

It is a combination of all these factors, which, most respectfully, gives the public the perception of an appearance of impropriety and partiality by this Court and to which Defendant now seeks recusal of this Honorable Court. It is apparent and inherent that this Honorable Court could not have sat as an independent and objective jurist in light of his close, professional and personal attachments and relationships with these attorneys who represented the core of the cooperating witnesses against Bergrin. This is especially so in light of Bergrin's accusations of misconduct against these attorneys and the prejudicial impact they had in the presentation of evidence in the case.

These relationships between His Honor and the involved parties, discovered subsequent to Bergrin's trial, not only affected the dispositional rulings against Bergrin but required full and complete disclosure and a hearing to determine the degree of prejudice and the impact these outside influences may have had on the judicial proceedings.

In sum, this Honorable Court should no longer preside over this case because a reasonable person with knowledge of all these facts would have to conclude that this Court could have been perceived by the

public as partially disposed against Bergrin and in personal favor with those adverse to Bergrin's interests in this proceeding.

III. 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.

On or about November 25, 2003, Bergrin was retained to represent William Baskerville in the United States District Court, for the District of New Jersey and a formal Notice of Appearance was filed. It is alleged that, subsequent to Baskerville's Initial Appearance (Rule 5, Federal Rules of Criminal Procedure), Bergrin informed Hakeem Curry that the cooperating witness against Baskerville, was Kemo Deshawn McCray. Additionally, it is alleged that 4 to 9 days after Thanksgiving, Bergrin appeared in the area of Avon Avenue and either 16th or 17th Street, Newark, New Jersey, in the evening hours and supposedly informed Hakeem Curry, Rakeem and Jamal Baskerville, Jamal McNeil and Anthony Young, that Baskerville is going to spend the rest of his life in prison unless they get rid of McCray; and that if there is "no Kemo, there is no case."

On March 2, 2004, in Newark, New Jersey McCray was shot and killed.

In or about May, 2005, William Baskerville was indicted for the capital murder of McCray and in April of 2007 stood trial, in United States District Court, Trenton, New Jersey. During the course of the trial, the government argued that Bergrin was as guilty as Baskerville for McCray's murder and this accusation was testified to by lead case agent Shawn Brokos of the Federal Bureau of Investigation and Assistant United States Attorney John Gay. Baskerville was convicted of McCray's murder and sentenced to life in prison.

In or about January 2007, Bergrin was arrested and Indicted for offenses in New York County, which included conspiracy to commit money laundering, money laundering, conspiracy to promote prostitution, promoting prostitution and misconduct by an Attorney. The offenses were alleged to have occurred between July of 2004 and March of 2005, in New York and New Jersey. A memorandum in the case of *United States v. Bergrin*, designated as J03166 and 03167, unequivocally depicted that there were innumerable communications and cooperation in the investigation and charging of Bergrin between New York County and the federal government. The memo proves that the New York authorities agreed to delay arresting Bergrin in order to further investigative and charging efforts by the federal government and for federal authorities to achieve strategic and tactical advantages in the disposition of their case.

Both New York State and the United States Attorney's Office for New Jersey colluded, acting jointly and cooperatively in the prosecution of the prostitution and money laundering case. More importantly, the Jencks Act materials specifically prove that New York State and New Jersey federal law enforcement authorities strategized on the investigation, the timing of Bergrin's arrest and indictment and any plea offers in the New York case.

Bergrin has had continuous legal representation since his arrest in January of 2007 to the present.

In late April of 2009, the New York authorities offered to resolve the Indictments through a negotiated plea by way of offering to Bergrin pleas to misdemeanor charges. Bergrin was promised that all felony charges would be dismissed and that he would receive a maximum of one year probation. On May 4, 2009, Bergrin entered pleas of guilty to two misdemeanor counts of conspiracy to promote prostitution as a means to resolve all charges existing against him.

Within approximately two weeks of his entry of the New York plea, Bergrin was indicted, arrested and charged by New Jersey federal authorities with the New York prostitution accusations, the murder of McCray and conspiracy to commit murder of witnesses against Vicente Esteves as well as other charges.

In or about June 2008, Bergrin was retained to represent Vicente Esteves on a criminal Indictment returned against him in New Jersey Superior Court. Within weeks of being retained to represent Esteves the government induced, paid and procured federal informant Oscar Cordova to record Bergrin and persistently suggest to Bergrin that Cordova would kill cooperating witnesses against Esteves.

The government's delay in indicting Bergrin from the dates of the alleged commission of the offenses violates the fundamental concepts of justice, which forms the basis of our civil and political institutions. It is abhorrent to the community's sense of fair play and decency. *Mooney v. Holohan*, 294 *U.S.* 103, 112 (1935), *Rochin v. California*, 342 *U.S.* 165, 173 (1952). See also *Ham v. South Carolina*, 409 *U.S.* 524, 526 (1973), *Lisenba v. California*, 314 *U.S.* 219, 236 (1941) and *Herbert v. Louisiana*, 272 *U.S.* 312, 316 (1926).

In *United States v. Marion*, the Supreme Court considered the significance for constitutional purposes the pre-indictment delay. 404 *U.S.* 307 (1971). The Court held that the Due Process Clause of the Fifth Amendment protects individuals against oppressive pre indictment delay. *Id*. at 324. Actual prejudice makes a due process claim ripe for adjudication and a due process inquiry must consider the reasons for the delay as well as the prejudice to the accused. *Id*. at 324-325. A "tactical delay" automatically violates the Due Process Clause. A Due Process violation might also be made out upon the showing of prosecutorial delay incurred in the reckless disregard of circumstances known to the prosecution, suggesting that there existed an appreciable risk that delay would impair the ability to mount an effective defense. *Id*. at 321, n 25.

The Third Circuit has held that pre-indictment delay, which is unreasonable and inexcusable, violates the Due Process Clause when it prejudices the defendant (the time between the crime and bringing the indictment) and the delay was motivated in order to obtain tactical advantage or to harass. *United States v. Beckett*, 208 F.3d 140, 150-51 (3d Cir. 2000), *United States v. Arakelyan*, 2008 WL 1849126(E.D.Pa., 3d Cir. 2000).

Although these cases did not find unreasonable delay to achieve a tactical advantage, their facts are incomparable and not analogous to Bergrin's case. Of utmost importance is the finding by our sister Circuits who opined that the government violated defendants' due process rights when they delayed indictment in order to bolster their case. "The desire to gain such a tactical advantage is not a sufficient reason for trial delay."

In the case *sub judice*, the pattern of the government's delay can only be interpreted in one light: that the delays were intentionally caused to gain a tactical advantage on behalf of the government and through the manipulation of constitutionally prescribed prohibitions which caused actual prejudice to

Bergrin.

The government colluded with the New York District Attorney's Office to make Bergrin an extraordinarily lenient plea offer so that he would accept it and they would have proof to meet one of the two predicate acts for the RICO charge. It is of no coincidence that New Jersey authorities delayed charging Bergrin until subsequent to his New York guilty plea; and that Bergrin was indicted immediately thereafter for charges that originated and terminated in 2005. What is just as atrocious is that the date of Bergrin's arrest and indictment in the case at hand was delayed through coordination between both offices so federal authorities could bolster their case against Bergrin.

The prejudice suffered by Bergrin in defending against the charges as a result of the government's delay in charging him with the McCray murder for five years is immeasurable. The delay resulted in unavailable evidence such as EZ Pass and other records, which would have provided proof Bergrin was not at the location alleged by the government's only witness; the loss of witness Stacey Webb, who died in 2013 and would have contradicted Young's false testimony; dissipated memories of witnesses who were unable to recall events that occurred years earlier; the loss of records detailing Bergrin's whereabouts at given times, which would have exculpated him; and the inability to locate multiple key witnesses who moved to different locations since the alleged incident occurred.

Additionally, the delay in charging Bergrin with the prostitution and money laundering charges strategically crippled Bergrin's ability to make an intelligent and informed decision as to resolving the New York case and inhibited Bergrin's ability to defend the federal charges.

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. Despite the fact that multiple prosecution representatives accused Bergrin of being complicit in the McCray murder case, at least three years prior to him being charged, they unreasonably delayed charging him to achieve a tactical advantage and to usurp their obligations pursuant to *United States v. Massiah* and *United States v. Henry.* Bergrin was represented by counsel throughout the proceedings and the Esteves charges are innately similar to the McCray charges and indeed were used as 404(b) evidence for the jury to consider in weighing the McCray evidence. The Government's pattern of manipulation and usurpation was used to avoid the constitutional restraints of *Massiah* and *Henry* in violation of the Due Process Clause and the progeny of the cases delineated there from. The Government's actions abused and violated the aura, tenets and principles espoused in *Massiah* and *Henry.*

Moreover, the Government's representations during the *United States v. William Baskerville* trial show the intentional and deliberateness in the Government's decision to delay charging Bergrin with the McCray murder. The government clearly sought to gain a tactical advantage and harm Bergrin's ability to effectively defend against the McCray charges by delaying charging Bergrin with the 2004 murder. As is clear from the trial testimony of lead prosecutor AUSA John Gay, the Government intentionally delayed pursuing the McCray murder charge to bolster the other charges in its 2009 indictment.

Specifically, during the trial of *United States v. William Baskerville*, the Government's lead prosecutor AUSA John Gay testified during the penalty phase. AUSA Gay stated that Bergrin and other co-conspirators were not charged because the Government did not "…feel we can prove the case beyond a reasonable doubt at trial." (May 8, 2007, transcript pages 6277:1 to 6277:25).

Moreover, AUSA Minish's argument to the jury suggests that the Government doubted Bergrin gave the advice Young claimed in his testimony. Furthermore, it shows that the Government misrepresented to the jury the evidence of *when* this alleged advice was purportedly given by Bergrin in the *United States v. Bergrin* trials and that the Government grossly and knowingly exaggerated Bergrin's role. There, AUSA Minish stated:

> …***Let's put an end to this Paul Bergrin thing***. Defense counsel's argument, taken to its logical conclusion, is this: Paul Bergrin gave him bad legal advice, that if you kill this guy, somehow or another you'll get off so, therefore, the fact that he actually did it should be excused; that because he made a decision, which ***by the way, we have no idea if that was the advice, there is zero testimony to say that was even advised prior to giving up the name, prior to the defendant making a call to Rakeem Baskerville***, but somehow or another, having bad legal advice is to excuse this act? Or the fact these other men have not been charged yet...***This is a full three years after the crime was committed***...while John Gay is my boss, I can tell you right now, it doesn't matter a whole heck of a lot to whether or not he's convinced what he believed…whether back in his office he believes or in his personal opinion he believes people are involved does not get you a conviction. {emphasis added}.

(May 10, 2007, *United States v. William Baskerville*, 6707:17-6709:3). Moreover, AUSA Robert Frazer noted, "…others responsible for contributing to the death of Kemo have not been charged with murder or any other crimes associated with this murder….John Gay told you why. Because we only charge people that we can prove - - where we can prove the case beyond a reasonable doubt…***Anthony Young told us about the other co-conspirators and the whole plan and their roles, but Anthony Young by himself, by himself does not equal beyond a reasonable doubt***. If we had come in here without Eric Dock, Rick Hosten and Eddie Williams and all the others, just put Anthony Young up there, could we have expected you to vote this case beyond a reasonable doubt based on Anthony Young's lone testimony? No….***We're not going to put one person up there without corroboration***. {emphasis added}. (May 10, 2007, *United States v. William Baskerville*, 6660:16-6661:10)

As a result of the delay, Bergrin's defense was actually and substantially prejudiced in the 2011 and 2013 trials in numerous ways including, as set forth above, the unavailability of key witnesses and documents, destruction of physical evidence as well as pretrial publicity.

Since delaying the charge violated Bergrin's due process rights and denied him a fair trial, the conviction must be vacated and the McCray-related charges in the indictment dismissed with prejudice. See *United States v. Marion*, 404 *U.S.* 307,324 (1971) (noting that the statute of limitations does not fully define a defendants' rights with respect to the events occurring prior to indictment and that the Fifth Amendment's Due Process Clause requires an indictment's dismissal if the pre-indictment delay caused substantial prejudice to the right to a fair trial and that the delay was an intentional device to gain tactical advantage over the accused) and *United States v. Lovasco*, 431 *U.S.* 783,795-796 (1997) (delay in filing charges amounts to a due process violation where there is actual prejudice and prosecutorial intent to undermine the defendant's ability to defend against the charges where Government gains a "tactical advantage").

For the aforementioned reasons, the verdict must be vacated and the indictment must be dismissed as violative of the Due Process Clause. *United States v. Ismaili*, 828 F.2d 153, 167-68 (3d Cir. 1998), *United States v. Lovasco*, 431 *U.S.* 783 at 789-90 (1977).

IV. THE GOVERNMENT'S UNAUTHORIZED ACCESS TO AND MONITORING OF BERGRIN'S COMMUNICATIONS WITHOUT A COURT ORDER WERE IMPROPER AND CAUSED ACTUAL AND EXTREME PREJUDICE TO BERGRIN'S DEFENSE.

The government's use and abuse of electronic surveillance in the seizure of Bergrin's emails and telephone conversations, while incarcerated at the Metropolitan Detention Center, Brooklyn, New York clearly violated the Department of Justices' 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.

Inmates 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. These communications are not intended to provide the prosecution with unfettered access to an inmate's personal and legal communications. The purpose of the monitoring, and consenting to the monitoring, is not to give the prosecution a means to gather evidence for impeachment purposes. Nor is the monitoring intended to be used to scrutinize defense strategies and gather intelligence to determine defense posture in the defense of charges. Moreover, it is improper to use this information to detrimentally affect the defense's case. Yet, that is precisely what the Government did in this case.

The detention of an inmate, especially a *pro se* defendant, by its very nature inhibits case preparation and detrimentally affects the ability to prepare a defense. It deleteriously precludes a defendant from properly preparing his case, affects one's ability to properly prepare witnesses for testimony, stymies the ability to concentrate fully on the legal and factual aspects of the defense, and limits the ability to review discovery and fully research issues. The time allotted for case preparation is materially affected and Sixth Amendment rights are extremely hampered. A *pro se* incarcerated inmate does not have the same opportunities and ability to attain an equivalent level of preparedness as the government as he has diminished resources and assistance.

Consequently, inmates rely on the ability to effectively communicate by use of the telephone and email with co-counsel, paralegals, investigators, experts, family and friends. In sum, Defendants materially use emails and the telephone to foster case preparation. It is impossible to prepare a case for trial without material reliance on them.

The Department of Justice policy is that, in the event that a telephone conversation, monitored routinely by prison officials for the purpose of prison security, is found to contain information relating to the violation of law, prison officials may disclose that information to the proper law enforcement authorities for prosecution. Law enforcement authorities outside the Bureau of Prisons are not supposed to be given carte blanche and unfettered access to an inmate's monitored telephone calls and electronic communications. In the cases when outside law enforcement agencies ask the Bureau of Prison officials to monitor and disclose future telephone and electronic communications of specific inmates in connection with a criminal investigation being conducted of activities outside the confines of the prison, not affecting prison security or administration, this monitoring is only properly conducted

when an interception order has been procured under the authority of Title III.[2]

In the case *sub judice*, 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. The communications were devoid of any security issues to the Bureau of Prisons and did not contain any indicia of law violations. The seizure paralyzed Bergrin's ability to communicate with Stand-By-Counsel, enabled the government to obtain advance notice of defense trial strategy and the scope and substance of defense investigation and was done with for no other purpose than to unjustly and unfairly obtain impeachment materials for use at trial. It also enabled the government to further the course of its investigation and to prepare their witnesses to counter the defense case. All matters that weighed heavily in the outcome of the trial and gave the government unfair advantage; especially since Bergrin was a *Pro Se* litigant whom relied heavily on communicating with his defense team, telephonically and through the use of the email system. The prejudice suffered by Bergrin and his case as the result of the government's actions was extremely detrimental. It resulted in denying Bergrin a fair trial.

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 must be ascertained 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.

Accordingly, the defense respectfully requests that this Honorable Court Order a hearing to compel the government to provide a copy of all communications seized and in its possession, disclose the manner in which the Government seized these communications and the extent to which they were used. Moreover, it is respectfully requested that, if the government obtained telephone conversations and emails of defendant, which included legal communications with members of the defense trial team, that this Court find that defendant's Due Process and Sixth Amendment rights were violated, set aside the verdict and dismiss the Indictment.

I thank the Court for its thoughtful consideration of these issues.

Respectfully,

/s/_____
Paul W. Bergrin

cc: S. Sanders, ASUSA

2 The United States Supreme Court has recently precluded the warrantless interception and tracking of individuals through the use of GPS devices. Henceforth, there is a trend toward preserving the constitutional rights of individuals.