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September 18, 2015

Hon. Peter G. Sheridan, U.S.D.J.
United States District Court
Clarkson S. Fisher Federal Building
and United States Courthouse
402 East State Street
Trenton, New Jersey 08608

Re. United States v. William Baskerville
Civil Number13-5881 (PGS)
Criminal Number 03-836 (JAP)

Dear Judge Sheridan:

Pursuant to this Court's Order dated July 23, 2015 (ECF No. 30)("Court's Order"), as modified by this Court's Letter-Order dated September 3, 2015 (ECF No. 33), the Government encloses herewith the information this Court requested, along with an explanation to put that information in context. (See Part I below). Additionally, the Government has, in Part II below, provided additional argument in response to some of the claims raised in William Baskerville's Reply to the Government's Response in Opposition to Petitioner's Title 28 U.S.C. § 2255 Motion ("Reply").

I. ITEMS OR INFORMATION REQUESTED BY THIS COURT.

Number 1

Enclosed herewith is a copy of the surveillance recording made by the Federal Bureau of Investigation ("FBI") on March 21, 2003 ("3-21-03 Video").[1]

[1] The 3-21-03 Video is marked as Exhibit 1. All of the exhibits referenced in this submission are included with the hard copy filing provided to the Court and Baskerville. None shall be filed with the ECF copy.

Baskerville references the 3-21-03 Video in his § 2255 Motion ("Motion") (ECF No. 1 at 4) and in his Reply (ECF No. 29 at 13-16).

Although Baskerville again references the 3-21-03 Video in his Reply, his claim is the same one raised in his original Motion. In the Government's opposition to Baskerville's Motion ("Opposition")(ECF No. 6), Trial Counsel[2] already explained that "[t]he audio would only have served to make the event more real in the jury's mind, and FBI Special Agent Shawn Manson's[3] testimony showed that the audio would not have contradicted her on any material aspect of the drug case . . . ". Opposition HD16; KD16.

Further, Baskerville mistakenly asserts that any audio statements on the 3-21-03 Video, in which Agent Brokos stated that she cannot see Baskerville's license plate or Baskerville's participation in the drug transaction, conflicts with her trial testimony. Baskerville fails to recognize that Agent Brokos was out in the field recording the 3-21-03 Video with a team of agents. ("We set up our surveillance *team*" Tr. 3570 (emphasis added);[4] "We had our surveillance *unit* set up" Tr. 3571 (emphasis added); "*We* were able to get the license plate" Tr. 3573 (emphasis added)). After the drug transaction, Agent Brokos met with the rest of the surveillance team, discussed what happened with Kemo Deshawn McCray, and reviewed the 3-21-03 Video. Collectively, that information provided the basis for Agent Brokos's trial testimony. In that context, the 3-21-03 Video does not demonstrate inconsistencies with Agent Brokos's testimony. The 3-21-03 Video was shown and provided to the jury. No audio portion could have undercut the transparency of the 3-21-03 Video.

To be sure, the 3-21-03 Video indicates that Agent Brokos was unable to see the writing on the license plate during the surveillance. However, regardless of what Agent Brokos stated, a review of the 3-21-03 Video clearly shows the license plate of Baskerville's car (timestamp 06:26 – 06:30); a partial view of the license plate (timestamp 07:10 – 07:30); the first hand-to-hand transaction between McCray and Baskerville (timestamp 06:29 – 06:34); and the second hand-to-hand transaction between McCray and Baskerville (timestamp 07:12 – 07:16), matching what Agent Brokos testified to.

Though Agent Brokos stated during her trial testimony that "you can't see [the license plate] on the videotape" (Tr. 3573), the Government believes that Agent Brokos was referring to *the jurors'* inability to see the videotape on

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[2] As done in the Government's Opposition, Baskerville's trial counsel, Carl Herman and Kenneth W. Kayser, shall be collectively referred to as Trial Counsel.

[3] FBI Special Agent Shawn Brokos's maiden name is Manson.

[4] "Tr." refers to the trial transcript for United States v. William Baskerville, Criminal Number 03-836 (JAP).

the screen because of their distance from the screen in the courtroom and the quality of the image on the screen at the time the videotape was stopped, not that the 3-21-03 Video does not show Baskerville's license plate. Indeed, the transcript reflects the difficulties seeing the screen the previous day during Detective Sabur's testimony "Q: I'm showing 319A, Detective. *I'm hoping the jury is seeing this.* I'm not sure if you can see it from where you're sitting? A: Yes Q: Again, I think it's better if you just come up." Tr. 3348 (emphasis added). In actuality, the license plate is quite visible on the 3-21-03 Video at various times, so there was no real impeachment value to the audio portion of the 3-21-03 Video.

Number 2

Pursuant to this Court's Order, the Government has enclosed a copy of the Drug Enforcement Administration ("DEA") 7 forms[5] referenced in Baskerville's Motion (ECF No. 1 at 4(b)-4(c)) and his Reply (ECF No. 29 at 24-26).

Trial Counsel cross-examined Agent Brokos on the inaccuracies in the DEA forms and made clear to the jury that Agent Brokos was not the author of the forms. Tr. 4001–02. Those errors, however, were extremely minor and Trial Counsel has already stated that "there was nothing that would have shown a defect in the chain of custody so as to preclude admission of the drugs." Opposition HD21; KD21.

The errors were minor and a formal challenge to them would not have resulted in the exclusion from evidence of the drugs referenced on the DEA forms. Therefore, Baskerville has shown no prejudice or harm through this claim. Trial Counsel had made an attempt through pretrial motions to exclude the relevant drug purchases based on a failure to establish chain of custody. Br. in Support of Pretrial Motions on Behalf of William Baskerville, (ECF No. 45, at p. 12), March 7, 2005; Notice of Pretrial Motions at ¶4, (ECF No. 45-1), March 7, 2005. This demonstrates that Trial Counsel in fact addressed the exact issue that Baskerville claims was omitted. Because the Trial Court properly exercised its discretion in denying Trial Counsel's chain of custody motion, Baskerville cannot show any prejudice from Trial Counsel's actions. Nor can he explain how Trial Counsel was deficient in the first place.

Number 3

Pursuant to this Court's Order, the Government has enclosed a copy of all of the wiretap recordings made by the Government in connection with its investigation of the Hakeem Curry drug trafficking organization ("Curry

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[5] The DEA 7 forms are attached hereto as Exhibit 2.

Wiretaps").[6] The Curry Wiretaps are referenced by Baskerville in his Motion (ECF No. 1 at 4-7) and his Reply (ECF No. 29 at 51). The Curry Wiretaps contain thousands of calls, so the Government has also enclosed a compact disc containing just the five calls referenced by Baskerville (ECF No. 29 at 52), along with an additional call between Curry and Rakeem Baskerville on November 25, 2003 and two additional calls between Curry and Bergrin on December 4, 2003.[7]

Baskerville argues that the Government failed to disclose the Curry Wiretaps, thereby violating his right to due process under Brady because those calls would have aided Baskerville's case. However, the Government *did* provide the Curry Wiretaps. Trial Counsel's declarations submitted in the Government's Opposition, the trial record, and Carl Herman's Supplemental Declaration ("HDII")[8] belies Baskerville's assertion that the defense was only given three recorded calls.

When referring to certain wiretapped audio recordings, Trial Counsel has stated that "[t]he Government provided these recordings." Opposition HD20, n.4; KD20, n.4. Baskerville now uses the inexactness of that language, combined with a transcript quotation pulled out of context at Tr. 4778 ("three transcripts and three tape recordings"), to make it seem as if *only three* of the recorded calls were turned over to the Defense. In actuality, the Government turned over *all* of the Curry Wiretaps, which included thousands of calls on multiple compact discs. The record at trial, trial counsel's declaration, and Carl Herman's Supplemental Declaration support this view. The Government does not have a record of the exact number of calls provided to Baskerville's counsel, but Mr. Herman has attested that he received numerous compact discs containing thousands of calls from the Government as part of discovery for Baskerville's case. HDII-3.

"While the prosecutors sought to admit three of the calls from the wiretap evidence from the case of United States v. Curry in their argument to the trial judge, the entirety of the recordings from the Curry case were turned over to the defense by the Government. In fact, those voluminous recordings which

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[6] The Curry Wiretaps are contained on the fourteen compact discs marked as Exhibits 3-A through 3-N, as well as CW – 000001 through CW – 000014.

[7] That compact disc is marked as Exhibt 3-O, as well as #15. The calls contained on Exhibit 3-O are saved in folders identified as Numbers 1-8. The Government refers to those calls herein by the relevant folder number. As the Government explained previously, many of those calls were not properly sealed under Title III and, thus, were inadmissible.

[8] Carl Herman's Supplemental Declarartion is attached hereto as Exhibit 6.

numbered well over 1,000 calls contained on multiple compact discs, was obtained from two sources as explained in the record." HDII-4.

Further, Trial Counsel's initial declaration made it clear they did not receive only three recordings. "Moreover, introducing any of the [otherwise inadmissible] calls would have likely allowed the Government to introduce other damaging evidence contained *in the large volume of recordings* which detailed the inner workings of the Curry drug organization." HD20, n.4, KD20. (emphasis added).

In addition to the initial declarations made by Mr. Herman and Ken Kayser, the record at trial supports the conclusion that numerous calls were turned over by the Government and that those same "voluminous" calls were obtained by Trial Counsel from individuals involved with the Curry trial:

> MR. HERMAN: Judge the prosecutor asked us early on "were we going to use the tapes. They made the tapes available."
>
> . . .
>
> THE COURT: There's a wiretap on Curry?
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> MR. HERMAN: Right. They get Curry talking to Paul Bergrin. That tape was turned over in the Curry case. I don't know if that applies to this case, but we got it through the Curry case and we got it from the Government.
>
> THE COURT: You got it two ways, you got it somehow out of the Curry case?
>
> MR. HERMAN: Right.
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> THE COURT: The trial of the case against Curry?
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> MR. HERMAN: Right.
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> THE COURT: However you got it, you did.
>
> MR. HERMAN: Right.
>
> THE COURT: And you also got it in discovery in this case?
>
> MR. HERMAN: Right.

(Tr. 4780-4781).

Moreover, Baskerville provides no support for his claim that he was prejudiced by the alleged failure to produce to Trial Counsel the Curry Wiretaps.

Importantly, Baskerville was never offered the plea deal that Paul Bergrin *claimed* he could get Baskerville in his December 4, 2003 call with Curry (call Number 8). Baskerville offers no evidence that that the Government offered him a plea deal as Bergrin claimed in that recorded call. Nor does Baskerville explain how Trial Counsel could have successfully used to Baskerville's advantage such an out-of-court statement made by an otherwise-available out-of-court declarant. See Fed. R. Evid. 802.[9]

Baskerville claims that the Curry Wiretaps would have assisted Trial Counsel in cross-examining Anthony Young about his misidentification of the third individual in the car with Curry and Young when Bergrin called from court on November 25, 2003. Importantly, Trial Counsel disagrees. Reviewing this audio recording would not have made a meaningful difference because the identity of the third individual in the car had little to no bearing on Young's testimony about what Bergrin said to Curry during the call; this third member was not on the phone and the only voices that can be heard are Curry's and Bergrin's. Further, other calls corroborated Young's testimony about Bergrin's statements to Curry, such that any error by Young in identifying of the third person Curry's car was irrelevant. Opposition HD19; KD19.

Moreover, Trial Counsel has already stated that "the calls intercepted during the investigation into the Curry Organization did not plainly reveal who else was present during the phone calls (or, conversely, plainly show that Young had misidentified who was sitting with him)." Opposition HD19; KD19. But even if they did (and even if Trial Counsel could be considered negligent for failing to detect and exploit that misidentification), any such negligence had no impact on the outcome of the trial for the reasons explained in the previous paragraph. Further, Young was a more important witness against Bergrin than he was against Baskerville because "the Government never claimed any direct connection between Young and Baskerville . . . .". Opposition at 21–22.

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[9] Besides the language in call Number 8 that Baskerville claims would have assisted in his defense, Bergrin stated "I don't how uh f--king stupid the guy (Baskerville) could be making his own hand deliveries" and "he (Baskerville) placed himself in a very bad position." Curry agreed with both of Bergrin's statements. That would have helped the Government's case.

Number 4

Pursuant to this Court's Order, the Government has enclosed a copy of the FBI 302 report referenced in Baskerville's Motion (ECF No. 1 at 11) and his Reply (ECF No. 29 at 55-59) ("FBI 302 Report").[10] Baskerville claims the Government failed to disclose the FBI 302 Report, thereby violating his right to due process under Brady because the FBI 302 report would have aided Baskerville's case. That is not true.

Importantly, Trial Counsel disagrees with Baskerville. "Apparently, Bergrin believed that Young was not the shooter of McCray. Presently, I do not recall whether I knew about Roderick Boyd's statement which purported to cast doubt on Young being the shooter, but to imply that anyone other than Anthony Young was the shooter would have been detrimental to Mr. Baskerville's defense." Opposition HD24 FN6; KD24 FN6.

A review of the FBI 302 Report reveals that the information it contains was entirely cumulative of information addressed during Baskerville's trial. The FBI 302 Report describes that Boyd provided information to the FBI regarding a murder possibly committed by Malik Lattimore, about which Agent Brokos testified. Baskerville's claim that the FBI 302 Report somehow would provide more details or explanation to this testimony is incorrect. Baskerville's claim that the FBI 302 Report would have provided an impeachment of Brokos is also incorrect since Brokos's testimony matches the contents of the FBI 302 Report. Tr. 3887–88.

In connection with the FBI 302 Report, Baskerville argues that Agent Brokos's testimony differed between his trial and her testimony in United States v. Paul Bergrin, Criminal Number 09-369, on whether she had leads before Young came forward. In fact, her testimony was consistent in both trials. In Baskerville's trial, Agent Brokos stated that she knew of someone named "Fat Ant" before Young came forward, but had not been able to confirm his identity or confirm that he was involved in the McCray shooting. Agent Brokos stated "I had heard the name and knew that Fat Ant was a member of William Baskerville's crew and also Hakim Curry's crew and that he went by Fat Ant. 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." Tr. 3890.

Baskerville's chosen quotation, from Tr. 3887, is pulled out of context. After Agent Brokos first stated that she had no leads until Young came forward, Agent Brokos immediately corrected herself and stated that she had

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[10] The FBI 302 Report is attached hereto as Exhibit 4.

considered Maleek[11] Lattimore and given that name to Newark Police Detective Sabur. Tr. 3887–88. This was consistent with Agent Brokos's testimony in Bergrin I (10/18/11) Tr. 164–65.

Baskerville's chosen quotations from the Bergrin trial are also pulled out of context. Baskerville has relied on a small portion of testimony in which Agent Brokos had momentarily confused or forgotten her investigation: "Q: Do you want to review a report to refresh your memory? . . . A: Sorry. I may be confused with your question . . . Mr. Minish: Judge, I have to refresh – I just have to show a document." Bergrin I (10/18/11) Tr. 162–63. Following this short exchange, Agent Brokos again testified that she initially considered Maleek Lattimore a possible lead, matching her previous testimony. Bergrin I (10/18/11) Tr. 164–65.

At bottom, Baskerville is muddling the distinction between whom Agent Brokos might have considered an official suspect or only a potential lead. An agent may consider multiple people during the early stages of her investigation, but may not consider any to be official suspects. When cognizant of those nuances, it is clear that Agent Brokos's testimony remained consistent. Though Agent Brokos mentioned a few possible leads in Bergrin I that were not mentioned in Baskerville, the end result remained the same: no one was formally charged until Young came forward.

Moreover, Baskerville's argument that Trial Counsel in fact tried to argue that Young did not shoot McCray is discredited by the record. In summation, Trial Counsel made statements clearly showing Baskerville is incorrect: (1) "I don't want to argue that the person Anthony Young who came into this courtroom and put his hand on the Bible and said under oath before Judge Pisano that he was the shooter, *I don't want to argue that he wasn't the shooter. I don't have to make that argument . . . I'm not making that argument.*" Tr. 5856–57 (emphasis added) and (2) "Again, *I'm not – the purpose of asking these questions was not to suggest or to argue that Mr. Young is not the shooter. That would be kind of crazy.* The point is we really don't know, we don't know if we can trust Anthony Young." Tr. 5860 (emphasis added). This is further supported by certain questions Trial Counsel posed to Young during cross-examination: (1) "Q: You put four bullets in Kemo McCray's body and killed him, right? A: Yes." Tr. 4603 and (2) "Q: What was going through your mind, Mr. Young, when you put that gun next to Kemo's head?" Tr. 4643.

The above quotations demonstrate that Trial Counsel's motivation was never to discredit the idea that Young was the shooter, but instead to generally discredit the trustworthiness of Young's testimony which implicated Baskerville. That was a plausible defense strategy.

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[11] Referred to in the FBI 302 Report as Malik.

Number 5

Pursuant to this Court's Order, the Government has enclosed a copy of the pretrial briefs cited in Trial Counsel's declarations, which are referenced in the Government's Opposition (ECF No. 16-1 ¶31).[12] Those briefs contradict Baskerville's assertions that Trial Counsel failed to challenge evidence pertaining to the hearsay statements made by McCray.

Baskerville argued in both his Motion (ECF No. 1 at 8) and his Reply (ECF No. 29 at 16) that Trial Counsel failed to object to the introduction of out-of-court statements made by McCray, which Agent Brokos relayed to the jury. Those out-of-court statements, Baskerville asserts, included "statements made by McCray on wiretap (sic) as well as statements made to Agent Brokos during the undercover operation" (ECF No. 29 at 16). In fact, each of the two categories of statements Baskerville claims went unchallenged were specifically addressed in pretrial motions which are attached: ECF No. 45 at 10 (Point III)) and ECF No. 106, "Letter-Memorandum of Law in Response to Government's Motion Pursuant to Fed. R. Evid. 804(b)(6)."

ECF No. 45, at Point III, challenged the admissibility of "tape recordings consist (sic) of consensual telephone conversations between the cooperating witness, DeShawn McCray, now deceased, and the defendant William Baskerville, as well as body wires worn by the cooperating witness during the course of the investigation," and asked the Trial Court for a hearing to determine the issue. ECF No. 45 at 10, Point III.

ECF No. 106 is Trial Counsel's response to the Government's motion for admission of statements made by McCray under the "hearsay by forfeiture" theory pursuant to Fed. R. Ev. 804(b)(6). Among other relief, Trial Counsel sought additional discovery of the McCray statements, a hearing on whether the Government could meet the burden of proof required by Fed. R. Ev. 804(b)(6), and the outright denial of the Government's motion.

Therefore, the record shows that Trial Counsel *did* challenge this evidence prior to the trial, and, while Baskerville may be unhappy with the Trial Court's discretionary ruling allowing this evidence, his disappointment does not translate into a viable ineffective assistance of counsel claim.

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[12] Those briefs are attached hereto as Exhibit 5.

II. SUPPLEMENTAL ARGUMENTS IN RESPONSE TO BASKERVILLE'S REPLY.

The Government also respectfully submits the following to address issues raised in Baskerville's Reply.

Trial Counsel failed to object to leading questions Tr. 4206 (ECF No. 29 at. 2-3).

Baskerville claims that Trial Counsel were constitutionally ineffective because they failed to object to certain allegedly leading questions. But the record belies Baskerville's claim. In any event, Baskerville cannot show prejudice.

Trial Counsel had just objected two questions before the quotation to which Baskerville cites. Therefore, it was not an extended span of questions to which Trial Counsel failed to object. After Judge Pisano sustained the leading-question objection that Baskerville cites to, there were no further leading questions. Baskerville cannot credibly argue that he was prejudiced by the unobjected-to questions. Moreover, after Trial Counsel's objection, the prosecutor explained to the Trial Court that the leading was "intentional with defense counsel on notice." Tr. 4228–29. Trial Counsel Kayser responded that he did not object to certain leading questions because he was trying to be "sensitive to that aspect" previously discussed between the Government and Trial Counsel. Tr. 4229. Therefore, Trial Counsel had specific strategic reasons to not object to those leading questions.

Trial Counsel failed to object to hearsay testimony at Tr. 5312 (ECF No. 29 at 2-3).

Baskerville claims that Trial Counsel were constitutionally ineffective because they failed to object to certain claimed hearsay testimony. But the record belies Baskerville's claim. In any event, Baskerville cannot show prejudice.

The Trial Court's statement that Mr. Kayser had an "obligation" to object did not imply that Mr. Kayser missed objections or did an improper job; it was rather merely an offhand remark about the duties of an attorney. Therefore, the passage Baskerville has chosen to reference does not show inadequacies of Trial Counsel. Moreover, Mr. Kayser did object to the specific issue this quotation refers to (Tr. 5314), which was sustained (Tr. 5315). A debate over it continued at Tr. 5317-24. So Trial Counsel did fight this issue substantially and it is incorrect for Baskerville to argue it demonstrates a failure of Trial Counsel.

Trial Counsel failed to object to Agent Brokos's relaying of McCray's statements and failed to preserve this issue for appeal (Ground One: Claim J) (ECF No. 29 at 3-4, 16-21).

Baskerville claims that Trial Counsel was constitutionally ineffective because they failed to object to certain out-of-court statements by McCray, which were relayed to the jury by Agent Brokos. But the record belies Baskerville's claim. In any event, Baskerville cannot show prejudice.

Baskerville's chosen quotations do not demonstrate the Trial Court affirmatively stating that objections to those statements were *missed*, as Baskerville alleges. Rather, Judge Pisano stated in those instances only that there had been no objections. Tr. 3768; Tr. 3850. And for good reason: Mr. Kayser had submitted a Brief and argued this precise issue at the January 5, 2007 Court Hearing. Hr'g (1/5/2007) Tr. 9-11. Mr. Kayser raised the issue again during trial at Tr. 3860. Baskerville's effort to show that Trial Counsel negligently failed to object is disingenuous because he simply ignores Trial Counsel's pretrial efforts to make legal arguments in an attempt to keep the jury from hearing McCray's statements.

Judge Pisano substantially considered and weighed allowing in those statements under the forfeiture-by-wrongdoing rule and determined that they could be admitted based on the Government's proffer that a sufficient connection would be subsequently shown. Tr. 3860-63. Specifically, Judge Pisano ruled "Unless there's anything further, based on the proffer that has been made, and pursuant to the discussions of the legal issues in Emery, Gray, and Dhinsa, taking into account that the Third Circuit has spoken on the admissibility of co-conspirator declarations by permitting the Courts to admit the statements subject to subsequent connection, where the Court finds by preponderance of the evidence that the evidentiary foundations have been satisfied, I will permit under 804(b)(6) Agent [Brokos] to testify as to statements by McCray with respect to his fearfulness for his well-being, the other statements of McCray that have already been admitted for the same reasons." Tr. 3862.

After the proffered testimony had been offered, Judge Pisano reviewed and summarized it at Tr. 5409–413 and ruled "the statements of Mr. McCray certainly would be, in my view, admissible. I find the requisite evidentiary threshold findings not only by preponderance of the evidence, but I do find them to be established by clear and convincing proof." Tr. 5413–14. He then stated again that "there is enough independent evidence in this record that I do conclude that the statements of Kemo McCray were properly admitted." Tr. 5414.

In the face of such findings by the Trial Court, Baskerville is unable to show any prejudice created by any action or inaction of Trial Counsel.

Trial Counsel failed to challenge Young's testimony, as Baskerville requested, and failed to interview other witnesses who would have challenged Young's testimony (Ground One: Claim E) (ECF No. 29 at 7-10).

Baskerville claims that Trial Counsel were constitutionally ineffective because they failed to challenge Young in a certain manner. But the record belies Baskerville's claim. In any event, Baskerville cannot show prejudice.

Baskerville's chosen quotation (Tr. 5219) shows only that Trial Counsel *considered* calling those witnesses; not that they *should* have called those witnesses. Indeed, that quotation refers to them as *possible* witnesses. Therefore, Baskerville's chosen quotation actually bolsters the Government's position that Trial Counsel fully considered and strategized on which witnesses would have been beneficial. And based on that considered strategy, Trial Counsel chose not to call the witnesses.

The investigative steps Trial Counsel took and the strategy for not calling those witnesses was previously set forth in Trial Counsel's declarations (Opposition HD22-HD27; KD22-KD27), and will not be repeated here.

Undaunted, Baskerville for the first time submits a number of affidavits in support of his claims. Each of those affidavits were submitted by individuals with obvious biases[13] and are not worthy of belief.[14] [15] Additionally, three of

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[13] "Diedra Baskerville, Mr. Baskerville's wife, also would have been of little to no value. Her bias is obvious." Opposition HD26; KD26.

[14] Rashidah Tarver testified consistent with her affidavit in Bergrin's 2013 trial. Her testimony directly contradicted Young's on multiple points. Nonetheless, consistent with Young's testimony, Bergrin's jury found Bergrin guilty of multiple charges related to Bergrin's involvement in the murder of McCray. Despite, as stated above, that Young was a more important witness against Bergrin than he was against Baskerville because "the Government never claimed any direct connection between Young and Baskerville . . . .". Opposition at 21–22.

[15] In Bergrin's certification (ECF No. 29 Ex. D), he states that Baskerville's Trial Counsel interviewed him. That claim is contradicted by Trial Counsel's declarations which state "For instance, Baskerville claims that Attorney Paul Bergrin notified me that he was willing to testify. *In fact, no such discussion took place.*" (emphasis added) Opposition HD24; KD24. Trial Counsel Herman's Supplemental Declaration also makes it abundantly clear that "no such conversation took place and Mr. Bergrin's assertion is false." HDII-5. Bergrin's certification is also contradicted by Baskerville himself who claims that Trial Counsel "never contacted or interviewed any of the named witnesses provided by" Baskerville. ECF No. 29 at 10.

the five are the self-serving statements of Baskerville's coconspirators in the McCray murder: his initial lawyer (Bergrin), his brother (Rakeem Baskerville), and his cousin (Curry). Each of them have their own 2255 motions pending in various courts for convictions related to their involvement with the Curry drug trafficking organization. Bergrin is serving six life sentences based on numerous charges, including a number directly related to his involvement in the murder of McCray. Although they are serving life sentences for charges unrelated to the murder of McCray, both Curry and Rakeem Baskerville remain subject to charges related to that murder.

Significantly, moreover, Baskerville points to his letter to Judge Pisano (Ex. B to Reply Brief), which actually *undermines* his argument. Baskerville did not specifically complain about the failure to investigate certain witnesses. But that letter was the perfect opportunity to inform the Trial Court of all possible failures or disagreements Baskerville had with Trial Counsel since it had no word limitations and was not being monitored by Trial Counsel. Nonetheless, Baskerville did not mention the issue when it was in his interest to do so. That failure is telling.[16]

Finally, as Trial Counsel has already explained in their Declarations, in their considered opinion, it would have been detrimental to Baskerville's case to call the witnesses Baskerville now identifies. Opposition HD24-27; KD24-27.

Trial Counsel failed to object to Young's speculation that: (1) Bergrin got Kemo's name from Baskerville and (2) that to "get rid" of McCray meant to kill him. (Ground One: Claim H) (ECF No. 29 at 10-12).

Baskerville claims that Trial Counsel were constitutionally ineffective because they failed to object to certain claimed speculation by Young. But the record belies Baskerville's claim. In any event, Baskerville cannot show prejudice.

Initially, Baskerville fails to offer the legal basis on which Trial Counsel should have objected. As was stated in the Government's Opposition, Trial Counsel concluded that "there simply was no strategic reason to raise this challenge" given the lack of direct contact between Young and Baskerville, and doing so would have "risked opening the door to past instances of similar conduct by the Curry gang members . . . .". Opposition HD29; KD29.

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[16] Baskerville's sole reference to potential defense witnesses in the letter is contained in his statement that "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."

There was also testimony from Young about a subsequent meeting with Bergrin, in which Bergrin stated that McCray had to be killed. Tr. 4360. This shows that there would have been no meaningful difference even had Judge Pisano sustained an objection to the testimony to which Baskerville refers. Trial Counsel admitted in Closing Argument "the evidence suggests pretty clearly that Paul Bergrin is the one who initiated this conspiracy . . . ." Tr. 5872. That Trial Counsel stated this in Closing Argument indicates that they strategically decided to shift the blame from Baskerville to Bergrin. Baskerville's current claims of what his Trial Counsel should have done would have undercut this defense strategy. This further shows that an objection to "Young's speculation"[17] would not have made a difference.

Further, the portion of Closing Argument that Baskerville refers to in order to support this argument (Tr. 5872–73) shows Trial Counsel arguing that Young was making an *assumption* about how to interpret Bergrin's statements, but does not explicitly prove that Young's testimony was speculation worthy of an objection (let alone one that would have been sustained). As stated above, Trial Counsel's real purpose during this Closing Argument was to cast doubt onto Young's credibility as a whole as it relates to his testimony implicating Baskerville.

Trial Counsel failed to object as hearsay Young's relating statements from Bergrin and McNeil about killing McCray. The Government failed to prove that those were co-conspirator statements. (Ground One: Claim I) (ECF No. 29 at 10-12).

Baskerville claims that Trial Counsel were constitutionally ineffective because they failed to object to certain claimed hearsay statements of Young. But the record belies Baskerville's claim. In any event, Baskerville cannot show prejudice.

Judge Pisano substantially considered the statements at issue and determined that they were admissible as co-conspirator statements. Judge Pisano stated that Young "had experience firsthand as one of the *co-conspirators himself in the conspiracy* that is, I think, reasonably identified in the indictment." Tr. 5408 (emphasis added). He went on to list all of the various facts Young testified to that clearly demonstrate this. Tr. 5408. He then concluded that "[t]here is *certainly* adequate independent evidence from which the Court concludes by preponderance of the evidence that a drug distribution conspiracy existed . . . and, therefore, *the co-conspirator declarations which were introduced are admitted.*" Tr. 5409 (emphasis added).

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[17] In call Number 2, Bergrin stated that Baskerville told Bergrin that the name of the individual that informed against Baskerville was K-Mo.

Trial Counsel themselves characterize those statements as "classic co-conspirator statement[s]" and explain an objection "would have highlighted to the jury the devastating impact of the statement and would have been overruled." Opposition HD30, KD30. The sustained objection that Baskerville cites in order to show that an objection to those statements would have also been sustained (Tr. 4354) actually is not an objection to hearsay, but rather an objection to Young's *characterization* of the statement. Therefore, this does not support Baskerville's argument.

Further, pretrial motions regarding co-conspirator statements show that Trial Counsel vigorously litigated this issue: see Br. in Support of Pretrial Motions on Behalf of William Baskerville at 14, Point V, Docket #45, March 7, 2005, and at Notice of Pretrial Motions at ¶8, Docket #45-1, March 7, 2005. The motion and the substantial debate on this topic which occurred during trial support the Government's argument that Trial Counsel vigorously debated this issue and Judge Pisano considered it before allowing Young's statements in as co-conspirator statements. Tr. 5406–09; 5414.

In the face of such findings by the Trial Court, Baskerville is unable to show any prejudice from any action or inaction of Trial Counsel.

Trial Counsel failed to investigate whether there were saved phone records at Hudson County Jail. The Government failed to produce those phone records. (Ground One: Claim B) (ECF No. 29 at 21-22).

Baskerville claims that Trial Counsel were constitutionally ineffective because they failed to investigate certain phone records. But the record belies Baskerville's claim. In any event, Baskerville cannot show prejudice.

First, Baskerville did not bring up, in his letter to Judge Pisano, his complaint that he supposedly asked his Trial Counsel to investigate those phone records. Ex. B to Reply Brief. This letter would have been the ideal opportunity for Baskerville to assert this claim, as his memory of any problems with Deputy Marshal William Cannon's testimony or Trial Counsel's inaction would have been fresh and the letter was uncensored by Trial Counsel.[18]

In fact, Trial Counsel questioned Deputy Cannon on whether there were phone records, both to ensure that they did not exist and to establish doubt in the jury's mind on this issue. Tr. 5471–73; 5476–77. Further, Baskerville also fails to acknowledge that the Government confirmed yet again before filing its Opposition Brief that those phone records do not exist. Opposition 20–21.

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[18] Baskerville's letter is dated April 26, 2007, two days after Deputy Cannon's April 24, 2007 testimony.

Baskerville also does not acknowledge the substantial trial testimony that even had those phone records existed, there were numerous ways for prisoners to get around those recordings, meaning that obtaining the phone records in question would not have materially affected Baskerville's case. Tr. 5711.

Trial Counsel failed to object to the hearsay in Deputy Cannon's testimony regarding the Hudson County Jail phone records (Ground One: Claim K) (pg. 21-24).

Baskerville relatedly claims that Trial Counsel were constitutionally ineffective because they failed to object to certain claimed hearsay statements by Deputy Cannon. But the record belies Baskerville's claim. In any event, Baskerville cannot show prejudice.

Whether or not Deputy Cannon learned about the lack of phone records from a third party, sustaining an objection on that ground would only have led to the Government calling an additional witness to provide the same information. Therefore, Trial Counsel has already explained that objecting to this issue "would not have been productive on such a minor point and may have affected the defense's credibility with the jury." Opposition HD18; KD18.

Trial Counsel failed to preserve their Batson challenge to the Government's striking of certain African-American jury members (Ground One: Claim M) (pg. 26-29).

Baskerville claims that Trial Counsel were constitutionally ineffective because they failed to preserve a claimed Batson issue. But the record belies Baskerville's claim. In any event, Baskerville cannot show prejudice.

Baskerville fails to acknowledge that Trial Counsel have already explained that they had no reason to further press the Batson challenge because after Trial Counsel initially lodged it, the Government provided legitimate reasons for their striking of certain African-American jurors. Trial Counsel has stated, "the prosecutor provided facially race-neutral reasons for his peremptory challenges . . . the defense *had no compelling basis* on which to challenge the prosecutor's stated reasons as pretextual . . . there was *no legitimate basis* to make any further objection." Opposition HD33; KD33 (emphasis added). Trial Counsel even utilized a "very thorough jury consultant" to make comparison of "similarly-situated white jurors." Opposition HD33; KD33. The Government provided legitimate reasons for each struck African-American juror, which Judge Pisano accepted. Tr. 3204–08, 3211. And even had Trial Counsel challenged the Government's reasons, Baskerville has failed to show that Judge Pisano would have found intentional discrimination (or that the Third Circuit would have rejected, as clearly erroneous, a contrary finding).

The Government's theory of motive for the McCray murder was inconsistent between Baskerville's trial and Bergrin's trials. (In Baskerville's trial, the Government argued that McCray's murder was only for Baskerville's own gain, but in Bergrin's trial, the Government argued that Bergrin had a personal motive for the murder.) (Ground Two: Claim A; Ground Three: Claim C) (pg. 32-38).

Baskerville incorrectly states that inconsistent motives were presented; instead, different aspects of the same shared motive were highlighted in each trial. Baskerville and Bergrin both shared the motives of getting Baskerville out of jail and protecting Curry's drug organization. In fact, helping Baskerville get out of jail had the ancillary benefit of helping the organization. As the Government already explained, "[t]he Government's overarching motive theory [was] to disrupt law enforcement's investigation of the Curry organization." Opposition 45.

In Bergrin's trial, the Government argued that "the evidence will prove overwhelmingly that Paul Bergrin conspired to kill Kemo DeShawn McCray *to prevent him from testifying at trial.*" Bergrin I (10/17/11) Tr. 29 (emphasis added). This shows that though Baskerville and Bergrin might have had slightly different personal motivations, the ultimate goal that the Government argued for each remained the same.

The cases Baskerville cites do not support his argument. Baskerville refers to cases in which prosecutors presented *factually contradictory or inconsistent theories between trials.* Reply Brief at 33, 37. This is vastly different from the Baskerville and Bergrin trials, in which there were no factual inconsistencies, and only a slightly differing emphasis on certain personal motivations.

Baskerville also fails to respond to the Government's previously raised point that, regardless of the above, motive was not an element that the Government needed to prove in the Baskerville's trial. Opposition 47.

The Government did sponsor perjured testimony, and the Government witnesses' factually inconsistent testimonies also support the Baskerville's inconsistent theory claim (Ground Two: Claims B & C; Ground Three: Claim B) (pg. 38-49).

Young's testimony differed between trials on who told him and when he was told that Baskerville was facing life in prison (pg. 41).

Here, Baskerville has provided no new argument to rebut the Government's Opposition Brief. Opposition 50–51. Though Young's testimony was inconsistent on whether Curry had spoken earlier to Young about Baskerville's time in prison, the point remained consistent that Young was eventually told (by Bergrin) that Baskerville was facing life in prison. Opposition 64–66.

Baskerville has also still failed to satisfy the requirements of a Napue claim because he continues to point to nothing more than inconsistencies and has failed to demonstrate how they were material to his conviction. Opposition 66–68; 70–72.

Young's testimony differed between trials on whether it was a demand or a request to kill McCray (pg. 41-43).

Young's testimony was consistent on this point. The transcript shows that what Young received probably was somewhere between a request and a demand. Young stated in Baskerville's trial that it was "[m]ore like a request demand," (Tr. 4354) until the prosecutor asked him to choose one and Young chose a "demand." Tr. 4355. In Bergrin I, Young instead chose to describe it as more of a "request," but again stated, "to me it's a request demand." Bergrin I (11/2/07) Tr. 183–84. There is no inconsistency here: since Baskerville was not Young's boss, though Baskerville may have "demanded" that McCray be murdered, Young was not obligated to accede to that demand. Young was trying to explain this: that the instruction was somewhere between what Baskerville wanted (a demand) and what Young considered it (a request).

Young's testimony differed between trials on who was in the car during Bergrin's phone call. The Government knew this testimony was incorrect but let it continue anyway (pg. 44-49).

Exhibits E and F to Baskerville's Reply Brief do not show that the Government had knowledge of the third person in the car during the Bergrin phone call, as Baskerville alleges. They only show that the Government was aware of the call itself.

Young admitted substantially in the Bergin I trial that he may have been mistaken about Rakeem (instead of Jamal) being the third individual in Curry's car. "A: In my previous testimony I said me – me, Hakeem, and I think I said – I might have said Rak[eem] or Jamal. I don't exactly remember . . . Q: Okay. Who was there? A: Jamal Baskerville." Bergrin I (10/27/11) Tr. 132–33. "A: Like I said, after thinking about it I knew it was one of the Baskerville brothers . . . ." Bergrin I (10/28/11) Tr. 147.

Regardless, as the Government has already explained, the third person in the car was not a participant in the phone call between Curry and Bergrin, and so played no material part in this testimony. Furthermore, Young had attended previous meetings in which Rakeem was present (Tr. 4348; 4350), making such a mistake for this particular meeting understandable and without significance.

However, a review of call Numbers 1-3, corroborate Young's testimony in at least two significant ways. Young testified that Bergrin mispronounced

Kemo's (McCray's) name as K-Mo when he spoke to Curry and that Young later told Curry the name was correctly pronounced Kemo. Tr. 4352. On call Number 2, Bergrin is clearly heard stating that Baskerville told him the confidential witness's name was K-Mo. Curry is then heard repeating the mispronunciation – "K-Mo." Minutes later on call Number 3, during his conversation with Rakeem Baskerville, Curry correctly pronounces the confidential witness's name as Kemo. That information is not contained in the newspaper article Baskerville references. ECF No. 29 at 87. Second, Young testified that Bergrin told Curry the amounts of crack cocaine Baskerville was charged with selling and the dates of those sales. Young testified that during his call with Bergrin, Curry repeated that information to those present in Curry's vehicle. Tr. 4353. On call Number One, Bergrin can be clearly heard giving Curry the dates the crack cocaine was sold and the corresponding weights. Curry can also be clearly heard repeating that information after Bergrin provides it. That information is not contained in the newspaper article Baskerville references. ECF No. 29 at 87. Clearly, Trial Counsel's decision to not cross Young with the (inadmissible) Curry Wiretaps (which would have opened the door to other damaging calls) was a sound strategic decision.

CONCLUSION

For the foregoing reasons, this Court should find that Baskerville has failed to satisfy the burden of proof required for relief under § 2255. This Court, therefore, should deny his motion without an evidentiary hearing. Further, because Baskerville has failed to make a "substantial showing of the denial of a constitutional right," 28 U.S.C. § 2253(c)(2), this Court should find that a certificate of appealability should not be issued in this case, see Slack v. McDaniel, 529 U.S. 473, 484 (2000) (certificate should issue only where defendant has shown "that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong").

Respectfully submitted,

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Dated: September 18, 2015

CERTIFICATE OF SERVICE

I hereby certify that on September 18, 2015, I served the foregoing Brief of the United States via first class mail on the following:

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