IN THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Docket No. 20-2828

UNITED STATES OF AMERICA,

Appellee

v.

PAUL BERGRIN,

Appellant.

On Appeal From: The United States District Court for the District of New Jersey
(Docket No. 09-cr-369)
Sat Below: The Honorable Madeline Cox Arleo, United States District Judge

REPLY BRIEF OF APPELLANT PAUL BERGRIN

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"**A**" refers to the Appendix accompanying Appellant Bergrin's principal brief in this appeal (the same abbreviation as used in the Government's brief).

"**ABr**." refers to Appellant Bergrin's principal brief.

"**B3A**" refers to the Joint Appendix filed in Bergrin's 2013 appeal (No. 13-3934) (the same abbreviation as used in the Government's brief).

"**DE**" refers to a docket entry filed in the District Court (Crim. No. 09-369) (the same abbreviation as used in the Government's brief).

"**GBr**." refers to the Government's brief in this appeal.

"**SA**" refers to the Supplemental Appendix the Government filed in the District Court at DE659 (the same abbreviation as used in the Government's brief).

PRELIMINARY STATEMENT

The Government's brief, while rich in derisive rhetoric, devotes most of its attention to issues not presented to this Court for appellate review. For example, it focuses on charges not here at issue, (GBr.5-11), and extols the benefits Bergrin supposedly obtained from having standby counsel (GBr.3), even as it advances arguments about Bergrin's poor trial defense (GBr.10-13). But none of this is germane to the issues before the Court on this appeal—while the trial was undoubtedly complex, the issues presented here are comparatively straightforward. In particular, the central issue now before this Court is whether the specific evidence presented warrants a new trial under Rule 33, which Bergrin's opening brief shows that it does.

As noted in Appellant's opening brief, Anthony Young's testimony that Bergrin called a meeting at which he uttered the words "No Kemo, no case" was the lynchpin of the McCray murder conspiracy case—indeed, it was the only evidence of Bergrin's involvement in that murder, the most serious charge he faced, and one that dominated the jury's consideration of the entire case. ABr.12-13. But newly-discovered evidence from both Charles Madison and Hassan Miller directly undermines Young's testimony; likewise, newly-discovered evidence casts legally significant—indeed fatal—doubt upon other aspects of the case against him, and other counts of the indictment, including those which turned on the testimony of

Government witness Oscar Cordova and those involving Bergrin's alleged drug-dealing. The Government's effort to distract the Court by disparaging Bergrin, and even insulting appointed counsel, should not be allowed to undermine the significance of this newly-discovered evidence or to conceal the legal errors that the District Court committed in assessing that evidence.

Indeed, as Appellant's Brief makes clear, the District Court's opinion contains critical legal and factual errors which warrant reversal by this Court. In several instances, the Government acknowledges these errors, claiming that "[w]hether some of Judge Arleo's individual reasons were wrong, her ultimate conclusion was right." GBr.16. Indeed, even with regard to the District Court's direct reliance on obsolete case law, expressly abrogated by this Court, the Government seeks to waive away the errors, stating "[n]or would it matter to the outcome if Judge Arleo erred in this minor respect." GBr.47. And it does not dispute the instances in which the District Court erred regarding the facts as well – for example, where the District Court criticized Appellant's supposed lack of diligence in seeking to interview witness Theresa Vannoy, whom it mischaracterized as having been relocated by the Government to Alaska when in fact she was secretly moved by her mother to Louisiana. ABr.42. These errors were critical: the District Court relied on its erroneous legal analysis to deny Bergrin's motion, though for the reasons discussed

below and previously, it should have been granted. Nor can these error be justified by the fact that the District Court did not preside over of Bergrin's trial.[1]

In sum, however despised the defendant in this case, even Mr. Bergrin deserves a just determination of this matter, which should have included an evidentiary hearing, which the District Court declined to convene, though it was necessary to assess the credibility of the proffered witness testimony the Government so vigorously attacks. *See, e.g.*, GBr.26-33, 38-43, 47-49. Indeed, the Government's attempt to defend the District Court's decision is strikingly inconsistent: on the one hand, it contends that Bergrin's Rule 33 motion, which is based on affidavits, is "disfavored" because such testimony is not subject to cross examination, GBr.16; on the other, though, it argues that the District Court was correct not to have held the hearing at which that very cross examination could have taken place, GBr.32-33. But where, as here, witness credibility is at issue, courts should hold the kind of evidentiary hearing that Bergrin sought. ABr.23 (citing

[1] While the Government contends that "[a] replacement judge is 'capable of assessing the credibility of the witnesses and the evidence at trial by a thorough review of the record,'" GBr.33, there is no question but that such a judge is handicapped in making credibility determinations and factual findings without having seen the witnesses, when—as here—no evidentiary hearing is conducted. *Cf. United States v. Provost*, 969 F.2d 617, 619 (8th Cir. 1992) ("Here, the district court was thoroughly familiar with the entire record . . . . The same district court judge presided at the trial and decided the first motion for a new trial. He observed the original testimony . . .").

United States v. Mensah, 434 F. App'x 123, 125 (3d Cir. 2011), *United States v. Stillis*, 437 F. App'x 78, 81-82 (3d Cir. 2011)). At a minimum, then, this Court should reverse and remand with instructions that such an evidentiary hearing occur.

ARGUMENT

I. THE GOVERNMENT FAILS TO REFUTE THAT THE NEWLY-DISCOVERED WITNESS TESTIMONY UNDERMINING ANTHONY YOUNG SATISFIES *IANNELLI*.

A. The Government Does Not Dispute That the Madison Testimony Is Newly-Discovered, It Merely Claims Such Testimony Would Be Inadmissible and Illogical, Which is Wrong.

Bergrin proffered the powerful testimony of Charles Madison attesting to the plan of the Government's star witness, Anthony Young, to frame Bergrin for the McCray murder, and demonstrated that the Madison testimony, which strikes at the heart of the Government's case, satisfies each prong of *United States v. Iannelli*, 528 F.2d 1290 (3d Cir. 1976), and thus "could, if believed, change the verdict," *United States v. Gambino*, 59 F.3d 353, 364 (2d Cir. 1995). ABr.12-26. In response, the Government argues that such testimony would be inadmissible hearsay and not credible, GBr.25,[2] as it "didn't square with fact or logic," GBr.26, but these arguments fail. Indeed, the Government mischaracterizes the law when it claims, right at the outset of its brief, that newly-discovered evidence "can't be merely … impeaching." GBr.1.

In truth, the law in this Circuit is clear that newly-discovered evidence can indeed warrant a new trial, even when it "could be categorized as impeachment in

[2] The Government does not challenge Bergrin's contention that the District Court correctly concluded that Madison's statements were newly-discovered for purposes of Rule 33. ABr.16.

character," where it "strongly demonstrate[s] that critical evidence at the trial against the defendant was very likely to have been false." ABr.11, 21 (citing *United States v. Quiles*, 618 F.3d 383, 392-93 (3d Cir. 2010); *United States v. Wallach*, 935 F.2d 445, 457-58 (2d Cir. 1991) ("[h]ad it been brought to the attention of the jury that [witness] was lying . . . his entire testimony may have been rejected by the jury.")). That, of course, is exactly the case here; indeed, *Quiles* is right on-point, as Madison's testimony directly contradicts Young, who was the lynchpin of the Government's case. ABr.14. But the Government, in its argument regarding Madison's testimony, does not even address this point, or cite this Court's binding decision in *Quiles*. Because Madison's testimony demonstrates that Young's critical testimony against Bergrin—indeed, it was the only testimony tying Bergrin to the McCray murder—"was very likely to have been false," *Quiles*, 618 F.3d at 393, it satisfies *Iannelli*.[3]

The Government's other argument—that Madison's testimony would be illogical, and thus not credible, because it would not adequately explain Young's actions—fares no better. GBr.26-28. The Government contends that Madison's claim is illogical because Young cold-called the FBI to implicate Bergrin before

[3] Though it argues that Madison's testimony would be inadmissible hearsay under Fed.R.Evid.801(d)(1)(A), GBr.25, the Government concedes that it would be admissible for impeachment purposes, *see* GBr.26, and thus would satisfy *Quiles*.

speaking with Madison and before Young was facing federal charges, and because Young would not have confessed to murder in exchange for a lighter sentence on a weapons charge. *Id.* But whether Young's decision to call the FBI was a foolish one, as the Government argues, does not detract from the credibility of Madison's testimony. Indeed, the Government concedes that Young initially appears to have called the FBI in order to falsely frame Jamal McNeil with the McCray murder, GBr.27, demonstrating the plausibility of the defense theory that Young, during his admitted course of lying to the FBI, ABr.23 (citing A958-61), falsely implicated Bergrin as well, just as Madison attests. Moreover, Young had an incentive to cooperate with the FBI to obtain leniency on the pending and potential weapons charges against him, consistent with Madison's testimony. ABr.24. Accordingly, especially given that Young's testimony was already subject to serious impeachment, ABr.22-23, Madison's testimony that Young admitted he fabricated his testimony could certainly tip the scales, exposing Young's specific intent to frame Bergrin, and thus resulting in an acquittal on these, if not all, counts.

B. The Government Does Not Defend the District Court's Faulty Reasoning Regarding the Miller Testimony, Instead It Raises a New Argument, But That Fares No Better.

Bergrin demonstrated that Hassan Miller's testimony, similar to but independent of Madison's, also demonstrates that Young admitted he intended to "pin this" on Bergrin who was his "meal ticket to get out," and thus told the

Government what he needed to—that Bergrin somehow orchestrated the McCray murder. ABr.13. Appellant further demonstrated that, though Miller's testimony otherwise satisfied *Iannelli*, the District Court erred as a matter of law by imposing an additional obligation on Bergrin to have sought Miller's testimony from other inmates, an unattainable requirement that Rule 33 does not impose. ABr.17-19. Implicitly conceding that this legal error cannot be defended, the Government instead attempts to rationalize the District Court's conclusion—essentially arguing that the ends justify the means—by contending (even though the District Court did not so find) that Miller's testimony cannot be newly-discovered because Bergrin already possessed a recording of Miller discussing Young, which Bergrin used at trial. GBr.28. But this argument is without merit because, as Bergrin has already made clear, he did seek to interview Miller prior to his second trial but Miller refused, a point the Government concedes.[4] Moreover, the prior recording did not include the critical fact that Young specifically admitted that he fabricated testimony against Bergrin. ABr.17n.6. Indeed, the District Court correctly credited Bergrin's contention that he did not actually know of Miller's newly-proffered statements at

[4] The Government obfuscates this point by stating that Bergrin "didn't try to interview Miller until after the first trial," GBr.28, which is, of course, irrelevant because Bergrin sought to interview Miller before his second trial—the one that resulted in his conviction—thus satisfying *Iannelli*'s diligence prong, but Miller refused. ABr.18.

the time of trial. ABr.17. The Government's argument that Miller could not have refused to provide this information for fear of the Government because he was already sentenced to time served, GBr.29, ignores that, as Miller himself attests, he feared Government retaliation. ABr.18. And the Government's argument that Miller lacks credibility because his statement "was not under oath when he was being interviewed [and] he did not have counsel present," GBr.30, is also without merit, as there is no rule that only sworn statements may support a Rule 33 motion. ABr.25. The Government's *ad hominem* attacks[5] against Bergrin's then-investigator, GBr.31, hardly deserve mention, as they are irrelevant to the *Iannelli* factors, but needless to say, Miller's credibility can and should be assessed at an evidentiary hearing, not on the basis of scurrilous attacks against Bergrin's former investigator.

Nor does the Government even attempt to defend the District Court's legal error regarding Bergrin's related *Brady* argument. As Bergrin contended in his

[5] The Government claims that Bergrin's then-investigator Michael McMahon has "his own credibility problems," GBr.31, citing to an indictment brought 10 months ago by its colleagues in E.D.N.Y. on completely unrelated charges, which do not, in fact, go to his credibility. *See, e.g.*, Superseding Indictment, *United States v. Ji, et al.*, No. 21-cr-265-PKC (E.D.N.Y. July 21, 2021) ("COUNT ONE Conspiracy to Act as an Agent of a Foreign Government . . ."). But, of course, Mr. McMahon is presumed innocent of those charges—a presumption that is "the foundation of the administration of our criminal law." *Coffin v. United States*, 156 U.S. 432, 453 (1895).

opening brief, the Government violated *Brady v. Maryland*, 373 U.S. 83 (1963) by failing to disclose that Miller told the Government that Young admitted he intended to falsely implicate Bergrin in the McCray murder. ABr.54-56. The District Court, however, erroneously reasoned that *Brady* was not violated on the grounds that Bergrin failed to exercise reasonable diligence to obtain the information, notwithstanding this Court's express holding in *Dennis v. Sec'y, Pennsylvania Dep't of Corr.*, 834 F.3d 263 (3d Cir. 2016), that *Brady* requires no such diligence. Declining to respond to this legal argument, the Government instead contends only that its own 2005 report does not say that Miller told the Government Young intended to lie about Bergrin. GBr.31. But this only further highlights the need for an evidentiary hearing, as the Government has raised a disputed issue of fact as to whether Miller provided exculpatory statements, which should be tested at an evidentiary hearing. *See*, *e.g.*, *United States v. Mensah*, 434 F. App'x at 125 (holding hearing on Rule 33 motion based upon newly-discovered evidence); *United States v. Stillis*, 437 F. App'x 78, 81-82 (3d Cir. 2011) (same).

Indeed, in contending that "the District Court needed no evidentiary hearing to accord the Madison and Miller statements little weight," GBr.32, the Government relies heavily on the discretion accorded district courts with regard to such issues. But in doing so, the Government conflates the standard of review—*i.e.*, that a district court ruling regarding whether to hold a hearing is governed by an abuse of

discretion standard—with a determination of the merits. That is, the fact that a district court has discretion to determine whether to conduct an evidentiary hearing does not mean that any decision made in the exercise of such discretion is *per se* correct. To the contrary, this Court's "caselaw has imposed limitations on the exercise of that discretion," *United States v. Booth*, 432 F.3d 542, 545 (3d Cir. 2005) (holding that the district court abused its discretion in denying defendant's habeas petition without holding an evidentiary hearing); *see also United States v. Abou-Saada*, 785 F.2d 1, 6 (1st Cir. 1986) (Breyer, J.) (reversing denial of Rule 33 motion and remanding with instructions to conduct a post-trial evidentiary hearing "to assess [witness] credibility"). As this Court has made clear in similar contexts,[6] a district court abuses its discretion when, as here, the proffered evidence "creates disputes of material fact such that a hearing is necessary before the District Court can address [the] underlying claim." *United States v. Tolliver*, 800 F.3d 138, 141 (3d Cir. 2015); *United States v. McCoy*, 410 F.3d 124, 131 (3d Cir. 2005) ("a district court's failure to grant an evidentiary hearing when the files and records of the case are

[6] For example, the Court has held that, in evaluating a motion to return seized property under Fed.R.Crim.P.41(g), a district court abuses its discretion if it refuses to "hold an evidentiary hearing on any disputed issue of fact necessary to the resolution of the motion." *United States v. Albinson*, 356 F.3d 278, 281 (3d Cir. 2004).

inconclusive on the issue of whether movant is entitled to relief constitutes an abuse of discretion."). Here, as the Government's response illustrates, disputed issues of facts require a hearing in order to resolve this motion. *See* GBr.26-28 (disputing whether Young admitted to Madison that he lied about Bergrin having a role in the McCray murder); GBr.29-32 (same regarding Miller); GBr.33-35 (disputing whether alleged attendees of the supposed "No Kemo, no case" meeting would testify credibly); GBr.39-40 (disputing whether Sauseda's testimony would credibly undermine Cordova's testimony about Bergrin); GBr.41-44 (disputing whether Jauregui would testify that Bergrin was not involved in drug-trafficking); GBr.45-46 (same regarding Vannoy); GBr.46-49 (disputing whether Braswell admitted to Shariff that he lied about Bergrin dealing drugs); GBr.49-51 (disputing whether Agent Hilton would testify that he spoke with Bergrin on 54 occasions). Indeed, the Government's challenges to the credibility of Bergrin's proffered witnesses are just the kinds of issues as to which a district court abuses its discretion when it fails to hold an evidentiary hearing in order to evaluate credibility. *See, e.g., United States v. Blondeau*, 480 F. App'x 241, 243 (4th Cir. 2012) ("Because whether Blondeau's assertions are correct . . . necessarily requires a credibility determination . . . an evidentiary hearing was required. The district court therefore abused its discretion in failing to hold one.").

C. The Government Unjustifiably Dismisses the Significance of the Cumulative Impact of All Available New Evidence.

Bergrin has demonstrated that the cumulative impact of all of the new evidence regarding the McCray murder, "would probably produce an acquittal," *United States v. Cimera*, 459 F.3d 452, 458 (3d Cir. 2006), because, in addition to newly-discovered evidence from Madison and Miller about Young's fabricated testimony, multiple witnesses alleged by Young to have attended the 2003 meeting at which Bergrin purportedly uttered the words "No Kemo, no case" now deny attending any such meeting, or even that there was one. ABr.26-28. The Government's argument that these witnesses would not testify for Bergrin because they did not do so previously is pure speculation, simply ignoring that they have since indicated a desire to correct Young's false portrayal. ABr.26-27. And the Government's implicit threat that such witnesses "could still be prosecuted on capital charges for the Kemo murder," GBr.34, amounts to intimidation and bullying in an effort to avoid having to confront powerful defense evidence, especially because these witnesses expressly deny involvement in the McCray murder. A4457-60. That such witnesses have a "familial connection" with William Baskerville may, again, go to their credibility, but—like the Government's characterization of such testimony as "self-serving," GBr.35—ought not be judged on paper, especially given the numerous witnesses who would testify that Young's testimony was false.

The so-called Curry Tapes, discussed further below, similarly undermine Young's testimony by showing that the relevant sequence of events of the time period at issue could not have been as Young testified. ABr.26-28, 52-54. In the aggregate, all this evidence collectively demonstrates the impossibility of Young's testimony. *Id*. The Government derisively dismisses this argument, unfairly labelling it "smuggling" and "bootstrapping," GBr.33, without citing any legal authority and notwithstanding the precedents cited by Bergrin which make clear how important it is in the Rule 33 context that the proffered evidence be viewed "collectively," and that its "cumulative impact" be assessed. *E.g.*, *United States v. Whoolery*, 625 F. App'x 24, 27 (3d Cir. 2015); *see also Eberhart v. United States*, 546 U.S. 12, 14 (2005) (reinstating district court's grant of a new trial where the court had concluded "'none of these concerns standing alone or in pairing would cause me to grant a new trial,' but [] taken together, they 'persuade me that the interests of justice require a new trial.'").

D. The Government Entirely Misunderstands and Mischaracterizes Appellant's *Brady* Argument Concerning the Curry Tapes.

The Government appears to misunderstand Bergrin's argument about the so-called Curry Tapes, focusing incorrectly on whether these calls are newly-discovered under *Iannelli*, GBr.17-24, although Bergrin's argument is that the Government's misrepresentations concerning the Curry Tapes—the Government represented that they have "some very damaging evidence that was suppressed,"

A4777-79—constitute a *Brady* violation. ABr.48-54.[7] While Bergrin has referred to the Curry Tapes, in passing, ABr.5, as newly-discovered, the argument presented to this Court on appeal concerning the Curry Tapes focuses not on *Iannelli*, but on the Government's *Brady* violation in misrepresenting the exculpatory significance of its discovery materials. ABr.51-52 (citing *United States v. Pelullo*, 399 F.3d 197, 213 (3d Cir. 2005) ("defense counsel's knowledge of, and access to, evidence may be effectively nullified when a prosecutor misleads the defense into believing the evidence will not be favorable to the defendant")). The District Court rejected this argument entirely on the basis of obsolete case law, A24-25, seeking to impose an additional diligence requirement on Bergrin, per *United States v. Perdomo*, 929 F.2d 967, 973 (3d Cir. 1991), that has been expressly abrogated by this Court. A55-56 (citing *Bracey v. Superintendent Rockview SCI*, 986 F.3d 274, 280 (3d Cir. Jan. 20, 2021); *Dennis*, 834 F.3d at 290). The Government does not challenge this point, saying only, in passing, that the prosecution did not mislead the defense, GBr.21, and then focusing for many pages on Bergrin's possession of the Curry Tapes for years before trial and blaming standby counsel for not reviewing them, despite the fact that the limited role of standby counsel did not include reviewing this discovery.

[7] The Government similarly agreed with Judge Cavanaugh's characterization that "if [Bergrin] opens the door, well, then, he could suffer the consequences." A4778; *see also* A4577-78, A4724-25.

GBr.22.[8] Even more misleading is the Government's citation to the reply brief filed by the Gibbons firm in the *Curry* appeal, GBr.23; as the Government well knows, that case was an appeal from a conviction on drug charges and did not, in any way, address the McCray murder, which would not, therefore have been the subject of this Firm's review in that other matter. *See United States v. Baskerville*, 339 F. App'x 176, 177 (3d Cir. 2009) ("Appellants Rakim Baskerville and Hakeem Curry were tried as co-defendants on charges relating to an alleged drug conspiracy."). Finally, the Government's reliance on statements made about Bergrin's inability to pay for Gibbons' legal services, GBr.24, proves precisely the opposite of what the Government contends, namely that Bergrin could not afford to pay for the review of the recordings at issue and thus that Bergrin, though incarcerated, would do so. Indeed, it was Bergrin, not standby counsel, who—though he had to overcome the difficulty of doing so from jail—ultimately identified the exculpatory contents of the Curry Tapes. A4722-25.

[8] The Government agrees that the Curry Tapes "contradict Young's testimony," but claims that this is "only in immaterial ways, such as the exact timing of a particular call or who overheard it." GBr.21. This is obviously incorrect: the Curry Tapes go to the very core of Young's testimony, including whether there ever was a meeting of Bergrin with Curry and others at which they conspired to murder McCray. These calls thus not only contradict Young's account of which Curry associates discussed Baskerville's arrest, they also contain no reference to the meeting at the very time it supposedly occurred, a powerful exculpatory fact. A52-54.

Regardless, the Government's arguments miss the mark entirely, as they only address the question of Bergrin's diligence, and who was "to blame" for not discovering earlier the exculpatory contents of the Curry Tapes, GBr.20, which as discussed above, is a consideration this Court has expressly held to be irrelevant to the *Brady* analysis. *See Dennis*, 834 F.3d at 293. And even more fundamentally, a review of the Government's brief, thorough though it may be in insulting Bergrin and his counsel, shows that the Government failed entirely to address the legal authority cited by Bergrin which makes clear that government misrepresentations, like those as issue here, amount to a *Brady* violation, irrespective of whether a defendant had time to review the discovery materials. ABr. 49 (citing *Pelullo*, 399 F.3d at 213). Nor does the Government even try to justify the District Court's denial of Bergrin's argument on the basis of a since-repudiated diligence requirement. That denial is unjustifiable and itself warrants reversal.[9]

[9] The Government mischaracterizes Bergrin's argument by falsely contending that Bergrin "implies the Curry Calls had 'latent attributes,' that were 'not discovered until after trial' – making them newly discovered." GBr.18. This misreads Bergrin's position: Bergrin's argument about "latent attributes" does not concern the Curry Tapes, but rather the Hilton records, ABr.43 ("the hundreds of pages of phone records possessed the latent attribute of proving that Bergrin had extensive contact with Hilton on 54 occasions"), which the District Court correctly held to be newly-discovered under *Iannelli*, a conclusion the Government does not challenge.

II. THE GOVERNMENT FAILS TO ADDRESS THE IMPACT OF THE NEWLY-DISCOVERED EVIDENCE ON THE DRUG-TRAFFICKING CHARGES AND SIGNIFICANTLY EXAGGERATES THE SUPPOSED 'AVALANCHE' OF INCULPATORY EVIDENCE.

While the Government claims that there was an 'avalanche' of incriminating evidence regarding the drug-trafficking charges, in truth, the bulk of its evidence concerning these charges comes from the testimony of Rondre Kelly, Abdul Williams and Eugene Braswell. GBr.41. But the Government fails to acknowledge that the newly-discovered evidence at issue completely undermines the testimony of each of those witnesses.[10] And the Government's reference to "hours of recordings in which Bergrin discussed his drug business," GBr.41, is particularly misleading, as the Government does not articulate the contents of those recordings, only citing, without explanation, to 40 pages of trial transcripts, and failing to mention that those recordings are mostly innocuous and not usable on their own without explanations by Government witnesses whose credibility is now challenged by newly-discovered evidence (indeed, the Government's brief relies primarily on witness testimony and only lists the "hours of recordings" last). The Government also includes in this supposed 'avalanche' that 53 kilograms of narcotics were seized from a building

[10] The newly-discovered evidence also undermines the testimony of other Government witnesses, including Vicente Esteves and Thomas Moran, as it demonstrates that those who were directly involved with, and witnessed first-hand, the drug-trafficking at issue, have admitted that Bergrin was not involved. ABr.38-41.

Bergrin owned—with Bergrin's ownership of the building serving the only evidentiary link to such narcotics—but the proffered Jauregui testimony undermines this claim as well by revealing that Bergrin had nothing to do with the drugs that others had stored there. ABr.38 n.15. In sum, the newly-discovered evidence directly undermines the Government's case and supports Bergrin's because it demonstrates that witnesses—who knew about, or were involved in the drug-trafficking at issue—will testify that Bergrin was not involved in the charged activity.

A. Amin Shariff.

The proffered testimony of Amin Shariff directly undermines the trial testimony of Eugene Braswell because Shariff attests that Braswell admitted he lied in claiming that Bergrin was involved in the drug-trafficking at issue. ABr.36. The Government dismisses this testimony on the grounds that Braswell was "just one of the many witnesses who tied Bergrin to drug-trafficking." GBr.46. But Braswell was a significant Government witness at trial, testifying as he did that he conducted four drug transactions with Bergrin, B3A8270-71; *see also* B3A8123, B3A8132, B3A8165, B3A8177, B3A8184, so proof that Braswell admitted lying about Bergrin would therefore likely change the verdict. *See United States v. Lipowski*, 423 F.Supp. 864, 867 (D.N.J. 1976) ("The newly discovered evidence herein . . . is impeaching evidence with serious implications regarding the truth and veracity of

[the witness's] testimony, a factor which had to weigh heavily on the minds of the jurors during their deliberation. This Court feels very strongly that the additional piece of impeaching evidence could have been the proverbial 'straw that broke the camel's back' with respect to [the witness's] credibility, which would have almost assuredly resulted in a different verdict by the jury.").[11] Additionally, the Government argues that Bergrin should have contacted Shariff earlier because Shariff's mother was close with Bergrin, GBr.47—a bizarre and irrelevant reason to presume, without evidence, that Bergrin would know the content of Shariff's testimony—but even more to the point, this overlooks Bergrin's specific argument that while Bergrin knew Shariff cooperated with the Government on other matters, he could not have known that Shariff had any information concerning this specific case. ABr.37. In any event, the Government all but confesses error as to the District Court's holding with regard to whether Bergrin exercised due diligence, stating "nor would it matter to the outcome if Judge Arleo erred in this minor respect." GBr.47. But this error was not "minor," as Bergrin cannot be required to have interviewed Shariff about this case simply because he knew Shariff was a Government cooperator in other cases, and thus the District Court imposed and relied upon a

[11] The Government's argument that Shariff's testimony would be inadmissible hearsay is wrong for the same reasons discussed above regarding Madison's testimony—it is admissible for impeachment.

diligence burden far beyond the applicable precedents. ABr.37. Finally, the Government's argument that Shariff would face "devastating" cross-examination is also without merit, as none of the Government's purportedly devastating points—that Shariff supposedly told the Government that Bergrin had used cocaine, moved money for people, and had said "no witness no case," GBr.48—undermine Shariff's testimony that Braswell admitted to testifying falsely about Bergrin. Indeed, even if the Government were correct, the proper step would be hold an evidentiary hearing at which Shariff's credibility could be properly assessed. *See Mensah*, 434 F. App'x at 125.

B. Yolanda Jauregui.

The proffered testimony of Yolanda Jauregui directly undermines the drug-trafficking charges against Bergrin: Jauregui, who coordinated those activities, has admitted that Bergrin was not involved in drug-trafficking, confessing that she previously implicated him only in response to Government pressure that could, and did, allow her to buy her freedom. ABr.38. Bergrin has argued that the District Court erred as a matter of law by requiring such statements to have been sworn and signed, and by excluding her testimony on the basis of her status as a codefendant. ABr.39-41. The Government does not defend these legal errors, instead acknowledging that, contrary to the District Court's erroneous holding, there is no legal requirement for Jauregui's statement to have been signed and sworn. GBr.42.

Instead, the Government contends that the proffered testimony of Jauregui should be disregarded because Jauregui's supposed "refusal" to sign the statement, as explained by her counsel, "is a proper consideration" in determining whether that evidence is credible. *Id*. But, as discussed above, because Jauregui's credibility is at issue, it should have been assessed at an evidentiary hearing, at which Jauregui could have been placed under oath, and her testimony, as well as that of Brian McVan, who spoke to her on Bergrin's behalf, ABr.39-40, is fully considered under all the circumstances, including the lack of signature on her statement.[12] *See Mensah*, 434 F. App'x at 125. Then, if McVan's certification were believed, as well it could be, there is really no question but that the result would likely have been an acquittal on at least some, if not all, of the pertinent counts, given Jauregui's central role in the drug-trafficking alleged. ABr.46.[13]

The Government counters that Jauregui's testimony was not newly-discovered because Bergrin already knew the substance of her testimony. But

[12] Indeed, the Government cites to a declaration from Jauregui's attorney that actually corroborates Bergrin's argument, as it demonstrates that Jauregui admitted to telling McVan that the statements in the draft certification were accurate, SA2392 (swearing that Jauregui "led McVan to believe she would sign the certification"), which only highlights the need for an evidentiary hearing.

[13] The Government also alleges that "a different Bergrin agent"—TIPI Innocence Project—offered Jauregui money to sign a statement, GBr.43, but this argument includes no basis whatsoever to believe that Bergrin directed or even knew about those communications.

Bergrin could not have known at the time of trial that Jauregui would later have a change of heart and admit that he was not involved. Indeed, the Government's contention would eviscerate motions for new trial in every case in which a defendant, like Bergrin, claims innocence in the face of evidence—like that embodied in Jauregui's original statements to the Government—of guilt. *See, e.g.*, SA2386 (telling the Government that she engaged in drug-trafficking with Bergrin). What is pertinent is that Jauregui's change of heart took place only after trial and after she no longer felt threatened with a lengthier prison sentence. ABr.39. Nor is the Government correct that Bergrin failed to exercise due diligence because he did not subpoena her for the second trial: Jauregui had testified in the first trial and she was poised to testify again at the second trial—indeed, she was listed by the Government as its witness, but not called. B3A8737-38. Under those circumstances, Bergrin cannot be faulted for not subpoenaing her himself; nor, given the trial judge's persistent failure to allow him the opportunity to procure witnesses, would he have been able to successfully do so. B3A8732-39; B3A9284-85; B3A9295-96; B3A9383-84. In sum, Jauregui's testimony satisfies *Iannelli*, and should be assessed at an evidentiary hearing; if believed, it would likely produce an acquittal on the drug charges.

C. Theresa Vannoy.

The proffered testimony of Theresa Vannoy would have confirmed, in critical

respects, that Bergrin had no involvement in the charged drug-trafficking, which she had personally witnessed, and was told to conceal from Bergrin. ABr.41-42. But the District Court erred by concluding that Bergrin failed to exercise reasonable diligence, A19, because, in fact, Bergrin had taken the necessary, appropriate and timely steps to subpoena her through the United States Marshals Service, but they had failed to do so, as Vannoy's affidavit makes clear. ABr.41-42.

In response, the Government, implicitly acknowledging the District Court's error in analyzing *Iannelli*'s diligence prong, again urges affirmance on alternative grounds that the District Court did not articulate, *i.e.*, that Vannoy's testimony would be inadmissible double hearsay and that Bergrin only offered this testimony in his reply brief below and not in his initial motion papers. GBr.45-46.[14] But each of these reasons fails. The proffered Vannoy testimony concerns her first-hand observations of Jauregui's and Alejandro Barraza-Castro's drug-trafficking activity, ABr.41, not hearsay. And Bergrin offered Vannoy's testimony in response to the Government's counterarguments, candidly telling the District Court that he was continuing to investigate after timely filing his original brief. DE685. This was, contrary to the Government's argument (but consistent with the District Court's

[14] The Government also contends that Vannoy's testimony is not newly-discovered because she was interviewed by a Bergrin investigator prior to trial. In fact, however, Bergrin endeavored to subpoena her for trial but the United States Marshals Service failed to serve her. ABr.42.

ruling below, which ignored this argument), entirely proper: Rule 33 requires the motion to be "filed within 3 years after the verdict" but does not require defendants to cease all investigative efforts in furtherance of those claims, especially to rebut the Government's arguments. *See United States v. Huggins*, 392 F. App'x 50, 66 (3d Cir. 2010) (the key dates for assessing timeliness under Rule 33 are the date "[t]he jury verdict was entered" and the date "[w]hen [defendant] filed his motion.").

D. Hilton Records.

Bergrin demonstrated that the Hilton phone records were newly-discovered under *Iannelli*, as the District Court correctly held, and that they likely would produce an acquittal because they show that Bergrin contacted the DEA over 50 times when the Government alleged that he was trafficking drugs, thus powerfully undermining the charges against him. ABr.42-45. The Government argues in response that Bergrin knew about the calls with Agent Hilton, contending that he should have called Agent Hilton to testify at trial, and that, even before that, he should have asked the Court to order production of Agent Hilton's phone number, which was necessary to give these records meaning. GBr.50. But this narrative overlooks that Bergrin, in fact, sought this information from the Government, which did not provide it, ABr.43, a fact that the Government does not deny. Nor would it have made sense to call Agent Hilton to testify at the second trial, as the Government argues, without this information. The Government also argues that Bergrin should

have testified to "establish the substance" of those calls (while simultaneously arguing that had Bergrin so testified he would have been convicted in "even less time") GBr.51, but this ignores Bergrin's point – speaking with the DEA 54 times itself undermines involvement in drug-trafficking, and these records, had they been produced, could have established Bergrin's defense. ABr.45. The District Court's ruling that this evidence would not likely produce an acquittal was wrong and should be reversed.

III. THE GOVERNMENT'S ARGUMENT REGARDING THE SAUSEDA TESTIMONY FAILS TO ADDRESS ITS SIGNIFICANCE.

Bergrin demonstrated that the Sauseda testimony, which the District Court correctly held was newly-discovered under Rule 33, would likely produce an acquittal because it undermined Cordova's testimony, which was the centerpiece of the Government's case against Bergrin on a number of charges. ABr.29-34. Specifically, Sauseda states that Cordova manipulated key recordings that were at the heart of his testimony and admitted to her that he lied on the witness stand against Bergrin. ABr.30. Of course, these statements are, contrary to the Government's skewed interpretation of the law, GBr.36, just the sort of powerful new impeachment evidence that warrants a new trial. *See Quiles*, 618 F.3d at 392-93.

The Government argues in response that Sauseda's account was "preposterous," GBr.36, and would have had no impact, as Cordova's credibility was already attacked. GBr.39-40. But whatever the prior attacks on his credibility, the Government overlooks that the evidence that Sauseda now provides is of a uniquely powerful kind: evidence that Cordova has since admitted he was paid to "lie on the witness stand against Paul Bergrin," ABr.30, which testimony would "put the whole case in such a different light as to undermine confidence in the verdict." *United States v. Barbosa*, 271 F.3d 438, 468 (3d Cir. 2001). The Government attempts to soften the significance of Cordova's trial testimony, contending that the material facts of Cordova's testimony were "on his recordings," GBr.39, but this

argument ignores that Cordova's testimony over more than two full trial days and spanning hundreds of pages of trial transcripts, A1853-A1930, A1969-A2411, A2624-2753, was far more than simply a recitation of the tape recordings, but very much turned on his credibility. *See*, *e.g.*, A1857-1872 (Cordova testifying about conversations with Vicente Estevez and Bergrin about criminal activity prior to recording any conversations); A1891-1895 (Cordova testifying about discussions with Bergrin regarding Estevez that were not recorded). Nor does the Government's invocation of the recordings, GBr.36-37, end the inquiry, given Sauseda's testimony which, if true, completely undermines the integrity of those recordings. And, of course, purported inconsistences in Sauseda's statements, GBr.38-39, are not a sufficient basis to deny Bergrin's motion on the papers: as the Government puts it, these inconsistencies (like the testimony of other convicted felons who testified to the integrity of the Cordova recordings, GBr.39), would only have created "cannon fodder for cross-examination." GBr.39. But this, of course, establishes why a hearing was necessary, and the testimony of the defense expert, upon which the Government also relies, GBr.39-40, shows how that hearing would have gone to a fact that was not able to be established at the trial of this matter – true newly-discovered evidence, as the District Court found. A15.

In sum, the Government overlooks the impact of Sauseda's testimony on the prosecution case – it eviscerates the credibility of Cordova's testimony which the

Government has acknowledged to be critical to the conviction. ABr.33. Accordingly, Sauseda's testimony directly undermines the Government's proofs and supports Bergrin's defense. It would, if believed—though the Government improperly asks the Court to assume that it would not be, ABr.39—have profoundly changed the outcome of the trial on some, if not all, counts.

CONCLUSION

For the foregoing reasons, this Court should reverse the denial of a new trial and instruct the District Court to grant Bergrin's motion for a new trial or, in the alternative, order an evidentiary hearing.

Respectfully submitted,

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Dated: August 31, 2021

CERTIFICATE OF COMPLIANCE

I, Lawrence S. Lustberg, Esquire, hereby certify that:

(1) this brief contains 6,493 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f), and thus does not exceed the 6,500-word limit;

(2) this brief complies with the typeface and style requirements of Federal Rules of Appellate Procedure 32(a)(5) and 32(a)(6) because it has been prepared using a proportionally spaced typeface, Times New Roman, with 14-point font, using Microsoft Word 2016;

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/s/ Lawrence Lustberg
Lawrence S. Lustberg, Esq.

Dated: August 31, 2021

CERTIFICATE OF BAR MEMBERSHIP

Lawrence S. Lustberg is a member in good standing of the Bar of United States Court of Appeals for the Third Circuit.

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Dated: August 31, 2021

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on August 31, 2021, I caused the foregoing brief to be electronically filed with the Clerk of the United States Court of Appeals for the Third Circuit through the Court's CM/ECF system, and thereby to be served upon all counsel appearing in this case, and to have seven paper copies delivered to the Court via FedEx.

/s/ Lawrence Lustberg
Lawrence S. Lustberg, Esq.

Dated: August 31, 2021