UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

CIVIL NO. 13-5881(JAP)
CRIM. NO. 03-836 (JAP)

WILLIAM BASKERVILLE,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.
_____/

PETITIONER'S REPLY TO THE GOVERNMENT'S RESPONSE IN OPPOSITION TO PETITIONER'S TITLE 28 U.S.C. §2255 MOTION

COMES NOW, William Baskerville ("Petitioner") pro-se, in the above styled cause, respectfully files to Reply to the Government's Response In Opposition of Petitioner's §2255 motion. This Reply addresses several distinct issues raised in the Government's Response, in furtherance thereof states the following:

1. **The Government's Response has misinterpreted the facts supporting Petitioner's claims, and/or disingenuously attempts to argue that counsels' deficient performance was based on strategic decisions.**

In Petitioner's motion and his affidavit in support of his §2255 motion, Petitioner asserted several claims of counsel's ineffectiveness during his trial, as result his convictions were obtained in violation of his Sixth Amendment right to effective assistance of counsel, and his Fifth Amendment rights to due process. As a remedy he requested that this Court dismiss the charges against him and/or grant him a new trial. In response the Government contends that, Petitioner claim of Sixth Amendment violations under Ground One of the motion, without any supporting facts, fails to show how he was prejudiced by his counsels'

strategic decisions, thus, Petitioner claim should be denied and his motion dismissed without an evidentiary hearing.

In support of its contentions the Government's relies upon the self-serving affidavits of trial counsels (Carl Herman & Kenneth W. Kayser), in contending that Petitioner's claim are without merit based on counsels alleged strategic decisions during Petitioner's trial. Further, the Government's Response is either non-responsive, and/or has disingenuously misinterpreted the facts of Petitioner's claim.

However, contrary to the Government's and/or counsels' contentions that several prejudicial acts of deficient performance during the trial's "guilt-phase" was based on strategic decisions to maintain credibility with jury in order to put forth a strong argument should the case go to the penalty phase, is an imaginative ploy to camouflage counsels' ineffectiveness under the umbrella of strategy. This is evident by counsels' numerous failures to make valid objections during trial, to either the prosecutions leading questions, and/or hearsay evidence. See e.g.

TRIAL TRANSCRIPTS AT PAGE 4206:

MR. KAYSER: Objection to the leading questions.

THE COURT: Every question you're asking is a leading question. There hasn't been an objection yet. Now there is. I'm sustaining it. Establish the foundation.

TRIAL TRANSCRIPTS AT PAGE 5312

MR. KAYSER: That's why I raise it. I don't like to object to start with. Sometimes I have no choice.

THE COURT: No, you have an obligation....

Here, the Government's contention that at the time of Petitioner's trial his counsels had approximately 60 years of

combined legal experience, and is two of the most experience death-penalty qualified attorneys in the District of New Jersey, does not negate the fact that his counsels acted incompetently in regards to the claims presented in Petitioner §2255 motion.

Although, counsels' experience is due some respect, no one's conduct is above the reasonable inquiry, because even the best lawyer could have a bad day, thus, it is reasonable to conclude that an experience lawyer may on occasion, act incompetently. See **UNITED STATES v. CRONIC**, 466 U.S. 648, 104 S.Ct. 2039, 2050, 80 L.Ed 657 (1984).

More importantly, the failure to conduct any pretrial investigation generally constitutes a clear instance of ineffectiveness," because, "in the context of complete failure to investigate... counsel can hardly be said to have made a strategic choice against pursuing a certain line of investigation when s/he has not yet obtained the facts on which such a decision could be made." **UNITED STATES v. GRAY**, 878 F2d 702, 711 (3rd Cir. 1989).

Further, Petitioner's trial counsels' deficient performance is quite evident from the record in this case, see e.g., where his experienced appellate counsel, outlined his counsels' deficient performance concerning a critical appeal issue that was not properly preserved for appeal, because it was not objected to during the guilt-phase of the trial. See Petitioner's Appellate Brief at pages 55-56 footnote #7 attached as Exhibit "A".

Courts have routinely declared assistance ineffective when "the record reveals that counsel failed to make a crucial

objection or to present a strong defense solely because counsel was unfamiliar with clearly settled legal principles." See **COFSKE v. UNITED STATES**, 290 F.3d 437, 443 (1st Cir. 2002) ("Courts tend to be somewhat less forgiving where counsel altogether overlooks a possible objection or opportunity").

Thus, this Court should reject the Government's and/or Trial Counsel's disingenuously contentions to camouflage counsel's ineffectiveness under the umbrella of strategy. See e.g. **MOORE v. JOHNSON**, 194 F.3d 586, 604 (5th Cir. 1999) (This Court is "not required to condone unreasonable decisions parading under the umbrella of strategy, or to fabricate tactical decisions on behalf of counsel when it appears on the face of the record that counsel made no strategic decision at all."), as here, in the instant case.

CLAIMS RELATING TO ANTHONY YOUNG

Ground One: Claim C- Failure To Investigate Young

Petitioner asserted in his §2255 petition and affidavit that his trial counsels were ineffective for failing to investigate the Government's key witness Anthony Young (upon whose testimony the charges in Counts 1 & 2 hinge). Specifically, asserting that had Trial Counsels reviewed the audio recordings of Hakeem Curry on November 25, 2003. They would have been apprised of the facts that the Government either solicited and/or failed to correct the perjured testimony of Anthony Young. When he (Anthony Young) alleged that it was Rakeem Baskerville that was present in Hakeem Curry vehicle, when Curry received a phone call from Paul Bergrin at 4:00 p.m. on November 25, 2003, and most importantly, that

it was Young and Rakeem Baskerville who collectively indentified the Government's informant as Kemo (McCray) and not K-mo, as incorrectly pronounced by Paul Bergrin in his phone conversation to Hakeem Curry. See Claim C, Exhibit A 8(A)-(E).

However, the Government and/or Trial Counsel attempts to down play Trial Counsel's deficient performance, by disingenuously contending that: "showing Young may have been lying or mistaken about who was present at the time of the 4:00 p.m. call had little strategic value, especially since other recordings turned over in discovery corroborated Young's version of what Bergrin said during the call...the Government never claimed any direct connection between Young and Baskerville, making Young a less important witness against Baskerville than he was against Bergrin...The paramount issue for the defense was to portray Young for what he was- the cold blooded killer of McCray-who had been insulated from possible death sentence by a deal with the Government." See Gov. Response at pages 21-22.

Here, Petitioner asserts that the Government and/or Trial Counsel's contentions that showing Young was lying about Rakeem Baskerville being present in the Hakeem Curry vehicle at the time of the 4:00 p.m., had little strategic value, is belied by the record in this case. First, the Government and/or Trial Counsel has failed to realize and overlooked an important key fact of Young's perjured testimony concerning the 4:00 p.m. Bergrin call to Hakeem Curry, which was that he falsely stated that it was he (Young) and Rakeem Baskerville, who came to the conclusion that it was Kemo and not K-mo, who was the Government's informant

against Petitioner.

Clearly, when, how, and by whom the Government's informant was identified as Kemo and not K-mo, was pivotol to the Government's case, the Government themselves chose to rely on the knowningly perjured testimony of Young to support its theory that Petitioner's alleged co-conspirators knew the identity of the Goverment's informant, as being Kemo (McCray), and not K-mo.

Second, the facts of this case show that the Government knew and/or Trial Counsel should have known (had he properly investigated), that as early as November 9, 2004, that Rakeem Baskerville was not in the car with Hakeem Curry, when he received the call from Paul Bergrin. In the motion the Government filed to have Paul Bergrin disqualified from representing Petitioner due to a conflict of interest. AUSA John Gay made it abundantly clear that soon after Hakeem Curry call (with Bergrin), Hakeem Curry made calls to Rakeem Baskerville who was a known member of Hakeem Curry's organization and told him that "K-mo" was the person who had informed on William Baskerville. See DE #22 at pg. 2 at ¶1.

Thereby, the Government had a duty not to exploit false testimony by prosecutorial argument affirmatively urging to the jury the truth of what it knows to be false. Here, in this case the Government told the jury in its closing argument:

> "Then he said that Will told him the informant is a guy named K-Mo. Then what happens? Anthony Young and Rakeem Baskerville, Young tells you, said K-Mo, no you mean Kemo. Okay. Can you imagine Anthony Young making that up, that detail?"
>
> [T.T. at pages 5713].

The Government not only permitted the false testimony of Anthony Young to go to the jury, but argued it as a relevant matter for the jury to consider, violating Petitioner's rights to due process of law. See **UNITED STATES v. SANFILIPPO**, 564 F.2d 176, 179 (5th Cir. 1977); **DEMARCO v. UNITED STATES**, 928 F.2d 1074, 1076 (11th Cir. 1991) (defendant's knowledge irrelevant when "prosecutor's argument to the jury capitalized on the perjured testimony"). It is of no consequences that the facts pointed to may support only the knowledge of AUSA John Gay, because such knowledge will be imputed to the prosecutorial personnel, which together make up the "prosecution team." See e.g. **SCHNEIDER v. ESTELLE**, 552 F.2d 593, 595 (5th Cir. 1977).

Thus, Trial Counsel's deficient performance in failing to investigate Anthony Young and/or review the audio recording of the November 25, 2003, Bergrin calls, greatly prejudice Petitioner, where the Government's knowingly use of Anthony Young perjured testimony, in which the Government by prosecutorial argument affirmatively urged to the jury the truth of what it knew to be false, violated Petitioner's constitutional right to due process of law, establishes a **STRICKLAND** violation of ineffective assistance of counsel.

GROUND ONE: CLAIM E-FAILURE TO INVESTIGATE WITNESSES FOR DEFENSE, TO CHALLENGE YOUNG'S TESTIMONY.

In the instant claim, Petitioner asserted in his §2255 motion and affidavit, that his counsel was ineffective for failing to investigate witnesses for his defense to challenge material aspects of the Government's key witness Anthony Young's testimony.

Specifically, asserting that Petitioner prior to and during trial unequivocally expressed to trial counsel that he wished to present an actual defense and/or to challenge Young's specific testimony as to alleged facts. See Claim E, Exhibit A 9(A)-(H).

Trial Counsel disingenuously contends that Petitioner's assertions are "false," stating that: "they had discussed "at length" with Baskerville the decision not to call witnesses, motivated primarily by a desire "to maintain credibility with the jury in order to avoid the imposition of the death penalty"... Trial Counsel also assert that Baskerville did not "request witnesses to be called, nor did he object to a specific witness not being called." See Gov. Response at page 23.

However, Trial Counsel's contentions are belied by the record in this case, where Trial Counsel informed the Court of two potential defense witnesses (Rasheeda Tarver & Diedra Baskerville). See Trial Transcripts at pages 5218-19. Moreover, Petitioner's letter to the Judge during his trial, reveals his dissatifaction with his Trial Counsel's defense strategy and/or tactics in failing to present certain evidence in his defense at trial, thus, in this case there is objective evidence that Petitioner "requested specific witnesses to be interviewed and/or called as witnesses in his defense." See Petitioner's letter to Judge dated 4/26/07 attached as Exhibit "B".

Further, Trial Counsel's contentions that: "in any event, for strategic reasons would not have called any of the witnesses identified in Baskerville's §2255 motion because they "would have added nothing of value or would have been detrimental" to

Baskerville's case," is either disingenuous, belied by the record in this case, and thus, is without merit.

Here, Petitioner asserts that the Government in its Response concedes that Paul Feinberg, Esq's and Rashidah Tarver testimony in **Bergrin I**, contradicted certain aspects of Young's testimony. See Gov. Response at page 51. Moreover, had Trial Counsel interviewed each of the witnesses mention by Petitioner, whether he intended to, **or not**, call them as witnesses, he could have learned of valuable information that would have been useful to Petitioner's defense, by contradicting certain aspects of Young's testimony at Petitioner's trial, e.g.: (1) who was present in Hakeem Curry's car during the Bergrin call on November 25, 2003; (2) that it was Paul Bergrin acting as Petitioner counsel at the time who asked Petitioner if he knew the name of the CI, so the credibility of the CI could be investigated, with hopes of possibly having his charges dismissed. More importantly, the Government argued this very point in its Brief Opposing Defendant's Rule 33 Motion at page 10 attached as Exhibit "C", stating that: "Baskerville "knew the unindicted co-conspirators and dealt with them regularly," and his trial "counsel could have interviewed them and called them as witnesses." See Exhibit "C" attached.

Neither Trial Counsel nor the Government has presented anything worthy of being called a strategic defense. Although an attorney's decision not to present particular witnesses "can be strategically sound" if it is based on the attorney's determination that the testimony the witness would give might on balance harm rather than help the defendant. Such determination

can rationally be made, however, only after some inquiry or investigation by defense counsel. See **CRISP v. DUCKWORTH**, 743 F.2d 580, 583 (7th Cir. 1984) ("though there may be unusual cases when an attorney can make a rational decision that investigation is unnecessary, as a general rule an attorney must investigate a case in order to provide minimally competent professional representation."). Yet in this case, Petitioner's Trial Counsel never contacted or interviewed any of the named witnesses provided by Petitioner in Exhibit A 9(A)-(H). See Affidavits of potential witnesses attached as Exhibit "D".

Ineffectiveness is generally clear in the context of complete failure to investigate because counsel can hardly be said to have made a strategic choice against pursing a certain line of investigation when s/he has not yet obtained the facts on which such a decision could be made. See **UNITED STATES v. DEBANGO**, 780 F.2d 81, 85 (D.C. Cir. 1986) ("The complete failure to investigate potentially corroborating witnesses... can hardly be considered a tactical decision"). Such is the situation presented in this case. Trial Counsel's offered alleged strategic justification for his failure to make any effort to investigate the witnesses offered by Petitioner, cannot be excused on the ground that investigation would have been fruitless.

GROUND ONE: CLAIMS H & I-FAILING TO OBJECT TO THE SPECULATIVE AND HEARSAY TESTIMONY OF YOUNG.

Petitioner asserted in his §2255 motion and affidavit that his Trial Counsel was ineffective for failing to object to the "speculative and hearsay testimony" of Young. Specifically, that Young testified, without objection, that Bergrin got the informant's

name from Petitioner, and that Petitioner told Jamal McNeil "to hurry up and get rid of the CI, which is Kemo." See Claim I, Exhibit A, ¶11. Young next testified that, by passing along the name, this was an instruction to "get rid of" or "kill" the informant. See Claim H, Exhibit A, ¶10.

Claim H:

Here, the trial record contradict Trial Counsel's Affidavits stating "there was no basis to object to Young's testimony about how he interpreted the communication from Baskerville regarding McCray as it was relevant evidence to explain Young's actions", is belied by the record in this case, where counsel argued in its closing argument to the jury, not to convict Petitioner based on this assumption [Trial Transcripts at pages 5872-73]. Contrary, to Trial Counsel's contentions Young did not just testify as to what he assumed the message to mean, but what was understood by everybody, thereby, had Trial Counsel lodged a valid objection on the ground that the statement was "speculative" it would have been sustained.

Claim I:

Trial Counsel contends that Young statement is "a classic co-conspirator statement" and that any objection would have been overruled. However, contrary to Trial Counsel's contention, before a co-conspirator statement may be introduced to a jury, the government must demonstrate, either in a pre-trial hearing or during the government case in chief, at least enough substantial **independent evidence** of a conspiracy to take the issue to the jury, and there is **independent evidence** linking the defendant against

whom the evidence is offered to the conspiracy. See **UNITED STATES v. AMMAR**, 714 F.2d 238 (3rd Cir. 1983) (the Court must determine that the government has established the existence of the alleged conspiracy and the connection of each defendant with it by a clear preponderance of the evidence independent of the hearsay declaration).

Although the Court has stated that the government is allowed in some instances "to introduce co-conspirator's statements without a prior showing of a conspiracy based on independent evidence, subject to the requirement that the government make such a showing by the close of its case". See **AMMAR**, 714 F.2d at 247. The Court went on to hold "that such a procedure, while it should be "carefully considered are sparingly utilized," Id.

This is the precise point this Court made clear to the Government during Petitioner's 804(b) hearing on January 5, 2007, dealing with a similar issue concerning the hearsay statements of McCray, where the Court said, "I would suggest that this sort of issue not, to the extent it can be avoided, not be the kind of thing that comes in subject to connection later on."

Here, Petitioner asserts that at the time of Young's hearsay statements (T.T. at page 4354 & 4376-77), the Government had not established a proper foundation of a conspiracy including Petitioner by a fair preponderance of independent evidence. This was evident when the Government attempted to elicit another hearsay statement from Young by its question to Young, which was whether Young would "characterize that message from the defendant" as "request" however, Trial Counsel objected on the ground that "Petitioner was not the

one on the phone," and the Court sustained that objection. Thus, had counsel objected to the previous hearsay testimony, from two questions before, that Bergrin received the informant's name from Petitioner, and by passing along the name, this was an instruction to "get rid of" or "kill" the informant (T.T. at page 4354), those objections would have also been sustained.

Moreso, the Government and Trial Counsel continue to mislead this Court by misrepresenting facts in an attempt to create a smoke screen to cover up Trial Counsel's deficient performance. Here, the Government and/or Trial Counsel state that extensive pretrial motions were filed to preclude coconspirator statement. See Gov. Response at page 27. However, the record is devoid of any such motions and the Government nor Trial Counsel points to any such proof of this contention, from the docket or anywhere in the record.

More importantly, Trial Counsel's deficient performance greatly prejudiced Petitioner, where the Court of Appeals relied on Young's hearsay and speculative statements when denying Petitioner's insufficiency of the evidence claim, on direct appeal.

CLAIMS RELATING TO AGENT BROKOS

GROUND ONE: CLAIM A- FAILING TO INVESTIGATE AUDIO RECORDING OF 3/21/03 SURVEILLANCE VIDEO.

Petitioner asserted in his §2255 motion and affidavit that his Trial Counsel was ineffective for failure to investigate the audio portion of a video surveillance presented at trial by the Government of the 3/21/03 drug transaction, allegedly made by Petitioner, where the audio portion of the surveillance video was inconsistent with the narrative Agent Brokos gave at trial, which could have been effectively exploited to cast doubt as to

issues of identity, and/or whether a crime actually took place, on the drug charge the video pertained to. See Claim A, Exhibit A, ¶5.[1]

Trial Counsel and/or the Government contends that Trial Counsel had specific strategic reasons for not introducing the audio portion of the drug-transaction video. Contending that "the audio would have only have served to make the event more real in the jury's mind...and that "Agent Brokos's testimony showed that the audio would not have contradicted her on any material aspect of the drug case." HD16, KD16. Additionally, "there was no real dispute over the vehicle used" as Baskerville used that vehicle in other transactions and it was tied to Baskerville through registration records." See Gov.'s Response at page 19-20.

Here, it is evident from Trial Counsel's response to Petitioner's claim that he failed to investigate the audio portion of the surveillance video. Because had Trial Counsel investigated the audio part of the surveillance video, Trial Counsel would have had material for a devastating cross-examiation of Agent Brokos on her prior inconsistent statements she gave her surveillance team that she couldn't make out the license plate number, and she didn't know if a transaction took place. Which was totally contradictory to her trial testimony of:

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1. It should be noted that Petitioner complained of this issue to the Court in his letter to Court, during trial. See Exhibit "B" attached to this Reply. Which is a copy of that letter.

AGENT BROKOS'S TRIAL TESTIMONY

Q. During the surveillance, were you able to get the license plate number?

A. We were able to get the license plate. I actually saw it very clearly, although you can't see it on the videotape.

[T.T. at page 3573 lines 20-23].

****

...then I debriefed Kemo and he explained to me exactly what transpired during that transaction and I was very curious to see why initially I saw the hand-to-hand transaction....

[T.T. at page 3573 lines 21-24].

Moreover, the gravamen of Petitioner's claim is not the vehicle used, but the identity of the person making the drug transaction, and/or whether a crime actually took place on 3/21/03, even assuming arguendo, that a drug transaction took place, Trial Counsel's failure to confront Agent Brokos with her prior inconsistent statement, failed to cast doubt as to Petitioner being the perpetrator of the 3/21/03 drug transaction. Especially, in light of the fact that others often used Petitioner's Monte Carlo [See T.T. at page 4207].

Trial Counsel had in his hands material for a devastating cross-examination of Agent Brokos on the critical issues in the alleged drug transaction of 3/21/03. However, because of his failure to investigate the audio portions of the surveillance video, and confront Agent Brokos with her inconsistent prior statement to her surveillance team, the jury did not learn that she could not determine the make and model of the car, the license number, or whether a drug transaction took place, which was very different from her trial testimony concerning these material facts.

Thus, there is no way in which the failure to confront Agent Brokos with her prior inconsistent statement, can be justified as sound trial strategy or a reasonable strategic choice, when Trial Counsel completely failed to investigate the audio recordings. See e.g. **FISHER v. GIBSON**, 282 F.3d 1283, 1291 (10th Cir. 2002) ("In order to make the adversarial process meaningful, counsel has a duty to investigate all reasonable lines of defense."). Further, it should be noted that the jury requested to watch the videos for March 21, June 19, and September 9, 2003 transactions [T.T at page 5946], thereby, there must have been some doubt concerning Petitioner's guilt as to those transactions, thus, had it not been for counsel's deficiency, there is reasonable probability that the outcome of the proceeding would have been different.

GROUND ONE: CLAIM J-FAILURE TO OBJECT TO HEARSAY TESIMONY OF AGENT BROKOS.

Petitioner asserted in his §2255 motion and affidavit that his Trial Counsel was ineffective for failing to object to the 804(b)(6) hearsay testimony by Agent Brokos, in which Agent Brokos relayed McCray's statement, which included statements made by McCray on wiretap as well as statements that McCray made to Agent Brokos during the undercover operation, thereby, forming the basis of the drug conspiracy and convictions. See Claim J, Exhibit A, ¶11.

In the Government's §2255 Response, the Government disingenuously contends that Trial Counsel made a "vigorous legal challenge" and the "record belies Baskerville's claim that Trial Counsel failed to object to this evidence." See Gov. Response

at page 28. However, the Government's §2255 Response is in direct conflict with the position that it took in the Appellee's Brief. That the defense failed to make any objection to the procedure used by the District Court in admitting McCray's out-of-court statements. See Appellee's Brief at pages 57-72.

Here, Petitioner asserts that prior to trial the Government filed an **in limine** motion seeking to introduce statements by McCray pursuant to Fed.R.Evid. 804(b)(6). These included recorded statements made by McCray on wiretaps as well as statements that McCray allegedly made to Agent Brokos. The Government argued that the statements was admissible because Petitioner participated in the conspiracy to murder McCray for the purpose of preventing him from testifying at Petitioner's trial. [DE #102].

In the written response to the Government's motion, Trial Counsel requested a pretrial evidentiary hearing to determine the admissibility of McCray's statements [DE #105]. The District Court held a hearing on the Government's motion on January 5, 2007 [DE #116]. The Court explicitly asked the both parties how it should proceed in making its admissibililty determination. The Government noted that the Court had the discretion to hold a pretrial hearing, to hold a hearing outside the jury's presence during trial or to deny a hearing entirely and rely on the testimony at trial to determine the admissibility of the statements. The Government stated its preference, which was to allow the statement to be admitted into evidence conditionally subject to the anticipated trial testimony. Immediately after that, Trial Counsel was asked for his position, and counsel simply

replied, "Judge, I don't think I have anything to add." During the hearing, Trial Counsel had not repeated his written request for a pretrial determination of admissibility but had instead discussed only the standard to be applied, i.e., preponderance of the evidence versus a higher standard, such as clear and convincing evidence.

Hearing no request for a pretrial determination of the issues the Court stated:

> "I suppose we have to take it as it comes. I don't know what more to tell you, other than to suggest to the Government that I would hope that would present the proofs on these threshold issues in such a way that it makes orderly sense and I would suggest, I don't know that it is determinative, but **I would suggest that this sort of issue not to the extent it can be avoided, not be the kind of thing that comes in subject to connection later on.**
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> [DE #116 at page 14]

During trial the District Court sua sponte addressed the forfeiture by wrongdoing issue. The Court anticipated that the Government would seek to elicit some statements made by McCray from the then-current witness, Agend Brokos, who was McCray's F.B.I. handler, and the Court acknowledged that the issue could be dealt with as it arose during Agent Brokos's testimony:

> **"The Court:** I don't know if Mr. Herman or Mr. Kayser [both defense counsel] will object if Agent Manson starts talking about statements made by McCray. **If they don't object we don't have an issue. If they do object, we need to deal with it** and I thought it would be prudent of me to raise the point before the jury comes into the room and then we have to take a break. Anything about it. Mr. Herman?
>
> **Mr. Herman: No Judge.** We're aware of what your Honor said and we'll be guided accordingly.
>
> [DE #184 at pages 3444-45].

The Court acknowledged its willingness to deal with any objections lodged by Trial Counsel to Agent's Brokos's testimony, and the Court acknowledged that it might be necessary to interrupt Agent Brokos's testimony and resolve the issue outside the presence of the jury.

After the Court explicitly instructed Trial Counsel that he needed to object prior to the introduction of McCray's out-of-court statements in order to preserve the issue Agent Brokos testified on numerous occasions about McCray's out-of-court statements, and Trial Counsel never lodged a single hearsay objection. Likewise, Trial Counsel lodged no objection to any of the tape-recordings of McCray's alleged drug deals with Petitioner. Near the end of Agent Brokos's direct examination, the Court noted that McCrays's statement to Agent Brokos and McCray's statements on audio tapes had all been admitted without objection from the defense. [DE #186: at pg. 3768].

The Court **sua sponte** discussed the forfeiture by wrong-doing issue. The Court began by again noting that there had been no objection to any of McCray's statements from either the tape recordings or from McCray's conversations with Agent Brokos. The Court announced that it would follow the well-accepted procedure for admission of co-conspirator declarations, and would admit the statements subject to subsequent connection, based on a preliminary finding by a preponderance of the evidence that the evidentiary foundations for the admission of the evidence had been satisfied. There was no objection to this procedure by Trial Counsel. [DE #187: 3850-53].

As noted above, Trial Counsel did not adequately preserve his written request for a pretrial hearing on the Rule 804(b)(6) issue both because he failed to verbalize his request for a hearing with witness testimony while the District Court was considering the issue and because he failed to object to the introduction of any of the out-of-court statements, despite the District Court's explicit command that Trial Counsel do so in order to preserve the objections.

More importantly, Trial Counsel's failure to lodge a valid objection to Agent Brokos's testimony, forfeited any review by the Court of Appeals as to whether the District Court erred, in failing to hold a pretrial hearing before admitting testimony pursuant to Fed.R.Evid. 804(b)(6). Thereby, Petitioner claim had to be reviewed under a higher standard of "plain error", instead of having the Court of Appeals review the claim in first impression review. Moreover, in the absence of any controlling precedent in the Third Circuit, the District Court's procedural error of failing to hold a pretrial hearing could not be characterized as "plain". See **UNITED STATES v. CLARK** 237 F.3d 293, 298-99 (3rd Cir. 2001) (no plain error where defendant fails to cite any controlling authority for his position).

Further, the Government argued in its Appellee's Brief at pages 57-72 that, the defense failed to make any objection to the procedure used by the District Court in admitting McCray's out-of-court statements. Also Petitioner's appellate counsel noted in its Initial Brief at page 55 n.#7 that **"the almost complete absence of objections during trial such that important issues**

were not adequately preserved for appellate review, is quite disturbing. See Exhibit "A" attached. Thus, Petitioner was greatly prejudiced by Trial Counsel's deficient performance, because there is a reasonable probably that Petitioner's appeal proceedings would have been different.

GROUND ONE: CLAIMS B & K- FAILURE TO INVESTIGATE PHONE SYSTEM AT HUDSON COUNTY JAIL, AND FAILURE TO OBJECT TO THE HEARSAY TESTIMONY OF MARSHAL WILLIAM CANNON.

Petitioner asserted in his §2255 motion and affidavit that Trial Counsel was ineffective for failing to investigate "the phone system at Hudson County Jail," and object to the hearsay testimony of Marshal William Cannon, that the jail lacked capabilities of recording prisoner telephone calls during the time when Petitioner was housed there. See Claim B & K, Exhibit "A" ¶14-16.

It is Trial Counsel's contention that they have no recollection of Petitioner's request that they investigate the phone system at Hudson County Jail, and that Petitioner does not provide any evidence that Marshal Cannon's information was false.[2] Further, that objecting on hearsay grounds would have been unproductive on such a "minor point" and "may have affected the defense's credibility with the jury. See Gov. Response at pages 20-21.

Claim B:

Here, Petitioner asserts that he asked his Trial Counsel to investigate the issue of telephone monitoring/recording

2. It should be noted that the Government themselves has failed to present any documentary evidence to refute Petitioner's claim that Marshal Cannon's hearsay testimony was untruthful.

capabilities at the Hudson County during the period that Petitioner housed there. Which was a very important issue during trial, because it was the Government's position that Petitioner made incriminating calls with regard to the alleged plot/conspiracy to kill McCray. Moreover, the Government's purpose for introducing this form of evidence before the jury, was to plant a seed in their mind that the cooperating witnesses testimony that the information regarding McCray was being facilitated out over the phones, was being corroborated.

Thereby, had Trial Counsel investigated, they could have learned that Hudson County Jail did in fact have the recording capabilities the Government claimed it did not have, which would have supported Petitioner's position during trial that the Government's failure to produce the recordings of the calls, was not due to the recording capabilities of Hudson County Jail, but the fact that the nature of the calls claimed by the Government through its cooperating witnesses did not exist.

Therefore, Trial Counsel's failure to investigate on its own the phone system at Hudson County Jail, instead of relying on the Government's disingenuous contention, was deficient performance on behalf of Trial Counsel. See e.g. **THOMAS v. LOCKHART**, 738 F.2d 304, 308 (8th Cir. 1984) (investigating consisting solely of reviewing prosecutor's file "fell short of what a reasonably competent attorney would have done").

Claim K:

It is undisputed by either the Government and/or Trial Counsel that Marshal Cannon's testimony was hearsay testimony, that should

have been objected to, however, Trial Counsel and/or the Government attempts to downplay Trial Counsel's deficient performance, by contending that an objection would have been "unproductive on such a minor point" and may have affected the defense's credibility with the jury. See Gov. Response at page 21.

Contrary, to the Trial Counsel and/or Government's contention. Marshal Cannon's testimony was to be taken for the truth of the matter that was asserted, which was that Hudson County Jail did not have the capabilities to record phones calls during the time that Petitioner was housed there. The Government knew the prejudicial effect that this evidence would have regardless of it being hearsay, which was to plant the seed in the minds of the jury that Petitioner was using the phones in Hudson County Jail to facilitate the information alleged by the Government's cooperating witnesses.

This information was damning because it was meant to be believed that these alleged calls actually took place. More importantly, the testimony of Marshal Cannon was used as some form of proof, it was to make a showing as to why the Government could not have gotten these alleged calls on tape. According to Marshal Cannon's testimony, the jail wasn't able to record the inmates calls. Marshal Cannon's testimony was an intricate pieced of the Government's evidence and its purpose was to be take for the truth of the matter asserted.

Further, the prejudice to Petitioner was amplified when the Government attempted to exploit the use of Marshal Cannon's inadmissible and prejudicial hearsay testimony during its closing

argument to the jury: "Now, I want to talk about it not being recorded because there's been a lot of talk about this ability to record calls and the implication is, well, why isn't this on tape? First of all, we shattered the myth that the defense has been portraying in cross-examination with Bill Cannon yesterday." [T.T. at pgs. 5710-11]. See **REYONALDS v. UNITED STATES**, 715 F.2d 99, 105 (3rd Cir. 1983) ("Where powerful hearsay statements are admitted into evidence offered again in closing argument the risk of prejudice is amplified."). Thus, Trial Counsel's contention that objecting on hearsay grounds would have been unproductive, is belied by the record in this case, and is in direct conflict with its argument in cross-examination of Marshal Cannon.

GROUND ONE: CLAIMS D & G- FAILURE TO INVESTIGATE AND CHALLENGE THE CHAIN OF CUSTODY.

Petitioner asserted in §2255 motion and affidavit that Trial Counsel was ineffective for failing to investigate and challenge the chain of custody of the drugs that McCray allegedly purchased from the Petitioner. See Claim D & G, Exhibit "A" ¶6-7. However, it is Trial Counsel contention that this was a minor issue, and any challenge went only to the weight and the admissibility of the evidence, and would not have changed the outcome of what was an extremely strong drug trafficking case...and unsuccessfully challenging the chain of custody would have undermined the defense's credibility with the jury for the death phase." See Gov. Response at page 23.

Here, Petitioner asserts that the Government failed to establish a sufficient chain of custody showing that the cocaine described in the DEA Form-7 report was the same substance seized

on the occasions described in the indictment. Where the DEA Form-7 reports describe alleged seizures from the "Crips Street Gang," and the indictment alleged controlled purchases from Petitioner.

Physical evidence must be authenticated before it is admitted. Authenticity is elemental to relevance, for evidence cannot have a tendency to make the existence of a disputed fact more or less likely if the evidence is not that which its proponent claims. See **UNITED STATES v. BRANCH**, 970 F.2d 1368, 1370 (4th Cir. 1992) (The requirement of authentication ... is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.); see also, **UNITED STATES v. HOWARD-ARIAS**, 679 F.2d 363, 366 (4th Cir. 1982) ("The chain of custody rule is but a variation of the principle that real evidence must be authenticate prior to its admission into evidence.").

It should be noted that Agent Brokos admitted under cross examination that certain reports contained errors and mistakes in them [T.T. at pages 3999-4002], Further, Agent Brokos was not the author of any of the DEA Form-7 reports in Petitioner case, thus, no proper chain of custody was established. See **UNITED STATES v. COLEMAN**, 631 F.2d 908, 912 (D.C. Cir 1980) (DEA Forms "are prepared not solely with an eye toward presentation, but towards preserving a record of the chain of custody.").

Thus, even assuming arguendo, that the District Court would not have suppressed the evidence on the grounds of the faulty chain of custody. Had Trial Counsel properly investigated or made objection to the admissibility of the evidence, and/or submitted the DEA Form-7 reports for the jury inspection, it would have

enabled the jury to make an informed assessment as to what weight, if any to attribute to the evidence, pertaining the alleged drugs seized from the dates of 3/18/03, 3/21/03, and 6/19/03. See **COLEMAN** 631 F.2d at 911, (We hold only that such a record is so admissible when offered by a criminal defendant to support his defense). Therefore, Trial Counsel's failure to investigate, and challenge the chain of custody, denied Petitioner effective assistance of counsel.

GROUND ONE: CLAIM M- FAILURE TO PROPERLY PRESERVE BATSON ISSUE.

Petitioner asserted in his §2255 motion and affidavit that Trial Counsel was ineffective for failing to effectively preserve the **Batson** objections. Specifically, asserting that counsel failed to satisfy the second step of the **Batson** challenge when they failed to challenge the pretextual nature of the Government's race neutral explanations by making a comparison of the four challenged black jurors vs. white jurors with similar traits as those claimed by the prosecutor as the basis for striking the black jurors. [T.T. at pages 3179-3213].

The Government and/or Trial Counsel contend that, "even had trial counsel asserted that the reasons were pretextual, this Court, at step three of the **Batson** analysis, would have rejected that assertion, and Third Circuit (based on the analysis in its October 2011 non-precedential opinion) would have affirmed that finding as not clearly erroneous," Gov. Response at page 29-30, is belied by both this Court and the Third Circuit Court of Appeal's Opinion. In which both Court's acknowledge that Trial Counsel failed to preserve the issue at step two.

Moreover, contrary to the Government and Trial Counsel's contentions. This Court in its Opinion on January 18, 2011, [DE #287], wrote that it would "reopen the **Batson** issue only to the limited extent necessary to consider whether the newly produced evidence bears on the original decision." Dist. Court's Op. at page 9. The Petitioner requested the Court to consider his pretextual argument to which the Court stated:

> "The Court shall not reopen the Batson hearing in its entirety and shall not consider arguments that could have been raised originally but were not".
>
> [See Dist. Court's Op. at page 10].

The Third Circuit Court of Appeals in its Opinion dated October 13, 2011, [DE #294], held that, trial counsel "failed to respond to the prosecutor's race-neutral explanation at trial," and that the issue was "unpreserved" to which "unpreserved **Batson** objections are reviewed for plain error." See [Third Cir.Ct.Op at pages 5-6].

Since Trial Counsel sat silent after the Government stated its reasons for exercising peremptory challenges to which Trial Counsel objected, the Third Circuit reviewed this Court's ruling for the higher standard of plain error as opposed to the standard for abuse of discretion because the issue was unpreserved. See [Third Cir.Ct.Op. at page 6]. As a result of Trial Counsel's failure to fulfill their obligations at step two of **Batson** by not responding to the Government's race neutral-explanations the Third Circuit went on to state:

> "Had the defense raised a challenge based on comparison to similar white jurors whom the government did not challenge and lack of support in the record for the explanations offered by the government, perhaps the District Court would have inquired and investigated further, and made a different ruling. But the defense made no such argument. Accordingly, the District Court's failure to scour the record of over six weeks worth of jury selection on its own for evidence of discriminatory intent unassisted by Baskerville did not constitute plain error. The error about which Baskerville complains with respect to the District Court's analysis is, instead, attributable to his own failure to point out weaknesses, in the proffered reasons when the opportunity arose."
>
> [See Third Cir.Ct.Op. at pages 7-8].

Further, Appellate-Counsel noted that Trial Counsel failed to exhaust the **Batson** challenge by properly preserving the issue for appeal, thus, constituting ineffective assistance of counsel, citing **GOV'T OF V.I. v. FORTE**, 865 F.2d 59 (3rd Cir. 1989), See Petitioner's Reply Brief at page 6 n.#2, to which Petitioner also relies on as the legal authority in support of his ineffective claim.

Thereby, it is Petitioner's assertion that his case is analogous to **FORTE**. That is because in **FORTE**'s initial proceeding on direct appeal, the Third Circuit held, "that the **Batson** equal protection analysis was not triggered because **FORTE** had failed to preserve his objections and because we did not find plain error in the trial proceeding." See **FORTE**, 802 F.2d 73, 74 (3rd Cir. 1986). The Third Circuit held addressing **FORTE**'s inffective assistance of counsel:

> "Forte's contention that he is entitled to relief only indirectly implicating **Batson** as we are concerned with the trial attorney's performance and not simply whether there was a **Batson** violation. Under the Sixth Amendment a defendant has the right to effective assistance of counsel which means that he is entitled to adequate representation by an attorney of reasonable comptence."
>
> See **FORTE**, 865 F.2d 62, citing **GOV'T OF THE V.I. v. ZEPP**, 748 F.2d 125, 131 (3rd Cir. 1984).

As stated above this Court on remand held that it would "not consider arguments that could have been raised but were not." Dist.Ct.Op. at page 10. Which the Third Circuit also recognized and failed to address as well holding that the **Batson** issue was not preserved due to trial counsel's silence after the government volunteered its race-neutral explanation. Thus, Petitioner asserts that his Trial Counsel was ineffective for failing to fulfill its obligation at step-two of the **Batson** objection, by pointing to the pretextual nature of the government's peremptory challenges, prejudiced Petitioner before this Court on remand and the Third Circuit Court of Appeals, during Petitioner's direct appeal, where Petitioner's issue had to be reviewed under a higher standard of "plain error review."

2. PETITIONER WAS PREJUDICED BY BOTH THE INDIVIDUAL AND CUMULATIVE IMPACT OF MULTIPLE DEFICIENCIES OR ERRORS BY TRIAL COUNSEL DURING THE PRETRIAL, TRIAL, SENTENCING, AND DIRECT APPEAL PROCESS.

Even where no **single** error by counsel is sufficient to vacate the convictions of the Petitioner, prejudice may result from the cumulative impact of multiple deficiencies or errors by counsel during the trial process. See **UNITED STATES v. RUSSEL**, 2002 U.S. App. LEXIS 9538 (4th Cir. 5-20-02) (vacating denial of motion pursuant to 28 U.S.C. §2255 and remanding on claim of cumulative error of counsel); **UNITED STATES v. RAMSEY**, 323 F.Supp 2d 27, 2004 U.S. Dist. LEXIS 12462 (D DC 2004) (granting new trial due to multiple deficiencies of counsel); **UNITED STATES v. BOWLING**, 619 F.3d 1175, 1188 (10th Cir. 2010) ("A cumulative error analysis aggregates all error found to be harmless and analyzes whether their cumulative effect on the outcome of the

trial is such that collectively they can no longer be determined to be harmless.").

In Petitioner's case, as set forth in the foregoing arguments and in his §2255 motion and affidavit, counsel's performance was below the objective standard required by the Constitution in multiple areas. While Petitioner respectfully submits that each of the multiple professionally unreasonable acts and omissions of counsel prejudiced him within the meaning of **STRICKLAND**, he was **clearly** prejudiced by the **cumulative** impact of the multiple deficiencies and errors.

Based on the foregoing facts and law, Petitioner has affirmatively pleaded "prejudice" in his case within the meaning of **STRICKLAND v. WASHINGTON**, 466 U.S. 668, (1984) and **UNITED STATES v. GLOVER**, 531 U.S. 198 (2001) and **WILLIAMS v. TAYLOR**, 120 S.Ct. 1495, 1512-16 (2000), due to the "multiplicity of errors" which denied Petitioner his Sixth Amendment constitutional right to effective assistance of counsel during the pretrial, and trial process, and direct appeal process.

Here, Petitioner asserts that he has not abandon Claims F,L,N,O,P,Q,R,S, or T, by not responding to those claims in this Reply, but however, reasserts his position and argument as asserted in his §2255 motion and affidavit pertaining to those claims.

3. PETITIONER'S NEWLY DISCOVERED EVIDENCE CLAIM IS COGNIZABLE UNDER 28 U.S.C. §2255.

Petitioner asserted in his §2255 motion and affidavit a claim of "newly discovered evidence." Specifically, asserting that exercising due diligence Petitioner has obtained information from the 2011 and 2013 trials in the matter of **UNITED STATES v. PAUL BERGRIN**, District of New Jersey, Criminal No. 09-369, which consists of inconsistencies in the Government's argument on motives, different theories, and different facts, between Petitioner's trial and Bergrin's trial, with regard to the McCray murder, and the inconsistent/conflicting testimonies of Agent Brokos and Anthony Young, which either standing alone, and/or cumulatively, warrants a new trial at the minimum, if the convictions are not fully reversed with the charges dismissed with prejudice. See Ground Two of Petitioner's §2255 motion, Exhibit "A" ¶19-20.

The Government in its Response contends that Petitioner's "newly discovered evidence" claim, should have been brought under a Rule 33 motion, and therefore, Petitioner cannot use §2255 a vehicle by which to raise a claim cognizable only in a Rule 33 motion. See Gov. Response at page 42.

Contrary, to the Government's contentions, Petitioner's "newly discovered evidence" claim is cognizable under §2255(f)(4), which states: The one year period runs from the latest of...(4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence. Petitioner asserts that he did not know of the evidence until after **BERGRIN I**, however, he did not receive any

information relating to the claim until June of 2012 [See Petitioner's Affidavit ¶19-20]. After learning of the "newly discovered evidence" and/or facts, Petitioner raised it in a timely fashion within the limitations period provided by §28 U.S.C. §2255.

Moreover, the Government in its Response, recognizes that Petitioner's Ground Two- Claims (C) and (D), also restated as his initial Ground Three Claim, is a claim under **BRADY v. MARYLAND**, 373 U.S. 83 (1963). See Gov. Response at pages 47-50. Thereby, Petitioner's claims are cognizable and reviewable, because **BRADY** claims are cognizable and reviewable by the District Court. See **UNITED STATES v. BIBERFELD**, 957 F.2d 98, 103 (3rd Cir. 1992); **UNITED STATES v. PELLULLO**, 110 F.3d 117, 122 (3rd Cir. 1997) (Recognizing that **BRADY**, violations falls within the scope of 28 U.S.C. §2255).

Additionally, Petitioner raised a due process violation as it relates to this claim in Ground Two and Three, which are closely related. The Government's Response to Grounds Two & Three at page 44, confirms this fact, See Section VI. Therefore, Petitioner's newly discovered evidence claims should be reviewed by this Court as timely filed.

4. THE GOVERNMENT'S THEORY OF MOTIVE FOR THE McCRAY MURDER WAS INCONSISTENT BETWEEN PETITIONER'S TRIAL AND PAUL BERGRIN'S TWO TRIALS. (GROUND TWO, CLAIM (A), AND GROUND THREE, CLAIM (c)).

Petitioner asserted in his §2255 motion and affidavit, that the Government's theory of the motive for the murder in the **Bergrin I** trial was inconsistent with the theory it offered in Petitioner's trial. See Ground Two, Claim (A), and Ground Three,

Claim (c). However, the Government contends that the motives are not inconsistent, that the theories presented during the two trials differed only in that, "Baskerville's personal motive was stressed during the **Baskerville** trial and Bergrin's personal motive was the focus during Bergrin's trials." See Gov. Response at pages 44-45, §VI (A)

Further, the Government disingenuously contends that the murder charges faced by Petitioner were not the same as those faced by Bergrin. Id. at 44-45. Contrary, to the Government's contention, Petitioner and Bergrin were both charged with (1) conspiracy to murder a witness, in violation of 18 U.S.C. §1512(k). Although both faced different charges on other substantive counts, the conspiracy to murder a witness count under 18 U.S.C. §1512(k), are one and the same, and the Government's theory as to these counts was inconsistent.

Courts has recognized that inconsistent prosecutorial theories can, in certain circumstances, violate due process rights. See **THOMPSON v. CALDERON**, 120 F.3d 1045, 1058-59 (9th Cir. 1997), held that the state of California violated a defendant's due process rights by arguing at **Thompson**'s trial that he alone committed a murder, when arguing at a subsequent trial that another defendant actually committed the same murder. After noting the fundamental duty of the prosecutor in the second trial "returned to his original theory and discredited the very evidence he had previously offered in **Thompson**'s trial." Id. The prosecutor had argued different motives, different theories, and different facts for each defendant and had secured convictions

at both trials. Id. 120 F.3d at 1059.

Here, in the instant case, the Government's pursuit of fundamentally inconsistent theories is evident from the transcripts of the two trials. The Government convicted Petitioner under an entirely different theory, and argued critical facts to Petitioner's jury that were at odds with those presented at Bergrin's trial. The glaring inconsistency between the Government's theories, argument, and factual representations at the two trials is apparent when one juxtaposes the Government's opening and closing arguments from Petitioner's and Bergrin I's trial. At Petitioner's trial the Government argued in its opening statement that:

> "What Kemo didn't know was back in November, three months earlier, when the defendant was arrested, he hatched a plan to have Kemo killed"..."What you'll learn during the course of this trial is that none of the members, these or others of the conspiracy could hope to gain anything from Kemo's murder, except the defendant."
>
> **Baskerville**'s Trial at page 3265.

Yet at **Bergrin I**'s trial the Government advanced a contrary motive for McCray's death. That Petitioner was not the only person that stood to gain from Kemo's murder, and that Bergrin wanted Kemo dead for his own personal reasons:

> "And you'll hear that Kemo was killed because he had provided information to the Government about a drug-trafficking organization that the defendant was associated with. You'll hear that because Kemo had infiltrated this organization, he posed a threat not only to the organization but Paul Bergrin--so it was not only the drug-trafficking organization that was on the line, it was Paul Bergrin himself and because of that, in Paul Bergrin's world, Kemo had to die."
>
> **Bergrin I**'s trial 10/17/11 at pages 4-5.
>
> **********
>
> "That is important because that provides the motive for this crime. That is the reason why Paul Bergrin got involved in murdering

> Kemo Deshawn McCray. Because again, he had a personal motive at this point; he was not simply representing Hakeem Curry, he was selling drugs to Hakeem Curry. And if Hakeem Curry's organization was infiltrated by law enforcement, by Kemo Deshawn McCray, his neck was personally on the line."
>
> **Bergrin I**'s trial 10/17/11 at pages 6-7.

At Petitioner's Trial the Government in its closing argued to the jury that, there was no independent motive to murder McCray by others, other than to help Petitioner in his request and demand to get out of trouble, because there was no concern that Petitioner would cooperate:

> "Why is that important? It's important to combat any argument that may be made that somehow Hakim Curry and Rakeem Baskerville did this all on their own. They had no motive to do this, but don't believe for a second that they were motivated in anything other than to keep Kemo off the witness stand Okay...They weren't concerned that they were going to be in trouble because they knew that Will would never rat them out, not in million years. You just don't do that...The only motive for Rakeem Baskerville and Hakim Curry was to help Will in his request and his demand to get Will out of trouble. They weren't concerned that we better knock this guy off because Will was going to cooperate and get them in trouble."
>
> **Baskerville**'s trial at pages 5724-25.

However, in Bergrin's trial the Government made factual representations that Petitioner was willing to cooperate, which caused concern and motive for Bergrin to murder McCray:

> "He was given time to consider his options. And after he had sufficient time to think, he said Agent Brokos tells us, and I'm quoting: (Reading) He said that he is interested in talking but has concerns about talking because he would implicate other family members and that he would feel more comfortable talking in the presence of an attorney. His attorney. Agent Brokos told you she understood that statement to be that he would like to talk, meaning he would like to cooperate. So what happens?"..."[a]fter William Baskerville spoke to his attorney, Mr. Bergrin, he said he's not interested in cooperating. That William Baskerville said, Paul Bergrin told him-- again, quoting, "To not cooperate, to keep his mouth shut and not cooperate."
>
> **Bergrin I**'s trial 11/14/11 at pgs. 16-17

****

"Now, the drug evidence is important, members of the Jury, because it provides a motive beyond just being house counsel. Paul Bergrin, so its clear, had a personal stake because of his involvement, his position in the drug chain, William Baskerville flipping, cooperating against Hakeem Curry, a personal stake in stopping the dominoes from falling.

Id. at page 25.

Based on the juxtaposition of the opening and closing argument's, from both Petitioner's and Bergrin's trial, you clearly see that the Government's theory pertaining to the motive for McCray's murder, simply did not change based solely on a specific defendant's vantage point, as the Government disingenuously contends, but was changed because of the inherently factually contradictory theories presented at both trials.

At the time of Petitioner's trial, the Government's theory was, that Petitioner was the only person stood to gain anything from McCray's murder (**Baskerville** Tr. 3265), and that it was Petitioner who "initiated the conspiracy" for McCray's death, as early as November 25th 2003, because Petitioner feared "spending the rest of his life in prison," so it drove him to kill McCray to prevent McCray from becoming a witness against him (**Baskerville** 5665-67).

However, in **Bergrin I**, the Government's theory changed, asserting that Petitioner was not the only person that stood to gain from McCray's murder, and that it was Bergrin who initiated, encouraged, instructed, demanded, and counseled the members of the Curry organization that they had to kill McCray, and that Bergrin wanted McCray dead for his own personal reasons. (**Bergrin I** 10/17/11 Tr. 29) & (**Bergrin I**, 11/14/11 Tr. 144-45).

Although the Government's use of different theories of motive, does not necessary violate Petitioner's due process rights, however, its the Government's use of inherently factually contradictory theories that violate the principles of due process. See **SMITH v. GROOSE**, 205 F.3d 1045, 1052 (8th Cir. 2000) ("[w]e do not hold that the prosecutors must present precisely the same evidence and theories in trials for different defendants. Rather, we hold only that the use of inherently factually contradictory theories violate the principles of due process.").

To violate due process, an inconsistency must exist at the core of the prosecutor's case against the defendants for the same crime. See **CLAY v. BOWERSOX**, 367 F.3d 993, 1004 (8th Cir. 2004). Here, there exist numerous inconsistencies at the core of the Government's case against Petitioner and Bergrin for the same crime.

The Government's theory in Petitioner's case was that, (1) Petitioner was the only one who stood to gain something for McCray's death, (2) It was Petitioner who initiated and demanded that McCray be killed as early as November 25th 2003, and (3) There was no concerns about Petitioner cooperating with the authorities.

However, in Bergrin I the Government's theory was, (1) Petitioner was not the only one who stood to gain from McCray's death, that Bergrin wanted McCray dead for his own personal reasons, (2) Bergrin was the one who initiated, encouraged, instructed, demanded, and counseled members of the gang to murder McCray, on December 4, 2003, and (3) Bergrin was concerned about

Petitioner cooperating with the Government.

Thus, there exist at the core of the Government's case against Petitioner and Bergrin for the same crime, several inconsistencies, thereby, rendering unreliable Petitioner's conviction. See **SMITH**, 205 F.3d at 1052.

5. **THE GOVERNMENT DID SPONSOR PERJURED TESTIMONY, AND THE GOVERNMENT'S WITNESSES FACTUAL INCONSISTENT TESTIMONIES ALSO SUPPORT THE PETITIONER'S INCONSISTENT THEORY CLIAM. (GROUND TWO, CLAIMS (B)&(C), AND GROUND THREE, CLIAM (b)).**

Petitioner asserted in his §2255 motion and affidavit that the Government did not merely suggest varying interpretations of motive, or ambiguous evidence, the Government manipulated evidence and witnesses, argued inconsistent motives, and in Petitioner's trial argued against the theory used to obtain a conviction at Bergrin's trial. Thus, by doing so, the Government brought its conduct squarely within an area forbidden by the Supreme Court- the "knowing presentation of false testimony". See Ground Two (A)(B)(C), Exhibit "A" ¶20(A-D), and Ground Three Claim (b).

The Government contends that Petitioner distorts the records of both the **Bergrin I** trial and his own, to support Petitioner's claims of prosecutorial misconduct. See Gov. Response §VI.(H) at pages 56-57. However, it is the Government who slants and misrepresents the facts from both trials.

The Supreme Court has long emphasized our Constitution's "overriding concern with the justice of finding guilt." **UNITED STATES v. AGURS**, 427 U.S. 97, 112 (1976). In particular, the Due Process Clause guarantees for every defendant the right to

a trial that comports with basic tenets of fundamental fairness. **LASSITER v. DEP'T OF SOC. SERVS.**, 452 U.S. 18, 24-25 (1981). Further, the Supreme Court has recognized that the prosecutor is in a peculiar and very definite sense the servant of the law, the twofold aim of which is guilt shall not escape or innocence suffer..., it is as much the prosecutor's duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate method to bring about one. See **BERGER v. UNITED STATES**, 295 U.S. 78, 88 (1935).

Lawyers representing the government in criminal cases serve truth and justice first. The prosecutor's job isn't just to win, but to win fairly, staying well within the rules. See **UNITED STATES v. KATTAR**, 840 F.2d 118, 127 (1st Cir. 1988) (stating that the function of the prosecutor "is not merely to prosecute crimes, but also to make certain that the truth is honored to the fullest extent possible"). This is so because "society wins not only when the guilty are convicted but when criminal trials are fair, our system of justice suffers when any accused is treated unfairly." See **BRADY v. MARYLAND**, 373 U.S. 83, 87 (1963).

The prosecutor may not become the architect of a proceeding that does not comport with the standards of justice. The prosecutor, thereof, violates the Due Process Clauses if he knowingly presents false testimony- whether it goes to the merits of the case or solely to witness's credibility. See **THOMPSON v. CALDERON**, 120 F.3d 1045, 1058 (9th Cir. 1997); citing **NAPUE v. ILLINOIS**, 360 U.S. 264 (1959); **MOONEY v. HOLOHAN**, 294 U.S. 103 (1935). Moreover, the prosecutor has a constitutional duty

to correct evidence he knows is false, even if he did not intentionally submit it. **GILES v. MARYLAND**, 386 U.S. 66 (1967).

From these bedrock principles, it is well established that when no new significant evidence comes to light a prosecutor cannot, in order to convict two defendant at separate trials, offer inconsistent theories and facts regarding the same crime. This is exactly what was done by the Government in this case. Here, the factual inconsistencies which Petitioner has cited in his affidavit (¶20(A)-(E)) and herein, from the records of both **Bergrin I** and Petitioner's own trial reinforces Petitioner's inconsistent theory claim. Moreover, the twisting and "flip-flopping" of certain facts that were provided by government witnesses, were to conform with whichever scenario that the Government advanced at the time.

a. THE GOVERNMENT WITNESSES TESTIMONIES WERE FACTUALLY INCONSISTENT AND DIAMETRICALLY OPPOSING IN BOTH THE PETITIONER'S TRIAL AND BERGRIN I.

The Government contends, that several of Petitioner's claims mischaracterize witness testimony, by ignoring the differing questions witnesses were asked for focusing on isolated semantic differences to argue inconsistency. See Gov. Response §VI (H)(b) at page 60. However, the Government is not being completely forthright, which has been the Government's stance throughout Petitioner's case.

The Government has omitted several key facts for instance, that it was AUSA Joseph Minish who examined the testimony of Anthony Young in **Bergrin I**, **Bergrin II**, and the trial of Petitioner's. See (**Bergrin I** 10/27/11); (**Bergrin II** 2/ /13);

(**Baskerville** 4/13/07). Petitioner asserts that it was AUSA Minish who arranged, constructed, and tailored the questions he'd ask Young so that they would correspond with each proceeding and Young answers were crafted to fit whichever script the Government proffered at the time. Thus, the record is replete of several examples of this.

Anthony Young:

In Petitioner's trial, Young testified that he learned from Curry the day of Petitioner's arrest that Petitioner was facing life in prison (**Baskerville** Tr. 4358-59). In **Bergrin I**, Young testified that he learned Petitioner was facing life from Bergrin at a later in-person meeting and did not recall Curry telling him Petitioner faced life on the day of Petitioner's arrest. Further, Young stated, despite what he had testified to four years earlier in the Petitioner's trial, that he did not remember Curry telling him on the day Petitioner was arrested that Petitioner faced a life sentence. See **Bergrin I** (11/2/11 Tr. 146-47).

Comparing the records of both **Bergrin I** and Petitioner's own trial, Young's testimony was not one of a failed "memory" or that he simply "misspoke" on this point, as the Government disingenuously contends. See Gov. Response §VI (H)(b) at page 65, but clearly are factually inconsistent. See **SMITH v. GROOSE**, 205 F.3d 1045, 1050 (8th Cir. 1994), citing **NICHOLS v. SCOTT**, 69 F.3d 1255, 1269 (5th Cir. 1995).

Further, the Government's contention that Petitioner misleadingly claims that Young's testimony that Petitioner never

"demanded" he kill McCray creates new, material information, and that Petitioner mischaracterizes Young's testimony in both trials on this point, is belied by the record in this case.

Here, Petitioner asserts that it is the Government who yet again, mischaracterizes the facts from the record, in its bold attempt to mislead this Court. During Petitioner's trial Young was asked a specific question, concerning the name of the informant (McCray's) being passed along:

> "**QUESTION:** "In your mind, when you got that information, was that a request?
>
> "**ANSWER:** More like a request demand
>
> "**QUESTION:** There's a difference between a request and demand. Which did you think it was?
>
> "**ANSWER:** Demand.
>
> "**QUESTION:** And why do you think it was a demand?
>
> "**ANSWER:** Cause if this guy still around, then one of Baskerville's go to prison.
>
> (**Baskerville** Tr. 4354-55).

The Government again relying on the testimony of Young offered those particulars to the jury in their summation. (**Baskerville** Tr. 5717). In **Bergrin I**, Young was ask those very questions by Bergrin, and his testimony was that Petitioner, "never gave (him) a demand" and that Petitioner would never give him a "demand." (**Bergrin I** 11/2/11 Tr. 113-16). However, the Government in their summation in **Bergrin I** told the jury, "those demands were made, that counsel was given by Mr. Bergrin to the gang to kill Kemo." (**Bergrin I** 11/14/11 Tr. 83).

More importantly, the inconsistency in Young's testimony, did not rise from the context of the questions Young was

answering, but from the diametrically opposing theories, from Petitioner's and Bergrin's trial. Thereby, at the time of Petitioner trial/had the Government presented the evidence it asserted to be truth or fact in **Bergrin I**, that it was Bergrin who initiated, encouraged, instructed, demanded, and counseled the group that they had to kill McCray, thereby, giving credit to Petitioner's theory of defense. See (**Baskerville** Tr. 5871-76), thus, Petitioner's proceeding would have been different.

Finally, Young's testimony was the linchpin of the Government's case, in which there consisted several factual inconsistencies, thus, violating Petitioner's rights to due process. Under the particular facts of this case, the actions by the Government violates the fundamental fairness essential to the very concept of justice. Thus, Petitioner has suffered from the due process deprivation that infected the conflicting prosecutions. See **SMITH**, 205 F.3d at 1052.

Agent Brokos:

Turning to the testimony of Agent Brokos, Petitioner asserted in his §2255 motion and affidavit, that Agent Brokos testified inconsistently in his trial that she had no leads in the McCray murder until Young came forward (**Baskerville** Tr. 3887). However, in **Bergrin I** she testified to several leads.[3] See (**Bergrin I** 10/18/11 Tr. 160-63) & (**Bergrin I** 10/19/11 Tr. 215-221).

3. Petitioner has before the Court a pending Motion for Discovery, for material relating to Shelton Leveret, Curtis Jordan, and Roderick Boyd, for their statements concerning possible leads in the McCray murder investigation, which is material to Petitioner's inconsistent testimony claim concerning Agent Brokos.

Here, in this claim, the Government distorts the facts in Petitioner's affidavit, and attempts to pull the cover over one of its many lies presented during Petitioner's trial, in an attempt to keep this Court from discovering the naked truth about the Government's nefarious trial tactics, by excluding the full context of Agent Brokos' testimony, by leaving out the following: "We had been trying to determine his identity, but had not yet been able to do so, **but we did not know of Fat Ant to be involved in Kemo's murder.**" (**Baskerville** Tr. 3890 lines 19-21).

Agent Brokos' testimony was not just inconsistent but was diametrically opposing when the records of both **Bergrin I**, and the Petitioner's are juxtapose. Agent Brokos' testimony was vital to the Government's prosecution against Petitioner, thus, any evidence affecting her credibility is material to guilt or innocence, particular in this case. See **BIBERFELD**, 957 F.2d at 103; citing **UNITED STATES v. GIGLIO**, 405 U.S. 153 (1972).

b. THE GOVERNMENT DID KNOWINGLY SPONSOR FALSE TESTIMONY BECAUSE YOUNG'S TESTIMONY WAS NOT MERELY INCONSISTENT, IT WAS A LIE.

Petitioner asserts that the Government did knowingly sponsor false testimony. Specifically, that Young testified falsely at Petitioner's trial "that Rakeem Baskerville sat in the passenger seat of Curry's car while Curry discussed Petitioner's arrest with Bergrin on his cell phone" (**Baskderville** Tr. 4350). In **Bergrin I**, Young testified "I think it was Jamal who got in the front [seat]" (**Bergrin I** 10/27/11 Tr. 129-136). See Petitioner's Affidavit at ¶20(3).

The Government contends that, "While Young's testimony does vary here, it is not a material contradiction. In neither trial

did Young testify that the person in the front passenger seat participate in Curry and Bergrin's conversation"... "Young's testimony in both trials focused on the substance of the phone call between Curry and Bergrin, not the person in the passenger seat. During that call, Bergrin told Curry that, according to Baskerville, the informant was someone named "K-Mo," whom Young understood (correctly) was "Kemo". Which of Baskerville brothers sat with Young and Curry during the call was not material to Baskerville's conviction." See Gov. Response §VI (H)(c) at pages 69-70.

However, the Government's contentions are disingenuous, and the Government has omitted key facts from its Response that, during Petitioner's trial Young's testimony concerning the mispronunciation of McCray's name as "K-Mo" was the center of identification. Because according to Young the identification of McCray as "Kemo" the "informant" was made by him and Rakeem Baskerville, and not just Young himself as the Gvoernment falsely states in its Response at page 70.

More importantly, the Government affirmatively urged to the jury this falsehood, as truth during the Government's closing, (**Baskerville**, Tr. 5713), which the Government knew to be false. Because the identity of McCray as Kemo and not K-mo, and by whom (Young & Rakeem Baskervill) was pivotol to the Government's case, thus, Young's known perjured testimony was material to Petitioner's conviction. See **SANFILIPPO**, 564 F.2d 176, 179 (5th Cir. 1977).

Next, the Government disingenuously contends that, "Nor did the Government "know" until long after Baskerville's trial that Young had wrongly identified Rakeem Baskerville as the other passenger Curry's truck." See Gov. Response at page 71. Here, the Government was fully cognizant of the evidence in its possession which shows that the Government knew or should have known that Young was fabricating the facts and testifying falsely. "Where the prosecutor knew or should have known of the perjury, the conviction must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." **UNITED STATES v. MONTELEONE**, 257 F.3d 210, 219 (2nd Cir. 2001).

The Government further contends that, the trial AUSAs were relying upon the "**recording**" of the 4:00 p.m. call in which Bergrin audibly mispronounced "Kemo" name as "K-Mo." That mispronunciation showed that Young's account of the substance of the call and the person who received it was accurate. See Gov. Response at page 71.

Assuming arguendo that Young's account of the substance of the call and the person who received it was accurate, it is Petitioner's contention that, this is not a proof or fact, that this information was exclusive to Young alone prior to his contacting the FBI in January of 2005. The substance of the Bergrin 4:00 p.m. call and the person who received it (Curry), was a matter of public records that was out there for over a month before Young contacted the FBI. See Exhibit "E" Articles from Star Ledger.

Unbeknownst to Young was the call between Curry and Rakeem Baskerville and its substance, which the Government referred to in its disqualification motion. See Exhibit "F". That call and its substance was never the subject of public information. Young's lack of knowledge of the call and its substance is why he falsely named Rakeem Baskerville in his statements to Agent Brokos in January 2005, and in his testimony during Petitioner's trial in 2007. This want of knowledge can not be attributed to the Government, because they were well aware of the evidence in their possession.

Finally, the Petitioner asserts that the chart of the "phone records" that the Government contends was created by Agent Brokos after Petitioner's trial, of the phone activity on November 25th, that was produced to Bergrin as Jenks material in advance of **Bergrin I**. That Bergrin was the one who realized that Young had inaccurately identified Rakeem Baskerville... Although AUSAs wish they had on their own come to that realization in 2007, that Bergrin did years later. See Gov. Response at pages 71-72. The Government again is being disingenuous.

The trial AUSAs had personal knowledge that Young had falsely identified Rakeem Baskerville. They also had ample opportunities to correct it in the Petitioner's case before the Bergrin trial started. On June 4th, 2010, while the Petitioner was back before the District Court on a remand order from the Third Circuit Court of Appeals, the trial AUSAs along with AUSA Mark Coyne had filed an opposition motion to the Petitioner's Rule 33 motion. [DE at 282]. In the Government's Opposition to Petitioner's motion

they referred to Exhibit "F", the disqualification motion. They also attached it as an Appendix, along with the transcripts of the proceeding held on November 29, 2004. [DE #282]. The AUSAs mentioned the call between Curry and Rakeem Baskerville stating that, the letter brief then described Curry's subsequent call to Rakeem Baskerville identifying "K-Mo" as the cooperating witness. See Exhibit "F". This prove that the trial AUSAs had full knowledge of the substance of the call.

While Petitioner's case was remanded to the District Court, the Government had another chance to right a wrong in which they failed to do. Rather than correcting those falsities, they've opted to being disingenuous themselves by misrepresenting the facts from the evidence that they possess. "The prosecutor has a constitutional duty to correct evidence he knows is false, even if he did not intentionally submit it." **THOMPSON**, 120 F.3d at 1059, citing **GILES v. MARYLAND**, 386 U.S. 66 (1967).

Young's testimony was vital to the Government's case against the Petitioner in proving Counts One and Two of the conspiracy. Therefore, any credibility issues he would have suffered, such as providing false testimony would have been damning, possibly affecting the entire proceeding. Thus, any "evidence affecting the witness credibility is material to guilt or innocence, particular when that witness is vital to the prosecutions case against the accused." **UNITED STATES v. BIBERFELD**, 957 F.2d 98, 103 (3rd Cir. 1992), citing **UNITED STATES v. GIGLIO**, 405 U.S. 153 (1972).

The Third Circuit has held, "that if the prosecutor had access to information that would indicate that a material witness is committing perjury, and when the perjured testimony creates a fundamental defect in the entire trial, a hearing is required to determine what relief should follow." **BIBERFELD**, 957 F.2d at 102-103, citing **UNITED STATES v. COSTANZO**, 625 F.2d 465, 470 n.3 (3rd Cir. 1980). Thus, Petitioner ask this Court to grant him a new trial, or at a minimum a evidentiary hearing to prove up the his claims, and determine what relief should follow.

6. PETITIONER DOES NOT RELY ON BERGRINS CLAIMS IN COURT FILINGS AS EVIDENCE.

As it relates to this issue. It's the Government's contention that, Petitioner argues (Ex.A 20(E)(1-9) that various claims made by Bergrin in a court filing, which complained about inconsistencies in Young's testimony and arguments made by the Government, provide Petitioner with a basis for relief, further contending that Bergrin's claim, however, are not testimony or evidence. See Gov. Response (G) at page 55.

Here, Petitioner does not rely on Bergrin's claims in his supplemental filing as evidence. Petitioner simply cited portions of that motion in his Affidavit at ¶20(E)(1-9), as evidence that the suppressed evidence (tapes) do exist, and as to what they may possible contain. Petitioner adopts the factual entries that contain information from the Curry wiretap, that are the subject of the constitutional claims raised in the instant petition. The supplemental filing is proof the Government (1) provided the tapes to Bergrin via discovery, and (2) The Government was cognizant of the substance of the calls. Petitioner's situation

is distinct from Bergrin, regarding the Curry wiretaps. Unlike Bergrin, where the Government fulfilled its discovery obligation. Petitioner was never given the opportunity to review the wiretaps to determine if there was any evidence to assist him in cross examination of the star Government witness against him, thus, creating a **Brady** violation.

7. **THE GOVERNMENT FAILED TO DISCLOSE FAVORABLE EVIDENCE (FBI 302 FORM & AUDIO RECORDINGS), VIOLATING PETITIONER'S RIGHT TO DUE PROCESS UNDER BRADY. (GROUND TWO, CLAIM(B) & GROUND THREE (A))**

In **BRADY v. MARYLAND**, 373 U.S. 83 (1963), and its progeny, the Supreme Court held that a defendant's constitutional right to due process is violated when the prosecution suppresses evidence favorable to the defendant that is material to either guilt or punishment. **BRADY**, 373 U.S. at 87. "[T]o establish a **Brady** violation requiring relief, a defendant must show that (1) the government withheld evidence, either willfully or inadvertently; (2) the evidence was favorable, either because it was exculpatory or of impeachment value; and (3) the withheld evidence was material." **LAMBERT v. BLACKWELL**, 387 F.3d 210, 252 (3rd Cir. 2004). The

> touchstone of materiality is a "reasonableprobability" of a different result .... The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence. A "reasonable probability" of a different result is accordingly shown when the government's evidentiary suppression "undermines confidence in the outcome of the trial."

KYLES V. WHITLEY, 514 U.S. 419, 434 (1995) (quoting **UNITED STATES v. BAGLEY**, 473 U.S. 667, 682 (1985)).

a. THE GOVERNMENT FAILED TO PROVIDE THE "AUDIO RECORDINGS" AS STATED IN PETITIONER'S AFFIDAVIT AT ¶20(E)(1-9).

Petitioner asserted in his §2255 motion and affidavit that the Government withheld favorable "audio recordings" related to **UNITED STATES v. HAKIM CURRY**, 04-cr-280 (FSH). Specifically, asserting that the "audio recordings" and there substance, which is mentioned and outlined in Petitioner's Affidavit ¶20(E)(1-9), was turned over to Paul Bergrin, however, was withheld from Petitioner, and thus, is the subject of this **Brady** claim. See (Ground Three, Initial Claim, Exhibit "A" ¶20(E)(1-9).

In its Response the Government contend that Petitioner received the "audio recordings," which is the subject of his **Brady** claim. Specifically, relying on Trial Counsel's contentions that they received the recordings. See Gov. Response §VI(C) at pages 47-48. However, the Government and/or Trial Counsel's are attempting to mislead the Court, by making a complete mispresentation of the facts stated in the Petitioner's Affidavit.

Here, Petitioner asserts that only three calls and transcripts of the Curry wiretap recordings were turned over to the defense, See Petitioner's Affidavit ¶8 (A)-(C), which is supported by the trial record through the admissions from both AUSAs Minish and Frazer to this Court, regarding how many calls and transcripts were turned over in discovery to the defense, and the parties who were on the calls:

> Mr. Minish stated: "One other issue as long as we're on the lines. I know Mr. Frazer and Mr. Herman have discussed whether or not a series of transcripts or phone calls based on other phone calls between Mr. Bergrin and Hakim Curry, and Hakim Curry and Rakeem Baskerville will be used. There's a discussion back and forth and at--- at this point I don't know whether or not we would stipulate or if its something the Court need to be involved in."
>
> (**Baskerville** Tr. 4777-84).

****

Mr. Frazer stated: "The actual tapes coming in, three transcripts and three tape recordings of Paul Bergrin on the wiretap that was done during the Curry investigation."

(**Baskerville** Tr. 4778)

The "audio recordings" depicted in ¶8(A)-(E) of Petitioner's Affidavit, between Bergrin and Hakim Curry (2 calls), and Hakim Curry and Rakeem Baskerville (1 call) which was intercepted on **November 25th, 2003,** are not the subject of Petitioner's **Brady** claim, but the calls that were intercepted between Hakim Curry and Jarvis Webb on **November 26, 2003 (cited as call 995, 926, 5:38 p.m.) & the December 4, 2003, call at approximately 5:30 p.m. (cited as recording number 135, 475)** which was depicted in ¶20(E)(4-8) of Petitioner's Affidavit, is the subject of Petitioner's **Brady** claim.

Besides mischaracterizing the facts as depicted in Petitioner's Affidavit at ¶8(A)-(E) & ¶20(E)(6-9), concerning the "audio recording" related to the Curry wiretap, the Government falsely contends that it turned over the "audio recordings" subject to Petitioner's **Brady** claim. However, the Government has failed to produce any documentary evidence, such as discovery inventory, to substantiate its contentions that Petitioner's received the "audio recordings" that is the subject of his **Brady** claim.

More importantly, the Government's contention that "even if Petitioner **did not** receive the recordings and his argument is analyzed under **BRADY v. MARYLAND**, 373 U.S. 83 (1963), his claim still fails"..."Trial Counsel made it clear that using

the recordings would have been detrimental to Baskerville's defense, which shows that the allegedly suppress recordings were not material" See Gov. Response at pages 48-49, is a **oxymoron.**

First, Trial Counsels could not have reviewed and discussed the recordings with Petitioner, and completed their analysis, that the recordings would have damaged Petitioner's defense, if the audio recordings were suppressed. Given the fact that Trial Counsels never even reviewed and/or discussed the suppressed audio recordings with Petitioner, to determine whether the recordings would help or hurt Petitioner's defense. Renders any argument by the Government that Trial Counsels' tactical decisions that the suppressed audio recordings were detrimental to Petitioner's defense, thus, is not material to Petitioner's **Brady** claim, is without merit.

Second, the Government's recurring theme of motive for McCray's murder during Petitioner's trial was that: "The defendant made the cold and calculated decision early on, on November 25th, 2003. His motive, again, was a lifetime behind bars and it was in his mind only one way out, no Kemo, no case." (**Baskerville** Tr. 5667). However, Trial Counsels' defense theory was that: "[T]he Government's theory of eliminating a witness really makes not much sense. They got recordings, they got surveillance, they got videos, the got lots of evidence about the drug transactions. This is a retaliation murder. Curry's making a point on the street for those who might consider informing on him or his group. Now, Baskerville might, might have been, might be a beneficiary in some respect, but although that's not all clear because we're

here having this trial, but this murder was not done by or for him." (**Baskerville** Tr. 5873-5875).

Had the Government not suppressed the "audio recordings" Petitioner's Trial Counsels could have used the recordings to bolster there defense theory, that Petitioner stood nothing to gain from McCray's murder. Because the recordings would have revealed that Petitioner and others were made aware by Bergrin that: (1) Petitioner could get a plea deal for approximately 13 years, and thus, do about 10 years, and (2) the drug charges was overwhelming totally independent of any testimony by McCray. See Petitioner's Affidavit ¶20(E)(6-7).

Thereby, contradicting the Government's theory of motive for Petitioner to murder McCray, and provide the defense with material to impeach Young's testimony that everyone thought Petitioner was facing life. Here, Petitioner asserts that the suppressed "audio recordings" is material, because **Brady** materiality encompasses the value of the evidence to Petitioner's defense investigation and preparation. See **BAGLEY**, 473 U.S. at 683 (a court must consider "any adverse effect that the prosecutor's failure...[to disclose the evidence] might have had on the preparation or presentation of the defendant's case.").

The Government's suppression of the "audio recordings" subject to Petitioner's **Brady** claim, and its presentation of Young's factually inaccurate testimony, violated Petitioner's due process rights. No fair-minded jurist could evaluate this evidence and find it to be anything less than powerful corroboration of Petitioner's defense. Even if it could be said

that there is still enough evidence to convict, if the favorable evidence had been disclosed. Evidence does not have to upset every aspect of the prosecution's case to be material under **Brady**; rather, the question is whether the defendant received a fair trial in the absence of the undisclosed evidence. See **KYLES**, 514 U.S. at 435 n.8. Petitioner is therefore entitled to a new trial.

b. THE GOVERNMENT DID SUPPRESS THE INFORMANT'S STATEMENTS, VIOLATING PETITIONER'S RIGHTS TO DUE PROCESS, UNDER BRADY.

Petitioner asserted in his Affidavit at ¶20(B)(3) and ¶20(C) of his §2255 motion that he was never provided with the FBI 302 report that a jailhouse informant (Roderick Boyd) told Agent Brokos that a Malik Lattimore told the informant he was responsible for McCray's murder. Although, the Government does not concede that Petitioner was not provided with a copy of the FBI 302 report, they do not argue that Petitioner did receive it. See Gov. Response §VI(D) at pages 49-50.

The Government contends that Petitioner's claim would not succeed under **Brady**, because the information would not have altered Petitioner's defense and could not have reasonably affected the outcome of the trial. Id. at 49. Specifically, contending that:

> "As Mr. Herman emphatically stated, the report that Baskerville claims to have never received could not reasonably have produced a different verdict in this case. Claiming another person was responsible for shooting McCray, besides being counterfactual, was directly contrary to Trial Counsel's strategy to portray Young as a cold-blooded killer who had avoided a death sentence (and who hoped to a life sentence) by cooperating with the Government, and who had no direct contact with Baskerville " Id. at 50.

What the Government has averred in its Response, is belied by the trial record. Trial Counsel cross-examined Detective Sabur (**Baskerville** Tr. 3369-73, 3374-75), and Agent Brokos (**Baskerville** Tr. 4005-11), as to the eyewitness' description of McCray's shooter. These witnesses were asked about the shooter's hair style, complextion, and the person the eyewitness identified from the photo array. Trial Counsel even asked Agent Brokos whether Young had dreadlocks, to which the answer was "no" (Id. at 4011).

That line of questioning raised concerns for the Government because AUSA Frazer referred to it in summation that: "There's been some talk about Anthony Young was not the shooter. There seemed to be early on in cross-examination some implication that this guy William Lattimore was the shooter because of the mystery dreadlock man, remember that?" (**Baskerville** Tr.5736)...."We know that Anthony Young is being truthful when he tells you that he, himself, shot Kemo Deshawn McCray." (Id. Tr. 5738 lines 13-14).

Moreover, Trial Counsel referred to the eyewitness's description of the shooter in summation. Even telling the jury that Young's description didn't fit the eyewitness' account, and they shouldn't ignore those facts. (**Baskerville** Tr. 5857-60). Here, Petitioner asserts that Trial Counsel's declaration creates a legal conundrum, because at trial Trial Counsel argued that Young did not fit the description of the shooter, suggesting that someone other than Young could have murdered McCray and that Young was not being truthful, which is contrary to his declaration that his strategy was to portray Young as a cold-

blooded killer HDFN6.

The FBI 302 report points to someone other than Young admitting to being McCray's murderer. Had Petitioner been provided with the suppressed FBI 302 report, it could have undoubtedly led to investigation that could have proved vital to the defense, and could have undermined aspects of the Government's case, also point out the corroborating indicia of reliability in it, such as the person named by Boyd (Lattimore), who eyewitness exactly identified from the photo array as the person he believed shot McCray. (**Baskerville** Tr. 3369-73; 4006; 4477-49).

Further, the FBI 302 report could have severely undermined the testimony of both Agent Brokos and Young. See **UNITED STATES v. TRIUMPH CAPITAL GROUP INC.**, 544 F.3d 149, 156 (2nd Cir. 2008). The report could have been used to point out those inconsistencies in Agent Brokos testimony, such as that, she had no leads on McCray's shooter prior to January 2005, (Id. Tr. 3887), and her reasons for giving Lattimore's name to Detective Sabur in which she stated:

> "I gave him the name for two reasons. His physical description fit that of one we had received from one of the witnesses and I had known William Lattimore to be a hit man for the Curry organization." (Id. Tr. 3387-88).

In the very next question the Agent Brokos was asked about there being any other information which she answered "no, there was no other information." Id. Agent Brokos' testimony was a complete misrepresentation of the facts. That is because a month before Newark PD administered the photo array, Agent Brokos had met with the informant (Boyd) and received the information concerning Lattimore.

Moreover, while Agent Brokos was crossexamined at trial, her credibility was never impeached, therefore, the importance of the FBI 302 report- in that it would have provided the defense's sole source of credibility impeachment against Agent Brokos. Because Agent Brokos' credibility was never impeached at trial, it is even more unreasonable to declare that her inconsistent statement would have made no difference. See **CONLEY v. UNITED STATES**, 415 F.3d 183, 191 (1st Cir. 2005) (explaining the jury is entitled to know of impeachment evidence when such evidence could impugn the credibility of a key witnesses).

The report also could have been used to undercut Young's testimony because it points to an alternative theory of the facts surrounding the case, the most important being the actual shooter. Young versus Lattimore, who the information in the report and the other evidence refers to. A key factor that could have been presented to the jury for their consideration. See **UNITED STATES v. GIGLIO**, 405 U.S. 105, 154-55 (1972).

The FBI 302 report was material to Petitioner guilt because it was impeaching, and it was suppressed by the Government rendering the verdict in Petitioner's case one unworthy of confidence. "The suppression by the government of evidence favorable to an accused... violates due process where the evidence is material either to guilt or punishment; irrespective of good faith or bad faith of the prosecutor." **BAGLEY**, 473 U.S. at 678 (1985).

"Thus, the law makes it easier for [habeas petitioners] to obtain a new trial where the Government has engineered an

unfair trial by withholding material exculpatory [or impeachment] evidence." **UNITED STATES v. JOSLEYN**, 206 F.3d 144, 153 (1st Cir. 2000). Thereby, for the aforementioned reasons the Petitioner's conviction should be vacated and he should be granted a new trial.

c. THE CUMULATIVE PREJUDICIAL EFFECT OF PETITIONER'S BRADY CLAIMS PROVIDES A SEPARATE BASIS FOR GRANT HABEAS RELIEF.

For the reasons explained above, both the suppressed "audio recordings" and "FBI 302 report" are material for the purposes of **Brady**. Each claim is sufficient, on its own, to warrant habeas relief. However, even if the claims were insufficient on their own to show materiality under **Brady**- if the withholding of the "audio recordings" and "FBI 302 report" did not, in fact, deny Petitioner a fair trial-together, their non disclosure meets the **Brady** materiality standard. Cumulatively, the prejudicial effect of their suppression by the Government cannot be denied. This cumulative prejduice therefore provides a separate basis for granting habeas relief.

Further, the cumulative impeachment value of the undisclosed evidence cannot be understated. This evidence would have impeached Young and Agent Brokos, the Government most important witnesses. Together, this evidence would have dramatically undercut many of the Government's witnesses and the case against Petitioner. In short, the suppressed evidence would have proved immensely cogent to the defense in pointing to an entirely new and otherwise unknown investigatory path, in strongly supporting Petitioner's defense.

The withholding of this evidence denied Petitioner a fair trial. As a result, even if the evidence on their own are

insufficient to show materiality under **Brady**, the cumulative effect of their non-disclosure requires heabeas relief. See **KYLES**, 514 U.S. at 436 (Kyles explained, the materiality of withheld evidence must be "considered collectively, not item by item.")

7. AN EVIDENTIARY HEARING IS NECESSARY AND WOULD BE USEFUL TO THIS COURT.

Title 28 United States Code, Section 2255 provides that a prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released or for reduction of sentence may move the court which imposed the sentence to vacate, set aside or correct the sentence. This section also provides as follows:

> "Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to the relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto."

28 U.S.C. §2255.

In the instant case as set forth in Petitioner's §2255 motion and Affidavit, and the foregoing arguments, Petitioner has pleaded, presented evidence, and argued the applicable law to demonstrate that his convictions and/or sentences is in violation of his Fifth Amendment right to Due Process, and his Sixth Amendment right to effective assistance of counsel. Petitioner has also submitted the following proffer to support the foregoing allegations: Pursuant to Rule 6 of the Rules Governing Section 2255 Proceedings, Petitioner ask leave of this Court to invoke the process of discovery. More specifically, Petitioner ask this Honorable Court to GRANT his Motion for Discovery. The evidence

developed through his discovery request, will materially support the allegations of Petitioner, as to the "performance" of counsel, and **Brady** violations, detailed and set forth herein. Petitioner proffers to this Honorable Court that the foregoing discovery request and/or evidentiary hearing will substantiate his allegations set forth in his Affdavit and §2255 motion, and the foregoing arguments herein.

While many of the allegations are already well established by the files and records of this case, many of the material allegations concerns events which took place outside the courtroom and are not, therefore, part of the "files and records." These allegations require an evidentiary hearing under well settled law. See **UNITED STATES v. BLAYLOCK**, 20 F.3d 1458, 1465 (9th Cir. 1994) (evidentiary hearing required unless section 2255 motion, files, and trial record "conclusively show" petitioner entitled to no relief); **VIRGIN ISLANDS v. WEATHERWAX**, 20 F.3d 572, 573 (3rd Cir. 1994) (petitioner entitled to evidentiary hearing on ineffective assistance of counsel claim where facts viewed in light most favorable to petitioner would entitled him to relief); **CIAK v. UNITED STATES**, 59 F.3d 296, 306-07 (2nd Cir. 1995) (holding that district court erred in denying request for evidentiary hearing when petitioner "alleged facts, which, if found to be true, would have entitled him to habeas relief."); **NICHOLS v. UNTIED STATES**, 75 F.3d 1137, 1145-46 (7th Cir. 1996) (petitioner entitled to evidentiary hearing on claim of ineffective assistance of counsel when record inconclusive on issue); **UNITED STATES v. WITHERSPOON**, 231 F.3d 923; 2000 U.S.

App. LEXIS 27778 (4th Cir. 11-6-00) (petitioner entitled to evidentiary hearing when motion presented colorable claim and unclear whether counter affidavit disputed defendant's allegations); **UNTIED STATES v. GRIST**, 1998 U.S. App. LEXIS 20199; 1998 Colo J.C.A.R. 4384 (10th Cir. 1998) (evidentiary hearing required unless Section 2255 motion, files, and trial record conclusively show petitioner entitled to no relief, court cannot choose between affidavits); **GUY v. COCKRELL**, 343 F.3d 348; 2003 U.S. App. LEXIS 16632 (5th Cir. 2003) (disputed issues of material fact require evidentiary hearing).

Based on all of the foregoing, Petitioner respectfully requests this Honorable court to **ORDER** an evidentiary hearing where Petitioner can prove his case.

CONCLUSION

Petitioner has demonstrated by the foregoing argument, the factual allegations of his motion, and the attached verified exhibits, that his convictions and/or sentences is violative of his Fifth Amendment right to Due Process, and Sixth Amendment right to effective assistance of counsel.

While many of the allegations are already supported by the record, some need to be developed at an evidentiary hearing.

WHEREFORE MOVANT William Baskerville respectfully asks this **HONORABLE COURT** to:

ORDER an evidentiary hearing as set forth in his motion and, upon proof of his allegations in his Affidavit, §225 motion, and herein.

ORDER that Petitioner's convictions and sentences be vacated and granted a new trial.

Respectfully Submitted,

4/30/2015
DATE

WILLIAM BASKERVILL PRO-SE
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DECLARATION OF DEPOSIT

I hereby verify and affirm under the penalty of perjury, pursuant to Title 28 U.S.C. §1746, that Petitioner's Reply To The Government's Response In Opposition To Petitioner's §2255 Motion, which pursuant to **HOUSTON v. LACK**, 487 U.S. 266 (1988), is deemed to be filed at the time it was delivered to prison authority for forwarding to the court. I placed the above referenced material in a sealed envelope with First Class Postage affixed, addressed to:

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY
OFFICE OF THE CLERK
402 EAST STATE STREET
TRENTON, NEW JERSEY 08608

OFFICE OF THE U.S. ATTORNEY
ATTN: AUSA MINISH / AUSA FRAZER
970 BROAD STREET, SUITE 700
NEWARK, NEW JERSEY 07102

and deposited the envelope in the proper prison authority's hand to be delivered for collection and mailed via the U.S. Postal Service on this 30 day of April, 2015.

Respectfully Submitted,

WILLIAM BASKERVILLE

EXHIBIT "A"

APPELLATE BRIEF FN.7 ASSERTING TRIAL COUNSEL'S INEFFECTIVENESS

C

In the

United States Court of Appeals

FOR THE THIRD CIRCUIT

Docket No. 07-2927

UNITED STATES OF AMERICA,

-against-

WILLIAM BASKERVILLE,

Appellant.

On Appeal From
The United States District Court for the District of New Jersey
Sat Below: Joel A. Pisano, U.S.D.J.

APPELLANT WILLIAM BASKERVILLE'S
BRIEF ON APPEAL
&
APPENDIX
(Volume I, pp. A1-A103)

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UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

UNITED STATES OF AMERICA	:	Crim. No. 03-836 (JAP)
	:	
v.	:	June 4, 2010
	:	
WILLIAM BASKERVILLE, a/k/a "Cheeb"	:	

BRIEF OF THE UNITED STATES OPPOSING DEFENDANT'S RULE 33 MOTION

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On the Brief:

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Anthony Young admitted that he had did not communicate with William Baskerville at all, Tr. 4375, and that it was Rakeem Baskerville who told him to kill McCray, Tr. 4601. Nevertheless, he was permitted to testify that Jamal McNeil visited Baskerville in jail, and that Baskerville told McNeil "to tell us that we got to hurry up and get rid of the CI, which is Kemo, and he needed to be dead quick or he was going to spend the rest of his life in prison." Tr. 4376. Jamal McNeil was never charged with a crime in connection with McCray's murder, and the government did not call him to testify at trial; there was no other evidence presented that McNeil ever visited Baskerville in jail.

Young's testimony regarding McNeil's out-of-court statements purporting to report the defendant's own words is the only evidence that Baskerville shared the specific intent to murder McCray to prevent him from testifying. Defense counsel did not object to this testimony.[7] Nevertheless, its admission was plainly wrong.

[7] Defense counsel persuaded the jury to split at the penalty stage, effectively saving the defendant a death sentence. Yet, the trial transcript is practically devoid of any significant objections, even to critical evidence such as Young's hearsay testimony. For example, after their request for a pretrial hearing on F.R.E. 804(b)(6) was denied, defense counsel did not object when SA Manson testified to statements made by McCray, a passivity twice-noted by Judge Pisano when he later ruled on the F.R.E. 804(b)(6) issue. A78, A80. A claim challenging counsel's performance properly is considered by way of an application under 28 U.S.C. § 2255. See United States v. Olfano, 503 F.3d 240, 246 (3d Cir. 2007); United States v. Thornton, 327 F.3d 268, 271 (3d Cir. 2003); United States v. Gaydos, 108 F.3d 505, 512 n.5 (3d Cir. 1997) (stating preference that ineffective assistance of counsel claims be raised in collateral proceeding). Nevertheless, the almost complete absence of objections during trial, such that important issues were not adequately preserved for appellate review, is quite disturbing. See Moore, 375 F.3d at 263 ("Inadmissible evidence and highly inflammatory statements came rolling in unimpeded at Moore's trial,

Young's testimony regarding McNeil's out-of-court statement was admissible only if there was independent corroborating evidence, beyond the hearsay testimony itself, establishing by a preponderance of the evidence that Baskerville and McNeil were participants in the conspiracy to kill McCray to prevent him from testifying at trial. Ammar, 714 F.3d at 245 (holding that "as a prerequisite for the submission of coconspirator statements to the jury, the court must determine that the government has 'established the existence of the alleged conspiracy and the connection of each defendant with it by a clear preponderance of the evidence independent of the hearsay declarations.'") (quoting Continental Group, 603 F.2d at 457); United States v. Al-Moayad, 545 F.3d 139, 173-75 (2d Cir. 2008) (holding that the trial court "did not satisfy the requirements of Rule 801(d)(2)(E)" because it "made no findings, by a preponderance of the evidence or otherwise, about the existence of a conspiracy including [the defendant] ..., nor do we think the court could have done so based on the record before us."). No such independent corroborating evidence exists.

Two witnesses who were in jail with Baskerville -- Troy Bell and Eric Dock -- testified that Baskerville told them that his "dudes are looking for him to put a bullet in his melon." Tr. 5060

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without any hesitation by the prosecutor, complaint by defense counsel, or correction by the District Court. Indeed, at only one point when irrelevant but enormously prejudicial evidence and wholly inappropriate statements came before the jury did defense counsel object, and that objection was not at all specific. His failure to object, of course, did not relieve the prosecutor of his duty to comply with the Federal Rules of Evidence and, even more importantly, rules of fundamental fairness. There was a serious break down here.").

EXHIBIT "B"

PETITIONER'S LETTER TO JUDGE DATED 4/26/07

4/26/07

Dear Honorable Judge Joel A. Pisano,

This Brief letter is in the Matter of United States of America vs William Baskerville. I am writing you this letter Sir because their's A few issues that I've been Having A problem with for some time and I Believe they should be made Aware of or brought to the court Attention. First of All Sir I Realize that the Attorneys summations Isn't Evidence In the Case At chief And must not be taken As such, which your Honor has made very clear. But After Istening to the first part of A.U.S.A. Frazer's summation on April 25, 2007 specifically Regarding the testimony of S. Agent Manson's visual Accounts and Her stating that she seen me on certain occasions isn't Completely true. your Honor, I Am completely Aware that I Have the Right to put own A defence In my case such As present witnesses And Even taking the stAnd In my own defence which I Invoked the Right not to do so. your Honor, with the understanding that the Attorneys summations Isn't Evidence I Also understand that the testimony of S. Agent Manson Is considered to be such. As the court Is Aware that S. Agent Manson Testified that on one day or Incident particularly on March 21, 2003 which she stated that I Road Right Past Her And she seen me or she looked me Right In my Face wasn't the teuth. In 2005 the Defence was provided with some discovery by A. U.S.A. Minish of the video surveillance tapes In V.H.S Form. The video of the March 21, 2003 which Is now In Evidence As Exhibits 51 And 51A was given to Me by Mr Herman Along with All the surveillance tapes to Review, which the video of the March 21, 2003 surveillance Had S. Agent Manson talking to Her surveillance team And she was stating that when my car pulled up Into the view of the video she wasn't sure of this being our guy, she gave the wrong make And color of the car, And wasn't sure if Even A transaction took place. I mentioned this to Mr. Herman And Mr. Kayser About this Information Being on this video long before trial. I Furnished Mr. Herman my copy of the V.H.S. video That I Had * that I knew Had this Information on it to use In His Cross examination of S. Agent Manson. I Asked Him to Review the video to be for certain of this Information being on there which He did not get A chance to Review the video or I guess He figured He didn't need it. your Honor, Maybe My Attorneys thought It wasn't useful or Believed that It Couldn't be use towards challenging S. Agent Manson's credibility? My Reasons For strongly Insisting that they use the video wasn't solely for that purpose

but for the weigh or barren of her testimony regarding the events on that particular day and date and maybe even others, but we won't know that now because the time for playing of that video has come and past. I understand that everyone has been mainly focused on counts one(1) and counts two(2) of the Indictment the capital offences but for me I was focused on all of the offences that I have been changed with. There are among other things such as the governments exhibits ten(10) thru sixteen(16) which are lab reports that are not in evidence that show the chain of custody of where these alleged drugs came from. Plus there are other reports that weren't brought as evidence nor was they brought to the court's attention which I believe should have been brought to the court's attention all of this evidence which gos to the thoroughness of the investigation conducted by the F.B.I.. There was some brief testimony brought out by Mr. Herman touching on certain issues regarding other people and their affiliation with me such as Richard Hosten and Tyrone Cox but the facts that these two individuals situation not having anything to do with me all of there evidences was being filed under the F.B.I. case or filing number attributed to my case information. These individuals never had their own case filing number but they were targets as well by the F.B.I.. Again these individuals alleged contraband was attributed to my case filing number and even some of the alleged contraband that the government attributed to me was actually filed under some other parties case filing number on more than one occasion by the F.B.I.. Your Honor, Mr. Herman and Mr. Kayser have been working very hard on this case. So have your Honor and his staff, which I truly appreciate. These are just a few of the issues and concerns that I was having during the preparations before and during the trial ing of this case that I believe this court should be made aware of. I am sorry that I haven't address these issues and concerns of mine earlier but as you are aware your Honor I'm not a defence Attorney and I don't know if any legal standings my concerns may have. I'm fighting for my life here and I don't want your Honor to be in the dark about my feelings and all of the issues and others I did and didn't address in this letter. Thank you and the court for taking up it's time to hear me out.

Sincerely your,
William Baskerville

William Baskerville

EXHIBIT "C"

PAGE 10 OF GOV. BRIEF IN OPP. TO PETITIONER'S RULE 33 MOTION

Where — as here — "the factual basis for a" *Brady* "claim is reasonably available to the" defendant "or his counsel from another source, the government is under no duty to supply that information to the defense." *Matthews v. Ishee*, 486 F.3d 883, 891 (6th Cir. 2007) (internal quotation marks omitted). In addition to what the Government provided about Bergrin and similar information in the media, Baskerville had even better sources: his own dealings with Bergrin and those of other unindicted coconspirators in the McCray murder, including Baskerville's brother, Rakeem, and cousin, Curry. Baskerville "knew the unindicted co-conspirators and dealt with them regularly," and his trial "counsel could have interviewed them and called them as witnesses." *U.S. v. Jones*, 712 F.2d 115, 122 (5th Cir. 1983) (finding no *Brady* violation "[w]here defendants have ready access to evidence that may be exculpatory"). Surely Curry, Rakeem Baskerville and Bergrin himself could have shed light on whether Bergrin had tampered with or murdered other witnesses and, more importantly, whether Baskerville himself was merely the unwitting beneficiary of the McCray murder. "In similar circumstances," courts "have refused to find *Brady* violations because a defendant is deemed to have access to personal acquaintances and associates." *U.S. v. Sipe*, 388 F.3d 471, 487 (5th Cir. 2004).

Finally, the Government "has no *Brady* obligation to communicate preliminary, challenged, or speculative information." *U.S. v. Amiel*, 95 F.3d 135 (2d Cir. 1996) (internal quotation marks omitted); *accord U.S. v. Agurs*, 427 U.S. 97, 109 n.16 (1976); *see U.S. v. Bagley*, 473 U.S. 667, 675 (1985) ("the prosecutor is not required to deliver his entire file to defense counsel, but only

EXHIBIT "D"

AFFIDAVIT OF WITNESSES STATING WHAT THEY WOULD TESTIFIED TO HAD BEEN CALL TO TESTIFY BY TRIAL COUNSEL

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW JERSEY

UNITED STATES OF AMERICA

v.

WILLIAM BASKERVILLE

CERTIFICATION

I, Paul W. Bergrin, do hereby affirm, under the penalties of perjury, that the following facts are true:

1) During the period of 2003 through approximately May 2009, I was an attorney at law, licensed to practice law in the State of New Jersey. My office was located at 572 Market Street, Newark, New Jersey and later moved to 50 Park Place, Newark, New Jersey.

2) In or about November 25, 2003, I was retained by William Baskerville to represent him in the case entitled, UNITED STATES OF AMERICA v. WILLIAM BASKERVILLE.

3) During the course of my representation of Mr. Baskerville, I had the opportunity to review all documentary and recorded evidence provided by the government pursuant to Rule 16, Federal Rules of Criminal Procedure. My representation of Mr. Baskerville extended until on or about 2005.

4) During 2005, the government made a motion to remove me as the counsel for Mr. Baskerville alleging a conflict of interest. A hearing pertaining to this issue was held before the Honorable District Court and I withdrew as Mr. Baskerville's counsel.

a) Attorney's Carl Herman and Kenneth Kayser were appointed pursuant to the Criminal Justice Act, to represent Mr. William Baskerville.

5) During the course of attorney's Herman and Kayser's representation of Mr. Baskerville, they interviewed me and I agreed to truthfully testify on Mr. Baskerville's behalf at trial, if subpoenaed.

6) I was completely candid, frank and absolutely truthful during all my interviews with counsel and would have truthfully sworn to the following:

a) During the course of my representation of Mr. Baskerville, he never expressed any intent to kill or cause bodily harm to Deshawn "Kemo" McCray, hereinafter "Kemo". Nor was this fact ever discussed or mentioned.

b) That I represented Mr. Baskerville on a prior occasion for a narcotic offense, in Essex County Superior Court, Newark, New Jersey and that there was a confidential witness used by the State, and that Mr. Baskerville plead guilty to the charge, was sentenced to State

imprisonment and never even mentioned nor inferred doing any harm nor bodily harm to any witness.

c) That Mr. Baskerville and I reviewed the Federal Criminal Complaint, listened to all recorded conservations and He knew that the informant used by the federal government was Kemo. It was clear to an absolute certainty based upon the deminimis sales of crack cocaine within the Complaint and the recorded conversations, which were provided as discovery by the government. Mr. Baskerville never hinted, suggested, inferred nor gave any indication whatsoever of causing any harm or bodily injury to Kemo, even after meticulously reviewing all discovery and ascertaining to an absolute certainty Kemo's identity. This fact was never discussed nor mentioned by neither myself nor Mr. Baskerville.

d) It was explained to Mr. Baskerville and he fully understood, that the evidence for prosecution against him was overwhelming. That there were six hand-to-hand sales of crack cocaine and that all the meetings to set up the crack cocaine sales were recorded by government agents. We knew there were video surveillances of several meetings between Kemo and Mr. Baskerville at the scene of the narcotic sales. That all sales were surveilled by law enforcement agents, that there was recorded buy money provided to Kemo by federal agents and that Kemo was thoroughly searched before his meeting with Mr. Baskerville and was watched as he left the presence of federal agents and met Mr. Baskerville. That Kemo

returned to agents after continuous surveillance and handed over to federal agents, crack cocaine, that he could have only been received from Mr. Baskerville on 6 occasions, Additionally, Mr. Baskerville had a prior record for drug distribution and we concluded, that if this case were to be tried, he could not take the witness stand to testify on his own behalf. Consequently, Mr. Baskerville fully understood that Kemo was not an instrumental nor a material witness and that the government could easily prove their case without Kemo as a witness. Mr. Baskerville was also advised that if I was the prosecutor, I would decline calling Kemo as a witness, as he was not needed and would weaken the government's proofs. Consequently, Mr. Baskerville knew and fully understood that his sole recourse was to negotiate a plea for guilty and not contest the charges.

e) Mr. Baskerville was never advised that he would receive life in prison nor did we ever believe he would even receive such a sentence, for six hand-to-hand sales of small quantities of drugs. I explained to him the Statutory maximum and minimums, and based on my experiences and past drug cases, we never believed nor anticipated a life sentence, nor any sentence even close to the Guideline calculations; especially with a plea bargain.

f) From early on in the case, Mr. Baskerville was inclined to plead guilty to his charges and I strongly advised him to do so. It was our intent to proceed via a plea of guilty and we were working on mitigation of his sentence.

g) Mr. Baskerville was willing to accept responsibility for his criminal conduct and if I testified, I would have vehemently, vociferously and categorically denied, ever attending, setting up, being present at any meeting with anyone and ever uttering the words, "No Kemo, No Case." That this statement was never made by me and is completely false and fabricated.

h) I told Mr. Baskerville's attorney's and Mr. Baskerville that I implore the government to polygraph me as I would voluntarily submit to one of the government's choice. There was never a meeting on Avon Avenue, Newark, New Jersey, nor at any other location between Me, Rakeem Baskerville, Hakeem Curry, Jamal McNeil, Jamal Baskerville and Anthony Young, wherein I ever informed any of these individual's that if Kemo was killed or even unavailable as a witness, that I would win William Baskerville's case and he would go free; that if Kemo testifies that William Baskerville would be convicted and get life in prison. This was never stated by me to any person, never even entered my thought process and no meeting ever held wherein I ever stated this. Anthony Young completely fabricated this evidence. I would never make such a false statement and committment knowing I would be held to my word.

5) William Baskerville never queried me nor was it ever discussed as to what would happen to him and the status of his case, if Kemo was not a witness. Mr. Baskerville

understood the law well enough to know that the government had evidence, independent of Kemo, to easily prove the case against him and that Kemo was not needed as a witness, by the government to prove its case.

6) I make this Certification knowingly, voluntarily and of my own free will. No threats, force, inducements, nor promises have been made nor offered to me. The contents of this Certification are true and I am willing to take a stipulated government polygraph, by any government agency or expert to prove to accuracy of these statements.

Paul W. Bergrin

Dated: January 30, 2014

CASE MANAGER
AUTHORIZED BY THE ACT OF JULY 7, 1955.
AS AMENDED, TO ADMINISTER OATHS.
18 U.S.C. 4004

DECLARATION OF HAKEEM CURRY

I, Hakeem Curry, declare the following under penalty of perjury pursuant to 28 U.S.C. § 1746:

1. I am submitting this declaration in connection with United States v. William Baskerville, District of New Jersey, Criminal No. 03-836.

2. The charges in that case against William Baskerville relate to the murder of a government informant/witness named Deshawn McCray.

3. I have been informed that Anthony Young gave testimony in that case implicating me in a conspiracy to kill Deshawn McCray because of his status as an informant and/or witness against Mr. Baskerville. I told my family to let Mr. Baskerville know I was prepared, willing, and available to testify, if necessary, at his trial. My family assured me that Mr. Baskerville would tell his trial attorney this information.

4. Had Mr. Baskerville's attorney called me as a defense witness I would have testified under oath that I had no role in any sort of conspiracy to kill Deshawn McCray because of his status as an informant/witness against Mr. Baskerville.

5. I would have further testified that Mr. Baskerville never communicated any desire to me that he wanted any harm to befall Deshawn McCray.

6. I also would have testified that I never suggested in any way that anyone should harm Deshawn McCray, nor would I have condoned or entertained anyone else's desire to harm Deshawn McCray because of his status as an informant/witness

against Mr. Baskerville.

Executed this 9 day of 27 2014, under penalty of perjury.

By: Hakeem Curry

Hakeem Curry

U.S.P. Lee County

P.O. Box 305

Jonesville, VA 24263

"AUTHORIZED BY THE ACT OF JULY 27, 1955,
TO ADMINISTER OATHS (18 USC 4004)."

S. Ostee-

Correctional Treatment Specialist

9-27-14

Date

Declration of Diedra Baskerville/Williams

I, Diedra Baskerville/Williams, declare the following under penalty of perjury pursuant to 28 U.S.C. § 1746:

1) I am submitting this declration in connection with United States V. WILLIAM BASKERVILLE, District of New Jersey criminalNO.03-836.

2)The charges in that case against WILLIAM BASKERVILLE related to the murder of a government informant/witness named Kemo Deshawn McCray.

3)I have been informed that Anthony Young gave testimony in that case alleging that I was present at the meeting on the morning of November 25,2003 the date of my ex-husband's **(William Baskerville)** Arrest at the residence of Jamal Baskerville.

4)While at the residence of Jamal Baskerville, I entered the van of Rakeem Baskerville accompanied by him**(Rakeem)** and Anthony Young where I was questioned by them concerning the arrest of my former husband William Baskerville.

5)Had William Baskerville's attorneys called me as a defense witness I would have testified under oath taht I did not attend any meeting on November 25,2003 at the residence of Jamal Baskerville.

6)I would have futher testified that I had no transportation that day because the F.B.I. had taken my vehicle during the arrest of my former husband William Baskerville.

7)I also would have testified that I never met Anthony Young in my life and the first time I ever saw him was in court when he testified in my former husband's trial in 2007.

Executed this 29 **Day of** Oct. **, 2013 under penalty of perjury.**

By: Diedra Baskerville

Address: 30 MAPLE Ave Apt 37
Springfield, NJ 07081

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
TRENTON DIVISION

UNITED STATES OF AMERICA,

Plaintiff-Respondent,

v.

WILLIAM BASKERVILLE.

Defendant-Movant

Crim. No. 3:03-CR-00836-JAP
Civil No. 3:13-CV-05881-JAP

AFFIDAVIT OF RAKEEM BASKERVILLE

****

The Affiant, Rakeem Baskerville, hereby swears under the penalty of perjury, 28 U.S.C. Section 1746, that the following statements are true and correct to the best of his recollection and knowledge:

1. That I am of sound mind and of the legal age to make this oath and affirmation.
2. That I am familiar with the above-entitled cause and action and the factual allegations underlying the same.
3. That, if called upon to testify in the above-entitled cause and action, I would have in fact testified as follows.
4. I would have testified that I had no involvement in, nor knowledge of, any plot, scheme, or conspiracy to Kill McCray as alleged in the above-entitled cause and action.
5. I would have testified that I did not attend, and have never attended, any meeting at Jamal Baskerville's home on 25 November 2003 with Deidra Baskerville, Jamal Baskerville, Hamid Baskerville, Jahmal McNeil, Hakim Currie, Anthony Young and Paul Bergrin as alleged in the above-entitled cause and action.
6. I would have testified that I was not in Hakim Currie's vehicle on 25 November 2003 with Anthony Young and Hakim Currie when it is alleged that Paul Bergrin called Hakim Currie and gave him the name "K-Mo."
7. I would have testified that I did not attend any meeting 4-10 days after William Baskerville's arrest where it is alleged that a meeting occurred between myself, Paul Bergrin, Hakim Currie, Anthony Young, Jahmal McNeil and Jamal Baskerville where it is further alleged that Paul Bergrin stated "no K-Mo, no case."
8. I would have testified and refuted the allegation that I was involved in any aspect of the McCray murder and that any such testimony to that effect was false.
9. I would have testified William Baskerville never communicated to me in any way that he wanted any act of violence carried out against McCray as alleged in the above-entitled cause and action.

Further the Affiant sayeth naught.

Signed under the penalty of perjury, 28 U.S.C. Section 1746, on this 16th day of October 2013.

Rakeem Baskerville

Rakeem Baskerville
Reg. No. 42112-037
U.S. Penitentiary Victorville
P.O. Box 3900
Adelanto, California 92301

DECLARATION OF RASHIDAH TARVER

I, Rashidah Tarver, declare the following under penalty of perjury pursuant to U.S.C. § 1746:

1. I am submitting this declaration in connection with United States v. William Baskerville, District of New Jersey, Civil No.3:13-cv-05881-JAP.

2. I am familiar with the above-entitled cause and action and the factual allegations underlying the same.

3. I am aware that I was falsely accused by Anthony Young in which he had testified that I had driven him and Rakeem Baskerville back in March of 2004 to an auto boby shop to dispose of a gun.

4. I had given testimony in the matter of United States v. Paul Bergrin, and my testimony was consistent in both of Mr. Bergrin's 2011 and 2013 trials to which I denied all of the false claims of Anthony Young of my involvement or having knowledge of those things which he has alleged.

5. Had I been called as a witness at the time of William Baskerville's trial, at which time I was available and willing to testify, I would had given testimony denying Anthony Young's false allegations that, I had driven him and Rakeem to a body shop to dispose of a gun in March of 2004 or at any other time.

6. I would had also testified that I have never driven Anthony Young and Rakeem Baskerville anywhere ever.

7. Also I have never been contacted or interviewed by any investigator of the attorneys' of William Baskerville in relations to the matter of Mr. Baskerville.

Executed this 20th day of Jan., 2015 under penalty of perjury, 28 U.S.C Section 1746.

Rashidah Tarver
247 Vassar Avenue
Newark, New Jersey
07112

EXHIBIT "E"

ARTICLES FROM NEWS PAPER, ASSERTING THE SUBSTANCE OF THE PHONE CALLS FROM PAUL BERGRIN TO HAKIM CURRY ON 11/25/03

Star-Ledger, The (Newark, NJ)

November 30, 2004
Edition: FINAL
Section: NEWS
Page: 1

A drug witness is killed, but who is to blame

Prosecution fault defense lawyer; he says government is out to get him
Author: *JOHN P. MARTIN; STAR-LEDGER STAFF*

Article Text:

A federal prosecutor said yesterday that a well-known New Jersey defense lawyer might have passed information to an alleged drug kingpin that led to the murder of a government witness.

The defense attorney, Paul Bergrin, denied any wrongdoing and said the accusation was part of the prosecutor's strategy to disqualify him from an upcoming drug trial.

The allegation had been outlined in sealed court motions, but emerged during a hearing yesterday before U.S. District Judge Joel Pisano in Newark. It underscored the legal tightrope that defense attorneys sometimes walk while representing criminals.

Bergrin gained international attention this year as the attorney for Army Sgt. Javal Sean Davis, 26, a Roselle native and prison guard facing a court-martial for allegedly mistreating detainees at Iraq's Abu Ghraib prison.

But he has long been known as an aggressive defender in Essex County. In that role, prosecutors say, Bergrin has been the regular defender for members of a Newark-based drug trafficking ring allegedly run by Hakeem Curry. In court papers, prosecutors claim Curry used Bergrin to monitor whether any gang members cooperated with law enforcement after being arrested.

One such defendant was Curry's cousin, **William Baskerville**, who was charged last fall with selling crack cocaine to an FBI informant. Bergrin was hired to represent **Baskerville** and on the day of **Baskerville**'s arrest, Bergrin called Curry twice, according to a motion filed by Assistant U.S. Attorney John Gay.

FBI agents had tapped Curry's phone and were listening.

"I got a chance to speak to **William**, and he said the informant is a guy by the name of K-Mo," Bergrin told Curry, according to a draft transcript of the tape. He told Curry he hoped to learn more about the informant after his second meeting with **Baskerville**.

"All right," Curry replied. "Get detail and detail and call me back."

K-Mo was actually DeShawn McCray, a cooperating government witness. Despite attempts by the FBI to protect

him, McCray was shot and killed in March as he walked along South Orange Avenue in Newark. No one has been arrested in connection with the killing, but Curry was jailed on federal drug trafficking charges three days later.

FBI spokesman Steve Kodak said the bureau would have no comment on the case.

Gay told the judge yesterday that investigators believe **Baskerville** and Curry were responsible for the death and that Bergrin may have "put himself in the middle of criminal activity."

If criminal charges are filed in McCray's death, Bergrin could be called as a government witness, Gay said. That would compromise his ability to represent **Baskerville**.

In a sealed motion filed three weeks ago, Gay wrote: "It appears that the information Paul Bergrin provided was used by Hakeem Curry and his associates to identify and later murder the cooperating witness. While it is unclear what Mr. Bergrin's motives were in passing on this information from **William Baskerville**, the mere fact that he did so raises a conflict of interest."

Bergrin told the judge there is no actual, potential or perceived conflict of interest. He also said investigators offered no proof that his phone calls to Curry had any relevance to the death 14 weeks later of a witness in another case.

In an interview after the hearing, Bergrin said he called Curry because **Baskerville**'s mother said Curry could get bail money for **Baskerville**. He said that during that conversation, Curry asked him about the case, and he related some of the details about the charges against **Baskerville**.

The complaint, a single-sheet document that listed four alleged drug deals between **Baskerville** and the FBI informant, did not identify the informant. But Bergrin said **Baskerville** knew it was McCray because of the dates of the transactions.

Bergrin contended that prosecutors had leveled the accusation as payback for his vigorous defense. He insisted that neither Curry nor **Baskerville** had any role in McCray's death and suggested that McCray's work as an informant made him a target for many people.

"He had a lot of enemies on the street," Bergrin said.

The judge said he will rule on the disqualification motion after the prosecutor files details about the investigation. **Baskerville** is scheduled to be tried in April; Curry's trial also is expected to occur next year.

John P. Martin covers federal courts and law enforcement. He can be reached at jmartin@starled ger.com or (973) 622- 3405.

Caption:
1. Attorney Paul Bergrin calls the accusation against him payback from prosecutors.

Record Number: sl200441aca712b5

Star-Ledger, The (Newark, NJ)

December 10, 2004
Edition: FINAL
Section: NEW JERSEY
Page: 47

Lawyer quits drug case over ties to suspect

Bergrin denies any link between phone call and killing of witness
Author: *JOHN P. MARTIN; STAR-LEDGER STAFF*

Article Text:

A notable Newark defense attorney has withdrawn from a federal narcotics case after prosecutors raised questions about his contact with an alleged drug kingpin and the death of a government witness in the case.

The attorney, Paul Bergrin, told U.S. District Judge Joel Pisano in a letter this week that he would no longer represent **William Baskerville**, a Newark man awaiting trial on charges of selling crack cocaine to an FBI informant. The judge declined to release the letter, but Bergrin said that in it, he explained that he was acting in the interests of his client.

"I don't want any grievance the government has with me being held against **William Baskerville**," Bergrin said in an interview Wednesday.

Known as an aggressive defender in local legal circles, Bergrin also represents Army Sgt. Javal Sean Davis, 26, a prison guard from Roselle who faces a court-martial for mistreating detainees at Iraq's Abu Ghraib prison.

In a sealed court motion, the U.S. Attorney's Office said Bergrin should be disqualified from the **Baskerville** case because of his contact with Hakeem Curry, an accused drug kingpin and a suspect in the March killing of a witness against **Baskerville**.

Prosecutors said Bergrin called Curry twice on the day **Baskerville** was arrested last November. The conversations were secretly monitored by the FBI. In one, Bergrin told Curry the key witness against **Baskerville** was a man known on the streets as "Ki-mo," whose real name was DeShawn McCray.

Three months later, McCray was murdered execution-style on a Newark street. No one has been charged in his killing.

Curry has since been jailed on federal drug trafficking charges.

Assistant U.S. Attorney John Gay told the judge last week that agents believe **Baskerville** and Curry had a role in McCray's murder and that Bergrin may have also "put himself in the middle of criminal activity." In court papers, Gay said Bergrin was the regular defender for members of a Newark-based drug trafficking ring allegedly run by Curry.

The judge asked Gay to submit a letter under seal detailing the murder investigation and the possible evidence involving Curry, **Baskerville** and the lawyer.

Bergrin denied any wrongdoing. He said Curry and **Baskerville** are cousins and that **Baskerville**'s mother asked him to call Curry that day to see if he could help arrange bail money. He said prosecutors wanted to force him off the case because of his aggressive defense.

He repeated that assertion even after withdrawing this week, and he again insisted that neither he, **Baskerville** nor Curry had a role in McCray's death.

"There's no evidence, absolutely no evidence whatsoever - because it didn't happen," he said. "I did absolutely nothing wrong."

Gay and Michael Drewniak, a spokesman for U.S. Attorney Christopher Christie, declined to comment on Bergrin's removal.

Bergrin also confirmed that he ended his 13-year law partnership with Anthony Pope this week. Both men said the timing of their breakup was coincidental, and unrelated to the developments in the **Baskerville** case.

Pope said he had been wanting "to take the law firm in another direction" for the past year or so.

"It's amicable; there's no 'bad' reason," Pope said. "It may look like it to someone else, but it just isn't."

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Record Number: sl200441b9eb5155

EXHIBIT "F"

PAGE 7 OF GOV. BRIEF IN OPP. TO PETITIONER'S RULE 33 MOTION
AND GOVERNMENT'S DISQUALIFICATION MOTION

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

UNITED STATES OF AMERICA	:	Crim. No. 03-836 (JAP)
	:	
v.	:	June 4, 2010
	:	
WILLIAM BASKERVILLE, a/k/a "Cheeb"	:	

BRIEF OF THE UNITED STATES OPPOSING DEFENDANT'S RULE 33 MOTION

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that Curry was having relations with Bergrin's daughter." Tr. 5873; *see* Tr. 4666-4667 (playing tape).

Second, on June 17, 2006 — long before trial — this Court granted the Criminal Justice Act application of Baskerville's trial counsel to obtain copies of the transcripts of the *Curry* trial. Docket Entry 80. Thus, Baskerville knew or should have known before his trial that according to *Curry* trial witnesses: Bergrin "was the attorney for the business" — Curry's "heroin trade or organization"; Curry was "constantly in contact with" Bergrin; Curry "ke[pt] tabs on" his subordinates "through the lawyer, see if anybody . . . [is] doing anything he didn't like, or . . . telling on him"; and Bergrin would report back directly to Curry. A1-11.

Third, long before trial, the Government disclosed Bergrin's exact role in the McCray murder. In a November 9, 2004, letter brief in support of its motion to disqualify Bergrin, the Government explained how Bergrin had called Curry twice on November 23, 2003 and attached transcripts of those calls. A12-17. In the first call, Bergrin related that Curry's "boy" Baskerville had been arrested and that Bergrin would be representing Baskerville at the initial appearance. A13. In the second call, Bergrin told Curry that the cooperating witness against Baskerville was "K-mo." A13. The letter brief then described Curry's subsequent call to Rakeem Baskerville identifying "K-mo" as the cooperating witness law and the Government's ultimately unsuccessful efforts to protect McCray, who had "learned from sources outside of law enforcement that Rakim Baskerville and other associates of . . . Curry were attempting to

U.S. Department of Justice

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November 9, 2004

via hand delivery
Honorable Joel A. Pisano
United States District Judge
United States Post Office & Courthouse
Federal Square
Newark, New Jersey 07102

UNDER SEAL

Re: *United States v. William Baskerville*
Criminal No. 03-836 (JAP)

Dear Judge Pisano:

Please accept this letter-brief in lieu of a more formal memorandum of law in support of the Government's motion to disqualify Paul W. Bergrin, Esq. from representing William Baskerville because of an actual conflict of interest. The Government respectfully requests that the Court list this matter for a hearing as soon as possible.

Background

Between February 15, 2003 and November 25, 2003, a cooperating witness made a number of narcotics purchases from William Baskerville, an alleged leader of a narcotics trafficking network in and about the Essex County area. On November 25, 2003, William Baskerville was arrested and charged with violations of Title 21, United States Code, Section 841. Paul Bergrin was retained to represent William Baskerville on those charges. At or about the time of William Baskerville's arrest, law enforcement was conducting a separate wiretap investigation of an individual named Hakeem Curry, who was the leader of a large scale narcotics trafficking organization also operating in Essex County. Although there are connections between Hakeem Curry and William Baskerville, including an apparent familial tie, there is not sufficient evidence at this time to charge them together in the same narcotics conspiracy.

On November 25, 2003, at approximately 3:30 p.m., William Baskerville was scheduled to have an initial appearance before a Federal Magistrate Judge on the above described narcotics charges. Prior to that initial appearance, Paul Bergrin obtained a copy of the criminal complaint via facsimile from the Assistant United States Attorney handing the prosecution of William Baskerville. That complaint charged William Baskerville with distribution of over 5 grams of cocaine base. The identity of the cooperating witness was not disclosed in the complaint, as he was referred to only as "the cooperating witness" in that document (a copy of the complaint is attached as exhibit A). After

obtaining the criminal complaint, Paul Bergrin called Hakeem Curry. That call was intercepted by law enforcement because they were conducting court authorized interception over the cellphone Hakeem Curry was using to receive the call. During that call, Paul Bergrin told Hakeem Curry, in substance, that Hakeem Curry's "boy" was arrested by the FBI for selling crack cocaine to a confidential witness and that Paul Bergrin was going to court to represent William Baskerville at his initial appearance (a draft transcript of this call is attached as exhibit B). Later that same day, at the initial appearance, the Government provided William Baskerville and his counsel with additional copies of the criminal complaint. Within minutes after the initial appearance ended, Paul Bergrin made a call to Hakeem Curry. That call was also intercepted by law enforcement because they were conducting court authorized interception over the cellphone Hakeem Curry was using to receive the call. During that call, Paul Bergrin told Hakeem Curry, in substance, that William Baskerville had informed him that the cooperating witness in William Baskerville's case was an individual named "K-mo"(a draft transcript of this call is attached as exhibit C). Soon after this telephone call, Hakeem Curry made calls to Rakim Baskerville who is a known member of Hakeem Curry's organization and told him that "K-mo" was the person who had informed on William Baskerville. The person identified as "K-mo" was indeed the cooperating witness in William Baskerville's case. Between November 25, 2003 and March 2, 2004, law enforcement took steps to protect the cooperating witness. During that time the cooperating witness learned from sources outside of law enforcement that Rakim Baskerville and other associates of William Baskerville and Hakeem Curry were attempting to locate and kill the cooperating witness because he had cooperated with law enforcement against William Baskerville. On March 2, 2004, in the vicinity of 19th Street and South Orange Avenue, Newark, New Jersey, the cooperating witness was shot 4 times in the back of the head and died as a result of his wounds.

The intercepted calls set forth above demonstrate that Paul Bergrin obtained information from William Baskerville regarding the identity of the cooperating witness and provided that information to Hakeem Curry. It appears that the information Paul Bergrin provided was used by Hakeem Curry and his associates to identify and later murder the cooperating witness. While it is unclear what Mr. Bergrin's motives were in passing on this information from William Baskerville to Hakeem Curry, the mere fact that he did so raises a conflict of interest. On one hand, if Mr. Bergrin was completely ignorant of the possible consequences of his identifying the cooperating witness to Hakeem Curry, then Mr. Bergrin is a witness to ongoing criminal activity involving his client. His duty to tell the truth as a sworn witness directly conflicts with his representation of William Baskerville, who would be implicated by such truthful testimony. On the other hand, if Mr. Bergrin identified the cooperating witness to Hakeem Curry with the knowledge that it would be used to identify, locate and kill the cooperating witness, then Mr. Bergrin is a knowing participant in criminal activity along with his client. In that case Mr. Bergrin would obviously have adverse interests from his client. In either case, by asserting himself into his client's then ongoing criminal activity, Mr. Bergrin has created a conflict of interest with his client.

Paul Bergrin's relationship to Hakeem Curry is also relevant in determining whether there is a conflict of interest in his representation of William Baskerville. During the course of the federal investigation into Hakeem Curry, law enforcement learned that Paul Bergrin had been consistently used by Hakeem Curry to represent arrested members of his organization. Law enforcement has learned from confidential sources of information that one of the reasons Hakeem Curry used Paul

Bergrin for such representation was so he could monitor whether any of those arrested persons attempted to cooperate against Hakeem Curry.

At the time of the intercepted calls set forth above, Hakeem Curry was not yet arrested on charges stemming from the federal wiretap investigation. On March 5, 2004, Hakeem Curry, and other members of his organization were arrested on federal narcotics charges. On or about March 6, 2004, Paul Bergrin called an Assistant United States Attorney who was handling the case and said that he represented Hakeem Curry on the federal case. Mr. Bergrin subsequently learned that he represented both Hakeem Curry and one of the other members of Hakeem Curry's organization, Jason Hannibal, on the same federal case. Upon learning this information, Mr. Bergrin withdrew from representing both Hakeem Curry and Jason Hannibal on the federal case.[1] Both Hakeem Curry and Jason Hannibal now have obtained other defense counsel on the federal case.

While Mr. Bergrin does not formally represent Hakeem Curry on his federal case, it is apparent that they continue to maintain a close relationship. Records from the Monmouth County Jail, where Hakeem Curry is currently detained, demonstrate that Paul Bergrin has visited Hakeem Curry 13 times between May 4, 2004 and October 19, 2004. The nature of the visits is not clear at this time. The Government notes, however, that the visitor records for Monmouth County Jail differentiate between general visitors and attorneys visiting their clients. On each of the occasions Paul Bergrin visited Hakeem Curry, Mr. Bergrin was designated as an attorney visiting a client, rather than a general visitor.

Argument

The Firm's Representation of William Baskerville Presents An Unwaivable Conflict of Interest Requiring Disqualification

Federal courts have held that the United States has a duty to alert the court to a potential

[1]The court never designated Mr. Bergrin the attorney of record for either Hakeem Curry or Jason Hannibal on the federal charges. Mr. Bergrin was the attorney of record for Jason Hannibal on narcotics charges brought by the Union County Prosecutor in December of 2003. In March of 2004, those Union County charges were subsumed in the broader federal charges against Jason Hannibal and Hakeem Curry. On March 6, 2004, the scheduled date of the initial appearance on Jason Hannibal and Hakeem Curry's federal charges, a member of Mr. Bergrin's firm, Anthony Pope, came to court in place of Mr. Bergrin. Prior to the on the record court proceedings, Mr. Pope informed the Government that his firm represented Jason Hannibal. In that same conversation, the Government informed Mr. Pope that it believed his firm had a conflict of interest because Jason Hannibal and Hakeem Curry were charged together in the same case. Mr. Pope left without making a formal appearance for either defendant Jason Hannibal or Hakeem Curry. The Federal Public Defender was appointed to represent Jason Hannibal at the initial appearance. Hakeem Curry retained Vincent Nuzzi, Esq. to represent him on the federal charges. Jason Hannibal later retained John Tiffany Esq. to represent him on the federal charges.

conflict of interest, and if warranted move for disqualification. United States v. Tatum, 943, F.2d 370, 379-80 (4th Cir. 1991) citing United States v. Agurs, 427 U.S. 97, 110-11 (1976). Here, the firm's present representation of William Baskerville presents an actual conflict of interest that cannot effectively be waived by William Baskerville without jeopardizing his right to effective counsel, the integrity of the judicial process and the finality of the verdict.[2] Accordingly, Mr. Bergrin, must be disqualified as counsel for William Baskerville.

Addressing this issue, the Supreme Court in Wheat v. United States, 486 U.S. 153 (1988), stated:

> [w]hile the right to select and be represented by one's preferred attorney is comprehended by the Sixth Amendment, the essential aim of the Amendment is to guarantee an effective advocate for each criminal defendant rather than to ensure that a defendant will inexorably be represented by the lawyer whom he prefers.

Wheat, 486 U.S. at 159. As such, the Sixth Amendment does not provide a defendant with the absolute right to the lawyer of his choice. See e.g. Davis v. Stamler, 650 F.2d 477 (3d Cir. 1981).

Thus, the Supreme Court has noted, "The Sixth Amendment right to chose one's own counsel is circumscribed in several important respects." Wheat, 496 U.S. at 159; see also United States v. Voigt, 89 F.3d 1050, 1074 (3d Cir. 1996), cert. denied, 519 U.S. 1047(1996) ("The right to counsel of choice, however, is not absolute."). And, one of the most important ways in which this right is circumscribed occurs where, as here, there are conflicts of interest. In such cases, the Court may disqualify counsel. See Wheat, 486 U.S. at 163 (counsel may be disqualified "[w]here a potential for conflict exists . . ."); Voigt, 89 F.3d at 1075 ("Clearly, the potential for serious conflicts . . . can outweigh a defendant's right to counsel of choice."); United States v. Mosconey, 927 F.2d 742, 750 (3d Cir. 1991), cert. denied, 501 U.S. 1211 (1991) ("when there is 'a showing of a serious potential for conflict' the presumption in favor of a defendant's counsel of choice is overcome and the trial court may disqualify counsel . . . .").

In this case, Paul Bergrin's conveyance of information from William Baskerville to Hakeem Curry places him squarely in the center of criminal activity. As set forth above, under the best case scenario, his actions make him a witness, perhaps against his own client, in the murder of a

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[2]There is an issue regarding whether the recordings of the calls described in this Brief were properly sealed pursuant to Title 18, United States Code, Section 2518 (a). As a result, there is an issue regarding whether these calls would be admissible in connection with sworn testimony at trial. In this Brief, the Government is not using these calls in connection with sworn testimony at a court proceeding. Accordingly, their use in this Brief is not contrary to the dictates of Title 18, United States Code Sections 2517(3) and 2518(a). Moreover, the purpose of this submission is to allow the Government to discharge its duty to inform the Court of evidence of a conflict of interest between the defendant and his attorney and thereby protect the defendant's Sixth Amendment right to effective assistance of counsel, and preserve the integrity of the judicial process.

cooperating federal witness. While William Baskerville is not currently charged in connection with the murder of the cooperating witness, evidence that he was involved in the murder of the chief witness against him would almost certainly be relevant and admissible at his narcotics trial. See United States v. Gatto, 995 F.2d 449, 454 (3d Cir. 1993); United States v. Guerrero, 803 F.2d 783, 784 (1986). Moreover, any statement by William Baskerville to Mr. Bergrin in furtherance of the murder would not be considered privileged because of the crime/fraud exception to the attorney client

privilege.[3] See United States v. Inigo, 925 F.2d 641, 657 (3rd Cir. 1991); In re Grand Jury Proceedings, 604 F2d. 798, 802-03 (3rd Cir 1979). Accordingly, it is likely that Mr. Bergrin could be called as a witness for the prosecution in William Baskerville's narcotics case, as well as any future prosecution connected to the murder of the cooperating witness. His status as a likely witness against William Baskerville would prevent him from also representing William Baskerville in that same case. See United States v. Cannistraro , 794 F.Supp. 1313 (D.N.J. 1992); United States v. Gomez, 584 F.Supp1185 (D.R.I. 1984). See also, United States v. Kilti, 156 F3d. 150 (2nd Cir. 1998).

Under the second possible scenario described above, Mr. Bergrin's actions would make him a knowing participant in a crime involving his client. Where an attorney is alleged to be involved in criminal activity along with his client, there is a clear conflict of interest requiring disqualification. United States v. Fulton, 5 F.3d 605 (2nd Cir 1993). See also, United States v. Jones, 900 F.2d 512(2nd Cir.), cert. denied, 498 U.S. 111 (1990). In Fulton, the Second Circuit held that when an attorney's self interest conflicts with the interests of his client, there is a *per se* violation of the Sixth Amendment right to counsel. Fulton, 5F.3d. at 611-12. Under these circumstances, the conflict is deemed unwaivable. Fulton, 5F.3d. at 613.

Even assuming that there is no actual conflict, the Supreme Court has made clear that in cases where there is a strong potential conflict of interest the Court may disqualify counsel:

> [w]e think the district court must be allowed substantial latitude in refusing waivers of conflicts of interest not only in those rare cases where an actual conflict may be demonstrated before trial, **but in the more common cases where a potential for conflict exists which may or may not burgeon into an actual conflict as the trial progresses.**

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[3]If the statement William Baskerville made to Paul Bergrin regarding the identity of the cooperating witness were found to be a privileged communication, then Mr. Bergrin may have violated his ethical obligations regarding disclosure of client's confidential information when he conveyed this information to Hakeem Curry. This would provide yet another basis to disqualify Mr. Bergrin from representing William Baskerville. Mr. Bergrin's interests in protecting himself from potential discipline by the New Jersey Bar would directly conflict with his client's interests in this case. Such a conflict would require Mr. Bergrin's disqualification. See Douglas v. United States, 488 A.2d 121 (D.C.App.1985).

Wheat, 486 U.S. at 163 (emphasis added); accord Stewart, 185 F.3d at 122 ("[a] district court has discretion to disqualify counsel if a potential conflict exists (citation omitted), even where the represented parties have waived the conflict); Voigt, 89 F.3d at 1078 ("serious potential for a conflict of interest . . .warranted disqualification."). Accordingly, a trial court's decision concerning the disqualification of counsel will only be reversed for abuse of discretion. Stewart, 185 F.3d at 120; Voigt, 89 F.3d at 1078.

The reasoning behind this broad latitude is clear. A trial court cannot be expected to anticipate every contingency that might happen during the shifting landscape of a criminal trial. A defendant who plans not to testify at the outset of trial, may change his mind as the trial progresses. Similarly, a lawyer who does not plan to cross-examine a witness may change his mind. Indeed, the defense theory and strategy at the outset of trial often changes as the Government presents its case.

In the present case, there is either an actual conflict of interest or a serious potential conflict of interest that could become an actual conflict of interest. To ensure that William Baskerville has effective counsel, that the verdict is final, and to protect the overall integrity of the judicial process, the Court should disqualify Mr. Bergrin and his firm as counsel for William Baskerville.

Conclusion

For the foregoing reasons, the United States respectfully requests that Paul W. Bergrin, Esq. and members of his firm be disqualified as counsel to defendant William Baskerville in the above-referenced matter.

Respectfully submitted,

CHRISTOPHER J. CHRISTIE
United States Attorney

By: John Gay
Assistant U.S. Attorney

cc: Paul W. Bergrin, Esq.
(via telefax & regular mail)

It is ordered that this letter be filed under seal.

11/9/04

JOEL A. PISANO
United States District Judge