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 DEFENDANT PAUL BERGRIN'S PRETRIAL MOTIONS**

TO: John Gay, Ass't U.S. Attorney
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PLEASE TAKE NOTICE that Defendant Paul Bergrin, by his attorneys, Gibbons P.C. (Lawrence S. Lustberg, Esq. appearing), hereby moves before the Honorable Dennis M. Cavanaugh, United States District Judge, for an Order (1) granting a severance of Counts Twelve and Thirteen; (2) excluding evidence of the Esteves Plot, the Pozo plot and the drug trafficking conspiracy from the severed trial of Counts Twelve and Thirteen under Federal Rules of Evidence 401, 403 and/or 404(b); (3) ordering a hearing on the allegations of government misconduct raised by Mr. Bergrin and his investigator to determine whether the

Indictment should be dismissed; (4) considering and granting Mr. Bergrin's previous pretrial motions to (a) dismiss Count Twenty-Six of the Second Superseding Indictment as facially invalid; (b) suppress as violative of Mr. Bergrin's Sixth Amendment rights any statements that Mr. Bergrin made to government informants (and evidence derived therefrom) who acted as government agents after the time that Mr. Bergrin was represented by counsel on the State Prostitution and Kemo Murder Cases; and (c) suppress as illegally seized, in violation of Mr. Bergrin's rights under the Fourth Amendment to the Constitution, 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 support of these motions, Mr. Bergrin relies on the Brief in Support of Defendant Paul W. Bergrin's Pretrial Motions, the Appendix and Compendium of Pleadings previously filed by the government, and the Certification of Louis F. Stephens separately filed *in camera*. A proposed form of order is filed herewith.

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Dated: August 21, 2012

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 **PROPOSED ORDER GRANTING PRETRIAL MOTIONS**

THIS MATTER having come before the Court upon the pretrial motions of defendant Paul Bergrin ("Bergrin") and the Court having considered the submissions of the parties, and the arguments of counsel and for good cause shown,

IT IS on this _____ day of _____, 2012,

ORDERED that Bergrin's pretrial motions be and they hereby are granted; and

IT IS FURTHER ORDERED Counts Twelve and Thirteen are hereby severed from the remainder of the trial of this matter;

IT IS FURTHER ORDERED that on _____, 2012, the Court shall conduct a hearing on government misconduct to determine whether the Indictment should be dismissed;

IT IS FURTHER ORDERED that County Twenty-Six of the Second Superseding Indictment is hereby dismissed;

IT IS FURTHER ORDERED that certain statements made by Bergrin to government informants are hereby suppressed;

IT IS FURTHER ORDERED that 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, is hereby suppressed;

IT IS FURTHER ORDERED that Mr. Bergrin be permitted to file additional pretrial motions on or before _____, 2012.

_____
Honorable Dennis M. Cavanaugh, U.S.D.J.

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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 **CERTIFICATE OF SERVICE**

I, **LAWRENCE S. LUSTBERG**, hereby certify as follows:

1. I am a Director with the law firm of Gibbons P.C., and counsel for Paul Bergrin (Bergrin) in the above-captioned matter.

2. On this date, I electronically filed, on behalf of Bergrin, the following:

- Notice of Motion;
- Brief in Support of Pretrial Motion;
- Certification of Louis M. Stephens;
- Proposed Form of Order; and
- Certificate of Service.

3. On this date, service was made upon the following attorneys in accordance with the United States District Court for the District of New Jersey's Local Rules on Electronic Service:

John Gay, Ass't U.S. Attorney
Joseph N. Minish, Ass't U.S. Attorney
Steven G. Sanders, Ass't U.S. Attorney
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970 Broad Street
Newark, New Jersey 07102

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.

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Dated: August 21, 2012

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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Standby Counsel for Defendant Paul Bergrin

On the brief:
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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]

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[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

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