UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

UNITED STATES OF AMERICA	:	
	:	
v.	:	Criminal No. 03-836 (JAP)
	:	
WILLIAM BASKERVILLE a/k/a "Cheeb"	:	
	:	

GOVERNMENT'S MEMORANDUM
IN OPPOSITION TO DEFENDANT'S OMNIBUS MOTIONS

Christopher J. Christie
United States Attorney
970 Broad Street
Newark, New Jersey 07102

On the Memorandum:

Joseph N. Minish
Robert Frazer
Mark E. Coyne
Assistant U.S. Attorneys

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PRELIMINARY STATEMENT

While in pretrial detention in this case, Defendant William Baskerville, a drug trafficker, orchestrated the brutal execution of Kemo Deshawn McCray, a Government informant. Defendant now faces trial on a ten-count indictment charging him with conspiring to murder McCray, conspiring to retaliate against McCray, conspiring to distribute and possess with intent to distribute crack cocaine, and possessing crack cocaine and heroin with intent to distribute them. The Government is seeking the death penalty, in part, in light of Defendant's substantial planning and premeditation in orchestrating the murder, his likelihood of future dangerousness, and the impact of his heinous conduct on McCray's family.

Defendant now moves to dismiss three of the aggravating factors charged by the Government in the Death Penalty Notice ("Notice"). His arguments, however, fail:

- Contrary to Defendant's contention, DB21,[1] "substantial planning and premeditation" is clear, objective and specific. As every Federal court to reach the issue has held, this factor is readily understood by a jury and channels the jury's discretion.
- Contrary to Defendant's contention, DB26, "future dangerousness" has a core meaning that jurors can understand and apply. Moreover, given Defendant's lamentable history of violence and drug-trafficking and lack of remorse, he could be incarcerated for the rest of his life does not make him less dangerous.
- Contrary to Defendant's contention, DB24, both Congress and the Supreme Court have recognized the relevance of

[1] "DB" refers to Defendant's Memorandum in Support of William Baskerville's Pretrial motions [Docket 89-2].

"victim impact" evidence in capital cases. Defendant's request that such evidence be limited is premature and can be resolved during the penalty phase should there be one.

Defendant also demands discovery to which he is not entitled, which he has already received or which are the subject of pending Government motions or this Court's orders. Specifically:

- Defendant's request for disclosure of "favorable" evidence to the defense as to guilt or punishment, DB7, should be denied as moot because the Government has no such evidence. The Government will turn over any such evidence that it uncovers.
- Defendant's request for disclosure of information regarding other participants in the killing of McCray, DB10, should be denied based upon the facts contained in the Government's earlier motion to withhold names of witnesses until one week prior to their testimony.
- Defendant's request for disclosure of character evidence that would mitigate against the imposition of the death penalty should be denied as moot because the Government has no such evidence. The Government will turn over any such evidence that it uncovers.
- Defendant's demand for disclosure of evidence that McCray was engaged in illegal activities at the time of his death and "information that [McCray] consented to the conduct that caused his death," DB10, should be denied as moot. The Government has provided all such information in its possession, and will provide any additional such information that it uncovers.
- Defendant's request for disclosure of Giglio material concerning the "credibility" of Government witnesses should be denied based upon the facts contained in the Government's earlier motion to withhold names of witnesses until one week prior to their testimony.
- Defendant's request for disclosure of the Government's proof at the penalty phase, DB12, should be denied. The Government's Death Penalty Notice, the Fourth Superseding Indictment, this Memorandum, and the discovery already turned over to Defendant give him sufficient notice of the theories and facts the Government will rely on in the penalty phase, should

there be one. Moreover, the Government will provide Defendant with an outline of its evidence of "future dangerousness" prior to the penalty phase.

- Defendant's request for disclosure of all co-conspirator statements the Government intends to introduce should be denied because Rule 16(a) does not require such disclosure. In addition, the Court should deny Defendant's request for a pre-trial hearing and instead rule on the admissibility of such statements when they are introduced at trial.

Finally, Defendant has re-filed his 2004 request for a bill of particulars concerning the drug-trafficking charges he faces. The Government has already provided more than adequate information concerning the nature of these charged offenses and when they occurred. Indeed, Defendant already received so much information that he wants the Government to summarize, distill, and analyze the information already provided. This amounts to asking the Government to do defense counsel's job for him. That is not the function of a bill of particulars.

BACKGROUND

Beginning in January of 2003, the FBI commenced an investigation of Defendant and others, who were engaged in the sale of narcotics in Newark, New Jersey. As part of that investigation, the Federal Bureau of Investigation ("FBI") used a confidential witness, Kemo Deshawn McCray, to make controlled purchases of crack cocaine from Defendant. On six separate occasions, between February and November of 2003, Defendant sold quantities of crack cocaine to McCray. The FBI, among other control measures, conducted surveillance of those narcotics

purchases, and recorded conversations between Defendant and McCray during the narcotics transactions. Between February and November of 2003, McCray also engaged in telephone conversations with Defendant regarding narcotics transactions.

On November 18, 2003, United States Magistrate Judge Susan D. Wigenton signed a complaint and issued an arrest warrant charging Defendant with one count of knowingly and intentionally distributing and possessing with intent to distribute more than five grams of a mixture or substance which contained cocaine base, in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(B). Although the complaint charged only one count, the factual portion of the complaint described numerous sales of cocaine base made by Defendant. On November 25, 2003, the FBI arrested Defendant on that warrant.

Defendant was indicted on December 2, 2003, on charges of conspiracy to distribute and posses with intent to distribute over 50 grams of a substance containing cocaine base, contrary to 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(A), in violation of 21 U.S.C. § 846 and six counts of distributing over 5 grams of a substance containing cocaine base, in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(B). A copy of the indictment, bearing Criminal Number 03-704 was provided to Defendant and his then counsel on December 11, 2003.

After indictment, the Government provided Defendant with discovery materials. Those discovery materials, as well as the

criminal court complaint, revealed that the charges in the indictment were based in part upon sales of crack cocaine Defendant made to McCray, who was not named in the discovery materials and the complaint, but referred to as a confidential witness.

On March 2, 2004, McCray was walking in the vicinity of 19th Street and South Orange Avenue, in Newark, New Jersey. An individual approached McCray, and shot McCray several times in the back of the head. McCray died from the wounds inflicted by the shooter.

ARGUMENT

I. THE GOVERNMENT HAS ALLEGED VALID STATUTORY AND NON-STATUTORY AGGRAVATING FACTORS FOR SEEKING THE DEATH PENALTY IN THIS CASE.

The Federal Death Penalty Act ("FDPA") lists sixteen explicit statutory aggravating factors for capital crimes. 18 U.S.C. § 3592(c)(1)-(16). To be eligible for the death penalty, the jury must find that Defendant committed at least one statutory aggravating factor. 18 U.S.C. § 3593. Thus, statutory aggravating factors serve to narrow the field of those defendants eligible for the death penalty. Maynard v. Cartwright, 486 U.S. 356, 362 (1988); Zant v. Stephens, 462 U.S. 862, 877 n.15 (1983). The FDPA also delineates the role of so-called non-statutory aggravating factors. Their primary purpose is to allow for the individualized determination of whether a death sentence is

justified for a particular defendant. Tuilaepa v. California, 512 U.S. 967, 972 (1994); Zant, 462 U.S. at 878; United States v. Pitera, 795 F. Supp. 546, 563 (E.D.N.Y. 1992).

Defendant raises a vagueness challenge to one statutory aggravating factor and two non-statutory aggravating factors charged in the Notice. Defendant argues that the statutory factor of substantial planning and premeditation, 18 U.S.C. § 3592(c)(9), and the non-statutory factors of future dangerousness and victim impact are constitutionally infirm under the Eighth Amendment because they do not adequately guide the jury, and generically apply to all murders. Defendant is wrong.

Under the Eighth Amendment, aggravating factors must satisfy two requirements. First, the aggravating circumstance must not be unconstitutionally vague. This requirement guards against the unacceptable risk that juries would impose a death sentence in a random, arbitrary, or capricious manner. Tuilaepa, 512 U.S. at 972; Stringer v. Black, 503 U.S. 222, 230-32 (1992); Lewis v. Jeffers, 110 S. Ct. 3092 (1990). In order to properly channel the sentencer's discretion, the Supreme Court requires each aggravating factor to "have some 'common-sense core of meaning . . . that criminal juries should be capable of understanding.'" Tuilaepa, 512 U.S. at 975 (quoting, Jurek v. Texas, 428 U.S. 262, 279 (1976) (White, J. concurring)).

Second, the aggravating factor must "generally narrow the class of person's eligible for the death penalty and must

reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." Lowenfield v. Phelps, 484 U.S. 231, 244 (1988) citing Zant v. Stephens, 462 U.S. 862 (1983) Gregg v. Georgia, 428 U.S. 153 (1976). Thus, an aggravating factor "may not apply to every defendant convicted of murder, it must apply only to a subclass of defendants convicted of murder." Tuilaepa, 512 U.S. at 972. An aggravating factor should function to "assist the jury in distinguishing those who deserve capital punishment from those who do not." United States v. McVeigh, 944 F. Supp. 1478, 1488 (D. Col. 1996), quoting, Arave v. Creech,507 U.S. 463, 474 (1993).

Courts must exercise deference in examining aggravating factors for vagueness, however. Tuilaepa, 512 U.S. at 973. United States v. Glover, 43 F. Supp. 2d 1217, 1223 (D. Kan. 1999) ("'mathematical precision' is not possible in defining the aggravating factors"). Moreover, § 3593(a) does not require elaborate description of the factors upon which the Government intends to rely in seeking a sentence of death. Apart from informing Defendant and the Court that the Government intends to seek the death penalty, the statute requires merely that the Government "set[] forth the aggravating factor or factors that the government . . . proposes to prove as justifying a sentence of death." 18 U.S.C. § 3593(a). In United States v. Chandler, 996 F.2d 1073, 1089 (11th Cir. 1993), the court described a

comparable notice provision in 21 U.S.C. § 848(h) as merely requiring that the Government provide a "list" identifying each aggravating factor on which it intends to rely.

Apart from that "listing" requirement, there is no constitutional requirement that the Government provide a detailed description prior to trial of the factors upon which it will rely, or give defendants a road map of the theory of its case in aggravation. See United States v. Cooper, 754 F. Supp 617, 621 (N.D. Ill. 1990). Consequently, the courts that have addressed the sufficiency of the specification of aggravating factors given by the Government in various death penalty cases have expressly approved those in which the government has tracked the statutory language set forth in the FDPA. See, e.g., United States v. Flores, 63 F.3d 1342 (5th Cir. 1995); United States v. Garza, 77 F.3d 481 (5th Cir. 1995) (statutory aggravating factor for "substantial planning and premeditation" as contained in the statute is not vague).

The three aggravating factors under attack here of substantial planning and premeditation, future dangerousness and victim impact have been routinely upheld by Federal courts. As set forth below, it is well settled that these aggravating factors have a core common-sense meaning sufficient for a jury to determine the presence or absence of the factor. It is also well settled that these aggravating factors function to distinguish

the conduct of garden variety murderers from the actions of those, like Defendant, who truly deserve this sanction.

A. There Is No Basis to Strike the "Substantial Planning and Premeditation" Aggravating Statutory Factor.

Pursuant to 18 U.S.C. § 3592(c), the Government has alleged the statutory aggravating factor of "Substantial Planning and Premeditation." The Notice reads: "The circumstances of the murder involved substantial planning and premeditation to cause the death of Kemo Deshawn McCray." Tracking the words of the statute, the Fourth Superseding Indictment alleges that Defendant "committed the offense after substantial planning and premeditation to cause the death of a person." 18 U.S.C. § 3592(c)(9). Defendant contends that the words "substantial," "planning," and "premeditation" individually and collectively are unconstitutionally vague and do not sufficiently channel the jurors' discretion. DB22. Not so: this phrase has a reasonably specific meaning and does not leave Defendant or the jury guessing as to the conduct underlying this factor.

In United States v. McVeigh, the district court rejected a vagueness challenge to the use of the word "substantial" in Section 3592(c)(9), concluding that "substantial is one of those everyday words having a common sense meaning that jurors will be able to understand." 944 F. Supp. at 1490. See, e.g., United States v. Jackson, 2003 WL 1233044, at *25 (4th Cir. 2003) (non-precedential); United States v. Spivey, 958 F. Supp. 1523, 1531

(D.N.M. 1997); United States v. Glover, 43 F. Supp. 2d 1217, 1225-26 (D. Kan. 1999); United States v. Minerd, 176 F. Supp. 2d 424, 438 (W.D. Pa. 2001). Moreover, every court that has addressed a vagueness challenge to the "substantial planning and premeditation" aggravating factor in 21 U.S.C. § 848(n)(8) has concluded that it sufficiently channels the jury's deliberations to withstand such an attack. See Tipton, 90 F.3d at 895-96; McCullah, 76 F.3d at 1110-11; Flores, 63 F.3d at 1373-74; Walker, 910 F. Supp. at 849; Cooper, 754 F. Supp. at 623-624. The logic of those cases compels the same result here.

The term "substantial" is frequently employed and commonly understood in criminal law. See Flores, 63 F.3d at 1373 (collecting examples); Cooper, 754 F. Supp. at 623; cf. Blystone, 494 U.S. at 308 (discussing "substantia[l] impairment" as a mitigating factor). As the Supreme Court explained in addressing the adequacy of an instruction defining the concept of reasonable doubt in terms of "actual substantial doubt," the word "'substantial' [is] commonly understood, [to] suggest a higher degree of doubt than is required for acquittal under the reasonable doubt standard." Cage v. Louisiana, 498 U.S. 39, 41 (1990). Courts construing the "substantial planning and premeditation" aggravator have accorded the phrase "substantial planning" its "commonly understood" meaning, connoting a higher quantum of planning than the minimum sufficient for the commission of the acts of homicide that must be its object.

Thus, the "aggravator is sufficiently definite and objective to pass constitutional muster." Flores, 63 F.3d at 1374.

B. There Is No Basis to Strike the "Future Dangerousness" Non-Statutory Aggravating Factor.

Pursuant to 18 U.S.C. § 3592(c), the Government has alleged the non-statutory aggravating factor of "Future Dangerousness." The Notice reads:

> Given the nature of the charges, it is likely that the defendant will attempt to retaliate against any individuals who cooperate with the government in connection with the murder charges. The defendant has demonstrated a lack of remorse for the capital offenses committed in this case, as indicated by statements made by the defendant during the course of and following the offenses alleged in the Superseding Indictment and the defendant's actions during the course of and following the offenses alleged in the Superseding Indictment.

Defendant claims that this factor is inherently vague, unreliable and applicable to all murderers. DB26-28. Not so.

The FDPA authorizes the Government to present future dangerousness as a non-statutory aggravating factor. United States v. Allen, 247 F.3d 741, 788 (8th Cir. 2001), vacated and remanded on other grounds, 536 U.S. 953 (2002). The factor by its terms has a "core meaning" that jurors are capable of understanding, so it is not vague. Moreover, the Supreme Court has specifically approved the use of future dangerousness as a factor that the jury may consider in imposing the death penalty. See Simmons v. South Carolina, 512 U.S. 154, 162-63 (1994); California v. Ramos, 463 U.S. 992, 1003 n.17 (1983); Jurek v. Texas, 428 U.S. 262, 275 (1976). For example, in Jurek, the

Supreme Court rejected a vagueness challenge to the Texas death penalty statute's future dangerousness factor, explaining:

> It is, of course not easy to predict future behavior. The fact that such a determination is difficult, however, does not mean that it cannot be made. Indeed, prediction of future criminal conduct is an essential element in many of the decisions rendered throughout our criminal justice system.

Jurek, 428 U.S. at 274,275.

Applying this reasoning, federal courts have consistently rejected vagueness challenges to the use of future dangerousness as a non-statutory aggravating factor under the FDPA and § 848. See Allen, 247 F.3d at 788 ("we have little doubt that future dangerousness to society and to prison officials and other inmates during incarceration is relevant to the jury's final determination of whether a death sentence should be imposed"); Regan, 228 F.2d 742, 752 (E.D. Va. 2002)(court refuses to strike future dangerousness from FDPA death notice finding that it has "a core meaning that a jury can understand"); United States v. Spivey, 958 F. Supp. 1523, 1535 (D.N.M. 1997) (§ 848 case holding that aggravating factor of future dangerousness is not vague); United States v. Nguyen, 928 F. Supp. 1525, 1542 (D. Kan. 1996) (rejecting vagueness challenge to "continuing danger" factor in FDPA case); United States v. Walker, 910 F. Supp. 837, 849 (N.D. N.Y. 1995) (non-statutory aggravating factor found not vague in § 848 case). There is no basis for the Court to strike future dangerousness as unconstitutionally vague.

Granted, "[i]n assessing future dangerousness, the actual duration of the defendant's prison sentence is indisputably relevant." Simmons v. South Carolina, 512 U.S. 154, 163 (1994). But "Simmons does not hold that future dangerousness is irrelevant to a jury's sentencing decision when the defendant will be imprisoned indefinitely, but instead requires that this aggravating factor be explained to the jury in the context of the defendant's ineligibility for parole." Bernard, 299 F.3d at 482. After all, "[a] defendant in prison for life is still a risk to prison officials and to other inmates, and even though a life sentence without the possibility of parole greatly reduces the future danger to society from that particular defendant, there is still a chance that the defendant might escape from prison or receive a pardon or commutation of sentence." Allen, 247 F.3d at 788.

Thus, while the Government concedes that future dangerousness must be considered if at all in the context of the alternative life without parole sentence, the alleged statutory factor and the Government's evidence need not be confined solely to danger inside the prison. Cf. United States v. Llera Plaza, 179 F. Supp. 2d 444, 488 (E.D. Pa. 2001); United States v. Gilbert, 120 F. Supp. 2d 147, 154 (D. Mass. 2000); United States v. Cooper, 91 F. Supp. 2d 90, 111-12 (D.D.C. 2000).

In addition, the Supreme Court (and lower courts) have consistently recognized that psychiatric experts are competent to

testify about a defendant's future dangerousness. See Barefoot v. Estelle, 463 U.S. 880 (1983). Even if psychiatric testimony is insufficient, or unreliable, to demonstrate it, future dangerousness can also be demonstrated by such factors as lack of remorse, lack of rehabilitative potential, or violent history. See Penry v. Johnson, 532 US 782, 795 (2001) (use of psychiatric report in violation of Fifth Amendment privilege was harmless because State had other sufficient evidence to prove future dangerousness factor); see also Gilbert v. Mullin, 302 F.3d 1166, 1182 (10th Cir. 2002) (a defendant's criminal history and lack of remorse can support finding that defendant poses "continuing threat"); Savino v. Murray, 82 F.3d 593 (4th Cir. 1996) (admission of opinion testimony by a mental health expert in support of the defendant's future dangerousness did not violate the defendant's constitutional rights).

Here, the future dangerousness aggravating factor distinguishes Defendant even among those defendants charged with capital offenses. As the charges in the Fourth Superseding Indictment indicate, incarceration is no bar to Defendant's involvement in violent crimes. That indictment charges Defendant with ordering a murder while incarcerated. Therefore, while the alternate of punishment of life imprisonment without possibility of release may temper the future dangerousness of some defendants, Defendant is not so constrained.

1. Defendant's Pattern of Continuous Violence Is Relevant to His "Future Dangerousness."

Defendant has engaged in a continuous pattern of serious and violent crimes throughout his adult life. These prior crimes can and should be considered in assessing whether Defendant poses a threat of future dangerousness. See, e.g., Gilbert, 302 F.3d at 182 ("prior convictions for child endangerment, theft and breaking and entering . . . and prior convictions for the unauthorized use of a motor vehicle and for embezzlement" supported jury's finding that capital defendant posed "'continuing threat'"). Should there be a penalty phase, the Government intends to offer proof of the following:

- On April 27, 1987, Defendant pled guilty to robbery in violation of N.J.S. 2C:15-1; aggravated assault in violation of N.J.S. 2C:12-1; unlawful possession of a weapon in violation of N.J.S. 2C:39-5b; and possession of a weapon for an unlawful purpose in violation of N.J.S. 2C:39-4a. On May 29, 1987, he was sentenced to 12 years' imprisonment and was ineligible for parole for 4 years of that term (824-2-87).[2]
- On July 14, 1993, Defendant was convicted of assault on a police officer and sentenced to 6 months' imprisonment (East Orange Municipal Court).
- On December 7, 1998, Defendant pled guilty to unlawful possession of a weapon in violation of N.J.S. 2C:39-5b. On January 15, 1999, he was sentenced to 4 years' imprisonment (1252-03-98).
- On December 18, 2002, Defendant pled guilty to unlawful possession of a stun gun in violation of N.J.S. 2C:39-5d. On February 10, 2003, he was sentenced to 2 years' probation (02-12-1463).

[2] The Government provided Defendant with a copy of his criminal case history report and judgments of conviction.

The Government will provide notice of any other violent acts of Defendant that it intends to offer at sentencing.

2. Defendant's Lack of Remorse Is Relevant to His "Future Dangerousness."

Defendant's lack of remorse is properly considered as evidence supporting a finding of future dangerousness. "Lower courts have uniformly upheld future dangerousness as a non-statutory aggravating factor in capital cases under the [Federal Death Penalty Act], including instances where such factor is supported by evidence of low rehabilitative potential and lack of remorse." United States v. O'Driscoll, 203 F. Supp. 2d 334, 345 (M.D. Pa. 2002) (citing United States v. Davis, 912 F. Supp. 938, 945 (E.D. La. 1996), and United States v. Bin Laden, 126 F. Supp. 2d 290, 303-304 (S.D.N.Y. 2001)). The Government intends to offer evidence during the penalty phase which indicates Defendant's satisfaction with and lack of remorse about McCray's murder. The nature of the proof will be fully developed during the guilt phase of the trial.

C. There Is No Basis to Strike the "Victim Impact" Non-Statutory Aggravating Factor.

Pursuant to 18 U.S.C. § 3592(c), the Government has alleged the non-statutory aggravating factor of "Victim Impact." The Notice reads:

> The victim is survived by his mother, his step-father and his 4 year old son. Kemo Deshawn McCray was murdered in front of his step father. The government further gives notice that in support of imposition of the death penalty it intends to rely upon all the

> evidence admitted by the Court at the guilt phase of the trial and the offenses of conviction as described in the Superseding Indictment as they relate to the background and character of the defendant, WILLIAM BASKERVILLE, his moral culpability, and the nature and circumstances of the offenses charged in the Superseding Indictment.

Defendant seeks to strike this non-statutory aggravating factor. Consideration of victim impact testimony as a non-statutory aggravating factor, however, is specifically authorized by 18 U.S.C. § 3593(a)(2) and by the Supreme Court in Payne v. Tennessee, 501 U.S. 808 (1991). Therefore, the factor is properly alleged.

Defendant also argues that evidence regarding this factor should be limited. These issues are better left addressed in the concreteness of the penalty hearing should there be one. For example, in United States v. Barnette, 211 F.3d 803 (4th Cir. 2000), the Fourth Circuit rejected an objection to the quantum of victim impact evidence presented at the death penalty phase of a case. The court stated: "No case has come to our attention in which this court or the Supreme Court has vacated a sentence because victim impact evidence violated the limits of due process." Id. at 818.

The Government intends to offer evidence during the penalty phase of the trial indicating the impact that McCray's murder had on members of his family. This evidence will not be unfairly prejudicial to Defendant. See McVeigh, 153 F.2d at 1220 (affirming the admission of victim impact testimony that "there

was a point where I actually stuck a pistol in my mouth" but "couldn't pull the trigger, thank God"); cf. Barnette, 211 F.3d at 818-19 (citing McVeigh with approval).

II. DEFENDANT'S REQUESTS FOR DISCOVERY TO WHICH HE IS NOT ENTITLED, WHICH HE HAS ALREADY RECEIVED, WHICH IS THE SUBJECT OF OTHER PENDING MOTIONS, OR WHICH IS PREMATURE SHOULD BE DENIED.

A. As a General Matter, the Government Is Complying with Its Obligations under Brady and Defendant's Request for Giglio Material Is Premature.

Defendant seeks an order requiring the Government to disclose "favorable evidence to the defense as to guilt or punishment." DB7. The Government is fully aware of its obligations to turn over any and all material favorable to Defendant. The Government has complied and will continue to comply with this mandate on a continuing basis. Defendant's request for impeachment, or "Giglio," material at this stage, as a "subset of Brady material" DB7, should be denied. The Government has, by separate motion, applied for an order to withhold disclosure of witness names, including Giglio material, until one week prior to the scheduled testimony of the witness based upon the substantial safety concerns in this case. A ruling by the Court allowing for the disclosure in the time frame suggested by the Government would comply with the rule that such material be turned over sufficiently in advance to allow "for full exploration and exploitation by the defense." DB8.

B. Defendant's Request for Disclosure Tending To Show Mitigating Factors Is Premature in Certain Respects and Otherwise Moot.

Defendant first seeks information regarding other participants in McCray's murder, including "charged or uncharged

persons who are alleged to be co-conspirators and/or accomplices." DB10. Presumably, Defendant intends to argue that if there are others equally involved in murdering McCray who are not facing the death penalty, then the jury should exercise mercy on Defendant. The Government has, by separate motion, applied for an order to withhold disclosure of witness names, including Giglio material, until one week prior to the scheduled testimony of the witness given the substantial safety concerns in this case, and incorporates that motion by reference herein.[3]

Defendant next seeks any information in the Government's custody or control regarding Defendant's character, including "good deeds" and reputation or statements from any source that would mitigate against the imposition of the death penalty. Defendant cites 18 U.S.C. §3592 and Lockett v. Ohio, 438 U.S. 586 (1978), to support its position. But nowhere in § 3592 is there any mention of an obligation by the Government to furnish such material. Nor is there any such discovery rule enunciated in Lockett.[4] In any event, at this time the Government does not

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[3] Attached as **Exhibit A** is an unsigned copy of this Court's Order dated August 18, 2005 which granted the Government's motion for a Protective Order. Among other protections, the Court ordered that the Government "shall be permitted to delay discovery and inspection of any other documents or materials in its possession that would disclose the identity of its witnesses." Order at 2.

[4] Lockett held "that the Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the

have any knowledge of any of Defendant's character traits that would mitigate the imposition of the death penalty.

Defendant also demands discovery regarding information that McCray was engaged in illegal activities, specifically murder and drug offenses, at the time of his death, and "information that the victim consented to the conduct that caused his death." DB10. The Government does not have any evidence that defendant "consented to the conduct that caused his death." Attached as Exhibit B is a list of material that, while not falling into this category, does relate to McCray's activity prior to March, 2004, when he was murdered. The Government is making this material available as part of its continuing disclosure obligations.

C. "Immediate" Disclosure of Information Tending to Show the Strength of the Evidence Supporting Defendant's Guilt Is Neither Necessary Nor Advisable.

Defendant requests "credibility" material of Government witnesses, i.e., "Giglio" material. DB 11-12. Once again, postponing such disclosure is the basis for a separate motion filed by the Government and that motion is incorporated herein.

D. Defendant Is Not Entitled to the "Immediate" Disclosure of Penalty Phase Information.

Defendant requests disclosure of evidence pertaining to the Government's proof at the penalty phase, specifically evidence the Government intends to use to prove his "future dangerousness"

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circumstances of the offense that the defendant proffers as a basis for a sentence less than death." Lockett, 438 U.S. at 604.

and evidence mentioned in the Notice of statements that Defendant made during the course of and following the offenses. DB12. Defendant cites no case law, however, to support his argument that such disclosure is warranted, now or at any time.

The Government's obligation to disclose specific evidence it intends to present at the penalty phase is satisfied by the allegations in the Notice and the Fourth Superseding Indictment. See United States v. Plaza, 179 F. Supp. 2d 464, 472 (E.D. Pa. 2001) (holding that to allow defendants to adequately prepare responses to sentencing phase evidence, the Notice, "in conjunction with the indictment, must inform the defendants of the theories and facts that the Government will use to establish each aggravating factor in the case").

1. Future Dangerousness

The death penalty statute does not require the Government "to produce the details of its sentencing phase evidence." Plaza, 179 F. Supp. 2d at 472 (E.D. Pa. 2001); see United States v. Battle, 173 F.3d 1343 (11th Cir. 1998) (holding that although the government must give notice of aggravating factors, 18 U.S.C. § 3593(a) does not require the Government to provide any specific evidence of what it intends to present at the penalty phase); United States v. Nyguen, 928 F. Supp. 1525, 1545(D. Kan. 1996) (rejecting defense argument that the Notice was constitutionally defective because it failed to detail the evidence the government intended to offer in support of its aggravating factors).

That said, the Government recognizes that Due Process might require that Defendant be given "some notice of the type of evidence the government intends to introduce at the sentencing phase." Plaza, at 472 (citing United States v. Kaczynski, 1997 WL 716487 (E.D. Cal. Nov. 7, 1997)). But any such notice requirement can be satisfied if the Government submits "an outline of the evidence it intends to introduce to support" the future dangerousness factor. Id. at 474.

Here, the Government believes that the Notice, taken together with the Indictment, the information summarized in this Memorandum concerning Defendant's criminal history and lack of remorse, and the discovery previously provided to the defense,[5] gives sufficient notice of the "theories and facts" the Government will rely upon to prove future dangerousness, and thus satisfies any Due Process concerns. Nonetheless, the Government will submit an outline of its evidence as to future dangerousness prior to the start of the penalty phase.

2. Defendant's Statements

Defendant's second request relates to statements he made to others during and after the offenses alleged in the indictment. Those statements are Defendant's admissions to individuals other than law enforcement, and therefore there is no right to

[5] The Government has turned over substantial discovery already, including the video and audio recordings of the six drug transactions that are the subject of Counts Four through Nine of the Fourth Superseding Indictment.

discovery at this time. See Fed. R. Crim. P. 16(a)(1)(A).[6] Further, disclosure of those statements would reveal the identity of the Government's witnesses and for the reasons stated in the Government's motion to withhold the identity of those witnesses, the Government asks the Court to deny this request.

E. Defendant Has No Right to Pretrial Disclosure of Co-conspirator Statements or a Pretrial Hearing as to the Admissibility of Such Statements.

Defendant requests discovery of all co-conspirator statements the Government intends to introduce at trial and a pretrial hearing concerning admissibility of those statements. He is entitled to neither.

1. Co-conspirator Statements Are Not Subject to Pretrial Disclosure.

The weight of authority does not support extending Rule 16(a)(1)(A) beyond its literal mandate requiring disclosure of a defendant's own statements to law enforcement. See, e.g., United States v. Mayberry, 896 F.2d 1117, 1122 (8th Cir. 1990) (Rule 16(a)(1)(A) applies only to statements made by the defendant);

---

[6] Rule 16 provides, in relevant part that "[u]pon the request of a defendant the government shall permit the defendant to inspect and copy or photograph: any relevant written or recorded statements made by the defendant, or copies thereof, within the possession, custody or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government; the substance of any oral statement which the government intends to offer in evidence at the trial made by the defendant whether before or after arrest in response to interrogation by any person then known to the defendant to be a government agent; and recorded testimony of the defendant before a grand jury which relates to the offense charged." Fed. R. Crim. P. 16(a)(1)(A).

United States v. Tarantino, 846 F.2d 1384, 1418 (D.C. Cir. 1988) (holding Rule 16(a)(1)(A) does not include statements made by co-conspirators even if those statements can be attributed to the defendant for purposes of the rule against hearsay); United States v. Orr, 825 F.2d 1537, 1541 (11th Cir. 1987) (Rule 16(a)(1)(A) does not apply to co-conspirators' statements); United States v. Roberts, 811 F.2d 257 (4th Cir. 1987) (en banc) (Rule 16(a)(1)(A) does not mention and is not intended to apply to statements made by co-conspirators; such statements are more properly governed by the Jencks Act); United States v. Percevault, 490 F.2d 126, 130-32 (2d Cir. 1974) (Rule 16(a) does not encompass statements made by co-conspirators who are potential government witnesses and the Jencks Act does not permit their disclosure before trial).

Moreover, the cases cited by Defendant for the proposition that co-conspirator statements are discoverable simply do not support the contention. In fact, they hold just the opposite. For example, United States v. Giampa, 904 F.Supp. 235 (D.N.J. 1995), analyzed this issue in light of a multi-defendant organized crime case. The defendant in Giampa sought an order compelling the Government to disclose all statements made by co-conspirators which it intended to introduce pursuant to Rule 801(d)(2)(E). 904 F. Supp. at 284. The defendant claimed that because "[t]he alleged conspiracy spanned over approximately two years and involved several individuals who have not been

indicted," he had "no way of knowing what statements the Government intends to use, and no way to prepare to rebut or impeach such statements." Id. at 284. The defendant added that his discovery request was made pursuant to Rule 16(a)(1)(A). Id. at 284.

The Giampa court held that even under a broad interpretation of Rule 16(a)(1)(A), discovery of the statements of co-conspirators may only be permitted on a Rule 16 motion if the Government does not intend to call such co-conspirators as witnesses at trial. 904 F. Supp. at 285; see United States v. Jackson, 757 F.2d at 1491; United States v. Konefal, 566 F. Supp. 698, 706 (N.D.N.Y. 1983). As Giampa explained, 904 F. Supp. at 285, if the Government intends to call such co-conspirators as witnesses, the Jencks Act, 18 U.S.C. § 3500, expressly makes statements of Government witnesses, including co-conspirators, not discoverable until such time as the witness testifies. See 18 U.S.C. § 3500(a).

2. Pretrial Hearings on the Admissibility of Co-conspirator Statements Are Not Required.

Defendant's request for a hearing to determine the admissibility of co-conspirator statements should also be denied. "Preliminary questions concerning . . . the admissibility of evidence shall be determined by the court," Fed. R. Evid. 104(a), and co-conspirator statements will be admitted only after the trial court determines that they fall within the definition of

the rule. Bourjaily v. United States, 483 U.S. 171 (1987). Nonetheless, a separate hearing on the admissibility of the statements is not required. United States v. Blevins, 960 F.2d 1252, 1256 (4th Cir. 1992); United States v. Ruiz, 987 F.2d 243, 246 (5th Cir. 1993).

As the Third Circuit has emphasized, "the control of the order of proof at trial is a matter committed to the discretion of the trial judge." United States v. Gambino, 926 F.2d 1355, 1360 (3d Cir. 1991) (quoting United States v. Continental Group, Inc., 603 F.2d 444, 456-57 (3d Cir. 1979)). In cases where it would be inconvenient or impossible for the Government to prove the existence of a conspiracy (and/or the participation therein of each of the alleged co-conspirators) prior to seeking admission of a co-conspirator's statement, courts act practically. They admit conditionally the co-conspirator's statement, subject to the Government's obligation to prove the conspiracy's existence and each conspirator's participation therein before the close of the Government's case-in-chief. See, e.g., Gambino, 926 F.2d at 1360-61; United States v. De Peri, 778 F.2d 963, 981 (3d Cir. 1985); United States v. Ammar, 714 F.2d 238, 245-47 (3d Cir. 1983); In re Fine Paper Antitrust Litig., 685 F.2d 810, 820-21 (3d Cir. 1982); Continental Group, 603 F.2d at 456-57.

Granted, conditionally admitting a co-conspirator's statement might prejudice a defendant in the eyes of the jury

before a conspiracy is proven to exist or lead to a mistrial if the Government fails sufficiently to connect the defendant to the conspiracy. Gambino, 926 F.2d at 1360. Yet despite the Third Circuit's admonition that such a procedure "should be carefully considered and sparingly utilized by the district courts," id. (quoting Continental Group, 603 F.2d at 457), the Circuit has never required the holding of a pretrial hearing to determine the admissibility of co-conspirator statements prior to trial. Cf. Gambino, 926 F.2d at 1360-61 (upholding admission of co-conspirator testimony subject to later connection); Ammar, 714 F.2d at 245-47 (same); Fine Paper, 685 F.2d at 820-21 (same); Continental Group, 603 F.2d at 457 (same); United States v. American Radiator & Standard Sanitary Corp., 433 F.2d 174, 195 (3d Cir. 1970) (same).[7]

Nor should this Court: such a hearing would necessitate a protracted "mini-trial" that would lead to the identity of potential witnesses and would require the Government to divulge the bulk of its case in advance of trial. See United States v. James, 590 F.2d 575, 582 (5th Cir. 1979) (en banc) ("[i]f [the

[7] Likewise, other Circuits have repeatedly held that a trial judge may conditionally admit coconspirator statements, subject to subsequent satisfaction of the requirements for their admission and make a final determination at the close of the evidence. See, e.g., United States v. Ortiz, 966 F.2d 707, 715 (1st Cir. 1992); United States v. Barrett, 933 F.2d 355, 358 (6th Cir. 1991); United States v. Cardell, 885 F.2d 656, 669 (10th Cir. 1989); United States v. Van Hemelryck, 945 F.2d 1493, 1498 (11th Cir. 1991).

district court] determines it is not reasonably practical to require the showing to be made before admitting the evidence, the court may admit the statement subject to being connected up").

Therefore, a pretrial hearing to determine the admissibility of coconspirator statements should be denied.

III. DEFENDANT'S RE-FILED REQUEST FOR A MINUTELY DETAILED BILL OF PARTICULARS HAS NO MERIT.

Defendant has also re-filed his 2004 request for a minutely detailed bill of particulars encapsulating the complete evidentiary background of the case. This request contradicts the purpose of a bill of particulars and ignores the extensive discovery already provided. While the granting of a bill of particulars lies within the sound discretion of the district court, United States v. Armocida, 515 F.2d 29, 54 (3d Cir. 1975), the specific requests by Defendant in this case go far beyond the bounds of Fed. R. Crim. P. Rule 7(f). For example, Defendant has demanded more specific information regarding the facts and circumstances surrounding the agreement that is the subject of the conspiracy charged in the narcotics conspiracy count.

The extensive materials provided to Defendant in discovery have already been delineated in the accompanying brief. The Government has provided more than adequate information concerning the nature of the charged offenses and when they occurred. Indeed, the Government has provided so much information to Defendant that the primary thrust of his bill of particulars is to request that the Government summarize, distill, and analyze the information already provided. This amounts to asking the Government to do defense counsel's job for him. That is not the function of a bill of particulars.

The purpose of a bill of particulars is to inform the defendant of the nature of the charges against him and to allow the defendant to plead his conviction as a bar to another prosecution. United States v. Addonizio, 451 F.2d 49, 63-64 (3d Cir. 1971); see also Wong Tai v. United States, 273 U.S. 77, 82 (1927). In deciding whether to grant a motion for a bill of particulars, this Court may consider not only the information set forth in the indictment but also the scope of information available through discovery. See, e.g., United States v. Urban, 404 F.3d 754, 771 (3d. Cir. 2005); United States v. Boffa, 513 F. Supp. 444, 485 (D. Del. 1980), aff'd in part, rev'd in part on other grounds, 688 F.2d 919 (3d Cir. 1982). In view of the detailed indictment and the discovery already provided to Defendant, neither of the purposes of a bill of particulars would be advanced substantially by requiring a bills of particulars in this case.

A bill of particulars is not a discovery device and does not permit a defendant "to 'obtain detailed disclosure of the government's evidence prior to trial.'" United States v. Kilrain, 566 F.2d 979, 985 (5th Cir. 1978). There "is no requirement that the Government weave all the information at its command into a warp of fully integrated trial theory for the benefit of defendants." Boffa, 513 F. Supp. at 485. Here, the true purpose of Defendant's motion appears to be to (1) to "unduly freeze [the Government] and its proofs at trial," Boffa,

513 F. Supp. at 485; and (2) obtain responses to an impermissible "set of detailed interrogatories in the guise of a bill of particulars," which was condemned by the Court in United States v. Kenny, 462 F.2d 1205, 1212 (3d Cir. 1972). Such "[w]holesale discovery of the government's evidence" has been consistently denied. Addonizio, 451 F.2d at 63-64. It should be denied in this case as well.

Because the indictment, as supplemented by the discovery materials, gives a fairly complete understanding of what the Government will present at trial, a bill of particulars is unnecessary and inappropriate. United States v. Deerfield Specialty Papers, Inc., 501 F. Supp. 796, 810 (E.D. Pa. 1980). Defendant has been supplied with the "central facts"; his thinly veiled demands for discovery should therefore be denied. See United States v. Vastola, 670 F. Supp. 1244, 1269 (D.N.J. 1987), aff'd in part, rev'd in part on other grounds, 899 F.2d 211 (3d Cir. 1990).

In that regard, it is telling that Defendant's motion, originally filed in July, 2004 and re-filed by Defendant's present counsel without any changes, addresses only the drug-trafficking counts; the murder counts had not yet been added when the motion was originally filed. The request asks for two main categories of discovery, which is couched in terms of a Bill of Particulars: (1) the names of co-conspirators and information on how the Government intends to prove the drug-trafficking

conspiracy count and (2) reports and photos of the surveillance conducted by the Government relating to the narcotics sales.

The first category has already been addressed in the Government's Response to Defendant's Discovery Motion. The second category simply is not the proper subject of a Bill of Particulars. Any and all reports of the surveillance will be turned over as Jencks material at the time the Court orders or at the time prescribed by statute. This portion is also unnecessary as all the tape recordings and videotape of the surveillance have already been turned over to Defendant.

Therefore, Defendant's motion for a Bill of Particulars should be denied.

CONCLUSION

For these reasons, Defendant's motion to strike three of the aggravating factors set forth in the Notice and his requests for discovery and a bill of particulars should be denied.

Respectfully submitted,

CHRISTOPHER J. CHRISTIE
United States Attorney

/s/ Joseph N. Minish
Joseph N. Minish
Robert Frazer
Mark E. Coyne
Assistant U.S. Attorneys

Newark, New Jersey
Date: December 5, 2006

CERTIFICATE OF SERVICE

The undersigned certifies that on this day I caused to be served a copy of the foregoing memorandum, via facsimile and regular mail, upon:

Carl J. Herman, Esq.
Attorney at Law
443 Northfield Avenue
West Orange, New Jersey 07052

Kenneth W. Kayser, Esq.
P.O. Box 2087
Livingston, New Jersey 07039

/s/ Joseph N. Minish
Joseph N. Minish
Assistant U.S. Attorney

Dated: December 5, 2006
Newark, New Jersey

EXHIBIT A

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

UNITED STATES OF AMERICA	:	Criminal No. 03-836
v.	:	Hon. Joel A. Pisano U.S. District Judge
WILLIAM BASKERVILLE	:	EX PARTE ORDER
	:	

This matter having come before the Court on the ex parte application of the United States of America (Christopher J. Christie, United States Attorney, by John Gay, Assistant United States Attorney), for an order denying, restricting, and deferring discovery and inspection pursuant to Rule 16(d)(1) of the Federal Rules of Criminal Procedure, and the Court having considered the written submissions of the government, and good and sufficient cause having been shown,

IT IS on this _____ day of August, 2005,

ORDERED that the United States' application for an order denying, restricting, and deferring discovery and inspection pursuant to Rule 16(d)(1) of the Federal Rules of Criminal Procedure is granted; and it is

FURTHER ORDERED that the United States be, and it hereby is, permitted to make its application wholly in the form of a written statement, namely the Brief of the United States in Support of Its Ex Parte Application for a Protective Order

Pursuant to Rule 16(d)(1), to be inspected by the judge alone; and it is

FURTHER ORDERED that the United States shall be permitted to delay discovery and inspection of statements made by the defendant in conversations recorded by the government; and it is

FURTHER ORDERED that the United States shall be permitted to provide the defendant with copies of transcripts of statements made by the defendant in conversations recorded by the government that have been redacted to prevent disclosing the identity of confidential witnesses; and it is

FURTHER ORDERED that the United States shall be permitted to delay discovery an inspection of any other documents or materials in its possession that would disclose the identity of its witnesses in the above captioned case.

FURTHER ORDERED that the Application, the Brief of the United States in Support of Its Ex Parte Application for a Protective Order Pursuant to Rule 16(d)(1), and all supporting papers shall be sealed until further order of this Court.

HON. JOEL A. PISANO
United States District Judge

EXHIBIT B

EXHIBIT B

1) New Jersey Criminal History Record for Kemo McCray (5 pages)

2) Advice of Rights card dated February 4, 2004 signed by Kemo McCray

3) Written statements dated February 4, 2004 of Kemo McCray (4 pages)

4) List of individuals about whom Kemo McCray provided information to law enforcement (1 page listing 17 individuals).*

*Social security numbers have been redacted

NEW JERSEY CRIMINAL HISTORY DETAILED RECORD PAGE 001

USE OF THIS RECORD IS GOVERNED BY FEDERAL AND STATE REGULATIONS. UNLESS FINGERPRINTS ACCOMPANIED YOUR INQUIRY, THE STATE BUREAU OF IDENTIFICATION CANNOT GUARANTEE THIS RECORD RELATES TO THE PERSON WHO IS THE SUBJECT OF YOUR REQUEST. USE OF THIS RECORD SHALL BE LIMITED SOLELY TO THE AUTHORIZED PURPOSE FOR WHICH IT WAS GIVEN AND IT SHALL NOT BE DISSEMINATED TO ANY UNAUTHORIZED PERSONS. TO ELIMINATE A POSSIBLE DISSEMINATION VIOLATION AND TO COMPLY WITH FUTURE EXPUNGEMENT ORDERS, THIS RECORD SHALL BE DESTROYED *IMMEDIATELY* AFTER IT HAS SERVED ITS INTENDED AND AUTHORIZED PURPOSES. ANY PERSON VIOLATING FEDERAL OR STATE REGULATIONS GOVERNING ACCESS TO CRIMINAL HISTORY RECORD INFORMATION MAY BE SUBJECT TO CRIMINAL AND/OR CIVIL PENALTIES. THIS RECORD IS CERTIFIED AS A TRUE COPY OF THE CRIMINAL HISTORY RECORD INFORMATION ON FILE FOR THE ASSIGNED STATE IDENTIFICATION NUMBER.

STATE ID NO. 621894B FBI NO. 132345LA1 DATE REQUESTED 03/02/2004
NAME: MCCRAY, KEMO D.

SEX	RACE	BIRTH DATE	HEIGHT	WEIGHT	EYES	HAIR	BIRTH PLACE
M	B	03/26/1971	506	130	BRO	BLK	NJ

RECEIVING AGENCY: NJNPD0000 U.S. CITIZEN: YES

FPC: 57540403TTAAAAAAAAAA AFIS NO: 1054518 III: SINGLE STATE
DNA AVAILABLE: NO

ALIAS NAMES/OTHER BIRTH DATES

CLARK, NADIR M.	02/02/1978
FIELDS, KEVIN	03/26/1972
MCCRAY, KEMO	03/26/1974
MCCRAY, KEMO D.	03/26/1973
THOMAS, TROY	03/24/1974
THOMAS, TROY M.	03/24/1974
WILLIAMS, NIZER	03/26/1971

SCARS/MARKS/TATTOOS/MISC NUMBERS

SCAR LEFT EYE	
TATTOO ABDOMEN	"JASMINE"
TATTOO BACK	
TATTOO LEFT ARM	JASMINE
TATTOO LEFT HAND	"JAZZY"
TATTOO RIGHT FOREARM	

LAST REPORTED ADDRESS/DATE : 12/31/2000 [redacted]

PAGE TO FOLLOW

SBI: 621894B RECEIVING AGENCY: NJNPD0000 DATE: 03/02/2004 PAGE 002

********** ARREST 001 **********

ARRESTED 11/17/1989 AGENCY CASE NO: 210987
AGENCY: NJNPD0000 PD NEWARK
001 CNT NJ2C15-1 ROBBERY
001 CNT NJ2C28-4 POSSES STOLEN PROP
001 CNT NJ2C29-2A RESISTING OFFICER
001 CNT NJ2C29-5 ESCAPE

SUMMONS/WARRANT
NO: S381400 DISPOSITION DATE: 03/12/1990
AGENCY: NJ007091J NEWARK MUN CT CRIMINAL

DISPOSITION: DISMISSED
001 CNT: NJ2C28-4 DEG: MAKING FALSE REPORT

SUMMONS/WARRANT
NO: W173276 DISPOSITION DATE: 03/12/1990
AGENCY: NJ007091J NEWARK MUN CT CRIMINAL

DISPOSITION: DISMISSED
001 CNT: NJ2C15-1 DEG: ROBBERY

SUMMONS/WARRANT
NO: W173277 DISPOSITION DATE: 03/12/1990
AGENCY: NJ007091J NEWARK MUN CT CRIMINAL

DISPOSITION: DISMISSED
001 CNT: NJ2C29-2A DEG: RESISTING OFFICER

DISPOSITION: DISMISSED
001 CNT: NJ2C29-5 DEG: ESCAPE

********** ARREST 002 **********

ARRESTED 10/08/1990 AGENCY CASE NO: 215103
AGENCY: NJNPD0000 PD NEWARK
001 CNT NJ2C20-7 POSSESS STOLEN VEH

INDICTMENT/ACCUSATION
NO: I3928-91 DISPOSITION DATE: 08/20/1993
AGENCY: NJ007013A ESSEX COUNTY PROSECUTOR

DISPOSITION: GUILTY FELONY CONVICTION
001 CNT: NJ2C20-7 DEG: 3 RECEIV STOLEN PROP

AGGREGATE SENTENCE DATE: 08/20/1993
COURT: NJ007053J ESSEX CO SUPERIOR COURT
CONFINEMENT 4Y
INCARCERATION: NEW JERSEY SP JAIL TIME CREDIT 1D
AMOUNT ASSESSED $ 50

********** ARREST 003 **********

ARRESTED 05/25/1992 AGENCY CASE NO: 223242
AGENCY: NJNPD0000 PD NEWARK ESSEX
NAME USED: MCCRAY, KEMO DOB USED: 03/26/1974
OFFENSE DATE: 05/25/1992 VENUE: NEWARK CITY PART I CRIMINAL
001 CNT 2C:5-5 BURGL-TOOLS-POSSES

PENDING MUNICIPAL COURT

********** ARREST 004 **********

PAGE TO FOLLOW

SBI: 621894B RECEIVING AGENCY: NJNPD0000 DATE: 03/02/2004 PAGE 003

ARRESTED 07/13/1992 AGENCY CASE NO: 210987
AGENCY: NJNPD0000 PD NEWARK
003 CNT NJ2C15-1 ROBBERY
003 CNT NJ2C39-4 POSS WEAPON
003 CNT NJ2C39-5 POSS WEAPON

INDICTMENT/ACCUSATION
NO: ESX920803038I DISPOSITION DATE: 07/01/1993
AGENCY: NJ007053J ESSEX CO SUPERIOR COURT

DISPOSITION: GUILTY FELONY CONVICTION
001 CNT: 2C:15-1 DEG: 2 ROBBERY

DISPOSITION: GUILTY FELONY CONVICTION
001 CNT: 2C:39-4A DEG: 2 POSS WEAPON

DISPOSITION: DISMISSED
002 CNT: 2C:15-1 DEG: 1 ROBBERY

DISPOSITION: DISMISSED
001 CNT: 2C:39-5B DEG: 3 POSS WEAPON

AGGREGATE SENTENCE DATE: 08/20/1993
COURT: NJ007053J ESSEX CO SUPERIOR COURT
CONFINEMENT 7Y PAROLE INELG TRM 3Y
INCARCERATION: NEW JERSEY SP JAIL TIME CREDIT 403D
AMOUNT ASSESSED $ 250

RECEIVED 09/07/1993 AGENCY CASE NO: P254924
AGENCY: NJ011045C NEW JERSEY STATE PRISON

********** ARREST 005 **********
ARRESTED 05/01/1997 AGENCY CASE NO: A216578
AGENCY: NJ0070000 ESSEX CO SHERIFF'S OFFICE ESSEX
OFFENSE DATE: 02/09/1995 VENUE: ESSEX COUNTY SUPERIOR CT
001 CNT 2C:29-5 ESCAPE

INDICTMENT/ACCUSATION PROMIS/GAVEL NO: ESX95004195-001
NO: ESX950501949I DISPOSITION DATE: 05/09/1997
AGENCY: NJ007053J ESSEX CO SUPERIOR COURT

DISPOSITION: GUILTY FELONY CONVICTION
001 CNT: 2C:29-5 DEG: 3 ESCAPE

AGGREGATE SENTENCE DATE: 05/23/1997
COURT: NJ007053J ESSEX CO SUPERIOR COURT
CONFINEMENT 364D
INCARCERATION: COUNTY JAIL JAIL TIME CREDIT 24D
AMOUNT ASSESSED $ 625

RECEIVED 05/23/1997 AGENCY CASE NO: 69284
AGENCY: NJ007013C ESSEX CO ANNEX/PEN

********** ARREST 006 **********
ARRESTED 01/12/1998 AGENCY CASE NO: 271329
AGENCY: NJNPD0000 PD NEWARK ESSEX

PAGE TO FOLLOW

SBI: 621894B RECEIVING AGENCY: NJNPD0000 DATE: 03/02/2004 PAGE 004

OFFENSE DATE: 01/12/1998 VENUE: NEWARK CITY PART I CRIMINAL
001 CNT 2C:35-10 POSSESSION/USE OF CDS

SUMMONS/WARRANT
NO: W 19980004120714
AGENCY: NJ007091J
PROMIS/GAVEL NO: ESX98900648-001
DISPOSITION DATE: 01/13/1998
NEWARK MUN CT CRIMINAL

DISPOSITION: REMAND LOWER COURT
001 CNT: 2C:35-10C DEG: FAILED TO GIVE CDS TO POLICE

********** ARREST 007
ARRESTED 10/21/2000 AGENCY CASE NO: 24803
AGENCY: NJ0070900 IRVINGTON PD ESSEX
NAME USED: THOMAS, TROY M. DOB USED: 03/24/1974
OFFENSE DATE: 10/21/2000 VENUE: IRVINGTON TOWN
001 CNT 2C:29-2A(2) RESISTING ARREST
001 CNT 2C:29-2B ATTEMPT TO ELUDE POLICE
001 CNT 2C:29-3A(1) HINDER APPREHENSION

SUMMONS/WARRANT
NO: W 20000034170709
AGENCY: NJ007071J
DISPOSITION DATE: 01/09/2001
MUNICIPAL COURT IRVINGTON

DISPOSITION: GUILTY
001 CNT: 2C:29-1A DEG: OBSTRUCT ADMIN OF LAW

DISPOSITION: DISMISSED
001 CNT: 2C:29-2A DEG: RESISTING ARREST

DISPOSITION: DISMISSED
001 CNT: 2C:29-3A(2) DEG: HINDER APPREHENSION

AGGREGATE SENTENCE DATE: 01/09/2001
COURT: NJ007071J MUNICIPAL COURT IRVINGTON
CONFINEMENT 90D
INCARCERATION: ESSEX CTY JAIL AMOUNT ASSESSED $ 255

RECEIVED 01/02/2001 AGENCY CASE NO: 69284
AGENCY: NJ007013C ESSEX CO ANNEX/PEN

********** ARREST 008
ARRESTED 12/31/2000 AGENCY CASE NO: 24803
AGENCY: NJ0070900 IRVINGTON PD ESSEX
NAME USED: MCCRAY, KEMO D. DOB USED: 03/26/1973
OFFENSE DATE: 12/31/2000 VENUE: IRVINGTON TOWN
001 CNT 2C:35-10 POSSESSION/USE OF CDS
001 CNT 2C:35-5 MANUFACTURE/DISTRIBUTE CDS
001 CNT 2C:35-7 CDS ON SCHOOL PROPERTY

SUMMONS/WARRANT
NO: W 20000040450709
AGENCY: NJ007071J
DISPOSITION DATE: 10/11/2001
MUNICIPAL COURT IRVINGTON

DISPOSITION: DISMISSED
001 CNT: 2C:33-2.1B DEG: LOIT OBT/SELL CDS IN PUBLIC

DISPOSITION: DISMISSED

PAGE TO FOLLOW

SBI: 621894B RECEIVING AGENCY: NJNPD0000 DATE: 03/02/2004 PAGE 005

001 CNT: 2C:35-10C DEG: FAILED TO GIVE CDS TO POLICE

DISPOSITION: DISMISSED
001 CNT: 2C:36-2 DEG: POSS OF DRUG PARAPHERNALIA

********** ********** ********** **********

CUSTODY STATUS (AS TRACKED WITHIN NJ DOC OBCIS SYSTEM): 1

INMATE NUMBER: P254924 STATUS DATE: 02/05/1999
STATUS: DISCHGD
LOCATION:
PAROLE VIOLATIONS: 2 ESCAPES: 1 ISP: N

********** ********** ********** **********

CRIMINAL HISTORY DIVERSION PROGRAM AND FELONY CONVICTION SUMMARY

PRE-TRIAL INTERVENTION 000
CONDITIONAL DISCHARGE: 000
FELONY CONVICTIONS: 004
VIOLATION OF PROBATION: 000

COURT DISPOSITION INFORMATION CONTAINED IN THIS RECORD IS REPORTED ELECTRONICALLY FROM THE SENTENCING COURT. QUESTIONS CONCERNING DISPOSITION INFORMATION SHOULD BE DIRECTED TO THE MUNICIPAL OR SUPERIOR COURT LISTED ON THE RECORD. INFORMATION REGARDING CORRECTIONS TO THIS RECORD MAY BE DIRECTED TO THE SBI AT (609)882-2000, EXTENSION 2369, 2457, OR 2886.

END OF CCH RECORD

FD-395 (Rev. 2-28-97)

ADVICE OF RIGHTS

Place NWK FBI H.Q.
Date 2/4/04
Time 3:02 PM

YOUR RIGHTS

Before we ask you any questions, you must understand your rights.

You have the right to remain silent.

Anything you say can be used against you in court.

You have the right to talk to a lawyer for advice before we ask you any questions.

You have the right to have a lawyer with you during questioning.

If you cannot afford a lawyer, one will be appointed for you before any questioning if you wish.

If you decide to answer questions now without a lawyer present, you have the right to stop answering at any time.

WAIVER OF RIGHTS

I have read this statement of my rights and I understand what my rights are. At this time, I am willing to answer questions without a lawyer present.

Signed Keino McCray

Witness: R. McVay Detective #172 NWK TFO

Witness: Eugene Kennedy Det #7456 NWK TFO

Time: 305pm 2-4-2004

On the day of July 28, 2003, Ms. Shawn ask Me to Call Tyrone and order up to 52 521 grams of Crack Cocaine. So I called tyrone, told him to pick Me up Cause I need him to take Me (rick) On lyons & Wainwright to See My Man and I will give him $150.00 (KM) on the Money I owed him. So he Came and got Me took Me over ther I got the Cook up from rick, gave tyron 150.00 I owed him and We left. Ms Shawn gave Me $1600 and I Spent 1,350 and I kept the rest. When I Say I Spent 1,350, I Mean I brought $1,350 wort of Cook up from rick. Tyrone and rick don't no one another, and they never Sold drugs to Another. I Made it Seems to whe thoough they Knew Each other, (KM) and to fool (KM) tape So I Can Keep the rest of the Money, which was $250.00.

KM

No threats, or promises where Made to Me.

Kemo McCray

2.4.04

Pg 3

Clround May or June of 2003, I did dealings with (KM) tyrone on the Side without Ms. Shawn or Mike Knowing anything about it. The dealings I had with tyrone during last Summer involves Me with Setting up deals for other people, him fronting Me drugs, which was Weed, Cocain and hero. During these times these deals were Made I did it without Ms. Shawn or Mike Knowin The Amount of drugs being Sold period, was Not a large Amount. Weed (Small amount) (A Brick he (KM) (20 Grams) CoCain, a Medium Amount), herion (Medium (and there) Amount) also. I (KM) dealt with 4 different people during these drug activities. I made 'bout $350 - $400 On my end of the deals.

KM

No threats, or promises been Made to Me.

Kenno McCray

2.4.04

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(KM) Last year about a year ago, I dealt with rick as far as Side deals. (KM) without Ms. Shawn or Mike Knowing anything 'bout it. I did deals with rick (as far as) Cook up. rough the amount of deals added up to about $250.00 worth of Cook (KM) up I Sold for rick. The Cook up that were been Sold, was $26-$27 grams. I also took him a play station (2) for 1 gram, and I never recieved No. Money Out of it.

KM

No threat, or promises been Made to Me.

Kemo McCray

2.4.04

Pages

Around May, June, July of 2003, I was staying On 14st and Madison Ave. I was hand to hand dealing On My own for a guy Name Quadir. I Sold Cook up and Hevion for him, to help Me try to pay My bills. Ms Shawn or Mike did Not have and Knowledge of my ~~Sale~~ KM activity. It lasted for a Couple of Weeks close to a month and a half. The Amount of Cook up I Sold A day was about 41-50 packs and the Amount of hevoin was 2 bricks a day.

KM

A 41-50 packs Contain 200 vials. $500.00 a day 2 brick of herion Contain 100 bags. the Cook was being Sold 2 for $5.00 and the hevion was being Sold for $6.00 a bag

KM

Quadir is from 14st between Madison an Avon. He live on 9th ave and 12 street. He drives a gold lexus, red porsche. His house has a black iron fence.

KM

No threats, No promise have been Made to Me

Witness: Det R. McClure 2-4-04
Witness: Det. Eugene Kennedy 2-4-04

Kemo McCray
2.4.04

Individuals McCray cooperated against:

1. Taquan Singleton, 05/20/1980, [redacted]
   - Arrested
2. Rakim Singleton, 05/26/1978, [redacted]
   - Arrested
3. Haniff Muhammad, 04/11/1983
   - Arrested
4. Anthony Moultrie, 05/20/1979, [redacted]
   - Arrested
5. Joseph Wash, 09/11/1972, [redacted]
   - Arrested***
6. Gary Smith, 09/27/1970, [redacted]
   - Arrested***
7. Shelton Leverett, 05/28/1972, [redacted]
   - Arrested
8. Calvin Rush, 06/10/1953, [redacted]
   - Arrested
9. MacKenney Dixon, 08/14/1968, [redacted]
   - Arrested
10. Aqeel Dixon, 05/11/1979, [redacted]
    - Arrested
11. Darren Williams, 05/24/1985, [redacted]
    - Arrested
12. **Robert Moore, 01/23/1985, [redacted]**
    - Yet to be Arrested
13. **Kenyour Watson, 06/25/1983, [redacted]**
    - Yet to be Arrested
14. Tyrone Cox, 11/10/1976, [redacted]
    - Arrested
15. Richard Hosten, 01/03/1967, [redacted]
    - Arrested
16. Terrell Thomas, 09/06/1975, [redacted]
    - Arrested
17. Horatio Joines, 04/23/1974, [redacted]
    - Arrested

*** No drug buys were made by McCray against these individuals.