In the

United States Court of Appeals

FOR THE THIRD CIRCUIT

Docket Nos. 11-4300, 11-4552
(Consolidated)

United States of America

- v. -

Paul Bergrin,

Defendant-Appellee.

On Appeal From The United States District Court for the District of New Jersey
Sat Below: The Honorable William J. Martini, United States District Judge

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AMENDED OPPOSITION BRIEF OF APPELLEE PAUL W. BERGRIN

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SUMMARY OF ARGUMENT

Defendant-Appellee Paul Bergrin respectfully submits this Brief in opposition to the government's appeals from the district court's November 23, 2011 evidentiary rulings potentially excluding other-acts evidence pursuant to Federal Rule of Evidence 404(b) and its order entered December 27, 2011, granting in part and denying in part his motion for severance under Federal Rule of Criminal Procedure 14. This Court lacks jurisdiction over the evidentiary rulings, which were neither embodied in an order nor sufficiently final to constitute decisions under the Criminal Appeals Act. Nor is the severance order appealable as a matter of pendent appellate jurisdiction, both because no such jurisdiction exists in criminal cases and because that order fails to satisfy even the standards for civil pendent appellate jurisdiction, which require that the otherwise unappealable order be necessary to the decision of the appealable one. Finally, the severance ruling, also setting the order of trials, is not separate from the merits of the case so as to be appealable as a collateral order.

The only possible basis for this Court to review these rulings is, then, mandamus. But mandamus may not be deployed to circumvent the strict limits on prosecutorial interlocutory appeals. Nor do the district court decisions, as alleged, engender the judicial usurpation which mandamus redresses.

Instead, the evidentiary rulings about which the government complains, even assuming they will apply on retrial, were well within the trial judge's discretion. With respect to each, the court carefully applied the correct law to the facts, which it was uniquely positioned to do, exercising its discretion in an effort to provide a fair trial, where the defendant would not be judged based upon a forbidden inference regarding his character. The severance granted by the court likewise fell within its discretion, and was similarly based upon appropriate considerations of doing that which "justice requires." Fed. R. Crim. P. 14.

Finally, the government's disturbing effort to effect the reassignment of this case based upon its disagreement with the trial judge's rulings should be denied. The argument presented misstates the record in critical respects and falls far short of the demanding legal standards for such relief. If granted, it would engender unfortunate precedent for a proposition, already taken to heart by so many district judges, that the government's position should be favored and fairness should be punished.

ARGUMENT

I. THIS COURT LACKS JURISDICTION TO DECIDE THE GOVERNMENT'S APPEALS.

A. The Criminal Appeals Act Does Not Confer Jurisdiction Over The Government's Appeal From The District Court's Evidentiary Rulings.

The government asserts that the district court's evidentiary "rulings" as to the admissibility of other-acts evidence in the retrial of the Kemo murder case constituted "a sufficiently final decision," GB18, to be appealable. The Court has requested that the parties brief this jurisdictional issue. *See* Order (1/13/12). The Criminal Appeals Act permits an interlocutory appeal "from a decision or order of a district court suppressing or excluding evidence." 18 U.S.C. § 3731. Here, there is indisputably no "order of a district court." Accordingly, this issue turns on whether there is a "decision" from which to appeal. But rulings must possess some degree of finality to qualify as "decisions" under § 3731. *See United States v. Brooks*, 145 F.3d 446, 453-54 (1st Cir. 1998) ("Sometimes a district court, faced with a pretrial motion *in limine*, will temporize … and the resultant order, depending on the degree of finality associated with it, may or may not qualify as an order excluding evidence under section 3731."). The rulings here are tentative, not final, and do not rise to the level of appealable "decisions."

The axiom that a Court of Appeals possesses only that jurisdiction granted by statute has particular force here. *See Gov. of V.I. v. Hamilton*, 475 F.2d 529,

530 (3d Cir. 1973). By the plain language of § 3731, the term "decision" denotes the "passing of judgment on an issue," "the act of reaching a conclusion or making up one's mind," "conclusion or judgment reached or pronounced," or "[f]irmness of … action." *The American Heritage College Dictionary* 359 (3d ed. 2000); *accord Black's Law Dictionary* 467 (9th ed. 2009) (defining "decision" as a "judicial … determination after consideration of the facts and the law").[1] The common feature of these definitions is that a "decision" must be conclusive, firm and settled.

The transcript of the November 23, 2011 proceedings from which the government appeals reveals that the district court did not "mak[e] up [its] mind" or come to a "conclusion" to exclude evidence from the retrial, let alone reach a "judicial determination after consideration of the facts and the law." Rather, following the declaration of a mistrial, the government asked the court whether it intended to adhere to the evidentiary rulings rendered at that trial. A49. In response, the court twice noted that "it's premature for me to answer that," explaining that it desired "to hear and see the briefs" regarding the admissibility of certain putative motive evidence based upon Bergrin's alleged involvement in drug trafficking. A49-50. The government clarified, "I'm asking your Honor about

[1] A "determination," in turn, is the "settling of a question or case by an authoritative decision or pronouncement, esp. by a judicial body." *American Heritage Dictionary* 379.

rulings that you made excluding evidence, if you were going to adhere to those; Pozo and Esteves and the things that were contained in the … 404(b) ruling." A49. The district court responded:

> Absolutely. I don't see -- *unless you can convince me otherwise* -- as to why those rulings -- I know you feel otherwise -- but on reflection I feel strongly that those rulings were appropriate. So I *don't expect* I would be changing those rulings. The concern I had was whether or not there was sufficient evidence to tie the motive theory about the drugs on the evidence that I heard that I allowed into this case, whether that was sufficient evidence to establish that that was the motive for the Defendant to be a part of this murder. And that's what you'll be addressing I assume, as part of it, or maybe not.

A49-50 (emphasis added).

Thus, the district court made clear, stating "unless you can convince me otherwise," and "I don't expect I would be changing those rulings," that its consideration was not final, but would depend upon future argument. But the government did not provide further briefing or seek to embody the Court's remarks in a proposed Order, for consideration of the Court and the parties; it appealed.

The cases that have addressed when a "decision" excluding evidence is sufficiently final to be appealable have required far more definitive conclusions. *E.g., United States v. Flemmi*, 225 F.3d 78, 82-83 (1st Cir. 2000) (jurisdiction existed over ruling suppressing evidence because district court announced its 661-page decision "with unmistakable clarity"); *United States v. Flores*, 538 F.2d 939,

943 n.3 (2d Cir. 1976) (jurisdiction existed because district judge explicitly stated that he was rendering a final decision).

Unlike the musings here, a judge's statement must actually reach a conclusion about admissibility to constitute an appealable "decision," even if it may be subject to reconsideration. For example, in *United States v. Siegel*, 536 F.3d 306 (4th Cir. 2008), the court permitted an appeal from a preliminary trial ruling excluding other-acts evidence because the district court "made it clear" it would revisit that ruling "only *after* the close of the government's case-in-chief" and had thus definitively excluded other-acts evidence from government's case-in-chief, "therefore effectively and finally suppress[ing]" it. *Id.* at 314-15. *See also United States v. Janati*, 374 F.3d 263, 269, 272 (4th Cir. 2004).

No such final decision was rendered here; the district court's remarks did not approach even that minimal threshold of definitively excluding evidence, subject to later reconsideration. Nor did the court's rulings in the first trial, excluding this evidence, convert its remarks into a definitive decision on retrial. *See United States v. Barletta*, 644 F.2d 50, 53 (1st Cir. 1981) ("neither the fact that the court had ruled against admissibility in the prior trial nor the bare fact that it acted on the motion prior to retrial serves to constitute a decision as to admissibility on retrial"). Every trial is different; decisions on admissibility must always be made in context.

Appellate courts are justifiably cautious about reviewing preliminary rulings. In § 3731, Congress straitened government interlocutory appeals to a few defined avenues; appeals of judicial remarks lacking the finality of orders or decisions were excluded because they risk interference with trial proceedings. 15A Wright, Miller & Cooper, *Federal Practice and Procedure* § 3907 at 274 & nn. 7.5, 8 (2d ed. 1996 & Supp. 2011). Moreover, in reviewing non-final rulings, appellate tribunals decide issues that may become moot or may change during trial. *See id.* at 274. Here, for example, the government's appeal is based largely upon Bergrin's opening statement. GB36, 42, 49-50. But Bergrin will likely not open in the same way on retrial given what transpired. A27, A986-87, A3884. The government, too, having failed to convict, may adjust its strategy on retrial. The court's evidentiary rulings may, then, shift. *See Gilda Marx, Inc. v. Wildwood Exercise, Inc.*, 85 F.3d 675, 679 (D.C. Cir. 1996).

Moreover, exercising appellate jurisdiction over tentative rulings would deprive this Court of the district court's full view. *E.g., Samuel v. Univ. of Pittsburgh*, 506 F.2d 355, 361 (3d Cir. 1974). Finally, an expansive definition of the "decision or order" language of § 3731 may encourage weak appeals for the purpose of reviewing "pendent" orders not otherwise appealable -- as here, where the government argues that these evidentiary rulings allow it to appeal the otherwise concededly unappealable issue of severance.

The district court rendered no decision or order, within the meaning of § 3731, regarding the evidentiary rulings that are the basis of No. 11-4300. Accordingly, this Court lacks jurisdiction over that appeal.

B. There Is No Pendent Appellate Jurisdiction Over The Second Severance Order

The government concedes that § 3731 does not provide for jurisdiction in No. 11-4552, but urges this Court to exercise "pendent appellate jurisdiction" over this severance appeal. Because jurisdiction is lacking over the appeal from the district court's evidentiary rulings, "pendent jurisdiction" is lacking. But even if the Court possesses jurisdiction over the evidence appeal, the "pendent jurisdiction" doctrine would not save the severance appeal; the doctrine does not apply to criminal cases, and this appeal does not pass the test for pendent jurisdiction in civil cases.

Firstly, the "pendent jurisdiction" doctrine does not apply to criminal cases. Indeed, Congress has never provided for pendent appellate jurisdiction at all, though it could do so, having explicitly authorized supplemental jurisdiction in other contexts. *E.g.*, 28 U.S.C. § 1367. Indeed, pendent appellate jurisdiction is historically disfavored, and categorically barred in criminal cases. *See Abney v. United States*, 431 U.S. 651, 663 (1977); s*ee also United States v. Cerilli*, 558 F.2d 697, 699-700 (3d Cir.), *cert. denied*, 434 U.S. 966 (1977).

The government argues that *Abney* merely rejected any "rule loosely allowing pendent appellate jurisdiction." GB20 (citing *United States v. Hsia*, 176 F.3d 517, 527 (D.C. Cir. 1999) (Rogers, J. concurring)). But this language does not appear in *Abney* and derives solely from an out-of-circuit concurring opinion that no court has ever endorsed, interpreting the Supreme Court's subsequent discussion in a civil case, *Swint v. Chambers County Comm'n*, 514 U.S. 35, 49-51 (1995). The Courts of Appeals, including this one, *Cerilli*, *supra*, interpret *Abney* to reject pendent appellate jurisdiction in criminal cases. *See, e.g.*, *United States v. Schneider*, 594 F.3d 1219, 1230 (10th Cir. 2010); *United States v. Ferguson*, 246 F.3d 129, 138 (2d Cir. 2001); *Hsia*, 176 F.3d at 526-27; *Roberson v. Mullins*, 29 F.3d 132, 136 n.6 (4th Cir. 1994); *United States v. Garner*, 632 F.2d 758, 763 n.2 (9th Cir. 1980).

Nonetheless, the government invokes pendent appellate jurisdiction in this criminal case, relying upon *United States v. Maker*, 751 F.2d 614, 626 (3d Cir. 1984). GB18-19. But *Maker*, in which the Court addressed the jurisdictional question of whether it could consider a severance that did not appear in the government's notice of appeal, nowhere mentions pendent appellate jurisdiction and does not cite any case that does so.[2] Nor is the government's citation to *United*

[2] Likewise, the government relies on *United States v. Lopez-Lukis*, 102 F.3d 1164, 1167 & n.10 (11th Cir. 1997), and *United States v. Zabawa*, 39 F.3d 279, 283 (10th

States v. Zafiro, 945 F.2d 881, 884-85 (7th Cir. 1991), *aff'd on other grounds*, 506 U.S. 534 (1993), apt, as the Seventh Circuit subsequently rejected the suggestion in *Zafiro* that pendent appellate jurisdiction authorizes review of a government appeal challenging severance. *United States v. Bloom*, 149 F.3d 649, 657 (7th Cir. 1998).

The government's citations establish that, post-*Abney*, the Supreme Court has only briefly touched on pendent appellate jurisdiction, and even then only in the civil context. GB20 (citing *Swint*, 514 U.S. at 49-51; *Clinton v. Jones*, 520 U.S. 681, 707 n.41 (1997)). In *Swint*, the Court discussed pendent appellate jurisdiction unapprovingly, noting that such jurisdictional exceptions "drift away from the statutory instructions Congress has given to control the timing of appellate proceedings," *id.* at 45, and finding that the concerns expressed in *Abney* applied to civil cases, *id.* at 49. Ultimately, *Swint* did not settle "whether or when it may be proper for a court of appeals, with jurisdiction over one ruling, to review, conjunctively, related rulings that are not themselves independently appealable." *Id.* at 50-51. In *Clinton*, the Supreme Court, in a footnote, approved the invocation of pendent appellate jurisdiction in a civil case, 520 U.S. at 707 n.41. The Court did not, however, refer to, let alone overrule *Abney* or discuss pendent appellate jurisdiction in criminal cases.

Cir. 1994), neither of which discusses *Abney* or its effect on the availability of pendent appellate jurisdiction in criminal cases.

Even in civil cases, pendent appellate jurisdiction is available only under narrow circumstances: when review of a nonappealable order is "necessary to ensure meaningful review of an appealable order." *Invista S.Á.R.L. v. Rhodia, S.A.*, 625 F.3d 75, 88 (3d Cir. 2010). *See also Nat'l Union Fire Ins. v. City Sav., F.S.B.*, 28 F.3d 376, 382 n.4 (3d Cir. 1994) (quoting *Hoxworth v. Blinder, Robinson & Co.*, 903 F.2d 186, 209 (3d Cir. 1990)); *Kershner v. Mazurkiewicz*, 670 F.2d 440, 445-46, 449 (3d Cir. 1982) (*en banc*).

The civil pendent jurisdiction standard is clear: review must be "*necessary* to ensure meaningful review of an appealable order." At least four cases, decided by this Court and never overruled, so hold. The government, however, argues that the unappealable issue need only be "inextricably intertwined" with the appealable order, GB21, and that this constitutes an alternative, lower standard. That position misreads *Clinton*, which, the government contends, applied a disjunctive test requiring *either* that the issues be inextricably intertwined *or* that review of the unappealable issue is necessary for review of the appealable issue. GB21 n.3. That is incorrect; the Supreme Court explicitly sanctioned jurisdiction because *both* standards were met in that case. 520 U.S. at 707 n.41 ("The District Court's legal ruling that the President was protected by a temporary immunity from trial -- but not discovery -- was 'inextricably intertwined,' … with its suggestion that a discretionary stay having the same effect might be proper; indeed, 'review of the

latter decision is necessary to ensure meaningful review of the former'") (quoting *Swint*, 514 U.S. at 51).

Clinton does not permit this Court to set aside its own, entirely consistent precedents. *Invista*, for example, rejects any notion that the "intertwined" standard somehow dilutes the "necessary" standard:

> Issues are "inextricably intertwined" only when the appealable issue "cannot be resolved without reference to the otherwise unappealable issue." *American Society for Testing & Materials v. Corrpro Companies, Inc.*, 478 F.3d 557, 580-81 (3d Cir. 2007) (citations omitted). In addition, "pendent appellate jurisdiction over an otherwise unappealable order is available only to the extent necessary to ensure meaningful review of an appealable order." *In re Montgomery County*, 215 F.3d 367, 375-76 (3d Cir. 2000).

Invista, 625 F.3d at 88. *Invista* does not ignore *Clinton*, GB21 n.3, but follows it: the non-appealable issue must be intertwined with the appealable issue *to such an extent* that an appeal is "necessary to ensure meaningful review" of the appealable order. The two formulations are not alternatives, but complementary.

The government's remaining argument is a form of misdirection, in which it argues that there is pendent jurisdiction because the Rule 404(b) rulings and the second severance derive from a common source: the district court's initial severance. GB21-22. But the government failed to appeal from that first severance, and it cannot do so now. *See United States v. Gilchrist*, 215 F.3d 333, 336 (3d Cir. 2000), (government's failure to timely appeal dismissal prevented

government from re-litigating it on later appeal from denial of motion to reinstate the indictment); *United States v. Sanderson*, 936 F.2d 581 (9th Cir. 1991) (appellate court precluded from reviewing district court's first order because government only appealed second order).[3]

This entirely new doctrine -- call it "pendent jurisdiction once removed" -- by which jurisdiction over order #1 is transferred to order #2 because they both share something in common with order #3, which is not on appeal, has no basis in statute or caselaw. The evidence rulings at issue in No. 11-4300, which must be judged within the context of the Kemo murder trial in which they were rendered may (unlike, for example, the dismissal in *Maker*, 751 F.2d at 626) be "meaningfully reviewed" without any consideration of the second severance order.

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[3] The government asserts that it did not appeal because it assumed that the district court would admit 404(b) evidence pertaining to the postponed counts. GB8, 54. But the district court's September 21, 2011 severance opinion confirmed that the bulk of the Esteves plot evidence would not be admissible under Rule 404(b) and that the district court would continue to evaluate the admissibility of other-acts evidence as the trial developed. A57, 62. Nor did the government take the necessary steps to preserve its ability to appeal at that time: although it requested preliminary Rule 404(b) rulings before the jury was sworn so that it could prepare its witnesses and opening argument, A585, it did not move for decision on its Motion *in Limine* to Admit Evidence Under Fed. R. Evid. 404(b), under Rule of Criminal Procedure 12(d) or seek to delay swearing the jury until resolution of that motion. *See United States v. Pharis*, 298 F.3d 228, 237 (3d Cir. 2002) ("Government's counsel has candidly conceded that in failing to ask the District Court not to swear the jury until after the pending motion was decided, the Government 'made a mistake' …. It was a mistake that is not without consequences.").

Even if appellate courts could exercise pendent jurisdiction in criminal appeals, there would, then, be no basis for the Court to do so here. *E.g.*, *Am. Soc'y for Testing & Materials*, 478 F.3d at 581.

Nor would it be wise to do so. As the Supreme Court noted in *Swint*, 514 U.S. at 45, pendent appellate jurisdiction flouts the limited congressional authorization for interlocutory appeals. Exercising pendent appellate jurisdiction here would permit a weak appeal to open the door to an otherwise unappealable issue. Here, the door-opener is the district court's preliminary consideration of evidentiary questions prior to retrial. This scenario echoes the Supreme Court's warning in *Abney* that permitting such appeals will encourage parties to seek review of spurious claims "in order to bring more serious, but otherwise nonappealable questions to the … courts of appeals prior to conviction and sentence." 431 U.S. at 663. The Court in *Abney* addressed only unwarranted defense appeals, but this case demonstrates that the temptation to expand the right of interlocutory appeal is irresistible for all parties. The government's effort to invoke pendent criminal appellate jurisdiction should be rejected.

C. The Collateral Order Doctrine Fails to Confer Jurisdiction Over The Second Severance Order

Cognizant of the lack of any authority under § 3731 to appeal from a granted severance, the government argues that the second severance is appealable as a collateral order because it dictates which counts must be tried next. GB22. But

courts interpret the collateral order doctrine "with the utmost strictness in criminal cases," *Midland Asphalt Corp. v. United States*, 489 U.S. 794, 799 (1989), and prosecutorial appeals in criminal cases, "are something unusual, exceptional, not favored." *Carroll v. United States*, 354 U.S. 394, 400 (1957), *cited in* GB23. The collateral order doctrine's application here, urged by the government, would be unprecedented. The Supreme Court has never applied the collateral order doctrine to a government appeal from a district court order in a criminal case. And this Court has never invoked the collateral order doctrine to review either a grant of severance or an order dictating the sequence in which counts are to be tried. Rather, the cases in which this Court has exercised appellate jurisdiction over a government appeal on the basis of the collateral order doctrine are few, and all involve district court rulings addressing issues truly collateral to the case. *See, e.g.*, *United States v. Mitchell*, 652 F.3d 387, 389-90, 396 (3d Cir. 2011) (order preventing government from collecting DNA sample where nothing "in the record demonstrates that [defendant's] DNA will be an issue at trial"); *United States v. Wecht*, 537 F.3d 222, 228 (3d Cir. 2008) (order concealing jurors' identities from media); *United States v. Whittaker*, 268 F.3d 185, 192 (3d Cir. 2001) (order disqualifying U.S. Attorney's Office).[4]

[4] The government also relies upon cases where other circuits permitted the government to invoke the collateral order doctrine, but which also involve collateral issues like the disclosure of information to non-parties, *United States v.*

Here, the order challenged is not collateral because it fails the test that it "resolve an important issue completely separate from the merits of the action." *Mitchell*, 652 F.3d at 392 (quoting *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546 (1949)). That order establishes the form and sequence of the trial. But challenges to orders concerning trial procedures cannot satisfy the "completely separate" requirement. *See Sell v. United States*, 539 U.S. 166, 176 (2003) (issue of defendant's forcible medication reviewable as collateral because separate from the merits and "wholly separate as well from questions concerning trial procedures"); *United States v. McDade*, 28 F.3d 283, 302 (3d Cir. 1994) ("a ruling on the admissibility of evidence at a criminal trial is not completely separate from the merits of the case"); *United States v. McVeigh*, 106 F.3d 325, 332 (10th Cir. 1997) (*per curiam*) ("The district court's sequestration order clearly is not independent from the ongoing criminal prosecution").

Indeed, it is difficult to understand how an order like this one, under Rule 14, could ever be "collateral." That Rule provides that if joinder "appears to prejudice a defendant or the government, the court may order separate trials of counts, sever the defendants' trials, or provide any other relief that justice requires." It thus goes to the very heart of a criminal case, turning upon an

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Moussaoui, 483 F.3d 220, 233 (4th Cir. 2007), or the appointment of a special prosecutor, *United States v. Cowan*, 524 F.2d 504, 505 (5th Cir. 1975).

analysis of prejudice and of the "relief that justice requires," matters intertwined with the merits and uniquely within the knowledge and discretion of the trial judge. *See Zafiro*, 506 U.S. at 539 (Rule 14 "leaves the tailoring of the relief to be granted, if any, to the district court's sound discretion," severance being appropriate if a joint trial will "prevent the jury from making a reliable judgment about guilt or innocence"); *United States v. Lore*, 430 F.3d 190, 205 (3d Cir. 2005).

The government contends that "[w]hether the Government must prosecute counts in a particular order has no bearing on whether Bergrin is guilty or innocent of the crimes charged." GB25. But the question of how to ensure "a reliable determination of guilt or innocence" suffused the district court's order, with respect to both severance and the order in which the severed trials would proceed. *See* A67, A73-74. These issues, do in fact "'substantially overlap factual and legal issues of the underlying' prosecution." GB26 (quoting *Van Cauwenberghe v. Biard*, 486 U.S. 517, 529 (1988) (order concerning venue not appealable as collateral order because of substantial overlap with factual and legal issues of underlying dispute)). Indeed, the order challenged here resembles that in *United States v. Santtini*, 963 F.2d 585 (3d Cir. 1992), where this Court determined that the government could not rely upon the collateral order doctrine to invoke appellate jurisdiction over a district court order suspending an arrest warrant under

Rule 4, so that the person named in the warrant could be deposed under Rule 15. The Court reasoned that the district court's decision, though procedural, implicated questions going to the merits. 963 F.2d at 592. That also applies here, where, the questions of law at issue are resolved only with "painstaking reference to the underlying facts of a case," 963 F.2d at 593, and cannot therefore be termed "collateral."

Of course, district courts have broad discretion to control their dockets, including determining the order in which they will hear cases. *See Landis v. N. Am. Co.*, 299 U.S. 248, 254-55 (1936); *United States v. Bertoli*, 994 F.2d 1002, 1016 (3d Cir. 1993); *In re Fine Paper Antitrust Litig*., 685 F.2d 810, 817 (3d Cir. 1982), *cited in United States v. Barbosa*, 347 F.App'x 746, 749 (3d Cir. 2009).[5] But discretion aside, the government's effort to invoke the jurisdiction of this Court over a severance that is not independently appealable should be rejected because the order at issue is not collateral.

D. Mandamus Jurisdiction Does Not Exist

Cognizant that the only potential avenue to obtain review over these appeals is by peremptory writ, the government urges this Court to exercise mandamus

[5] The district court cited caselaw specifically supporting its authority to determine the sequence of trials following a severance. A74 n.4 (citing *United States v. Brooks*, No. S1-4:04CR0538, 2005 U.S. Dist. LEXIS 33506 at *12, 17 (E.D. Mo. Aug. 29, 2005); *United States v. Cheely*, 814 F.Supp. 1430, 1438 (D. Alaska 1992).

jurisdiction pursuant to 28 U.S.C. § 1651(a). GB29. The government is incorrect that mandamus jurisdiction exists here.

While mandamus may be appropriate with respect to unappealable procedural orders in certain criminal cases, *In re United States*, 273 F.3d 380, 385 (3d Cir. 2001), the writ "may never be employed as a substitute for appeal in derogation of" the "clear policies" limiting government appeals "to narrow categories of orders terminating the prosecution," given the strict construction of the Criminal Appeals Act "against the Government's right of appeal." *Will v. United States*, 389 U.S. 90, 96-97 (1967). Moreover, the writ "is a drastic remedy that 'is seldom issued and its use is discouraged.'" *United States v. Higdon*, 638 F.3d 233, 244 (3d Cir. 2011) (quoting *Lusardi v. Lechner*, 855 F.2d 1062, 1069 (3d Cir. 1988)); *Whittaker*, 268 F.3d at 193 ("a court 'should grant mandamus only in extraordinary circumstances in response to an act amounting to a judicial usurpation of power'") (quoting *Hahnemann Univ. Hosp. v. Edgar*, 74 F.3d 456, 461 (3d Cir. 1996)). Thus, the function of mandamus "is not to 'control the decision of the trial court,'" nor is it "a punitive remedy," *Will*, 389 U.S. at 104, 107. Rather, the writ exists solely "to confine the lower court to the sphere of its discretionary power." *Id.* at 104.

The attempt to use the writ as a "substitute for interlocutory appeal" aside, *id.* at 97, the government fails to address, let alone to meet, the writ's "stringent"

standard of review, *United States v. Wexler*, 31 F.3d 117, 128 (3d Cir. 1994). That is, the government has not even alleged, let alone demonstrated, a "clear error of law," *id.*, or act "amounting to a judicial usurpation of power," *Whittaker*, 268 F.3d at 193. As in *Will*, the district court in this case was not "in any sense without 'jurisdiction' to order" a severance of counts, which Rule 14 "specifically empowers" the trial court" to do, in its discretion. *Will*, 389 U.S. at 98; *see* Fed. R. Crim. P. 14; *Zafiro*, 506 U.S. at 539. Likewise, the court's evidentiary rulings were, as discussed below, discretionary ones; though proper, even "erroneous order[s]" will not justify granting the writ. *Id.* at 98 n.6. ("Courts faced with petitions for the peremptory writs must be careful lest they suffer themselves to be misled by labels such as 'abuse of discretion' and 'want of power' into interlocutory review of nonappealable orders on the mere ground that they may be erroneous."). As discussed below, the district court "was careful never to divorce his ruling from his view of the legitimate needs of the defendant in the case before him and there is no indication that he considered the case to be governed by a uniform and inflexible rule." *Will*, 389 U.S. at 102-03. Rather, throughout trial, the district court's ruling were careful, nuanced and issue-specific, A7-13 (admitting other-acts evidence to demonstrate motive and provide context); A70-72 (rejecting defendant's proposed second severance as "neither justified by concerns for prejudice nor fair to the Government"), and were always concerned

with ensuring a fair trial for both parties. A32, 127, 331, 354, 478, 564, 1342, 3859, 3861, 3870, 3871, 4439, 4448, 4461.

This Court should not entertain the instant application for a writ of mandamus, but if it does, the district court did not so clearly abuse its discretion as to warrant its issuance. The government's application should be denied.

II. THE DISTRICT COURT'S EVIDENTIARY RULINGS DID NOT CONSTITUTE AN ABUSE OF DISCRETION OR CLEAR LEGAL ERROR.

A. Appellate Courts Defer To Trial Courts' Discretionary Decisions

As the government observes, GB30, appellate courts review trial court decisions to exclude other-acts evidence for abuse of discretion. *E.g.*, *Higdon*, 638 F.3d at 238. That is, evidentiary rulings under Rule 404(b) "may be reversed only when they are 'clearly contrary to reason and not justified by the evidence.'" *United States v. Kellogg*, 510 F.3d 188, 197 (3d Cir. 2007) (quoting *United States v. Balter*, 91 F.3d 427, 437 (3d Cir. 1996)). Moreover, with regard to the Rule 403 aspect of such rulings, if "judicial self-restraint is ever desirable, it is when a Rule 403 analysis of a trial court is reviewed by an appellate tribunal." *Id.*; *United States v. Mathis*, 264 F.3d 321, 326-27 (3d Cir. 2001) ("discretion is construed especially broadly in the context of Rule 403").

Deference is the "hallmark" of abuse-of-discretion review. *United States v. Bankoff*, 613 F.3d 358, 374 (3d Cir. 2010). This is because "only the trial judge

has supervised the course of litigation through discovery and pretrial …. In those circumstances the trial court has a superior vantage point which an appellate court cannot replicate. The trial court's decision therefore merits a high degree of insulation from appellate revision. Rulings on evidentiary matters … fall in this category." *Robinson v. Lehman*, 771 F.2d 772, 782 n.18 (3d Cir. 1985) (quoting *United States v. Criden*, 648 F.2d 814, 817-18 (3d Cir. 1981)). For this reason, on abuse-of-discretion review, this Court does not substitute its judgment for that of the district court, even if it would have made a different decision. *United States v. Mike*, 655 F.3d 167, 173 (3d Cir. 2011) ("Our role is not to substitute the judgment we might reach after reading the record for the judgment of a district court judge who actually saw that record develop live in a courtroom.").

The analysis governing admissibility under Rule 404(b) is uncontroversial: the evidence "must (1) have a proper evidentiary purpose; (2) be relevant; (3) satisfy Rule 403; and (4) be accompanied by a limiting instruction (where requested)." *United States v. Green*, 617 F.3d 233, 249 (3d Cir. 2010); *accord Huddleston v. United States*, 485 U.S. 681, 691-92 (1988). A proper evidentiary purpose "is one that is 'probative of a material issue other than character.'" *Green*, 617 F.3d at 250 (quoting *Huddleston*, 485 U.S. at 686). Moreover, the government must show "genuine need" for the evidence based on material, contested issues and the absence of other evidence to the same effect. *United States v. Scarfo*, 850 F.2d

1015, 1019 (3d Cir. 1988); *United States v. Sriyuth*, 98 F.3d 739, 748 (3d Cir. 1996).

B. The District Court Excluded Richard Pozo's Testimony Pursuant To A Proper Rule 404(b) Analysis

In its original Motion *In Limine*, the government proffered that Richard Pozo would testify that, during an attorney visit in 2004, Bergrin advised him that Pozo's co-defendant was a government informant, and that if Pozo "murdered [the co-defendant] he (Bergrin) would win R.P.'s Federal Drug Case." D.E.304, Exhibit B. Specifically, as the district court clarified after reviewing the Jencks material supporting this testimony, Pozo's testimony was to be that Bergrin said "if we can get to him and take him out, you know, this headache will go away," which Pozo interpreted to mean that Bergrin wanted the co-defendant killed. A3731.

The district court initially ruled this evidence admissible under Rule 404(b). A10. Later, however, the court indicated that it wanted to learn more about this evidence before Pozo testified. A1928-29. At the government's request, A3526, the district court deferred the discussion over a weekend; then, after reviewing written submissions and hearing oral argument, the court excluded the evidence. A17-27.

Contrary to the government's assertion, the district court did not impermissibly exclude this evidence because it concluded that Pozo's testimony would not be credible. GB32-34. Rather, consistent with the dictates of

Huddleston, 485 U.S. at 688, the court assessed the proffered evidence "under the usual rules for admissibility":

> … the first step is one which very rarely is even an issue, and that is, the first step is to determine the admissibility of other acts, and the first step is to -- the district court must decide whether there is sufficient evidence that the other act in question actually occurred … and then the second step, of course, is the Court must decide whether the evidence of other acts is probative of the material issue other than character; and then if the evidence is probative of a material issue other than character, the district court must decide whether the probative value of the evidence is substantially outweighed by its potential prejudicial effect.

A17. Properly analyzing whether the government had proffered "evidence sufficient to support a finding of the fulfillment of the condition" upon which relevancy depended, *Huddleston*, 485 U.S. at 690, the court, after hearing the majority of the government's case-in-chief and reflecting on the proffered evidence in light of the parties' arguments, A19, A3736, raised several legitimate concerns, including (but certainly not limited to) whether the jury could "reasonably conclude that the act occurred," 485 U.S. at 689.

The court noted that the conversation "occurred many years ago, and we're talking about people's best recollections of that conversation without it having been recorded, without it having been documented immediately." A20. *See also* A25 ("Pozo would be another witness, a drug dealer who is claiming at some point some conversation occurred. It's not documented."). The court also expressed

well-founded concerns regarding whether the act occurred given that Pozo, according to the proffer, made the statement long after the events at issue and months after a prior proffer in which he did not mention them, all in an effort to reduce a 132-month federal sentence and mitigate his 24-year exposure in a New Jersey drug kingpin case. A3696-A3705. These concerns were reasonable in light of "all evidence presented to the jury." *Huddleston*, 485 U.S. at 690-91. That is, the other-acts evidence that the district court had already admitted, had proved not only questionable but tenuous with regard to the purpose of its admission. A1768-69. The court, then, understandably questioned the reliability, as well as the effect and purpose, of the Pozo evidence. A3605. In *Huddleston*, the sum of the evidentiary presentation had bolstered the relevance of the excluded evidence, 485 U.S. at 691; here, that same analysis militated in favor of exclusion, a circumstance which the trial court was able to evaluate firsthand.

In considering the reliability of this evidence, particularly in light of the record of the case as a whole, the district court certainly did not err. *See, e.g.*, *United States v. Hough*, 385 F.App'x 535, 537 (6th Cir. 2010) (testimonial similar-acts evidence properly excluded in part because probative value of unproven acts was low); *United States v. Gilbert*, 229 F.3d 15, 23 (1st Cir. 2000) ("we regard the inherent reliability of the [similar acts] evidence, and thus its overall probative value, as very much open to question"). But additionally -- and foremost to its

analysis -- the court was concerned that the evidence would be confusing rather than helpful to the jury. Specifically, its ruling was expressly based upon the fact that this evidence, which it assumed to be true, would have required jurors to parse what Pozo interpreted Bergrin to have meant and then to use that interpretation to understand a very different phrase, all in an effort to establish Bergrin's intent. A3730. As the district court explained:

> And in weighing the factors that I need to weigh as far as, you know, the minimum degree it will have with respect to intent, because this jury would have to parse those words, whatever they finally conclude were the words, first of all, because there's nothing to document other than Mr. Pozo saying what he remembers, and then on cross it may come out to be something else, they'd have to document those -- they'd have to parse those words along with the "No Kemo, no case." And I think their challenge as far as dealing with "No Kemo, no case" is enough. But they have direct evidence in this case. They have Mr. Young and they have Mr. Castro to show what those words meant …. And in weighing -- in making the balance test that I have to make, introducing this evidence at this time would be, in my opinion, too confusing to the jury for the minimum value it has with respect to intent.

A25-26.

Thus, contrary to the government's argument, the district court was primarily concerned, not with Pozo's credibility, but with whether the evidence was sufficiently probative with regard to an issue in the case. *E.g.*, *Hamling v. United States*, 418 U.S. 87, 125 (1974) (district court correctly determined

confusing evidence had limited probative value); *Hough*, 385 F.App'x at 537. And, as the district court correctly observed, the probative value of other-acts evidence, which is by definition collateral to the charged acts, is lower when there is direct evidence of the contested issue. *See United States v. Lopez*, No. 86 CR 513, 1987 U.S. Dist. LEXIS 7552 at *17 (N.D. Ill. Aug. 17, 1987) ("in light of the already available direct evidence of defendants' involvement in the present conspiracy, the incremental probative value of the corroborating evidence from the earlier case is negligible at best"); *Gilbert*, 229 F.3d at 30 (similar acts evidence was "at best cumulative" of direct evidence). *See generally Scarfo*, 850 F.2d at 1019 ("trial judge must appraise the genuine need for the challenged evidence"). Here, such evidence existed, as both Young and Castro offered direct testimony regarding Bergrin's actions and the intent behind them. A2324, A2528. By contrast, as the district court's ruling made clear, Pozo's interpretation of Bergrin's words on one occasion would have confused, rather than assisted the jury in interpreting the very different phrase "No Kemo, No Case" on another.

Most significantly, the district court's ruling excluding Pozo's testimony was correct because, in fact, Bergrin's actual defense, as it developed at trial, was *not* that he lacked "specific intent to tamper with and kill Kemo," GB15. Rather,

though the government, in its effort to admit this inflammatory evidence,[6] continues to intone that Bergrin's intent was "the key issue in the case," GB15, that is simply untrue. As the district court ultimately acknowledged, the case did not turn on what Bergrin meant by "No Kemo, no case." A3871. Instead, Bergrin's defense -- introduced primarily through the cross-examination of Anthony Young, the single witness who testified as to that conversation -- engendered a complete denial that he made that statement or even attended the meeting at which it was allegedly made. A2943-44, A4189, A4241, A4270-74, A4281, A4291, A4294-96, A4307-4311, A4317, A4353. Under these circumstances, of which the district court was uniquely aware, having sat through the trial, the real purpose of admitting the Pozo evidence was not to show intent, but to establish Bergrin's propensity to commit the offense. That, of course, can never be the purpose of evidence admitted under Rule 404(b).[7] Because it was here, as the government's

[6] Showing "intent" is perhaps the most common purpose for which evidence is admitted under Rule 404(b). *See Bauchman v. West High Sch.*, 132 F.3d 542, 571 (10th Cir. 1997) ("prior acts or wrongs are most frequently admitted in both civil and criminal trials to 'show a pattern of operation that would suggest intent'") (quoting *Weinstein's Federal Evidence* § 404.22[1][a] (2d ed. 1997); *United States v. Manganellis*, 864 F.2d 528, 542 (7th Cir. 1988).

[7] *See* Fed. R. Evid. 404(b) ("Evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character."); *United States v. Sampson*, 980 F.3d 883, 888 (3d Cir. 1992) ("The district court … must in the first instance, rather than the appellate court in retrospect, articulate reasons why the evidence also goes to show something other than character."); *United States v.*

own documents demonstrated, A3723 (quoting Case Update stating "As it relates to Bergrin, a proffer held on April 5, 2005 with Richard Pozo provides additional information regarding Bergrin's propensity to have witnesses killed."), the district court's ruling excluding Pozo's testimony, far from constituting an abuse of discretion, let alone justifying a writ of mandamus, was correct.

Nor does the district court's Rule 403 analysis justify appellate intervention. The court, after full consideration of the parties' arguments over several days, methodically balanced the probative value of the evidence against its danger for unfair prejudice. *See* A3737 (postponing decision so court need not "rush"). The court then concluded that the government, as proponent of the evidence, had failed to show that the risk of unfair prejudice did not substantially outweigh the probative value of the testimony. A23. In making this determination, the court expressed "concern that it would be considered by this jury as propensity versus really going to intent," A23, as well as that it would be "cumulative and very collateral and very confusing." A24. Although the district court concededly performed the analysis that the Rule requires, *cf. United States v. Murray*, 103 F.3d 310, 318-19 (3d Cir. 1997), and notwithstanding the "especially broad[]" deference to which this balancing is entitled by this Court, see *Mathis*, 264 F.3d at 326-27,

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Herman, 589 F.2d 1191, 1198 (3d Cir. 1978) (evidence improperly admitted for "whether [the defendant] was the kind of person who would take a bribe").

the government attacks the district court's Rule 403 analysis as "arbitrary and irrational." GB35.

This attack does not even purport to recognize the trial judge's discretion with regard to such evidentiary issues, or address the standards for mandamus. Though the government did not prevail, that does not necessarily engender error. Rather, the district court did its job and its Rule 403 ruling should, particularly in the fact-sensitive and potentially explosive context of Rule 404(b) evidence, be affirmed. *See, e.g., United States v. Lee*, 612 F.3d 170, 190 n.24 (3d Cir. 2010) ("Application of the standard dictated by Rule 403 is, by definition, a judgment call."); *Gilbert*, 229 F.3d at 25 ("Here, where the other act evidence is only marginally reliable, of marginal probative value, and so undeniably explosive, the court's decision to tread a cautious path was well within its wide discretion."); *United States v. Martinez*, 744 F.2d 76, 80 (10th Cir. 1984) ("The district court, which was in a position to weigh the particularized prejudice of such evidence under all the circumstances of this litigation, decided that evidence of the incidents for which Martinez is not now charged should not be admissible in the third trial. We cannot say that this decision is an abuse of the district court's discretion").

Thus, although the government argues that the district court erred in its assessment of the proffered Pozo testimony as of "minimal value," because it "is highly probative of intent," GB35, 37, the government's "incantation of the proper

uses of such evidence under the rule does not magically transform inadmissible evidence into admissible evidence." *United States v. Morley*, 199 F.3d 129, 133, 140 (3d Cir. 1999). And, as set forth above, intent was *not* the primary issue at trial: whether Bergrin did what government witnesses Young and Castro said he did was. Nor do the passages of Bergrin's opening, cross-examination or summation, cited by the government, GB36, focus on intent: the discussion in his opening attacks whether Bergrin said that which Pozo attributed to him. A691-692 ("I never say to him: Let's get rid of the informant"). Likewise, the passage of cross-examination cited by the government, A2973-74, is an attack upon Young's testimony as to what Bergrin said, consistent with the theme that Young fabricated the meeting, his role as shooter, and Bergrin's involvement. And the brief summation passages cited, though they mention intent,[8] must be read in the context

[8] The passage on A4194 is properly read, given the summation as a whole, as Bergrin's denial of any involvement in the death of Kemo McCray. He states, consistent with his defense, that "I, under no circumstances, ever intended, ever wanted, ever told, ever warned, ever advised, ever inform anyone to ever harm a hair on the head of Kemo McCray." Likewise, the passage on A4277, discusses not the meeting at which Bergrin allegedly said "No Kemo, No Case," but instead Bergrin's actions in transmitting the information provided him by his client as to the identity of the informant, in order, Bergrin contended, A4276, to make a bail argument addressed to the strength or weakness of the government's case (also the subject of the jury instruction which, the government argues, GB36, somehow renders the Pozo conversation admissible). But the crux of the government's case was not this conversation, which Bergrin admitted, but the subsequent meeting, which he denied. A2943-44, 4189, 4241, 4270-74, 4281, 4291, 4294-96, 4307-4311, 4317, 4353.

of a summation which establishes the real defense in the case: that Young's account was not to be believed. A4191-93, 4197, 4199, 4202-04, 4237-47, 4269-4281, 4298, 4306-4311.

In sum, the government's argument that the district court abused its considerable discretion in refusing to admit the Pozo testimony turns entirely upon its probative value as evidence of intent in a case that really was not about intent. Under these circumstances, admitting this evidence would not have fulfilled a proper purpose under Rule 404(b) evidence; instead, as the court feared, the jury might very well have considered it for the improper purpose of establishing propensity to commit a crime or bad character. A3751-54. Nor did the court find it more prejudicial than probative, A23, because it "helps one side prove its case," GB40 (quoting *United States v. Starnes*, 583 F.3d 196, 215 (3d Cir. 2009)), as the government argued concerning nearly every evidentiary issue that arose. A4489-90; D.E.302 at 4; D.E.304 at 6, Exhibit C at 4.

Finally, although the government finds the district court's analysis "unpersuasive," GB38, other federal courts have agreed that where similar acts evidence threatens to distract or confuse the jury, it is inadmissible under Rule 403. *See, e.g.*, *Hough*, 385 F.App'x at 537-38 (proving that similar acts "actually occurred would make this case derail into a mini-trial into each of those, would inflame … [and] confuse the jury"); *United States v. Stout*, 509 F.3d 796, 801 (6th

Cir. 2007) ("despite the probative value of the prior bad acts evidence in this case, suppression is appropriate … the reverberating clang of those accusatory words would drown out all weaker sounds"); *Gilbert*, 229 F.3d at 23 ("even if the district court considered the evidence regarding the attempted murder of Glenn Gilbert as having a significant degree of special relevance as to identity, intent, knowledge, opportunity, or causation, the court still would have excluded the evidence because, in its view, the evidence was overwhelmingly likely to confuse the issues and mislead the jury."). Here, the district court expressed understandable concern not only with the prospect of a mini-trial on a collateral issue, but also with the confusing nature of the potential testimony. A26. The trial judge's decision in this regard, was not, as the government claims, derived from an "overall attitude towards this prosecution," GB39, but rather, was an appropriate response to the government's repeated attempts to bolster a weak case with propensity evidence. *See Sampson*, 980 F.2d at 886 (government's stated purpose for admission of 404(b) evidence "may often be a Potemkin, because the motive, we suspect, is often mixed between an urge to show some other consequential fact as well as to impugn the defendant's character.").

C. The District Court Properly Excluded Evidence of the Esteves Plot Under Rule 404(b).

The district court was long concerned about the propriety and fairness of admitting evidence of the Esteves plot in a trial of the Kemo Murder. From the

outset, Bergrin sought a severance, so that evidence of the former would not deprive Bergrin of a fair trial on the latter. D.E.135 at 41-44. Initially, the trial court reserved decision, D.E.159, but after this Court reversed the district court's dismissal of the RICO charges, Bergrin again argued, this time with respect to a Second Superceding Indictment, that a joint trial of these two sets of charges would present too great a risk that the jury would use evidence of the Esteves plot to draw the forbidden inference of propensity with regard to the Kemo murder. D.E.218 at 7-8. In considering this severance motion, the court sought a proffer from the government of the Rule 404(b) evidence it would seek to introduce in a stand-alone trial of the Kemo murder. A373, A58. The government complied, without objection, and the parties briefed and argued the issue. D.E.304, Exhibit A; A338-569, 4486-4491. Ultimately, the district court granted in part Bergrin's severance motion and ordered that Counts Twelve and Thirteen, the Kemo Murder, be tried first. A51. In its ruling, the court addressed the proffered Rule 404(b) evidence, anticipating that, while it was unlikely to admit "much of the evidence regarding the Junior murder conspiracy," A59, "some" of that evidence would "likely be admissible to provide the requisite background information to support testimony … as to certain admissions Bergrin made in 2008 that are probative of his guilt on the K.D.M. Counts," A62.

The government then moved *in limine* to admit the evidence of the Esteves case in the Kemo Murder Case. D.E.304, Exhibit B; A4492-4501. After consideration of the briefs and *in camera* argument, the district court admitted significant portions of the government's proffered evidence, A7-13, but excluded evidence of the Esteves plot, including Bergrin's alleged statement to Esteves quoted by the government, GB5, reasoning that the evidence's potential for unfair prejudice "far outweighs its minimal probative value." A12-13. The court wrote:

> … while the Court previously indicated its willingness to consider allowing a limited amount of evidence to provide the necessary context as to these admissions, this no longer seems appropriate now that the Court has a better understanding of those admissions. The admissions that Bergrin allegedly made are too vague to be of great probative value -- indeed Bergrin does not mention the K.D.M. murder specifically, but only alludes in general terms to some past act of indeterminate nature. And they, like the evidence of the 2008 murder conspiracy, are potentially unduly prejudicial …. the potential prejudice of evidence regarding the murder conspiracy with Estevez is so great that it threatens to prevent the jury from making a proper determination of Bergrin's guilt for the K.D.M. murder ….

A13. The government, having failed to request either that this ruling issue before the jury was sworn, or that the jury be sworn immediately before opening, did not appeal from this ruling.

The government sought reconsideration of this ruling, among others, both following Bergrin's opening, D.E.263, A963-969, and again shortly before resting

its case. D.E.304 at 9-13. The district court heard argument, A3955-3958, 3976-3980, 3870-3879, and reviewed further briefing, D.E.306, 309, before denying that motion. A3879. The court stated:

> if the Esteves evidence came in and there was a conviction, I would believe in my belief that that conviction was the result of the Esteves evidence, because I don't see how they could humanly put that out of their mind and the purposes of the cautionary instruction would be and then weigh the rest of the case accordingly.

A3876.

The government now contends this ruling was an abuse of discretion because the Esteves plot should be admissible on a retrial of the Kemo murder, as relevant to intent which will be "vigorously contested" on retrial. GB47.[9] The government is wrong. As discussed above, Bergrin's defense was not -- and will

[9] The government also contends that the district court abused its discretion in refusing to admit the Esteves evidence in light of Bergrin's opening. GB49-51. But this ruling obviously cannot be the basis of an appeal excluding evidence from a retrial, in which the opening has not yet taken place. *See United States v. Akers*, 702 F.2d 1145, 1148 (D.C. Cir. 1983). Moreover, the district court repeatedly instructed the jury that opening statements specifically, and statements by the attorneys in general, are not evidence and that they must only consider the evidence in deciding the case. A590-91, A693, A1592, A4034. Finally, unlike the cases cited by the government, GB49, Bergrin's comment addressing 404(b) evidence did not constitute his defense to the crimes charged. *E.g.*, *United States v. Castillo*, 181 F.3d 1129, 1132-34 (9th Cir. 1999) (affirming district court's decision to admit evidence to impeach defendant's "expansive and unequivocal denial of involvement with drugs" in drug case); *United States v. Higham*, 98 F.3d 285, 292-93 (7th Cir. 1996) (404(b) evidence admissible to show predisposition in the face of entrapment defense).

not be -- intent but, rather, that he did not do the acts alleged, including that he did not attend the meeting or make the statement ("No Kemo, no case") that was the centerpiece of the government's case.[10] Under these circumstances, just as with regard to the proffered Pozo testimony, the only possible inference that a jury could draw from the Esteves evidence would have been the forbidden one of propensity. The district court's ruling excluding this evidence is then, on even more solid ground now than it was at the outset of the trial, when the court believed that intent would be the key issue in the case.

Moreover, the district court's holding that the Esteves plot had limited probative value with respect to intent, A58-61, was correct, and well within its discretion. Just as the "logic of showing prior intent or knowledge by proof of subsequent activity escape[d]" this Court in *United States v. Boyd*, 595 F.2d 120, 126 (3d Cir. 1978), so did the district court here, even as it explicitly acknowledged that "there is no *per se* bar to subsequent act evidence," properly conclude that evidence of similar acts occurring more than four years after the charged acts were minimally probative of prior intent. A59-60. In the district court's words, "to impute knowledge or intent from subsequent acts requires a less

[10] As Bergrin argued on summation, "this case rises and this case falls on Anthony Young. He's the one who supposedly heard me make the statement 'No Kemo, no case.'" and not "a word that he utters" could be believed. A4189, A4191. The government cites excerpts from Bergrin's summation, but ignores those to this effect.

defensible inferential leap. The fact finder must assume that because a person acted expecting or intending a certain consequence at a later date, he intended that same consequence to occur when he took that same act some time before … it looks more like evidence that is being offered to show … propensity[.]" A60. Other federal courts have concluded likewise. *See, e.g.*, *United States v. Curley*, 639 F.3d 50, 61 (2d Cir. 2011); *United States v. Cowart*, 90 F.3d 154, 158 (6th Cir. 1996); *United States v. Bakke*, 942 F.2d 977, 980-81 (6th Cir. 1991); *United States v. Garcia-Rosa*, 876 F.2d 209, 221 (1st Cir. 1989); *United States v. Watson*, 894 F.2d 1345, 1349 (D.C. Cir. 1990); *United States v. Zelinka*, 862 F.2d 92, 99 (6th Cir. 1988).[11]

The district court also acted well within its discretion when it correctly concluded that the Esteves plot evidence was too unfairly prejudicial to admit under Rule 403. A13, 56, 62, 3876. In reaching this conclusion, the court never

[11] The government relies on cases, GB43, which not only pre-date the enactment of Rule 404(b), but are inapposite. For example, *United States v. Alker*, 260 F.2d 135, 157 (3d Cir. 1958), concerned "contemporaneous false statements," and addressed the probative value of defendant's *prior* failure to file a tax return to the subsequent charged conduct of filing a false tax return. *United States v. Todaro*, 448 F.2d 64, 67 (3d Cir. 1971), also concerned contemporaneous similar acts, one occurring minutes *before* the charged act, and one occurring "about two months after." Both cases affirm district court decisions; neither suggests that it would be an abuse of discretion to exclude evidence of other acts occurring four years after charged conduct based on its limited probative value. *See Ansell v. Green Acres Contracting Co., Inc.*, 347 F.3d 515, 524-25 (3d Cir. 2003) ("Subsequent actions … may be less probative of … intent."). The district court also correctly distinguished the cases the government cites, GB48. *See* A60.

suggested that proof of similar acts to show intent, dictates exclusion *per se*, as the government contends. GB44. In fact, the court twice rejected Bergrin's proposal for separate trials organized by substantive scheme, A56-57, 70-72, noting that "evidence of other witness tampering plots in which Bergrin may have been involved before or around the same time as the K.D.M. murder conspiracy could be admissible under Rule 404(b) to show Bergrin's intent," A59, and that "evidence of the K.D.M. murder conspiracy would likely be admissible under Rule 404(b)" in a trial of the Esteves plot, A71. As the district court explained, only the introduction of the Esteves plot in the Kemo murder trial "created a kind of perfect storm that this Court felt, based on its trial experience, posed a serious risk of undue prejudice." A72. And the district court was explicit as to what that prejudice was: evidence of the Esteves plot was

> potentially -- so prejudicial to the extent that he wouldn't get a fair trial that I don't see how a jury -- now I'm even more convinced, having heard this case, I don't see how a jury could disregard that evidence and solely use it to consider it for intent here. When they hear that evidence, they're human, I think the jury would be convicting him on that evidence on this case, and not just using it.

A35.

Thus, the government's bromide that the district court's "real concern" was "that the Esteves Plot was *too* probative," and that unfair prejudice means "damage to the opponent's cause," GB45, ignores the district court's articulated concern that

Bergrin receive a fair trial on the Kemo murder "and not have a jury struggling with, well, five years later, he said something, and now we have to consider that only as to intent, not that he's got a propensity to do this … I don't see how that's humanly possible." A36. Far from an intrusion on the jury's role,[12] GB46, this is precisely the kind of judgment properly committed to the district court's discretion. *See, e.g.*, *Murray*, 103 F.3d at 318-19 (even if Rule 404(b) evidence of prior unrelated murder "had some relevance to show something other than that [defendant] has a homicidal character, this relevance was so slight and the potential for unfair prejudice was so great that Fed. R. Evid. 403 demanded the exclusion of the evidence …. It should go without saying that evidence in a murder trial that the defendant committed another prior murder poses a high risk of unfair prejudice."). Indeed, in conducting its careful Rule 403 balancing, the district court correctly

[12] The government incorrectly contends, GB46, that the district court intruded on the jury's role by employing its common sense understanding of the phrase "no witness, no case" as one that would commonly and usually be innocently used by criminal defense attorneys, in contrast to the coded language at issue in *United States v. Ortiz*, 474 F.3d 976, 980-81 (7th Cir. 2007), which would be clarified by evidence of the subsequent use of that phrase. *See* A61. Of course, no case is cited -- and there is none -- that supports the proposition that in exercising its discretion, a district court may not employ its common sense, without intruding upon the jury. *E.g.*, *United States v. Brooks*, 426 F.App'x 878, 881 (11th Cir. 2011) ("[t]o determine whether the evidence is more probative than prejudicial, a district court must engage in a common sense assessment of all the circumstances surrounding the extrinsic offense"); *In re TMI Litig.*, 193 F.3d 613, 698 (3d Cir. 1999) (noting proper role common sense plays in evaluating admissibility of expert testimony).

determined that, rather than serving as relevant evidence with a proper purpose, evidence of the Esteves plot posed too great a risk of creating an inference of just the type of propensity that Rule 404(b) forbids. A13, A56, A62, A3876.

The government disparages the district court's exclusion of this evidence as an "abdicat[ion of] its role to police the search for the truth in order to punish the Government's charging decisions." GB50. This not only insults the district court's good-faith exercise of its discretion to provide the defendant a fair trial, but valorizes the government's repeated attempts to base an otherwise weak murder prosecution on evidence of other acts, which risk a conviction based upon character rather than guilt. As the court said:

> it should be as fair as possible and not use extraneous other crime evidence that someday the Government's going to have their chance to prosecute the Defendant on that. So, you know, in terms of balancing this out in terms of giving the Government a fair shot and giving the Defendant a fair shot -- you know, this case, the Government made this charge. These are the witnesses you made it on, primarily. If the jury believes these witnesses, he'll be convicted.

A3875-76. The government fails to point to any cognizable legal error amounting to an abuse of discretion, let alone an "act amounting to a judicial usurpation of power," justifying mandamus.

III. The District Court's December 27, 2011 Severance Order Was Correct.

From the outset, Bergrin sought a severance of the Kemo murder counts so that he could receive a fair trial on those charges. D.E.135 at 41-44. This concern was far from frivolous: this Court acknowledged, in its opinion reversing the district court's dismissal of the RICO case, that the risk of spillover prejudice or complex limiting instructions were of "understandable concern for a trial judge." *United States v. Bergrin*, 650 F.3d 257, 275 (3d Cir. 2011). The Court further stated that the district court had "a rational reason for discussing … severance under Rules 8 and 14"; indeed, the Court recognized that "[t]he Government's indictment was somewhat unwieldy," even citing the government's admission "that the acts [alleged] would be prejudicially joined under Rule 14(a)." *Id.* at 276 & n.18 (quoting *United States v. Bergrin*, 707 F.Supp.2d 503, 510-11 (D.N.J. 2010)).

When, again, "[f]aced with a handful of motions to sever," stemming from the Second Superseding Indictment, D.E.218 at 7-8, the district court "needed to analyze these rules." *Id.* After considering the parties' arguments, D.E.304, Exhibit A; A338-569, 4486-449, the court granted, in part, Bergrin's request for separate trials of the charges contained in the Second Superseding Indictment, ordering that the Kemo murder case "be tried first and separate from the remaining

Counts." A51; A54-64. The government did not object to this order of trials; it also did not seek to appeal from that severance.

That trial ended in a hung jury. A4413. After declaring a mistrial, the district court set January 4, 2012 for retrial. A4415. The government then filed its appeal from the court's putative evidentiary rulings and "formally request[ed] to try the balance of the Second Superseding Indictment (Counts 1 through 11 and 14 through 33)" next. D.E.344 at 1. Meanwhile, Bergrin requested a severance, seeking to try the Esteves Plot alone. A4422. After briefing and argument, D.E.351, 352, 353, D.E.354, 357, A4431-4485, the district court rejected Bergrin's motion, instead severing Counts Five, Eight through Ten, and Seventeen through Twenty-Six, *i.e.*, the balance of the indictment, except the racketeering counts and certain unrelated tax- and prostitution-based offenses, A75. The court's opinion reasoned that this severance "avoids undue prejudice because Bergrin faces no exposure for his alleged involvement in the K.D.M. murder conspiracy, and so the jury cannot find him guilty of those charges based on improper spillover evidence." A73. The district court further ordered the severed counts to proceed first because "[i]n this case, justice requires not only severance but a determination of the order in which the severed counts may be tried …. Indeed, if the Court ordered severance but did not also determine the order of the severed trials, the Government could proceed with the RICO Counts and seek to convict Bergrin of

the K.D.M. murder conspiracy based on evidence regarding his involvement in the Junior murder conspiracy. The severance would accomplish nothing." A73-74. Notwithstanding that Rule 14 empowers the district court to "order separate trials of counts … or provide any other relief that justice requires" and "leaves the tailoring of the relief to be granted, if any, to the district court's sound discretion," *Zafiro*, 506 U.S. at 539; *Lore*, 430 F.3d at 205, the government now attacks both the severance and the order of proceedings. GB52.

Of course, as the government concedes, if this Court affirms the district court's evidentiary ruling excluding evidence of the Esteves Plot, then the basis of the government's severance appeal would be eviscerated. GB52-54. But even if this Court were to reverse that 404(b) ruling, it does not follow that the second severance fails. Rather, the admission of other-acts evidence is only one factor in a district court's severance analysis. Severance turns on whether a "joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence." *Zafiro*, 506 U.S. at 539. Thus a severance may be warranted to avoid the risk that the jury will use other-act evidence to convict the defendant of the charged offense based on an inference of propensity. But even if that other-act evidence is admissible under Rule 404(b), appropriate limiting instructions would be required. *See Green*, 617 F.3d at 249; *accord Huddleston*, 485 U.S. at 691-92. Nonetheless, district courts may, within

their discretion, grant a severance, in order to address the understandable concern that a jury would not be able to follow these instructions. *See Higdon*, 638 F.3d at 243-44 ("we are not so naïve as to believe that a curative instruction will always vitiate all possibility of prejudice in every case") (citing *Zafiro*, 506 U.S. at 540-41).

Indeed, that was precisely the concern here. As the district court stated: "I don't feel [jury instructions] would be adequate. I told you that in the beginning. If I thought they would be adequate I wouldn't have severed those counts to begin with. If I really thought explaining to a jury by a limiting instruction would have been curative of the concerns I had, I would have done it. I've done it in most other cases." A4441. Thus, even if the Court somehow concludes that the district court's evidentiary rulings amounted to an abuse of its discretion, the second severance still withstands appellate scrutiny, as an independent, appropriate exercise of discretion.

Moreover, the government's second argument, that the district court abused its discretion in ordering the sequence of the proceedings, is truly unprecedented; indeed, the government did not raise this argument in response to the first severance order. A51. Bergrin agrees that it is not the defendant's choice as to which counts will proceed next, *see United States v. Pimentel*, 654 F.2d 538, 545 (9th Cir. 1981), but it is also not the government's. Thus, though the government

contends, without support, that "by requiring the Government to try particular counts next, without identifying any legitimate countervailing considerations warranting such relief," the second severance order "impinges on the separation of powers," GB56-57,[13] in fact, it is the government which, in the name of "the separation of powers," seeks to override the district court's well-established control over its own docket. *See Landis*, 299 U.S. at 254-55 ("every court" has the power "to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants"); *United States v. Schiff*, 602 F.3d 152, 176 (3d Cir. 2010) ("We give a district court broad discretion in its rulings concerning case management both before and during trial."); *Bertoli*, 994 F.2d at 1016 ("Power inherent in the function of the judiciary exists so that a court may manage its affairs"). *See also Clinton*, 520 U.S. at 706 (discussing district courts' "broad discretion to stay proceedings").

Nor does the government provide any authority for the new standard it announces, that "[a] court cannot use Rule 14 to override the Government's preference concerning which charges to try when, unless doing so addresses substantial and legitimate countervailing considerations." GB55. No case requires

[13] The government cites *Zabawa*, 39 F.3d at 284, for this proposition, but that case addressed an order forcing the government to abandon the prosecution of separate crimes. Here, by contrast, the district court has repeatedly made clear its intention to proceed to trial on the RICO case should the government choose to do so. D.E.363 at 2; A4513; A4484; A4466.

such a showing, particularly not *United States v. Casamento*, 887 F.2d 1141, 1149-53 (2d Cir. 1989), which only suggests principles to guide district courts in managing long, complex trials. But even if this Court were to apply such a neologism, the district court has, since the outset of this case, and particularly in granting the second severance, identified just such substantial and countervailing considerations, consistently emphasizing the risk that the jury would find Bergrin guilty of the Kemo murder based upon improper spillover evidence, A73-74, and that it would not be able to follow a limiting instruction to mitigate that danger of undue prejudice. A4441. Even the government's novel standard would, then, be satisfied. The district court neither abused its discretion nor made a clear error of law.

IV. THE GOVERNMENT'S REQUEST TO ORDER THE CASE REASSIGNED, BASED PRIMARILY UPON THE COURT'S ADVERSE RULINGS, SHOULD BE DENIED.

Disappointed with the district court's rulings, the government requests that this Court order the case reassigned to a different district judge. But, as the government acknowledges, "reassignment is an extraordinary remedy." GB63. The Court has the authority to reassign a case on remand, which stems from two sources, the federal recusal statute, 28 U.S.C. § 455 and its statutory authorization pursuant to 28 U.S.C. § 2106. *United States v. Bertoli*, 40 F.3d 1384, 1411 (3d Cir.

1994) (citing *Liteky v. United States*, 510 U.S. 540, 554 (1994)). *See also United States v. Wecht*, 484 F.3d 194, 226 (3d Cir. 2007).

Reassignment pursuant to the recusal statute is required only if the district judge's "impartiality might reasonably be questioned." 28 U.S.C. § 455(a). But the law is clear that beliefs or opinions requiring recusal under § 455 must derive from an extrajudicial source; recusal is almost never appropriate based on judicial rulings or opinions formed as a result of presiding over a case. As the Supreme Court stated in *Liteky* (not cited by the government):

> [J]udicial rulings alone almost never constitute a valid basis for a bias or partiality motion. *See* [*United States v. Grinnell Corp.*, 384 U.S. 563, 583 (1966)]. In and of themselves (*i.e.*, apart from surrounding comments or accompanying opinion), they cannot possibly show reliance upon an extrajudicial source; and can only in the rarest circumstances evidence the degree of favoritism or antagonism required (as discussed below) when no extrajudicial source is involved. Almost invariably, they are proper grounds for appeal, not for recusal. Second, opinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings, do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible. Thus, judicial remarks during the course of a trial that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge.

Liteky, 510 U.S. at 555-56.

As this Court has held, "Beliefs or opinions that merit recusal must involve an extrajudicial factor; '[f]or example, if a judge has acquired a dislike of a litigant because of events occurring outside of the courtroom, a duty to recuse might ensue.'" *United States v. Vampire Nation*, 451 F.3d 189, 208 (3d Cir. 2006) (quoting *United States v. Antar*, 53 F.3d 568, 574 (3d Cir. 1995). An extrajudicial source is "a source outside of the official proceedings." *Bertoli*, 40 F.3d at 1412. *See, e.g., Selkridge v. United of Omaha Life Ins. Co.*, 360 F.3d 155, 167 (3d Cir. 2004) (counsel's letter to local newspaper is extrajudicial source). As this Court has explained, "[b]ecause the focus is on the source of the judge's views and actions, 'judicial rulings alone almost never constitute a valid basis for a bias or partiality motion.'" *Bertoli*, 40 F.3d at 1412 (quoting *Liteky*, 510 U.S. at 555). "Similarly, and for the same reason, judicial remarks during the course of a trial that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge." *Id.*

"Post-*Liteky* cases involving allegations of bias derived from judicial proceedings have construed the exception to the extrajudicial source requirement narrowly." *Antar*, 53 F.3d at 574. Thus, judges' *in*-court conduct will warrant recusal or reassignment only in the rare case that it "reveal[s] such a high degree of favoritism or antagonism as to make fair judgment impossible." *Liteky*, 510 U.S. at 555; *Bertoli*, 40 F.3d at 1412. Mere disagreements with a court's rulings (as in

this case) are grounds for persuasion or appeal, not recusal. Indeed, this Court has "repeatedly stated that a party's displeasure with legal rulings does not form an adequate basis for recusal." *Securacomm Consulting, Inc. v. Securacom Inc.*, 224 F.3d 273, 278 (3rd Cir. 2000); *see also Azubuko v. Zobel*, 179 F.App'x 136, 137 (3d Cir. 2006); *Jones v. Pittsburgh Nat'l Corp*., 899 F.2d 1350, 1356 (3d Cir. 1990) ("Disagreement with a judge's determinations and rulings cannot be equated with the showing required to so reflect on impartiality as to require recusal."). Even a series or pattern of adverse rulings is not indicative of bias. *Mass. Sch. of Law at Andover*, 107 F.3d 1026, 1043 (3d Cir. 1997).

This jurisprudence highlights the deficiency of the government's request for reassignment. First, the large majority of the actions upon which the government bases its request for reassignment are not in the least extrajudicial. Most are simply rulings, with which the government certainly disagrees, but which are matters for further litigation -- where permitted -- not reassigment. Indeed, the government expressly, and repeatedly, seeks reassignment on the basis of the district court's severance, GB64; GB65, and evidentiary rulings, GB67; GB68 -- the very rulings that are the subject of *this* appeal. The government also cites miscellaneous discretionary determinations that did not go its way. *See* GB68 (complaining that the Court refused to poll the jury regarding media accounts of the Court's criticisms of the government's witness). As set forth above, such

rulings, even if erroneous, would not constitute a basis for reassignment. Nor are the district court's expressed views of the case, frequently mischaracterized by the government in its brief,[14] grounds for reassignment. All of them were indisputably based upon what the court learned during the course of this matter, and none had an "extrajudicial source."[15] *See* GB65 (protesting the district court's view that the

[14] For example, the government states that the district court "expressed surprise that the jury had not acquitted Bergrin and stated that it would have acquitted Bergrin." GB69. In fact, the court said no such thing, and the government's citation to the record is to *its own* statement to that effect. The district court did not adopt the government's account, but instead engaged in a colloquy with regard to the court's having conducted (as most courts do during the course of trial) off-the-record discussions with counsel, none of which had been objected to during trial. Undersigned counsel's recollection of the conversation is nothing like the government's: the district judge, as counsel recalls it, opined that he *expected* either a hung jury or an acquittal; the judge never said that *he* would have acquitted Bergrin and, indeed, he has now denied Bergrin's Rule 29 motion. D.E.373-74. Nor has the district court, contrary to the government's accusation, ever stated that it believed that the mandatory life sentence that Bergrin faces on Counts 12 and 13 is "too harsh." GB66. Rather, the court cited that severe penalty as one basis for severing those counts, on the ground that it was particularly important, given the stakes, that Bergrin be afforded a fair trial on those charges. *See* A37, A57, A69, A72. Likewise, the government complains that the district court "invited Bergrin to move to exclude at the retrial of Counts 12 and 13 the drug conspiracy evidence the Government introduced at the first trial to prove motive." GB68. In fact, the defense, not the court, first raised that issue. A3601-04. Nor, finally, can the trial court's entirely appropriate interruption of the government's summation, GB68, provide a basis for reassignment. *See In re Cmty. Bank of N. Va.*, 418 F.3d 277, 320 (3d Cir. 2005) ("judicial remarks during the course of trial that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge …") (citing *Liteky*, 510 U.S. at 555).

[15] The government mentions press reports that Bergrin had made campaign contributions to the judge's campaign for Congress in 1994 and 1996, GB68, but

Kemo Murder and Esteves Plot cases should never have been joined); GB67-68 (discussing district court's reaction to the testimony of Albert Castro and Anthony Young); GB69 (discussing district court's opinion of the government's case and reaction to the government's jurisdictional filing in this Court).[16]

A Court of Appeals may also reassign a case pursuant to its supervisory authority under 28 U.S.C. § 2106, in order to "preserve not only the reality but also the appearance of the proper functioning of the judiciary as a neutral, impartial administrator of justice." *Gov't of V.I. v. Walker*, 261 F.3d 370, 376 (3d Cir. 2001) (quoting *Alexander v. Primerica Holdings*, 10 F.3d 155, 167 (3d Cir. 1993)). Such cases, or their rationales, fall into several broad categories, none of which apply here.

Many § 2106 reassignment cases, for example, involve courts that rendered unexplained, and perhaps inexplicable, evidentiary rulings. *See, e.g.*, *United States*

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does not move for reassignment on this basis, citing only the court's response to these reports, without explaining why that response is objectionable.

[16] It was also entirely appropriate for the district court to request that the parties provide it with their briefs with regard to appellate jurisdiction -- and the government did not object to doing so -- in order for the court to determine whether it should stay the matter pending appeal (or even whether it had jurisdiction to do so). *See United States v. Leppo*, 641 F.2d 149, 151 n.3 (3d Cir. 1981) (noting district court reviewed defendant's appellate claim to determine whether court retained jurisdiction to proceed with retrial) (citing *United States v. Dunbar*, 611 F.2d 985, 988 (5th Cir. 1980) (*en banc*) (district courts shall determine whether appellants' double jeopardy motions are frivolous and thereby fail to divest district court of jurisdiction)).

v. Brunson, 416 F.App'x 212, 214 (3d Cir. 2011) (granting mandamus and ordering reassignment based upon, *inter alia*, "a pattern of unreasonable and largely unexplained rulings by the District Court"), *cited in* GB69; *Svindland v. Nemours Found.*, 287 F.App'x 193, 195 (3d Cir. 2008) (reassigning under § 2106 where "the District Court judge consistently failed to exercise appropriate discretion by not giving reasons for his rulings and by the manner in which he conducted the trial so that we are hard-pressed to discern the basis on which he dealt with the issues before him"); *United States v. Moolenaar*, 259 F.App'x 433, 436 (3d Cir. 2007) (reassigning under § 2106 where the District Court "fail[ed] to provide a reasoned basis for a criminal sentence"). Of course, even the most cursory review of the record here establishes that Judge Martini always heard counsel's arguments and stated a reasoned basis for his rulings.

By the same token, this case contains none of the dishonesty or intemperance that has moved this Court to order reassignment under § 2106. *See, e.g.*, *Moolenaar*, 259 F.App'x at 436 (district judge "stated that the Presentence Report recommended a sentence of probation," when PSR actually "stated no such thing," and then "threw the Presentence Report across the bench and left the courtroom," an "episode of intemperance [which] leaves us with more than a passing concern as to the appearance of his impartiality"). Nor did the district judge here interfere with the fact finder's function or refuse to charge the jury as

the law required. *See Brunson*, 416 F.App'x at 222-23 (reassigning where "the District Court made clear that it has no intention of providing complete and proper instructions to the jury," "fail[ed] to instruct the jury on all elements of the charged counts and erroneously inform[ed] the jury that it had to find the same verdict for both counts"); *Higdon*, 638 F.3d at 235, 247 (reassigning where "the same district court judge [as in *Brunson*] refused to follow the precedent of this circuit and instead insisted upon conducting a trial according to his own personal view of the law and his own custom," and refused to inform the jury about a stipulation between the government and the defendant as to certain elements of the offense).

Indeed, the government's only complaint about a jury instruction is simply false. *See* GB68 (arguing that reassignment is necessary because the court "refused to instruct the jury during trial not to infer that the Court had an opinion about the case or its outcome"). In fact, the District Court delivered that very instruction to the jury, immediately after the government first requested it, A2460-61, and repeated it several times in its final instructions, just as it had promised to do -- with the government's consent. A2955-56 ([THE COURT:] "As far as your requests for a charge in terms of any reactions I may have as to witnesses' testimony, I will cover that in my final charge to the jury, and I'll address it at that time. Okay? MR. SANDERS: Okay."). *See* D.E.327, at 3 ("You should not take anything I may have said or done during the trial as indicating what I think of the

evidence or what I think your verdict should be."); *id*. at 47 (same); *see also id.* at 10 ("Also, do not assume from anything I may have done or said during the trial that I have an opinion about any of the issues in this case or about what your verdict should be.").[17]

In sum, the government's portrayal of the district court's conduct is inaccurate, unfair and inappropriate.[18] Although the government enumerates adverse rulings, as if deciding a question against the government were evidence of partiality, a thorough review of the record shows that the trial court handled this case in the most even-handed manner. Specifically, far from the bias the government cites, the district court repeatedly ruled against the defense before,

[17] Indeed, far from "intemperate," the district judge's actions in the face of troubling testimony were highly professional. For example, when government witness Castro testified in a way that the court believed rendered him incredible, the court declared a recess, A2406, and consulted with counsel outside the presence of the jury, specifically so that the jury would not be able to perceive his reaction. A2459.

[18] That portrayal includes citation to the government's brief in another case in which it has appealed from a decision of the same judge. GB67 n.9. That case, in which neither the undersigned counsel nor Bergrin is involved, addressed an entirely distinct matter, involving totally different issues. Respectfully, the fact that the government has appealed from the same judge twice, on such different grounds, is not helpful with regard to the analysis that this Court is here asked to undertake. It does, however, underscore the true basis of this reassignment request: the government substantively disagrees with the judge's rulings and would prefer to be before another judge. But, as set forth above, that is not a basis for reassignment.

during and after trial, D.E88, 166, 236, 238, 374, A541, A51-52, A75, and even admonished Bergrin in front of the jury.[19]

Moreover, the government's effort to characterize the trial court as "flout[ing] this Court's opinion," and thus "adhering to its mistaken view that the RICO statute does (or should) not apply to Bergrin's conduct," GB64, is particularly unfaithful to the record and unfair to the court. As discussed above, the district court has repeatedly made clear its willingness to try the RICO case, should the government determine to do so, *see* D.E.363 at 2; A4513; A4484; A4466.[20] Indeed, though the district court acknowledged and accepted this Court's judgment that it erroneously allowed "logistical concerns" to play a role in its initial ruling dismissing the RICO counts, *Bergrin*, 650 F.3d at 274, the government interprets this respect for the Court as some sort of "admission" and cites it in support of its request for reassignment, GB66.

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[19] *E.g.*, A649, A662-63, A666, A689, A1031, A1049, A1055, A1112, A1235, A1407, A1420, A1512, A1536-38, A1555, A1564-65, A1999, A2179, A2480, A2708, A2741-42, A2746, A2785-86, A2869, A2889, A2924, A2926, A2936, A2942, A2944, A3074, A3200, A3427.

[20] Thus, unlike the out-of-circuit cases upon which the government relies, *see United States v. Gupta*, 572 F.3d 878, 893 (11th Cir. 2009); *United States v. Torkington*, 874 F.2d 1441, 1447 (11th Cir. 1989), the court has never expressed a belief that Bergrin's conduct was not criminal, *see Gupta*, 572 F.3d at 893, or challenged the government's decision to prosecute Bergrin, whom the court has made clear would likely receive a lengthy sentence. A4482, A4460. *Cf. Torkington*, 874 F.2d at 1447.

To find that the district court's actions constitute judicial misconduct of the extreme sort that warrants reassignment would constitute a grave injustice, both to the district court and to the defendant in this case. In future cases, it would stand as a clear message that judicial independence in general and disagreement with the government in particular carries with it the risk of this most severe form of admonition. The government's request, which flies in the face of the caselaw, should be denied.

CONCLUSION

For these reasons, defendant-appellee Bergrin respectfully requests that the government's consolidated appeals be dismissed for lack of jurisdiction or, in the alternative, that the district court's rulings be affirmed and the government's request for reassignment be denied.

Respectfully submitted,

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February 16, 2012

CERTIFICATE OF COMPLIANCE

I, Lawrence S. Lustberg, Esquire, hereby certify that:

The attached brief exceeds the 14,000-word limit prescribed in Federal Rule of Appellate Procedure 32(a)(7) in that it contains 14,698 words, excluding those parts exempted by Federal Rule of Appellate Procedure 32(A)(7)(B)(iii). The attached brief complies, however, with this Court's January 19, 2012 order permitting appellee to file a brief not exceeding 14,700 words.

The attached brief complies with the typeface and type style requirements of Federal Rules of Appellate Procedure 32(a)(5) and 32(a)(6) because this brief has been prepared using a proportionally spaced typeface, Times New Roman, using Microsoft Word with 14-point font. The text of the PDF copy of the attached brief is identical to the text in the paper copies, and a virus detection program, Sophos Endpoint Security and Control, version 9.5, has been run on the file, and no virus was detected.

/s/ Lawrence S. Lustberg
Lawrence S. Lustberg, Esq.

Dated: February 16, 2012

CERTIFICATE OF BAR MEMBERSHIP

Lawrence S. Lustberg is a member in good standing of the Bar of United States Court of Appeals for the Third Circuit.

/s/ Lawrence S. Lustberg
Lawrence S. Lustberg, Esq.

Dated: February 16, 2012

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on February 16, 2012, I caused the attached Opposition Brief to be electronically filed with the Clerk of the United States Court of Appeals for the Third Circuit through the Court's electronic filing system, and to have paper copies delivered by sending 10 paper copies of the Opposition Brief via FedEx.

I hereby certify that on February 16, 2012, I caused the attached Opposition Brief to be served upon the following Filing Users through the Notice of Docketing Activity issued by this Court's electronic filing system:

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