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BY ECF & E-MAIL

Hon. Dennis M. Cavanaugh, U.S.D.J.
U.S. District Court, District of New Jersey
Post Office Building & Federal Courthouse, Room 451
Newark, New Jersey 07101-0999

Re: United States v. Bergrin, Crim. No. 09-369 (DMC)

Dear Judge Cavanaugh:

Defendant Paul Bergrin has moved to strike Government Exhibit 644 and certain testimony by Assistant Prosecutor Tony Guttierez. The evidence concerns Mr. Bergrin's request to delay the attempted murder trial of Noberto Velez due to an alleged illness.[1]

Mr. Bergrin now claims that evidence concerning his request to delay the Velez trial was irrelevant under Rule 401. He claims the Government proffered that Mr. Bergrin needed the continuances to buy time necessary to get Carolyn Velez to stick to the original (and false) script after Mr. Bergrin learned that Ms. Velez had provided a (true) statement to the prosecutor. Mr. Bergrin claims that the objected-to evidence is irrelevant because there was no testimony explicitly showing that additional acts of tampering occurred after the requested continuances. Mr. Bergrin's understanding of what constitutes relevant evidence is at odds with the definition prescribed by Rule 401.

Evidence is relevant if "it has *any* tendency to make a fact more or less probable than it would be without the evidence" and "the fact is of consequence in determining the

[1] Mr. Bergrin inaccurately states that Exhibit 644 reflects his request for a continuance due to illness. In fact, Exhibit 644 was Mr. Bergrin's earlier motion for a continuance; he then unsuccessfully appealed the denial of that motion, after which he failed to show up for trial, sending a colleague to claim that he (Mr. Bergrin) was ill.

action." Fed. R. Evid. 401 (emphasis added). "The definition of relevant evidence is very broad and . . . Rule 401 does not raise a high standard." Gibson v. Mayor & Council of Wilmington, 355 F.3d 215, 232 (3d Cir. 2004). Here, the fact that Mr. Bergrin needed to bring Carolyn Velez back in line after learning that she had provided a damaging statement to the Essex County Prosecutor's Office is clearly a "fact [that] is of consequence in determining the action." And the fact that Mr. Bergrin twice sought to delay the Velez, the second time falsely claiming illness, after which Ms. Velez went back to the (false) story she told at trial, alone shows that the objected-to evidence makes the existence of the fact at issue more likely than it would be without the evidence.

Mr. Bergrin nonetheless complains that the Government never made good on its promise to elicit direct evidence of additional tampering after the continuances requested by Mr. Bergrin. But the Government did not promise to elicit *direct* evidence of additional tampering, and it did not need to do so to show the logical relevance of the requested continuances, as the preceding paragraph amply demonstrates. The Government argued that additional tampering necessarily occurred after the continuance, Tr. 527-28, and the evidence elicited easily allows just such an inference, see Tr. 971-72 (Carolyn Velez gave an audio-recorded statement to prosecutors' detectives in which she told the truth); Tr. 525-26 (in or around April 26, 2003, Mr. Guttierez personally delivered Ms. Velez's statement to Mr. Bergrin); Tr. 973-75, 1107 (Norberto Velez grabbed Carolyn by the neck and screamed at her after learning of her statement to prosecutors, and Mr. Bergrin told Carolyn that he had "f-d up"); Tr. 528-32 (Mr. Bergrin thereafter made three different attempts to delay the trial date, including feigning illness); Tr. 76-1001 (Carolyn Velez testifies falsely at her father's trial).

Indeed, the mere fact that the Government could permissibly argue in summation that additional tampering must have occurred—because Ms. Velez went back to the false story that Mr. Bergrin, NobertoVelez, and Yolanda Jauregui had forced her to tell—alone shows the relevance of a request for a continuance that was made in bad faith. See United States v. Lee, 612 F.3d 170, 194 (3d Cir. 2010) ("a 'prosecutor is entitled to considerable latitude in summation to argue the evidence and any reasonable inferences that can be drawn from that evidence'") (citation omitted).

Mr. Bergrin additionally contends that the objected-to evidence poses a substantial danger of unfair prejudice under Rule 403 because the jury at this trial was informed that the ten-day adjournment at the start of trial was occasioned by Mr. Bergrin's having come down with the flu. This claim, too, lacks merit.

This Court swore in the jury on January 9, 2013 (a Thursday). It then adjourned opening statements until January 14th (the following Monday) due to the fact that Mr. Bergrin had been coughing during jury selection. ECF. No. 404. On January 10th, this Court adjourned the trial, at Mr. Bergrin's request, until January 22nd because he had

been diagnosed with influenza. ECF No. 406. On January 22nd, just prior to opening statements, this Court explained the reason for the delay:

> As you can see, things happen that we don't expect all the time. Sorry there was a brief bout of influenza, and through no one's fault, obviously, but that's why there was a slight delay.

Tr. (1/22/2013) at 16. Given that explanation, and given that the jury could see for itself that Mr. Bergrin had been genuinely ill, there is no danger (much less a substantial one) of unfair prejudice, as no one has suggested or implied that Mr. Bergrin either feigned illness or used the continuance to tamper with witnesses.

In sum, rather than striking testimony elicited some seven weeks ago, the most this Court should do is provide a limiting instruction regarding the legitimate purpose for which the Government offered the objected-to evidence and cautioning the jury not to use the evidence for any other purpose. See Fed. R. Evid. 403 advisory comm. notes ("consideration should be given to the effectiveness or lack of effectiveness of a limiting instruction"); see also Fed. R. Evid. 105.

Respectfully submitted,

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