

1 UNITED STATES DISTRICT COURT
2 DISTRICT OF NEW JERSEY

3 USA, .
4 Plaintiff, .
5 vs. . Case No. 09-cr-00369
6 BERGRIN, et al., . Newark, New Jersey
7 Defendants. . May 28, 2009
8 .
9 .

10 TRANSCRIPT OF HEARING
11 BEFORE THE HONORABLE MADELINE ARLEO
12 UNITED STATES MAGISTRATE JUDGE

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1 (Commencement of proceedings)

2

3 THE COURT: Okay. Good morning, everyone. Please
4 be seated. We're here in United States versus Bergrin.
5 Could I have appearances, please?

6 MR. MINISH: Good morning, Judge. Joe Minish and
7 John Gay for the government.

8 MR. SHARGEL: Gerald Shargel and Ross Kramer for
9 Mr. Bergrin.

10 Your Honor, I'm speaking in a halting way because I
11 was just handed a stack of documents relevant to this hearing
12 this afternoon.

13 THE COURT: I did not receive a stack of documents,
14 by the way.

15 MR. GAY: Your Honor, no, you didn't, and the
16 government would like to make an application before the
17 hearing begins, if that's possible?

18 MR. SHARGEL: Well, may I just speak to what I have
19 in my hand? Your Honor made note this is approximately
20 three-quarters of an inch or inch. Some of this a
21 single-spaced 302s or some sort of reports in the back.
22 Your Honor has observed that I'm just looking at this for the
23 first time.

24 THE COURT: I hear you. Why -- why don't --

25 MR. SHARGEL: My point is -- my point is --

1 THE COURT: -- why don't we do this? Why don't I
2 ask Mr. Gay to explain it, since he gave it to you.

3 Mr. Gay, what did you just give to Mr. Shargel, why
4 don't you explain to the Court?

5 MR. GAY: Your Honor, I gave Mr. Shargel, although
6 the government -- since Agent Smith is Mr. Shargel's witness,
7 the government has no obligations to turn over any Jencks or
8 other discovery materials. In order to proceed -- make this
9 proceeding more fruitful, the government provided Mr. Shargel
10 the documents, including excerpts from transcripts and other
11 things that Agent Smith is going to rely upon or did rely
12 upon in making the certification, as well as presumably what
13 he's going to rely on in his testimony today. The government
14 had no obligation to turn that over. They did that -- again,
15 we did that because we wanted to make this procedure move
16 more smoothly. And we would like to make those documents
17 part of the record as well.

18 THE COURT: Okay. Mr. Shargel.

19 MR. SHARGEL: Judge, this has been a long morning.
20 I've been in here since 8:30.

21 First of all, this is cross-examination, because
22 the certification -- the government also gave us a letter
23 minutes before the proceeding began -- I don't know if
24 Your Honor has a copy of that, but on the question of the
25 scope of the examination of Agent Smith.

1 THE COURT: I don't have it. What are you
2 referring to?

3 MR. GAY: Your Honor, again, we -- this is
4 something that we just -- I just got it myself. I gave it to
5 Mr. Shargel as soon as it came into my hands.

6 THE COURT: What is it?

7 MR. GAY: It is -- it's a very short letter brief,
8 Your Honor, that the federal government prepared regarding
9 the scope of this proceeding, the scope of the evidentiary --

10 THE COURT: Something you'd like to give to me?

11 MR. GAY: Yes, absolutely, Your Honor --

12 THE COURT: Okay.

13 MR. GAY: -- and I apologize, but literal- -- we
14 just got it now --

15 MR. SHARGEL: This is --

16 MR. GAY: -- and --

17 MR. SHARGEL: This is signed by Mr. Gay. He said
18 he just got it himself.

19 THE COURT: Well, Mr. Shargel, I got an order from
20 you this morning too. So let's be fair. I got a letter from
21 you. I got a letter from him. I'm going to be fair to
22 everyone. But I got a letter from you this morning too.
23 That's what I was doing in the time while we were waiting for
24 the proceeding to commence. So I got his letter, your letter
25 and cases, I read them, and I'll read his letter too. I'm

1 going to give everyone a full and fair opportunity to be
2 heard and to make their points today. Okay? So I have his
3 letter. Please hand it up.

4 Mr. Shargel, you can be heard.

5 MR. SHARGEL: Well, my point is this. Judge, I'm
6 not complaining about the letter. I know I submitted a
7 letter to Your Honor this morning. I was up all night
8 working on it.

9 But -- but here's the point. The point is that
10 we're about to have a hearing. And I think that this
11 material being turned over now -- and Mr. Gay concedes that
12 it's relevant to the testimony that'll be elicited -- I need
13 time to read it. I can't go forward. It would be
14 irresponsible. It would be professionally irresponsible to
15 go forward with this. I'm as anxious to have this hearing as
16 anyone else. But this is a very important record that we're
17 making here, whatever the outcome. And I want to represent
18 my client in a professional and effective way. I can't be
19 cross-examining a witness about the very subject matter --

20 THE COURT: So what do you propose, Mr. Shargel?

21 MR. SHARGEL: I need time.

22 THE COURT: Would an hour be enough? Half hour be
23 enough? I'll take a break, we'll come back. I want to give
24 you an opportunity. But this is an important hearing, and
25 the Bail Reform Act instructs me that I should proceed as

1 | swiftly as possible.

2 | MR. SHARGEL: No question. I'm --

3 | THE COURT: And I don't want to adjourn this for a
4 | day. I will not adjourn it for a day.

5 | MR. SHARGEL: I'm not asking for that --

6 | THE COURT: If you need a half an hour, an hour to
7 | review it. I have every confidence that you will -- you are
8 | a quick study and can absorb this information quickly and
9 | that you could proceed. If you need a half an hour to review
10 | it, out of an abundance of caution and out of a sense of
11 | fairness -- Mr. Gay has a point, he didn't need to turn that
12 | over to you today. There's nothing in the rules that require
13 | that -- this material to be turned over before a hearing.
14 | Just isn't. There's no authority for it.

15 | But he turned it over, and you're trying to protect
16 | your client's interests. I understand that. And I will give
17 | you an opportunity. Is a half -- it's now 11:15. Can we
18 | come back at a quarter to 12 to -- quarter -- half an hour
19 | for you to review it?

20 | MR. SHARGEL: I think it'll be more effective, if I
21 | just notify your chambers when I'm finished reading,
22 | whether --

23 | THE COURT: That doesn't work for me for a lot of
24 | reasons, because I have the marshal service, I have
25 | Mr. Bergrin here, I have a full courtroom. And I am going to

1 ask you to come back here -- it's 11:15 -- at 12 o'clock, and
2 we will begin this hearing. Okay?

3 MR. SHARGEL: Very well.

4 THE COURT: Thank you very much.

5 THE BAILIFF: All rise.

6 (Recess taken)

7 THE COURT: We're on the record in United States of
8 America versus Bergrin.

9 Mr. Shargel?

10 MR. SHARGEL: I'm ready to proceed and thank you
11 for the time.

12 THE COURT: Okay.

13 MR. GAY: Your Honor, the government is ready to
14 proceed as well, but we just wanted to briefly address the
15 Court regarding the letter brief that we submitted this
16 morning.

17 THE COURT: Okay.

18 MR. GAY: The government is a little concerned that
19 the scope of this hearing may become expanded into a --
20 basically a fishing expedition or a mini-trial. And based on
21 the case law that's cited in our brief, it's clear that the
22 purpose of this is limited. We believe that if the
23 appropriate questions of Mr. Smith -- of Agent Smith can be
24 asked that will elicit the information proper for this
25 proceeding, and that things beyond the scope, certainly the

1 government would object to and hope that the Court would
2 sustain.

3 THE COURT: Well, let's -- let's see where it goes.
4 I would certainly think that the scope would be the
5 certification of Mr. Smith, because it's -- the certification
6 is entitled "Certification in Support of the Government's
7 Request For Detention."

8 MR. GAY: Yes.

9 THE COURT: So let's start with this, and let's see
10 where it takes us. Okay? And we'll --

11 MR. GAY: Thank Your Honor.

12 THE COURT: -- we'll see how it goes.

13 MR. GAY: Okay.

14 THE COURT: Okay?

15 Mr. Shargel, you want to call your first witness?

16 MR. SHARGEL: Yes, I'd like to call the first
17 witness.

18 But before I do --

19 THE COURT: One housekeeping matter too. We
20 referred to yesterday two documents. One was a letter that
21 you provided to me in support of -- in support of bail. And
22 that was a letter dated May 27th, 2009, from the Creative
23 Spirits of the State of New Jersey, Ministry of Justice
24 Committee.

25 MR. SHARGEL: Yes.

1 THE COURT: Would you like this marked as an
2 exhibit for the record?

3 MR. SHARGEL: Yes, I would. If it please the
4 Court.

5 THE COURT: Okay. So this'll be Defense Exhibit 1,
6 okay.

7 Okay. We'll mark it.

8 MR. GAY: Judge --

9 THE COURT: And do you want this certification
10 marked?

11 MR. MINISH: Yes, Judge.

12 THE COURT: Okay. So why don't we mark that as
13 Government 1.

14 MR. MINISH: Judge, the 1 was one -- we actually
15 have marked -- the documents we provided before Your Honor
16 took the recess, we have marked so that we can all be
17 referring to the same documents by exhibit number.

18 THE COURT: Okay. Any objection to those
19 documents? Any objection to his Exhibit 1?

20 MR. SHARGEL: No.

21 MR. GAY: No, Your Honor.

22 THE COURT: Okay. So they'll be so marked. Okay?

23 MR. MINISH: So we already have 1.

24 THE COURT: Okay. So -- just so the record is
25 clear. What's -- have you -- have you premarked them,

1 Mr. Minish?

2 MR. MINISH: Yes, Judge, we -- government exhibit,
3 and this has been provided with -- to defense counsel, we
4 have government Exhibit 1-A.

5 THE COURT: 1-A is what?

6 MR. GAY: Your Honor, just -- Your Honor, just so
7 the record is clear, we do have a copy for Your Honor that is
8 marked as well.

9 THE COURT: Okay. That's -- would be great. Could
10 I have that marked copy?

11 MR. MINISH: Yes.

12 THE COURT: Hand it up to Nissa [phonetic].

13 And does Mr. Shargel have marked copies?

14 UNIDENTIFIED SPEAKERS: Yes, he does.

15 THE COURT: Okay.

16 MR. SHARGEL: Your Honor, one more housekeeping
17 matter?

18 THE COURT: Sure.

19 MR. SHARGEL: There was reference to it earlier
20 before we took this 45-minute recess, that this morning we
21 filed with the Court a letter brief.

22 THE COURT: Yes.

23 MR. SHARGEL: And accompanying -- accompanied by
24 cases, because the issue was raised yesterday by Your Honor
25 about whether there existed any cases where --

1 THE COURT: Yes.

2 MR. SHARGEL: -- bail was granted and where there's
3 either -- where either the death penalty was sought or there
4 was a potential death penalty in the case. And we have
5 submitted cases that --

6 THE COURT: Yes.

7 MR. SHARGEL: -- where that occurred, four cases
8 where defendants were released on bail despite the fact that
9 they were facing the death penalty.

10 THE COURT: Yes. So noted. Thank you.

11 MR. SHARGEL: Thank you, Judge.

12 THE COURT: Okay. Call Mr. --

13 MR. SHARGEL: I'm ready to call Agent Smith, Agent
14 Michael Smith.

15 THE COURT: Agent Smith?

16 MR. GAY: He's outside, Your Honor.

17 THE COURT: Call him in.

18 Agent Smith, you can take the stand.

19 MR. SMITH: Thank you.

20 AGENT MICHAEL SMITH, DEFENDANT'S WITNESS, SWORN

21 THE CLERK: Please state your name for the record
22 and spell it, please.

23 THE WITNESS: Special Agent Michael Smith,
24 M-i-c-h-a-e-l, S-m-i-t-h.

25 THE COURT: Okay. You can be seated.

1 THE WITNESS: Thank you.

2 MR. SHARGEL: May I proceed, Your Honor?

3 THE COURT: Yes.

4 EXAMINATION BY MR. SHARGEL:

5 Q. Agent Smith, good afternoon, my name is Gerry Shargel,
6 and I'm one of the lawyers for Mr. Bergrin. You and I have
7 never met before; correct?

8 A. Yes, sir. Good afternoon.

9 Q. Good afternoon.

10 You're an agent with the Drug Enforcement
11 Administration?

12 A. Yes, sir. That's correct.

13 Q. And how long have you been an agent with the Drug
14 Enforcement Administration?

15 A. Since November of 2002, sir.

16 Q. And just for the record, we have an exhibit marked in
17 evidence that's, I think, Government Exhibit 1, which is a
18 certification that you swore to in connection with this
19 proceeding; correct?

20 THE COURT: Let me just stop you. I think it's
21 Government Exhibit PB3.

22 MR. SHARGEL: That's correct, Your Honor.

23 THE COURT: Okay.

24 MR. SHARGEL: I'm sorry.

25 MR. GAY: Well, actually, Your Honor. That -- I

1 don't want -- I don't want to confuse the record --

2 THE COURT: I just want the record -- I just want
3 the record to be clear.

4 MR. SHARGEL: Right. PB3, just so we can explain.
5 PB3 was turned over as part of the package that was received
6 an hour ago because it contained handwritten notes of the
7 agent, you'll correct me if I'm wrong. And --

8 THE COURT: I see.

9 MR. SHARGEL: And so it's not PB3 that's the --
10 that was the original certification.

11 MR. GAY: Yes.

12 MR. SHARGEL: The original certification is --

13 MR. MINISH: 1. Should be government Exhibit 1,
14 Your Honor.

15 MR. SHARGEL: Government Exhibit 1.

16 THE COURT: Okay.

17 BY MR. SHARGEL:

18 Q. You're familiar with -- I don't think I need to put in
19 front of you, you're familiar with Government Exhibit 1, are
20 you not?

21 A. The bail certification, yes, sir.

22 Q. And that was signed by you; correct?

23 A. Yes, it was, sir.

24 Q. That was based on information that was gathered by you
25 and other agents as well; correct?

1 A. It was information that was provided to me by other
2 agents, yes, sir.

3 Q. And not only by other agents, but other agencies;
4 correct?

5 A. Yes. Besides the Drug Enforcement Administration, yes.

6 Q. I want to focus your attention on the -- on the second
7 part of the certification, just to make this clear, which is
8 titled on page 14 of the certification, it was just titled "A
9 Risk of Flight"?

10 THE COURT: Let me -- let me note, I'd like to have
11 the witness to have a copy of the document, if you're going
12 to be cross-examining with the document.

13 MR. SHARGEL: I was -- that was the next thing I
14 was going to -- that was the next thing I was going to do.

15 Can I have an extra copy of the certification?

16 THE COURT: I have an extra copy. Why don't we
17 just move this along.

18 MR. SHARGEL: Yes, thank you.

19 THE WITNESS: Thank you.

20 BY MR. SHARGEL:

21 Q. Agent Smith, you now have a copy in front of you of
22 Government Exhibit 1, your certification. I respectfully ask
23 that you turn to page 14.

24 A. Yes, I'm there.

25 Q. Ands this is the section of the certification that deals

1 with risk of flight; correct?

2 A. Yes, sir.

3 Q. Okay. Now I'm going to ask that you answer questions to
4 the best of your ability without referring to the document,
5 but if you need to refresh your recollection, let me know.

6 A. Thank you, sir.

7 Q. Now, information in connection with the financial
8 information -- we're focusing on the financial information --
9 came from the FBI, did it not?

10 A. Yes, sir.

11 Q. The FBI was conducting an investigation of Mr. Bergrin
12 as well and conveyed information to you; is that correct,
13 sir?

14 A. Yes, sir.

15 Q. And particularly with regard to this section, the
16 financial information was provided by the Federal Bureau of
17 Investigation; correct?

18 A. To the best of my knowledge, yes, sir.

19 Q. And it's true, is it not, that other information was
20 gathered from the execution of search warrants; correct?

21 A. I'm not aware -- actually I'm aware of one grand jury
22 search warrant, yes, sir.

23 Q. And on the day of the arrest, which was a week ago,
24 eight days ago, did you participate in any of the searches?

25 A. No, sir.

1 Q. Did you receive information as the result of any of the
2 searches?

3 A. I did not, sir.

4 Q. Did you make inquiry as to what was obtained as a result
5 of those searches?

6 A. No, sir.

7 Q. Were you aware of a search conducted by the Manhattan
8 District Attorney's Office?

9 A. Yes, sir.

10 Q. And did the Manhattan District Attorney's Office share
11 information with you in connection with the investigation of
12 Mr. Bergrin?

13 A. No, sir.

14 Q. You saw no documents as a result of the -- that
15 investigation?

16 A. Not directly, no, sir, I don't believe so.

17 Q. When you say not directly --

18 A. Or actually -- I'm sorry, I did, sir. I -- I'm sorry, I
19 did.

20 Q. Do you recall -- and we have a package of information
21 starting with PB1-A, with the Court's permission --

22 MR. SHARGEL: -- may I approach the witness,
23 Your Honor?

24 THE COURT: Yes.

25

1 BY MR. SHARGEL:

2 Q. With the Court's permission, I'm placing in front of
3 you, are there any documents within that package of documents
4 that were obtained from the Manhattan District Attorney's
5 Office?

6 A. I believe it was this package here, sir.

7 Q. All right. And you are referring to, if you could
8 identify this by exhibit number?

9 MR. SHARGEL: May I just confer with Mr. Gay for
10 one moment.

11 THE WITNESS: Sure.

12 MR. SHARGEL: Your Honor, Mr. Gay is marking as
13 Government Exhibit 6-A for identification, certain
14 documents -- again this is part of the package that was
15 turned over -- a certain financial records that were
16 obtained --

17 THE COURT: I just want to make sure I have the
18 same copy.

19 MR. GAY: Yes, Your Honor. If you want, I can mark
20 your copy --

21 THE COURT: I have a PB6. I don't have an A.

22 MR. GAY: Do you have it? The first -- the first
23 document in PB6.

24 THE COURT: Okay. And does Mr. Shargel have the
25 same marking?

1 MR. GAY: Yes, he has exactly the same marking.

2 MR. SHARGEL: I have the same markings.

3 THE COURT: Okay.

4 MR. SHARGEL: Do we have a copy for the witness, so
5 I -- or -- look I'll make this -- may I approach the witness
6 without permission?

7 THE COURT: Yes.

8 BY MR. SHARGEL:

9 Q. Agent Smith, looking at Government Exhibit 6A --

10 A. Yes, sir.

11 Q. That consists of financial records; correct? I'll
12 strike financial records and say business documents. If you
13 have a better description, I'll take it.

14 A. Yes, sir.

15 Q. Business documents?

16 A. Better documents, yes, sir.

17 Q. And when did you receive those business documents, as
18 best you can recall, approximately?

19 A. Last night, sir.

20 Q. Did you saw those for the first time last night?

21 A. Yes.

22 Q. And there's information contained within your
23 certification relating to the companies, or some of the
24 companies that are referred to in those documents; correct?

25 A. Yes, sir.

1 Q. And that information was conveyed to you when?

2 A. It was conveyed to me by SA Shawn Brocos from the
3 Federal Bureau of Investigation.

4 Q. And the information that's contained in your
5 certification came from that special agent of the FBI?

6 A. Yes.

7 Q. And so you have no personal knowledge, direct personal
8 knowledge of the information that is contained in your
9 certification?

10 A. Based on secondhand information from her, yes, sir.

11 Q. It's all secondhand information; right?

12 A. Yes, sir, that's correct.

13 Q. Did you take any investigative -- by the way -- strike
14 that --

15 When did you receive this information, if we don't have
16 that already?

17 A. The -- this particular package in front of me, sir?

18 Q. Yes.

19 A. Again, last night.

20 Q. No, but the information, the underlying information from
21 the special agent of the Federal Bureau of Investigation.
22 Her last name, again?

23 A. Brocos.

24 Q. Brocos?

25 A. Yes, sir.

- 1 Q. When did Agent Brocos furnish this information to you?
- 2 A. The morning before I signed the certification.
- 3 Q. And the certification, for the record, is signed when
- 4 that? You may look at the last page.
- 5 A. 20th, sir.
- 6 Q. 20th of -- of May?
- 7 A. Yes, sir.
- 8 Q. This year? Just --
- 9 A. 2009.
- 10 Q. -- a week or so ago?
- 11 A. Yes, sir.
- 12 Q. Between May the 20th, 2009, and today, have you taken
- 13 any steps to do further investigation on these documents?
- 14 A. No, sir.
- 15 Q. So let me ask you this, if I may, Agent. Turning to
- 16 page 15 of the certification -- actually just -- so for the
- 17 sake of the record, page 14, to which we referred before, in
- 18 paragraph 27 sets out what you describe as Mr. Bergrin's
- 19 identified assets; right?
- 20 A. Yes, sir, paragraph 27.
- 21 Q. Did you intend that to be an exclusive list?
- 22 A. No, sir.
- 23 Q. In other words, to the exclusion of any other asset?
- 24 A. No, sir, I don't believe so.
- 25 Q. You say on the next page in your sworn certification --

1 | actually I don't know if it's sworn, but it's a
2 | certification, on paragraph 28, that although Bergrin has
3 | substantial identifiable assets, such as those listed above,
4 | there's evidence indicating that he has significantly larger
5 | assets that have been not been identified because they are
6 | either overseas or hidden by Bergrin.

7 | Do you see that?

8 | A. Yes, sir.

9 | Q. So as you sit here now, do you have any direct personal
10 | knowledge, whatever, as to any hidden asset of Mr. Bergrin in
11 | an offshore account?

12 | A. I personally do not, direct personal knowledge, no, sir.

13 | Q. And based on the information that you received from
14 | Special Agent Brocos of the FBI, do you have a single
15 | document showing a bank account overseas held by Mr. Bergrin?

16 | A. Not that I'm aware of, sir.

17 | Q. Do you have, as you sit here now, from whatever source,
18 | either your own personal knowledge or information supplied by
19 | Agent Brocos, any asset [sic] held by Mr. Bergrin in a
20 | foreign country?

21 | A. Not that I'm personally aware, sir. You'd have to ask
22 | Agent Brocos.

23 | Q. Well, did you ever ask Agent Brocos?

24 | A. No, sir.

25 | Q. Sir, you say in your certification that -- that

1 Mr. Bergrin has assets, larger assets that are overseas or
2 hidden by him. Do you of your own personal knowledge, know
3 of any asset large or small that is hidden by Mr. Bergrin?

4 A. Not of my own personal knowledge, no, sir.

5 Q. And did Ms. -- and did Ms. Brocos tell you of any
6 significant or even insignificant asset hidden by
7 Mr. Bergrin?

8 A. Based on information that was provided to her from a
9 confidential informant, she said that they believed that
10 there were assets overseas that belonged to Mr. Bergrin.

11 Q. But Agent Smith, in your certification, you say that
12 Bergrin has substantial identifiable assets, and then there's
13 evidence indicating that he has significantly large assets
14 that have not been identified because they are either
15 overseas or hidden by Bergrin.

16 Is it your testimony that Agent Brocos has no -- to your
17 knowledge, has no personal knowledge of this matter?

18 A. No, it's not my testimony, no, sir.

19 Q. The investigation, you go on to say, has revealed that
20 Bergrin often advised clients on methods of hiding illegal
21 proceeds that they earned.

22 Where did you get that information?

23 A. Again, from Agent Brocos.

24 Q. You say that there is evidence that Bergrin has hidden
25 significant assets which are also at his disposal to assist

1 him in fleeing.)

2 Again from Agent Brocos?

3 A. Yes, sir.

4 Q. Do you know of any steps that were taken to ascertain
5 whether this representation was true?

6 A. No, sir.

7 Q. Did you, sir, take any steps to ascertain whether the
8 statements in this paragraph were true?

9 A. Sir, I believed that the information that Agent Brocos
10 was providing me in my conversations with her was completely
11 accurate.

12 Q. Well, what do you base that on?

13 A. Just based on I don't believe a federal agent would
14 mislead or mis -- or lie to me relevant to information
15 contained in any kind of certification or otherwise.

16 Q. Have you been involved in a situation where someone else
17 may have lied to a special agent?

18 A. Someone lied to a special agent, certainly, sure.

19 Q. So let me ask you this question, Agent Smith: Do you
20 know from conversations with Agent Brocos what steps were
21 taken by her --

22 A. I do not --

23 Q. -- special -- may I finish the question.

24 A. Sorry, sir.

25 Q. Do you, sir, as you sit here now, know what, if any,

1 | steps were taken by Agent Brocos to determine whether this
2 | was true, that Mr. Bergrin had assets?

3 | A. I do not, sir.

4 | Q. Paragraph 29. There's also evidence that Bergrin has
5 | significant assets hidden in bank accounts overseas.

6 | Have you, sir, seen a single bank record showing that
7 | Mr. Bergrin has \$25 overseas. Have you seen that?

8 | A. I personally have not, no, sir.

9 | Q. And did Agent Brocos tell you that she had taken steps
10 | to clarify or ascertain whether it was accurate that there
11 | were significant assets hidden in bank accounts overseas?

12 | A. Again, conversations with her confidential informant.
13 | That was the information that was relayed to her.

14 | Q. Confidential Informant Number 4, as you identify the
15 | person or don't identify the person in paragraph 29, has --
16 | has reported that Mr. Bergrin controls bank accounts in Japan
17 | and the Dominican Republic containing substantial sums of
18 | money.

19 | Do you see that?

20 | A. Yes, sir.

21 | Q. Do you know the last time that Mr. Bergrin was in the
22 | Dominican Republic?

23 | A. I do not, sir.

24 | Q. Did you ask Agent Brocos whether she was able to
25 | determine when Mr. Bergrin was in the Dominican Republic?

1 A. No, sir.

2 Q. Did you ask Agent Brocos if she had any evidence of any
3 bank account owned or controlled by Paul Bergrin in -- in
4 Japan or the Dominican Republic?

5 A. No, sir.

6 Q. Do you know the last time that Mr. Bergrin was in Japan?

7 A. No, sir, I do not.

8 Q. Do you know, as you sit here now, whether from your own
9 knowledge or from -- from knowledge that was provided or
10 information that was provided by Agent Brocos, do you know
11 whether Mr. Bergrin has a quarter in a bank account in Japan?

12 A. Again, sir, just based on the information he shared with
13 me from her confidential source.

14 Q. Well, do you know whether -- and I don't want to labor
15 it -- but do you know whether Agent Brocos took any steps to
16 confirm or corroborate what that informant was telling her
17 about bank accounts overseas? Do you know?

18 A. I asked agent -- I asked Agent Brocos if the
19 confidential informant had been proven reliable in the past,
20 and she said yes.

21 Q. You asked that?

22 A. Yes, sir.

23 Q. That's an important investigative issue, isn't it?

24 A. Normally yes, sir. Absolutely.

25 Q. Well -- I'm sorry?

1 A. Absolutely, sir.

2 Q. So in other words, if you're going to take information
3 from a source, you want to know whether the source is -- has
4 been corroborated in the past; correct?

5 A. Yes, sir, generally, if you can.

6 Q. Whether -- whether the source is reliable; right?

7 A. Yes, sir.

8 Q. You may have answered this at the beginning, but how
9 long have you been with the DEA?

10 A. Since 2002, sir.

11 Q. And before that, were you in law enforcement?

12 A. No, sir.

13 Q. And since 2002 in the last approximately seven years,
14 have you been involved in many investigations?

15 A. Yes, sir.

16 Q. And have you, sir, filled out many affidavits for
17 various purposes in federal courts?

18 A. Yes, sir.

19 Q. And have you knowingly submitted affidavits in support
20 of search warrants and for applications for search warrants,
21 you've done that; right?

22 A. Yes, sir.

23 Q. And when you do that, you customarily, because you were
24 trained at some DEA school; right?

25 A. Yes, sir.

1 Q. You customarily include in the affidavit, when it's
2 true, that the informant is known to be reliable; right?

3 Right?

4 A. Yes, sir. You can. I think it's wordsmithing.

5 Q. A wordsmithing, who smithed these words in this
6 certification?

7 A. The AUSA drafted it, sir.

8 Q. The AUSA wrote it; correct?

9 A. Yes, sir.

10 Q. And the AUSA, we're talking about the prosecutors at
11 this table; right?

12 A. Yes, sir.

13 Q. Now, when reference was made to Confidential Informant
14 Number 4, he's -- he or she is the person supplying the
15 information; correct?

16 A. Yes, sir.

17 Q. This certification says not a word, not a word about
18 Confidential Informant Number 4 being reliable; right?

19 A. Yes, sir.

20 Q. Do you need to take a look at it to see the reference to
21 Confidential Informant 4 and nothing whatever is said about
22 efforts to corroborate the information received from him or
23 her? You know that to be a fact, don't you?

24 A. No, sir.

25 Q. Well, what steps were taken to corroborate -- and I'm

1 staying with risk of flight and this information regarding
2 finances -- what steps, based on your conversation with the
3 FBI agent, any other information you've received, what steps
4 were taken to corroborate this allegation of hidden assets
5 abroad? What steps?

6 A. Sir, I did not directly engage in a conversation
7 regarding that question.

8 Q. So the answer is that you don't know; right?

9 A. Yes, sir.

10 Q. You know the last time that Mr. Bergrin was in the
11 Dominican Republic?

12 A. Again, no, sir.

13 Q. Now, there's information in -- and I'm looking at
14 paragraph 29, if you wish to refresh your recollection on the
15 certification.

16 A. Yes, sir.

17 Q. Still on page -- on page 15. You say that -- that
18 records from a search warrant corroborate CI4. Do you see
19 that?

20 A. Yes, sir.

21 Q. There's no corroboration from records from a search
22 warrant about bank accounts and hidden money, is there?

23 A. Not that I'm aware of with respect to the bank accounts,
24 sir.

25 Q. Because Government Exhibit PB6 --

1 A. 6 alpha?

2 Q. -- PB6?

3 MALE SPEAKER: 6-A, I think --

4 THE WITNESS: 6 alpha.

5 BY MR. SHARGEL:

6 Q. PB6-A, that last batch that we had marked?

7 A. Yes, sir.

8 Q. There's no bank -- there are no bank records in there;
9 correct?

10 A. Not that I notice, no, sir.

11 Q. They are records having to do with certain businesses
12 and business ventures; right?

13 A. Yes, sir.

14 Q. And business ventures having to do with Baccarate
15 Promotions, the companies that you have in -- in -- listed or
16 enumerated or described, if I may, in paragraph 29; right?

17 A. Yes, sir.

18 Q. Do you know, of either your own personal knowledge --
19 I'll make it a broader question -- for -- with conversations
20 with the FBI agent, do you know whether any of these
21 companies, whether any of these companies were ever finally
22 formed?

23 A. I do not know that answer, sir.

24 Q. Do you know whether, of your own personal knowledge or
25 from conversation with -- you're going to have to help me

1 with this -- I'm old -- what's the agent's name?

2 A. Brocos, sir.

3 Q. Broc -- I'm going to write it down this time, so I don't
4 have to ask that question again. Brocos. Okay.

5 Do you know of your own personal knowledge or knowledge
6 conveyed to you by Agent Brocos, if steps were taken to
7 determine whether any of these -- of these companies ever
8 earned any money at all?

9 A. No, sir.

10 Q. So you conclude paragraph 29 going onto page 16 -- by
11 the way, on page 16, at the end of paragraph 29, Bergrin also
12 told CI6 -- do you see that -- that he had baccarat gambling
13 machines that were generating a million dollars of income per
14 month?

15 A. Yes, sir, I see the sentence.

16 Q. And then you go on to say: Accordingly, it is clear --
17 that was the word choice of the prosecutor; correct?

18 A. Yes, sir.

19 Q. It is clear that Bergrin has enormous assets overseas
20 that he could use to flee if released on bail; do you see
21 that?

22 A. Yes, sir.

23 Q. Do you, either of your own personal knowledge or
24 knowledge gained in conversations by Agent Brocos, do you
25 have any evidence in that package or anywhere else of

1 Mr. Bergrin receiving a million dollars a month?

2 A. No, sir.

3 Q. And Agent Smith, CI6, another confidential informant
4 that you proffer in connection with financial information, I
5 don't have to elaborate, there's nothing in here to
6 demonstrate that CI6 is a reliable informant; correct?

7 A. No, sir.

8 Q. Well, I am correct in saying there's nothing in here?

9 A. You are correct, sir.

10 Q. Now, in paragraph 31.

11 A. Yes, sir.

12 Q. Are you the case agent on this case?

13 A. No, sir.

14 Q. But are you assigned as one of the agents working the
15 case?

16 A. No, sir.

17 Q. You were just asked to come in and do the certification?

18 A. Yes, sir.

19 Q. In paragraph 31, there is fin- -- there is information
20 in connection with real estate transactions; correct?

21 A. Yes, sir.

22 Q. Reference is made to a check of \$135,800; correct?

23 A. Yes, sir.

24 Q. Goes back to a real estate sale in November of 2005;
25 correct?

1 A. Yes, sir.

2 Q. In this situation, you actually have in that package
3 bank records; right?

4 A. I believe it's a separate document, sir, besides that
5 package.

6 Q. Well, let me see -- let me see if I can find it.

7 A. Are you referring to check, sir?

8 Q. The check, yes.

9 THE COURT: Are those of PB4?

10 MALE SPEAKER: PB4. I think it's part of the
11 package but not that --

12 MR. SHARGEL: All right. May I just confer, one
13 second, Your Honor.

14 BY MR. SHARGEL:

15 Q. Let me show you what's been marked as Government
16 Exhibit PB4.

17 A. Okay, sir.

18 Q. Would you -- would you identify that?

19 MR. SHARGEL: By the way, Your Honor, may I offer
20 in evidence the entire package, the financial records, which
21 is PB --

22 THE WITNESS: 6 alpha.

23 MR. SHARGEL: PB6-1?

24 MR. GAY: Your Honor, the government has no
25 objection to this coming in in its entirety, the package.

1 All the exhibits.

2 THE COURT: So let me be clear, what -- are you
3 moving in a particular exhibit, Mr. Shargel?

4 MR. SHARGEL: Well, if we do all the government PB
5 exhibits, then, I have no argument to kick out any exhibits.
6 I don't intend to.

7 THE COURT: Okay. So for the record is clear,
8 we're going to move in with no objection PB1, which is the
9 original certification dated May 20th of Smith; PB 1-A, which
10 is Paul Bergrin recorded conversations; TM1-A, which is
11 Thomas Moran recorded conversations; PB2, which is a partial
12 trial transcript; PB3, which is a marked-up version of PB1;
13 PB6, which is a number of documents, one of which appears to
14 be in Spanish; PB6-A, which is a business record, I think as
15 Mr. Shargel described it; PB5 which is -- looks like a
16 partial transcript; PB4, which looks like bank records.

17 And they'll all be moved into evidence. Okay?

18 BY MR. SHARGEL:

19 Q. So I was showing you was -- been marked as -- you have
20 in front of PB4?

21 A. Yes, sir. I think we were referring to the check for
22 \$135,800.

23 Q. -- \$35,000. This is in -- this is in your
24 certification, you've noted this in the certification; right?

25 A. Yes, sir.

1 Q. This is a check that's drawn on an attorney trust
2 account; right?

3 A. I do not see where it specifically states that on the
4 check, sir.

5 Q. Well, wait a minute. Okay. Let me just share -- okay.
6 Up here.

7 This -- this actually, you're right, that this check
8 135,800 is drawn on the account of Gary Bootes, B-o-o-t-e-s,
9 made out to Paul Bergrin for \$135,800; right?

10 A. Yes, sir.

11 Q. There is a memo closing 82 Hazelwood; correct?

12 A. Yes, sir.

13 Q. It's endorsed, is it not?

14 A. It is.

15 Q. And -- and it is endorsed by -- it's actually endorsed
16 twice and Barbara Bergrin is a signature -- correct?

17 A. Yes, sir.

18 Q. Now, and again, this is referred to in your
19 certification; right?

20 A. Yes, it is, sir.

21 Q. So this check went through a New Jersey bank. It was
22 drawn on a New Jersey bank; correct?

23 A. Yes, sir.

24 Q. And you say in your certification that Mr. Bergrin
25 received this check and deposited -- it was deposited into

1 his wife's account; right?

2 A. That's correct, sir.

3 Q. And did you take any steps to determine whether this
4 money was recognized on his income tax return for the
5 calendar year as reflected on there 2005.

6 Sir?

7 A. I'm just trying to recollect, sir, one moment, please.

8 Q. All right. Take your time. I'm sorry.

9 A. Can you ask the question again?

10 Q. Yes. Did you take any steps to determine -- I mean, you
11 raise a question about this check in your certification,
12 paragraph 31; right?

13 A. Yes, sir.

14 Q. And so my question to you is: Did you take any steps to
15 ascertain whether this money was recognized or treated on
16 Mr. Bergrin's income tax return?

17 A. I had a conversation, sir -- I had a conversation, sir,
18 regarding this particular check with an IRS agent SA Steve
19 Cline.

20 Q. Yes?

21 A. Regarding the proceeds of the check. And based on my
22 recollection of the conversation with SA Cline, he indicated
23 to me that the check obviously was endorsed and signed into
24 the Bergrins' personal account, but they had no recognizable
25 ties to the property itself.

1 Q. They have no recognizable ties to the property itself;
2 right?

3 A. Yes, sir.

4 Q. But did you ask him, sir, whether -- withdrawn.

5 What do you mean by "recognizable ties"? What do --

6 A. Where they were part of the title or the original chain
7 of title with the property, sir.

8 Q. So in other words, the IRS agent -- you don't have to
9 adopt my words -- but the IRS agent didn't understand the
10 reason or didn't know the reason why this was deposited in
11 the personal account of Mr. Bergrin?

12 A. No, I'm -- I'm sure he did, sir. I failed to ask that
13 follow-up question.

14 Q. What follow-up question? The reason?

15 A. Yes, sir.

16 Q. So how does this wind up in the certification as
17 evidence of risk of flight?

18 A. Again, just based on the information that he had shared
19 with me.

20 Q. But he didn't share any information with you. What was
21 his concern about money that is drawn on a New Jersey bank,
22 going into a New Jersey account with the names of the people
23 making the check and receiving the check on the check. What
24 was his concern about that?

25 A. Sir, income from outside sources, sir, that potentially

1 | may not be being reported --

2 | Q. Sorry?

3 | A. -- but I don't know.

4 | Income from outside sources, sir.

5 | Q. What does that mean?

6 | A. Receiving income from outside individuals.

7 | Q. Well, don't -- don't people receive income from outside
8 | individuals --

9 | MR. GAY: Your Honor, I'm going to object. This is
10 | going far afield here.

11 | THE COURT: I'm going to give him a little bit of
12 | room.

13 | BY MR. SHARGEL:

14 | Q. Don't people who earn --

15 | A. You're right, sir, they do.

16 | Q. -- income from outside sources.

17 | A. That was poor -- yes, sir, that was poorly put.

18 | Q. You don't know, as you sit here now, whether anything
19 | was wrong with that check; correct? Right?

20 | A. Again, based on information that the IRS agent provided
21 | me, I believed that there was an issue with the check.

22 | Q. Well, what was the issue with the check?

23 | A. Again, it was endorsed over into their personal account,
24 | and they had no ties to the property at hand.

25 | Q. Is --

1 A. -- still was a closing for 82 Hazelwood.

2 Q. Based on what -- what the IRS agent knew; is that the
3 point?

4 A. Yes, sir.

5 Q. Did the IRS agent tell you whether it -- this income was
6 reported or not?

7 A. No, sir. Not that I recollect.

8 Q. As you sit here now, you don't know whether there was
9 anything illegal, improper, or unethical about this check?

10 A. Not that I -- I recollect, sir, sorry.

11 Q. And -- and going on to -- to other checks that are in
12 this paragraph, proceeds of a sale of \$53,657 check; do you
13 see that?

14 A. Yes, sir.

15 Q. And there, again, New Jersey bank; correct?

16 A. Yes, sir.

17 Q. In paragraph 32, you certify that there's ample evidence
18 that Bergrin has hidden other income and assets from the IRS;
19 for example, in addition to the real estate transactions
20 described above, which were not reported to the IRS.

21 Now, where did you get that from?

22 A. Agent Cline in this particular case, sir, informed me
23 that the 125,000 in question, that was inputted into the
24 Premium Realty business account, which he -- which he
25 informed me was owned by Mr. Bergrin, that income had never

1 | been reported, as part of the Premium Realty.

2 | Q. Well, you say in this paragraph, the real estate
3 | transactions described above, which would mean the preceding
4 | paragraph, correct, were not reported to the IRS. A moment
5 | ago you said you didn't know what was wrong with those
6 | checks, if anything.

7 | A. Again, I said I did not recollect my conversation with
8 | Agent Cline.

9 | Q. Did you make -- take any independent steps to see
10 | whether or not this income was properly recognized --
11 | recognized on the federal tax returns of Mr. and
12 | Mrs. Bergrin?

13 | A. No, I did not personally, sir.

14 | Q. Now, last question or last area on this risk of flight,
15 | if I may.

16 | A. Yes, sir.

17 | Q. In paragraph 33, and you certify: In addition to his
18 | significant business contacts overseas.

19 | Now, once again, you don't know the last time that
20 | Mr. Bergrin had been overseas, particularly, Japan, Costa
21 | Rica and the Dominican Republic; correct?

22 | A. Yes, sir.

23 | Q. In addition to that, based on conversations with and
24 | observations of Bergrin, CI4 learned that Bergrin possesses
25 | five fraudulent passports that contained his picture and list

1 | him under a different name.

2 | You wrote that -- oh, well, you signed that; right?

3 | A. That's correct, sir.

4 | Q. Have you ever -- have you ever seen a passport showing
5 | Mr. -- or representing Mr. Bergrin to be a different person
6 | or in a different name? Have you ever seen one?

7 | A. I personally have not, no, sir.

8 | Q. And do you, sir, know whether Agent Brocos saw one?

9 | A. I do not, sir.

10 | Q. Do you know whether Special Agent Cline of the Internal
11 | Revenue Service ever saw one?

12 | A. No, sir.

13 | Q. Did anyone suggest to you that in the search of his
14 | house, the search of his office, the search of his
15 | codefendant, that any such passport was ever found?

16 | A. No, sir.

17 | Q. Do you know, sir, whether -- or were you told that in
18 | the search conducted by the Manhattan District Attorney's
19 | Office whether a single one passport in a different name or
20 | representing Mr. Bergrin to be a different person was ever
21 | found?

22 | A. No, sir.

23 | MR. SHARGEL: May I just have a moment, Your Honor?

24 | THE COURT: Sure.

25 |

1 BY MR. SHARGEL:

2 Q. All right. Now, I'd like to move on and talk about, if
3 I may, the danger to the community. It starts at page 4.
4 Did you do any work on this case other than the -- do the
5 certification?

6 A. I reviewed documents and reports, yes, sir.

7 Q. You reviewed -- you did review before you signed the
8 certification the documents that are in this packet, which is
9 marked as PB1-A through --

10 MALE SPEAKER: 1-A through 6-A.

11 BY MR. SHARGEL:

12 Q. 1-A through 6-A, the whole package?

13 A. Can I see the entire package, sir?

14 Q. Yes. It's an unmarked copy. But I'll put it before
15 you, with the Court's permission.

16 THE COURT: Sure.

17 THE WITNESS: Thank you, sir.

18 BY MR. SHARGEL:

19 Q. Thank you. Just try to keep it separate.

20 A. I will.

21 The documents you provided me, sir, no, I had not looked
22 at prior to signing the certification.

23 Q. So there are some transcripts of conversations in there,
24 you saw that?

25 A. Yes, sir.

1 Q. There are some business records here as well; right?

2 A. Yes, sir.

3 Q. There is a portion of a -- what appears to be either a
4 DEA 6 or a 302 or some similar report; did you see that?

5 A. Yes, sir.

6 Q. So -- but you reviewed none of this before you signed
7 the certification; right?

8 A. That is correct, sir.

9 Q. So -- so on page 4, if you would look at the
10 certification.

11 A. Yes, sir.

12 Q. Where there's reference to murder of a federal
13 informant.

14 A. Yes, sir.

15 Q. Do you know whether that's one of the charges in the
16 indictment; do you know that?

17 A. Can I take a look at it? I believe it is, sir.

18 Q. Believe it is. Okay. So there's information that's
19 contained in here that you have no personal knowledge of;
20 correct?

21 A. Again, just knowledge based on my conversations with
22 certain special agents from various organizations.

23 Q. Could you just tell us who those special agents are?

24 A. Again, FBI, SA Shawn Brocos.

25 IRS, Steve Cline. And DEA, Bob Ivanoshevitz.

1 Q. Was there information in here that you learned from the
2 prosecutors?

3 A. Yes, sir.

4 Q. On what basis could you certify the information learned
5 by the prosecutors, if you know? I mean, why would you do
6 that?

7 A. I'm sorry? Can you --

8 Q. Why would you certify information that was just given to
9 you by the prosecutors?

10 A. Why would I certify it?

11 Q. Yes.

12 A. Based on information that was provided to them in order
13 that they originally drafted the documents.

14 Q. Do you know why you were chosen as the person to
15 certify?

16 A. Yes, sir.

17 Q. Why?

18 A. Because I'm not deeply involved in the investigation as
19 a lead investigator. I'm a summary witness.

20 Q. I see.

21 So the information that's set forth here with regard to
22 the -- to the person who's referred to here at KDM or Kemo,
23 do you know who that is; correct?

24 A. Kemo, yeah, that's Deshawn McCray.

25 Q. And with regard to that, you have no personal knowledge

1 of any of this information; correct?

2 A. Again, just conversations with FBI Brocos in this case.

3 Q. What you heard from others; right?

4 A. Yes, sir.

5 Q. Did you have any discussion with the agent as to the --

6 and I ask this question within the meaning of Subsection (g),

7 the weight or strength of the prosecution's case?

8 A. No, sir, I didn't ask that specifically.

9 Q. Do you have any information of your own direct personal
10 knowledge to offer on that issue?

11 A. No, sir.

12 Q. And going on to page 5 of the subsection, the plot to

13 kill witnesses against Vicente Esteves?

14 A. Yes, sir.

15 Q. Do you see that?

16 A. Yes, sir.

17 Q. This again -- and I don't want to labor it -- is the

18 same kind of source: conversations with others?

19 A. Yes, sir.

20 Q. Did you ever receive any information about the progress

21 of this investigation prior to signing the certification?

22 A. Just in some general conversations with SA Ivanoshevitz,

23 but, no, I was not directly involved in the investigation

24 leading up to this, sir.

25 Q. Now, going on to page 8.

1 A. Yes, sir.

2 Q. Where the caption is "Other Evidence of Witness
3 Tampering, Including Murder Plots." Do you see that?

4 A. Yes, sir.

5 Q. And you go on to set forth other instances where
6 Mr. Bergrin, according to your certification, urged his
7 clients to kill witnesses.

8 Do you see that on the top of page 9?

9 A. Yes, sir.

10 Q. You go on to say in paragraph 17, that CI4, and we
11 discussed and that's the same CI4 on the risk of flight;
12 correct?

13 A. Yes, sir.

14 Q. And in this paragraph, again, there is nothing to
15 suggest that CI4 is a reliable informant; correct?

16 A. That verbiage is not in there, no, sir.

17 Q. There's no other verbiage either, is there, to suggest
18 to the -- to the magistrate judge that this is a reliable
19 informant; correct?

20 A. Not that I'm aware, no, sir.

21 Q. Because sometimes different verbiage is chosen, such as
22 the prior history of the informant and his or her success in
23 providing information to federal authorities; right?

24 A. Yes, sir.

25 Q. But it doesn't appear in any kind of verbiage in this

1 paragraph; correct?

2 A. No, sir, it's not there.

3 Q. So this paragraph says that CI4 was present when Bergrin
4 told one of Bergrin's clients to kill a person that Bergrin
5 and that client believed was cooperating with law enforcement
6 in a criminal case against that client.

7 I ask you, sir, what's the name of the person who was
8 going to be killed?

9 A. I don't know, sir.

10 Q. What's the name of the case?

11 A. I don't know if it's case-specific. I don't believe it
12 is, sir.

13 Q. In what -- well, you make it appear that it's specific.
14 CI4 was present when Bergrin told one of Bergrin -- one of
15 Bergrin's clients to kill a person that Bergrin and that
16 client believed was cooperating with law enforcement in a
17 criminal case against that client.

18 What criminal case?

19 A. I'm not aware of a criminal case, sir.

20 Q. What year did it take place?

21 A. Don't know, sir.

22 Q. Which jurisdiction did it take place in?

23 A. Don't know, sir.

24 Q. Who was prosecuting the case?

25 MR. GAY: Your Honor, objection.

1 THE COURT: I'm going to allow it.

2 BY MR. SHARGEL:

3 Q. Who was prosecuting the case?

4 A. I don't know, sir.

5 Q. CI4 has also been present on other occasions when
6 Bergrin spoke about having witnesses killed for other clients
7 whom Bergrin represented on criminal cases.

8 Do you see that?

9 A. Yes, sir.

10 Q. When were those occasions?

11 A. I do not know, sir.

12 Q. What cases were involved?

13 A. Again, I do not know.

14 Q. What jurisdiction or what prosecutor?

15 A. I don't know, sir.

16 Q. And going on -- going on: In addition to the murder and
17 other plots to kill witnesses set forth above, there are
18 additional examples of cases in which clients represented by
19 Bergrin thwarted or attempted to thwart criminal prosecution
20 after witnesses against them were murdered.

21 And you go on to give examples; right?

22 A. Yes, sir.

23 Q. Now, you reviewed your certification in anticipation of
24 this testimony; right?

25 A. I did, sir.

1 Q. And you had a copy that made certain notes on; right?

2 A. I did, sir.

3 Q. And I'm going to show you what's been marked as PB3, PB3
4 in evidence.

5 A. Yes, sir.

6 Q. Do you recognize that as the copy that you used to
7 prepare your testimony here this afternoon and make notes on?

8 A. Yes, sir.

9 Q. So could you turn -- and there's a yellow Post-it, one
10 of about three yellow Post-its on the right, to page 9,
11 paragraph 18.

12 A. Yes, sir.

13 Q. And on that exhibit, there's certain handwriting; right?

14 A. Yes, sir.

15 Q. And the handwriting, at least on my copy, is a little
16 chopped off on the left side; right?

17 A. Yes, sir.

18 Q. But you wrote it, and if you would -- you probably wrote
19 it in the last couple of days; right?

20 A. Last night, sir.

21 Q. Last night after you learned that I was going to call
22 you as a witness today; right?

23 A. Yes.

24 Q. And you wrote it and so you know what you wrote, cut off
25 or not; right?

1 A. Yes.

2 Q. Please tell the Court what is that you wrote.

3 A. Said the -- basically the blow [phonetic] information
4 from SA Shawn Brocos is relevant to conversations she had
5 with APs only, and it's secondhand knowledge that she
6 received from the APs.

7 Q. What's APs?

8 A. Assistant prosecutor, sir.

9 Q. Wait a minute, you mean assistant prosecutors, like the
10 two prosecutors here?

11 A. No, at the state level, sir, regarding the blow list of
12 cases.

13 Q. How many different APs, assistant prosecutors?

14 A. I believe -- I don't know the exact amounts, but I think
15 that the cases referred to are Essex and one Monmouth, sir.

16 Q. And where did those assistant prosecutors get the
17 information?

18 A. From actually working the case, sir.

19 Q. Well, what's "working the case" mean? From sources?

20 A. From their investigation.

21 Q. And who provided the information?

22 A. I don't know, sir.

23 Q. Were they reliable people?

24 A. I do not know that, sir.

25 Q. Were they liars and backbiters and backsliders, or do

1 | you know that?

2 | A. No, sir.

3 | Q. Now, you go on to give examples after paragraph 18, in

4 | A, B, and C.

5 | A. Yes, sir.

6 | Q. And -- and this is offered in support of the fact that

7 | Mr. Bergrin, according to the certification, would have

8 | witnesses murdered; right?

9 | A. Yes, sir.

10 | Q. So A says that in State v. Loyal, Bergrin represented

11 | Loyal on murder charges in Essex County's Superior Court.

12 | Do you see that?

13 | A. Yes, sir.

14 | Q. A witness to the murder, DB, provided police with a

15 | statement implicating Loyal in the murder. Prior to that

16 | trial, DB was murdered execution style in broad daylight.

17 | When did the happen by the way?

18 | A. 3/1/04, sir.

19 | Q. And other witnesses to the crime refused to cooperate

20 | after DB was murdered. The prosecutor was forced to dismiss

21 | the murder case against Alquan Loyal.

22 | See that?

23 | A. Yes, sir.

24 | Q. What do Mr. Bergrin do? What did he do? Sir?

25 | A. Specifically in this particular thing besides

1 | representing Alquan Loyal, I do not know, sir.

2 | Q. Well, did Agent Brocos tell you what he did other than
3 | represent a client within -- within the purview of the Sixth
4 | Amendment to the Constitution?

5 | A. No, sir. Agent Brocos shared with me that she only
6 | spoke to the prosecutors, and she did not expand the scope of
7 | her investigation in fear of compromising the investigation.

8 | Q. You don't know how many layers of hearsay even establish
9 | this; correct?

10 | A. No, sir, I do not.

11 | Q. And you don't have a scintilla of evidence that suggests
12 | that Mr. Bergrin did anything wrong just representing him.

13 | Right?

14 | A. In this particular case, no, sir.

15 | Q. Let's talk about the next particular case, State v.
16 | Malik Howard. Actually, was there a change or correction
17 | with respect to who that was, or no?

18 | A. I think that's a follow-on case you're referring to,
19 | sir.

20 | Q. It's State v. -- it's the Malik Howard, Bergrin
21 | represented Howard on murder charges in Essex County.

22 | Nothing wrong with that; right?

23 | A. Yes, sir.

24 | Q. And Howard had been charged with the murder of CJ and
25 | the aggravated assault of another male victim SL, CJ's

1 girlfriend. I'm sorry. Let me read it with the correct
2 emphasis.

3 SL, CJ's girlfriend identified Howard as the shooter.

4 The male victim who was shot in the foot as Howard was
5 shooting at CJ also identified Howard as the shooter. Howard
6 originally absconded, but later surrendered himself to
7 Bergrin two days after SL was murdered. At trial Bergrin
8 claimed that since SL was dead, there were no witnesses to
9 the murder.

10 What did Mr. Bergrin do in connection with that murder?

11 A. Again, he represented the defendant, sir.

12 Q. Nothing wrong with that, is there?

13 A. No, sir.

14 Q. And making an argument to a jury that since SL was dead,
15 there were no witnesses to the murder, nothing wrong with
16 that, either; right?

17 A. Yes, sir.

18 Q. In State v. Tyleek Baker, et al., Bergrin represented
19 Tyleek Baker on murder charges in Ocean County Superior
20 Court. James Russell and Jamal Scott were charged along with
21 Tyleek Baker in that case. Days before testimony was to
22 commence in that case, persons entered a residence where the
23 main witness against Tyleek Baker was staying and murdered
24 another resident of that house, AB, who was the mother of the
25 main witness's girlfriend. Bergrin's investigator, GB, had

1 | been in AB's house the day before in an attempt to interview
2 | the witness.

3 | Sir, may I ask you this: Is it not common or proper,
4 | both, for an investigator to interview witnesses in
5 | connection with defending a case?

6 | A. I'm not a defense attorney, sir. I don't know the
7 | common practices.

8 | Q. Sorry?

9 | A. I said, not being from -- not being a defense attorney
10 | nor an attorney, I don't know your common practices.

11 | Q. Based on your seven years of experience --

12 | A. From a law enforcement perspective, yes, absolutely.

13 | Q. From a law enforcement perspective, you know that a
14 | defense lawyer is duty-bound to investigate the case under
15 | the canons of ethics; correct?

16 | A. Yes.

17 | Q. Tyleek Baker's codefendants James Russell and Jamal
18 | Scott were subsequently charged with the October 14th, 2008,
19 | murder of AB.

20 | See that?

21 | A. Yes, sir.

22 | Q. And that's the end of the description of State v. Tyleek
23 | Baker; correct?

24 | A. Yes, sir.

25 | Q. So I ask you, sir, going back to paragraph 18: In

1 | addition to the murders and other plots to kill witnesses set
2 | forth above, there are additional examples of cases in which
3 | clients represented by Bergrin were thwarted or attempted to
4 | thwart criminal prosecution after witnesses against them were
5 | murdered.

6 | I ask you, sir, with regard to the Tyleek Baker case,
7 | what did Mr. Bergrin do that was improper?

8 | A. Again, he just represented the client, sir.

9 | Q. You go on, paragraph 19, to certify for the Court that
10 | eyewitnesss have informed law enforcement that on numerous
11 | separate occasions, Bergrin counseled persons who were
12 | government witnesses or persons whom Bergrin intended to call
13 | as witnesses to provide testimony at trial falsely
14 | exculpating Bergrin's clients.

15 | Where is this information coming from?

16 | A. Again, it's coming from conversations that SA Brocos has
17 | had with the assistant prosecutors, from those various --

18 | Q. And once again, you don't know how many layers of
19 | hearsay; correct?

20 | A. That is correct, sir.

21 | Q. And once again, you know nothing about reliability;
22 | correct?

23 | A. Yes, sir.

24 | Q. Paragraph 20, do you know who AY is?

25 | A. Anthony Young, sir.

1 Q. And Anthony Young has been a witness in this courthouse;
2 do you know that?

3 A. Yes, sir.

4 Q. Do you have any firsthand knowledge about -- about the
5 information contained in paragraph 20?

6 A. Firsthand?

7 Q. Yes.

8 A. No, sir.

9 Q. Where did you get the information in paragraph 22 about
10 State v. Norberto Velez. I'm trying to go a little more
11 quickly now.

12 A. Yes, sir.

13 Q. So please try to stay with me.
14 Norbert Velez?

15 A. Again, it came from Essex County Superior Court, sir,
16 and that particular paragraph, there was a mistake. It
17 should have been attempted murder charges, not murder
18 charges.

19 Q. I see. And when did you learn that mistake?

20 A. Last night, sir.

21 Q. And did you speak to any state prosecutors?

22 A. I did not, sir.

23 Q. State v. Al Tarik Gumbs, do you see that?

24 A. Yes, sir.

25 Q. What did Mr. Bergrin do in connection with this?

1 A. Represented Gumbs, sir.

2 Q. And in State v. -- there's a correction here, also, it
3 says Louis [sic] Nimely, but it's Dwayne Chisolm [phonetic];
4 right?

5 A. That is correct, sir.

6 Q. Mr. Bergrin represented Mr. Nimely on charges in Essex
7 County?

8 A. Yes, sir. Actually he represented Mr. Chisolm.

9 Q. Mr. Chisolm?

10 A. Yeah.

11 Q. This -- the last -- the last sentence here on page 13,
12 and I'm getting to the end, it's --

13 MALE SPEAKER: C.

14 BY MR. SHARGEL:

15 Q. Yeah, same paragraph C. It's at the top of page 13,
16 Your Honor.

17 The witness who was facing unrelated criminal charges
18 was told that if he or she changed his or her testimony
19 regarding the murder, then Bergrin would handle the witness's
20 ongoing criminal case for free.

21 Told by who? The witness was told. Told by who?

22 A. I don't know, sir.

23 Q. And this again, is that secondhand knowledge --

24 A. It is, sir.

25 Q. -- state prosecutors?

1 | And with the State v. Raheem Clark, same thing?

2 | A. Yes, sir.

3 | Q. And just going on, 23, finally an eyewitness has told
4 | law enforcement that based upon on conversations with
5 | Bergrin, the eyewitness learned that Bergrin has bribed
6 | jurors in an effort to win cases.

7 | Do you see that?

8 | A. Yes, sir.

9 | Q. Where did you get that from?

10 | A. Again, that's information that SA Brocos had shared with
11 | me, secondhand knowledge.

12 | Q. Do you -- do you know -- do you know of your own
13 | personal knowledge of a single instance where Paul Bergrin
14 | did anything improper --

15 | A. Personally no.

16 | Q. -- let alone, bribe?

17 | A. Personally no, sir.

18 | Q. So you don't know persons making this allegation, you
19 | don't know when this is supposed to have occurred; correct?

20 | A. Correct, sir.

21 | Q. You don't know where it's supposed to have occurred;
22 | correct?

23 | A. Correct, sir.

24 | Q. You don't know what case in which this is supposed to
25 | have occurred?

1 A. Yes, sir.

2 THE COURT: Mr. Shargel, do you have any sense of
3 how much longer you're going to be with this witness?

4 MR. SHARGEL: My sense is I'm trying to --

5 THE COURT: Okay. Because we'll take a break. We
6 can talk about what you want -- what your plans are for the
7 afternoon, if you want to finish this witness first? It's
8 one o'clock.

9 MR. SHARGEL: I'd appreciate --

10 THE COURT: Do you want to go forward?

11 MR. SHARGEL: Was Your Honor thinking of a lunch
12 break?

13 THE COURT: Do you want to take a short break? Do
14 you want to take a short break?

15 MR. SHARGEL: I'd like to take a short break and
16 then continue, but I'm -- what I'm trying to do is I think
17 I've made virtually all my points. I just want to make
18 sure there's not any loose ends.

19 THE COURT: Okay. Sure. Take a minute.

20 MR. SHARGEL: So if we can take a short break.
21 That would be good, just --

22 THE COURT: Okay. And then -- when you finish the
23 witness.

24 MR. SHARGEL: It'll shorten rather than lengthen
25 it, is what I'm saying.

1 THE COURT: Okay.

2 MR. SHARGEL: So --

3 THE COURT: Okay. You want to finish with this
4 witness now or you want to --

5 MR. SHARGEL: No, no, I'm asking if we can just
6 take a short break.

7 THE COURT: How -- do you want to take half an
8 hour? 15, 20 minutes --

9 MR. SHARGEL: And that'll be the lunch hour, and
10 then we'll continue when we get back?

11 THE COURT: That -- that -- does that work with
12 you, Mr. Gay and Mr. Minish?

13 MR. MINISH: That's fine, Your Honor.

14 THE COURT: Okay.

15 MR. SHARGEL: Okay.

16 THE COURT: Could I just speak to the lawyers in a
17 side bar for a minute?

18 MR. SHARGEL: Sure.

19 (Bench conference)

20 THE CLERK: All rise.

21 THE COURT: We'll resume here at a quarter to 2
22 promptly. Thank you.

23 (Recess taken)

24 THE COURT: Agent Smith, you remain sworn.

25 THE WITNESS: Yes, ma'am.

1 THE COURT: Okay. Mr. Shargel, your witness.

2 MR. SHARGEL: Your Honor, I have no further
3 questions.

4 THE COURT: Okay. Thank you.

5 MR. GAY: Just briefly, Your Honor.

6 EXAMINATION BY MR. GAY:

7 Q. Agent Smith, I'd like to show you Government
8 Exhibit PB3, which is the certification. If you can look at
9 the first eight paragraphs of that.

10 A. Yes, sir.

11 Q. You testified earlier that you obtained some information
12 regarding the certification from an assistant United States
13 attorney; is that correct?

14 A. Yes, sir, that's correct.

15 Q. And specifically, would that be paragraphs 1 through 8?

16 A. Yes, sir.

17 Q. And are those paragraphs that reference charges in the
18 indictment itself?

19 A. Yes, sir.

20 Q. Okay. You also testified about -- that you were chosen
21 to swear out the certification; is that correct?

22 A. Yes, sir.

23 Q. Do you know where the agents were -- Agent Brocos, Agent
24 Ivanoshevitz, and Agent Cline were at the time you were asked
25 to swear out this certification?

1 A. Yes, sir.

2 Q. Where were they?

3 A. They were actively participating in arrest and search
4 warrants.

5 Q. And, to your knowledge, were a number of other agents
6 from those various organizations also doing the same thing?

7 A. Yes, sir, they were.

8 Q. Based on your knowledge, do you know whether there's any
9 single agent in either the FBI, the IRS, or the DEA who would
10 have firsthand knowledge of every single fact contained in
11 that certification?

12 A. Absolutely not, sir.

13 MR. GAY: No further questions, Your Honor.

14 Oh, sorry, one more question.

15 BY MR. GAY:

16 Q. Agent Smith, based on your knowledge, are the facts
17 contained in that certification true and accurate except for
18 the two clarifications that you made earlier in your
19 testimony regarding Dwayne Chisolm and the attempted murder
20 as opposed to the murder?

21 MR. SHARGEL: I object to that, no foundation.

22 THE COURT: Repeat the question?

23 BY MR. GAY:

24 Q. To your knowledge, Agent Smith, are the facts contained
25 in that certification, true and accurate other than the two

1 | things you indicated during your prior testimony about the --
2 | Dwayne Chisolm being the defendant rather than Mr. Nimely,
3 | and also that in the other case, the Velez case, that if the
4 | charge was attempted murder rather than murder?

5 | THE COURT: I'll allow it. You can answer it.

6 | THE WITNESS: Yes, sir. In addition, the only
7 | other correction was pointed out to me that the Bently was an
8 | '07 and not a -- it was an '05 and not an '07.

9 | MR. GAY: I have no further questions at this time,
10 | Your Honor.

11 | THE COURT: You can -- you're excused.

12 | THE WITNESS: Thank you.

13 | THE COURT: Thank you.

14 | Mr. Shargel, do you want it make a closing
15 | statement?

16 | MR. SHARGEL: Yes, I would.

17 | THE COURT: Before we begin, I just want to ask one
18 | question for the record, and I know that earlier we moved all
19 | of these exhibits into evidence. I think it would be helpful
20 | if there was at least as to the -- the transcripts, if there
21 | was some further description for the record of what they are.

22 | MR. GAY: Certainly, Your Honor.

23 | THE COURT: So let's go through them.

24 | MR. GAY: If you'd like me to do that, I certainly
25 | will.

1 THE COURT: Before the closing statements, I think
2 it's important, okay?

3 MR. GAY: Yes. Okay.

4 And I'm going to go in the order that I have here,
5 Judge, which would be Government Exhibit PB1-A would be
6 excerpts from recorded conversations involving Mr. Bergrin
7 and the cooperating witness, the individual referred to as
8 the hit man in the indictment, and there are various excerpts
9 from various transcripts there. Total of --

10 THE COURT: They're excerpts. They're not --

11 MR. GAY: Yes, they're not complete transcripts,
12 they are excerpts, Your Honor, yes.

13 The second exhibit is TM1-A. Those are recorded
14 conversations of Thomas Moran again in excerpt. And that is
15 for a conversation that took place on December 8th, 2008.
16 Again, Thomas Moran being the charged codefendant of
17 Mr. Bergrin in this case.

18 Exhibit PB2 is an excerpt of the testimony of
19 Anthony Young at the William Baskerville trial for murdering
20 Kemo Deshawn McCray, conspiring to murder Kemo Deshawn
21 McCray.

22 THE COURT: And that was before.

23 MR. GAY: That was before Judge Pisano.

24 THE COURT: Okay.

25 MR. GAY: Exhibit 3, PB3 is the certification of

1 special agent in support of the government's request for a
2 detention. This is to be distinguished from Government's
3 Exhibit 1 in that PB3 contains the handwritten notes of
4 Special Agent Smith, the agent who testified today.

5 PB4 is our copy of three checks, one from Gerald N.
6 Kaminski's [phonetic] account, one from Susan Barrone
7 [phonetic] account, and a third one from Gary Bootes'
8 account.

9 PB5 is an excerpt from a transcript between
10 Mr. Bergrin and the person marked to CS. On this transcript,
11 the CS is actually the same informant from the prior
12 transcripts, the person identified as the hit man in the
13 indictment.

14 THE COURT: Any date on that?

15 MR. GAY: That, Your Honor, it's not on the
16 transcript itself, but if memory serves correct, that
17 occurred on 12/9 of 2008, December 9th, 2008.

18 Government Exhibit PB6 is an excerpt from an
19 FBI 302. And Government Exhibit PB6-A contains a number of
20 documents, and these are documents that were recovered by
21 the -- in connection with the Manhattan DA's Office search of
22 Mr. Bergrin's office, I believe in January of 2007,
23 January 10th, if memory serves correct.

24 Okay. And those are all the documents, Your Honor.
25 Again, other than Government Exhibit 1, which is Agent's

1 Smith certification, which I didn't describe, but I just did
2 not.

3 THE COURT: Okay.

4 MR. SHARGEL: May I, Judge?

5 THE COURT: Yes.

6 MR. SHARGEL: Your Honor, I don't want to repeat
7 what's in our memorandum, and I don't want to repeat the
8 arguments that I made yesterday. But I'd like to put
9 everything in context. And it's really in the context of
10 those cases that I cited to Your Honor early this morning in
11 the letter of May 28th, because those are cases where the
12 Court found applying the provisions of the 1342, recognizing
13 that there is no presumption, either conclusive or
14 rebuttable, that a death penalty case should be treated
15 differently under the law. And I rely on those cases.

16 But here's what we have: Yes, there's a grand jury
17 indictment. There's no question about that. And I recognize
18 the significance of the grand jury indictment.

19 But the provisions of 3142(g) also say that the
20 Court is permitted, indeed required, to take into account the
21 weight of the evidence. And what was put before you
22 yesterday or in anticipation of yesterday was this
23 certification, which I submit is not really a certification
24 at all. I objected to that last question. It actually is
25 a -- is -- the answer to it is contained in the certification

1 | itself, because the first line says that it's submitted under
2 | penalties of perjury.

3 | But all of the information that was put before you,
4 | essentially to overwhelm you with the idea that Paul Bergrin
5 | is essentially a walking crime wave, that he has committed
6 | murders, obstruction, acts which deal with the very heart of
7 | the criminal justice system, putting you as the fact finder
8 | and as the magistrate judge in a position where it's
9 | simply -- it was simply overwhelming.

10 | And what I intended to demonstrate, and I hope I
11 | did demonstrate, and I argue that I did demonstrate, what I
12 | wanted to establish is that this certification is not
13 | adequate because of the foundation on which it rests. There
14 | is -- Your Honor has probably dealt with hundreds, if not
15 | thousands, of search warrants. Agents typically come before
16 | you and prosecutors come before you and describe the
17 | reliability of the informant, past history with the
18 | informant, corroboration of the informant.

19 | And here you've heard nothing in that whole section
20 | that goes beyond the charges that are contained in the
21 | indictment, the 2004 murder charge and the conspiracy to
22 | murder charge in related statutes in -- of counsel, dealing
23 | with what happened in 2008. I'll get to those two charges in
24 | a moment.

25 | But I think Your Honor -- and I respectfully submit

1 | that Your Honor should discount what the government has put
2 | before you in that certification. It's not a question of
3 | whether the agents were busy and who submitted the
4 | certification. We're beyond that.

5 | I don't -- I don't quarrel with this agent's
6 | testimony and his candid testimony about what he knew, but
7 | more importantly about what he didn't know. It does not
8 | appear that anyone corroborated the information that's
9 | contained in the -- certification, and I think for that
10 | reason, we have to look only to the charges.

11 | Now, as I said yesterday and I'll say again today,
12 | the government's free to rely on the grand jury indictment,
13 | but they didn't do that. They wanted to discuss -- they
14 | chose the battle. They wanted to discuss the weight of the
15 | evidence in addition to the grand jury indictment. They
16 | didn't come before you and say the grand jury indicted and
17 | there's case law that says that's enough for you to find
18 | probable cause and to detain. They wanted to talk about the
19 | weight of the case, the second factor, because the first
20 | factor, nature and the circumstances of the offense, so
21 | obviously when we deal with the nature and circumstances of
22 | the offense, we're dealing with an indictment, so that's the
23 | charge.

24 | But the second factor under 3142(g) is the weight
25 | of the evidence. And look at what we have. I argued

1 | yesterday that the murder of Deshawn McCray was essentially a
2 | one-witness case.

3 | But there are other curious properties about this
4 | case. As I understand it, and I don't think I'll be
5 | contradicted, the conversations that they talk about were
6 | allegedly captured on a wiretap in 2003 and 2004. And the --
7 | when the death occurred in 2004.

8 | Judge, this is 2009. There's been a trial in this
9 | courthouse where those charges were brought before a jury.
10 | And the fact remains that Mr. Bergrin was not charged in all
11 | of those years. There was -- there was no charge brought
12 | against him --

13 | THE COURT: How does that go to the weight of the
14 | evidence?

15 | MR. SHARGEL: Because -- because I'm saying --

16 | THE COURT: How does it go to weight?

17 | MR. SHARGEL: -- I'm saying that -- what I see here
18 | is a thin, one-witness case. This man Anthony Young has
19 | gotten on the stand and -- at a prior trial and has testified
20 | that there were conversations with Mr. Bergrin, and it's on
21 | those conversations which the government case rests. It's
22 | obvious what has occurred here. They are hoping to gain
23 | strength in connection with that murder charge by the -- by
24 | joining as part of a RICO enterprise, the allegations in
25 | connection with 2008 and what happened in December of 2008.

1 THE COURT: Why don't you talk a little bit --
2 you've talked about 2004. We've talked about through
3 cross-examination some of the state court cases. But what
4 hasn't been discussed by you is the tape regarding Esteves.
5 Why don't we -- why don't we jump to that, because I
6 anticipate, based on the briefs that they submitted and the
7 certification, that is going to be a large part of their
8 argument. And it's what we talked about yesterday a little
9 bit, the Baskerville issue, and then we have the Esteves,
10 where there's a tape, and I'd like you to address what's
11 contained on that tape.

12 MR. SHARGEL: Here's my -- here's what I have to
13 say about that tape. They put, as you just heard moments
14 ago, an excerpt in front of you. I asked for production of
15 all the tapes, so I could be on the same -- you know, on the
16 same level as the prosecutors who have access to all the
17 tapes, so obviously I don't have access to a larger context.
18 I have what Your Honor has.

19 And here's what I'll say about it. This happened
20 in December -- the last conversations were December of 2008.
21 And the theory of the government's case is that Mr. Bergrin
22 had ordered a hit, and Mr. Bergrin was going to supply guns,
23 you know, the excerpts that are contained in the
24 certification, that he was a potential supplier of guns and
25 location.

1 Well, 2008 comes and then 2008 goes. Mr. Bergrin
2 is not arrested until six months later in May of 2009. And
3 in those ensuing days, weeks, or months, there was no --
4 there was not a weapons supply to this confidential
5 informant. There was not a location of a witness, and I said
6 yesterday, and I'm sure Your Honor has it in mind, that --
7 that the purported victim or intended victim of this
8 purported murder plot was in jail at the time and -- and not
9 reachable by -- with any effort to corrupt or kill him. And
10 nothing happened. Nothing happened in those six months that
11 would corroborate anything that the government is alleging
12 here.

13 THE COURT: When you say nothing happened, what do
14 you mean? The undercov- -- according to the tapes, the
15 undercover, the confidential informant was the alleged hit
16 man. And that's why nothing happened.

17 MR. SHARGEL: Well, I don't mean nothing happened.

18 THE COURT: But what -- nothing happened within six
19 months, but the fact that nothing happened in six months, how
20 does that go to the weight of the evidence? Because what I
21 haven't heard is, well, you know, the intended victim was in
22 jail and not reachable. Other than that fact and that six
23 months expired, there's no explanation proffered for some
24 pretty damning dialog on that tape.

25 MR. SHARGEL: The --

1 THE COURT: And that is what I don't have an answer
2 to.

3 MR. SHARGEL: The explanation is this: One, I'm at
4 a disadvantage because I don't all the tapes. I have to --
5 Judge, any lawyer looking at this would say, the first
6 question is, well, could I see what the charges really are
7 because they're contained in this tape. We have an excerpt.

8 And moreover, when I say nothing happened, I'm not
9 pointing to the fact that a confidential informant didn't --
10 didn't execute the person. That's not the point. The point
11 is that the government it had -- let me start again.

12 That Mr. Bergrin does nothing following that
13 conversation to support what it is the government is
14 claiming. He doesn't come back with the location of the --
15 of the purported victim. He doesn't do anything that the
16 government says is the meaning of that -- or within the
17 meaning of that conversation. I think the fact that he does
18 nothing is important. I've been in tape cases before. I've
19 been in cases where the tapes seem awful taken out of
20 context, but ultimate -- ultimately acquittal resulted
21 because the jury had the full picture.

22 And I think that what Mr. Bergrin said and did or
23 more importantly didn't do, didn't say, didn't act, but in
24 the six months between that conversation and his arrest
25 speaks volumes of what was on his mind, because at the end of

1 | the day, the case will come down to what was meant, what was
2 | intended, and what was on my client's mind. And there is
3 | nothing in the actions that he took following that
4 | conversation to suggest that it was anything untoward,
5 | because he does absolutely nothing. He doesn't supply guns.
6 | He doesn't supply location. He doesn't go forward in any
7 | manner or form with this purported plot.

8 | But that's only part of the argument. It's part of
9 | the argument for the following reason: Because the statute
10 | does not say look at the nature and circumstances of the
11 | case, look at the charges and look at the weight of the
12 | evidence, and that's the end of it. There are several more
13 | questions within § (g), and in § (g), the history and
14 | characteristics of the defendant, and the history and
15 | characteristics of this defendant weigh heavily in our favor.

16 | THE COURT: Let me ask you one question on that
17 | that was raised by the prosecutor yesterday: What about,
18 | during the search, the fact that an unregistered handgun was
19 | found in his house?

20 | MR. SHARGEL: It's not an unregistered handgun.
21 | The handgun belongs to -- or belonged, because he's now
22 | deceased -- to Mr. Bergrin's father-in-law. The authorities
23 | didn't even check that. I can tell the person's -- the name,
24 | David Gottfurcht, G-o-t-t-f-u-r-c-h-t. That's who the gun is
25 | registered to. He died something like 25 years ago.

1 THE COURT: Okay.

2 MR. SHARGEL: The gun has been in the house for 25
3 years. Any test or any examination of that weapon, including
4 the examination of the weapons that Mr. Bergrin had, would
5 show that these weapons were not carried. It's not true -- I
6 know it was reported to you by pretrial services -- it has a
7 carry permit; my understanding is that he does not have a
8 carry permit. He has a permit to have a weapon in the house
9 or whatever is needed to have a weapon in the house. The
10 guns are registered. That does not present a danger.

11 And on that subject, may I just say one thing and
12 then I want to get back --

13 THE COURT: Sure.

14 MR. SHARGEL: -- to the 3142(g).

15 The assessment by a very capable pretrial services
16 officer that was put before you addresses both the
17 possibility of risk of flight and assessment of danger. It's
18 the last page of the pretrial services report. May -- it's
19 very short. May I -- may I read this?

20 THE COURT: Sure.

21 MR. SHARGEL: The pretrial services officer, again
22 a very experienced officer, very competent officer, says that
23 the following factors may suggest risk of non-appearance:
24 Potential penalties if convicted of the instant offense.

25 But we know from statute that that's not

1 outcome-determinative. It's not a matter of look at what the
2 penalties are, whether it's -- it's years in prison or
3 whether it's death and that's the end of the inquiry.

4 Possession of a passport, Mr. Bergrin, let me make
5 it plain, does not have passports in any other names or any
6 other kind. He has one passport, which is now in the
7 possession of government.

8 Foreign travel, the government has his passport.
9 They can see that he -- that, yes, he's traveled, but he
10 hasn't been to the three countries in -- in many, many years,
11 the three countries that are referenced in the certification.

12 And what I'm proposing of this case is 24-hour
13 house arrest, strict house arrest, with a bracelet and a GPS.

14 And then assessment of danger, there are only two
15 things. One is the possession of the firearms permit and
16 firearms in the residence. There are no firearms in the
17 residence. And if he's under strict 24-hour detention in his
18 home, what is the suggestion? I know the government raises
19 this about some other gun that -- what is the suggestion?
20 That someone's going to come over to the house who's a
21 potential witness in this case and then Mr. Bergrin's going
22 to shoot him? I mean, that's a preposterous suggestion.

23 And again, assessment of danger, nature of the
24 instant offense.

25 Now, the cases that I cited this morning, include

1 cases involving murder of government witnesses -- or -- and
2 it's not -- that alone cannot do it, because Your Honor's
3 duty-bound, I respectfully submit, to look further. And I
4 think that the conditions and the bail package -- and I want
5 to make this clear, Judge, I don't think you were left with
6 the impression yesterday, when I talked about the -- I guess,
7 the New York style, eastern southern districts using private
8 companies and Your Honor wasn't -- wasn't impressed with that
9 notion and observed that it's not done in New Jersey.

10 But I wasn't suggesting that alone. Your Honor
11 knows that, I believe. And I was suggesting that the
12 third-party custodian be Mrs. Bergrin's wife [*sic*], who he is
13 in the house with, who would sign the bond, who does have
14 something to lose, and is fully capable, this women who's a
15 school teacher, is fully capable of fulfilling that role.

16 So with the -- the package, the bail package that
17 I've put forward, is, I think, more than adequate to address
18 the concerns of risk of flight and danger to the community.

19 I -- I tell -- I tell you again, there's no
20 evidence before you that Mr. Bergrin has one dollar in assets
21 abroad. There's no evidence that's been put before you,
22 whether this officer believes it's true or doesn't believe
23 it's true, he is relying on other information that was not
24 corroborated. The record will speak for itself. He had --
25 no one came in here -- of all the documents that were put in

1 | evidence this morning, no one came in here and said he has a
2 | house offshore. He has a huge yacht offshore. He has
3 | something -- he has assets offshore that he can avail himself
4 | of. The answer is none. None of it was put before you.

5 | He -- if you look at history and characteristics of
6 | this defendant, that issue weighs heavily in our favor. The
7 | only -- the only criminal offense, and Your Honor knows
8 | about, it's been discussed in the memoranda that's been
9 | submitted to you, deals with what is now a misdemeanor
10 | conviction in the state of New York.

11 | And given all of the defendant's background, his
12 | background in the military, his background in the district
13 | attorney's office, his background in handling thousands of
14 | cases as a -- as a defense lawyer over his career. And where
15 | his roots are deeply placed in this New Jersey community. He
16 | doesn't have roots established anywhere else. This is where
17 | he lives. This is where he has lived for virtually his
18 | entire adult life. This is where his family is. This is
19 | where his ailing mother is. And he's not walking away from
20 | that.

21 | So if Your Honor were to find by a preponderance of
22 | evidence that there is a risk of flight, because it's never
23 | zero as the cases say, and if Your Honor were to find by
24 | clearing and convincing evidence, which Judge Weinstein
25 | [phonetic] has described as an 80 percent standard clear,

1 | convincing evidence that he's a danger to the community, the
2 | inquiry doesn't stop there. Your Honor knows that the
3 | government still has the burden of proof to -- to convince or
4 | persuade you that there is no condition or combination of
5 | conditions that would assure the safety of the community for
6 | his appearance in court.

7 | Now, I think under all the circumstances, you know,
8 | Judge, I'll be frank to say, this is a tough case. It's a
9 | tough case because the government has showered you with --
10 | with visions of murder as a matter of practice, corruption
11 | and tampering as a matter of ordinary procedure.

12 | And what I hope to show and I think I did -- I
13 | don't want to repeat myself -- but you don't have that. You
14 | don't have proof of that before you by any standard, not by a
15 | preponderance, and certainly not by clear and convincing
16 | evidence, which is what's required of -- for the danger
17 | aspect. And I again say, that as Judge Weinstein has
18 | rendered an opinion, where he's said that it's at 80 percent
19 | that they -- that that has to be shown.

20 | So for all of those reasons, unless Your Honor has
21 | any further questions, I ask that Mr. Bergrin be released on
22 | the package that I've put before you.

23 | THE COURT: Thank you, Mr. Shargel.

24 | Mr. Gay.

25 | MR. GAY: Thank Your Honor.

1 Your Honor, at the outset I reserved my comments
2 from Mr. Shargel's arguments yesterday till today. I just --
3 before I begin, I want to clarify a couple of things.

4 First of all, the government is relying, of course,
5 on the indictment in addition to everything else. It's part
6 of the record. And just so we're clear, the government is
7 relying on the indictment, the certification of Agent Smith,
8 the testimony of Agent Smith today, the documents that were
9 given to the Court and to Mr. Shargel, as well as the
10 pretrial services report and everything else that's in the
11 record in this case to support detention.

12 I'd like to clarify a couple of other things too,
13 some of which were mentioned yesterday. First, the defense
14 mentioned that -- yesterday that the Baskerville case was a
15 state trial. In fact, we know today that the Baskerville
16 case was a federal trial, and not only was it a federal
17 trial, but a federal trial in which Anthony Young testified,
18 and was ultimately believed by the jury in that they
19 convicted William Baskerville, Mr. Bergrin's coconspirator in
20 Counts 3 and 4 of this indictment, with conspiring to murder
21 Kemo Deshawn McCray. That is powerful evidence, Your Honor.

22 In addition, Mr. Shargel mentioned yesterday about
23 some on-the-record comments Mr. Bergrin made regarding his
24 duties to defend clients. And one of the interesting things
25 that the defense didn't mention is that during one of those

1 on-the-record conversations, Mr. Bergrin admitted that he
2 passed on the name of Kemo Deshawn McCray, the cooperator,
3 from William Baskerville to Hakeem Curry. Again,
4 corroborating precisely what Anthony Young testified to at
5 trial.

6 I'm not going to go into the other evidence of that
7 crime as it's not necessary, Your Honor. There's plenty of
8 evidence here. It's presented in the indictment. The grand
9 jury has voted an indictment on this case. And we've
10 given -- provided the -- the Court with a small picture of
11 the evidence in that case.

12 But let's move on to the next incident charged in
13 the indictment, the murder -- the plot to kill witnesses in
14 the Vicente Esteves case. Through six months of
15 conversations, the government -- and again, part of the
16 record are excerpts from those transcripts, and I submit,
17 Your Honor, those transcripts are unequivocal: Make it look
18 like a home invasion robbery. Put on a ski mask. Take all
19 the money. Under no circumstances, can it look like a hit.

20 Powerful, powerful evidence, the words coming from
21 Mr. Bergrin's mouth.

22 I'd also like to address one of the things that
23 Mr. Shargel said yesterday, and again, it appears to be one
24 of the cornerstones of his argument, that this could not have
25 taken place. And part of the reason that he says the plot

1 | could not have taken place is because the intended victim,
2 | Junior, the Panamanian, was actually in jail the entire time.
3 | Well, that is simply not true.

4 | The facts are, Your Honor, that Junior, the
5 | Panamanian, was arrested on March 30th of 2009, months after
6 | the alleged -- the plot contained in the indictment. So he
7 | was out. He was somebody that could have been killed. And
8 | the only reason he wasn't killed, I submit to Your Honor, is
9 | that Mr. Bergrin, unfortunately for him, hired a hit man who
10 | was cooperating with the government. That is the sole reason
11 | that Junior, the Panamanian, is alive today.

12 | Now, Mr. -- the defense also mentioned that the
13 | government was -- and he phrased it a couple of different
14 | ways -- but yesterday he mentioned that we were ex -- the
15 | government was engaged in hyperbole in this case. And
16 | absolutely, Your Honor, I guess I'm not quite as familiar
17 | with that term as some others might be, but I don't see this
18 | in any way, shape, or form as hyperbole. It's fact, not
19 | hyperbole, that Anthony Young testified in trial subject to
20 | cross-examination, testimony that was believed by the jury
21 | that Mr. Bergrin was integrally involved in the murder of
22 | Kemo Deshawn McCray. It is fact, not hyperbole, that
23 | Mr. Bergrin engaged in six months of conversations with a
24 | cooperator for the government in which he plotted to kill
25 | witnesses against Vicente Esteves. It's fact, not hyperbole,

1 | that the government has additional eyewitnesss that directly
2 | connect Mr. Bergrin to other acts, plots to kill witnesses,
3 | plots to tamper with witnesses, and plots to bribe witnesses.

4 | In addition, one of the things that Mr. Shargel
5 | seized on during the cross-examination of Agent Smith is a
6 | very minimal section of the certification. And that section,
7 | I want to read the paragraph here briefly, because I think
8 | it's very important to demonstrate that this is not
9 | hyperbole.

10 | Paragraph 18: In addition to the murders and other
11 | plots to kill witnesses set forth above -- that's referring
12 | to the plot to kill, the murder of Kemo Deshawn McCray and
13 | the plot to kill witnesses against Vicente Esteves -- there
14 | are additional examples of cases in which clients represented
15 | by Bergrin thwarted or attempted to thwart criminal
16 | prosecution after witnesses against them were murdered.

17 | The government did not overreach and submit
18 | Mr. Bergrin was directly involved in these, but, Your Honor,
19 | they establish a pattern. If you look at the numerous,
20 | numerous examples and couple those with the facts that we
21 | know from eyewitnesss that Mr. Bergrin operates this way,
22 | that he's done it two occasions previously that we have sworn
23 | testimony about or tape-recorded conversations about, and we
24 | have additional other instances in which eyewitnesss say,
25 | this is the way Mr. Bergrin operates, and you analyze the

1 | examples, the scores of examples after that are set forth in
2 | this certification, it's not only relevant, it's also very
3 | persuasive, the government would argue, showing that this is
4 | a pattern of activity that Mr. Bergrin engages in. He's
5 | engaged in it for years. He will continue to engage in it if
6 | the Court allows him to do so.

7 | I will leave this, Your Honor. I won't belabor the
8 | points that I made yesterday or the testimony or the
9 | certification. But I'll leave the Court with one --

10 | THE COURT: Let me ask you one question. What
11 | about today's -- Mr. Shargel spent a lot of time talking
12 | about financial resources on the issue of risk of flight.

13 | MR. GAY: Okay, Your Honor, I will certainly
14 | address that.

15 | THE COURT: Yeah, why don't you address that.

16 | MR. GAY: Your Honor, the -- it's uncontroverted
17 | that Mr. Bergrin has assets in this case. Those assets are
18 | listed in the -- in the certification. Mr. Shargel does
19 | not -- does not contest that.

20 | What is contested, Your Honor, is the assets that
21 | Mr. Bergrin has hidden. The government claims that he has
22 | hidden assets. Obviously, the defense says he doesn't. And
23 | I know that a lot of time was spent on cross-examination
24 | regarding that.

25 | But I will point out the following, Your Honor.

1 We -- the government has testimony from confidential
2 informants indicating that Mr. Bergrin has assets and
3 business contacts overseas. A search warrant executed by the
4 Manhattan DA's Office corroborates that there are documents
5 that indicate that Baccarate Limited -- Baccarate Limited
6 Promotions, Ltd., is a corporation that Mr. Bergrin is a part
7 of, that is -- it is incorporated in the Dominican Republic;
8 that he does have joint venture agreements with other
9 companies, including "kit plan" [phonetic], which is a
10 Japanese company; that there are letters in here indicating
11 that Mr. Bergrin has told others that he has plans to open up
12 casinos in Costa Rica, that he has gambling machines that
13 things of that nature. There is also --

14 THE COURT: Let me ask you, other than informant --
15 confidential informant testimony that he has assets, any
16 other direct evidence of assets other than --

17 MR. GAY: No, Your Honor.

18 THE COURT: Okay?

19 MR. GAY: -- there isn't. There is not.

20 THE COURT: Okay.

21 MR. GAY: Other than what's set forth in the
22 certification, we have no other evidence of hidden assets.

23 THE COURT: Okay.

24 MR. GAY: But I would submit, Your Honor, that he
25 does have assets and Your Honor will obviously weigh what --

1 | you know, the weight of that.

2 | But I think the core of this case, Your Honor, is
3 | not -- although I -- the government submits there is a
4 | serious risk of flight, the real core of this case,
5 | Your Honor, is the danger Mr. Bergrin presents to the
6 | community, a danger which will only be mitigated by one
7 | thing, and that is detention.

8 | I'll leave you with this, Your Honor: Mr. Bergrin
9 | participated in numerous plots to kill witnesses. Two that
10 | we know of, that we again, direct testimony from Anthony
11 | Young. Another one, second one, six months of tape-recorded
12 | conversations. Additional ones that we have CI testimony
13 | about or we expect CI testimony about. He did that so that
14 | he could get his clients off of a case.

15 | He sits here today accused of a death
16 | penalty-eligible crime and numerous other serious crimes. If
17 | he is willing to go to those lengths simply to win a case for
18 | his client, he's absolutely going to be doing the same thing
19 | to win his own freedom.

20 | There -- on those grounds, Your Honor, and for
21 | everything else we said, the government believes the only
22 | reasonable bail condition in this case is detention.

23 | THE COURT: Thank you.

24 | MR. SHARGEL: Judge, I have -- I have a number of
25 | things to say.

1 First, I want to say one thing about flight that I
2 failed to mention, I should have made it in my argument.

3 There -- one of the cases that I cited to you,
4 United States against Ross, the case from Southern District
5 of Ohio decided in January of 2007, took particular note of
6 the fact that the defendant in that case, again a death
7 penalty case, that the defendant in that case knew that there
8 was an investigation, knew that she might face charges in the
9 case, was aware of the investigation.

10 So I go back to an article that appeared on the
11 front page, not the metropolitan section front page, but the
12 real front page of the *New York Times* in January of 2007,
13 where reference was made to the New Jersey investigation in
14 New York, that -- that's two and a half years ago. And there
15 were other disclosures that were made during the Manhattan
16 case.

17 Mr. Bergrin is well aware of this investigation.
18 He took no steps to flee. He made no preparation to run. He
19 has stayed in this community, and in the face of those
20 allegations that were spread on the pages of *New York Times*
21 and other newspapers as well, and he's here. So I think that
22 that's something that's worthy of note. And I think that
23 that's part of the calculus in the case.

24 But it doesn't end there. See, at bottom, Judge,
25 what the government presses over and over again, is that this

1 | is the -- and these are Mr. Gay's words, not mine -- the way
2 | he operates. And they -- they make that inference about the
3 | way he operates by the fact that cases that he's been
4 | involved in -- and I've mentioned that he's handled thousands
5 | of cases -- yes, he defends people charged with murder. Yes,
6 | he defends people charged with being members of violent
7 | gangs. But the fact that there are murders that occur in
8 | cases like that should come as no surprise to anyone in this
9 | courtroom.

10 | Again and again I asked the agent whether there was
11 | any participation by Mr. Bergrin in these examples. To
12 | simply say he passed the name on and that's the way he
13 | operates, that he passed the name on, doesn't address the
14 | issue at all. It -- it evidences a misunderstanding of the
15 | defense function. A defense lawyer is duty-bound by the
16 | canons of ethics, as Your Honor well knows, that a defense
17 | lawyer is duty-bound to find out all that can be found out,
18 | all the facts that can be found out about the case, who the
19 | witnesses are, and what steps may be taken to prepare
20 | cross-examination to impeach the credibility of those
21 | witnesses.

22 | If this were a white-collar case, no one would
23 | blink an eye. If this were a case involving a corporation
24 | and the lawyers in the case, the defense lawyers were
25 | engaging investigators to go out and find out who the

1 witnesses are, there is no problem. The way to find out
2 about witnesses in any case, whether it's a corporate case or
3 a gang case, is to talk to people who know the potential
4 witness or someone described as a witness and find out as
5 much information as possible about that witness. To do
6 anything less would be irresponsible, professionally
7 irresponsible.

8 So passing on the name to other members of the gang
9 does not suggest that someone is involved in a murder plot.
10 The passing on the name to other people who know that witness
11 is perfectly permissible --

12 THE COURT: I hear you, but I also think that the
13 testimony of the agent and what's contained in the
14 certification was not simply in every -- on every example in
15 the certification was I have no evidence that Mr. Bergrin
16 had -- did anything other than speak some -- speak the words
17 that you're referring to.

18 But in other instances, he said, I don't have
19 firsthand knowledge, but I did get that knowledge from the
20 assistant prosecutor. I got it from a confidential
21 informant. I'm looking at paragraph 22(a), and it says: The
22 daughter lied in court and Velez was acquitted. The daughter
23 later forward to admit in open court that Bergrin coached her
24 to lie on the stand.

25 I think his testimony was I don't have firsthand

1 | knowledge of that. So just to fairly characterize the
2 | testimony, I'm not -- I hear your point on a lot of it, but
3 | there were other instances of other examples where the answer
4 | from the agent was just, I don't have firsthand knowledge.

5 | MR. SHARGEL: But it was more than that, most
6 | respectfully. It was -- it was, I don't even know where the
7 | knowledge came from. The secondhand knowledge that he notes,
8 | candidly notes, on the handwritten -- Exhibit F contained his
9 | handwritten notes.

10 | THE COURT: On some of them, that's true. But on
11 | others he said, and we can go look at his testimony, the
12 | record will speak for itself. My notes reflect that he did
13 | say, I got the information from prosecutors or from the FBI
14 | agents who interviewed, second- and thirdhand information,
15 | but it wasn't completely bare information. It wasn't just
16 | inference, inferential. It was second- and thirdhand
17 | hearsay.

18 | MR. SHARGEL: Well, Judge, it's worthy of note,
19 | then, in the years that have passed, that Mr. Bergrin has
20 | never been charged or accused of any wrongdoing in connection
21 | with those cases. It -- there is -- there are strict
22 | controls over people who practice law, over lawyers, and
23 | there are disciplinary proceedings that may be invoked.

24 | And here you have a situation where according to
25 | the certification, a young girl came forward and said that

1 her testimony had been tampered with by Mr. Bergrin, and this
2 is years ago, and nothing is said, no report is made to the
3 state community -- committee that deals with these matters?
4 Nothing was referred to a prosecutor for prosecution? If
5 someone said in open court that this had occurred, every --
6 what happened? Everyone just let it go by, wink, wink? I
7 don't think so. No complaint at the grievance committee? I
8 don't think so.

9 So that to me squarely refutes this notion. People
10 coming in now and making accusations -- and you're right, the
11 record will speak for itself, you have the notes, and very
12 shortly, we'll have the transcript. But the testimony was
13 that FBI agent got it from -- got it from assistant
14 prosecutors. Where they got it from, who knows? You don't
15 have that before you. Where did they get it from? And I
16 think that it's of little weight. The fact that he was never
17 accused, never charged, I think is significant.

18 Now, another thing, I frankly never heard anyone
19 stand up in court and say that we have strong evidence
20 because another jury convicted another person under -- under
21 other circumstances in a courtroom in this building. My
22 understanding -- I've read the Baskerville transcript -- my
23 understanding is that there were numerous other witnesses who
24 testified that he -- that the defendant in that case made
25 admissions about the murder. And the fact that one jury

1 renders a verdict of guilty when the charges, as Mr. Gay
2 said, I think he said Counts 2 and 3, I may be wrong, but
3 there were two counts or three counts that dealt with the
4 murder. There were drug-dealing counts. There were other
5 counts in the indictment, as I recall. I'll be corrected if
6 I'm wrong. But the fact that a jury faced with that evidence
7 and the testimony, has -- had rendered a verdict in favor the
8 government is not that compelling.

9 I say again, I say again, this is a one-witness
10 case. And I'm not so sure that I heard anything to refute
11 that. They can talk about circumstances. They can talk
12 about other charges. They can try to gain evidentiary weight
13 in different ways. But I think in assessing the strength,
14 the weight of the evidence in that -- in that charge, their
15 principal charge, I think they come out behind.

16 I think that under all the circumstances,
17 Mr. Bergrin should be released under conditions, and here's
18 what I'll leave you with. Here's a bail package that's been
19 before you since yesterday or day before yesterday. It's
20 been discussed at length. The government doesn't refute the
21 proposition. I didn't hear them concede it. Maybe they
22 conceded it yesterday, that they do bear the burden and what
23 those burdens are, the different burdens.

24 But there's been almost nothing said about the
25 conditions. There's been nothing said about why the

1 conditions won't work. Your Honor is -- has released people
2 to 24-hour house arrest who had substantial ties in overseas,
3 but I think that Your Honor recognized the efficaciousness of
4 the detention and the nature of the detention.

5 One thing we don't have in New York that you have
6 in New Jersey is the GPS system. For some reason, which I
7 can't figure out, New York hasn't embraced the GPS system.

8 THE COURT: New York has always been -- New
9 Jersey's always been ahead of the curve.

10 (Laughter in the courtroom)

11 MR. SHARGEL: You didn't like my guard service, but
12 okay. I'll accept that, Judge.

13 Your Honor, I think under the circumstances that
14 this case after today's hearing, starts to resemble, feel
15 like, and look like the cases -- the death penalty cases that
16 I cited to Your Honor, and I ask that Mr. Bergrin be
17 released.

18 THE COURT: Thank you.

19 Very briefly, Mr. Gay?

20 MR. GAY: Yes, Your Honor. I would just like --
21 I'm not going to rehash. We did argue yesterday about why
22 the bail conditions were improper, but there is one thing I
23 just want to -- since Mr. Shargel raised the cases that he
24 brought to the Court 's attention this morning, I just want
25 to briefly distinguish those.

1 The first two of those cases -- well, actually the
2 first three of those cases have nothing to do with killing
3 witnesses. So I think that right off the bat that puts this
4 in a different -- in a different light.

5 Two of those, there was evidence -- exculpatory
6 evidence brought to the Court's attention after the
7 defendants were initially detained. Again, nothing like that
8 here.

9 The one that -- the last one, Eisheid, does deal
10 with a witness, but the difference there, Your Honor, is that
11 the government -- the Court did not detain Eisheid in large
12 part because the government did not present any evidence
13 whatsoever. The government wanted to go by way of proffer
14 only. The Court rejected that, and that's why Mr. Eisheid --
15 why Eisheid was let out.

16 Here we don't have that. We have testimony of
17 witnesses, we have various documents, we have a
18 certification, all those things, so all these cases are
19 distinguishable, and this is a unique case which does
20 require detention.

21 THE COURT: Mr. Gay, answer Mr. Shargel's looming
22 question, which is why the conditions he's proposed are not
23 acceptable to the government?

24 MR. GAY: Your Honor, in short, the conditions
25 proposed are not acceptable to the government because at the

1 | end of the day, they rely completely on Mr. Bergrin
2 | voluntarily following the rules of the Court. And to expect
3 | that he's going to do that, given his history, again, he has
4 | tampered with witnesses, that he's bribed witnesses, the
5 | indictment itself charges he ran an enterprise, who one of --
6 | whose -- one of whose purpose was to tamper with witnesses.
7 | That's in the indictment. That has been found by the grand
8 | jury.

9 | So, he is -- you know, his history and the unique
10 | character of him, indicates that he will not follow the rules
11 | of the Court. He hasn't done it before. He will not do it
12 | in the future. Couple that with the fact that he is facing
13 | the death penalty in this case, he has every incentive --
14 | there is not a single person on the planet who has a greater
15 | incentive to kill witnesses than Mr. Bergrin to get out from
16 | underneath this case.

17 | Given his history and given that large incentive
18 | that he has here, there is no way that he is not going to --
19 | that he is going to follow, voluntarily follow the Court's
20 | rules not to have a cell phone, not to communicate with
21 | people to try to get witnesses killed, not to engage in other
22 | activities that are prohibited by the Court.

23 | The only thing that stands between him doing that
24 | is a company that is going to be hired by Mr. Bergrin,
25 | granted they may be approved by the government, but they're

1 going to be hired by Mr. Bergrin, they're going to do
2 periodic checks, to see whether, in fact, he's not talking on
3 the cell phone to the person who is going to kill witnesses
4 in this case; whether he's not using the computer to try to
5 locate a hit man; whether he's not having people visit him
6 who are going to carry out these tasks. There is no way that
7 in any way, shape, shape or form protects the community in
8 the way, by contrast, that him being in detention would,
9 where the United States Marshal Service is in charge of
10 making sure that he does not contact anybody on the cell
11 phone that could cause witnesses to be harmed, intimidated,
12 or killed; that he doesn't have visitors that are plotting to
13 kill witnesses. There is -- the -- the bail package is
14 completely inadequate.

15 And I will say again, not to harp on the money, the
16 monetary part of it, Judge, but pursuant to the local rule,
17 he's only putting up a \$500,000 package here. He had a
18 million dollar package in New York, and that did not stop him
19 from trying to kill witnesses in the Esteves case.

20 There is no question that with the incentive he has
21 now, that the package, even with home confinement is
22 completely inadequate.

23 THE COURT: Okay.

24 MR. SHARGEL: Have 30 seconds?

25 THE COURT: Sure.

1 MR. SHARGEL: Okay. 30 seconds.

2 No comment has been made about the wife as
3 third-party custodian, that he will have the signature and as
4 I offered yesterday, not only his own signature and his
5 wife's signature, but his nephew who's just finished first
6 year of law school in Maine, his 78-year-old mother, and his
7 daughter. There is morale suasion there, and morale suasion
8 is an important component of the bail. I think that's my 30
9 seconds.

10 THE COURT: Okay. Thank you. Anything further
11 from anyone?

12 MR. GAY: No, Your Honor.

13 THE COURT: Okay. I will take this matter under
14 advisement. I will get a written opinion out promptly,
15 hopefully by tomorrow. Okay. It'll be electronically filed.
16 Okay? If there's any delay, I'll let you know, both of you.
17 Okay? Thank you.

18 MR. GAY: Thank you Your Honor.

19 MR. SHARGEL: Thank you, Judge.

20 THE CLERK: All rise.

21 (Conclusion of proceedings)

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Certification

I, Sara L. Kern, Court-approved transcriber, certify that the foregoing is a correct transcript from the official electronic sound recording of the proceedings in the above-entitled matter.

s/ *Sara L. Kern*

June 1, 2009

Signature of Approved Transcriber

Date

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