UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY
CASE NO.: 13-5881(PGS)
03-836(JAP)

WILLIAM BASKERVILLE,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.
_____/

PETITIONER'S RESPONSE
TO THE GOVERNMENT'S
RESPONSE, DATED
SEPTEMBER 15, 2015

COMES NOW, Petitioner files this Response pro-se. Petitioner is a layman of the Law, unskilled in the Law, therefore, request that this Response be construed liberally in regards to Haines v. Kerner, 404 U.S. 519 (1972).

Petitioner states the following in this Response to the Government's Response:

1). The Honorable Court only requested for the Government to expand the record in accordance with Section 2255, Rule 7. Not to supplement the record according to Civil Procedure Rule 15(d), which is amended and supplemental pleading. However, the Government is attempting to mislead the Petitioner as well as the Court.

by trying to use a letter, as a supplement, even though the Court never asked, nor ordered for the Government to supplement the record.

2). Therefore, the Government's Response is inaccurate and incomplete. Because the Government is presently not adhering to the Court's Order, which is to expand the record, instead they attempt to circumvent the Order and procedure which was mandated by the Honorable Court.

3). The Petitioner humbly request that the Honorable Court not consider any new Amendments, nor supplements made by the Government, since they have not adhered to the Court's Order.

4). Finally, Petitioner states that if the Court has decided to give consideration to entertain those arguments put forth by the Government, in it's supplement, then Petitioner therefore, humbly request that the Honorable Court also, allow Petitioner the opportunity to respond to the Government's Supplemental Letter in these moving papers herein.

PETITIONER'S RESPONSE
TO THE GOVERNMENT'S
LETTER NUMBER ONE
RESPONSE

1). Petitioner continues to state to the Honorable U.S. District Court that the video would have undoubtedly contradicted Agent Brokos on material aspects in Petitioner's drug case in her testimony. It is the Government who mistakenly contends in their letter that the audio portion of the 3/21/03, video of Agent Brokos statements to her surveillance team would not have undercut her trial testimony. The Government is therefore, attempting to mislead the Honorable Court by not citing all of the relevant portions of the transcripts and instead they cite partial portions of the transcripts.

2). The Government's exclusion of relevant and crucial aspects of Agent Brokos testimony is contradicted by her in the real time statements on the video. For example in the complete context of her testimoney, Agent Brokos, stated the following regarding the license plate:

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

See TR. Page 3573, Lines 22-23. Agent Brokos, states: "I actually saw it very clearly", yet, the Governement concedes that she did not see it al all in it's Response Letter. (Doc. 34 at 2). "The 3/21/03, video clearly indicates that Agent Brokos was unable to see the writing on the license plate during the surveillance", from the audio portion of the 3/21/03, video. However, the Government has asked the

Honorable Court to completely disregard and give no consideration whatsoever to Agent Brokos statements from her personal eye witness accounts of those events as they were unfolding before her on 3/21/03, and instead only review the video because it "matches what Agent Brokos testified to," which is totally absurd. Agent Brokos statements on the 3/21/03, video is the basis of the Court's Order requesting the Government to expand the record so in providing it to the Court, the Court could review and consider those statements evidentiary value to determine if the Petitioner's claim is one of merit.

3). So it is the Petitioner's position that it is a must, that this Honorable Court give full consideration and weight to all of Agent Brokos' statements on the 3/21/03, video, especially those in which the Government has conveniently omitted from its Letter, showing other instances of inconsistencies in Agent Brokos trial testimony, such as the lack of identification of the Petitioner, if a transaction had actually taken place, and giving her surveillance team the wrong make, model, and color of the car, in which the audio from the video also verify that her surveillance team was unsuccessful at getting the plate number of the vehicle in the video.

4). Therefore, this Honorable Court should weigh those statements against the balance of Agent Brokos testimony. See TR. Page 3570-83.

5). Thus, Petitioner restates his argument in his reply to the Government's Response in opposition (Docket No.: 29, at Page

13-16), that trial counsel had in his hands material for a devastating cross-examination on the critical issues in the alleged drug transactions of 3/21/03. However, because of his failure to investigate the audio portion of the surveillance, and confront Agent Brokos, with her inconsistent prior statements to her surveillance team, to which the jury was never apprised of those facts above and their differences, counsel's performance fail below the standards afforded by the Constitution of a counsel guaranteed to the Petitioner by the Sixth Amendment. Thus, had it not been for counsel's deficiences, there is a reasonable probability that the outcome of the proceedings would have been different. Strickland v. Washington; and Cronic v. United States, supras.

Petitioner request an Evindentiary Hearing, based on the merits of this claim.

PETITIONER'S RESPONSE
TO THE GOVERNMENT'S
LETTER NUMBER TWO
RESPONSE

1). The Government continues even in it's Letter number two Response, to mislead and misinform the Court by submitting a Doc-Ket Number 45, Motion in Limine, stating that "trial counsel made an attempt through pretrial Motions to exclude the relevant drug purchases, based on a failure to establish a chain of custody". And 'that the trial Court properly exercised it's discretion in denying trial Counsel's chain of custody Motion". (Doc. #34 at 3).

2). These alleged facts CONTENDED by the Government is belied by the record, based on the following reasons:

(1). Docket Number 45, Motion in Limine, Petitioner was only charged with a drug conspiracy at the time it was filed. Two weeks later, the Government supreceded the Petitioner at Docket Number 48, in the alleged involvement in the McCray murder, at Docket 84, which is the Fourth superceding indictment to which the Court dismissed all previously pending Motions WITHOUT PREJUDICE, Motion for Discovery, regarding capital authorization, filed by William Baskerville. Docket entry 15, Motion to Dismiss, filed by William Baskerville, Docket entry 34, first Motion for Extention of time to file Motions, filed by William Baskerville. Docket entry 45, Motion in Limine, filed by William Baskerville. Docket entry 40, Motion for Extention of time filed be William Baskerville.

3). Although counsel resubmitted some of the Motions dismissed without prejudice by the Court, which are the second Motion for Discovery, and Motion for Bill of Particulars, and Motion to Dismiss. See Docket entry 89, to which the Court denied said Motions at Docket entry 111. However, counsel never resubmitted for filing, Motion in Limine, at entry 45, challenging the

chain of custody or any other arguments therein, rendering this Motion moot.

4). But, yet, again this is proof of the Government's attempt to mislead and deceive the Honorable Court with their continuous misrepresentation of the facts, knowing good and well, that trial counsel never resubmitted Docket entry number 45 Motion for filing, as stated, in which the U.S. District Court did not dismiss the Motion summarily on its merits.

5). Therefore, the Honorable Court should not waste it's time or give any consideration to the Government's number two arguments for the following reasons:

> (1). Docket entry number 45, was not one of the items requested by the U.S. District Court in it's expansion Order. And therefore, this document has no evidentiary worth because it was never resubmitted for filing after the Petitioner's fourth superceding indictment.
>
> (2). Contrary to the Government's argument in it's Letter at number two; counsel never challenged the chain of custody. Therefore, the Court should accept the Petitioner's argument that counsel was again ineffective and accept Petitioner's claim as true and deny the Government's Response Letter Number Two, as baseless without merit. Because it has no shoe laces in which to tie it's shoes with.

Counsel's ineffectiveness fail below the standard of representation and prejudiced the Petitioner and caused him the rest of his life in a Federal prison. Along with the Government's prosecutorial misconduct and intentional misrepresentations to mislead and misinform the Honorable Court. Strickland v. Washington; and Cronic v. United States.

Again, Petitioner request a remand and or Evidentiary Hearing, based on the above stated facts.

PETITIONER'S RESPONSE
TO THE GOVERNMENT'S
LETTER NUMBER THREE
RESPONSE

1). Petitioner reincorporate those facts in his reply to the Government's Response and Opposition, Docket 29, at Pages 4-7, and Pages 51-55, to minimize redundancy.

2). Petitioner reasserts that the Government is yet again attempting to mislead the Honorable U.S. District Court, in it's number three letter argument, by obfuscation of the facts. (Docket 34, Page 3-6).

FIRST

1). The Government has conceded that "the Government does not have a record of the exact number of calls provided to counsel". (Docket 34, at Page 4). Which is proof of what Petitioner asserted in his reply (Docket 29, at Page 52). Although the Government admits the fact that they cannot produce any evidence that they provided Petitioner's trial counsel with the calls requested by the Honorable Court, from the first Curry wiretaps the Government seeks to compensate it's failure by offering a false supplemental declaration from counsel Herman which the record in it's complete context belies. (See TR. Pages 3803; and Pages 4778-4784).

SECOND

1). So these ("Tapes") or numerous ("call") referred to by the Government in its letter, ID., are not actually "Tapes" or numerous "calls" in it's real sense, but are three individual taped

recorded calls from the Curry wiretaps and the balance of those calls between Bergrin and Curry and Curry and Rakeem Baskerville, on the day of the Petitioner's arrest which were the subject of the Government's Disqualification Motion, Docket No. 23. These "Tapes" or "Calls" were the basis of the colloquy before the trial Court, which the record in it's complete context, truly reflect. ID.

THIRD

1). Thereby, the Government in it's Letter and counsel in it's Supplemental Declaration HD II, contend that counsel received all the wiretap calls from the Curry case. They seek to support this false claim by mischaracterizing the facts from the record and documentary evidence. Since those call between Curry and Bergrin and Curry and Rakeem Baskerville, were the subject of a prior proceeding (Docket No. 23), the Government was compelled to turn those calls over under it's "Brady" obligation. However, those other calls from the Curry wiretap were never the basis of any proceedings, therefore, the Government felt it was not obliged to turn them over under "Brady".

FOURTH

1). The Government contends in it's Letter (Docket # 34, at Page 6), that Petitioner "was never offered the deal Bergrin claimed he could get" Petitioner, and that he "offers no evidence that the Government offered him a plea deal as Bergrin claims", in the December 4th, 2013, call with Curry (call No. 8), is a mischaracterization of the call between Bergrin and Curry and it is immaterial to Petitioner's claim. (Docket No. 29, at Pages 51-55).

2). In call No. 8:(1), Bergrin never claimed that the Government offered Petitioner a deal; (2), It was Curry who made the inquiry as to how much time Petitioner was facing to which Bergrin initially replied 18 years. And his final statement on that very subject was that on a plea Bergrin could get it down to 13 years. So, here yet again, is more evidence of the Government's disingenuous attempt to twist and spend the evidence. Importantly enough is the Petitioner's assertion in his reply (Docket No.: 29, at page 53-54). And in which the call showed that the Petitioner nor anyone else believed that Petitioner was facing life. Thereby, contriadicting the Government's theory of motive for Petitioner to murder McCray.

FIVE

1). The Government and counsel in the Government's Letter (Docket No.: 34, at Page 6), continues in their effort to mislead the Honorable Court with their false contentions by downplaying Young's perjuried testimony, as mere "misidentification of the third individual in the car with Curry and Young when Bergrin called from Court on November 25, 2003)".

2). Most importantly the Government and trial counsel has now failed to realize and they purposefully overlook key facts that: (1). Young's perjuried testimony concerning the Bergrin call to Curry, which was that he falsely stated he (Young) and the third individual (Rakeem Baskerville) came to the conclusion that it was "KeMO and not K-MO" to which the record reflects that trial counsel Kayser, had acknowledged this very fact during trial. (See

Transcript, Pages 5444-5445); (2). That the Government exploited this false testimony by prosecutorial argument, affirmatively urging to the jury the truth of what it knew to be false. (See Trial Transcript, Page 5713). Moreso, the Government and counsel in the Government's Letter (Docket No.: 34, Page 6), conceded that counsel failed to review the audio of those calls from November 25, 2003 (call number 1,2,3). Yet, they attempt to offer feeble justification to the Honorable Court for their negligence in failing to investigate those audio recordings provided to counsel by the Government.

3). Therefore, as asserted by Petitioner in his reply, (Docket No.: 29, at Pages 4-7), had trial counsel reviewed the audio recordings of the Novermer 25, 2003, calls, they would have been apprised of the facts that the Government either solicited and or failed to correct the perjuried testimony of Young. Thus trial counsel's deficient performance in failing to investigate Young and or review the audio recordings from November 25, 2003, Bergrin calls, greatly prejudiced Petitioner where the Government's knowingly use of Young's perjuried teatimony violated Petitioner's Constitutional right to due process of Law, establishing a Strickland v. Washington, 466 U.S. 668-687, violation of ineffective assistance of counsel.

4). Thus, Petitioner has also made a colorful showing from the facts stated above as well as his reply brief (Docket No.: 29, at Pages 51-55), that the Government violated Petitioner's "Brady rights" by suppressing those tapes from the Curry wiretap.

PETITIONER'S RESPONSE
TO THE GOVERNMENT'S
LETTER NUMBER FOUR
RESPONSE

1). The Government in it's Letter Four Argument (Docket No.: 34, at Pages 7-8), has still failed to make an argument that Petitioner did not receive the F.B.I. 302 Report, pertaining to the information therein, stated by Government informant Roderick Boyd. See (Docket No.: 34, Government Exhibit 4).

2). Instead they rely on trial counsel's contentions which is one of hindsight in their declarations that their strategy to paint Young as a cold-blooded killer, and to imply that anyone other than Young was the shooter would have been detrimental to the Petitioner's defense. Citing trial counsel's declarations from the Government's opposition (HD24FN6; and KD24FN6), and that the 302 report was cumulative of information addressed during Petitioner's trial, which is without merit because it is belied by the record.

3). Petitioner reincorporates his argument from his reply (Docket No.: 29, at Pages 55-59), to prevent redundancy.

4). As asserted by Petitioner in his reply to the Government's opposition that: (1). the Boyd 302 report was suppressed by the Government to which they still offer no proof that it was not violating Petitioner's due process under "Brady"; (2). The information contained within, pointed out the corroborating indicia of reliability within it, relating to the identity of the McCray shooter, who the witness exactly identified from the photo array

of the person who he believed shot McCray, which is supported by the record; (3). The report was not just exculpatory, but it was also, of an impeaching nature as well.

5). It is the Government's claim that Petitioner's "chosen quotation(s) is pulled out of context". See (Docket No.: 34, at Pages 7-8). Moreover, the Petitioner has shown throughout, from the Government's Letter that it is the Government who has taken and pulled out of context evidence from the record, creating a mosaic for the Honorable Court.

6). Thus, the Court should review the record in it's entirety which was cited by both the Petitioner in his reply and the Government in it's Letter (Docket No.: 34, at Pages 7-8). So that the Court could properly analyze the evidence therein in it's complete context. Because it is the Petitioner's assertion that after full analysis by this Honorable Court that it will support Petitioner's claim. And because of these disputes this Court should grant the Petitioner an Evidentiary Hearing to finalize the truth.

PETITIONER'S RESPONSE
TO THE GOVERNMENT'S
LETTER NUMBER FIVE
RESPONSE
AND
THE GOVERNMENT'S NUMBER II,
SUPPLEMENTAL ARGUMENT.
IN RESPONSE TO PETITIONER'S REPLY
AND
TRIAL COUNSEL'S FAILURE
TO OBJECT TO AGENT BROKOS
RELYING ON MCCRAY'S STATEMENTS
AND FAILURE TO PRESERVE
THIS ISSUE ON APPEAL.
DOCKET NO.: 34, AT PAGES 9 AND 11
(GOVERNMENT'S SUPPLEMENTAL).

1). The Government claims in their point number five (Docket No.: 34, at Page 9), and their II Supplemental (Docket No.: 34, at page 11), pertains to the same issue, trial counsel's failure to object to the Hearsay Statements of McCray, as etc...as testified to by Agent Brokos, under Rule 804(b)(6). Therefore, Petitioner will collectively address this below.

2). As noted by Petitioner in his reply to the Government's point Number Two claim above, (See Pages 6 and 7), that Government's Exhibit No.: 5, (Docket No.; 45, Motion in Limine), was never re-submitted for filing by trial counsel. Thus, rendering that document, and any argument made therein, moot (void).

3). So, the Honorable Court, should not entertain it as evidence or proof, that: (1). In support of any of the Government's false claims, in which this document was used to support any of their claims in their Letter; (2). Nor those false claims made by trial counsels in their declarations from the Government's opposition (HD 31; KD 31), which is pursuant to the Court's Order

(Docket No.: 30).

4). Petitioner continues to assert that trial counsel failed to object to Agent Brokos relaying of McCray's statements and failing to perserve the issue for Appeal.

5). Petitioner reincorperates his reply to the Government's opposition (Docket No.: 29, at Pages 16-21), to minimize redundancy only referring to those relevant portions therein.

6). The Government and counsel has offered two Motions as proof of their compliance, pursuant to the Court's Order. Again, (Docket No.: 45, In Limine), which the record reflects is void. And (Docket No.: 106), a "letter-Memorandum of Law in Response to Government's Motion pursuant to Fed.R.Evidence 804(b)(6)", which was cited by Petitioner in his reply to the Government's opposition (Docket No.: 29, at Page 17).

7). Thus, the Government and trial counsel offers no proof, written or otherwise, requesting for a pre-trial hearing, or objecting to any of the Hearsay Statements of Agent Brokos. Therefore, counsel's statement in their Declarations that counsel "made ("objections"), through written briefs and arguments before the Court" was false and belied by the record as stated by both trial counsels". ID. (HD 31; KD 31).

8). Moreover, is that the Government's attempt to waste the Court's time with their false II Supplemental claims (Docket No.: 34, at Page 11), that Petitioner "ignores trial counsel's pre-trial

efforts to make legal arguments in an attempt to keep the jury from hearing McCray's statements". Is truly disingenuous of them as the Government likes to have it coming and going both ways when it's convenient for them.

9). The Governent clearly ignores those facts from the record as stated by the Petitioner in it's reply to the Government's opposition (Docket No.: 29, at Pages 16-17), that "however, the Government's 2255 Response, is in direct conflict with the position that it took in it's Appellee's Brief. That the Defense failed to make any objection to the procedure used by the District Court in admitting McCray's out of Court statements".[1]

10). More importantly is that if the Honorable Court closely examines both the Petitioner's assertions in it's reply to the Government's Opposition, ID. And those contentions made by the Government in it's Appellee's Brief (Exhibit "A"), it will be shown that they are completely identical to one another. Thus, proving that the Government's claims are completely belied by the record.

11). Therefore, as asserted by the Petitioner, trial counsels made no effort to challenge those out of Court Statements after filing the Response to the Government's In Limine Motion. (Docket No.: 106), which is what the record truly reflects. Thus, their inactions violated Petitioner's Sixth Amendment rights to effective

Footnote 1
Attached is Exhibit "A", are those relevant pages from the Government's Appellee's Brief, at Pages 57-71.

assistance of counsel by refusing to raise an objection to those out of Court Statements of McCray as testified by by Agent Brokos. Thus, failing to preserve the issue for Appeal. Petitioner was therefore, prejudiced by trial counsel's deficient performance.

THE GOVERNMENT'S II SUPPLEMENTAL ARGUMENTS IS A MISINTERPRETATION OF FACTS SUPPORTING PETITIONER'S CLAIMS AND THEY DISINGENUOUSLY CONTINUE TO MISREPRESENT THE FACTS FROM THE EVIDENCE

1). Petitioner does not attempt to relitigate those claims he had already stated in his 2255 Petition. And his Reply to the Government's Opposition. However, he wishes to clear the muddling of the facts created by the Government pertaining to Petitioner's claims and those facts from the evidence.

2). The Government in it's II Supplemental (Docket No.: 34, at Page 10), in their claims, "trial counsels failed to object to the leading questions" and "trial counsels failed to object to hearsay testimony", cited from Petitioner's Opposition. (Docket No.: 29, at Pages 2-3), is a misrepresentation of the Petitioner's claim. Petitioner used these two instances of counsel's failures as examples, in his Reply to the Government's Opposition, stating that the Government and counsels contentions was an imaginary ploy to camouflage counsel's ineffectiveness under the umbrella of strategy.

3). So what the Government cited from the record in it's Letter that "the prosecutor explained to the trial Court that the leading was "intentional with defense counsel on notice'" (Docket No.: 34, at Page 10), and (TR. Page 4228). However, the Government has taken trial counsel's Kayser's response out of context to which trial counsel Kayser demonstrates through his response his state of confusion of when the Government was leading the witness, inten-

tional or otherwise.

4). Trial counsel Keyser's response was "By the same token, while I was sensitive to that aspect it was never clear to me when the Leading comes for that reason and when it's for some other reason, so it's hard to make that judgement". (TR. Page 4229).

5). More importantly the trial Court's statement was an admonishment of trial Counsel's Kayser obligation to his client to object. And not some mere "offhand remark about the duties of an attorney". ID.

6). The Government in II Supplemental claim (Docket No.: 34, at Pages 12-13), points to the Affidavits that Petitioner submitted in his Reply to the Government's Opposition (Docket No.: 29, Exhibit "D"). Thus, the Government's position here is belied by the record.

FIRST

In Petitioner's Reply to the Government's Opposition (Docket No.: 29, Exhibit "C") of the Government's Brief in Opposition to Petitioner's Rule 33 Motion. The Government's position at that time was that Petitioner "had even better sources: his own dealings with Bergrin and those other unindicted co-conspirators in the McCray murder, including (Petitioner's) brother, Rakeen, and his cousin Curry". (Petitioner) "knew the unindicted co-conspirators and dealt with them regularly" and his trial "counsel could have interviewed them and called them as witnesses"which is in complete contrast with their position now.

SECOND

The Government concedes that "Rashidah Tarver testified consistent with her Affidavit in Bergrin's 2013 trial. Her testimony directly contradicted Young's on multiple points". (Docket No.: 34, Page 12, Footnote 14). Also, it should be noted that she testified in the Bergrin I, trial to which her testimony was consistent and contradictory to Young's testimony, which resulted in a hung jury. In which Bergrin was only tried on the counts relating to the McCray murder. (Bergrin I, Transcript Page 38-60, date 11/09/2011).

THIRD

The Government and trial counsel have overlooked certain key factors for counsel's ineffectiveness: (1). That counsel failed to investigate by interviewing those witnesses cited in Petitioner's Reply to the Government's Opposition. (Docket No.: 29, Exhibit "C"), which the Government has themselves acknowledged as cited above; (2). That the Government mischaracterizes Petitioner's statement which they cited in their Letter (Docket No.: 34, at Page 13, Footnote 16). At the time of Petitioner's statement, it was based upon the advise of trial counsel during trial at their assessment of the evidence offered by the Government to Counts One and Two. To which the Petitioner thought at that time that counsel was acting in his best interest which is evident they were not. The Government has overlooked that Petitioner states in his Letter:

> "These are just a few of the issues and concerns that I was having during the preparations before and during the trialing of this case that I believe this Court should be made aware of. I am sorry that I haven't addressed these issues and concerns of mine earlier, but as you are aware your Honor, I'm not a defense attorney and I don't know of any legal standings my concerns may have."

7). It is a recurring theme of the Government to be disingenuous by repeatedly misinterpreting the Petitioner's claims and misrepresenting those facts in the record. More importantly, is their continuous efforts to try and mislead the Honorable Court by pulling Petitioner's claims out of context. As well as the facts found within the record, in support of their false contentions.

8). Moreover, is the Government's II Supplemental claims (Docket No.: 34, at Pages 13-15), relating to Petitioner's Ground One: claim H and claim I, from Petitioner's Reply to the Government's Opposition. (Docket No.: 29, at Pages 10-12). Specifically is their claim I argument to which they have pulled Judge Pisano's statements completely out of context. Even falsely claiming Judge Pisano substantially considered the statements at issue and determined that they were admissible as co-conspirators statements". (Docket No.: 34, at Page 14).

9). When "Judge Pisano stated that had Young experienced first hand as one of the co-conspirator's himself in the conspiracy that is, I think reasonably identified in the indictment." ID. He was not referring to those statements that are the subject of Petitioner's claims in either his claims H and or I, ID. But rather he was expanding on some findings and rulings that he had made earlier in the trial. (TR. Page 5404), in admitting co-conspirators statements for the drug distribution which is even evident from those pages cited by the Government in it's II Supplement (Docket No.: 34, at Pages 13-15). Judge Pisano's com-

plete statement cited by the Government was:

> "We then have the testimony of Anthony Young, who testified with respect to the drug conspiracy, as to his knowledge having been -- having had experienced first hand as one of the co-conspirators himself in the conspiracy - that is, I think reasonably identified in the indictment. (See TR. page 5408).

10). Thus, the record belies the Government's false claims and does not support their false contention. More importantly is those pages that were not cited by the Government in it's II Supplemental (Docket No.: 24, at Page 15), from the trial record (TR. Page 5410-5413), wherein, Judge Pisano referred to those statements of Young that are the subject matter of Petitioner's Ground One claims H, and I. ID. In his opinion on the imposition of Rule 804(b)(6).

11). The Government's final claim that "pretrial motions regarding co-conspirators'' statements show that counsel vigorously litigated this issue", citing that moot (void) (Docket No. 45, Motion In Limine), (Docket No.: 34, at Page 15), is false and belied by the record as stated from above.

Thus, as pointed out in Petitioner's reply to the Government's Opposition (Docket No.: 29, at Page 13), that the Government and counsel still has not offered any proof for their false contentions. Hereby, yet again attempting to mislead the Honorable Court by offering false proof or either none at all.

12). The Government in it's II Supplemental claim (Docket No.: 34, at Pages 15-16), relating to Petitioner's Ground One, claims B and K, in his Reply to the Government's Opposition (Docket No.: 29, at Pages 21-24), that (Petitioner) did not bring up, in his letter to Judge Pisano, his complaint that he supposedly asked trial counsel to investigate "those records" (Docket No.: 34, at Page 15). The Government again clearly overlooked the statements from the Petitioner in his Letter that he stated:

> "These are just a few of the issues and concerns I was having during the preparations before and during the trialing of this case that I believe this Court should be made aware of". (Exhibit "B").

Reply to Government's Opposition. So, although Petitioner never specifically mentioned counsel failed to investigate the phone records nor object to the hearsay testimony of Deputy Cannon regarding the Hudson County phone records, it is clear from Petitioner's Letter that he told the Court that he had other "concerns during the trialing of this case". Petitioner did address these specific "concerns" to his Appellant counsel, via a Letter to his Appellant counsel.[2] (See Sxhibit "B").

13). More importantly is that Petitioner's Appellant counsel Mr. Berman, acknowledged these facts in his Declaration cited in the Government's Oppossition Brief. (HD3 at Paras. 30 and 31). To which Appellant counsel stated: "My recollection is that Marshall Cannon testified without objection from trial counsel. Thus, any

Footnote 2

Exhibit "B" is the Letter from Petitioner to Appellant counsel.

errors were not perserved for Appeal and would have been 'subject' to the highly unfavorable 'plain error' standard of review". (Government Opposition HD, Para. 31). Thus, it is evident that Petitioner did have "concerns" pertaining to other instances of trial counsel's ineffectiveness, by ignoring evidence in the case or challenging evidence presented by the Government.

14). It should be noted that the Government again has stated in it's II Supplemental (Docket No.: 34, at Page 15), that "(Petitioner) also fails to acknowledge that the Government confirmed yet again before filing it's Opposition Brief that those phone records do no exist. Opposition 20-21". More importantly, that the Government has still failed to offer any documentary proof supporting this false contention in it's Opposition and in it's II Supplemental, but rather tell the Court to just accept our word that we confirm that those records do not exist, is perfidious.

THE GOVERNMENT DID OFFER
INCONSISTENT MOTIVES AND THEORIES
FOR THE MCCRAY MURDER,
BETWEEN THE TRIAL OF PETITIONER AND
BERGRIN

1). The Government claims in it's II Supplemental (Docket No.: 34, at Page 17), is completely belied by the record as pointed out in Petitioner's Reply to the Government's Opposition (Docket No.: 29, at Pages 32-38). As noted by Petitioner in it's reply to the Government's Opposition that the Government's theory in Petitioner's case was that: (1). Petitioner was the only one who stood to gain something from McCray's death; (2). It was Petitioner who initiated and demanded that McCray be killed as early as November 25, 2003; and (3). There was no concerns about Petitioner cooperating with the authorities.

2). However, in Bergrin I, the Government's theory was: (1). Petitioner was not the only one who stood to gain from McCray's death, that Bergrin wanted McCray dead for his own personal reasons; (2). Bergrin was the one who initiated, encouraged, instructed, demanded, and counseled members of the gang to murder McCray, on December 04, 2003; and (3). Bergrin was concerned about Petitioner cooperating with the Government. (Docket No.: 29, at Page 32-38).

3). Thus, these facts from within the records shows that the Government's theories were diametrically opposing. Rendering the Government's argument inaccurate. Because the records from both trials show that the Government's theories were factually contradictory and inconsistent.

YOUNG'S TESTIMONY
WAS DIFFERENT BETWEEN TRIALS
AND THE GOVERNMENT'S CLAIMS
ARE BELIED BY THE
RECORD

1). Petitioner in his Reply to the Government's Opposition (Docket No.: 29, at Page 41), stated "that the record is replete of several examples", That "AUSA Minish who arranged, constructed, and taylored the questions he'd asked Young, so that they would correspond with each proceeding. And Young's answer was crafted to fit whatever script the Government proffered at the time".

2). Petitioner only offered two sets of examples of Young's inconsistent testimony between Petitioner's trial and Bergrin's I trial. In it's Reply to the Government's Opposition. (Docket No.: 29, at Page 41-43).

3). However, it should be noted that in Petitioner's Affidavit attached to his 2255 Petition, (Docket No.: I, Affidavit 20(D) 1-22), that Petitioner cited at least 22 inconsistencies in Young's testimony to which some were even admitted lies by Young himself. For example: See Affidavit (Docket No.: 1, Affidavit Para. 20(D) 18).

4). So those two examples that Petitioner used in his Reply to the Government's Opposition of Young's inconsistent testimony cited by the Government in it's II Supplemental (Docket No.: 34, at Pages 17-18), in which the Government disingenuously distorts the facts by attempting to infer what Young meant by ("request or demand" during the trial of Petitioner). And when Young found

out from who, how much time the Petitioner was allegedly facing which is relevant to Petitioner's conviction; (1) it was the basis for the motive according to the Government's theory of this case, and (2) at whose insistance was the murder perpetrated for. See again (Docket No.: 29, at Pages 41-43).

THE GOVERNMENT KNOWINGLY
SPONSORED FALSE TESTIMONY
BECAUSE YOUNG'S TESTIMONY
WAS NOT JUST MERELY
INCONSISTENT,
BUT IT WAS A LIE

1). The Government in it's Opposition Brief and II Supplemental claims have repeatedly attempted to misconstrue Petitioner's claims and the evidence from the case. Thereby, putting every effort to deceive the Honorable Court with their false and dubious practices and contentions. Instead of the Government admitting that they injected false evidence into Petitioner's trial and admit that Young lied, they continue up to this point to uphold this charade.

2). The Government has pulled Exhibits "E" and "F", from Petitioner's Reply completely out of context in their II Supplemental. (Docket No.: 34, at Pages 18-19). These Exhibits were not used to show that "the Government had knowledge of the third person in the car during the Bergrin phone call" as they claimed. ID. What Exhibit "F" does show is that both AUSA's had knowledge of who was not in the car at the four P.M. call, between Curry and Bergrin. Petitioner made it very clear in his Reply to the Government's Opposition, the purpose of those Exhibits. See Reply (Docket No.: 29, at Pages 46-49).

3). Thus, the Government is being disingenuous by trying to spin and twist the facts from the evidence. Exhibit "F", from Petitioner's Reply is evidence showing that both AUSA's Minish and Fanzer, had knowledge that Rakeem Baskerville, was: (1). Not in the car at the four P.M. call, between Bergrin and Curry; (2). That

because he was not in the car at the time of the Bergrin and Curry call, Rakeem Baskerville and Young could not have come to the "conclusion" identifying "Kemo", as"K-mo"as Young falsely testified to at Petitioner's trial. See (Trial Transcript, at Pages 4352-4353); (3). Instead of the Government correcting this fallacy they instead exploited it to the jury. (Trial Transcript, at Page 5713).

4). More importantly, is how the Government are attempting to spin the evidence in it's possession in their efforts to deceive and mislead the Honorable Court, by first offering it's knowledge of the call between Curry and Rakeem Baskerville, as "phone records" in it's Opposition clearly excluding the facts that they knowingly possessed the actual phone calls mentioned by Petitioner in his 2255 Motion and reply to which they concede that "the Government was aware of the calls itself". See, (Government Opposition Brief, at Pages 71-72, and II Supplemental, Docket No.: 34, at page 18).

5). It must be noted that the Government has failed to dispute and or contest Petitioner's claims that they sponsored false testimony during Petitioner's trial. Rather they have focused their energies in trying to show that the taped calls of Bergrin and Curry corroborate certain aspects of Young's testimony, in their II Supplemental.

6). However, the Government is delusive of the facts from all the evidence even that which they cited from those Exhibits, from Petitioner's Reply (Exhibit "E" and "F"), calls, (calls 1-3) and the record (Trail Transcript, Pages 4338-4353). After closely

examining all of this evidence in its entirety, in which it also, contradicts certain other aspects of Young's testimony as well.

CONCLUSION

The Government continues to distort the facts, and attempts to pull the cover over the lies it has presented during Petitioner's trial and those that they have been manufacturing in their Letter and their II Supplemental argument in an attempt to keep the Honorable Court from discovering the naked truth about the Government's neferious trial tactics; violating the Petitioner's due process rights under the Fifth and Sixth Amendments. Therefore, the Honorable Court should grant the Petitioner an Evidentiary Hearing at the least, ordering the Petitioner's conviction and sentence be vacated and granted a new trial.

Respectfully Submitted,

10/16/2015
Executed On

William Baskerville
#25946-050
FCC-COLEMAN-MEDIUM
POB 1032
COLEMAN, FLORIDA
33521-1032

CERTIFICATE OF SERVICE

I, William Baskerville, majority, CERTIFY, that a true and correct copy of the foregoing has been furnished, via United States Postal Service, this 16 day of October, 2015, to:

Clerk of US District Court
District of New Jersey
Trenton Division
402 East State Street
Room 2020
Trenton, New Jersey
08608

AND

U.S. Attorney's Office
970 Broad Street
Suite 700
Newark, New Jersey
07102

Respectfully ~~Submitted~~,

William Baskerville
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COLEMAN, FLORIDA
33521-1032

Title 28 U.S.C.
Section 1746

EXHIBIT "A"

No. 07-2927

IN THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

UNITED STATES OF AMERICA

v.

WILLIAM BASKERVILLE,
Appellant

Appeal From a Final Judgment in a Criminal Case of the United States District Court for the District of New Jersey (Crim. No. 03-836)
Sat Below: Honorable Joel A. Pisano, U.S.D.J.

BRIEF FOR APPELLEE

RALPH J. MARRA, JR.
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On the Brief:

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coconspirator statements. Third, he argues that the statements should not have been admitted under the theory of forfeiture by wrongdoing.

Baskerville's challenges to the admission of this evidence should be rejected. First, as shown below, Baskerville did not properly preserve for appellate review either his now-stated objections to the introduction of this evidence or his now-stated objection to the procedures used by the District Court in determining the admissibility of the statements. Second, this Court need not reach the issue of whether some of McCray's statements were properly admitted as coconspirator statements, since all of McCray's out-of-court statements were properly admitted pursuant to Fed.R.Evid. 804(b)(6), which governs forfeiture by wrongdoing.

Procedural History

Prior to trial, the Government filed an *in limine* motion seeking to introduce statements by McCray pursuant to Fed.R.Evid. 804(b)(6). These included recorded statements made by McCray on wiretaps as well as statements that McCray made to Agent Manson during the undercover operation. The Government argued that the statements were admissible because Baskerville participated in the conspiracy to murder McCray for the purpose of preventing him from testifying at Baskerville's upcoming trial.

In his written response to the Government's motion, Baskerville requested a pretrial evidentiary hearing to determine the admissibility of the statements. SA24-28. The District Court held a hearing on the Government's motion on January 5, 2007. A37. The Court explicitly asked the parties how it should proceed in making its admissibility determination. A47-48. The Government noted that the Court had the discretion to hold a pretrial hearing, to hold a hearing outside the jury's presence during trial, or to deny a hearing entirely and rely on the testimony at trial to determine the admissibility of the statements. A44. The Government stated its preference, which was to allow the statements to be admitted into evidence conditionally, subject to the anticipated trial testimony. A49. Immediately after that, defense counsel was asked for his position, and counsel simply replied, "Judge, I don't think I have anything to add." A50. During the hearing, defense counsel had not repeated his written request for a pretrial determination of admissibility, but had instead discussed only the standard to be applied, *i.e.*, preponderance of the evidence versus a higher standard, such as clear and convincing evidence.

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

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

A50 (emphasis added). The Government suggested that the Court might be able to hold a hearing or consider a Government proffer of evidence outside the presence of the jury, at an appropriate mid-trial point. A50. The Court agreed that this was a possible way to proceed. A50-51.

At the start of the second day of trial testimony, the District Court *sua sponte* addressed the forfeiture by wrongdoing issue. A437-38. The Court anticipated that the Government would seek to elicit some statements made by McCray from the then-current witness, Agent Manson, who was McCray's F.B.I. handler. A437. The Court noted that the Third Circuit had not yet taken a position on the standard for the admissibility of such statements, and that there was a split between the Circuits, some requiring the Government to demonstrate forfeiture by wrongdoing under the "clear and convincing evidence" standard and some requiring proof by only a "preponderance of the evidence." A438. The Court stated:

> I don't know where the arguments are going on this, but *if there's going to be an objection during Agent Manson's testimony*, if the Government seeks to elicit McCray's statements, *I may ask you to recall Agent Manson after some other testimony has been put in.*
>
> I haven't ruled on this one way or the other yet and I want to see how this comes out, but I just want to give you a heads up that I'm thinking in advance and let's see how it goes.

A438 (emphasis added). The Government responded that some of the statements from McCray that it would be eliciting are non-hearsay, and the Court acknowledged that the issue could be dealt with as it arose during Agent Manson's testimony:

> THE COURT: I don't know if Mr. Herman or Mr. Kayser [both defense counsel] will object if Agent Manson starts talking about statements made by McCray. *If they don't object, we don't have an issue. If they do object, we need to deal with it* and I thought it would be prudent of me to raise the point before the jury comes into the room and then we have to take a break. Anything about it, Mr. Herman?
>
> MR HERMAN: *No, Judge.* We're aware of what your Honor said and we'll be guided accordingly.
>
> THE COURT: All right. I mean, I agree, it doesn't make much sense logistically if you have to take Agent Manson off the stand and put her back on after you hear some other witnesses and then take her through the same testimony, but nevertheless, I need to raise the issue because I don't know how it's going to come out.

A439-40 (emphasis added). Thus, the Court acknowledged its willingness to deal with any objections lodged by the defense to Agent Manson's testimony, and the Court acknowledged that it might be necessary to interrupt Agent Manson's testimony and resolve the issue outside the presence of the jury.

After the Court explicitly instructed Baskerville that he needed to object prior to the introduction of McCray's out-of-court statements in order to preserve the issue, Agent Manson testified on numerous occasions about McCray's out-of-court statements, and Baskerville never lodged a single hearsay objection. *See, e.g.,* A486 (McCray told Agent Manson that Baskerville told him that he was "back in business" after not having had any crack earlier in the day); A520-24 (Agent Manson testifies about a conversation between McCray and Baskerville in which "Kemo was attempting to order cocaine and William Baskerville did not have it with him at that time, but said that he would return with it later that evening"); A618 (McCray told Agent Manson that "Car Wash" was in the back seat of Baskerville's car while McCray bought 30 grams of crack from Baskerville, and that "Car Wash" was "an individual who packages drugs for William Baskerville"); A709 (McCray told Agent Manson that Baskerville told him that he was going out of town and that McCray should "deal with my man, Ray-Ray"

while he was out of town). Likewise, Baskerville lodged no objection to any of the tape-recordings of McCray's drug deals with Baskerville.

Near the end of Agent Manson's direct examination (on the third day of her trial testimony) the Court noted that there was sufficient evidence in the record, including but not limited to Agent Manson's eyewitness testimony of Baskerville's drug transactions with McCray, to establish the existence of a conspiracy to distribute crack cocaine, that Baskerville was a member of that conspiracy, and that some or all of the statements admitted into evidence were in furtherance of that conspiracy. A736-39. The Court also noted that McCray's statements to Agent Manson and McCray's statements on the audio tapes had all been admitted without objection from the defense. A739.

The next day, the Court *sua sponte* discussed the forfeiture by wrong-doing issue. A797-810. The Court began by again noting that there had been no objection to any of McCray's statements from either the tape recordings or from McCray's conversations with Agent Manson. A797. The Court then discussed the prerequisites for admission of such statements under Rule 804(b)(6). A798. The Court noted that it was required to find that the defendant either engaged or acquiesced in wrongdoing and that the wrongdoing was intended to and did procure the unavailability of the declarant as a witness. A798.

The Court next discussed the procedure for making this determination. A799. The Court noted that preliminary questions of admissibility are governed by Fed.R.Evid. 104. A799. The Court noted that it could use the methodology commonly utilized in admitting co-conspirator declarations, and allow the evidence to come in subject to subsequent connection. A799. The Court also noted that some Circuits require a separate evidentiary hearing for the preliminary findings, and some do not. A799. For those Circuits that do not require a separate evidentiary hearing, the rule is that the Court must make the requisite findings by a preponderance of the evidence. A799. The Court asked the Government for a proffer of the evidence and also asked "does anybody have a position with respect to the legal standards that apply here?" A800.

In terms of the expected proffer, the District Court noted that it was beyond dispute that McCray was murdered and thereby was rendered unavailable as a witness. A804. The relevant question for the Court was "whether there's going to be enough evidence that Mr. Baskerville engaged or acquiesced in the wrongdoing, leading up to and which was intended to procure McCray's unavailability." A805.

The Government proffered, among other things, that Richard Hosten would testify that he was with Baskerville on the day of Baskerville's arrest, that Baskerville figured out that McCray was the informant against him, and that

Baskerville transmitted that information in a phone call from the Hudson County lockup. A805. The Government proffered that Eddie Williams would testify that Baskerville admitted to him that he was the person that caused McCray's murder. A805. The Government proffered that there were other individuals, such as Eric Dock and Troy Bell, who would corroborate that admission. A805-06. The Government also proffered that Ramaine York would testify about Baskerville's knowledge of who was looking for McCray to kill him. A806.

When defense counsel addressed the Court, he focused on Fed.R.Evid. 403, and argued that the testimony from the alleged conspirators was not credible. A807. The defense did not, however, ask the Court to stop the trial and hold an evidentiary hearing outside the presence of the jury. Nor did the defense ask the Court to stop Agent Manson's testimony and require the Government to present the testimony of the proffered witnesses prior to the admission of McCray's statements. The Court announced that it would follow the well-accepted procedure for admission of co-conspirator declarations, and would admit the statements subject to subsequent connection, based on a preliminary finding by a preponderance of the evidence that the evidentiary foundations for the admission of the evidence had been satisfied. A809. There was no defense objection to this procedure.

A. This Case Does Not Require This Court To Resolve The Split Among The Circuits Concerning Whether A District Court Must Hold A Hearing Outside The Presence Of The Jury Prior To Admitting Out-Of-Court Statements Because Of Forfeiture By Wrongdoing.

Baskerville argues that the District Court abused its discretion by failing to determine the admissibility of McCray's out-of-court statements before trial and outside the presence of the jury. DB38. Baskerville notes that there is a split in the Circuits concerning whether, prior to the admission of statements under a theory of forfeiture by wrongdoing, the District Court is required to hold a hearing outside the presence of the jury. DB39. However, even in those Circuits that require a hearing outside the presence of the jury, there is no requirement that the hearing be held pretrial. In this case, the District Court stated that it was open to holding a hearing outside the presence of the jury during the trial, if and when the defense objected to the introduction of the relevant evidence. As it turned out, all of McCray's out-of-court statements about Baskerville's drug dealing were admitted without objection from the defense.

Despite the absence of any objection from the defendant, the District Court nevertheless, *sua sponte*, addressed the forfeiture by wrongdoing issue outside the presence of the jury. The Court made a preliminary determination on the admissibility of McCray's out-of-court statements pursuant to Fed.R.Evid.

804(b)(6), based on the Government's proffer of the anticipated trial testimony concerning Baskerville's involvement in McCray's murder. There is no need for this Court to reach the issue of whether the District Court erred, plainly or otherwise, in failing to hold a pretrial hearing before admitting testimony pursuant to Fed.R.Evid. 804(b)(6).

Neither the Supreme Court, nor this Court, has ever held that a hearing is required before evidence can be introduced at trial pursuant to Fed.R.Evid. 804(b)(6). *See United States v. Davis*, 126 S.Ct. 2266, 2280 (2006) ("tak[ing] no position on the standards necessary to demonstrate such forfeiture" and "if a hearing on forfeiture is required"). At least two Circuits have held that "[t]he district court need not hold an independent evidentiary hearing if the requisite [804(b)(6)] findings may be made based upon evidence presented in the course of the trial." *United States v. Gray*, 405 F.3d 227, 241 (4th Cir. 2005); *accord United States v. Emery*, 186 F.3d 921, 926 (8th Cir. 1999) (allowing admission of murdered witness's out-of-court statements "at trial in the presence of the jury," without a preliminary hearing, "contingent upon proof of the underlying murder by a preponderance of the evidence"). Two Circuits have held that an evidentiary hearing outside the presence of the jury is required. *See United States v. Dhinsa*, 243 F.3d 635, 653-54 (2d Cir. 2001); *United States v. Balano*, 618 F.2d 624, 629

(10th Cir. 1980), *overruled on other grounds by Richardson v. United States*, 468 U.S. 317, 325-26 (1984).

Importantly, even in the Circuits that require a hearing outside the presence of the jury, the District Court retains the discretion to determine both the timing of the hearing and its scope. *Dhinsa*, 243 F.3d at 653. Thus, a Government proffer or the testimony of a summary witness can satisfy the Government's burden to establish the preliminary admissibility of the Rule 804(b)(6) evidence. *See, e.g., United States v. White*, 116 F.3d 903, 913-14 (D.C. Cir. 1997) (police detective's testimony, which relayed hearsay statements linking defendant to the murder of a witness, was sufficient to support district court's preliminary finding of forfeiture by wrongdoing); *United States v. Johnson*, 219 F.3d 349, 356 (4th Cir. 2000) (the court held "a lengthy conference outside the presence of the jury to discuss the admission of Thomas' hearsay"); *see also* Fed.R.Evid. 104 (district court "is not bound by the rules of evidence" when making preliminary determinations of admissibility of evidence).

As noted above, Baskerville did not adequately preserve his written request for a pretrial hearing on the Rule 804(b)(6) issue both because he failed to verbalize his request for a hearing with witness testimony while the District Court was considering the issue, and because he failed to object to the introduction of any

If this Court were to reach the merits of the issue, the Government urges this Court to follow the reasoning of the Fourth and Eighth Circuits, and not *mandate* a pretrial hearing prior to admitting evidence pursuant to Rule 804(b)(6). As the Eighth Circuit explained:

> The trial court . . . admitted the evidence at trial in the presence of the jury contingent upon proof of the underlying murder by a preponderance of the evidence. In doing so, the trial court followed cases dealing with the hearsay statements of co-conspirators. . . .
>
> We agree with the trial court that a procedure adapted from the co-conspirator case was appropriate in the present context. In so ruling, we are motivated by the functional similarity of the questions involved and by the fact that the repetition necessarily inherent with a preliminary hearing would amount to a significant waste of judicial resources.

Emery, 186 F.3d at 926 (internal citation omitted). In the related context of admitting coconspirator statements, this Court does not mandate a pretrial hearing, which might unnecessarily waste scarce judicial resources. *See United States v. Hendricks*, 395 F.3d 173, 182 n.8 (3d Cir. 2005) (in determining the admissibility of coconspirator statements "[w]e take no position on whether the District Court should undertake such inquiries prior to trial, or during the course of trial as the various objections arise"); *see also United States v. Ammar,* 714 F.2d 238, 246-47 (3d Cir. 1983) (holding pretrial hearing on admissibility of coconspirator

statements is not mandatory, but admitting such testimony prior to a preliminary determination should be done sparingly).[11]

Finally, and importantly, even in those Circuits that require a pretrial hearing, the failure to hold such a hearing is harmless error if the evidence admitted at trial does in fact demonstrate that the defendant "engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness." Fed.R.Evid. 804(b)(6). *See Dhinsa,* 243 F.3d at 656-58 ("notwithstanding the requirement that the trial court hold an evidentiary hearing prior to the admission of the challenged witness statements, the failure to do so may constitute harmless error if the evidence at trial sufficiently establishes that the defendant was involved in, and intended to procure, the unavailability of the declarants as witnesses"); *United States v. Miller*, 116 F.3d 641, 667-69 (2d Cir. 1997) (district court's error in failing to hold pretrial hearing pursuant to Rule

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[11] In *Ammar*, the district court used, and this Court approved, a procedure quite similar to the procedure used by the District Court here. As *Ammar* noted, "[i]n this case, the district court denied appellants' motion for a pre-trial hearing on the admissibility of coconspirator statements on the ground that it would involve 'a mini-trial,' but stated that at the request of the defendant at any time prior to testimony by a co-conspirator, the court will determine whether there is or is not sufficient threshold evidence of a conspiracy of which defendant was a member or what specifically must still be proved and the government, of course, will be required to submit such further evidence or else suffer the possibility of a mistrial." 714 F.2d at 247. This Court upheld that procedure: "The court is of the opinion that Rule 104(b) of the Federal Rules of Evidence does not demand more." *Id.*

804(b)(6) was harmless where there was ample evidence at trial that defendants procured the death of the missing witnesses).

Based on the evidence presented at trial, the jury here found *beyond a reasonable doubt* that Baskerville knowingly and willfully conspired to kill McCray with the intent to prevent his testimony at Baskerville's criminal trial. A7-8 (Count One). The abundant trial testimony, which led to the jury's guilty verdict on Count One, and which is described below in Point III of this Brief, establishes that the District Court's failure to hold a pretrial evidentiary hearing, where the standard of proof is a preponderance of the evidence, was at most harmless error. *See Miller*, 116 F.3d at 669 ("[i]f presented with even a fraction of this [trial] evidence at a hearing, the district court could not fail to find it established by a preponderance of the evidence that defendants were responsible for the deaths of" the missing witnesses).

In sum, there is no reason to reach the issue of whether a District Court *must* hold a *pretrial* evidentiary hearing before admitting evidence pursuant to Fed.R.Evid. 804(b)(6).

EXHIBIT "B"

William Baskerville #25946-050
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Coleman,Florida 33521

c/o Mark A.Berman
Attorney at Law
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Hackensack,N.J. 07601

Dear Mark,

I am writing you this letter in regards to yet another Confrontatial Clause violation which comes out of the testimony of Marshal Bill Cannon. This will be yet another issue that was not properly preserved with an objection by my prior attorneys which again points to their being ineffective which may force us to have to ask the Circuit Court to review it for plain error.

Mark, the testimony of Marshal Cannon should not have been admitted because it lacked indicia of reliability in regards to the fact that Hudson County Jail did not have the capabilities of recording phone conversations prior to November 2006 and his being a expert on three way phone calling.The following reasons are why I believe his testimony wasn't reliable and it should not have been admitted:
(1)The information came from an unavailable and also unknown or unidentified source.
(2)The information or the source of the information was not corroborated by any independent or circumstantial evidence.
(3)and in his capacity as a U.S.Marshal did not qualify him to be an expert regarding the inter-functioning of jail operations and three way calling.

Mark,I contend to that MarshalCannon's testimony was highly prejudicial had an impact on the verdict as to the murder counts because its use was to plant that seed in minds of those jurors that i was using the phones in Hudson County Jail to facilitate the information alleged by the government cooperators.This information was damning because it was ment to believe that these alleged calls actually took place.The testimony of Marshal Cannon's was used as some form of proof it was to make that showing as to why the government could not have gotten these alleged calls on tape.According to the Marshal's testimony the jail wasn't able to record the inmates calls.The Marshal testimony was an intricate piece of the government's evidence and its purpose was to be taken for the truth of the matter asserted.

The facts of this issue are the fact,which is that the source of this information that Marshal Cannon alleges wasn't supported,substantiated,or corroborated by information such as reports,records,or documentary evidence which is a concern as to the reliability and trustworthiness of these alleged facts.I turn you attention to the record from the testimony of Marshal Cannon during cross examination where the declarant is not just unavailable its proven that he unknown he's unidentifiable as well.(see pages 5471-72)**Q:**Now you told us about the phone system at Hudson County Jail back in 2004.**A:**I talked about both systems.What specific?**Q:**You say that Hudson didn't have the capabilities of recording phone calls?**A:**No, they did not. **Q:** And how were you aware of that? **A:**I was told that by Hudson County Jail,our point of contact there.Further down the page the Marshal was asked who told him this and he stated,a sergeant.I don't recall his name.

The fact that Marshal Cannon does not recall the name of this sergeant whose the declarant of these alleged facts which was the basis of his testimony creates a few problems,the statements are hearsay and are hearsay within hearsay and the unidentifiability of the declarant.The court in Miller v. Keating 754 f.2d at 510(3rd cir.1985)stated that"the unidentifiability of the declarant is germane to the admissibility determination.A party seeking to introduce such statement carries a burden heavier than where the declarant is identifed to demonstrate the statements circumstantial trustworthiness". We know from the testimony of the Marshal that declarant is unknown and and unidentified,the question now is did the government demonstrate that the alleged facts that Marshal Cannon testified about were they circumstantial trustworthy,I contend to that were not.The government did not lay the proper foundation for the admittance of the Marshal's testimony and the court allowed it to come in.If you were to review the entire record relating to the testimony of Marshal Cannon nowhere would you find any mention about any reports records, or documentation evidence to support these alleged facts,nor did government in its proffer to court state that they were introducing any evidence of this form. The court in Miller stated 754 f.2d at 510"The unifying trait of all the Rule 803 exceptions is a circumstantial guarantee of trustworthiness sufficient to justify nonproduction of the declarant,whether available or not."I was not awarded this guarantee by the government or the court.

Marshal Cannon's testimony was to be taken for the truth of the matter that was asserted which was that Hudson County Jail did not have the capabilities to record phone calls during the time that I was there.The government knew the prejudicial effect that this evidence would have regardless of it being hearsay and the unavailibility of the declarant and his being unknown and unidentified. The government's major concern and purpose for bringing this form of evidence before the juror ~~it~~ was to plant a seed in their mind that the cooperators was being corroborated that the information regarding McCray was being facilitated out over the phones.

The district court failed to fulfill its gatekeeper function by admitting this evidence.This is also a showing the ineffectineness of my prior attorneys because they failed to object especially when it became aware to everyone that the declarant could not be identified by the witness.They should have challenged this evidence because it was not reliable and it wasn't trustworthy.The court in Reyonlds v.U.S.715 f.2d 99(3rd Cir.1983)at 102; stated "The hearsay rule forbids merely the use of extrajudicial utterance as an assertion to evidence the fact assert.Such a use would be testimonial,we should be asked to believe the facts because Doe asserted it to be true,precisely as we should be asked to believe Doe's similar assertion if made on the stand. What the hearsay rile forbids...is the use of testimony evidence--i.e., assertions--uttered not under cross-examination."

Now there is the issue where there was not a proper foundation laid for the admittance of these out court statements from this unavailable and unidentified declarant be the government.In McCandless v. Vaughn 172 f.3d 255(3rd Cir.1999)see 364-65;the court stated"The Surpeme C,however,has interpreted the clause to allow admission of non-testifying declarants' out of court statements where prosecution estabilshes that(i)the declarant is"unavailable"and(ii)that statement baers adequante"indicia of reliability"."The government fail short of the first prong by because there was never an attempt made them or the court nor did my prior attorney request that they make the establshment of unavailability.None of the parties took into consideration of the constitutional safe guards that was afforded to me be the the 6th amendment regarding confrontion.In Crawford at 541 U.S.68 the Supreme Court stated"Where testimonial evidence is issue,however, the 6th amendment demands what the common law require:unavailability and prior opportunity for cross-examination."Also see U.S.v.Hinton 423f.3d 355(3rd Cir.2005)at 360;where the court stated"where an objective witness reasonably anticipates that a give statement will be used at a later trial, that statement is likely to be testimony in a sense that it is offered to establish or prove afact."I was not awarded the opportunity to cross-examine because he was not just unavailable he was also unidentified and his statements was offered to prove that the jail was unable to record phone calls prior to November of 2006.Yhe court in McCandless 172 f.3d at 266 stated that "the defendant's interest in confrontation is,of course,further heightened where the absent witness has special reason to give testimony favorable to the prosecution."

Marashal Cannon lacked personal knowledge as the alleged facts that he stated in his testimony.This is because(1)he was not aan employee of the Hudson County Jail(2)the source of this information is unidentified and its hearsay and(3)it is unknown if the unidentified source was the custodian of records of this alleged information which none of this was proven at trial.This why the Marshal's testimony raises a concern of its reliability and it being trustworthy I've taken language from McCandless 172 f.3d at 266 that"in a capital case,for example,it is fair to ask more of the prosecution than in a situation involving significantly less serious consequence, and this relates to confrontation.

Now, I turn your attention to the government's closing arguement where A.U.S.A.Frazer refer to the testimony of Marshal Cannon(see pages 5710-11).This was yet another attempt of by the government to exploit the use of this inadmissible and highly prejudicial evidence which did not fall under any of the exceptions to the rules goervned by Rule 803.The Reynolds'court 715 f.2d at 105 stated that "where powerful hearsay statements are admitted into evidence offered again in closing argument the risk of prejudice is amplified."

Although it was mention or implied by the government Marshal Cannon purpose for being paraded before the juror was for him to be considered as an expert which was the only basis for his testimony. The Marshal testimony was to show that he had knowledge of the interfunctions of jail.The Marshal explained in his testimony as to what was his actual job functions were in his capacity as a U.S. Marshal(see pages 5460-61).Marshal Cannon should not have been viewed as an expert because his testimony was based off what someone else told him.Under Rules 702 and 703 the expert is require to have specialize knowledge which will assist the tier of facts to understand the evidence or determine a fact in issue.This is yet another reason why the Marshal's testimony should have been excluded.Again I say that the court failed to fulfill its gatekeeper function by allowing this evidence to go before the juror especially since it was untested. THe fact that the source of the information was unidentified by the witness I was deprived of fair trial.

I conclude that this evidence was only presented by the government to try to show corroboration for the testimony of the cooperators. (see page 5432)The court and my prior attorneys as you can see all got caught sleeping and as a result of this the government got some damning evidence which effected substantial rights of mine.Mark,I,m seeking your guidance and your assistance with issue and I need you to get back to me a.s.a.p.to let me know what you think about my claim.Also I need for you to get the brief to me so I can review it before you submit it.I have enclosed a separate hand written paper with a question regarding another argument.Here are a list of cases that I had reviewed and sited in this letter.Thank you for your help and assitance.

Date:March 10,2009

Sincerely,
William Baskerville