UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

UNITED STATES OF AMERICA v. PAUL W. BERGRIN	**ELECTRONICALLY FILED** Crim. No. 09-369 (DMC)

GOVERNMENT'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT'S POST-TRIAL MOTIONS

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TABLE OF ABBREVIATIONS

BB	refers to Bergrin's Brief.
ECF No.	refers to docket entries in this case. (When citing to a page of an electronically filed pleading, the Government refers to the page number in the ECF legend at the top of the pleading.)
Exh.	refers to the Exhibits attached to this Brief.
GX	refers to a Government Exhibit admitted at trial.
_T__	refers to the volume number of the trial transcript followed by the page number.

PRELIMINARY STATEMENT

After a seven-week trial, a jury found that Defendant Paul Bergrin misused his law practice to commit a pattern of crimes. Bergrin now requests various forms of post-trial relief. All of those requests should be denied.

First, Bergrin claims that the Government failed to prove that he conspired to murder, or aided and abetted the murder of, Kemo McCray. But Judge Martini rejected identical arguments after the 2011 trial, finding that Anthony Young's testimony alone was sufficient to support guilt on both theories, United States v. Bergrin, Crim. No. 09-369, 2012 WL 458426 (D.N.J. Feb. 10, 2012), just as Young's testimony was sufficient to prove William Baskerville's membership in the same conspiracy, United States v. Baskerville, 448 F. App'x. 243 (3d Cir. 2011). Bergrin's arguments therefore must fail.

Second, Bergrin claims that the Government failed to prove that he intended to evade reporting requirements when he failed to file an IRS Form 8300 reflecting the $20,000 in shrink-wrapped cash he received from informant (and putative hit man) Oscar Cordova. But a rational juror could have inferred that Bergrin (a lawyer) knew that reporting the $20,000 in apparent drug proceeds could have triggered law enforcement scrutiny, and that Bergrin endeavored to avoid that scrutiny by evading the reporting requirement that could have triggered it.

Third, Bergrin seeks a new trial under Rule 33. He claims that this Court should have immunized Jamal McNeil, who (through counsel) invoked his Fifth Amendment privilege in response to Bergrin's trial subpoena. Even if this Court had the authority to immunize defense witnesses to secure exculpatory testimony (an issue the *en banc* Third Circuit is resolving), this Court did not abuse its discretion when it declined to order the

Government to immunize a potential murder suspect whose testimony, even if credited, would not have exonerated Bergrin. Further, Bergrin waived his claim as to Jamal Baskerville by not formally seeking defense witness immunity for him.

Fourth, Bergrin asks this Court to question the jurors to determine whether a March 17, 2013 New York *Daily News* article influenced their deliberations. He reasons as follows:

- This was a long trial and should have produced a long period of deliberations.
- The jury "abruptly" reached a verdict on the third day of deliberations, one day after the *Daily News* published its article.
- Juror 5 supposedly violated this Court's instructions about matters unrelated to press accounts of the trial.
- Therefore, one or more jurors must have ignored this Court's instructions by reading the *Daily News* article and allowing it to influence their verdict.

Bergrin waived any claim by not bringing the article to this Court's attention before the jury was discharged. Further, his speculation provides no grounds for a post-verdict voir dire of the jurors. And his reliance on Juror 5's post-verdict remarks in an effort to prove that the jurors violated their instructions is "so clearly within [Fed. R. Evid. Rule 606(b)] and outside the exception as to make it difficult to give an explanation beyond stating the rule itself: 'we do not permit jurors to impeach their own verdicts.'" United States v. Lakhani, 480 F.3d 171, 185 (3d Cir. 2007) (citation omitted). In any event, Bergrin cannot show that the *Daily News* article caused "substantial prejudice."

Fifth, Bergrin rightly footnotes his request that this Court question Juror 5 to determine "whether he truthfully conveyed his full bias against" Bergrin during jury

selection. Bergrin claims that Juror 5's post-trial observations about the case show that his pretrial exposure to press coverage of Bergrin "colored his perception of the guilt or innocence and credibility of the parties and witnesses." But Bergrin can make that claim only by deploying *six different sets of ellipses* to omit, from his quotation of the juror's remarks, language proving that the juror developed his "perception" about the case *after* he showed up for jury duty, not before. At any rate, Bergrin waived any right to relief by not asking this Court to probe more deeply when Juror 5 disclosed his exposure to media coverage of Bergrin's arrest jury selection and said he could decide the case fairly.

For the reasons set forth herein, this Court should deny Bergrin's motions in their entirety.

PROCEDURAL HISTORY

On June 2, 2011, the Grand Jury returned a 33-count Second Superseding Indictment charging Bergrin with RICO, VICAR, and related substantive offenses. ECF No. 213. On September 19, 2011, over the Government's objection, Judge Martini severed Counts 12 and 13 and ordered the Government to try those two Counts first. ECF No. 236. On November 23, 2011, Judge Martini granted a mistrial after the jury declared that it was hopelessly deadlocked. ECF No. 338.

On November 30, 2011, the Government appealed from Judge Martini's oral order excluding from the retrial on Counts 12 and 13 evidence supporting the Pozo Plot and the Esteves Plot. ECF No. 343. That same day, Bergrin moved for a judgment of acquittal under Fed. R. Crim. P. 29(c). ECF No. 342.

Additional procedural wrangling, see ECF Nos. 344, 350, 351, 352, 353, 354, 357, 358, 359, 360, 363, 364, led to a second Government appeal, ECF No. 361, and a stay pending the outcome of the Government's appeals, ECF No. 365. One month later, Judge Martini denied Bergrin's motion for a judgment of acquittal. ECF Nos. 373 & 374.

On June 15, 2012, the Third Circuit vacated the order excluding evidence of the Pozo Plot, directed that this case be reassigned, and instructed the newly assigned Judge to reconsider the challenged evidentiary rulings and whether any severance was appropriate. United States v. Bergrin, 682 F.3d 261 (3d Cir. 2012). Chief Judge Simandle assigned this case to this Court. ECF No. 377.

The Government then moved, among other things, to try Counts 1 through 26 in a single trial and to admit evidence of the Pozo Plot and Esteves Plot to prove the McCray

murder charged in Counts 12 and 13. ECF No. 381. Bergrin again moved to sever Counts 12 and 13, and opposed admission of the Pozo Plot and Esteves Plot to prove those counts. ECF No. 382.

On September 12, 2012, this Court heard oral argument on and denied Bergrin's motion to sever Counts 12 and 13. 9/8/2013 Tr. at 29-47. One week later, this Court ruled that the Pozo Plot and Esteves Plot would be admissible under Federal Rules of Evidence 404(b) and 403 to prove the murder charged in Counts 12 and 13. ECF Nos. 392 & 394.

The jury was sworn on January 9, 2013, ECF No. 404, and opening statements were presented on January 22, 2013, 1T1–174. On March 5, 2013, the Government rested its case in chief. 28T7631. This Court reserved decision on Bergrin's oral motion for a judgment of acquittal under Rule 29(a). 28T7672. Bergrin thereafter presented a defense case, resting on March 11, 2013. 32T8344.

The jury heard the parties' closing arguments, 34T8541–713, the Government's rebuttal summation, 35T8795–830, and this Court's jury instructions, 35T8833–965. On March 14, 2013, the jury retired to deliberate. 35T8966.

On March 18, 2013, the jury returned a verdict finding Bergrin guilty on all counts. In addition, the jury found that the Government had proved beyond a reasonable doubt all of the racketeering acts charged in Count 1. 37T9013–38; see ECF No. 537.

ARGUMENT

I. There Was Ample Evidence Of Bergrin's Involvement In The Murder Of Kemo McCray.

Bergrin asks this Court to enter judgments of acquittal on Counts 12 and 13. BB4-31. He presses the same three arguments he made in November 2011. See ECF No. 342.[1] Judge Martini rejected those arguments, holding "that the Government presented sufficient evidence from which a rational trier of fact could find Bergrin guilty of conspiring to murder McCray" and "of aiding and abetting the murder of McCray beyond a reasonable doubt." Bergrin, 2012 WL 458426, at *5-*6.

Bergrin contends that Judge Martini's Rule 29 opinion is irrelevant because the Government supposedly presented more evidence at the 2011 trial than it did at the 2013 trial. BB19-20. That is incorrect. True, at the 2013 trial the Government did not call three witnesses who testified at the 2011 trial. But the Government never claimed, and Judge Martini never held, that legal sufficiency depended on that testimony. Indeed, two of the witnesses (Yolanda Jauregui and Ramon Jimenez) testified in 2011 primarily to corroborate Lachoy Walker's testimony that Bergrin had hooked Curry up with a cocaine connection. That testimony allowed the jury to infer that Bergrin had a personal motive to prevent Baskerville from turning on Curry, but motive is not an essential element of the offense. A third witness (Alberto Castro) testified in 2011 that Bergrin approached him about murdering McCray. Bergrin argued that such testimony undermined the existence

[1] The Government agrees that the specific arguments Bergrin raises apply to Count 3 and Racketeering Act 4 of Count 1 as well. BB30-31.

of a conspiracy, ECF No. 341-2 at 13, and Judge Martini, while rejecting that assertion, cited Castro's testimony merely as "additional evidence to buttress" his conclusion that Anthony Young's testimony alone provided sufficient evidence to convict. Bergrin, 2012 WL 458426, at *4. Judge Martini's basic conclusion with respect to the record developed at the 2011 trial applies with equal force to the record developed at the 2013 trial. The Government now explains why that is so.

A. The Rule 29 Standard.

"After the government closes its evidence or after the close of all the evidence, the court on the defendant's motion must enter a judgement of acquittal of any offense for which the evidence is insufficient to sustain a conviction." Fed. R. Crim. P. 29(a). Where a district court has reserved decision on the motion, a defendant may renew his motion within seven days after the jury is discharged. Fed. R. Crim. P. 29(c). This Court nonetheless reviews the evidence as it existed when the motion was made. See Fed. R. Crim. P. 29(b); United States v. Brodie, 403 F.3d 123, 133-34 (3d Cir. 2005).

"The burden on a defendant who raises a challenge to the sufficiency of the evidence is extremely high." United States v. Lore, 430 F.3d 190, 204 (3d Cir. 2005). The question for this Court is whether "*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." United States v. Voigt, 89 F.3d 1050, 1080 (3d Cir. 1996) (quoting Jackson v. Virginia, 443 U.S. 307, 319 (1979)). This Court does "not weigh evidence or determine the credibility of witnesses in making this determination," but rather "examine[s] the totality of the evidence, both direct and circumstantial. [It] must credit all available inferences in favor of the government."

United States v. Pendleton, 636 F.3d 78, 84 (3d Cir. 2011) (quoting United States v. Gambone, 314 F.3d 163, 170 (3d Cir. 2003)); accord United States v. Scanzello, 832 F.2d 18, 21 (3d Cir. 1987) ("all credibility issues resolved in the government's favor").

Further, "the government's proof need not exclude every possible hypothesis of innocence." United States v. Ozcelik, 527 F.3d 88, 94 (3d Cir. 2008) (so holding in sustaining aiding and abetting conviction) (quoting United States v. Bala, 236 F.3d 87, 93-94 (2d Cir. 2000)); accord Brodie, 403 F.3d at 133-34 (reversing grant of Rule 29 relief and explaining that "[t]o sustain a conspiracy conviction, the contention that the evidence also permits a less sinister conclusion is immaterial") (internal quotation marks omitted). Accordingly, "[t]he evidence does not need to be inconsistent with every conclusion save that of guilt if it does establish a case from which the jury can find the defendant guilty beyond a reasonable doubt." United States v. Sandini, 888 F.2d 300, 311 (3d Cir. 1989) (internal punctuation omitted).

B. There Was Ample Evidence Of Bergrin's Participation In The Conspiracy To Murder McCray.

Count 12 charges Bergrin with conspiring with one or more persons to murder Kemo McCray to prevent McCray's testimony in an official proceeding, in violation of 18 U.S.C. § 1512(a)(1)(A), (k). ECF No. 213 at 92-96. The Government had to adduce legally sufficient evidence of (1) an unlawful agreement to murder McCray to prevent his testimony at an official proceeding, and (2) Bergrin's knowledge of and intent to join in that agreement to further its unlawful purpose. See United States v. Mastrangelo, 172 F.3d 288, 292 (3d Cir. 1999) (citation omitted).

Bergrin does not dispute that the Government proved the first element, *i.e.*, the existence of the conspiracy charged in Count 12. To the contrary, he acknowledges "the Curry organization's conspiracy to murder McCray." BB11. Rather, Bergrin argues that the conspiracy formed only after he left the meeting on 17th Street and Avon Avenue about which Anthony Young testified. Bergrin therefore claims that no rational juror could conclude that he knew about and intentionally joined in that conspiracy. BB10-19. This argument misstates the law and the evidence.

"[I]llegal agreements are rarely, if ever, reduced to writing or verbalized with the precision that is characteristic of a written contract." United States v. McKee, 506 F.3d 225, 238 (3d Cir. 2007). "Indeed, the very nature of the crime of conspiracy is such that it often may be established only by indirect and circumstantial evidence." Brodie, 403 F.3d at 134; see United States v. Rawlins, 606 F.3d 73, 80 (3d Cir. 2010). Membership, like any other element of a conspiracy, may be proven entirely by circumstantial evidence. See Lore, 430 F.3d at 204; Brodie, 403 F.3d at 134; see also United States v. Anderskow, 88 F.3d 245, 254 (3d Cir. 1996) (stating that if defendant's "argument were taken at face value, the government could never prove the existence of a conspiracy where, as here, the coconspirators do not discuss the [criminal] nature of their actions"); United States v. Barr, 963 F.2d 641, 650 (3d Cir. 1992) ("It is well settled that a written or spoken agreement among alleged co-conspirators is unnecessary; rather, indirect evidence of [a] mere tacit understanding will suffice.").

Further, because "[k]nowledge is often proven by circumstances," United States v. Iafelice, 978 F.2d 92, 98 (3d Cir. 1992), "the government can rely entirely on

circumstantial evidence to prove that an alleged conspirator had the knowledge and intent necessary to commit the crime," United States v. Carr, 25 F.3d 1194, 1201 (3d Cir. 1994), overruled in part on other grounds by Cuellar v. United States, 553 U.S. 550, 555 n.1 (2008); see 35T8957 (so instructing the jury). Thus, the Government had to produce some evidence from which the jury could rationally infer that Bergrin knew of the unlawful agreement and intended to join in it. The Government did far more than that.

Initially, on November 25, 2003, there was an existing conspiracy to distribute narcotics among Bergrin, Hakeem Curry, William Baskerville, Rakeem Baskerville, Anthony Young, and others. 1T185–222; 3T698–720; 3T725–59; 7T1519–552; 9T2215-31. Further, the members of that conspiracy resorted to violence in furtherance of its unlawful ends, including eliminating those who cooperated against members of the Curry Organization. 1T202–03; 1T222–23; 7T1598-99; 9T2061–73; 10T2551–53. As Bergrin was "house counsel" to the Curry Organization, the jury rationally could have inferred that Bergrin knew how that Organization dealt with informants. 1T201-04; 3T759; 10T2303–04; 28T7677; GX5700–04, 5707–09, 5711, 5713.

With that background, "a trier of fact could reasonably infer that the conspiracy began when Bergrin and Baskerville first met and discussed the identity of the witness on November 25th, and that the other members of the Curry organization joined the conspiracy on December 4th in Bergrin's presence and as a result of his urging." Bergrin, 2012 WL 458426, at *4; accord Baskerville, 448 F. App'x. at 250-51 ("[t]estimony from Anthony Young . . . supported the jury finding that Baskerville directed Bergrin to pass along McCray's identity to several associates after identifying him as the informant" and

that "the associates to whom McCray's identity was passed understood the message to be an instruction from Baskerville to have McCray killed").

Specifically, Richard Hosten testified that he and Baskerville were in a holding cell on November 25, and that a visibly upset Baskerville had determined that "Kemo" was the cooperating witness mentioned in the complaint. 9T2144-45, 2157. That day, Bergrin met with Baskerville before Baskerville's initial appearance. 7T1570–71. It was determined that McCray had to be assassinated. At Baskerville's initial appearance, the Government noted that Baskerville was a career offender and was facing 360 to life under the Sentencing Guidelines (although Baskerville's exposure was capped at 40 years based on the charges in the complaint). 7T1573–75. Leaving court, Bergrin called Curry and relayed the identity of the informant against Baskerville, mispronouncing the name as "Kamo." 8T1572, 1886–87; 9T2242-43; 12T3004–05, 3008; 27T7542-43; GX2517. Young, who was with Curry when Bergrin called, realized that Bergrin was referring to Kemo McCray. 9T2243.

On December 4, 2003, Baskerville and Bergrin attended a bail hearing. 8T1575; GX2218. Based on the charges in the recently filed indictment, they learned that Baskerville faced a statutory sentencing exposure of ten years to life, and a (mandatory) Guidelines range of 360 months to life. 8T1576–77; GX2218. Baskerville was ordered held without bail. 8T1578.

That night, Bergrin went to Avon Avenue and 17th Street to meet with members of the Curry Organization, specifically, Curry, Young, Rakeem Baskerville, Jamal

Baskerville, and Jamal McNeil. 9T2249-50.[2] Before the meeting, the group had not definitively decided whether they would carry out the plot to kill McCray because no one knew how much time Baskerville actually faced and whether he would make bail. 9T2249–51. But that changed when Bergrin arrived. Bergrin told the group that Baskerville "was facing life in prison for that little bit of cocaine." 9T2252–53. Bergrin "said, if Kemo testify against Will, Will was never coming home. He said, telling us, don't let Mr. McCray -- I mean, don't let Mr. Kemo testify against Will, and if he don't testify, he'll make sure he gets Will out of jail." 9T2253. Bergrin emphasized, "if no Kemo, no case." Id. After speaking privately with Curry, Bergrin walked to his car, turned back toward the group, and said, "remember what I said: No Kemo, no case," making a gesture with his hand that resembled a gun. 9T2254. And while Bergrin had not used the word "dead" or "kill" during that conversation, he essentially said, "get rid of him." 11T2759; accord 11T2767.

After Bergrin left, the group discussed how they would go about finding and killing McCray, *i.e.*, the means for executing the extant unlawful agreement. 9T2254–57; 10T2301–02. The group achieved the goal of the unlawful agreement when McCray was spotted on March 2, 2004, and when Young used a 9 millimeter handgun supplied by Curry to fire three shots into the back of Kemo's head and neck, killing him. 11T2315, 2320–21, 2340-42; see also 6T1265–66, 1311.

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[2] Phone records showed a call from Bergrin to Curry at 7:13 p.m. on December 4, 2003, 27T7544, and (according to Young) Curry said that evening, "My man on his way. Mr. Bergrin is on his way." 9T2252.

Young's testimony alone allows a rational jury to conclude that an illegal agreement to murder McCray formed on November 25th between Baskerville and Bergrin, and that Bergrin joined with the members of the Curry Organization on December 4th to further the goal of that agreement. In his role as house counsel to the Curry Organization, Bergrin not only leaked the informant's name to Curry, he instructed the group to murder McCray to prevent him from testifying against William Baskerville. The members of the group so clearly understood Bergrin's instruction that they complied with it by searching for McCray shortly thereafter and by murdering him three months later. See United States v. Bingham, 653 F.3d 983, 991-92 (9th Cir. 2011) (finding the evidence sufficient to sustain a murder conspiracy conviction where defendant "told Benton to go to war, and Benton did"); United States v. Crawford, 60 F. App'x 520, 534 (6th Cir. 2003) (unreported) (that defendant/attorney "had initiated the plan by relaying the message and the contact information" of the informant "alone would be sufficient to establish his participation" in the murder conspiracy"). See generally United States v. Riggi, 541 F.3d 94, 108-09 (2d Cir. 2008) (affirming conspiracy conviction where defendant ordered victim's murder).

Beyond Young's testimony, additional evidence at trial powerfully reinforced the rational inference that Bergrin had knowingly and intentionally entered into an agreement with members of the Curry Organization to murder McCray. First, when Bergrin was discussing with Vicente Esteves the plot to kill Junior the Panamanian, Bergrin said that "if there's no witness, there's no case," assuring Esteves that he (Bergrin) would "handle everything and that it wasn't his first time," which Esteves understood to mean that

Bergrin had killed witnesses before. 21T5825–26. A jury rationally could have inferred that Bergrin was referring to—and admitting his guilt of—the McCray murder. (As this Court well knows, the first jury never heard this testimony.)[3]

Second, Abdul Williams testified that around the time of a home invasion robbery at 710 Summer Avenue, Bergrin expressed concern about Baskerville cooperating against him with respect to the McCray murder. 16T4222–24. The timing of that conversation was important: the home invasion occurred on March 6, 2007, GX6035, which was after jury selection had begun in William Baskerville's death penalty trial for the McCray murder, GX5165–66, *i.e.*, when the pressure on Baskerville to cooperate reached its apex. Bergrin was concerned because, as a member of the same conspiracy to murder McCray, Bergrin knew Baskerville could incriminate him. See United States v. Shorter, 54 F.3d 1248, 1260 (7th Cir. 1995) (defendant's suggestion that coconspirator not implicate the former at trial showed consciousness of guilt).

Third, Thomas Moran asked Bergrin about a December 2007 article in the *New York Times* linking Bergrin to the McCray murder. Bergrin responded that

> he was representing a major drug dealer by the name of William Baskerville, and that during one of his attorney-client visits with Baskerville, Baskerville had told him the name of the informant against Baskerville in this particular drug case that Paul was representing him on.

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[3] Bergrin claims that the Rule 404(b) evidence was admitted solely to establish intent, and thus has no bearing on whether he intentionally joined the conspiracy to murder McCray. BB15-16. But Esteves' testimony, that Bergrin said that he had murdered witnesses before, was directly admissible under Rule 401 to prove the Kemo murder, as this Court ruled prior to trial. ECF No. 392-1 at 6 (explaining that evidence of the Esteves Plot "could provide basic context for a jury to decide whether [Bergrin] was referring to and admitting the Kemo murder when he said [I've done this before]").

> Paul told me he met with Baskerville's people and he told them the name of the informant, and that three months later, they had killed him.

23T6362. Moran explained that by "people" Bergrin meant Baskerville's criminal associates, not his family. 23T6362-63. Bergrin also told Moran that the shooter (Young) had given three different stories and was not credible; that his conversation with Baskerville was protected by the attorney-client privilege (which was false); and that the Government had an illegal phone tap. 23T6363-64. In other words, rather than tell Moran that "I did nothing wrong," Bergrin effectively boasted that "the Government can't get me," again implicitly admitting his involvement in the McCray murder.

Fourth, Bergrin lied to two reporters when discussing McCray's murder. Bergrin admitted to those reporters that he had relayed McCray's name to Curry, but claimed that he did so only to evaluate the strength of the case against Baskerville at the behest of Baskerville's family. 9T2186-87, 2196. He also claimed that he, Baskerville, and Curry had nothing to do with murdering McCray. 9T2187, 2196. But Bergrin told Moran that his client's "people" had murdered McCray. A rational jury could consider Bergrin's false statements to the press as evidence of his consciousness of guilt, which provided additional circumstantial evidence of his knowing and intentional participation in the conspiracy. See United States v. Kemp, 500 F.3d 257, 297-98 (3d Cir. 2007) (consciousness of guilt evidence is "of high probative value to the Government's case").

Fifth, Bergrin implicitly admitted his guilt when he told William Baskerville in March 2004, just after McCray's murder but eight months *before* the Government first suggested that Bergrin might be criminally liable for it, that "I don't care if they charge

me, if they do, I'll just come in here with you and fight my shit, and I got lawyers just in case they decide to charge me with anything." 9T2128. If Bergrin had nothing to do with McCray's murder, he would have had no reason to expect any criminal charges.

Beyond all of this, a jury rationally could have inferred that Bergrin had a personal motive for preventing Kemo from testifying against Baskerville: because Baskerville could have cooperated against Curry, who in turn could have cooperated against Bergrin. See 1T208-09 (Curry told Walker that he was obtaining large quantities of cocaine from "Paul's connect"); see also 7T1518–19 (all the other drug dealers from whom McCray made controlled purchases were arrested, all pleaded guilty, and most cooperated); 7T1565–67 (William Baskerville expressed interest in cooperating after his arrest but changed his mind immediately after speaking with Bergrin); 1T180-81 (Walker testified against Curry and Rakeem Baskerville); 3T698 (the DEA builds its investigation of a major narcotics organization from the bottom up); 9T2232–34 (the FBI's arrest of William Baskerville meant that the entire Organization could be under investigation); 12T2909–10 (everyone thought Curry was "soft" and would cooperate if arrested).

Taken as a whole, and viewed in a light most favorable to the Government, the foregoing evidence amply establishes that Bergrin knowingly and intentionally entered into a conspiracy to murder McCray to prevent his testimony at an official proceeding.

Bergrin nonetheless claims that an unlawful agreement did not exist before he left the December 4, 2003 meeting because none of the Curry Organization members communicated by words or actions any reciprocal willingness to carry out the murder in response to his statements. BB12-14. Initially, Bergrin erroneously focuses on the

December 4th meeting: the evidence allowed the jury to infer that Bergrin joined a conspiracy that began on November 25th. Regardless, "a written or spoken agreement among alleged co-conspirators is unnecessary; rather, indirect evidence of [a] mere tacit understanding will suffice." Barr, 963 F.2d at 650. Thus, no one needed to manifest assent to Bergrin's December 4th advice because, as Young testified, everyone knew what Bergrin meant and intended and, thus, knew what they had to do (*i.e.*, murder McCray). See Anderskow, 88 F.3d at 254 (finding sufficient circumstantial evidence of defendants' membership in a conspiracy despite the fact that coconspirators never openly discussed what they were doing); United States v. Messerlian, 832 F.2d 778, 798 (3d Cir. 1987) (finding sufficient evidence of an agreement even though "[d]irect evidence in support of the government's argument that a 'cover-up' began with the meeting between Wolkowski and Messerlian . . . is similarly lacking"), overruled in part on other grounds by Graham v. Connor, 490 U.S. 386 (1989).

Bergrin relatedly claims that the only evidence of an agreement to work together to achieve a common goal was the conversation among Young, Curry, and Rakeem Baskerville about the details of the murder conspiracy *after* Bergrin left the December 4th meeting. Bergrin Br. at 11-12. He then pretends that no agreement could have existed *before* he left. But this legerdemain simply restates Bergrin's flawed argument that there must be direct evidence of the unlawful agreement itself. That the coconspirators openly discussed the means and methods of carrying out the illegal agreement Bergrin had cemented after Bergrin left no more absolves Bergrin of conspiracy liability than does the fact that the coconspirators did not openly discuss the formation of the agreement before

Bergrin left. To the contrary, the direct evidence of the later discussions corroborates the circumstantial evidence showing that the agreement formed earlier. See Bergrin, 2012 WL 458426, at *4 ("The fact that the coconspirators carried out the murder several months later without further communication from Bergrin could reasonably suggest that Bergrin and his coconspirators formed an agreement during that meeting that was so clear that further communication was unnecessary.").

Equally meritless is Bergrin's claim that there was no evidence that he intended to work together with the other coconspirators to fulfill the conspiracy's goal. BB14-16. First, Bergrin worked with William Baskerville to relay the identity of the informant to Curry. Second, Bergrin showed up at Avon Avenue and 17th Street on December 4th and directed members of the Curry Organization to kill McCray. Taken together, those acts show that Bergrin worked together with his coconspirators to fulfill the conspiracy's goal. Beyond that, Bergrin implicitly admitted his guilt to Esteves, Moran, and Williams.

Bergrin next claims that the Government's evidence shows only that he was merely present at the scene of planned criminal activity or that he merely associated with those who actually conspired to kill McCray. BB16-17. But "a defendant's 'mere presence' argument will fail in situations where the 'mere' is lacking." United States v. Echeverri, 982 F.2d 675, 678 (1st Cir. 1993). "[P]resence or a single act will suffice if the circumstances permit the inference that the presence or act was intended to advance the ends of the conspiracy." United States v. Xheka, 704 F.2d 974, 988-89 (7th Cir. 1983) (citation omitted). Here, Bergrin passed the name of the informant from William Baskerville to Curry, and then later told members of the Curry Organization in sum and

substance that killing McCray would ensure Baskerville's release. Viewing the evidence in the light most favorable to the Government, this evidence showed that Bergrin was far more than "merely present" at the scene of conspiratorial conduct.

Bergrin argues that it belies common sense to argue that he believed that William Baskerville's release from jail depended on the Curry Organization killing McCray in light of the audio, video, and other evidence of Kemo's drug purchases from Baskerville. BB18-19. Initially, it is hardly a forgone conclusion that the recordings could have been authenticated without McCray's testimony. Further, given how little the videos actually show, a rational jury could have concluded that McCray's testimony was necessary to proving a strong drug case against Baskerville. At any rate, *Bergrin* knew the quality of the evidence against Baskerville when he passed McCray's name to Curry, allegedly to secure Baskerville's release on bail by obtaining information undermining McCray's credibility. That fatally undermined his assertion that he knew the Government had an airtight case against Baskerville. 35T8826-27. After all, if Bergrin believed the case was airtight, what possible benefit could there be to impeaching McCray? It was Bergrin's defense, not the Government's argument, that defied common sense.

As he did in 2011, see ECF 342-1 at 18, Bergrin once again claims that the phrase "no Kemo, no case" is "at most an opinion about the strength of Baskerville's federal drug case, but more likely an accurate historical statement reflecting the fact that Kemo's cooperation was the catalyst for the government's case against William Baskerville," BB19. But "Bergrin is wrong that these are the only inferences a trier of fact may reasonably and properly draw." Bergrin, 2012 WL 458426, at *5. Viewing the evidence

in the light most favorable to the verdict, a rational jury easily could have found that the phrase "no Kemo, no case" was an instruction to kill McCray based on (1) how Young interpreted all of Bergrin's words, (2) Bergrin's admissions to Williams, Moran, and Baskerville, (3) Bergrin's interaction with Pozo and with Esteves, where Bergrin made his intent explicit, and (4) Bergrin's personal motive to prevent Baskerville from turning on Curry. In any event, it was the jury's job to determine which competing inference to accept—the exculpatory one Bergrin peddled at trial, or the inculpatory one the Government argued.

In sum, there was sufficient evidence to permit a rational juror to conclude that Bergrin knowingly and intentionally participated in the conspiracy charged in Count 12.

C. There Was Ample Evidence That Bergrin Aided And Abetted McCray's Murder.

Count 13 charges Bergrin with aiding and abetting the murder of McCray to prevent McCray's testimony in an official proceeding, in violation of 18 U.S.C. § 1512(a)(1)(A), (a)(3)(A) and 18 U.S.C. § 2. ECF No. 213 at 97.

A person who "aids, abets, counsels, commands, induces or procures" the commission of an offense against the United States "is punishable as a principal." 18 U.S.C. § 2(a). The Government had to adduce legally sufficient evidence that Bergrin "'knew of the commission of the substantive offense and acted with the intent to facilitate it.'" United States v. Carbo, 572 F.3d 112, 118 (3d Cir. 2009) (quoting United States v. Dixon, 658 F.2d 181, 189 n.17 (3d Cir. 1981)). More specifically, the Government had to prove that Bergrin "associated himself with the venture and sought by his actions to make

it succeed." United States v. Mercado, 610 F.3d 841, 846 (3d Cir. 2010) (citation omitted). The Government could meet its burden by showing "some affirmative participation which, at least, encourages the principal offender to commit the offense." Id. (citation omitted). As with conspiracy liability, "circumstantial evidence can be sufficient to uphold an aiding and abetting conviction." United States v. Soto, 539 F.3d 191, 195 (3d Cir. 2008).

Importantly, words of advice or encouragement alone are sufficient to establish accomplice liability for murder; the accomplice need not provide the murder weapon or drive the getaway car. Wayne LaFave, Substantive Criminal Law § 6.7(a), at 576 (2d ed. 1986) ("Such terms as 'advise,' 'command,' 'counsel,' 'encourage,' 'induce,' and 'procure' suggest that one may become an accomplice without actually rendering physical aid to the endeavor. This is the case.") (footnotes omitted). Further, "[o]nce it is determined that [the accomplice] assisted [the principal] . . . the degree of aid or influence provided is immaterial. Any aid, *no matter how trivial*, suffices." Joshua Dressler, Understanding Criminal Law, § 30.04[b][1], at 467 (6th ed. 2012). For that reason, the evidence is more than sufficient where the principal actually followed the accomplice's advice. See United States v. Nolan, 718 F.2d 589, 593 (3d Cir. 1983) (affirming aiding and abetting conviction where principal followed instructions provided by accomplice); United States v. Barnett, 667 F.2d 835, 841-42 (9th Cir. 1982) ("If . . . the person so assisted or incited, commits the crime he was encouraged to perpetrate, his counselor is guilty of aiding and abetting."). Thus, where a defendant instructs another to murder the victim and his instruction is followed, the defendant is guilty as an accomplice. See

Bingham, 653 F.3d at 991-92 (evidence sufficient to sustain conviction for aiding and abetting murder where defendant "told Benton to go to war, and Benton did"); Riggi, 541 F.3d at 109 (sustaining aiding and abetting conviction and finding that the "totality of evidence is sufficient to support a jury finding that Schifilliti commanded the murder, and that LaRasso was murdered pursuant to that command").

Here the evidence amply showed "some affirmative participation" by Bergrin "which, at least, encourage[d] the principal offender to commit the offense." Mercado, 610 F.3d at 846. As explained in Section B above, in his role as house counsel to the Curry Organization, Bergrin relayed the name of the informant from Baskerville to Curry on November 25th in furtherance of the plot to murder McCray. That alone constituted "aiding" or "abetting." Further, and perhaps more fundamentally, before the December 4th meeting at Avon Avenue and 17th Street, the members of the Curry Organization had not definitively decided to carry out the plot to murder McCray that had formed the previous week, because they were unsure about William Baskerville's sentencing exposure. After Bergrin arrived, he advised the Organization members assembled there that Baskerville was not getting out on bail and was facing life in prison if McCray were to testify against Baskerville. Bergrin also advised the group that if they prevented McCray from testifying, he would win the case and secure Baskerville's release. Based on Bergrin's advice, the members of the Curry Organization thereafter searched for McCray, found him, and brutally murdered him. Viewed in a light most favorable to the verdict, this evidence presented a classic case of "counsel[ing], command[ing], induc[ing] or procur[ing]" the commission of the offense by the principal. See 18 U.S.C. § 2(a).

Bergrin does not dispute that the Government's evidence was sufficient to show that someone committed the § 1512(a)(1)(A) offense. Nor does he dispute that he knowingly performed an act with the specific intent of aiding or assisting that offense. Nonetheless, Bergrin claims that the Government failed to adduce sufficient proof that he knew someone intended to murder McCray. BB22-25. As he did in attacking Count 12, Bergrin essentially complains there is no direct proof of knowledge because no one from the Curry Organization actually informed him of the plan to murder McCray. BB22-23.

As already explained, however, direct proof of knowledge is unnecessary and is rarely available. 35T8957. Besides, it "is not essential that the accessory know the modus operandi of the principal." Russell v. United States, 222 F.2d 197, 199 (5th Cir. 1955). Having advised a violent drug gang that the murder was necessary to secure the release of one of the gang's members, Bergrin cannot now profess ignorance that the gang would carry out the murder. Indeed, the very point of the December 4th meeting was to instruct the group to commit that murder. Bergrin, 2012 WL 458426, at *5 (evidence showing that "Bergrin encouraged the murder" could also "lead to a reasonable inference that Bergrin knew or intended that the murder would occur"); accord United States v. Ray, 688 F.2d 250, 242 (4th Cir. 1982) ("The testimony is undisputed that [defendant] had 'told' Tinnin to steal the money. He was thus the instigator of the criminal act itself.").

Bergrin again accuses the Government of relying on his mere association with criminals to create guilty knowledge where none otherwise exists. BB21. Not so. The Curry Organization assembled on December 4th for the specific purpose of meeting with Bergrin. 9T2249–52. That Bergrin drove to Avon Avenue to deliver illicit advice puts the

lie to his claim that he merely associated with criminals. Further, Bergrin's representation of and association with members of a violent drug organization made it rational to infer that Bergrin knew the consequences of advising members of that organization to kill an informant so that an incarcerated organization member would not have to spend the rest of his life in prison. See Echeverri, 982 F.2d at 678 ("A defendant's 'mere presence' argument will fail in situations where the 'mere' is lacking").

Bergrin also contends that there is insufficient proof that his actions actually aided and abetted McCray's murder. He claims that McCray's death was a forgone conclusion once Baskerville determined that McCray was the informant. BB25-29. Judge Martini did not address Bergrin's implicit legal premise that the defendant's actions must be the but-for cause of the principal's crime. Instead, Judge Martini found that Bergrin's argument failed on the facts. Bergrin, 2012 WL 458426, at *5 ("the Government presented evidence suggesting that McCray's murder was far from *fait accompli* and further suggesting that Bergrin's acts actually aided the murder").

But Bergrin's legal premise was and is wrong as a matter of substantive criminal law. As Professor Dressler explains:

> A secondary party is accountable for the conduct of the primary party even if his assistance was causally unnecessary to the commission of the offense—i.e., *S* is an accomplice even if, but for his assistance, *P* would have committed the offense without his assistance. Thus, it would be immaterial to *S*'s liability . . . that *P* would have committed the crimes when he did without *S*'s minor aid or encouragement. *S* must help, but need not cause, the crime.

Understanding Criminal Law, supra, § 30.04[B][2][a], at 468; accord United States v. Sacks, 620 F.2d 239, 241-42 (10th Cir. 1980) (holding that defendant's "attempt to inject

a but-for causation requirement into [§ 2(a)] is without merit"). That being so, a defendant who "counsels murder . . . is guilty as an accessory before the fact, though it appears to be probable that murder would have been done without his counsel." State *ex rel.* Martin v. Tally, 15 So. 722, 738-39 (Ala. 1894). Thus, even if the evidence compelled the inference that McCray's fate was sealed on November 25th (and it does not), Bergrin still would be liable as an accomplice for his December 4th acts of encouraging a murder that the principal had already decided to commit.

Bergrin misreads Nolan as having created a but-for causation requirement. BB26. The Third Circuit in Nolan said that "the aider must in fact render aid or assistance," and concluded that "appellant did in fact aid Danko in the commission of the crime" because "Danko testified that he followed appellant's instructions to the letter on this initial importation trip." Nolan, 718 F.2d at 593-94. Nolan did not hold that the proof of § 2(a) was sufficient only because the Danko's crime would not have occurred but for Nolan's assistance. Rather, the proof in Nolan was overwhelming given that Nolan's advice plainly assisted Danko's crime. As set forth above, however, "the degree of aid or influence is immaterial." Understanding Criminal Law, supra, § 30.04[B][1], at 467.

Here, the Government proved far more than necessary to sustain accomplice liability under § 2(a). Relying on the evidence summarized in Section B above, Judge Martini concluded that "Bergrin's acts actually aided the murder." Bergrin, 2012 WL 458426, at *5. This was so because "[i]t was only after Bergrin provided this additional information—and made statements which Young interpreted as encouraging the murder to happen—that Young and the other members of the Curry organization finally decided

to commit the crime." Id. That the Curry Organization was "willing . . . to kill for much less," BB26, simply underscores the depravity of Bergrin's decision to relay McCray's identity to Curry on November 25th and to instruct the Curry Organization not to let McCray testify against Baskerville on December 4th.[4]

At any rate, Bergrin's legally flawed causation argument requires this Court to construe in Bergrin's favor testimony that Young gave on cross examination (to the effect that "you get rid of" someone who crosses a Baskerville), 10T2552, while ignoring Young's testimony on direct examination that the decision to murder McCray followed Bergrin's advice at the December 4th meeting, 9T2249–53; accord 11T2759, 2767. Bergrin also misstates the record when he suggests that William Baskerville relayed McCray's name to his brother Rakeem even before Bergrin called Curry. BB27-28. The evidence showed that Bergrin called Curry immediately after the initial appearance in court, 8T1572, 1886–87; 9T2242-43; 12T3004–05, 3008; 27T7542-43; GX2517, whereas Hosten testified that Baskerville did not use the phone until they returned to Hudson County, 9T2146, approximately an hour later, 9T2172-73. Finally, Bergrin's argument here assumes that the conspiracy formed on November 25th, which conflicts with his separate claim that it formed on December 4th. Bergrin cannot have it both ways.

In sum, the Government adduced ample evidence that Bergrin aided and abetted McCray's murder.

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[4] United States v. Crews, Crim No. 587-7, 1988 U.S. Dist. LEXIS 860, at *6-7 (S.D. Ga. Jan. 11, 1988), which Bergrin cites, BB29, involved a defendant charged with aiding and abetting an already-completed crime, which is not the case here.

II. There Was Ample Evidence That Bergrin Specifically Intended To Evade IRS Reporting Requirements.

Bergrin moves for a judgment of acquittal on Count 26 (and on Racketeering Act 8 of Count 1). He claims that there was insufficient proof that he "failed to file an IRS Form 8300 'for the purpose of evading the report requirements of section 5331 or any regulation prescribed under such section.'" BB31 (quoting 35T8928). Bergrin is wrong.

Count 26 charges Bergrin with failing to file a Form 8300 with the Financial Crimes Enforcement Network, in violation of 31 U.S.C. § 5324(b)(1). See ECF No. 213 at 129-30. To convict Bergrin of this charge, the Government had to prove that Bergrin (1) was operating a trade or business; (2) received more than $10,000 in cash in a single transaction; (3) knew of the legal obligation to file a Form 8300; and (4) within fifteen days knowingly failed to file a Form 8300 for the purpose of evading that reporting requirement. See 31 U.S.C. § 5324(b)(1).

Importantly, as this Court instructed the jury, 35T8957, specific intent "can rarely be proven by direct evidence, since it is a state of mind; it is usually established by drawing reasonable inferences from the available facts,'" United States v. Starnes, 583 F.3d 196, 213 (3d Cir. 2009) (quoting United States v. Bank of New Eng., N.A., 821 F.2d 844, 854 (1st Cir. 1987)); see Am. Commc'ns Ass'n v. Douds, 339 U.S. 382, 411 (1950) ("[C]ourts and juries every day pass upon knowledge, belief and intent—the state of men's minds—having before them no more than evidence of their words and conduct, from which, in ordinary human experience, mental condition may be inferred.").

Here, there was ample evidence—albeit circumstantial—to prove beyond a reasonable doubt that when Bergrin received the $20,000 from Cordova and failed to file a Form 8300 thereafter, he intended to evade the reporting requirement prescribed by 31 U.S.C. § 5331 and its implementing regulations. Indeed, the Government arguably met its burden based solely on two facts that Bergrin does not and cannot dispute: (1) Bergrin (an attorney) knew of his reporting obligation, as in 2007 he belatedly filed a Form 8300 reporting $20,000 in cash supposedly received from Carmen Dente, Sr., for a retainer fee, 24T6732–33; GX373 & 550,[5] and (2) Bergrin did not file a Form 8300 reporting the $20,000 he had received from Cordova, 24T6738. See United States v. Dichne, 612 F.2d 632, 636-38 (2d Cir. 1979) (evidence that Government took "affirmative steps" to bring the reporting requirement to the defendant's attention supported inference that defendant acted "willfully," a *mens rea* higher than mere specific intent).

Beyond that, there was ample evidence showing that Bergrin had a motive to avoid law enforcement scrutiny and, thus, acted with the intent to evade the reporting requirement that he knew governed his transaction with Cordova:

- First, Bergrin believed that Oscar Cordova was gang member and a cocaine dealer who had agreed to act as the hit man in an ongoing plot to murder witnesses against Bergrin's client, Vicente Esteves. E.g., 18T4851, 4853, 4864–67, 4872–73, 4889–92, 4894–910; 19T5092–103; 21T5790–826,

[5] In fact, this form was false: the $20,000 in question had been supplied by cooperating witness Shelton Leverett, 27T7363–70, and was seized during the 2007 search of Bergrin's law office, 13T3431–32, 3437–42; 27T7537–38. In short, Bergrin misused a belatedly filed Form 8300 to deceive the New York County District Attorney's Office into releasing the cash that Leverett had asked him to hold. That speaks volumes about Bergrin's intent in *not* filing a Form 8300 one year later.

5735; 22T6031; 23T6376–408, 2418–23, 6435–38; 24T6716–18; 25T6923–24.

- Second, on September 4, 2008, Cordova handed Bergrin a black duffel bag containing $20,000 in shrink-wrapped cash. 19T5024–25; 20T5296–97; GX4123b2.

- Third, Bergrin previously had received $20,000 in shrink-wrapped cash from drug dealer Richard Pozo (without filing a Form 8300), 12T3035–36, and thus had ample reason to suspect that the cash he received from Cordova was narcotics proceeds, see 19T5024–25; 20T5296–97; 25T6833–34, meaning that he was engaging in money laundering merely by accepting the money, see 18 U.S.C. § 1957.

- Fourth, Bergrin did not deposit the cash he had received from Cordova into his attorney trust account, GX1012 at p.93, a deposit that would have required Bergrin's bank to file a Currency Transaction Report. A rational jury could infer that by not depositing the $20,000 into a bank account, he intended to evade IRS reporting requirements and that he harbored the same intent when he failed to file a Form 8300 reflecting that cash. See Spies v. United States, 317 U.S. 492, 499 (1943) (efforts to conceal bespeak willfulness required for tax conviction).

- Fifth, Form 8300 "is a very valuable tool to law enforcement," 24T6730, and the majority of Form 8300s filed by small law firms "are filed by individuals and the conductor of the transaction," 24T6739.

These facts easily allowed a jury to infer that, at the time Bergrin received the $20,000 in cash from Cordova, Bergrin feared that filing a Form 8300 reporting that cash (1) would require him to admit that he had engaged in a transaction involving what he believed were the proceeds of a criminal offense (*i.e.*, narcotics trafficking by Cordova), or (2) could trigger scrutiny that would either disrupt the ongoing murder plot or allow law enforcement to connect Bergrin and Cordova if the plot succeeded. In short, a rational jury could find that Bergrin intended to evade the reporting requirements because compliance could have triggered law enforcement scrutiny of his illicit relationship with

Cordova. See United States v. Gricco, 277 F.3d 339, 249 (3d Cir. 2002) (stating that it "would not be at all surprising if all of these participants independently reached the conclusion that it would be best not to report their illicit income . . . because they feared attracting investigative attention" and holding that a "rational jury could conclude that, if participants in the embezzlement scheme had reported their illicit income, this might have sparked an investigation that might have ultimately led to Gricco").[6]

Bergrin does not deny that he received $20,000 from Oscar Cordova, knew of his obligation to report cash transactions exceeding $10,000, and failed to file a Form 8300. Instead, Bergrin claims that the Government's legal theory is insufficient as a matter of law "to establish liability under the statute" because § 5324 supposedly "requires the purpose *of the transaction* to be evasion of the obligation to report cash transactions." BB35 (emphasis added). Thus, while Bergrin accepts the possibility that he had the requisite purpose to evade when he failed to file the Form 8300, he claims he is entitled to a judgment of acquittal because there was no "evidence that Mr. Bergrin conducted this transaction [with Cordova] with the intent to evade the reporting requirements applicable to the Law Office of Paul Bergrin." BB34.

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[6] Accord United States v. Abdelbary, 496 F. App'x 273, (4th Cir. 2012) (unreported) (fact that § 5324 violations started "only after [defendant] encountered serious financial difficulty based on the dispute with Jordan Oil supports the conclusion his purpose was to avoid the reporting requirements in order to hide his assets"). See generally United States v. Hosseini, 679 F.3d 544, 556 (7th Cir. 2012) (noting Government's theory that "defendant repeatedly and intentionally failed to file the [8300s] to conceal the true nature and source of the purchase money involved in the transactions with drug dealers".

Bergrin apparently treats this case as one involving actual structuring under § 5324(b)(3), where the manner in which the parties conducted the transaction is probative of the defendant's intent. See Ratzlaf v. United States, 510 U.S. 135, 136 (1994) ("It is illegal to 'structure' transactions-*i.e.*, to break up a single transaction above the reporting threshold into two or more separate transactions-for the purpose of evading a financial institution's reporting requirement."). But this case involves the simple failure to file a Form 8300 that indisputably governed Bergrin's $20,000 transaction with Cordova. Thus, the only question for the jury was why Bergrin *failed to file* that Form—not why Bergrin *conducted the transaction* with Cordova.[7] At all events, the evidence is sufficient even under Bergrin's crabbed understanding of the statute's specific intent requirement. The duty to file a Form 8300 arose the moment Bergrin received $20,000 from Cordova, and Bergrin had fifteen days to fulfill that duty. If Bergrin had the specific intent to evade the reporting requirement when he failed to file the Form 8300 fifteen days after the transaction (and he plainly did), then the jury could reasonably infer that he had the same intent when he received the $20,000 from Cordova.

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[7] The Government's proposed jury instructions explicitly tied the purpose to evade to Bergrin's failure to file the Form 8300. ECF No. 488 at 106. The Government acceded to Bergrin's alternative, see Exh. A at 131-32, which asked whether "the purpose of the transaction" in which Bergrin received the $20,000 was to evade IRS reporting requirements, 35T8929. While Bergrin's instruction arguably misstated the statute's intent requirement, legal sufficiency review turns on the statute properly construed, not on how the jury instructions defined the offense. See United States v. Gonzalez, 443 F. App'x 588, 591 n.1 (2d Cir. 2011) (unreported); United States v. Inman, 558 F.3d 742, 750 (8th Cir. 2009); United States v. Guevara, 408 F.3d 252, 258 (5th Cir. 2005); United States v. Zanghi, 189 F.3d 71, 79 (1st Cir. 1999). At any rate, as explained in text, the evidence is plainly sufficient under any construction of § 5324(b)(1)'s intent element.

Bergrin nonetheless claims that there was no direct evidence that he conducted the transaction with Cordova for the purpose of evading the reporting requirement. He cites United States v. Seher, 562 F.3d 1344, 1364 (11th Cir. 2009), as a case in which there was "ample evidence from which the jury could infer that the transaction occurred for the purpose of avoiding the reporting requirements." BB35. That is disingenuous. Seher did not find the evidence sufficient solely because there was direct evidence of specific intent, as Bergrin would have this Court believe. Rather, the Eleventh Circuit noted that *the defendants* conceded that "the record is replete with proof" that Seher intended to avoid reporting requirements with respect to substantive counts of money laundering in violation of 18 U.S.C. § 1956(a)(3)(C). Seher, 562 F.3d at 1363-64.

Further, and far more germane to this case, the Eleventh Circuit upheld the legal sufficiency of Seher's conviction for conspiring to violate § 1956(a)(3)(C) based entirely on circumstantial evidence of Seher's specific intent. Id. at 1365. Specifically, four drug dealers testified that they had purchased jewelry from Seher between 1996 and 2002. Those drug dealers never told Seher that their money stemmed from narcotics dealing, and were never asked to provide information necessary to complete a Form 8300. Indeed, they "were aware of this reporting requirement, and . . . would have been reluctant to provide such information for fear of creating a paper trail and might not have shopped at the Depot if they had been forced to do so." Id. 562 at 1351. Thus, far from showing that direct evidence of intent to avoid a reporting requirement is required, Seher confirms that circumstantial evidence alone is sufficient to meet the Government's burden.

Bergrin also argues that because the $20,000 in cash was intended to cover Esteves' legal fees, there was insufficient evidence that Bergrin intended to avoid his reporting obligation. BB33-36. Any defendant could claim that there was a legitimate purpose for the transaction giving rise to the § 5324 prosecution. Indeed, the ostensible purpose of the transactions at issue in Seher was to sell jewelry. But if the defendant also acts with the purpose to conceal the source of the funds from the IRS, then liability attaches. Imposing liability for defendants who act with such a dual intent is hardly novel. See United States v. Coyne, 4 F.3d 100, 113 (2d Cir. 1993) (a "'valid purpose that partially motivates a transaction does not insulate participants in an unlawful transaction from criminal liability.'") (citation omitted); see also United States v. Greber, 760 F.2d 68, 71-72 (3d Cir. 1985) (affirming instruction allowing jury to find guilt if one purpose of payment was proscribed by anti-kickback provision).

Besides, contrary to Bergrin's assertion, the evidence hardly compels the conclusion that the sole purpose of the $20,000 cash "transaction" was to pay legitimate legal fees for Esteves. See Spies, 317 U.S. at 500 ("Petitioner claims other motives animated him in these matters. We intimate no opinion. Such inferences are for the jury."). Almost all of Bergrin's work for Esteves consisted of *illegal* services: tampering with and/or killing witnesses; fabricating tax returns falsely stating that Esteves' money derived from a legitimate source; and hiding properties to prevent law enforcement from seizing them. E.g., 19T4984–86, 5092–103; 21T5777–78, 5790–826, 5735; 5818–21, 23T6409–13. In fact, the jury heard Bergrin say that he would use money provided by Cordova to hire a forensic accountant to prepare fraudulent documents falsely exculpating

Esteves. 19T5120; GX4129b10 at 2. A jury rationally could infer that Bergrin secretly accepted the $20,000 in cash from Cordova not just as consideration for illegal services, but to prevent law enforcement from discovering those illegal services.

Bergrin's remaining arguments improperly view the evidence in a light most favorable to him. For example, Bergrin claims that he made no effort to hide his association with Cordova. BB36. That Bergrin introduced Cordova to his criminal associates hardly shows that Bergrin freely advertised his association with Cordova *to law enforcement*. Indeed, the fact that Bergrin warned Moran not to let Cordova visit Esteves in jail alone permitted the jury to draw a contrary inference. 23T6399–400.

Similarly, the jury was not required to infer that Bergrin inadvertently failed to file a Form 8300 with respect to the $20,000 merely because he never filed those forms when accepting more than $10,000 in cash from known drug dealers and from "King of All Pimps" Jason Itzler. BB36-37. The jury just as easily could have concluded that in those circumstances Bergrin acted with the same purpose to evade required by § 5324(b)(1), which reinforced the inference that he acted with the same purpose when dealing with Cordova. See United States v. MacPherson, 424 F.3d 183, 192-93 (2d Cir. 2005) (noting that jury may infer specific intent from repeated violations of reporting requirement and rejecting suggestion that cash at issue has to be criminally derived in order to support inference of specific intent).

Finally, Bergrin incorrectly claims that the Government did not introduce "any evidence suggesting that officers ever check such data in the course of investigating witness tampering cases." BB38. While no such testimony was necessary, Agent Moravek

testified that Form 8300 “is a very valuable tool to law enforcement.” 24T6730. And Bergrin belatedly filed a (false) Form 8300 when he sought to recoup the $20,000 that New York authorities had seized from his law office, which tended to show *Bergrin’s* concern that law enforcement might check those forms. Further, Bergrin knew he was under scrutiny for the McCray murder at the time he was dealing with Cordova. 23T6362–63. A jury rationally could have inferred that, had the Esteves Plot achieved its illicit goal of murdering Junior the Panamanian, one of the investigative steps law enforcement could have pursued was to search the Financial Crimes Enforcement Network database to determine the source of cash paid to Bergrin’s law office. See Gricco, 277 F.3d at 249 (where defendants where charged with evading taxes on illegally embezzled funds, the Third Circuit concludes that it “would not be at all surprising if all of these participants independently reached the conclusion that it would be best not to report their illicit income . . . because they feared attracting investigative attention”).

In sum, the evidence sufficiently showed that Bergrin acted with the specific intent to evade the reporting requirement when he received $20,000 in shrink-wrapped cash from Cordova and then failed to file a Form 8300 reflecting it.

III. Assuming That This Court Had The Authority To Confer Immunity On Defense Witnesses, It Did Not Abuse Its Discretion In Declining To Confer Immunity Under Gov't of V.I. v. Smith, 615 F.2d 964 (3d Cir. 1980).

Bergrin seeks a new trial under Federal Rule of Criminal Procedure 33(b)(2). He claims that this Court abused its discretion when it declined to confer immunity on Jamal McNeil and Jamal Baskerville, two defense witnesses who would have invoked their Fifth Amendment rights had they been called to the stand. BB38-45. Even if the Third Circuit maintains its minority-of-one view that district courts have authority to confer immunity under the "effective defense theory" that Bergrin invoked at trial and invokes now, this Court properly exercised its discretion in denying Bergrin's request as to McNeil. Further, Bergrin waived any claim as to Baskerville.

A. Whether District Courts Have Authority To Grant Immunity To Secure Favorable Defense Testimony Is In Doubt.

Congress has conferred upon the Attorney General statutory authority to grant use immunity to witnesses in order to obtain their testimony at trial. See 18 U.S.C. § 6003(b); Kastigar v. United States, 406 U.S. 441, 446 (1972). Despite this exclusive grant of authority to the Executive Branch, the Third Circuit has recognized two circumstances in which a court may immunize a defense witness: (1) to cure prosecutorial misconduct; and (2) to secure favorable defense testimony—the option Bergrin invoked at trial. See Gov't of V.I. v. Smith, 615 F.2d 964, 968 (3d Cir. 1980).

As Bergrin notes, the Third Circuit stands alone in recognizing this authority. BB41. But Smith's continuing vitality is in serious doubt. On February 20, 2013, the Third Circuit sat *en banc* "to reconsider the 'effective defense theory of judicial

immunity' doctrine first established by this Court in [Smith]." United States v. Quinn, No. 11-1733 (3d Cir. July 10, 2012). If the *en banc* Third Circuit overrules Smith and applies that overruling to Quinn, Bergrin could not tenably claim that this Court violated any constitutional right by denying his request for immunity. See United States v. Burnom, 27 F.3d 283, 284-85 (7th Cir. 1994) ("That courts have rendered decisions later deemed erroneous by higher authority does not entitle criminal defendants to the benefits of those mistakes."); cf. Lockhart v. Fretwell, 506 U.S. 364, 371-72 (1993) (counsel's failure to make objection based on precedent that the *en banc* Eighth Circuit later overruled did not show cognizable prejudice as a matter of law).

Thus, to avoid unduly lengthening this brief, and to preserve the issue for further review (if necessary) the Government respectfully incorporates here the arguments advanced in Quinn by the U.S. Attorney's Office for the Eastern District of Pennsylvania. See Supp'l Brief for Appellee, United States v. Quinn, 2012 WL 6901673 (No. 11-1733).

B. This Court Did Not Abuse Its Discretion In Declining To Confer Judicial Immunity On McNeil Under Smith.

Even if Smith survives in Quinn, this Court did not abuse its discretion in denying Bergrin's request to immunize Jamal McNeil.

Under Smith, a court *may* grant judicial immunity for a witness who can provide "clearly exculpatory evidence" and when the government can present no "strong countervailing interest." 615 F.2d at 969. Nevertheless, noting the "unique and affirmative nature of the immunity remedy and fundamental considerations of separation of powers," the Third Circuit cautioned that the grants of judicial immunity "must be

bounded by special safeguards and must be made subject to special conditions." Id. at 971. The Smith Court thus identified five conditions that must be met before the remedy is available: "(1) the immunity is properly sought in the District Court; (2) the witness is available to testify; (3) the proffered testimony is clearly exculpatory; (4) the proffered testimony is essential to the defense; and (5) there is no strong governmental interest against the immunity." Id.

The question whether to confer immunity under Smith is committed to this Court's sound discretion. United States v. Perez, 280 F.3d 318, 348 (3d Cir. 2002). A district court abuses its discretion if its decision was arbitrary, irrational, fanciful, clearly unreasonable, or based on a "clearly erroneous finding of fact, an errant conclusion of law, or an improper application of law to fact." United States v. Lee, 612 F.3d 170, 184 (3d Cir. 2010). Further, "[i]t is important that a reviewing court evaluate the trial court's decision from its perspective when it had to rule and not indulge in review by hindsight." Old Chief v. United States, 519 U.S. 172, 182 n.6 (1997). Under that standard, Bergrin fails to show an abuse of discretion.

As this Court will recall, Bergrin's stand-by counsel made an off-the-cuff oral application for immunity with respect to McNeil, submitting a written (but unsworn) proffer of what McNeil supposedly would say. 29T7838. When the Court asked for the legal authority supporting that request, Bergrin responded by citing Smith, 29T7840, but without marshaling the five Smith factors in any meaningful way. Over the ensuing lunch break, the Government e-mailed to this Court with a written summary of Smith and its

progeny. See Exh. B. This Court denied the oral application after considering that summary and after speaking with counsel for McNeil. 29T7853–55.

1. Bergrin Failed To Demonstrate That McNeil's Expected Testimony Was "Clearly Exculpatory" And "Essential To The Defense."

A district court does not abuse its discretion by denying a request for immunity where the proffered testimony—even if believed—would not have compelled an acquittal. Compare United States v. Lowell, 649 F.2d 950, 965 (3d Cir. 1981) ("Montalbano's expected testimony, even if believed, would not in itself exonerate Lowell"), with Smith, 615 F.2d at 974 ("Sanchez would testify that Glen, Rieara and Georges did not participate in the crime").

Here, testimony by McNeil to the effect that there was no meeting on Avon Avenue and 17th Street at which Bergrin uttered the words "no Kemo, no case" would not have compelled an acquittal. As the Third Circuit suggested one year ago, Bergrin's (undisputed) act of relaying McCray's name from William Baskerville to Curry on November 25, 2003 alone was sufficient, when performed with the requisite intent, to prove Bergrin's guilt. Bergrin, 682 F.3d at 280 ("Pozo's testimony is, therefore, powerfully suggestive of Bergrin's intent in passing Kemo's identity on from Baskerville to Curry."). It is Bergrin who falsely claims that his guilt turned exclusively on the jury believing Young's testimony about the "no Kemo, no case" remark. See 29T7839.

Further, it is not at all clear that McNeil would have testified consistently with the proffer contained in Stephens' (unsworn) proffer. First, this Court found wanting a *sworn* certification filed by Stephens prior to trial. ECF No. 392-1 at 12-13. Second, many of the

defense witnesses who did testify fell well short of the proffer Bergrin provided. Third, an attorney for another subpoenaed witness (Jan Ludvig) provided information to the Government suggesting that the memorandum Stephens prepared of his interview with Ludvig falsely attributed to Ludvig statements he had never made. 29T7660–63 Fourth, when Bergrin complained that defense witnesses who had provided statements were invoking their Fifth Amendment rights, this Court responded that "it might have been just as well that they took the Fifth," 31T8214.

Thus, Bergrin has failed to meet his burden of showing the proffered testimony of McNeil and Baskerville was "clearly exculpatory" and "essential to the defense."

2. Strong Governmental Interests Weighed Against Immunizing Bergrin's Coconspirator.

As for the fifth factor, there were "strong governmental interests which countervail[ed] against a grant of immunity" for coconspirator McNeil.

Bergrin sought immunity to secure exculpatory testimony from an individual who, according to Young, was present for the December 4th meeting at which Bergrin instructed the Curry Organization to kill McCray. In fact. McNeil was chosen as one of the two designated assassins when and if the group found McCray, and was part of the three-car caravan that traveled to South Orange Avenue and 18th Street. 9T2250–56.

The Government had a compelling interest in objecting to McNeil falsely exculpating Bergrin for the same murder conspiracy in which he had participated. See Lowell, 649 F.2d at 961 (recognizing need to prevent coconspirators from "whitewashing" each other); accord United States v. Turkish, 623 F.2d 769, 775-76 (2d

Cir. 1980) ("The threat of a perjury conviction, with penalties frequently far below substantive offenses, could not be relied on to prevent such tactics."). Simply put, "the prosecution does have an arguable reason for denying immunity," for "it may yet prosecute" McNeil. Lowell, 649 F.2d at 965.

The Government's interest here contrasts sharply with Smith. There, the subpoenaed defense witness was a juvenile who was subject to prosecution for his role in the offense only by local Virgin Islands prosecutors. The local prosecutor was willing to provide use immunity so that the juvenile could testify as a defense witness at the federal trial so long as the AUSA also consented. But "[f]or reasons which were unexplained at trial and which the United States Attorney did not explain to this court at oral argument, this consent was never granted." Smith, 615 F.2d at 967. In remanding the case for a hearing, the Third Circuit observed that "it appears from the record that the United States Attorney would have little claim to any governmental interest in opposing a grant of immunity to Sanchez." Id. at 974.

Bergrin nonetheless claims that the Government lacks any interest in opposing immunity because ten years has elapsed since McCray's murder and no charges are likely to issue against McNeil. BB44. Bergrin ignores the fact that there is no statute of limitations for murder, and he fails to appreciate that the Government may well decide to level charges against McNeil or Baskerville. Indeed, the Government waited more than five years before indicting Bergrin for that murder. Simply put, the Government had a compelling interest in precluding one of Bergrin's coconspirators from falsely exculpating himself and Bergrin at trial.

C. Bergrin Waived Any Claim Of Immunity As To Jamal Baskerville.

Bergrin claims that this Court also erred in not immunizing Jamal Baskerville. However, he can point to nothing in the record showing that this Court formally denied a request to immunize Baskerville. Accordingly, he waived his claim.

As this Court will recall, Baskerville appeared at the first trial and invoked his right against self-incrimination, and both parties assumed he would do the same at this trial. But Bergrin never formally requested immunity for Baskerville. When this Court addressed and resolved the immunity request for McNeil, stand-by counsel represented that "we would have a similar application for Jamal Baskerville," but added that "we don't have to deal with it now because he's not here[.]" 29T7855. This Court did not deny that yet-to-be-made application, but indicated it would have to review the proffer and make a ruling when the issue ripened. 29T7856.

Ultimately, the issuer did not ripen. During a colloquy addressing the list of remaining defense witnesses, Bergrin's stand-by counsel said that Baskerville would invoke his Fifth Amendment rights without specifying whether her information was based on recent contact with Baskerville or on his decision at the first trial. 30T8227. Significantly, moreover, Bergrin did not request Smith-based immunity for Baskerville when this Court responded, "So he's out." Id. Instead, Bergrin apparently released Baskerville from his obligation to appear. Thus, Bergrin waived his Smith-based claim as to Jamal Baskerville. See United States v. Wright, 588 F.2d 31, 36 (2d Cir. 1978) ("Because Wright failed to subpoena Parker and to prove any need for use immunity, he

cannot now demonstrate that the refusal to confer immunity prejudiced his trial."); see also United States v. Klauber, 611 F.2d 512, 514 (4th Cir. 1979) ("Since Klauber did not call Simons to the stand, the contention that he would have asserted his Fifth Amendment right and refused to testify without a grant of immunity from the government is not established as we believe it normally would be required to be for the question Klauber raises to be preserved."); see also Smith, 615 F.2d at 971 (requiring that the immunity be properly sought and that the witness be available to testify).

Bergrin seeks to gloss over his failure to secure a ruling denying immunity for Baskerville by falsely claiming that this Court had "so clearly indicated its intention to deny all such applications." BB41 n.15. In fact, this Court plainly limited its ruling to the only witnesses before it at that time: McNeil and Edward Peoples. If Bergrin wanted this Court to immunize other witnesses, or if he doubted the *bona fides* of those witnesses' privilege invocations, it was his obligation to make a proper application or lodge a proper objection. That he failed to do so does not mean that he can treat this Court's ruling denying immunity for McNeil as an implicit denial of an unmade request to immunize Baskerville (especially when Bergrin did not seek such immunity at the prior trial).

Accordingly, Bergrin waived his claim that this Court should have conferred Smith-based immunity on Baskerville. And, even if he did not, his claim fails for the same reasons discussed in Section B, above.

IV. Bergrin Waived His Request To Interview Jurors. In Any Event, His Motion Improperly Relies On Speculation Instead Of Fact.

On the Sunday before the jury returned its verdict, the New York *Daily News* published an article—on page 13—about the parties' summations. BB Exh. 6. Bergrin saw no need to bring this supposedly inflammatory article to this Court's attention the following Monday. Instead, he waited until *after* the jury convicted him to speculate that the speed with which the jury convicted him suggests that the article influenced the jury. (Never mind the mountain of evidence proving Bergrin's guilt.) Bergrin therefore asks this Court to recall and interview the jurors to explore his speculation. Bergrin waived his right to poll the jurors by waiting until after the jury had reached its verdict. Even if he did not, Bergrin's speculation that the jury may have read the article fails to satisfy the rigorous standard for conducing post-trial juror interviews. Further, the *Daily News* article contains nothing so inflammatory as to warrant a hearing, let alone compel a new trial.

A. Bergrin Waived His Right To Poll The Jury By Not Raising The *Daily News* Article Before The Verdict.

The Third Circuit requires defendants to raise claims of jury misconduct in a timely manner and does not allow them to "learn of juror misconduct during the trial, gamble on a favorable verdict by remaining silent, and then complain in a post-verdict motion that the verdict was prejudicially influenced by that misconduct." United States v. Pelullo, 105 F.3d 117, 126 (3d Cir. 1997) (internal quotation marks and citation omitted). This requirement ensures that "[i]n the particular context of juror misconduct the trial court is given every available opportunity to attempt to salvage the trial by ridding the jury of prejudicial influences." United States v. Bolinger, 837 F.2d 436, 439 (11th Cir.

1988). Even if evidence is discovered "after the jury ha[s] completed its deliberations but before the verdict [has been] received, . . . [the] Court and counsel still have an opportunity to do something about [it], and correspondingly, the obligation to act on it." United States v. McKinney, 952 F.2d 333, 335-36 (9th Cir. 1991). At a minimum, a defendant who cannot fully investigate claims of juror misconduct before the trial ends must at least "raise[] the issue of juror bias by bringing [the allegation] promptly to the attention of the trial court." United States v. Dean, 667 F.2d 729, 731 (8th Cir. 1982).

Here, Bergrin had time to bring the *Daily News* article to the attention of the Court before the end of trial. The article was published on March 17, 2013, but Bergrin did not raise an issue with the Court until two months later. Compare United States v. Fumo, Crim. No. 06-319, 2009 WL 1688482, at *58 (E.D. Pa. June 17, 2009) (noting that upon learning from a media report during deliberations that a juror had been using social media to comment about the trial, Fumo filed a motion that same night to disqualify the juror, prompting a hearing the next day, just before the verdict was returned), and United States v. Rugiero, 20 F.3d 1387, 1389 (6th Cir. 1994) (defendants promptly complained during deliberations about television news report linking defense counsel to organized crime). Instead, Bergrin prevented this Court from taking potential curative action (if any was even necessary) before the jury returned a verdict by not immediately bringing the *Daily News* article to this Court's attention. Given the Third Circuit's holding in Pelullo, this Court should hold that Bergrin waived his right to a remedy.

Bergrin cannot excuse his failure to act by claiming he did not know about the article. Given that the jury was not sequestered, it was his obligation to monitor press

coverage of the trial and bring any potentially prejudicial articles to this Court's attention. See United States. v. DiCarlo, 575 F.2d 952, 960 (1st Cir. 1978). He certainly had the means to do so through his very capable stand-by counsel: two partners and an associate from one of the most respected criminal defense firms in New Jersey. Bergrin's failure to bring the *Daily News* article to this Court's attention waives—or at the very least forfeits—his right to claim that the article irrevocably tainted the jury.

B. Even If Bergrin Did Not Waive His Claim, It Is Far Too Speculative To Warrant An Evidentiary Hearing.

1. The Legal Standard.

The American judicial system places a high value on the finality of jury verdicts. See, e.g., McDonald v. Pless, 238 U.S. 264, 267-68 (1915). "Jurors who complete their service should rarely, if at all, be recalled for [voir dire] proceedings . . . months or years later." United States v. Gilsenan, 949 F.2d 90, 98 (3d Cir. 1991). That is so because "desperate criminals willing to commit violent crimes in the first place would think nothing of attempting to intimidate jurors in an effort to overturn verdicts." Id. Thus, "[t]here is no obligation for the judge to conduct an investigation . . . where no foundation has been established." United States v. Console, 13 F.3d 641, 669 (3d Cir. 1993) (quoting United States v. Vento, 533 F.2d 838, 869-70 (3d Cir. 1976)).

"'Reasonable grounds are present [only] when there is clear, strong, substantial and incontrovertible evidence.'" Console, 13 F.3d at 669 n.34 (quoting United States v. Moon, 718 F.2d 1210, 1234 (2d Cir. 1983)); accord United States v. Anwo, 97 F. App'x 383, 386-87 (3d Cir. 2004) (not precedential); United States v. Fumo, 639 F. Supp. 2d

544, 551 (E.D. Pa. 2009). Thus, "[n]ot every allegation of outside influence requires an evidentiary hearing," United States v. Moses, 15 F.3d 774, 778 (8th Cir. 1994), and no hearing is required "when only thin allegations of jury misconduct are present," United States v. Easter, 981 F.2d 1549, 1553 (10th Cir. 1992).

Further, this Court forbids interviewing jurors with respect to the deliberations or verdict of the jury "except on leave of Court granted upon good cause shown." D.N.J. L. Crim. R. 24.1; see United States v. Militello, 673 F. Supp. 141, 144 (D.N.J. 1987). A court can grant such leave only if the moving party demonstrates good cause, a standard that serves "to avoid harassment of jurors, preserve the finality of judgments, discourage meritless applications for post-verdict hearings, . . . as well as other concerns." Id.

2. Bergrin's Motion Improperly Rests On Speculation.

Bergrin's request to interview jurors "is based on nothing more than unfounded speculation." Fumo, 639 F. Supp. 2d at 556. His argument goes something like this: (1) this was a long trial and should have produced a long period of deliberations; (2) the New York *Daily News* published its page-13 article about this case on March 17th; (3) the jury "abruptly" reached its verdict the next day; (4) jurors likely violated this Court's admonitions to ignore press coverage of the trial (because Juror 5 supposedly violated other instructions); therefore (5) one or more jurors must have read the *Daily News* article and allowed it to influence their verdict. BB51-54. Such "speculation can hardly be considered 'clear, strong, substantial and incontrovertible evidence.'" United States v. Connolly, 341 F.3d 16, 35 (1st Cir. 2003) (citation omitted).

Bergrin's argument depends on the proposition that the announcement of a verdict one day after the *Daily News* article necessarily proves that latter caused the former. That ignores the "well-known principle that correlation does not imply causation," United States v. Jacques, 784 F. Supp. 2d 59, 65 (D. Mass. 2011). Simply put, "there is no evidence in the record to indicate that any of the jurors read the newspaper article." United States v. Shaffner, 524 F.2d 1021, 1025 (7th Cir. 1975); see also Vento, 533 F.2d at 869 (affirming denial of hearing where there was no basis "to believe that the jury had, in fact, been exposed to tainted information"); Exh. C at 46-47 (Judge Chesler denies from the bench a motion that was identical to, and just as speculative as, Bergrin's; finds no basis to conclude "that any jurors were subjected to extraneous influences during the deliberations;" and notes that the "mere timing of the Court's charge [on Friday] pursuant to Fioravanti, followed by the jury returning with a verdict the following Monday, by itself is simply unremarkable.").

Bergrin also assumes that long trials ought to produce long deliberations. BB51-52. But "[i]t seems self-explanatory that '[n]o rule requires a jury to deliberate for any set length of time.'" United States v. Dolan, 120 F.3d 856, 870 (8th Cir. 1997) (citation omitted). This Court should not be "impressed with the suggestion that any injustice resulted from the jury's failure to deliberate more than" three days. United States v. Penagaricano-Soler, 911 F.2d 833, 846 (1st Cir. 1990). At any rate, quick verdicts are not uncommon in long trials. The jury took just four days to convict Vincent Fumo on all 145 counts after a five-month trial. United States v. Fumo, 655 F.3d 288, 297 (3d Cir. 2011). And the jury took just six days to convict Kaboni Savage (and two days to impose the

death penalty) after a 3.5-month trial for RICO conspiracy, VICAR, and witness tampering arising out of six retaliation murders. United States v. Savage, E.D. Pa. Crim. No. 07-550, ECF. Nos. 1047, 1297, 1329, 1415, 1424.

Similarly flawed is Bergrin's assertion that this trial was "complex" given the length of the indictment, jury instructions, and verdict form. BB51-52. In fact, the indictment charged five "discrete" schemes, 9/12/2012 Tr. at 45, that turned largely on witness credibility. Further, all of the substantive counts arose from the racketeering acts charged in Count 1, as confirmed by the numerous cross-references between the two in the jury instructions and on the Verdict Form. Additionally, many of the predicate acts and related substantive counts involved additional instances of interstate travel in support of the same charged scheme. Once the jury concluded that Bergrin participated in that scheme, all it had to do was consider whether the Government had proved the particular means of interstate travel charged. The case was far less complex than Bergrin claims.

Also flawed is Bergrin's assumption that the jury announced its verdict before having had time to read all of Young's testimony, which it had requested the previous Friday. BB52. Nothing in the jury's note requesting Young's testimony suggests that the jury wanted to read the entire testimony. It is equally likely that a single juror was looking for a specific answer to a specific question asked on a specific date.

Bergrin also assumes that the jury considered only his "defense of the Kemo murder case, but was not yet considering the evidence related to any other charges at that time." BB51; accord BB46. But he ignores the possibility that the jury resolved all other

counts first and then turned to the McCray murder, or that the jury turned to other counts while awaiting the transcript of Young's testimony.

With no real proof to support his motion, Bergrin notes that Rule 606(b), which prohibits an inquiry into the jurors' deliberative process, contains an exception permitting a juror to "testify about whether . . . extraneous prejudicial information was improperly brought to [his] attention." Fed. R. Evid. 606(b)(2)(A). See BB48. But the fact that "the Rule permits the *voir dire* requested here" does not mean that Bergrin has satisfied the rigorous standard for conducting it. To the contrary, "[t]he prevention of fishing expeditions in search of information with which to impeach jury verdicts is a principal purpose of the rule." United States v. Davila, 704 F.2d 749, 754 (5th Cir. 1983).[8]

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[8] In fact, Bergrin's cases all involve tangible proof of some extraneous influence on the jury, often raised *during* trial when the court could take curative action. See Smith v. Phillips, 455 U.S. 209, 212-13 (1982) (prosecutor reported that one of the jurors had sought employment with his office during the trial); Parker v. Gladden, 385 U.S. 363, 363-64 (1966) (bailiff made prejudicial statements to the jurors during trial); Remmer v. United States, 347 U.S. 227, 228 (1954) (juror told judge that someone had offered him money to reach a certain verdict); Kemp, 500 F.3d at 271-77 (several jurors complained to the judge that a fellow juror was biased and refusing to deliberate or consider evidence); United States v. Lloyd, 269 F.3d 228, 236 (3d Cir. 2001) (a juror informed the court after the trial that she may have been influenced by a news report during trial); Wilson v. Vermont Castings, Inc., 170 F.3d 391, 393-94 (3d Cir. 1999) (juror informed counsel after trial that she had consulted an extraneous document); Gov't of the V.I. v. Weatherwax, 20 F.3d 572, 577-58 (3d Cir. 1994) (uncontradicted evidence showed that some jurors walked out of the jury room with a newspaper containing a prejudicial article about the case); United States v. Resko, 3 F.3d 684, 687 (3d Cir. 1993) (juror informed court officer that other jurors were prematurely discussing the case); Gov't of the V.I. v. Dowling, 814 F.2d 134, 136 (3d Cir. 1987) (juror informed the judge that another juror was reading news about the case during trial); United States v. Pantone, 609 F.2d 675, 689 (3d Cir. 1979) (a juror testified that other jurors had prematurely decided on guilt); United States v. Moten, 592 F.2d 654, 656-57 (2d Cir. 1978) (defendant's sister told defense counsel and the trial judge that a juror had tried to communicate with the defendant through her); Vento, 533 F.2d at 846 (nephew of one of the jurors informed

Bergrin also argues that this Court cannot apply the legal presumption that the jurors followed their instructions to ignore press coverage of this case. DB53-54 (citing Richardson v. Marsh, 481 U.S. 200, 211 (1987)). Unable to cite a single page of *trial transcript* rebutting that presumption, Bergrin resorts to quoting Juror 5's post-verdict statements to the *Star-Ledger*, which supposedly show that Juror 5 violated this Court's instructions by (1) not considering each count separately, (2) inferring criminal propensity, and (3) considering Bergrin's decision to proceed *pro se*. BB53.

Quoting a juror's remarks in an effort to prove that the juror violated a court's instructions is "so clearly within [Rule 606(b)] and outside the exception as to make it difficult to give an explanation beyond stating the rule itself: 'we do not permit jurors to impeach their own verdicts.'" United States v. Lakhani, 480 F.3d 171, 185 (3d Cir. 2007) (citation omitted); see United States v. Stewart, 433 F.3d 273, 307-08 (2d Cir. 2006) (Rule 606(b) barred defendant from relying on jurors' post-verdict statements to prove that they violated court's limiting instruction regarding a piece of evidence). It makes no difference that Bergrin quotes Juror 5's post-verdict statements in an effort to secure a hearing, rather than to directly attack the verdict: Rule 606(b) "categorically bar[s] juror testimony 'as to any matter or statement occurring during the course of the jury's deliberations even if the testimony is not offered to explore the jury's decision-making process in reaching the verdict." Williams v. Price, 343 F.3d 223, 235 (3d Cir. 2003). As

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defendant and defense counsel that the juror may have possessed extraneous prejudicial information regarding defendant); United States *ex rel.* Greene v. New Jersey, 519 F.2d 1356 (3d Cir. 1975) (hearing was required when two articles about the defendant's abortive effort to plead guilty were published during trial).

Bergrin may not rebut the Richardson presumption by violating Rule 606(b)(1), Gacy v. Welborn, 994 F.2d 305, 313 (7th Cir. 1993), the *Star-Ledger* article is legally irrelevant.

The *Star-Ledger* article is also factually irrelevant. Read in context, Juror 5's remarks put the lie to Bergrin's claim that Juror 5 violated this Court's jury instructions. First, the juror said that "the judge's instructions were helpful in leading the jurors through a thorough consideration of each count," adding that "the jury was confident in its verdict, and did not rush its decision." BB Exh. 7. Second, the juror's statements about an "accumulation of evidence" that "created a pattern of criminal activity" simply confirm what the jury's verdict showed: that the Government had overwhelmingly proved the fifth element of its substantive RICO count, *i.e.*, that "Bergrin knowingly conducted the enterprise's affairs . . . '*through a pattern of racketeering activity*.'" 35T8863 (emphasis added). It is specious to claim that a juror's post-verdict comment about the strength of the Government's evidence proving the critical pattern element shows that the juror improperly inferred criminal propensity.[9]

Third, Bergrin claims that the juror violated this Court's instruction about *pro se* litigants by observing that "[t]he risk [of self-representation] is that you show character," in that "you cannot totally disguise who you are." BB53. But all the instruction does is preclude a jury from holding against a defendant *the choice* to proceed *pro se*. It does not

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[9] Bergrin's stand-by counsel has publicly stated that "the juror's reasoning also gives weight to the appellate issue he and Bergrin still plan to bring to the fore," *i.e.*, the denial of his severance motion. BB, Exh. 7 at 2. That would plainly violate Rule 606(b)(1). See United States v. Lewis, 284 F. App'x 940, 942 n.3 (3d Cir. 2008) (not precedential) ("We admonish counsel . . . for attempting to use a post-trial letter from a juror to impeach the verdict in clear violation of" Rule 606(b).).

prevent jurors from doing what they are permitted to do with *all* defendants (represented or not): consider their demeanor and actions in court among the total mix of information available to them. See United States v. Calabrese, Crim. No. 02-1050, 2008 WL 1722137, at *3, *5, (N.D. Ill. Apr. 10, 2008) (stating "that there is nothing improper about a jury observing a defendant's courtroom demeanor during trial," and that "it would be quite asymmetrical indeed if a defendant were to receive the benefit of a new trial based on his or her own behavior in the courtroom"), aff'd, United States v. Schiro, 679 F.3d 521 (7th Cir. 2012). Having chosen to go *pro se* so that he could make unsworn assertions to the jury and testify through his questions, 5T1021; 12T3020; 18T4668; 23T6467; 24T6593, Bergrin cannot complain that a juror recognized the impact of that strategy.

In sum, "to rule that even a hearing is required on the paltry submission made to [this Court] would render nugatory the sound policy of protecting jurors from post verdict harassment and inquiry and would encourage, in other cases, attempts to tamper with jury verdicts." United States v. Dinorsico, 661 F. Supp. 1041, 1043 (D.N.J. 1987) (Barry, J.).

3. Bergrin Fails To Show That The *Daily News* Article Substantially Prejudiced Him.

This Court may decline to hold a hearing on the existence of extraneous influence if it concludes that Bergrin could not have been substantially prejudiced by the jury's alleged exposure to the *Daily News* article. See Wilson, 170 F.3d at 395 & n.4; Gilsenan, 949 F.2d at 95-96; United States v. Armocida, 515 F.2d 29, 48 (3d Cir. 1975). To determine whether a defendant was substantially prejudiced, a court will "assess the probability of prejudice, and to do so we must 'review [] the entire record, analyz[e] the

substance of the extrinsic evidence, and compar[e] it to that information of which the jurors were properly aware.'" Lloyd, 269 F.3d at 239 (citation omitted).

The article—published on page 13 of the *Daily News* after the jury heard all of the evidence—summarized the parties' contentions in closing arguments. Because the parties were commenting on the evidence admitted at trial, Bergrin does not and cannot claim that the article exposed the jury to inadmissible evidence that had been excluded from the trial. E.g., Frank v. Brookhart, 877 F.2d 671, 674 (8th Cir. 1989) (holding that there was no prejudicial effect when "the newspaper accounts did not disclose any material which the jurors had not heard [during the trial]").

Indeed, Bergrin focuses almost exclusively on the article's comparison of him to deceased Mafia boss John Gotti. He takes issue with the caption that appears under the photograph of Gotti: "Bergrin is accused of being John Gotti (pictured) with a law degree – a ruthless racketeer every bit as dirty as his lowlife clients." BB47. He also complains about the term "cold-blooded." Id. While such characterizations "[are] not necessarily flattering to [Bergrin]," they "[are] not sufficiently prejudicial to constitute a violation of [his] Sixth Amendment rights." United States v. DiSalvo, 34 F.3d 1204, 1222 (3d Cir. 1994). Indeed, "cold-blooded" aptly describes the evidence showing that Bergrin instructed (1) nine-year-old Carolyn Velez to lie at her father's trial; (2)Young to "get rid of" McCray, (3) Pozo to "get to and take out" Pedro Ramos; and (4) Cordova to "make it look like a home invasion robbery," and not a hit on a witness. See Schiro, 679 F.3d at 530 (district judge properly concluded that "media coverage of this case" was neither "inflammatory nor added anything of substance to the evidence presented at the trial"

despite "extensive press coverage," including "an opinion piece saying that the jurors would be 'basically stupid' if they didn't convict the defendants"); see also United States v. Moss, 410 F.2d 386, 388 (3d Cir. 1969) ("the publication of a photograph of Moss handcuffed to a 'notorious bank robber' was not so prejudicial as to require a new trial").

It particularly unseemly for Bergrin to claim that an article likening him to John Gotti caused any prejudice, let alone affected the outcome of the trial. After all, *Bergrin* proudly invoked Gotti's name when Cordova met Bergrin at the airport in Chicago:

BERGRIN: Yeah, absolutely, mm-hm.

CORDOVA: I'm glad you're here. Look at Paul [LAUGHS].

BERGRIN: John Gotti always told me, man, always look ...

CORDOVA: Right here, baby. Right here. I'm sorry, come on. He said what, Papa?

BERGRIN: He told me that when you look fucking good you'll be good.

GX4119a1 at 1:55–2:04; GX4119b1 at 4. That was not just small-talk. Later that same evening, Bergrin told Cordova that they had "to build a system of inner contacts like the mob had 50 years ago" by paying off the politicians who appoint judges, so that the "judges owe them favors and then you . . . make them owe you. They have to come to you." GX4119a7 at 00:23–1:23; GX4119b7 at 1-2.

At any rate, the Third Circuit rejected a claim of substantial prejudice in very similar circumstances. In United States v. D'Andrea, 495 F.2d 1170 (3d Cir. 1974), an article appeared in a Philadelphia newspaper after the close of evidence but before the case was submitted to the jury. The article "reported appellant's indictment (in a different

jurisdiction) on an assault charge and recited the circumstances of that alleged offense. It also referred to appellant as a 'gang figure' (in the headline), and as a 'reputed underworld figure' (in the body of the article)." Id. at 1172. The Third Circuit affirmed the District Court's conclusion that the article had not caused substantial prejudice. "[T]he arrest giving rise to the indictment reported in the article and the facts that gave rise to it had already been presented to the jury. As a result, the possible prejudice was restricted to the characterizations of appellant that appeared in the article." Id. Further, the Third Circuit explained, the article "was not published until the 35th day of trial, and by that time the jury had already heard all the evidence, including extensive testimony by the appellant himself. As a result the jurors were thoroughly familiar with the defendant and the case, and were less likely to be influenced by the brief characterization of the defendant that appeared in the Daily News article." Id. As in D'Andrea, "the possible prejudice" to Bergrin "was restricted to the characterizations of [him] that appeared in the article." Indeed, the *Daily News* article was published at a time when "the jury had already heard all the evidence," such that "the jurors were thoroughly familiar with the defendant and the case, and were less likely to be influenced by the brief characterization of the defendant that appeared in the Daily News article."

Further, "a heavy 'volume of incriminating evidence also can undermine a claim of prejudice.'" Lloyd, 269 F.3d at 242 (citation omitted). Here, the evidence against Bergrin was positively overwhelming. The jurors heard recorded conversations plainly showing Bergrin's guilt of cocaine trafficking and witness tampering, which were buttressed by corroborative evidence and testimony. See United States v. Sanders, 962 F.2d 660, 674

(7th Cir. 1992) (in denying motion for new trial based on fact that jurors learned through news reports of a threat to a single juror, district court noted "that the evidence against the defendants was 'overwhelming,' and that much of it came from the defendants' own mouths in the form of video and audio recordings").

Finally, at the end of each trial day, this Court admonished the jury not to "do any Internet searches or read anything or listen to anything about the case." 1T238.[10] Further, in its final instructions, this Court instructed the jury to "make your decision in this case based only on the evidence that you saw and heard in this courtroom. Do not let rumors, suspicions, or anything else that you may have seen or heard outside the courtroom influence your decision in any way." 35T8838. Beyond that, this Court reminded the jury that it could not use the Internet or electronic devices "to investigate or communicate about the case because it is important that you decide this case based solely on the evidence presented here in the courtroom," 35T8834, reiterating that instruction just before the jury retired to deliberate, 35T8964. See Richardson, 481 U.S. at 211; see also Gilsenan, 949 F.2d at 96 (noting that the jury was exposed to the extraneous information after it "was instructed to decide the case on the basis only of the evidence and not extrinsic information, an instruction the jury is presumed to have followed").

In sum, this Court should deny Bergrin's request to interview jurors as unduly speculative and because the Daily News article did not cause substantial prejudice.

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[10] Accord 2T550; 3T824; 4T867; 5T1031; 6T1324; 7T1629; 8T1931; 9T2259; 10T2254; 11T2849; 12T3175; 13T3513; 14T3805; 15T4011; 16T4297; 17T4595–96; 18T4926; 19T5122; 20T5408; 21T5831; 22T6291; 23T6511; 24T6786; 25T6988; 26T7269; 27T7550; 28T7632; 29T7884; 30T8130; 31T8247; 32T8352; 34T8714.

V. There Is No Basis In Law Or Fact For Questioning Juror Five.

Bergrin buries his final claim for relief in a half-page-long footnote, and for good reason. Bergrin claims that Juror 5's remarks to the *Star-Ledger* show that his pretrial exposure to press coverage of Bergrin "colored his perception of the guilt or innocence and credibility of the parties and witnesses." BB54 n.20. Bergrin therefore asks this Court to question Juror 5 to determine "whether he truthfully conveyed his full bias against" Bergrin during jury selection. This claim is patently meritless.

In McDonough Power Equipment, Inc. v. Greenwood, 464 U.S. 548 (1984), the Supreme Court held that to obtain relief based on a claim that a juror gave false answers during voir dire, the litigant must show (1) that the "juror failed to answer honestly a material question on voir dire," and (2) "that a correct response would have provided a valid basis for a challenge for cause." Id. at 455. This standard applies in federal criminal cases, too. United States v. Hodge, 321 F.3d 429, 441 (3d Cir. 2003).

Bergrin cannot show that Juror 5 lied during jury selection, so there is no need to reach McDonough's second step. In fact, Bergrin's "brief truncates the quote in a troubling way," Sandoval v. Ulibarri, 548 F.3d 902, 915 (10th Cir. 2008), by deploying *six sets* of ellipses to alter the meaning of Juror 5's statements:

> when [I] **...** showed up for **...** jury duty **...** 'I just thought, 'What a zoo of a case,' **...** this is going to be amazing **...** in terms of **...** the real parade of people who would come through that courtroom, all the way from felons convicted of serious offenses to the murderer of a federal witness to just some of the more innocent parties involved.'

BB54 n.20 (quoting BB Exh. 7 at 1). Bergrin thus attempts to make it appear as if Juror 5 harbored thoughts about "a zoo of a case," including "the real parade of people who

would come through that courtroom," *before* he "showed up for jury duty," *i.e.*, "as a result of having read about the case prior to his jury service." BB54 n.20. But removing the ellipses makes it clear that Juror 5 developed those thoughts *after* he showed up for court and "began to hear about the case he would decide:"

> Flash forward to January of this year, when Hershorn, 58, showed up for the first time in his life for jury duty in a criminal trial. **As he began to hear about the case he would decide — Mafia-like accusations, witness murder, drug trafficking and a defendant acting as his own lawyer** — Hershorn realized he'd be deliberating the fate of one Paul Bergrin.
>
> He also realized, quickly, he said yesterday in a lengthy interview, that the case itself would be one he'd never forget.
>
> "I just thought, 'What a zoo of a case," Hershorn, an archivist for the Institute of Jazz Studies, said yesterday. "And I just thought, this is really going to be amazing in scope — both in terms of the charges and the real parade of people who would come through that courtroom, all the way from felons convicted of serious offenses to the murderer of a federal witness to just some of the more innocent parties involved."

BB Exh. 7 (emphasis added). The text highlighted above shows that Juror 5's impression stemmed from what he learned when he "showed up . . . for jury duty and began to hear about the case he was about to decide." See Rice v. Hamilton Oil Corp., 658 F. Supp. 446, 449 (D. Colo. 1987) ("Of greater concern to this Court is the selective omission of portions of a quote by Frederic Hamilton which distorted the meaning of his statement.").

So understood, Juror 5's answers during jury selection were entirely accurate. His questionnaire disclosed that he had seen news coverage of the case, (Sealed) Exh. C at 3, and this Court questioned Juror 5 about that coverage during jury selection:

> THE COURT: This is juror number 02-172. I note in response to your question to number 19 whether or not you heard anything about this case or Mr. Bergrin, you answered yes. Could you tell us what that was?

JUROR NO. 02-172: Nightly news reports and newspapers, less on television, some on radio.

THE COURT: How long ago?

JUROR NO. 02-172: I'd say probably a year and a half.

THE COURT: Do you recall what it was that you heard?

JUROR NO. 02-172: Just I believe possibly the arrest.

THE COURT: Okay. Did anything that you hear, would it have any bearing on your ability to be fair and impartial in this case?

JUROR NO. 02-172: I don't believe so.

THE COURT: Okay.

. . .

THE COURT: And I looked at question number 39, the last question, and I just wanted to make certain that you still feel that way. It states that -- you stated yes, that if you were selected, you'd be able to render a verdict based on the evidence in accordance with my instructions and disregarding any other ideas or beliefs that you might have, basically that you could render a fair and impartial verdict.

Do you still feel that way?

JUROR NO. 02-172: Yes, sir, I do.

Exh. D [1/18/2013 Tr.] at 3-5. Bergrin did not probe the matter further despite asking this Court to follow up on other answers. Id. at 5-6. By not asking "any follow-up questions or ask[ing] the judge to ask them," Bergrin "lost [his] ability to seek a new trial on this basis." United States v. Benabe, 654 F.3d 753, 781 (7th Cir. 2012). See McDonough, 464 U.S. at 550 n.2; see also Isbell v. Ray, 208 F.3d 213 (6th Cir. 2000) (unreported); Robinson v. Monsanto Co., 758 F.2d 331, 335 (8th Cir. 1985).

Bergrin also fails to mention that Juror 5 asked to be excused *after* he had been selected and sworn in as a juror. 1T3-4, 10-11. The timing of that request further shows Juror 5's perception of the case developed based on what he learned during about it jury selection, not from reading press accounts of Bergrin's arrest. Bergrin cannot credibly claim that Juror 5 lied to obtain a seat on the jury, only to ask to be removed just ten days later. And even if Juror 5's perception of the case stemmed from pre-trial news coverage, his remarks to the *Star-Ledger* hardly suggest (much less prove) that he lied when he said that he could still judge the case fairly.

As Bergrin cannot show that Juror 5 lied during jury selection, there is no basis for ordering a new trial. See United States v. James, Crim. No. 07-578, 2011 WL 5080355, at *4 (D.N.J. Oct. 25, 2011) ("Defendant has failed to show that during jury selection, Mr. Asuquo provided an affirmatively dishonest statement to the Court as required by the first McDonough prong"), aff'd, 2013 WL 500724 (3d Cir. Feb. 12, 2013). And "[b]ecause [Bergrin] does not possess 'clear, strong, substantial and incontrovertible evidence' that either of the McDonough prongs are satisfied," this Court would "not abuse its discretion by refusing to grant a new trial without an evidentiary hearing." See James, 2013 WL 500724, at *1 (quoting Stewart, 433 F.3d at 302-03); accord United States v. Brooks, 569 F.3d 1284, 1288 (10th Cir 2009) ("Based on Mr. Brooks's scant evidence, the district court was within its 'wide discretion' in ruling that a hearing was unnecessary to determine whether Mr. Brooks should be granted a new trial.").

Bergrin cites United States *ex rel.* De Vita v. McCorkle, 248 F.2d 1 (3d Cir. 1957) (*en banc*), where a sharply divided Third Circuit vacated a death sentence by rejecting the

holdings of the New Jersey courts and the District Court that a juror had not intentionally concealed the fact that he had been the victim of a robbery, similar in time and place, to the one that led to the charged murder. McCorkle, which predates McDonough, is *sui generis*, and the Third Circuit has not cited it since 1991. At any rate, the juror in McCorkle had concealed information that, if disclosed during jury selection, plainly would have resulted in a for-cause challenge. Here, there was no concealment at all, and the juror's remarks do not show that he had any bias against Bergrin.

Further, Bergrin cites United States v. Skelton, 893 F.2d 40, 41 (3d Cir. 1990), without mentioning that the Third Circuit reversed the order granting a new trial because the District Court found that the juror in question had not concealed any information. Bergrin also quotes Judge Garth's dissent in Gov't of the V.I. v. Nicholas, 759 F.2d 1073, 1087 (3d Cir. 1985), for the proposition that a hearing must be held if a juror lies in voir dire and the lie is revealed after trial. But the issue in Nicholas was whether a hearing was necessary where a juror, after the trial, had submitted two affidavits, one stating that he could not hear the trial testimony, and the other stating that he could. No one claimed that the juror had lied during voir dire. At any rate, the panel majority *affirmed* the order denying a hearing because any post-trial inquiry would have violated Rule 606(b). Id. at 1080-81. And the Supreme Court favorably cited *the majority's* holding in Tanner v. United States, 483 U.S. 107, 118-19 (1987).

In sum, this Court should deny Bergrin's Rule 33 motion without a hearing.

CONCLUSION

For the foregoing reasons, this Court should deny in their entirety Bergrin's motions under Rules 29(c) and Rule 33.

Respectfully submitted,

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United States Attorney

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Date: June 12, 2013
Newark, New Jersey

REQUEST NO. 38

RICO – RACKETEERING ACT EIGHT
(Failure To File an IRS Form 8300),
as also charged in Count 26

Both Racketeering Act 7(g) and Count 26 charge that, on or about September 4, 2008, in the county of Essex, in the District of New Jersey and elsewhere, defendant Paul Bergrin did knowingly and for the purposes of evading the reporting requirements of Title 31, United States Code, Section 5331, and the regulations issued thereunder, cause a nonfinancial trade and business, namely Law Office of Paul Bergrin, to fail to file a report required under Title 31, United States Code, Section 5331, in connection with the receipt by Law Office of Paul Bergrin of United States currency in amounts over $10,000, i. In violation of Title 31, United States Code, Section 5324(b), and Title 18, United States Code, Section 2.

Section 5324(b)(1) of Title 31 of the United States Code provides that:

"No person shall, for the purpose of evading the report requirements of section 5331 or any regulation prescribed under such section . . . cause or attempt to cause a nonfinancial trade or business to fail to file a report required under section 5331 or any regulation prescribed under such section[.]"

With respect to currency transaction reporting requirements, Section 5331 of Title 31, United States Code, Section 5331, and the regulations of the Treasury Department under that section, provides requirethat any person who is engaged in a trade or business, and who, in the course of such trade or business, receives more than $10,000

EXHIBIT A

in coins or currency in 1 transaction (or 2 or more related transactions) . . . shallto file a report, IRS Form 8300) with the Government described in subsection (b) with respect towithin 15 days of such transaction (or related transactions)) with the Financial Crimes Enforcement Network .at such time and in such manner as the Secretary may, by regulation, prescribe."

Pursuant to section 5331(b), the Secretary of Treasury has promulgated a regulation requiring a trade or business that receives more than $10,000 in coins or currency in 1 transaction to file, within 15 days of the transaction, an IRS Form 8300 with the Financial Crimes Enforcement Network.[84]

To find defendant Paul Bergrin guilty of this offense, the Government must prove beyond a reasonable doubt the following four elements:

1. Tthat on or about September 4, 2008, in the county of Essex, in the District of New Jersey and elsewhere, at the time specified in the Indictment, defendant Paul Bergrin was engaged in a trade or business, *i.e.*, Law Office of Paul Bergrin;

2. that in the course of that trade or business, defendant Bergrin knowingly received more than $10,000 in cash in a single transaction;

3. that That defendant Bergrin knowingly caused the trade or business to fail to file a Form 8300 with the Financial Crimes Enforcement Networkhad knowledge of the currency transaction reporting requirements; and

3. That in the course of that trade or business, and with such knowledge, defendant Bergrin knowingly and willfully caused or attempted to cause the trade or business to fail to file a Form 8300 with the Government within 15

[84] 31 C.F.R. § 103.30(a) (2008), recodified as 31 C.F.R. § 1010.330(a) in 2011.

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days of a currency transaction wherein he received more than $10,000 in cash; and

4. ~~that~~ That ~~defendant Bergrin did so for~~ the purpose of the transaction was to ~~evading~~ evade the transaction reporting requirements in section 5331 of Title 31.[85]

The Government must prove beyond a reasonable doubt that the defendant was required to file a report on or about September 4, 2008, and that a currency transaction took place within 15 days of that date in which he received more than $10,000 in cash. The Government must also prove beyond a reasonable doubt that defendant Paul Bergrin caused or attempted to cause the trade or business to fail to file a Form 8300 with knowledge of the reporting requirements and with the specific intent to avoid said reporting requirements. That is, the Government must prove beyond a reasonable doubt that defendant Paul Bergrin acted willfully. "Willfully" means a voluntary and intentional violation of a known legal duty.[86] Mr. Bergrin's conduct was not willful if he acted through negligence, mistake, accident, or due to a good faith misunderstanding of the requirements of the law. A good faith belief is one that is honestly and genuinely held.[87]

[85] The Government has not been able to locate any model charges for this offense.
[86] 3d Cir. Model Crim. Instr. No. 6.26.7201-4 - Tax Evasion - Willfully Defined.
[87] See the following model charges charging similar offenses: 3d Cir. Model Crim. Instr. No. 6.26.7203 - Failure to File a Tax Return - Elements of the Offense (26 U.S.C. § 7203); Tenth Circuit Criminal Pattern Jury Instructions § 2.96 (2011 ed.) (Structuring Transactions To Evade Reporting Requirements, 31 U.S.C. § 5324(a)(3)), available at http://www.rid.uscourts.gov/menu/judges/jurycharges/OtherPJI/10th%20Circuit%20Pattern%20Criminal%20Jury%20Instructions.pdf; Eleventh Circuit Pattern Jury Instructions (Criminal Cases) § 85 (1997) (Evading Currency Transaction Reporting Requirement

From: Sanders, Steven (USANJ) 1
To: scott_creegan@njd.uscourts.gov
Cc: Lustberg, Lawrence S.; Levy, Bruce A.; "Protess, Amanda B."; Gay, John (USANJ); Minish, Joseph (USANJ)
Subject: immunity caselaw
Date: Tuesday, May 21, 2013 6:57:55 PM

The District Court's ability to immunize a defense witness is governed by *Government of Virgin Islands v. Smith*, 615 F.2d 964 (3d Cir. 1980. *Smith* established two roads by which a defendant could compel that a witness be given immunity. First, where the Government's denial of use immunity to a defense witness is undertaken with the "deliberate intention of distorting the judicial fact finding process," the court can order acquittal if the prosecution refuses to grant statutory immunity. Second, even in the absence of prosecutorial misconduct, *Smith* opens the door to a non-statutory order of immunity derived from the defendant's due process right to have exculpatory evidence presented to the jury. But it does so under very narrow circumstances: "Due to the unique and affirmative nature of the immunity remedy and fundamental considerations of separation of powers, grants of immunity to defense witnesses must be bounded by special safeguards and must be made subject to special conditions." *Smith*, 615 F.2d at 971.

Thus, *Smith* identified five conditions that must be met before the "essential to the defense" judicial immunity can be granted: "(1) the immunity is properly sought in the District Court; (2) the witness is available to testify; (3) the proffered testimony is clearly exculpatory; (4) the proffered testimony is essential to the defense; and (5) there is no strong governmental interest against the immunity." 615 F.2d at 972. Focusing on the third and fourth factors, testimony is not clearly exculpatory if it is "undercut by . . . prior inconsistent statement[s]," *United States v. Perez*, 280 F.3d 318, 350 (3d Cir. 2002), or where it is undercut by other evidence in the case," *United States v. Thomas*, 357 F.3d 357, 366 (3d Cir. 2004) (no error in the failure to grant immunity where "a credibility determination would be required in order to determine which parties were more credible"). Furthermore, judicial immunity is properly denied where the exculpatory nature of the proffered testimony is "at best speculative." *United States v. Ammar*, 714 F.2d 238, 251 n.8 (3d Cir. 1983). As for the fifth factor, there are "strong governmental interests which countervail against a grant of immunity" where, as here, a defendant seeks judicial immunity for a co-defendant or co-conspirator. Courts have been reluctant to confer immunity upon co-conspirators and co-defendants, because doing so may provide them with an opportunity to lie with impunity. *Smith*, 615 F.2d at 973; *Lowell*, 649 F.2d at 961 (3d. Cir. 1981) (recognizing need to prevent coconspirators from "whitewashing" each other through testimony unchallengeable for one reason or another). As the Second Circuit observed:

> [T]here is considerable force to the Government's apprehension that defense witness immunity could create opportunities for undermining the administration of justice by inviting cooperative

EXHIBIT B

> perjury among law violators. Co-defendants could secure use immunity for each other, and each immunized witness could exonerate his co-defendant at a separate trial by falsely accepting sole responsibility for the crime secure in the knowledge that his admission could not be used at his own trial for the substantive offense. The threat of a perjury conviction, with penalties frequently far below substantive offenses, could not be relied on to prevent such tactics.

United States v. Turkish, 623 F.2d 769, 775-76 (2d Cir. 1980).

Since *Smith* itself, the Third Circuit has *never* overturned a district court's denial of a request for *Smith* immunity for a defense witness. *United States v. Mike*, 655 F.3d 167 (3d Cir. 2011), is instructive. There, Mike was charged with the unlawful receipt of a firearm when he and his codefendants picked up a mailed AK-47 that had been sent through the mail by Fenyang Francis in Florida to the fictitious name "Imon Thomas" at a post office box in St. Thomas, Virgin Islands. *Id.* at 169. Francis was also charged and pleaded guilty to shipping a firearm in the mail and transferring a firearm to an out-of-state resident. During his plea negotiations, Francis told the government that neither Mike nor his co-defendant knew that an AK-47 was in the box addressed to Imon Thomas. *Id.* at 170. Prior to trial, Mike subpoenaed Francis to testify for the defense, and Francis moved to quash the subpoena. Mike then asked the district court to grant Francis judicial use immunity, and the court denied this request concluding that Francis' testimony was not clearly exculpatory. The district court found that the proposed testimony, which conflicted with that of co-defendant Hunte, would simply create a credibility issue. *Id.* at 170.

The Third Circuit found that the district court did not abuse its discretion in denying the request for judicial immunity. While the Circuit rejected the broad contention that testimony could not be "clearly exculpatory" whenever it must be weighed against the testimony of other witnesses, it found that the testimony at issue confronted the jury with more than just a credibility determination, and was not clearly exculpatory because other evidence undercut Francis' potential testimony and Mike's theory of the case. *Id.* at 173. In addition to the testimony of Hunte, the Court noted that the phone records showed phone contact between Mike and Francis both before and after the delivery. *Id.* Thus, while Francis' testimony "may have helped the defendant," it also was "far from necessary to ensure a fair trial." *Mike*, 655 F.3d at 173.

Likewise, in *United States v. Thomas*, 357 F.3d 357 (3d Cir. 2004), the Third Circuit affirmed the denial of judicial immunity. Thomas was arrested and charged with narcotics violations after officers found crack and powder cocaine behind the glove box of Thomas' vehicle. *Id.* at 359. Prior to trial, Thomas attempted to subpoena James Stager, the car dealer who sold Thomas the car, and his assistant, Patty Kapustka. *Id.* at 361-62. Both

witnesses invoked the Fifth Amendment and refused to testify. During closing argument, Thomas, appearing *pro se*, argued that Stager planted the drugs in the car the day before Thomas was stopped by police. Thomas was convicted and appealed on the grounds that the court should have immunized Stager and Kapustka to allow Thomas to effectively present this defense. *Id.* at 365.

The Third Circuit held that Thomas could not meet the test outlined in *Smith* because the witnesses' testimony would not have been clearly exculpatory. *Id.* The Court reasoned that "at least two other witnesses offered testimony that undercut Thomas' theory that Stager planted the drugs." *Id.* The Court also noted that the conflict in the testimony would have required a credibility determination in order to determine which parties were more credible. *Id.* at 366. "Because a credibility determination would have been required in order to determine which parties were more credible," the testimony of the witnesses "would not have been 'clearly exculpatory[.]'" *Id.*

Finally, in *United States v. Lowell*, 649 F.2d 950 (3d. Cir. 1981), which affirmed the denial of a request for judicial immunity for a defense witness, the Third Circuit emphasized the need to apply *Smith* narrowly:

> the facts of this case are insufficient to warrant judicial conferral of immunity under the *Smith* rule. In *Smith*, the court was faced with a probable certainty that Sanchez's testimony would exonerate three of the convicted felons. Additionally, it was given absolutely no reason why the U. S. Attorney refused to consent to a grant of immunity by the otherwise willing Virgin Islands prosecutor, even though only the latter would have had the responsibility of deciding whether to prosecute Sanchez. Here, on the other hand, the district court found, and we agree, that the prosecutor's conduct evinced no "deliberate intention of distorting the factfinding process." And we note in support of that conclusion that the prosecution does have an arguable reason for denying immunity. For it may yet prosecute Montalbano. Moreover, Montalbano's expected testimony, even if believed, would not in itself exonerate Lowell; apparently, Sanchez's testimony alone, if believed, would have required acquittal. Thus, although there are points of congruence between the cases, they do not go to the heart of Judge Garth's reasoning in *Smith*. In view of what Judge Garth recognized as the "unique and affirmative nature of the immunity remedy and fundamental considerations of separation of powers," *Government of the Virgin Islands v. Smith*, 615 F.2d at 971, we decline to extend further the rule announced in *Smith* to cover this factual situation.

1 IN THE UNITED STATES DISTRICT COURT

2 FOR THE DISTRICT OF NEW JERSEY

3

4 UNITED STATES OF AMERICA : Criminal No. 09-cr-369-DMC

5 v. :

6 PAUL W. BERGRIN, : TRANSCRIPT OF JURY VOIR DIRE

7 Defendant. :
------------------------------x

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9 Newark, New Jersey
January 8, 2013

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13 BEFORE:

14 THE HON. DENNIS M. CAVANAUGH, U.S.D.J.

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19 Reported by:
CHARLES P. McGUIRE, C.C.R.

20 Official Court Reporter

21

22 Pursuant to Section 753, Title 28, United States Code, the following transcript is certified to be an accurate record as taken stenographically in

23 the above entitled proceedings.

24

s/CHARLES P. McGUIRE, C.C.R.

25

EXHIBIT D

1 **APPEARANCES:**

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10 **Standby counsel for Defendant**

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1 (Defendant present)
2 THE COURT: This next one is number 34 we've got
3 an issue with.
4 MR. LUSTBERG: And, Judge, this next one also
5 seems to have read something, question number 19.
6 (Juror No. 02-172 enters)
7 THE COURT: How are you?
8 JUROR NO. 02-172: All right.
9 THE COURT: This is juror number 02-172.
10 I note in response to your question to number 19
11 whether or not you heard anything about this case or
12 Mr. Bergrin, you answered yes. Could you tell us what that
13 was?
14 JUROR NO. 02-172: Nightly news reports and
15 newspapers, less on television, some on radio.
16 THE COURT: How long ago?
17 JUROR NO. 02-172: I'd say probably a year and a
18 half.
19 THE COURT: Do you recall what it was that you
20 heard?
21 JUROR NO. 02-172: Just I believe possibly the
22 arrest.
23 THE COURT: Okay. Did anything that you hear,
24 would it have any bearing on your ability to be fair and
25 impartial in this case?

1 JUROR NO. 02-172: I don't believe so.
2 THE COURT: Okay.
3 I note also that in response to question number
4 34, it seems to say that you would give police officers
5 either greater or lesser weight, their testimony. Could you
6 explain that?
7 JUROR NO. 02-172: Well, I would say, before I
8 became an archivist, I was 20 years, about 17 years in
9 smaller newspapers in Texas, and after having a lot of
10 associations with police, I would say they've been, on the
11 whole, good.
12 THE COURT: Okay. Well, I would probably agree
13 with that. Let me -- the real issue here is, we want to
14 make certain that any jurors that are chosen would treat
15 each witness fairly and listen to what they have to say, and
16 then weigh the evidence and make your decision as to what
17 you believe, what you don't, whatever. And we just want to
18 make certain that you wouldn't place extra credence in what
19 a policeman said just because he was a policeman. We would
20 hope that anybody that comes in and testifies will testify
21 truthfully under oath, but that's a decision for a jury.
22 Would you be able to be fair and impartial and not
23 treat police any different than any other witness, and to
24 evaluate --
25 JUROR NO. 02-172: I believe so.

1 THE COURT: You think so?
2 JUROR NO. 02-172: Yes.
3 THE COURT: And I looked at question number 39,
4 the last question, and I just wanted to make certain that
5 you still feel that way. It states that -- you stated yes,
6 that if you were selected, you'd be able to render a verdict
7 based on the evidence in accordance with my instructions and
8 disregarding any other ideas or beliefs that you might have,
9 basically that you could render a fair and impartial
10 verdict.
11 Do you still feel that way?
12 JUROR NO. 02-172: Yes, sir, I do.
13 THE COURT: Okay. Counsel, any -- gentlemen,
14 anything?
15 MR. BERGRIN: Judge, can you ask him a question,
16 if a police officer was to testify and a layperson was to
17 testify, would he give greater credence to the weight --
18 greater credence and weight to the testimony of a police
19 officer just based upon his title?
20 THE COURT: Well, I think I asked that, but I'll
21 ask it again.
22 Would you give the same weight to a police officer
23 as any other person, a layperson that might testify?
24 JUROR NO. 02-172: No. I think it's fair to say
25 that part of it is just listening to the questions, the

1 responses, the Rules of Evidence.

2 THE COURT: So you'd listen to both equally.

3 JUROR NO. 02-172: Oh, absolutely.

4 THE COURT: Okay. You can step out for a

5 moment --

6 MR. BERGRIN: Could you ask him about 20 and 24,

7 questions? There were positive responses.

8 THE COURT: I'm sorry, which ones?

9 MR. BERGRIN: Twenty and 24, sir.

10 THE COURT: On 24, you say that you know defense

11 or prosecuting attorneys.

12 JUROR NO. 02-172: Oh, yes. I know both criminal

13 defense attorneys, when I was in library school, I worked,

14 you know, as a part-time job at a law firm that handled

15 corporate defense and product litigation, and also people

16 involved in, you know, social justice causes.

17 THE COURT: And would those relationships or

18 knowing those people, would that have any bearing one way or

19 the other on whether you could be fair and impartial in this

20 case?

21 JUROR NO. 02-172: Well, I would say in this case

22 I've dealt with enough different types of attorneys to know

23 that they have different angles, different temperaments, and

24 different responsibilities.

25 THE COURT: Well, you've got a whole bunch of

1 attorneys around the table. They probably all have
2 different --
3 JUROR NO. 02-172: I can't say.
4 THE COURT: So could you be fair and impartial to
5 both the Government and the Defense?
6 JUROR NO. 02-172: Absolutely.
7 THE COURT: Okay. I have two other questions --
8 JUROR NO. 02-172: Yes.
9 THE COURT: -- that you haven't been asked yet.
10 These are new questions that we came up with, so I would
11 just ask you to listen and respond.
12 Some of the evidence in this trial may come from
13 telephone conversations or in-person conversations that were
14 secretly recorded by a Government witness. You may hear
15 that the Government had authorization to record that
16 information, and there's nothing improper or unlawful about
17 doing that, those types of investigation techniques.
18 Knowing that, would you still be able to fairly
19 and impartially evaluate that evidence obtained through
20 those conversations?
21 JUROR NO. 02-172: I believe so.
22 Can I ask a question of you? Is that being
23 challenged in terms of legally recorded?
24 THE COURT: No.
25 JUROR NO. 02-172: Oh, okay.

1 THE COURT: As a practical matter, everything you
2 would hear, you would have to weigh. We just want to make
3 certain that you wouldn't, because of the way this evidence
4 was found, that you wouldn't evaluate it unfairly, that you
5 would give it the same opportunity as any other evidence.
6 You would.
7 Okay. And the last question. Several Government
8 witnesses have lengthy criminal histories, some of the
9 witnesses have been involved in drug trafficking and other
10 criminal conduct, some violent, and some of these have pled
11 guilty and are testifying here pursuant to a cooperation
12 agreement with the Government in hopes that their sentences
13 will be reduced.
14 Knowing those facts, will you be able to evaluate
15 their testimony fairly and impartially?
16 JUROR NO. 02-172: Yes, sir.
17 THE COURT: Okay. One last thing.
18 You mentioned you used to be in the news
19 business, media business. I would have to -- it looks as if
20 you're going to be a potential candidate, a potential juror
21 here. I would ask you to please refrain from reading any
22 newspaper reports or TV reports or doing any Internet search
23 of your own about this case or Mr. Bergrin. Will you do
24 that?
25 JUROR NO. 02-172: Oh, absolutely. I think that's

1 fair and standard practice.

2 THE COURT: Okay. Thank you. I appreciate it.

3 See you tomorrow.

4 (Juror No. 02-172 exits)

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