UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

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

GOVERNMENT'S BRIEF IN SUPPORT OF ITS PRETRIAL MOTIONS

Office of the U.S. Attorney
970 Broad Street
Newark, New Jersey 07102
(973) 645-2700

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes & Rules

Other Authorities

TABLE OF ABBREVIATIONS

"A__"	refers to the pages of the five-volume Appendix the Government filed in United States v. Bergrin, 3d Cir. Docket Nos. 11-4300 & 11-4552, a copy of which has being provided to this Court.
"C__"	refers to the pages of the Compendium of Pleadings the parties have jointly submitted.*
"Dkt."	refers to the docket entries in this case. (When the Government cites to a specific page of a pleading, it will cite the page number in the ECF legend at the top of the filed pleading.)

* This Compendium contains pleadings related to severance and Rule 404(b) issues. Any pleadings not contained in that Compendium will be referred to by their docket entry number.

PRELIMINARY STATEMENT

The Government respectfully submits this Brief in support of its pretrial motions, and summarizes below the relief it seeks.

I. This Court should conduct a single trial of Counts 1 through 26 of the Second Superseding Indictment ("SSI") for five main reasons. *First*, the Third Circuit's most recent Bergrin opinion counsels against severing any counts. *Second*, severing counts arising from a common scheme is disfavored, especially in RICO cases. *Third*, much of the evidence the Government would introduce to prove the RICO counts would be admissible in a stand-alone trial of any parallel substantive count. *Fourth*, limiting instructions are sufficient to guard against any risk posed by a joint trial. *Fifth,* trying all counts together will prevent Bergrin from again misleading the jury.

II. This Court should permit the Government to prove the Kemo Murder charged in Counts 12 and 13 with evidence that will be introduced to prove the various racketeering acts alleged in the substantive RICO count.

III. This Court should bar Bergrin from testifying in his opening and closing statements and warn him of the consequences of doing so.

IV. This Court should bar Bergrin from mentioning his military service and his representation of police officers and soldiers, as such information is inadmissible under Rule 405 and substantially more unfairly prejudicial than probative under Rule 403.

V. This Court should preclude Bergrin from violating Federal Rule of Evidence 613 when cross-examining Government witnesses.

VI. This Court should bar Bergrin from eliciting privileged information from his former client, Albert Castro, and from suggesting that he dissuaded Castro from obstructing justice.

VII. This Court should permit the Government to introduce false statements Bergrin made to the jury in the first trial as proof of Bergrin's consciousness of guilt.

VIII. This Court should bar both parties from referring to the outcome of the previous trial.

IX. This Court should conduct a new Faretta colloquy to ensure that Bergrin's decision to represent himself at the forthcoming trial is knowing and voluntary, and made with knowledge of the consequences should Bergrin repeat at this trial his misconduct from the first trial.

X. This Court should allow the parties to file such additional motions as may be necessary.

STATEMENT OF FACTS

Defendant Paul Bergrin is a criminal defense attorney licensed to practice law in New Jersey. Dkt. 213 at 2, ¶ 3; 3-4, ¶ 5(c). From approximately November 2001 through May 21, 2009, Bergrin led an association-in-fact enterprise: The Bergrin Law Enterprise ("BLE"). Dkt. 213 at 2, ¶¶ 2-3; 28, ¶ 52(a). The BLE functioned as a business that in addition to providing legitimate attorney services, committed and conspired to commit acts of murder, witness tampering, drug trafficking, traveling in aid of a racketeering enterprise, bribery, coercion, prostitution, money laundering and other crimes for the benefit of its members and associates. Dkt. 213 at 2, ¶ 2.

In addition to Bergrin, the BLE was comprised of both individuals and corporations. The individuals included Alejandro Barraza-Castro ("Alejandro"), and individuals whose initials are Y.J., T.M., R.J., J.C., A.W., and N.V.; the corporations included the Law Office of Paul W. Bergrin P.C. ("L.O.P.B."), P. Bergrin & V., P.A. ("PB&V"), Premium Realty Investment Corp. ("Premium"), and Isabella's International Restaurant, Inc. ("Isabella's"). Dkt. 213 at 27-30, ¶ 52(b)-(l). Bergrin used these corporations to conceal the criminal activities of BLE members and associates. Dkt. 213 at 2, ¶ 3; 29-30, ¶ 52(i)-(l).

The BLE's primary goal was to make money for its members and associates by providing illegal services to other criminal organizations. Dkt. 213 at 3-4, ¶¶ 5(b)&(f). Providing these services fulfilled a secondary goal of generating an expanding base of clients for such services. Dkt. 213 at 3, ¶¶ 5(a)&(b). Additionally, the BLE protected and preserved Bergrin's status as a licensed lawyer and enhanced his reputation as a criminal

defense attorney. Dkt. 213 at 3-4, ¶¶ 5(c) & (d). These purposes were important because there was a symbiotic relationship between the legitimate legal services Bergrin provided and the illegal services the BLE provided. See Dkt. 213 at 2, ¶ 2; 4-6, ¶¶ 6-11. All of the persons who benefitted from the illegal services the BLE provided were clients of, employed by, or otherwise associated with Bergrin's law practice. Dkt. 213 at 4-6, ¶¶ 7-10. Accordingly, as Bergrin's reputation as a criminal defense lawyer grew, so did the potential to attract criminals to whom BLE members could also provide illegal services. Moreover, the manner in which the BLE provided many of the illegal services depended upon the unique privileges granted to a licensed lawyer. Dkt. 213 at 5, ¶ 9.

The BLE primarily engaged in two types of activities: drug trafficking and witness tampering. Often, the witness tampering was related to protecting or otherwise furthering the BLE's drug business. The Government summarizes some of those activities here.

Drug Trafficking

Under the guise of conducting legitimate business through PB&V., L.O.P.B., Premium and Isabella's, members and associates, including Bergrin, Alejandro, Y.J., R.J., A.W., and N.V., distributed multi-kilogram quantities of cocaine between 2000 and 2009. The BLE's drug trafficking activity was intricately tied to Bergrin's law practice. Bergrin solicited and used clients of his law practice to purchase and supply kilograms of cocaine. Bergrin provided legal representation to persons associated with the BLE's drug trafficking business, often tampering (or offering to tamper) with witnesses as part of that legal representation. Bergrin used persons employed by or otherwise associated with his law practice to assist in the BLE's drug trafficking business.

The BLE also used its corporate entities to assist in drug trafficking. Specifically, the BLE used Isabella's to store and distribute cocaine and otherwise conduct drug trafficking business. On May 21, 2009, agents from the Drug Enforcement Administration recovered 54 kilograms of cocaine that the BLE had stored inside Isabella's. The BLE also used the offices of PB&V and L.O.P.B. to store and distribute cocaine, and to otherwise conduct drug trafficking business. Between 2000 and 2009, the BLE's drug trafficking business distributed hundreds of kilograms of cocaine.

The N.V. Plot

On or about November 19, 2001, N.V. was arrested and charged in Superior Court in Essex County, New Jersey, after he stabbed his wife multiple times with a knife. Bergrin was retained as N.V.'s attorney. Bergrin, Y.J., N.V., and others devised a plan whereby they would bribe, threaten, coerce, and otherwise influence a person who was then a minor ("N.V.'s Witness") to testify falsely at trial, in an effort to thwart the prosecution of N.V. on attempted murder charges. Bergrin and N.V. determined that N.V.'s Witness was a person who would testify at trial. Bergrin developed a strategy to defend the case which required N.V.'s Witness to testify falsely to a story developed by N.V. and Bergrin. Since they knew N.V.'s Witness, they executed the plan to influence N.V.'s Witness to testify falsely. For several months thereafter, Bergrin, Y.J., and N.V. repeatedly bribed, threatened, coerced, and otherwise influenced N.V.'s Witness to testify falsely on behalf of N.V. At numerous preparation sessions, Bergrin coached N.V.'s Witness to testify falsely. At trial, Bergrin, among other things, knowingly put on the false testimony of N.V.'s Witness. As a result, a jury acquitted N.V. of the charges.

The Kemo Murder

William Baskerville was an associate in a large-scale drug trafficking organization headed by Hakeem Curry (the "Curry Organization"). A748. Bergrin was "house counsel" to the Curry Organization. A1842, A3353-55. On November 25, 2003, the FBI arrested Baskerville for a series of crack cocaine sales he made to a confidential witness. A851-81. Bergrin was retained to represent Baskerville in that case. A886-97.

While awaiting his initial appearance, Baskerville correctly identified the confidential witness, Kemo McCray, A2197-99, and he so advised Bergrin, A665. Shortly thereafter, Bergrin telephoned Curry and conveyed that "Kamo" was the confidential witness. A667, A2519-20, A3575-90. Curry Organization member Anthony Young, who was with Curry during the call, realized that Bergrin was referring to "Kemo." A2519-20.

Approximately one week after Baskerville's arrest, Young was present for a meeting in which Bergrin said that Baskerville would never get bail, was facing life in prison, and would not see the streets again if Kemo testified. Bergrin twice reiterated, "No Kemo, no case." A2522-30. After Bergrin left, Curry Organization members discussed how to find and kill Kemo. A2530-32.[1] On March 2, 2004, they found Kemo, and Young shot and killed him. A2007, A2543-79.

Bergrin implicitly admitted his complicity in the murder to former Curry associate Abdul Williams (identified as "A.W." in the SSI). In or around March of 2007, approximately one month before testimony was to commence in Baskerville's trial on the

[1] Bergrin separately had offered drug dealer Albert Castro $10,000 to murder Kemo, an offer Castro refused. A2322-26.

Kemo Murder, Bergrin called Williams into a private meeting. During that meeting, Bergrin asked if Williams thought Baskerville would cooperate with the Government and implicate Bergrin in the Kemo Murder. When Williams indicated he did not think Baskerville would do so, Bergrin replied that he was not worried about Baskerville doing so because Baskerville would be implicating himself in the Kemo Murder if Baskerville were to implicate Bergrin in that murder. A3408-10.

Bergrin also implicitly admitted his guilt to attorney Thomas Moran. A3781-82. In or around early 2008, Moran asked Bergrin about the Kemo Murder. Bergrin explained that while meeting with the client, the client told Bergrin about the identity of the informant. Bergrin then met with "the client's people," which Moran knew meant "Bergrin's client's criminal associates." During that meeting, Bergrin divulged the identity of the informant. Bergrin added that three months later, they killed him.

The Pozo Plot

Richard Pozo distributed multi-hundred kilogram shipments of cocaine he received in New Jersey via Texas. C317. In February 2004, Pozo was charged in the Western District of Texas with narcotics offenses. *Id.* Pozo hired Bergrin to represent him. During an attorney visit, Bergrin told Pozo that P.R. was cooperating with authorities, asked Pozo if he knew where P.R. lived, and told Pozo that his federal headache would go away if he could "take out" P.R. *Id.* Pozo responded, "Are you nuts? I'm not murdering anyone," and later retained new counsel. Bergrin did not contradict or dispute Pozo's understanding of what Bergrin had proposed. *Id.*; A3731-34; C317; C289-90.

The Abdul Williams Witness Bribery

On or about June 8, 2007, Abdul Williams was arrested for possessing a .22 caliber revolver and subsequently charged in Superior Court in Essex County, New Jersey, with possession of a firearm by a convicted felon ("Williams's Essex County Case"). Williams was being supervised by the New Jersey State Parole Board at the time he was charged on Williams's Essex County Case. The Parole Board thus charged Williams with violating the conditions of his parole ("Williams's Parole Violation Charges"). Bergrin was Williams's attorney on Williams's Essex County Case and Parole Violation Charges.

Prior to being charged in Williams's Essex County Case and Parole Violation Charges, Williams was employed by L.O.P.B. Williams also assisted Bergrin and other members associates of the BLE in distributing kilogram quantities of cocaine. As a result of Williams's Parole Violation Charges, Williams was detained in the Essex County Jail and thus unable to assist Bergrin and others in distributing kilogram quantities of cocaine for the BLE's Drug Trafficking Business.

After Williams's arrest on or about June 8, 2007, Bergrin, Williams, and others devised and executed a plan to thwart the prosecution of Williams's Essex County Case and Parole Violation Charges by, among things, paying money to an associate of Williams whose initials are J.M. in exchange for J.M. falsely confessing to Newark police officers and to an investigator hired by L.O.P.B. that he, not Williams, possessed the .22 caliber revolver on June 8, 2007. Pursuant to that plan, J.M. provided a false written statement to that effect to Bergrin's investigator. Soon thereafter, J.M. also falsely

confessed to Newark police officers that he, not Williams, possessed the .22 caliber revolver on June 8, 2007. As a result, Newark police officers generated a report of J.M.'s false confession and arrested J.M. for possessing the revolver on June 8, 2007. J.M. received payment in exchange for falsely confessing that he possessed the revolver.

Bergrin sent a letter to the Parole Board, to which he attached, among other things, a copy of J.M.'s false confession and argued that Williams was innocent of the Parole Violation Charges. Thereafter, in connection with his representation of Williams at a hearing before the Parole Board, Bergrin knowingly presented J.M.'s false confession to the New Jersey State Parole Board Hearing Officer assigned to adjudicate Williams's Parole Violation Charges. The Hearing Officer subsequently found Williams not guilty.

After the Parole Board Hearing Officer acquitted Williams, Williams was released from the Essex County Correctional Facility. Sometime after his release, Williams returned to his role assisting Bergrin and others in distributing kilogram quantities of cocaine for the BLE's Drug Trafficking Business.

The Edward Peoples Plot

On or about January 1, 2006, Edward Peoples was arrested and charged in Essex County Superior Court with murdering Rahman Jenkins. Bergrin represented Peoples in that case. In order to thwart the prosecution, Peoples asked G.S. to testify at trial and falsely exculpate Peoples of the murder. At the time, G.S. was detained on charges unrelated to Peoples' Essex County case, was not present during the murder, and was not otherwise a witness to any events related to the murder charges against Peoples. Peoples told G.S. to testify that G.S. was present at the murder and observed another person

murder Rahman Jenkins. Peoples promised to provide G.S. with bail money after G.S. falsely exculpated Peoples at trial. Peoples told G.S. that Bergrin would meet with G.S.

Bergrin later met with G.S. in jail and discussed G.S.'s false exculpatory testimony for Peoples. Bergrin told G.S. to testify to whatever Peoples told G.S. to say. Bergrin explained that Peoples was going to give G.S. a paper, that G.S. was to take that paper to his cell and memorize everything on the paper, and that G.S. was supposed to testify based upon what was on the paper. G.S. told Bergrin that he was not present when Rahman Jenkins was shot, which Bergrin acknowledged. Bergrin nonetheless went through the same false story that Peoples had earlier rehearsed with G.S. Bergrin then told G.S. that if he "helped out" Peoples and Peoples won his case, Bergrin would provide G.S. with free legal representation.

In connection with Bergrin's defense of Peoples, Moran attended a meeting between Bergrin and one of Bergrin's criminal associates, named Rasheem King. King was a drug dealer who controlled the Baxter Terrace housing project in Newark, the crime scene location of Peoples' Essex County Case. At that meeting, although Bergrin was aware Peoples was in fact the shooter, Bergrin told King that he (Bergrin) needed a witness to testify that Peoples was not the shooter. Sometime thereafter, King brought to Bergrin's office someone who falsely claimed that Peoples did not shoot Jenkins.

The Esteves Plot

Vincente Esteves operated a large-scale drug trafficking business in New Jersey. In May 2008, Esteves was charged with drug trafficking and related crimes in New Jersey state court, and hired Bergrin as his defense counsel. C229. During an attorney visit,

Bergrin discussed with Esteves a list of witnesses that Bergrin believed were cooperating with the prosecutor, and told Esteves that the only way to beat the case would be if Esteves took care of those witnesses. Bergrin professed his hatred of "rats;" said he would kill a "rat" himself; assured Esteves that this was not the first time he has done this; and said, "if there are no witnesses, there is no case." Id. Informant Oscar Cordova, whom Bergrin believed was a hitman, later recorded Bergrin instructing that in killing the main witness against Esteves, "we gotta make it look like a robbery. It cannot under any circumstances look like a hit. . . . We have to make it look like a home invasion robbery." Dkt. 304-5 at 3-4.

The Prostitution Business

Under the guise of providing legitimate legal services to another criminal organization headed by J.I., Bergrin, among other things, made false representations to J.I.'s parole officer so that J.I. could evade his New Jersey parole restrictions and operate a New York prostitution business. Dkt. 213 at 16-17, ¶¶ 28-30. When J.I. was later arrested, Bergrin took over operating the prostitution business, and enlisted BLE associate J.C. to assist him.. Dkt. 213 at 17-18, ¶¶ 30-31. Bergrin used, among other things, L.O.P.B., PB&V, and Premium to assist him in this activity. Dkt. 213 at 16-18, ¶¶ 28-31. Bergrin was charged with prostitution-related offenses in New York and ultimately pleaded guilty to a related misdemeanor. Before that guilty plea, BLE associate Y.J. solicited a hitman to kill BLE associate J.C., who was a witness in the New York prosecution. Y.J. did so to protect Bergrin's status as a licensed attorney and to ensure the continued viability of the BLE. Dkt. 213 at 18-19, ¶¶ 32-35.

PROCEDURAL HISTORY

The First Superseding Indictment

On November 10, 2009, a grand jury returned a First Superseding Indictment ("FSI") naming Bergrin and seven other defendants. Dkt. 92. Count 1 charged Bergrin and four others with participating in the affairs of the BLE through a pattern of racketeering activity, in violation of 18 U.S.C. § 1962(c), and named Bergrin in 10 of the 13 charged racketeering acts, including the Kemo Murder and the Esteves Plot. Dkt. 92 at 1-31. In April 2010, Judge Martini dismissed Counts 1–3, holding that they failed to state a viable RICO offense. United States v. Bergrin, 707 F. Supp. 2d 503 (D.N.J. 2010).

The Third Circuit Reinstates The RICO Counts

In April 2011, the Third Circuit reversed the April 2010 dismissal order and reinstated the RICO counts. United States Bergrin, 650 F.3d 257, 261 (3d Cir. 2010) ("Bergrin I"). After explaining why the FSI stated a viable RICO offense, the Court noted that its dismissal had been premised on "equitable or logistical concerns" that were "either endemic to RICO prosecutions or involve[d] the application of irrelevant legal standards." Id. at 268-76. To ensure that such "equitable or logistical concerns" would not infect future decisions, the Court emphasized that Congress "intended to create a broad and powerful new statutory weapon for the federal government to wield against individuals like Bergrin and organizations like the" BLE, and "that RICO is a powerful weapon that significantly alters the way trials are conducted in cases that involve racketeering acts committed by members of an enterprise." Id. at 268, 274-75.

The Second Superseding Indictment

On June 2, 2011, the Government secured the SSI charging Bergrin with RICO, VICAR, and related substantive offenses. Dkt. 213. Count 1 charges Bergrin with conducting the BLE through a pattern of eight predicate racketeering acts, including the cocaine trafficking, the Kemo Murder, and the Esteves Plot. Count 1 further pleads the Pozo Plot, the N.V. Witness Tampering, the Edward Peoples Plot, and the plot to tamper with witnesses in the prostitution case as the "manner & means" by which the BLE furthered its illicit goals.

Count 2 charges Bergrin with RICO conspiracy. Counts 3–4 charge VICAR offenses for, respectively, the Kemo Murder and the Esteves Plot. As is typical in RICO cases, Counts 5–26 charge substantive counts that parallel the eight racketeering acts charged in Count l. Counts 27–33 charge that Bergrin evaded taxes on the proceeds of mortgage fraud offenses that were contained in the FSI but deleted from the SSI. The following table depicts the relationship between Count 1 and the substantive counts:

Count 1 (Substantive RICO)		**Parallel Substantive Counts**
Acts 1-3	(cocaine distribution)	5 through 11
Act 4	(Kemo murder)	12 and 13
Act 5	(prostitution)	14 through 16
Act 6	(A.W. witness bribery)	17 through 19
Acts 7-8	(Esteves Plot)	20 through 26

Bergrin's July 2011 Severance Motion

Bergrin moved under Fed. R. Crim. P. 14 for a count-based severance that asked Judge Martini to group the substantive counts by "scheme" and convene five separate juries to consider each scheme in isolation, with a sixth jury to consider the RICO counts last. C96-101. The Government vigorously opposed Bergrin's motion on the ground that the relief he sought would undermine the purpose of the RICO statute, threaten the safety of witnesses, and waste limited judicial and prosecutorial resources. C113-34. The Government agreed to sever Counts 27–33 (the tax evasion counts). C131 n.7.

Judge Martini conducted hearings directed at Bergrin's severance motion, A337, A427, A537, and accepted briefs on the question whether evidence supporting the RICO counts would be admissible in a stand-alone trial of Counts 12 and 13 (the Kemo Murder). C188; C191; C207; C249; C251; C273. On September 19, 2011, Judge Martini severed Counts 12 and 13 from the SSI, and ordered them tried first. Dkt. 236 (A51).

The Mistrial

Trial on Counts 12 and 13 commenced on October 17, 2011. A608. In defense, Bergrin asserted that he had no intent to harm Kemo, that he had simply provided Baskerville with the representation guaranteed him under the Sixth Amendment, and that he would never counsel a drug-dealing client like Pozo to murder a witness. A648, A691-92, A4188, A4194, A4277. The Government, however, was precluded from introducing the Pozo Plot and the Esteves Plot to rebut those assertions. A12-13 (Esteves); A19-26 (Pozo), A32-47 (denying reconsideration). Deprived of critical evidence bearing on Bergrin's intent, the jury deadlocked after six days of deliberations. A4412.

Bergrin's December 2011 Severance Motion

The Government appealed the evidence-exclusion rulings in advance of any retrial, A1, and moved to try the balance of the SSI, Dkt. 344. Bergrin responded by moving to sever Counts 20 through 26 (arising from the Esteves Plot) and try those counts alone. Dkt. 344. On December 27, 2011, Judge Martini severed most of the remaining substantive counts in the SSI, including the cocaine-distribution conspiracy charged in Count 5, and ordered them to be tried next. A75 (Dkt. 360). The Government appealed the same day, A4, and trial was stayed pending the Government's appeals, Dkt. 365.

The Third Circuit's June 2012 Opinion

The Third Circuit vacated the decision ruling the Pozo Plot inadmissible to prove the Kemo Murder and ordered this matter reassigned. United States v. Bergrin, 682 F.3d 261 (3d Cir. 2012) ("Bergrin II"). Citing Bergrin's defense to the Kemo Murder counts, the Third Circuit found the Pozo Plot highly probative of Bergrin's intent and, based on the record before it, saw nothing to justify its exclusion under Rule 403. Id. at 278-81. The Third Circuit also directed this Court to reconsider whether the Esteves Plot could be used to prove the Kemo Murder, holding that Rule 404(b) treats subsequent and prior acts equally. Id. at 281-82 n.25. Further, the Third Circuit instructed this Court to reconsider whether any severance was necessary, id. at 284, noting that trying the RICO counts next effectively would render moot the evidentiary rulings the Government had appealed, id. at 281-82 n.25.

ARGUMENT

I. This Court Should Try Counts 1 Through 26 In A Single Trial.

The Third Circuit has directed this Court "to consider anew whether the Indictment should be severed in any respect." Bergrin II, 682 F.3d at 284. The Court issued a similar directive in United States v. Brunson, 416 F. App'x 212, 223 (3d Cir. 2011), and the newly assigned judge there vacated a similar count-based severance and ordered a single trial on the remaining counts, A4502-03. There are at least five cogent reasons why this Court should take the same step here.

A. Bergrin II Strongly Counsels Against Severing Any Counts.

Bergrin II exposed the fatal flaw in Bergrin's main severance argument, *i.e.*, that allowing a single jury to consider multiple crimes would violate his right to a fair trial:

> The problem with that view is that presenting the witness-tampering allegations as part of a related pattern of racketeering activity is exactly what the Indictment and RICO allow. The Indictment contains valid RICO charges which allege the Kemo murder along with the Esteves Plot and the Pozo Plot, and, if the government ever brings its RICO charges in this case to trial, it will necessarily introduce evidence of those murder plots to meet its burden of proof.

682 F.3d at 284. Bergrin I was just as emphatic: "RICO is a powerful weapon that significantly alters the way trials are conducted in cases that involve racketeering acts committed by members of an enterprise." 650 F.3d at 274-75. Thus, severing substantive counts that arise directly from a validly pled RICO count would improperly "frustrate the intent of RICO by failing to provide juries with a complete picture of the business" and "needlessly compel duplicate presentations of evidence and endanger witnesses." United States v. Persico, 621 F. Supp. 842, 853 (S.D.N.Y. 1985).

B. Courts Routinely Refuse To Sever Counts In RICO Cases.

Long before Bergrin I and Bergrin II, defendants bore "a heavy burden in gaining severance," United States v. Quintero, 38 F.3d 1317, 1343 (3d Cir. 1994), especially "[w]here, as here, the crime charged involves a common scheme or plan," United States v. Girard, 601 F.2d 69, 72 (2d Cir. 1979); cf. United States v. Abdelhaq, 246 F.3d 990, 992 (7th Cir. 2001) (suggesting in a *non*-RICO case that the court erred by severing counts arising from a single scheme and ordering trial on murder counts first).

This "heavy burden" becomes insurmountable in RICO cases, where the charged substantive counts precisely parallel the predicate acts of racketeering activity pled in support of the RICO count. See United States v. Locascio, 357 F. Supp. 2d 536, 546 (E.D.N.Y. 2004) (denying severance where "the two alleged frauds are linked, not only in that they are similar, but because they are both predicate acts of the RICO charges in which [the moving defendants] are charged"); United States v. Castellano, 610 F. Supp. 1359, 1413 (S.D.N.Y. 1985) (rejecting individual defendants' requests to sever certain substantive counts arising from RICO count); United States v. Lavin, 504 F. Supp. 1356, 1364 (N.D. Ill. 1981) (refusing to sever perjury count from the RICO and mail fraud counts, because it was "intimately tied to the alleged RICO conspiracy," which would lead to "a substantial overlap between the elements of those offense and the proof to be adduced at trial"); see also United States v. Andrews, 754 F. Supp. 1161, 1182 (N.D. Ill. 1990) (agreeing that "non-RICO substantive counts will be tried along with their corresponding RICO racketeering acts" despite severing defendants into more manageable groups).

Not surprisingly, in over three years Bergrin has not been able to locate any case (besides this one) in which a court faced with a RICO count naming only one defendant severed parallel substantive counts for *seriatim* trials. Maybe that explains Bergrin's concession last year:

> if you were to deny my motion for a severance and if there were to be a conviction, and if I were to appeal from that conviction to the Court of Appeals and argue that the conviction should be reversed because this Court denied my motion for a severance, my chances of prevailing on that argument would be very poor.

A367. That concession was and is well-founded. See United States v. Scoblick, 225 F.2d 779, 780-81 (3d Cir. 1955) (affirming trial court's refusal to sever conspiracy count from substantive offenses that were charged as overt acts in furtherance of that conspiracy).

C. Evidence Offered To Prove The RICO Counts Would Be Admissible In A Trial Of Any Single Substantive Count.

Even were this Court to address the question whether evidence supporting one RICO predicate would be admissible to prove a separate predicate (and it should not), a substantial amount of the evidence offered to prove the RICO counts would be admissible in a stand-alone trial of any of the substantive counts:[2]

- *First*, the cocaine-distribution conspiracy charged in Count 5 is inextricably intertwined with four of the witness-tampering episodes alleged in the SSI, including the Kemo Murder, the Pozo Plot, the Abdul Williams Witness Bribery, and the Esteves Plot. Dkt. 213 at 82-84, ¶ 4(a)-(d). Thus, a trial on Count 5 logically should include the substantive counts charging those witness-tampering counts, including Counts 12–13 (Kemo Murder), 17–19 (Williams witness bribery), and 20–26 (Esteves Plot).

[2] Point II addresses this issue in greater depth.

- *Second*, many of the witnesses who will testify about Bergrin's involvement in one or more of the crimes alleged in Count 1 committed other crimes with Bergrin that are charged in the SSI. Evidence of those crimes is admissible to explain why Bergrin confided in or associated with certain witnesses and why they are now testifying for the Government;

- *Third*, all of the witness-tampering episodes are admissible to prove any single witness-tampering episode because they show that Bergrin acted pursuant to a common scheme—or, in Count 1's parlance, a "pattern;" and

- *Fourth*, the Pozo Plot and Esteves Plot prove Bergrin's intent to murder Kemo. The Esteves Plot involves Bergrin's admission that he has killed a "rat" before and shows that when Bergrin says "no witness, no case," he means "murder the cooperating witness," proving what the Third Circuit recognized is *the key issue* in the Kemo Murder: Bergrin's intent.

In sum, the "substantial overlap in the evidence" strongly supports conducting a single trial. United States v. Eufrasio, 935 F.2d 553, 568-71 (3d Cir. 1991) (affirming denial of severance where defendant claimed that RICO predicate charging murder tainted jury's consideration of parallel substantive counts).

D. Limiting Instructions Are Sufficient To Guard Against Any Risks Posed By A Single Trial On Counts 1 Through 26.

But even if evidence offered to prove some RICO predicates would be inadmissible to prove others, "less drastic measures [than severance], such as limiting instructions, often will suffice to cure any risk of prejudice." Zafiro v. United States, 506 U.S. 534, 539 (1993). Federal courts strongly favor those "less drastic" measures due to their marked preference for joint trials, which: (1) "conserve state funds, diminish inconvenience to witnesses and public authorities, and avoid delays in bringing those accused of crime to trial," United States v. Lane, 474 U.S. 438, 449 (1986); (2) provide "the jury [with] a more complete view of all the acts underlying the charges than would

be possible in separate trials," Buchanan v. Kentucky, 483 U.S. 402, 418 (1987); and (3) "serve the interests of justice by avoiding the scandal and inequity of inconsistent verdicts," Richardson v. Marsh, 481 U.S. 200, 210 (1987).

Bergrin II recognizes that limiting instructions are preferable to severance. The Third Circuit noted that the question whether evidence supporting one RICO predicate is admissible to prove a different predicate "becomes essentially moot if" this Court "disagrees with the approach to severance that had been followed here, though a limiting instruction might still be warranted." 682 F.3d at 281-82 n.25. By adverting to limiting instructions, the Third Circuit reiterated that severance is not required even if this Court deems evidence proving one witness-tampering plot inadmissible to prove another.

Beyond that, severing *any* counts would ensure at least two more trials and would further delay the resolution of this three-year-old case. That delay is unacceptable given the significant concerns for witness safety. See United States v. Bergrin, Crim. No. 09-369, 2009 WL 1560039, at *5 (D.N.J. May 29, 2009) (finding "by clear and convincing evidence that no condition or combination of conditions . . . will reasonably insure the safety of the community"). And that delay is unnecessary where the Third Circuit will affirm a decision to conduct a single trial. See United States v. Brassington, Crim. No. 09-45, 2010 WL 3982036, at *13-14 & n.13 (D.N.J. Oct. 8, 2010) (favorably citing United States v. Urban, 404 F.3d 754, 776 (3d Cir. 2005), which affirmed an order denying severance in multi-defendant, multi-count RICO case where court directed the jury to compartmentalize the evidence and to consider each count and defendant separately).

E. Conducting A Single Trial Will Prevent Bergrin From Again Misleading the Jury.

Finally, conducting a single trial on Counts 1 through 26 will prevent Bergrin from again misleading the jury.

Bergrin was warned not to open the door to evidence rendered inadmissible by any decision to sever Counts 12 and 13, especially the tape of Bergrin warning the hit man in the Esteves Plot to "make it look like a robbery," not "a hit." (Bergrin sought a severance to keep that tape from the jury.) Bergrin promised to "be very careful about that" and to "make every effort to not [undo] the effect of such a severance . . . by opening the door," A499, A566-677, representing that "such a tactic is not anticipated," A4499 n.2.

After securing a stand-alone trial on Counts 12 and 13 and successfully excluding from that trial evidence of the Esteves Plot (among other evidence), Bergrin in his *pro se* opening statement testified that he did nothing more than act as William Baskerville's attorney, that he never intended for Kemo to be harmed, and that he would never counsel a drug-dealing client like Pozo to murder a cooperating witness. A648, A691-92. Bergrin went even further in summation, claiming that the Government had deliberately framed him because it needed a scapegoat to blame for Kemo's murder. A4268, A4360-61.

Bergrin unfairly exploited the severance to mislead the jury in another respect. While cross-examining Government witness Abdul Williams, Bergrin stressed that Williams had waited until his fifth proffer session with the Government to mention his April 2007 conversation with Bergrin regarding the Kemo murder, A3417, and accused Williams of fabricating that evidence to curry favor with the Government, A4225-26. But

Bergrin knew that Williams had spent his first four proffer sessions detailing, among other things, crimes he had committed with Bergrin. Those crimes were excluded during trial because they post-dated the Kemo Murder, A3337-39, despite having been ruled admissible prior to trial to explain why Bergrin had confided in Williams, A17-27. Bergrin took this tack with Moran as well. Compare A3790-94, with A4226. Of course, Moran was proffering about the Esteves Plot, which was ruled inadmissible.

Bergrin could not have made false assertions had the jury been permitted to consider the full scope of his misconduct in a single trial, including the Cordova tape. Further, in a trial of all counts, witnesses like Williams and Moran would testify about the crimes they committed with Bergrin. Because other evidence would corroborate their testimony, it would blunt Bergrin's attack on their motive to fabricate. See United States v. Porter, 881 F.2d 878, 886 (10th Cir. 1989) ("Because Stephanie Porter's credibility had been placed in issue by the defense, the corroborating testimony about the Mayfield incident is also relevant for the purpose of overcoming that attack."); United States v. Everett, 825 F.2d 658, 660 (2d Cir. 1987) (same).

In sum, accepting the truism that "a trial is not a contest but a search for the truth so that justice may properly be administered," Riley v. Goodman, 315 F.2d 232, 234 (3d Cir. 1963), this Court should conduct a unitary trial on Counts 1 through 26 to prevent Bergrin from misleading the jury. Such a trial "gives the jury the best perspective on all of the evidence and therefore increases the likelihood of a correct outcome." United States v. Buljubasic, 808 F.2d 1260, 1263 (7th Cir. 1987); see Buchanan, 483 U.S. at 418 (joint trials present "the jury [with] a more complete view of all the acts").

II. This Court Should Permit The Government To Prove The Kemo Murder With Evidence Supporting Many Of The Other Crimes Charged In Ths SSI.

Bergrin's severance motions have argued that Counts 12 and 13, which charge the Kemo Murder, would have to be tried alone were they not joined with RICO counts that charge the Kemo Murder as a predicate act of racketeering. Point I explains why that "but for the RICO counts" argument is beside the point: there *is* a RICO count, and (regardless) limiting instructions are strongly preferred over severance. But putting that to one side, Bergrin's construct fails on its own terms: much of the evidence supporting the RICO counts would be admissible under Rule 404(b) to prove the Kemo Murder.

A. The Legal Standard.

"Evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character." Fed. R. Evid. 404(b)(1). However, "[t]his evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident." Fed. R. Evid. 404(b)(2). To be admissible under Rule 404(b), other acts "must (1) have a proper evidentiary purpose; (2) be relevant; (3) satisfy Rule 403; and (4) be accompanied by a limiting instruction (where requested) about the purpose for which the jury may consider it." United States v. Green, 617 F.3d 233, 249 (3d Cir. 2010).

The Third Circuit accepted the Government's argument that "intent is the key issue in" the Kemo Murder case. Bergrin II, 682 F.3d at 280 n.24. The court also stressed that Rule 404(b) says "nothing about whether the act in question is a 'prior' or 'subsequent'

act," which "makes sense because 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* as it can by a prior one." Bergrin II, 682 F.3d at 281 n.25 (citing cases) (emphasis added). The court's reference to a "course of behavior" was hardly accidental: the Government argued on appeal, as it had since the inception of this case, that all of the witness-tampering episodes form a "pattern" or "common scheme," which permits the jury to infer that any single act is part of that pattern. Thus, acts of witness-tampering by Bergrin—both before and after the Kemo Murder—are probative of several non-propensity purposes and "relevant," satisfying the first two elements of the four-step test summarized in Green. Thus, this Court's Rule 404(b) analysis turns primarily on a Rule 403 balancing.

Under Rule 403, courts may exclude otherwise relevant evidence only where "its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Fed. R. Evid. 403. Because exclusion under Rule 403 requires the danger of unfair prejudice to "*substantially* outweigh[] the probative value," United States v. Kemp, 500 F.3d 257, 297 (3d Cir. 2007), evidence may not be excluded "merely because its unfairly prejudicial effect is greater than its probative value," United States v. Cross, 308 F.3d 308, 323 (3d Cir. 2002).

B. The Pozo Plot Is Admissible To Prove Bergrin's Intent.

The Third Circuit held that Richard Pozo's testimony is "proper Rule 404(b) evidence," directed this Court to conduct a Rule 403 balancing, but cautioned that its "review of the record thus far reveals no sound basis upon on which" that evidence

should have been excluded from a trial of the Kemo Murder counts. Bergrin II, 682 F.3d at 281 n.25; id. at 284-85 n.29. There is no legitimate basis for exclusion.

First, the Third Circuit has already held that Pozo's testimony "is highly probative of Bergrin's guilt" because it is "powerfully suggestive of Bergrin's intent in passing Kemo's identity on from Baskerville to Curry," and "is likewise relevant to deciding whether Bergrin uttered the words 'No Kemo, no case,' and, if he did, what he meant." Bergrin II, 682 F.3d at 280. Further, the Third Circuit rejected the Rule 403 concerns Judge Martini had cited, *i.e.*, that Pozo's testimony would be cumulative or confusing, and expressed concern that Pozo's testimony had been excluded on the improper ground that it would undermine Bergrin's lack-of-intent defense (which is precisely why the evidence was offered), id. at 279-80. The Third Circuit also rejected the various arguments Bergrin raised in defending the decision excluding the Pozo Plot. Thus, all those Rule 403 concerns are off the table, and no others exist.

In sum, there is no sound basis upon which to exclude the Pozo evidence: it is highly probative of Bergrin's guilt, and whatever slight risk of unfair prejudice it carries easily can be mitigated through proper limiting instructions. See United States v. Saada, 212 F.3d 210, 224 (3d Cir. 2000).

C. The Esteves Plot Is Admissible To Provide Context To Bergrin's Admission And To Prove Bergrin's Specific Intent.

After clarifying that subsequent acts are admissible to prove a prior crime, the Third Circuit directed this Court to decide whether the 2008 Esteves Plot is admissible to prove the 2004 Kemo Murder. Bergrin II, 682 F.3d at 281-82 n.25; see id. at 284. It is.

Initially, as the Government has explained at length in prior pleadings, the Esteves Plot is probative of an issue other than character in two respects. It provides critical context to Bergrin's admission to Esteves that he has "done this before" (*i.e.*, murdered witnesses for a client), thus allowing a jury to infer that Bergrin was referring to Kemo. Further, the Esteves Plot demonstrates that when Bergrin uses the term "no witness, no case," he means "murder the cooperating witness." C123-25; C191-92; C235-41; C274-77; C299-301. That Bergrin used that phrase in 2008 in explicitly advising Esteves to murder cooperating witnesses makes it less likely that Bergrin had benign intent when he uttered the phrase "No Kemo, no case" to members of the Curry Organization in 2003. That inference becomes even more powerful when factoring in the other episodes of witness-tampering alleged in the SSI. See United States v. Simels, 654 F.3d 161, 172 (2d Cir. 2011) (the jury was "entitled to infer what Simels meant and what action he intended with respect to each witness not only from what was said about that witness but also from what he said about all the witnesses"); United States v. Queen, 132 F.3d 991, 996 (4th Cir. 1997) ("the more similar the extrinsic act or state of mind is to the act involved in committing the charged offense, the more relevance it acquires toward proving the element of intent").

That the Esteves Plot postdates the Kemo Murder by four years does not diminish its substantial probative value. *All* admissions occur after the crime they are introduced to prove. Thus, it is unfair to insulate admissions about a prior crime just because a defendant utters them in the course of committing or soliciting a subsequent, similar crime. This is especially so where Bergrin continued to tamper with witnesses during the

intervening four years, proving that the prior crime and the subsequent one are "not [disconnected] bookends" with nothing in between. Bergrin II, 682 F.3d at 274.

Further, Bergrin's conduct in the Esteves Plot, including saying "no witness, no case" to Esteves while making explicit his intent to kill an informant, is strikingly similar to Bergrin's statements to the Curry Organization where he was not as explicit about his intent. Thus, just like the Pozo Plot, the Esteves Plot forcefully rebuts Bergrin's assertion that he merely intended to provide William Baskerville with the representation to which he was entitled under the Sixth Amendment. See United States v. Thomas, 593 F.3d 752, 758-59 (8th Cir. 2010) (upholding admission of 2008 arrest for crack-cocaine distribution to prove that Thomas intentionally committed identical offense four years earlier); United States v. Rutkoske, 506 F.3d 170, 174-78 (2d Cir. 2007) (upholding admission of conversations regarding one fraud scheme to show knowledge of a different fraud scheme four years earlier given "the similarity between the [two schemes]").

Any danger of unfair prejudice from the Esteves Plot evidence does not *substantially* outweigh its high probative value. To date, Bergin has maintained that jurors necessarily would misuse the Esteves Plot to infer propensity. But Bergrin premised that argument on his assertion that the Esteves Plot, as a subsequent act, has *no* probative value at all. C99 (quoting United States v. Boyd, 595 F.2d 120, 126) (3d Cir. 1978)); C144-45 (same). The Third Circuit exposed the quotation in Boyd for what it was: sheer *dicta* that contradicted the law of every other Circuit, including the Third Circuit. Bergrin II, 682 F.3d at 281 n.25. Thus, Bergrin's argument significantly undervalued the probative value of the Esteves Plot and skewed his Rule 403 argument. Because limiting

instructions are sufficient to guard against any risk of unfair prejudice, there is no basis for excluding the Esteves Plot evidence under Rule 403, let alone severing Counts 12 and 13 for a stand-alone trial.

D. All Of The Witness Tampering Episodes, Including The Pozo Plot And Esteves Plot, Are Admissible To Show Bergrin's Common Scheme And *Modus Operandi*.

In fact, all of the witness tampering episodes alleged in Count 1—including the A.W. witness bribery, the N.V. Plot, and the Edward Peoples Plot, the Pozo Plot, and the Esteves Plot— are admissible to show that Bergrin acted pursuant to a common scheme of witness tampering, provide additional circumstantial evidence of Bergrin's specific intent, and further undermine Bergrin's defense that he was acting as a legitimate defense attorney in representing Baskerville. See C214-16, 235-37; C285-91; see also United States v. Siegel, 536 F.3d 306, 318, 320 (4th Cir. 2008) (finding other acts critical to show defendant's method of operation); United States v. Weber, 437 F.2d 327, 333 (3d Cir. 1970) ("evidence of each of Weber's alleged crimes was relevant to prove the other since each tended to demonstrate Weber's plan to control pipeline construction in New Jersey for his own pecuniary benefit, his motive, and the history of the transaction."). Again, with proper limiting instructions, there is no danger that any risk of unfair prejudice will substantially outweigh the high probative value of this evidence.

E. The Context Evidence.

Further, evidence supporting the crimes charged in Counts 17–26 provides context for the testimony of Thomas Moran and Abdul Williams, to whom Bergrin made admissions regarding the Kemo Murder. C240-41; C291-301. Such evidence is relevant

and admissible to show why Bergrin confided in Moran and Williams and to explain why they are testifying for the Government. See United States v. Dansker, 537 F.2d 40, 58 (3d Cir. 1976) (the other acts "cast light . . . on the relationship" between the witness and the defendants, where "the background information provided by this testimony enable the jury to better understand [the witness's] role . . . as well as his testimony as a whole"); see also United States v. Flemmi, 402 F.3d 79, 93 (1st Cir. 2005) (the Rule 404(b) evidence "explains why Stephen would feel comfortable telling St. Croix about the hide and asking him to move the guns").

F. The Drug Conspiracy Evidence Is Admissible To Show The Membership Of The Conspiracy Charged In Count 12 And As Proof of Bergrin's Motive.

As set forth above, a cocaine-distribution conspiracy underlies many of the witness-tampering episodes in the SSI, including the Kemo Murder. The existence of that conspiracy allows the jury to infer Bergrin's motive to tamper with and murder Kemo: to prevent Baskerville from turning on Curry, who was in a position to turn on Bergrin. C120-22; C233-35; C283-85. Again, with proper limiting instructions the highly probative nature of this evidence would not be substantially outweighed by any danger of unfair prejudice. See Siegel, 536 F.3d at 318 (reversing order excluding evidence of motive in § 1512(c) prosecution and explaining that the "Other Crime Evidence would thus give a jury a basis for concluding that Siegel had a very strong interest in keeping Watkins quiet") (citing United States v. Willoughby, 860 F.2d 15, 24 (2d Cir. 1988)); see also Green, 617 F.3d at 249 (providing "necessary background information" about the relationships among the players is a proper non-propensity purpose).

G. Conclusion.

So that there is no misunderstanding, the Government reiterates here its Point I argument: there are *five* compelling reasons to try Counts 1 through 26 in a single trial. So regardless of whether *some* evidence offered to prove the RICO counts would be inadmissible to prove one or more of the parallel substantive counts, the proper remedy is to craft limiting instructions guiding the jury's consideration of that evidence:

> Even if evidence of the Auferio murder conspiracy predicate might possibly prejudice the jury against Idone in the non-RICO phases of trial, that mere possibility did not compel Rule 14 severance as a matter of law. The jury could reasonably be expected to confine its consideration of the Auferio murder conspiracy evidence to its deliberations on the RICO counts. Furthermore, as mentioned earlier in connection with Eufrasio's and Iacona's Rule 14 severance motions, it was within the discretion of the trial court to determine if the economies afforded by a joint trial of all the charges against Idone outweighed any potential for trial prejudice caused by joinder of the RICO and non-RICO counts

Eufrasio, 935 F.2d at 571 (affirming denial of Rule 14 severance motion in RICO case); accord Brassington, 2010 WL 3982036, at *13-14 (citing Urban, 404 F.3d at 776).

III. This Court Should Preclude Bergrin From Testifying In His Opening Statement And Summation And Impose Sanctions If Bergrin Does So.

When Bergrin chose to proceed *pro se* one year ago, the Government was concerned that he would abuse his status as a *pro se* litigant by making unsworn assertions to the jury that he had no intention of proving through competent evidence and without subjecting himself cross-examination. See United States v. Sacco, 563 F.2d 552, 556-57 (2d Cir. 1977) (agreeing that a *pro se* defendant who makes unsworn assertions and speaks in the first person jeopardizes the rights of other parties to a fair trial); Miller v. Follette, 397 F.2d 363, 366 (2d Cir. 1968) (discussing "the thorny problems raised by a *pro se* defendant who repeatedly engages in improper conduct"). Bergrin did just that.

For example, Bergrin in his opening statement said that "[there will] be further evidence. An individual by the name of Roderick Boyd, on June of 2004 told the FBI that Malik Lattimore at the Passaic County Jail confessed to him to doing the murder of Kemo McCray." A688. But Bergrin elicited no such evidence at trial. Rather, he questioned the lead FBI agent as follows:

> Q. Now, have you ever heard the name Roderick Boyd?
>
> A. Yes, I have.
>
> Q. Based upon information that you received from Roderick Boyd – and this was an individual that was confined to the Passaic County Jail. Correct?
>
> A. That is correct, yes.
>
> Q. And your investigation disclosed that Malik Lattimore was confined at the Passaic County Jail. Correct?
>
> A. Yes.

> Q. Based upon information you received from Roderick Boyd, did you ever charge -- excuse me -- did you ever charge Malik Lattimore with the murder of Kemo McCray?
>
> A. No, I did not.

A1186. Bergrin knew he could not elicit the information to which he alluded in his question, because it was inadmissible hearsay. And because Bergrin had no intention of subpoenaing the declarant, he testified to the statement in his opening.

In some instances, Bergrin used his opening statement to testify to personal details about his background that had no relevance to the charges and were calculated to seek jury nullification:

> ***I*** wore the uniform of an American soldier, as the evidence will prove, for over 20 years and rose to the rank of major. And when ***I*** put on that uniform, I took a vow to defend the United States Constitution even if it meant my death. And ***I*** volunteered and went overseas nine times as an obligated officer in the United States Army. . . . When ***I*** took the oath as a soldier, when ***I*** took the oath as an attorney to defend the Constitution of the United States, that's what ***I*** did. When my fellow soldiers cried out on the battlefields of Iraq for me to help them, after ***I*** had retired as a major in the United States Army, ***I*** went back to Iraq five times, five times to defend these soldiers.

A648-49.[3] At sidebar, Bergrin could neither articulate a proper theory of relevance nor explain how he intended to elicit the information; yet despite having been admonished not to make factual assertions that he could not support with evidence, A649-52, Bergrin continued unabated, A658-59, A662-65, A666-67, A677-78, A679, A688-89, A690.

In other instances, Bergrin went so far as to make factual assertions he knew were flatly untrue or could be rebutted by evidence he had successfully excluded. For example,

---

[3] As addressed in Point IV, Rule 405(b) bans specific instances of good character.

Bergrin claimed that he knew William Baskerville was not facing significant time in prison, even though Baskerville was a career offender in a mandatory Guidelines regime, A665, and that he would never counsel a drug-dealing client like Richard Pozo to murder cooperating witnesses, A691-92, despite a tape showing Bergrin doing just that.[4] In summation, Bergrin testified to the provisions of the Bail Reform Act, A4276, and even read from an FBI 302 that was not in evidence, A4347-48.

Bergrin is a not a lay person unschooled in the rules of evidence and trial practice. Rather, he is a criminal defense attorney who seems determined to prove by his own conduct that he can win cases only by breaking the rules. The need to police Bergrin's conduct is especially pressing: Bergrin is facing a sentence of mandatory life without parole and likely does not care if his misconduct could lead to a mistrial. Anything that delays a conviction, in Bergrin's view, is a victory. This Court is not powerless to curb misconduct by *pro se* litigants.

Initially, while the Government's concerns extend beyond opening statements, it is useful to restate what the Supreme Court said 34 years ago with respect to an improper opening by counsel:

> An improper opening statement unquestionably tends to frustrate the public interest in having a just judgment reached by an impartial tribunal. Indeed, such statements create a risk . . . that the entire panel may be tainted. The trial judge, of course, may instruct the jury to disregard the improper comment. In extreme cases, he may discipline counsel, or even remove him from the trial as he did in United States v. Dinitz, 424 U.S. 600 [(1976)]. Those actions, however, will not necessarily remove the risk of bias that

[4] As addressed in Point VII, the Government seeks to admit these assertions and prove them false as evidence of Bergrin's consciousness of guilt.

> may be created by improper argument. Unless unscrupulous defense counsel are to be allowed an unfair advantage, the trial judge must have the power to declare a mistrial in appropriate cases.

Arizona v. Washington, 434 U.S. 497, 512-23 (1978). Short of a mistrial, the "judge must eliminate improper unsworn testimony by the defendant, and the prosecutor has the right to call to the attention of the jury that statements made by counsel (even if counsel is a pro se defendant) are not sworn to and are not evidence." United States v. Warner, 428 F.2d 730, 738 (8th Cir. 1970).

Importantly, calling a *pro se* defendant's unsworn assertions to the jury's attention does not violate his Fifth Amendment rights because he waives those rights by making unsworn factual assertions to the jury. See United States v. Lacob, 416 F.2d 756, 760 (7th Cir. 1969) (finding that a *pro se* defendant waived "his constitutional privilege not to testify" where "the jury had the benefit of defendant's theory of defense and assertions of the 'facts' from his viewpoint from his own lips, repeatedly," and "[i]n his examination and cross-examination of witnesses, defendant also frequently 'testified' by unsworn statements purporting to be facts"); Redfield v. United States, 315 F. 2d 76, 80 (9th Cir. 1963) (finding that a *pro se* defendant who "persistently testified, though not under oath, throughout his trial" in "flagrant and contemptuous disregard of repeated admonitions and orders from the bench not to testify without first being sworn" waived his privilege against self-incrimination).

There are several measures this Court can employ to prevent, curb or cure attempts by Bergrin to testify without taking the stand. These include:

- precluding him from speaking in the first person in opening statements, when questioning witnesses, and in summation, Sacco, 563 F.2d at 556-57;

- admonishing him in the presence of the jury "as to his excesses" and that he must "follow proper methods of questioning and argument," Warner, 428 F.2d at 739;

- ordering him—outside of the jury's hearing—that he cannot testify without taking the stand, id. at 738-39; United States v. Mahanna, 461 F.2d 1110, 1113-16 (8th Cir. 1972); see United States v. Lepiscopo, 429 F.2d 258, 260 (5th Cir. 1970) (affirming conviction where trial court twice admonished defendant "not to make side comments to the jury while he was cross-examining a witness"; "[t]he trial judge stated: 'Don't make comments. You'll have your opportunity to be sworn and testify, if you care to do so.'");

- warning him "outside of the jury's presence" of "the possible loss and waiver of Fifth Amendment rights which may be attendant upon failure to follow" this Court's "instructions[,]" Warner, 428 F.2d at 738;

- striking any question or comment during opening statement, direct examination, cross-examination or summation in which he refers to facts not in evidence (but only if, for the first three categories, he cannot proffer a good faith basis that those facts will later be in evidence), see Faretta v. California, 422 U.S. 806, 834 n.46 (1975) ("The right of self-representation is not a license to abuse the dignity of the courtroom. Neither is it a license not to comply with relevant rules of procedural and substantive law.");

- treating his "unsworn testimonial statement, after a proper warning, as a waiver of his right to have no comment upon his failure to take the stand[,]" Miller, 397 F.2d at 366 (*dicta*); see Lacob, 416 F.2d at 760; Redfield, 315 F.2d at 80; and

- barring him from proceeding *pro se* if his misconduct persists despite repeated warnings, because "[b]y asserting his right of self-representation," Bergin has "assumed the responsibility of acting in a manner befitting an officer of the court" and "[b]y flouting the responsibility," he will have "forfeited that right," United States v. West, 877 F.2d 281, 287 (4th Cir. 1989); see Faretta, 422 U.S. at 835 n.46 ("the trial judge may terminate self-representation by a defendant who deliberately engages in serious and obstructionist misconduct"); United States v. Long, 597 F.3d 720, 726 (5th Cir. 2010) (recognizing "that obstructionist behavior may waive the right to self-representation"); United States v. Brock, 159 F.3d 1077, 1081 (7th Cir.

> 1998) ("The trial judge did not abuse her discretion in holding that Brock had forfeited his Sixth Amendment right to self-representation."); United States v. Dougherty, 473 F.2d 1113, 1125 (D.C. Cir. 1972) ("obstreperous behavior may constitute waiver of the *pro se* right").

In sum, we ask this Court to warn Bergrin of the sanctions he faces for repeating his misconduct from the first trial and, as set forth in Point IX below, to conduct a new Faretta colloquy to ensure that Bergrin still desires to waive his Sixth Amendment right to counsel.

IV. This Court Should Bar Bergrin From Mentioning His Military Service And His Representation Of Police Officers And Soldiers, As Such Information Is Inadmissible Under Fed. R. Evid. 405 And Substantially More Unfairly Prejudicial Than Probative.

As set forth in Point III above, Bergrin in his opening statement blatantly tried to arouse the passions and sympathy of the jury by referring to the details of his service in the military, and his legal representation of police officers and soldiers. A648-49. Not only was there no evidence to support those assertions, they were irrelevant and unduly prejudicial. A649-52.[5] This Court should preclude Bergrin from referring to these matters in his opening statement and from introducing evidence about them.

Rule 405(b) makes specific acts offered to show good character inadmissible when they are not probative of an essential element of the offense charged or any defense thereto. Gibson v. Mayor & Council of City of Wilmington, 355 F.3d 215, 232-33 (3d Cir. 2004). As the Advisory Committee explained, "specific instances of conduct . . . possess[] the greatest capacity to arouse prejudice, to confuse, to surprise, and to consume time. Consequently the rule confines the use of evidence of this kind to cases in which character is, in the strict sense, in issue and hence deserving of a searching inquiry." Fed. R. Evid. 405 (Advisory Committee's Note).

Here, character is not an essential element of or defense to the crimes charged. Thus, Bergrin's service in the military and his legal representation of police officers and

[5] Bergrin asked Jimenez to identify one of the soldiers he represented under the guise of testing Jimenez's recollection; but because Jimenez was able to recall the name, it enhanced his credibility before the jury. A1424-25. Thus, Bergrin's real purpose in asking this question was to elicit evidence that had been ruled inadmissible during his opening statement.

soldiers is simply irrelevant to the question of his guilt, and this Court should preclude Bergrin from mentioning it, eliciting evidence of it, and discussing it in summation. See United States v. Doyle, 130 F.3d 523, 541 (2d Cir. 1997) (rejecting claim that District Court abused its discretion and violated defendant's right to put on a defense "by excluding trial testimony relating to specific actions against Libya which Doyle allegedly took in cooperation with the U.S. Army Intelligence Agency to promote the U.S. security policy toward Libya"); United States v. Washington, 106 F.3d 983, 999-1000 (D.C. Cir. 1997) (affirming exclusion of defendant-police officer's commendations); United States v. Brown, 503 F. Supp. 2d 239, 244 (D.D.C. 2007) (excluding commendations); United States v. Wilson, 586 F. Supp. 1011, 1016 (S.D.N.Y. 1983) (precluding defendant-former CIA agent from introducing details of his CIA activities), aff'd, 750 F.2d 7 (2d Cir. 1984). Simply put, "[n]either party has a right to have his case decided by a jury which may be tainted by bias." Arizona v. Washington, 434 U.S. 497, 516 (1978).

Further, even if Bergrin's military service or representation of soldiers and police officers has some probative value other than to show good character, it is dwarfed by the danger for "unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time . . . ." Fed. R. Evid. 403. The details Bergrin mentioned in his opening statement at the first trial were calculated to invite the jury to acquit him because he has served his country and somehow deserved a break.

Given Bergrin's conduct in the prior trial, "one can understand the [Government's] suspicions." United States v. Harris, 491 F.3d 440, 447 (D.C. Cir. 2007) ("the court was nonetheless free to find the evidence excessively prejudicial"); accord Doyle, 130 F.3d at

542 ("Doyle's past cooperation with army intelligence had no bearing on the crimes charged," and "any probative value was substantially outweighed by the risk of confusing the jury with extraneous matters, or of wasting the court's and jury's time."); cf. United States v. Guibilo, 336 F. App'x 126, 129-30 (3d Cir. 2009) (not precedential) (even where defendant's role as an FBI informant was relevant to his defense to bank robbery charges, "we do not believe that the District Court abused its discretion when it barred the introduction of details [of defendant's positive accomplishments as an informant] it deemed irrelevant or unfairly prejudicial").

Accordingly, in addition to barring Bergrin from testifying in his opening statement, this Court should bar him from recounting or eliciting irrelevant personal details under Rule 403 and/or 405(b). If Bergrin wishes to call character witnesses, he may do so under Rules 404(a)(2)(A) and Rule 405(a); but that will permit the Government to ask character witnesses if their opinion would change if they knew that Bergrin had engaged in specific instances of conduct whether charged or not. See Fed. R. Evid. 405(a); see also United States v. Kellogg, 510 F.3d 188, 191-97 (3d Cir. 2007).

V. This Court Should Require Bergrin To Comply With Federal Rule Of Evidence 613.

On numerous occasions during trial, Bergrin confronted witnesses with FBI 302s and, when the witnesses refused to adopt statements in those reports that Bergrin believed contradicted their testimony, Bergrin would effectively read aloud from the report, often identifying it as such. A1790, A1802-03, A2695-96, A2707-08, A2730-31, A2774, A2812, A2813, A2876, A2878-79, A2898-99, A2900, A2931-32, A2962-63, A3093-94, A3199-3200, A3267. On some occasions, Bergrin would show the report to the witness under the guise of refreshing his recollection even though the witness had not said that he needed his recollection refreshed. A1783-84, A3794. This was and is improper.

Federal Rule of Evidence 613 governs the examination of witnesses with respect to prior statements. Rule 613(a) permits a party to examine "a witness concerning a prior statement *made by the witness*, whether written or oral;" Rule 613(b) permits a party to introduce "extrinsic evidence of" such a statement, but only if "the witness is afforded an opportunity to explain or deny the same." Fed. R. Evid. 613(a), (b) (emphasis added). While Rule 613(a) eliminated the common-law requirement that the impeaching party show the witness the statement before questioning him or her about it, the highlighted language confirms that the statement must, in fact, be a prior statement of the witness before it may be used for impeachment purposes. An FBI 302 does not qualify as such a statement, and an attorney's out-loud quotation of the contents of the 302 is *not* the "extrinsic evidence" to which the rule refers.

In United States v. Saget, 991 F.2d 702 (11th Cir. 1993), the Eleventh Circuit "conclude[d] that a witness may not be impeached with a third party's characterization or interpretation of a prior oral statement unless the witness has subscribed to or otherwise adopted the statement as his own." Id. at 710. The court interpreted Rule 613(b) as imposing "procedural requirements" for "establishing the proper foundation." See United States v. Adames, 56 F.3d 737, 744-45 (7th Cir. 1996) (noting that the "district court did not abuse its discretion by insisting that impeachment be in accordance with the Federal Rules of Evidence" where witness refused to adopt statements contained in FBI summary); see also United States v. Schoenborn, 4 F.3d 1424, 1429 n.3 (7th Cir. 1993); United States v. Chavez, 979 F.2d 1350, 1355 (9th Cir. 1992); see United States v. Barile, 286 F.3d 749, 758 (4th Cir. 2002); see also 1 WEINSTEIN'S FEDERAL EVIDENCE § 613.04[1] (2d ed. 2001).

The construction of Rule 613 adopted by the Second, Fourth, Seventh, Ninth and Eleventh Circuits precludes parties from confusing witnesses and misleading juries:

> the prosecution was concerned that the jury, seeing Marks' lawyer reading from [an FBI 302], would infer that if the witness denied having made the statement read by the lawyer, the witness must be lying, though in fact the FBI agent who had made the report might have gotten the witness's story down wrong and might have failed to ask the witness to read and sign the statement. . . . [S]ince a statement appearing in an interview report could easily be garbled, yet seem authoritative when read from a paper that the jury would infer was an official FBI document, the judge was reasonable in insisting that the witness be allowed to examine his purported statement before being impeached by it.

United States v. Marks, 816 F.2d 1207, 1211 (7th Cir. 1987). Here, proof that Bergrin violated Rule 613 was the fact that he never called the author of any FBI 302 to "prove

up" any prior inconsistent statements. Bergrin had no need to do so because he had already suggested through his improper questioning that the witness had made the statement attributed to him in the report.

Thus, this Court should preclude Bergrin from referring to reports as such when questioning witnesses about potentially contradictory statements in those reports, and this Court should require Bergrin to show the report to the witness and ask whether the witness in fact made the statement Bergrin believes is contradictory. If the witness answers "no," then Bergrin should be precluded from asking, "Then why does it say *X* [or why isn't *X* contained] in this FBI report." Instead, he can call the author of the report and to complete the impeachment. Policing compliance with Rule 613 will prevent Bergrin from reading the contents of reports into the record through his questions.[6]

Requiring compliance with Rule 613 in no way deprives a defendant of a meaningful opportunity to confront and cross-examine witnesses. Where a witness has not adopted as his or her own statements contained in an FBI 302 and refuses to do so when confronted with them at trial, "the matter could then be resolved," not by reading the FBI 302 aloud, but "by calling the FBI agent who had compiled the report." Marks, 816 F.2d at 1211; accord Adames, 56 F.3d at 744-45; Paget, 991 F.2d at 711.

---

[6] Of course, the report is hearsay because it is an out-of-court assertion by the author of the report to the effect that "this is what the witness told me." See In re High Fructose Corn Syrup Antitrust Litig., 156 F. Supp. 2d 1017, 1027 (N.D. Ill. 2001) ("The FBI 302 reports are clearly hearsay under Rule 801 of the Federal Rules of Evidence since they are out-of-court assertions."), rev'd on other grounds, 295 F.3d 651 (7th Cir. 2002). Thus, reading aloud the contents of the report violates the hearsay prohibition.

And even if complying with Rule 613 would make it more difficult for Bergrin to impeach witnesses, "cross-examination is not a freestyle exercise, but, rather, must be conducted within reasonable limits." United States v. Zaccaria, 240 F.3d 75, 80 (1st Cir. 2001). In short, "the Confrontation Clause guarantees an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." Delaware v. Fensterer, 474 U.S. 15, 20 (1985) (*per curiam*).

VI. This Court Should Bar Bergrin From Eliciting Privileged Information From His Former Client, Albert Castro, And Suggesting In His Opening Statement Or Otherwise That He Dissuaded Castro From Obstructing Justice.

In his opening statement, Bergrin preemptively attacked the credibility of expected Government witness, Albert Castro, Bergrin's former client. A658-60. Speaking in the first person, Bergrin claimed that Castro wanted his daughter to falsely take full responsibility for narcotics that Castro had stored in her house with her knowledge and consent. Bergrin then twice boasted that "I refused to allow him to do that," A659, portraying himself as an attorney who would never allow a client to obstruct justice.

The Government objected to this on two grounds. First, based on Bergrin's version of events, Castro at most sought advice from Bergrin—his lawyer—about the legality of a proposed course of action and then declined to pursue that course. Castro's conversation with Bergrin thus was protected by the attorney-client privilege. Dkt. 272. Second, the Government argued that specific instances of good conduct were inadmissible under Rule 404(b) and Rule 405. A2117-19, A2294; A3853-54; see also Dkt. 263 at 4 n.4. Bergrin nonetheless was permitted to question Castro about this issue. A2299-300.

Castro admitted that his daughter had discussed with him the prospect of her taking full responsibility for the drug offense, but could not recall ever discussing that matter with Bergrin. A2332, A2405-06. But Bergrin never elicited testimony—from Castro or anyone else—tending to show that it was Bergrin who prevented him from allowing his daughter to take full responsibility for the narcotics. The only such "evidence" came from Bergrin's opening statement. Because Bergrin had failed to show that he had prevented Castro from obstructing justice, and based on the Government's

objection that specific acts of good character are inadmissible to show conformity therewith, Judge Martini precluded Bergrin from arguing in summation that he had prevented Castro from obstructing justice.

The Government renews its objection that Castro's communications with Bergrin are protected by the attorney-client privilege. Dkt. 272. But even if they are not, Bergrin should be precluded from suggesting in his opening statement or otherwise that he prevented Castro from allowing his daughter to accept full responsibility for the drugs Castro was storing in her house. First, as set forth in Point III above, the only support for that alleged "fact" is Bergrin's unsworn assertion, which is not competent evidence. Second, Rule 404(a)(1) precludes a party from offering specific acts of good conduct to show conformity therewith. See United States v. Hill, 40 F.3d 164, 168-69 (7th Cir. 1994). Bergrin, of course, may offer character evidence through competent witnesses, see Fed. R. Evid. 404(a)(2)(A); Fed. R. Evid. 405, but the Government would then be able to rebut such evidence with specific instances of misconduct—including those that may have been ruled inadmissible under Rule 404(b) and/or Rule 403.

VII. This Court Should Permit The Government To Introduce Bergrin's False Statements To The First Jury As Proof Of Bergrin's Consciousness Of Guilt.

As set forth in Point III above, Bergrin made a series of demonstrably false factual assertions to the jury. This included Bergrin's assertion that he knew William Baskerville was not facing a substantial amount of prison time, and Bergrin's assertion that he would never counsel a drug-dealing client like Pozo to murder a cooperating witness. By making such false assertions in an effort to avoid liability for his actions, Bergrin betrayed a consciousness of guilt, which is relevant and admissible in the forthcoming trial.

Evidence tending to show a defendant's consciousness of guilt of the charged offenses is "independently probative of his guilt," United States v. Deutsch, 451 F.2d 98, 115 (2d Cir. 1971), and is therefore relevant and admissible, see United States v. Burrous, 147 F.3d 111, 117 (2d Cir. 1998); United States v. Wilson, 11 F.3d 346, 353 (2d Cir. 1993). Indeed, "[e]vidence of consciousness of guilt is routinely admitted against defendants in criminal cases, in the form of flight, threatening a witness, subornation of perjury, and the like[,]" and trial courts have broad discretion "to permit the government" to present such evidence "in its case in chief, instead of waiting for a rebuttal." United States v. Dittrich, 100 F.3d 84, 86-87 (8th Cir. 1996). Surely, if "evasive conduct aimed at concealing" a relevant "transaction" is "circumstantial evidence of guilty consciousness," Deutsch, 451 F.2d at 116, as is engaging in conduct before trial designed to hinder the truth-seeking process, e.g., Wilson, 11 F.3d at 353; United States v. Macklin, 927 F.2d 1272, 1279 (2d Cir. 1991), then false statements by Bergrin at trial which sought to mislead the jury are evidence of consciousness of guilt, as well. See, e.g., United States v.

Kahan, 415 U.S. 239, 241 (1974) (per curiam) (holding that trial court properly admitted "[a]s part of the Government's case in chief [defendant's] statements to the court as to his lack of funds" as, inter alia, "false exculpatory statements evincing respondent's consciousness that the bank deposits were incriminating"); United States v. Durham, 139 F.3d 1325, 1331-32 (10th Cir. 1998) (affirming "instruction on false exculpatory statements, which this court allows to prove consciousness of guilt"); United States v. Perkins, 937 F.2d 1397, 1402 (9th Cir. 1991) ("false statements may be considered as circumstantial evidence of consciousness of guilt"); United States v. Scheibel, 870 F.2d 818, 822 (2d Cir. 1989) (although "[a] defendant's fabrication of exculpatory evidence cannot be the sole basis for a conviction," it is admissible as "'evidence of consciousness of guilt'") (citation omitted); cf. United States v. McKeon, 738 F.2d 26, 31-33 (2d Cir. 1984) (attorney's opening statement in a first trial "was properly admitted" against his client on retrial to show consciousness of guilt arising from a change in defense because excluding it would impair "the function of trials as truth-seeking proceedings").

> The Supreme Court long ago held that there could not
>
> > be any question that, if the jury were satisfied, from the evidence, that false statements in the case were made by defendant, or on his behalf, at his instigation, they had the right, not only to take such statements into consideration, in connection with all the other circumstances of the case, in determining whether or not defendant's conduct had been satisfactorily explained by him upon the theory of his innocence, but also to regard false statements in explanation or defense, made or procured to be made, as in themselves tending to show guilt.

Wilson v. United States, 162 U.S. 613, 620-21 (1896). Thus, "there is no question 'that the factfinder is entitled to consider a party's dishonesty about a material fact as

'affirmative evidence of guilt.'" United States v. Urban, 404 F.3d 754, 782 (3d Cir. 2005) (quoting Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 147 (2000)).

For example, in United States v. Kemp, 500 F.3d 257 (3d Cir. 2007), a defendant, who did not testify at trial, had appeared before the grand jury, and there denied culpability in various acts of local corruption by setting forth detailed and grandiose claims of personal wealth, asserting that he was too affluent to get involved in the matters alleged in the indictment. The Third Circuit held that the government was entitled to prove that the claims of wealth were false, in order to show that the grand jury testimony consisted of false exculpatory statements showing consciousness of guilt. Id. at 296-98. Here, the Government should be permitted to prove that Bergrin's representations during his opening statement to the prior jury were false, which would be probative of his consciousness of guilt. Finally, Rule 403 balancing favors admission.

As Kemp explained: "Because evidence of [the defendant's] consciousness of guilt was of high probative value to the government's case, [the defendant] faces a high hurdle in showing that the danger of unfair prejudice substantially outweighed the probative value." Id. at 297 (emphasis in original). The hurdle was too high for the defendant in Kemp, and the same holds true here.

In sum, this Court should permit the Government to introduce Bergrin's opening statement assertions in the prior trial and prove in the next trial that they were false.

VIII. This Court Should Bar Both Parties From Referring To The Outcome Of The Previous Trial.

As this Court is aware, the trial on Counts 12 and 13 ended with a mistrial. That outcome is irrelevant to any issue in this trial, and thus neither party should refer to it, even if they must refer to that prior trial in conducting direct or cross-examination.

Evidence is relevant if "it has any tendency to make a fact more or less probable than it would be without the evidence" and "the fact is of consequence in determining the action." Fed. R. Evid. 401. Here, the outcome of the prior trial is not a "fact . . . of consequence in determining" the next trial. Rather, the evidence adduced in the next trial will determine its outcome. What happened previously—where probative evidence was withheld from the jury—is simply not relevant in a subsequent trial.

But even if the jury's inability to reach a verdict had some logical relevance, its danger for unfair prejudice dwarfs any probative value. Fed. R. Evid. 403. See United States v. Giovanelli, 945 F.2d 479, 487 (2d Cir. 1991) ("the judge must be mindful that revealing the verdict of the prior trial may unfairly prejudice either the government's or the defendant's case"). For that reason, courts have barred parties from referring to the fact that a prior jury failed to reach a verdict. See United States v. Amato, 540 F.3d 153, 165 (2d Cir. 2008) (trial court acted within its discretion under Rule 403 in preventing defendant's use of cross-examination to inform the jury about prior mistrial); United States v. Forbes, Crim. No. 02-264, 2007 WL 141952, at *10 (D. Conn. 2007) ("[T]he court properly exercised its discretion by allowing Forbes to refer to the fact that he had

been tried two prior times, but by excluding, under Fed.R.Evid. 403, evidence that the juries in those trials had failed to reach a verdict as to him.").

To be clear, the Government is not asking this Court to bar all references to the prior trial. Such references are inevitable if either party wishes to use a transcript from the prior trial for impeachment purposes. However, this Court can and should bar the parties from referring to the prior trial's *outcome*. See United States v. Cook, 776 F. Supp. 755, 757-59 (S.D.N.Y. 1991) (permitting continued reference to prior trial of same defendant for purposes other than confronting witnesses with their own prior statements would be highly prejudicial to the government and possibly the defendant).

IX. This Court Should Conduct A New Faretta Colloquy To Ensure That Bergrin's Decision To Represent Himself At The Forthcoming Trial Is Knowing And Voluntary, And Made With Knowledge Of The Consequences Of Repeating At This Trial His Misconduct From The First Trial.

Last year, when Bergrin announced his desire to proceed *pro se*, he made that decision knowingly, voluntarily, and intelligently. See A410-23; A429-63, A570-82; see also Faretta v. California, 422 U.S. 806, 821 (1975); United States v. Peppers, 302 F.3d 120, 135-37 (3d Cir. 2002). On August 7, 2012, this Court secured Bergrin's representation that he wished to remain *pro se.* Normally, an effective waiver of the defendant's Sixth Amendment right to counsel carries through to all subsequent proceedings, absent a material change in circumstances. United States v. McBride, 362 F.3d 360, 367 (6th Cir. 2004); United States v. Unger, 915 F.2d 759, 762 (1st Cir. 1990); United States v. Fazzini, 871 F.2d 635, 643 (7th Cir. 1989); Panagos v. United States, 324 F.2d 764, 765 (10th Cir. 1963).

Much has transpired since Bergrin waived his right to counsel. Not only does Bergrin face the prospect of a full-blown RICO trial, he also faces whatever sanctions this Court may choose to impose if Bergrin abuses his status as a *pro se* litigant. See supra Point III. It is not clear that these constitute materially changed circumstances. After all, Bergrin likely chose to proceed *pro se* precisely so he could make unsworn assertions to the jury without testifying. However, if this Court agrees that any such misconduct must be remedied, it may be prudent to conduct a new Faretta colloquy to ensure that Bergrin still desires to proceed *pro se*. The Government will submit proposed questions, as it did last year.

X. This Court Should Permit The Parties To File Such Additional Motions As May Be Necessary.

The Government has endeavored to include in this Brief as many motions as possible. However, as trial preparation progresses, additional evidentiary issues may surface. Should that occur, the Government requests leave to file additional *in limine* motions addressing those issues rather than delay their resolution to trial, which could inconvenience the Court and the jury.

CONCLUSION

For all of the foregoing reasons, the Government respectfully requests that the Court grant the relief requested herein.

Respectfully submitted,

PAUL J. FISHMAN
United States Attorney

By: s/ Steven G. Sanders
John Gay
Joseph Minish
Steven G. Sanders
Assistant U.S. Attorneys

Date: August 21, 2012
Newark, New Jersey

CERTIFICATE OF SERVICE

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

Lawrence S. Lustberg, Esq.
llustberg@gibbonslaw.com

Amanda B. Protess, Esq.
Aprotess@gibbonslaw.com

I certify that the foregoing is true and correct.

Executed on: August 21, 2012

s/ Steven G. Sanders, AUSA