NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

UNITED STATES OF AMERICA, **v.** **PAUL W. BERGRIN,** **Defendant.**	**Crim. No. 09-369 (DMC)** **ORDER**

THIS MATTER is before the Court by way of: (1) the Government's motion to rely on specific Rule 404(b) evidence to prove certain substantive counts in the Indictment; and (2) Defendant's motion to convene a hearing on alleged prosecutorial misconduct; and for the reasons stated on the record on September 12, 2012, which are incorporated herein at length; and for the reasons stated in the Opinion issued on this date; and for good cause shown;

IT IS on this 18 day of September 2012,

ORDERED that, the Government's motion to prove certain substantive murder counts with 404(b) evidence is **GRANTED IN PART AND DENIED IN PART**; and it is further

ORDERED that, Defendant's motion to convene a hearing on alleged prosecutorial misconduct is **DENIED**.

Dennis M. Cavanaugh, U.S.D.J.

Dated: September 18, 2012

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UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

UNITED STATES OF AMERICA, **v.** **PAUL W. BERGRIN,** **Defendant.**	**Crim. No. 09-369 (DMC)** **OPINION**

CAVANAUGH, U.S.D.J.

The parties in this case filed fifteen *in limine* motions in advance of trial. On September 12, 2012, the Court held oral argument and placed a series of decisions on the record, which resolved nearly all of the pending *in limine* motions. In addition to the oral rulings, the Court advised that, for reasons to be stated in a written opinion to follow, the Government's motion to rely on certain evidence pursuant to Rule 404(b) in order to prove two non-RICO murder counts would be **granted in part and denied in part**, and that Bergrin's motion for a hearing on alleged prosecutorial misconduct would be **denied**. This Opinion incorporates by reference the transcript of the September 12th hearing and provides the Court's reasoning for resolution of the remaining two motions.

BACKGROUND

The facts and procedural history of this case are detailed in prior opinions. See, e.g., United States v. Bergrin, 650 F.2d 257 (3d Cir. 2011) (Bergrin I); United States v. Bergrin, 682 F.3d 261 (3d Cir. 2012) (Bergrin II). They are repeated herein only to the extent necessary.

On November 10, 2009, the Government filed a 33-count Second Superseding Indictment (the "SSI") against Defendant Paul Bergrin, charging him with, among other things, RICO violations, witness tampering, drug crimes, tax evasion, and prostitution. Count 1 of the SSI charges Bergrin with conducting a RICO enterprise and alleges three different witness tampering episodes described as follows: (1) Bergrin and co-conspirators conspired to murder—and did murder—a man named Kemo D. McCray, who was a witness against one of Bergrin's clients; (2) Bergrin plotted to kill a witness who planned to testify against a client, Richard Pozo (the "Pozo Plot"); and (3) Bergrin plotted to kill witnesses in connection with the defense of another client, Vincente Esteves (the "Esteves Plot"). In addition to the RICO counts, the SSI charges Bergrin in substantive, parallel counts with murdering a witness and conspiracy to commit such a murder (the "Kemo Murder Counts").

Following two Third Circuit appeals and a mistrial, the case was assigned to this Court on August 2, 2012. On August 21, 2012, the parties filed *in limine* motions in advance of trial. On September 12, 2012, this Court held oral argument and ruled on the pending *in limine* motions, including granting the Government's motion to jointly try Counts 1 through 26 of the SSI. This Opinion supplements the September 12th transcript with respect to following motions: (1) the Government's motion to rely on certain evidence to prove the Kemo Murder Counts and Bergrin's cross-request to exclude such evidence on those counts; and (2) Bergrin's motion to convene a hearing on alleged prosecutorial misconduct.

DISCUSSION

A. The Government's Motion to Admit 404(b) Evidence & Bergrin's Cross-Request to Exclude

This Court has ordered a joint trial of Counts 1-26 in SSI. As the Third Circuit noted, because a joint trial will result in a full presentation of the evidence, this renders the majority of the parties' evidentiary disputes "essentially moot," except for the potential for appropriate limiting instructions. See Bergrin II, 682 F.3d at 281 n.25. Despite the joint trial that will include all of the evidence, the parties have briefed the discrete issue of the proper scope of admissible evidence for the jury's consideration of the non-RICO, substantive Kemo Murder Counts. The Government contends that five categories of evidence (described more fully below) are admissible, for various reasons, under Rule 404(b) to prove the Kemo Murder Counts. Bergrin counters that all five categories should be excluded from the jury's consideration of the substantive Kemo counts. [1]

Legal Standard – Rule 404(b)

Federal Rule of Evidence 404(b) permits the introduction of other bad acts unless such evidence is offered to "prove the character of the person in order to show conformity therewith on a particular occasion." Fed. R. Evid. 404(b). Rule 404(b) is a rule of inclusion, not exclusion, and evidence is admissible if it is probative of something other than character, such as "intent, plan, knowledge, identity, or absence of mistake or accident." Id.; see United States v. Jemal, 26 F.3d 1267, 1272 (3d Cir. 1994) ("We have recognized that Rule 404(b) is a rule of

[1] Again, these motions pose the limited evidentiary question of what information admissible in the joint trial is *also* appropriate for the jury to consider in connection with the individual, substantive Kemo Murder Counts. Thus, to be clear, any references in this Opinion to the exclusion or admissibility of evidence are limited solely to what consideration (if any) the jury in the joint trial should give a particular piece of evidence when deliberating on the Kemo Murder Counts.

inclusion rather than of exclusion"); United States v. Givan, 320 F.3d 452, 460 (3d Cir. 2003) ("We favor the admission of evidence of other criminal conduct if such evidence is relevant for any purpose other than to show a mere propensity or disposition on the part of the defendant to commit the crime." (emphasis added)).

A four factor test applies to questions of admissibility of evidence under Rule 404(b): (1) a proper evidentiary purpose; (2) relevance under Rule 402; (3) weighing of the probative value against any unfair prejudice under Rule 403; and (4) a limiting instruction concerning the purpose of the evidence. See, e.g., United States v. Butch, 256 F.3d 171, 176 (3d Cir. 2001). In order for otherwise admissible 404(b) evidence to be excluded under Rule 403, it must be shown that the "probative value is *substantially outweighed* by a danger of *unfair* prejudice . . . ." Fed. R. Evid. 403 (emphases added). Mere "prejudice" to the defendant is not enough; rather, it "must always be remembered that *unfair* prejudice is what Rule 403 is meant to guard against, that is, prejudice based on something *other than the evidence's persuasive weight*." Bergrin II, 682 F.3d at 280 (citing United States v. Cruz-Garcia, 344 F.3d 951, 956 (9th Cir. 2003)).

i. The Pozo Plot

The Government seeks to prove the Kemo Murder Counts with the testimony of Richard Pozo, a former Bergrin client, who was charged with drug crimes in Texas in 2004. Bergrin is alleged to have informed Pozo of the identity of a cooperating witness, asked Pozo if he knew where the witness lived, and told Pozo his charges would go away if the individual could be "taken out."

The relevance and probative nature of the Pozo Plot is not in legitimate dispute. The Third Circuit has found that the Pozo Plot "is proper Rule 404(b) evidence," that it is "powerfully suggestive of Bergrin's intent in passing Kemo's identity on from Baskerville to

Curry," and that it is "relevant to deciding whether Bergrin uttered the words, No Kemo, No Case, and if he did, what he meant." Bergrin II, 682 F.3d at 280-81 & n. 25. While the Third Circuit did state that this Court has an obligation to conduct an appropriate Rule 403 balancing to evaluate unfair prejudice, the Circuit also cautioned that its "review of the record thus far reveals *no sound basis* upon which that evidence should have been precluded from the Government's case on the Kemo Murder Counts." Id. (emphasis added). The record has not materially changed upon remand and, thus, there is no basis to exclude the evidence from the jury's consideration on the Kemo Murder Counts. Moreover, while Bergrin claims that he will suffer prejudice because the jury will conclude that he is "the kind of person who tampers with witnesses," this concern existed during the initial trial, and the Third Circuit already found that "no sound basis" existed to exclude the evidence when considering the appeal following that trial. Putting that all aside, and looked at anew, the similarities of the two alleged events are obvious and, while there is some potential for prejudice to Bergrin, that potential clearly does not substantially outweigh the evidence's probative nature. Thus, evidence of the Pozo Plot is admissible under Rule 404(b) with respect to the substantive Kemo Murder Counts.

ii. The Esteves Plot

The Government also seeks to prove the Kemo Murder Counts through evidence alleging that Bergrin conspired with others to murder an individual identified as "Junior the Panamanian" for the benefit of a client, Vincente Esteves. According to the Government, Bergrin made statements to Esteves to the effect that he had a hatred of "rats"; would kill a "rat" himself; admitted that he had "done this before"; and said "if there are no witnesses, there is no case." In addition, the Government states that Bergrin was later recorded by an informant instructing the informant to kill the main witness against Esteves, and also stating, "we gotta make it look like a

robbery. It cannot under any circumstances look like a hit . . . We have to make it look like a home invasion robbery."

The Esteves Plot is appropriate and relevant Rule 404(b) evidence on the Kemo Murder Counts for at least two reasons. First, the Esteves Plot involved conduct that is similar to Bergrin's alleged conduct with respect to the Kemo Murder. If the jury believes Bergrin made the statements attributed to him, Bergrin's comment to Esteves that he had "done this before" is appropriate Rule 404(b) evidence on the Kemo Counts in the sense that it could provide basic context for a jury to decide whether he was referring to and admitting the Kemo murder when he said it. Cf. In re Vivendi Universal, S.A. Sec. Litig., 765 F. Supp. 2d 512, 553-54 (S.D.N.Y. 2011) ("statements made at a later point, while certainly not dispositive, may be highly relevant to establishing facts at an earlier time").

Second, the Esteves Plot evidence is relevant and highly probative Rule 404(b) evidence on the Kemo Murder Counts to the extent that it allows the jury to evaluate Bergrin's intent in connection with the Kemo Murder. In the supposed Esteves Plot, Bergrin is alleged to have made statements to the effect of "if there are no witnesses, there is no case," while at the same time allegedly having made clear what he actually meant was that a witness against Esteves should be killed. In contrast, in the context of the Kemo murder, Bergrin is alleged to have made similar statements—"No Kemo, no case"—while not expressing intent in the same way it was alleged to have happened in conversations during the Esteves Plot. Thus, the Esteves Plot is relevant to the Kemo Murder Counts in that it could allow a jury to infer—if a jury chooses to give the evidence such weight—Bergrin's intent when he supposedly made the "No Kemo, no case" comments to members of the Curry Organization. See, e.g., United States v. Simels, 654 F.3d 161, 172 (2d Cir. 2011) (the jury was entitled "to infer what Simels meant and what action

he intended with respect to each witness not only from what was said about that witness but also from what he said about all the witnesses"); United States v. Queen, 132 F.3d 991, 996 (4th Cir. 1997) ("the more similar the extrinsic act or state of mind is to the act involved in committing the charged offense, the more relevance it acquires toward proving elements of intent").

Bergrin attempts to challenge the relevance and probative value of the Esteves evidence, arguing it is amorphous and does not provide reliable evidence of intent. However, these arguments do not effectively diminish the evidence's relevance and probative value. Indeed, at most, his arguments challenge the *weight* of the evidence, not its overall admissibility. Cf. Carter v. Hewitt, 617 F.2d 961, 968 (3d Cir. 1980) ("While some inferences, no doubt, must be drawn from Carter's letter to reach the conclusion that he had a plan[,] . . . these inferences only render the letter less probative, not less admissible."); see also United States v. Martin, 9 F.3d 113, 1993 WL 430154, at *5 (7th Cir. 1993) (table) (reversing district court's conclusion that statement was too "ambiguous" and lacking in probative value to be considered by a jury). For example, Bergrin's papers attack the probative value of the Esteves Plot because it occurred five years after the Kemo Murder. (DB 20 n.8.) Although now slightly refined, this was the same basic argument that was the driving force behind the exclusion of the Esteves Plot in the first trial. See, e.g., United States v. Bergrin, 2011 WL 6779548, at *5 (D.N.J. Dec. 27, 2011). However, as Bergrin II makes clear, the argument is based on a distinction without functional difference. See Bergrin II, 682 F.3d at 281 n.25 ("With respect to the Esteves Plot, we agree with the government that the District Court observed an unwarranted analytical distinction between a 'prior bad act' and a 'subsequent bad act' . . . [and later] "the District Court erred to the extent it dismissed the probative value of the subsequent act evidence."). And, in all events, as the Government convincingly argues, all admissions occur after the crime they are introduced

to prove, and thus, the fact that five years separate the two plots does not move the needle from relevant and probative to irrelevant.

Bergrin's claim of prejudice under Rule 403 is insufficient to exclude the evidence from consideration on the Kemo Murder Counts. The probative value of the Esteves Plot is high. See Huddleston v. United States, 485 U.S. 681, 685 (1988) ("extrinsic acts evidence may be critical to the establishment of the truth as to a disputed issue, especially when that issue involves the actor's state of mind and the only means of ascertaining that mental state is by drawing inferences from conduct"). To preclude the jury from considering it in connection with the Kemo Murder Counts, it must be shown that Bergrin faces "unfair" prejudice that "substantially outweighs" the evidence's probative value. See Bergrin II, 682 F.3d at 280. That is not the case here. The evidence carries high probative value directed to a key issue on the Kemo Murder Counts, *i.e.*, Bergrin's intent, which is not substantially outweighed by the danger of unfair prejudice.

The prejudice that Bergrin claims is essentially that the evidence is inflammatory and that the jury will not be able to effectively limit their consideration of the evidence for appropriate purposes when deliberating the Kemo Murder Counts. However, as the Court has already noted in rejecting Bergrin's severance request, this position is essentially a claim of prejudice due the evidence's persuasive weight, an improper basis for exclusion. Id. The argument also does not give adequate consideration to the jury's ability to compartmentalize evidence and the Court's ability to construct appropriate limiting instructions. See, e.g., United States v. Hakim, 344 F.3d 324, 330 (3d Cir. 2003) ("We begin our analysis with the presumption that juries follow instructions given by district courts." (citing United States v. Newby, 11 F.3d 1143, 1147 (3d Cir. 1993)). Despite Bergrin's claims to the contrary, a jury is, in fact, capable of evaluating

counts independently. See United States v. Jones, 482 F.3d 60, 67 (2d Cir. 2006) (convicting on RICO counts, but acquitting on certain murder counts). Thus, Bergrin's allegations of prejudice, while not without some basis, are neither of the "unfair" nature or of such a degree that they warrant the exclusion.

iii. All of the Witness Tampering Plots

The Government seeks to prove the Kemo Murder Counts with evidence of all of the witness tampering episodes in the SSI, including tampering plots that involved efforts short of attempting to murder witnesses—such as the N.V. Plot— contending that they are relevant to show Bergrin's "common scheme" or "*modus operandi*." However, Judge Martini excluded this evidence and it was not the subject of the Third Circuit appeal. (See DB at 10.) Judge Martini's rulings on these issues are persuasive. See, e.g., United States v. Bergrin, 09-369, Slip Op. (undated); Appendix A7-13. For the same reasons articulated by Judge Martini, the Government's motion to rely on this evidence under Rule 404(b) in order to prove the Kemo Murder Counts is **denied**, and appropriate limiting instructions will be given if necessary.

iv. The Context Evidence

The Government seeks to prove the Kemo Murder Counts with evidence of crimes charged in Counts 17 through 26 of the indictment because it claims that such evidence provides context for the testimony of two witnesses, Thomas Moran and Abdul Williams, to whom the Government claims Bergrin made admissions regarding the Kemo Murder. (Gov't Br. 28.) In short, the theory goes that Bergrin was involved in criminal activity with Moran and Williams and, because they were involved in criminal activity together, Bergrin felt comfortable enough to confide in these individuals about the Kemo Murder. Thus, the Government contends that evidence of their collective criminal activities is appropriate in order to place the testimony of

Moran and Williams in proper context. Judge Martini addressed this issue in connection with the first trial, largely denying the Government's 404(b) request with respect to Moran, and allowing limited background with respect to Williams. See Slip. Opinion (undated) located at Joint Appendix A11-12. The Court has reviewed Judge Martini's Opinion on this subject and entirely agrees with the persuasive reasoning therein. Thus, this Court adopts Judge Martini's prior rulings on this subject. As such, the Government's motion is **granted in part and denied in part**, subject to the same parameters detailed in Judge Martini's Opinion.

v. Drug Conspiracy Evidence

The Government seeks to prove the Kemo Murder Counts with certain evidence that purports to show that Begrin was involved in supplying drugs to Hakeem Curry; that Bergrin utilized a third-party [an individual "Changa"] to provide drugs to Curry; and that Bergrin, Changa and Curry were all involved in a drug conspiracy. The Government argues this evidence is admissible on the Kemo Murder Counts because it supplied a two-fold "motive" for Bergrin to murder Kemo: (1) it would have resulted in Bergrin losing a client (Curry); and (2) if Curry were arrested it would raise the possibility that Curry could cooperate against Bergrin.

Judge Martini admitted this evidence in the severed trial. Bergrin claims this was error because, he contends, the Government never tied the drug evidence to him and the prejudice of the evidence outweighs the probative value. Bergrin's perception about what the Government did or did not establish with respect to the conspiracy does not provide a sufficient basis to deviate from Judge Martini's initial ruling. Moreover, wholly independent from Judge Martini's previous ruling, the Court agrees with the Government that this evidence could be considered probative of Bergrin's motive with respect to the Kemo Murder Counts. Thus, the Court precisely adopts Judge Martini's prior rulings, which are incorporated herein by express

reference. See Slip Op. at A8. And, as Judge Martini suggested, if at some point during the trial, the evidence becomes cumulative and unnecessary, additional instructions may be given.

B. Bergrin's Motion to Convene a Hearing on Prosecutorial Misconduct

Bergrin has requested that the Court conduct a hearing on alleged Government misconduct with respect to broad allegations of coercing witnesses to lie and the commission of numerous *Brady*[2] violations. (DB 31.) The allegations supporting Bergrin's motion are contained in two documents: his brief and a declaration submitted by Bergrin's private investigator, Louis F. Stephens, which was submitted for *in camera* review. Because of the sensitive nature of the *in camera* submission, the Court does not repeat the arguments and allegations supporting and opposing the motion at length. It is enough to say that the Court has closely and carefully considered all the information that has been submitted. And, following that consideration, the Court will deny the motion for the reasons that follow.

Legal Standard

A party is not entitled to a pretrial evidentiary hearing as a matter of course. See Fed. R. Crim. P. 12(c). In the Third Circuit, an evidentiary hearing is required when a defendant's motion is "sufficiently specific, non-conjectural, and detailed" to show: (1) a "colorable" constitutional claim; and (2) disputed issues of fact material to its resolution. See, e.g., United States v. Hines, 628 F.3d 101, 105 (3d Cir. 2010). To be "colorable," a claim must contain more than "bald-faced allegations of misconduct." United States v. Voight, 89 F.3d 1050, 1067 (3d Cir. 1996). Moreover, there must be "significant factual disputes in order to receive a pretrial evidentiary hearing," United States v. Jackson, 363 Fed. Appx. 208, 210 n.2 (3d Cir. 2010), and the defendant must "make a *prima facia* showing of the alleged wrongdoing." United States v.

[2] See Brady v. Maryland, 373 U.S. 83 (1963).

Nissenbaum, 87 Fed. Appx. 87, 87-88 (3d Cir. 2002); see also United States v. Glass, 128 F.3d 1398, 1408-09 (10th Cir. 1997) (holding that defendant bears the burden to show there are material facts in dispute and that a hearing is only required when the motion raises factual allegations that are sufficiently definite, specific and non-conjectural); United States v. Panitz, 907 F.2d 1267, 1273-74 (1st Cir. 1990) (holding that "[t]he test for granting an evidentiary hearing in a criminal case should be substantive: did the defendant make a sufficient threshold showing that material facts were in doubt or dispute?"). The purpose of an evidentiary hearing is to "assist the court in ruling on specific allegations of unconstitutional conduct . . . *not* to assist the moving party in making discoveries that, once learned, might justify the motion after the fact." Hines, 628 F.3d at 106 (emphases added).

Here, there is no basis for a hearing with respect to Bergrin's allegations for the following reasons.

First, the Stephens Declaration, which is the chief support for the motion, consists exclusively of hearsay. Indeed, the Stephens Declaration not only contains hearsay statements in the sense that he is repeating statements that witnesses allegedly told him, but it contains an *additional* layer of hearsay in that, even if Stephens *was* told what he claims he was told, the "confidential witnesses" are repeating things *they* claim *they* were told—creating double and triple hearsay issues. This creates something of a threshold reliability issue that weighs against a hearing. Cf. Neil v. Gibson, 278 F.3d 1044, 1056 (10th Cir. 2001) (holding that district court did not abuse discretion in disregarding hearsay affidavits); United States v. Allied Steverdoring Corp., 258 F.2d 104 (2d Cir. 1958) (rejecting hearsay affidavit as "patently inadequate to justify a hearing").

Second, and more important, Bergrin has not raised a "colorable claim" of a constitutional violation. Bergrin's claims are purely speculative. For example, Bergrin alleges Government coercion with respect to four witnesses, but the allegations consist entirely of hearsay statements such as the Government "put words in the witnesses' mouths" and promised reduced jail time and other perks if the witnesses would implicate Bergrin. Attacking the credibility of prosecution witnesses is a *common defense strategy*, and Bergrin is free to attempt to attack the credibility of witnesses on cross-examination and/or at trial by suggesting they were coached or coerced to lie. This happened in the first trial, and it happens in nearly every trial. However, these types of allegations are not sufficient to warrant an evidentiary hearing. Accepting simple allegations of this type as a basis for an evidentiary hearing and a "colorable constitutional violation" would essentially mean in any case the Government has a cooperating witness, it would take nothing more than pure speculation to compel an evidentiary hearing on prosecutorial misconduct. That is not the law.

Third, the facts here differ dramatically from cases where the Third Circuit has suggested a pre-trial hearing should be held. For example, in United States v. Voight, 89 F.3d 1050 (3d Cir. 1996), the defendant alleged that the government had engaged in improper conduct by using his personal attorney, identified as Mercedes Travis, as a confidential informant against him, resulting in a breach of the attorney-client privilege. Defendant offered his own sworn affidavit, an affidavit from Travis, and Travis's grand jury testimony. Id. at 1066. In contrast, the Government offered an affidavit from an FBI agent stating that Travis was not acting in the capacity of Lewis's attorney at the time of the event. Id. The Third Circuit found that, based on the state of the record, the court should have conducted a pretrial evidentiary hearing. Id. at 1067. Voight stands in stark contrast to the much more attenuated and specious allegations here.

Finally, Bergrin's *Brady* allegations do not appear to be "colorable," and, in all events, do not warrant a hearing. A true *Brady* violation requires a showing of prejudice. See Strickler v. Greene, 527 U.S. 263, 281-82 (1999). Bergrin's moving papers show that he possesses the information he claims is exculpatory and that has not suffered any prejudice. Thus, there is no basis for his *Brady* claims. See, e.g., United States v. Kaplan, 554 F.2d 577, 580-81 (3d Cir. 1977).

CONCLUSION

For the reasons set forth above, the Government's motion to prove the Kemo Murder Counts with certain evidence is **granted in part and denied in part**, and Bergrin's motion to convene a hearing on alleged prosecutorial misconduct is **denied**.

An appropriate Order will be entered.

Dennis M. Cavanaugh, U.S.D.J.

Dated: September 18, 2012