UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

UNITED STATES OF AMERICA	:	
	:	Hon. Dennis M. Cavanaugh
v.	:	
	:	Criminal No. 09-369 (DMC)
	:	
PAUL BERGRIN	:	

GOVERNMENT'S BRIEF IN OPPOSITION TO DEFENDANT PAUL BERGRIN'S PRETRIAL MOTIONS

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BB	refers to the pages of Bergrin's Brief.
GB	refers to the pages of the Government's Brief.[*]

[*] Unless otherwise noted, all capitalized terms in this Brief bear the meaning ascribed to them in the Government's initial brief.

PRELIMINARY STATEMENT

Defendant Paul Bergrin refuses to accept the letter and spirit of the Third Circuit's June 2012 opinion. No wonder. That opinion vacated the exclusion of the Pozo Plot due to two legal errors, and directed this Court to reconsider the exclusion of the Esteves Plot due to a third legal error. Further, the Third Circuit asked this Court to reconsider two severance rulings that were plagued by several errors. Beyond all of that, the Third Circuit reassigned this matter because the prior Judge's discomfort with allowing a jury to consider a pattern of criminal activity—just what the RICO statute requires—seemingly drove many of its rulings.

Undeterred, Bergrin asks this Court to sever Counts 12 and 13 from the SSI and to exclude even more evidence in a second stand-alone trial of those counts. This Court should reject the first request and deny the second as moot. The time has come for Bergrin to accept that "RICO is a powerful weapon that significantly alters the way trials are conducted in cases that involve racketeering acts committed by members of an enterprise." United States v. Bergrin, 650 F.3d 257, 274-75 (3d Cir. 2011) ("Bergrin I"). This Court should vindicate Congress's intent by, at long last, allowing a single jury to consider the pattern of racketeering activity charged in Count 1.

ARGUMENT

I. This Court Should Deny Bergrin's Severance Motion.

Bergrin asks this Court to sever Counts 12 and 13 from the remaining counts and try them first "to ensure that [he] receives a fair trial as to those charges." BB2. Eleven pages later, Bergrin clarifies that "a fair trial" means "the fairest, most reliable means of adjudicating" the Kemo Murder, BB13, *i.e.*, a trial that maximizes his chances of acquittal on two of twenty-six counts at the expense of every countervailing concern. In between, Bergrin trots out the usual claims about spillover prejudice and that limiting instructions are ineffective in a multi-count case. Bergrin's severance argument betrays the Third Circuit's June 2012 opinion and ignores Rule 14 jurisprudence. This Court should vindicate the intent of Congress by trying all counts next.

A. This Court Should Reject Bergrin's Invitation To Construct A Detour Around RICO.

Initially, Bergrin's argument—that severing Counts 12 and 13 and trying them first will "ensure that [he] receives a fair trial as to those charges"—assumes that a single trial on all the substantive counts would be unfair. But all of the misconduct underlying Counts 5 through 26 is alleged in support of the substantive RICO count (Count 1), as the Table on page 13 of the Government's Brief shows. Thus, Bergrin asks this Court "to construct a detour around RICO simply because" he believes that it is unfair to allow the jury considering the Kemo Murder RICO predicate to hear evidence supporting other predicates. United States v. Bergrin, 682 F.3d 261, 284 (3d Cir. 2012) ("Bergrin II"). Indeed, these are the identical arguments Bergrin pressed before Judge Martini. C96-101.

The Third Circuit, however, exposed "[t]he problem with th[e] view" that RICO is unfair because it requires a jury to consider a pattern of criminal activity. Bergrin II, 682 F.3d at 284; see GB16. As that view led the Third Circuit to direct this Court to reconsider two severance rulings, Bergrin cannot credibly contend that a severance is necessary to prevent a jury from hearing evidence of multiple crimes. To the contrary, "presenting the witness-tampering allegations as part of a related pattern of racketeering activity is exactly what the Indictment and RICO allow." Bergrin II, 682 F.3d at 284.

Indeed, Bergrin II cautioned that the power to sever under Rule 14 "is not . . . unyielding or unbounded," and quoted Judge Posner's warning that "[a] judge in our system does not have the authority to tell prosecutors which crimes to prosecute or how to prosecute them." 682 F.3d at 284 n.28 (quoting United States v. Giannattasio, 979 F.2d 98, 100 (7th Cir. 1992)) (alteration in Bergrin II). The Court did not have to delineate the boundaries of that authority because it left it to this Court to determine whether any severance was necessary. In so doing, the Third Circuit was hardly suggesting that this Court adopt the same flawed methodology that led this case to this Court.

B. Bergrin's Other Arguments Are Meritless.

Aside from misconstruing Bergrin II, Bergrin's severance motion stands Rule 14 on its head.

1. This Is A RICO Case.

Initially, Bergrin pretends that Counts 12 and 13 (the Kemo Murder) are "the heart" of the SSI because those counts charge a murder and carry a sentence of mandatory life without parole. BB5. In fact, the substantive RICO count—Count 1— is the heart of

the SSI. Further, Bergrin conveniently fails to mention that Count 3, a VICAR offense arising from the Kemo Murder, similarly carries the same sentence as Counts 12 and 13. Thus, severing Counts 12 and 13 (but not Count 3) would make no sense.

If any severance were warranted (and none is), this Court should try Counts 1–4 first and hold the parallel substantive counts for a later trial. That would vindicate the Government's desire to try its RICO and VICAR counts and address Bergrin's concern that he could not obtain a fair trial on the parallel substantive counts.

2. The SSI Is Far Less Complex Than Bergrin Claims.

In a vain effort to make the SSI seem like an ad-hoc mixture of unrelated crimes that would confound a jury, Bergrin asserts that the SSI charges "six discrete schemes" and "five separate sub-schemes." BB6-7. But that does not make the SSI complex. The Third Circuit certainly did not see it that way: the SSI "accuses Bergrin of misusing his law practice to traffic drugs, facilitate prostitution, tamper with witnesses, and evade taxes." Bergrin II, 682 F.3d at 265.[1]

In fact, Bergrin fatally undermines his severance motion by stressing that the crimes are "discrete" or "separate." Courts presume that jurors can compartmentalize evidence involving discrete criminal episodes. See United States v. Lore, 430 F.3d 190, 205 (3d Cir. 2005) (finding no spillover prejudice from evidence admitted against codefendant where it was "relatively straightforward and discrete"); United States v.

[1] Bergrin claims that the Government agreed to sever the tax counts only in response to his December 2011 severance motion. BB7 n.3. In fact, the Government agreed to sever those counts in August 2011. C131 n.7.

Gooch, 665 F.3d 1318, 1338 (D.C. Cir. 2012) ("The offenses arising from the Cunningham/Lane incident were relatively 'simple and distinct,' so it does not matter whether the evidence would have been admissible in a separate trial."); United States v. Jones, 482 F.3d 60, 78 (2d Cir. 2006) (finding no retroactive misjoinder from VICAR count that was dismissed for insufficient evidence "given that the evidence as to the murder of Lawrence was discrete from the evidence on the other counts").

3. Jurors Can Follow Limiting Instructions Requiring Them To Consider Each Count Separately.

Bergrin complains that "a joint trial necessarily will include evidence of such quantity and variety that no jury will be able to 'compartmentalize' it, by considering it solely for its proper purpose, in determining Mr. Bergrin's guilt or innocence with respect to the Kemo murder." BB5-6; see BB9. As the Third Circuit made clear, this issue is "essentially moot" if this Court tries the RICO Counts. Bergrin II, 682 F.3d at 282 n.25. Regardless, Bergrin's argument is meritless.

Initially, the "prejudice" about which Bergrin complains is "the same potential for prejudice that every criminal defendant faces when multiple counts are tried together." United States v. Joshua, 976 F.2d 844, 848 (3d Cir. 1992). The argument that this type of prejudice warrants severance is "clearly an untenable position that we decline to endorse." Id. But "[t]he more fundamental problem with" Bergrin's position "is that it reflects a skepticism about the ability of the Court to craft limiting instructions regarding specific evidence and the ability or inclination of the jury to follow them." United States v. W.R. Grace, 439 F. Supp. 2d 1125, 1135 (D. Mont. 2006). Bergrin's "lack of faith in the jury's

capacity to follow instructions is contrary to . . . experience and contrary to 'the almost invariable assumption of the law that jurors follow their instructions.'" Id. (citation omitted). In short, "[p]rejudice cannot be shown merely because the jury may consider the facts alleged in one count during their considerations of another count." United States v. Eufrasio, 935 F.2d 553, 570-71 (3d Cir. 1991).

Thus, this Court has refused to grant a severance based on its confidence—well-justified after almost two decades of experience on the Bench—in a jury's ability to follow its instructions to consider each count separately. See United States v. Brassington, Crim. No. 09-45, 2010 WL 3982036, at *13-14 & n.13 (D.N.J. Oct. 8, 2010) (citing United States v. Urban, 404 F.3d 754, 776 (3d Cir. 2005)). Granted, Brassington did not involve a murder, but appellate courts have routinely relied on the presence of limiting instructions to reject claims of spillover prejudice in RICO or VICAR cases involving multiple murders, e.g., Gooch, 665 F.3d at 1335-38; United States v. DeCologero, 530 F.3d 36, 56 (1st Cir. 2008); United States v. Carson, 455 F.3d 336, 374-76 (D.C. Cir. 2006); Eufrasio, 935 F.2d at 568-71, even where the jury acquitted on one of the murders, e.g., Jones, 482 F.3d at 78-79.

4. Bergrin Cites No Case In Which A District Court Has Granted The Sort Of Severance He Requests.

Other than citing to and relying on Judge Martini's 2011 severance opinions, Bergrin again cites no case in which a district court severed RICO counts from the substantive counts arising from the RICO charge. Bergrin cites more than 30 cases, only three of which involved RICO counts. In one, the court severed tax evasion counts that

did not arise from the RICO count but refused to sever a substantive perjury count that was "intimately tied to the alleged RICO conspiracy." BB4 (citing United States v. Lavin, 504 F. Supp. 1356, 1364 (N.D. Ill. 1981)). In the second, the court severed *defendants*, not counts. BB9 (citing United States v. Burke, 789 F. Supp. 2d 395, 399-400 (E.D.N.Y. 2011)). In the third, the Seventh Circuit affirmed the refusal to sever defendants. BB12 (citing United States v. Emond, 935 F.2d 1511, 1515-16 (7th Cir. 1991)). That is hardly a ringing endorsement for Bergrin's position. GB17-18. In fact, even when a court severs RICO *defendants,* it accepts as a given that "non-RICO substantive counts will be tried along with their corresponding RICO racketeering acts." See United States v. Andrews, 754 F. Supp. 1161, 1182 (N.D. Ill. 1990).

5. The Esteves Plot Is Admissible To Prove The RICO And VICAR Counts.

When Bergrin finally gets around to the real reason for moving to sever Counts 12 and 13—to prevent the jury from hearing evidence supporting the Esteves Plot—he makes two basic claims: (1) the Esteves Plot is inadmissible to prove the Kemo Murder, and (2) jurors would misuse the Esteves Plot evidence to infer propensity given the disparity in the evidence supporting each crime. BB8-12. As set forth above, this claim is beside the point because evidence proving the Kemo Murder and Esteves Plot is intrinsic to Counts 1–4. Regardless, each of Bergrin's assertions is false.

Initially, Bergrin relies heavily on Judge Martini's severance opinions, BB8-11, predicting that the Government will argue that the decision reassigning this case renders those opinions unpersuasive, BB3 n.1. In fact, they are unpersuasive because they

erroneously assign no probative value to subsequent acts, incorrectly assume that jurors cannot follow limiting instructions, and wrongly treat powerful evidence of guilt as unfairly prejudicial under Rule 403. See infra Point II.A. Beyond that, Judge Martini's discomfort with RICO plainly affected his decision to sever counts and exclude evidence regardless of whether the Third Circuit was willing to say so explicitly. But even if Judge Martini genuinely believed that he could not ensure a fair trial on Counts 12 and 13, that hardly requires this Court to reach the same conclusion, especially given the letter and spirit of Bergrin II. E.g., A4502-03 (order in Brunson granting motion to try all counts together even though previously assigned Judge believed such a trial would be unfair).

At any rate, the Government has explained *ad nauseam* why the 2008 Esteves Plot is relevant and admissible to prove the 2004 Kemo Murder. GB18-19, 25-28; accord C123-25; C191-92; C235-41; C274-77; C299-301. Bergrin implicitly admitted his guilt to Esteves by saying this is not the first time I've done "this," *i.e.*, murder witnesses, and Bergrin used the term "no witness, no case" while explicitly encouraging Esteves to murder the cooperating witnesses. Thus, the Esteves Plot is admissible to provide necessary context to Bergrin's admission (because a juror could rationally infer that he was referring to Kemo), and because it shows that when Bergrin uses the phrase "no witness, no case," he means "murder the witness." Thus, the Esteves Plot provides critical evidence bearing on Bergrin's intent in passing Kemo's name from Baskerville to Curry and in telling the Curry Organization, "No Kemo, No Case."

But even were this Court to rule the Esteves Plot inadmissible to prove Counts 12 and 13, a severance still is unwarranted. As set forth above, see supra Point I.B.3, limiting

instructions will mitigate any danger of unfair prejudice, because evidence of an unconsummated murder plot is hardly inflammatory in case involving an actual murder, see Gooch, 665 F.3d at 1335-38; DeCologero, 530 F.3d at 56; Jones, 482 F.3d at 78-79.

Straining mightily to bolster the case for severing counts, Bergrin predictably invokes the mistrial to claim that evidence supporting the Kemo Murder is "weak" and to accuse the Government of attempting to "bolster[] its evidence with evidence of unrelated misconduct." BB12. Far from "unrelated," the misconduct is part of a pattern of racketeering activity that the Third Circuit (twice) has said a jury is entitled to consider. *It is Bergrin* who repeatedly refuses to accept Bergrin I and Bergrin II.

Further, Bergrin ignores that the first jury never got to hear highly probative evidence of his intent, and that he was permitted to lie to the jury without fear of reprisal. GB21-22. At any rate, while the evidence supporting the Kemo Murder is certainly circumstantial, that is a basis for *admitting*—not excluding—other acts probative of intent. Huddleston v. United States, 485 U.S. 681 (1988) ("Extrinsic acts evidence may be critical to the establishment of the truth as to a disputed issue, especially when that issue involves the actor's state of mind[.]"). Additionally, Bergrin's effort to undermine Anthony Young's credibility (BB11 n.5) omits to mention that a jury in 2007 convicted William Baskerville (Bergrin's client) of conspiring with Bergrin and others to murder Kemo McCray, largely on the strength of Young's testimony. United States v. Baskerville, 448 F. App'x 243 (3d Cir. 2011) (not precedential).

Thankfully, all of this is a side-show. "Neither a disparity in evidence, nor introducing evidence more damaging to one defendant than others entitles seemingly less

culpable dependents to severance." Eufrasio, 935 F.2d at 568. Bergrin cites Sandoval v. Calderon, 241 F.3d 765 (9th Cir. 2001), BB11, but he neglects to mention that the Seventh Circuit questioned the viability of the decision on which Sandoval relied and criticized a severance very similar to the one Bergrin obtained last year and demands again, United States v. Abdelhaq, 246 F.3d 990, 992 (7th Cir. 2001) ("Moreover, as a basis for requiring severance, 'evidentiary spillover' has been rejected, in all but one case that we've found, Bean v. Calderon, 163 F.3d 1073, 1084-85 (9th Cir. 1998), where it was accepted on very dubious due process grounds").

In sum, that the Esteves Plot evidence is stronger reflects the reality that a defendant who commits crimes over time comes under increasing law enforcement scrutiny. Bergrin should not be rewarded with a severance just because he was caught on tape committing a later crime while implicitly admitting to an earlier (more serious) one.

6. Bergrin's Likely Defense To The Esteves Plot Further Undermines His Severance Argument.

Bergrin's motion confirms the Government's previous prediction that the Kemo Murder would be admissible to prove the Esteves Plot, which further undermines Bergrin's motion to sever Counts 12 and 13 from the rest of the SSI.

In opposing Bergrin's December 2011 motion to sever Counts 20–26 (arising from the Esteves Plot), the Government argued that "Bergrin's defense to the [Esteves Plot] . . . will likely be that he was just talking, wasn't serious, or both," which "would place directly in issue the fact that a witness ended up murdered on another occasion when Bergrin was 'just talking.'" Dkt. 353 at 1-2. The Government's prediction was accurate.

In support of his motion for a hearing regarding alleged prosecutorial misconduct, Bergrin's investigator has submitted a certification contending that Moran—who pleaded guilty to Travel Act offenses underlying the Esteves Plot, Dkt. 174-76—allegedly told third parties that he and Bergrin knew that Oscar Cordova (the hit man in the Esteves Plot) was an informant and claiming that Bergrin and Moran were simply stringing Cordova along. Stephens Certification at 16, ¶¶ 127-29. By placing his intent in issue on the Kemo Murder (where Bergrin claims that he was simply acting as a legitimate defense attorney) and on the Esteves Plot (where Bergrin intends to claim he was not serious), a jury should be able to consider both the Esteves Plot and the Kemo Murder in a single trial, *i.e.*, a trial on Counts 1 through 26.

7. Conducting Two More Trials Is Hardly Efficient.

Predicting that concerns for efficiency will be the centerpiece of the Government's opposition to his severance motion, Bergrin claims that such concerns should not "trump [his] right to a fair trial." BB12. But the Government opposes a severance because Congress enacted RICO so that a single jury could consider all of a defendant's misconduct. Bergrin, on the other hand, seeks *seriatim* trials because he believes RICO is unfair. Bergrin II vindicated the Government's position, not Bergrin's.

Bergrin nonetheless argues that severing Counts 12 and 13 would promote efficiency because the Government might drop the RICO and VICAR counts if he is convicted, whereas collateral estoppel principles would bar the Government from introducing the Kemo Murder at any subsequent trial if he is acquitted. BB12-13 & n.6.

Each claim is false. As the Government argued before, it cannot abandon validly pleaded RICO and VICAR counts because Bergrin will most certainly appeal (and collaterally attack) a conviction on Counts 12 and 13. C189. Further, the Government has publicly stated its intention to try its RICO and VICAR counts no matter what. A4449. It stands by that commitment.

Nor would an acquittal shorten any future trial. "[W]here the government 'has made no effort to prosecute the charges seriatim, the considerations of double jeopardy protection implicit in the application of collateral estoppel are inapplicable.'" United States v. Ashley Transfer & Storage Co., 858 F.2d 221, 227 (4th Cir. 1988) (quoting Ohio v. Johnson, 467 U.S. 493, 500 n.9 (1984)). Here, the Government brought a single indictment that charges a RICO count and parallel substantive counts and seeks to try all of its counts to a single jury. If Bergrin persuades this Court to sever Counts 12 and 13, then he waives his right to invoke the collateral estoppel later. See United States v. Blyden, 740 F. Supp. 376, 379 (D.V.I. 1990) ("The court concludes that defendants caused the severance, and in so doing, they waived their double jeopardy claims."), aff'd, 930 F.2d 323, 328 (3d Cir 1991); accord Ashley Transfer & Storage Co., 858 F.2d at 227.

But even if an acquittal would have estoppel consequences, evidence of the Kemo Murder still would be admissible to prove the BLE, to show the continuity and relatedness of the acts forming the RICO pattern, and to prove Bergrin's intent with respect to the other witness-tampering acts. See Dowling v. United States, 493 U.S. 342, 349 (1990) (evidence underlying acquitted conduct is admissible to prove a subsidiary fact); see also United States v. Salamone, 902 F.2d 237, 240-41 (3d Cir. 1990) (same).

Thus, severing Counts 12 and 13 will require this Court to conduct at least two more lengthy trials in this three-year-old case, which hardly promotes efficiency.[2]

8. Bergrin Is Not Entitled To A Severance Simply Because He Believes That A Separate Trial On Counts 12 And 13 Will Maximize His Chances Of Acquittal.

Bergrin ultimately concedes that he is not asking for a "fair trial," *i.e.*, one that satisfies the Due Process Clause, but for "the fairest, most reliable means of adjudicating" the Kemo Murder, BB13, *i.e.*, a trial that maximizes his chances of acquittal at the expense of every countervailing concern. But "defendants are not entitled to severance merely because they may have a better chance of acquittal in separate trials," Zafiro v. United States, 506 U.S. 534, 540 (1993), and it is "within the discretion of the trial court to determine if the economies afforded by a joint trial of all the charges . . . outweigh[] any potential for trial prejudice caused by joinder of the RICO and non-RICO counts," Eufrasio, 935 F.2d at 571.

C. Conclusion.

In sum, Bergrin's severance motion assumes that a RICO trial is unfair, precisely the "view" the Third Circuit rejected in Bergrin II. Rather than grant Bergrin's motion, this Court should grant the Government's motion and try Counts 1 through 26 next.

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[2] Bergrin fallaciously claims that this Court may not consider concerns for witness safety and judicial economy because they "were not the subject of the Third Circuit's opinion." BB14 n.7. The Government argued those concerns on appeal, Brief for Appellant, United States v. Bergrin 2012 WL 371818, at *49-60. But instead of reversing the severances, the Third Circuit directed this Court "to consider anew whether the [SSI] should be severed in any respect." 682 F.3d at 284 (emphasis added). Only Bergrin could construe the word "anew" to mean that this Court must ignore the Government's arguments against severance but must consider his arguments for severance.

II. Bergrin's Rule 404(b) Arguments Ask This Court To Ignore The Third Circuit's Mandate And to Misapply The Law Of The Case Doctrine.

Bergrin candidly claims that admitting Rule 404(b) evidence at a trial on Counts 12 and 13 "would undermine the purpose of the severance." BB13.[3] What Bergrin really means is that he seeks a severance so that he can again put his intent in issue and make false assertions to the jury while objecting to the admission of extrinsic acts proving his intent and putting the lie to his assertions. GB21-22. Bergrin then asks this Court to exclude the Esteves Plot and Pozo Plot (either now or at trial). BB15-26. Finally, Bergrin claims that this Court cannot admit any Rule 404(b) evidence whose exclusion the Government did not formally appeal, BB14 n.7, but that this Court may exclude the drug conspiracy evidence because Judge Martini invited him to move to exclude it, BB26-31.

Fortunately, this Court can avoid all of these issues by conducting a trial on Counts 1 through 26 (or, at the very least, Counts 1 through 4). As the Third Circuit noted, trying the RICO counts next would render "essentially moot" the question whether the Esteves Plot and the Pozo Plot are admissible to prove Counts 12 and 13. Bergrin II, 682 F.3d at 282 n.25. There simply is no need for this Court decide Rule 404(b) issues and to confront the numerous door-opening and evidentiary issues that invariably will arise in a stand-alone trial of two counts when it can safely and properly conduct a trial on all counts. At any rate, Bergrin's arguments do not withstand scrutiny.

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[3] Bergrin attributes to the Government his claim that the Rule 404(b) issues are "inextricably intertwined" with the severance issues. BB13-14. In fact, *it is Bergrin* who has contended that the severance question turns on the Rule 404(b) issues. While the substantial overlap in evidence certainly militates against severance, the Government's principal argument is, and always has been, that this is a RICO case. C23-79.

A. The Esteves Plot Is Admissible.

Despite acknowledging that Bergrin II found a legal error in the prior Judge's assessment of the Esteves Plot, Bergrin quotes the September 2011 severance opinion's finding "'looks more like evidence that is being offered to show that the accused is a 'bad guy,' someone with the propensity to commit criminal acts. He did it [in] 2008, so he must have done it in 2004[.]'" BB15 (quoting A60). Bergrin then claims that this finding "remains not only legally viable but also correct." BB15. It is neither.

In the first place, the September 2011 severance opinion relies on a critical Rule 404(b) error, *i.e.*,.that subsequent acts are not probative of a prior act. But as the Third Circuit held, Rule 404(b) says "nothing about whether the act in question is a 'prior' or 'subsequent' act," which "makes sense because light can be shed on motive, intent, and the other issues listed in Rule 404(b)(2) as much by a subsequent course of behavior as it can by a prior one." Bergrin II, 682 F.3d at 281 n.25. Thus, the conclusion that the Esteves Plot created a danger for unfair prejudice was infected by a finding that the evidence had no probative value at all and was being offered to show (or would be used by the jury only to infer) propensity.

Beyond that, the assertion that the Esteves Plot would unfairly prejudice Bergrin was simply a restatement of the risk inherent in all other acts evidence and in all multi-count trials. But proof of similar acts to show intent "almost unavoidably raises the danger that the jury will improperly conclude that because (the defendant) committed some other crime, he must have committed the one charged in the indictment." United States v. Pettiford, 517 F.3d 584, 590 (D.C. Cir. 2008). That danger, however, "cannot

give rise to a *per se* rule of exclusion," id., let alone a Rule 14 severance, because it "is no different than that confronted in any trial in which multiple counts are tried together: namely, that the jury will improperly use evidence of one crime as evidence of bad character to resolve issues presented by other crimes presented to the jury for consideration," United States v. DiSalvo, 797 F. Supp. 159, 167 (E.D.N.Y. 1992).

In reality, Bergrin persuaded the prior Judge to exclude the Esteves Plot because it would fatally undermine his lack-of-intent defense with respect to the Kemo Murder. But that is the very purpose for which that evidence was offered. "It must always be remembered," the Third Circuit cautioned, "that *unfair* prejudice is what Rule 403 is meant to guard against, that is, prejudice 'based on something *other* than [the evidence's] persuasive weight." Bergrin II, 682 F.3d at 279 (quoting United States v. Cruz–Garcia, 344 F.3d 951, 956 (9th Cir. 2003)). Thus, the analysis of the Esteves Plot in the September 2011 severance opinion is unpersuasive and should not be followed.

The Government's principal brief sufficiently rebuts most of Bergrin's efforts to understate the probative value of the Esteves Plot and to exaggerate its danger for unfair prejudice. GB25-28. But a few observations are in order. First, Bergrin's claim, that the Esteves Plot is too dissimilar from the Kemo Murder to be probative, BB18-19; accord BB21 n.9, stands in sharp contrast to his observation last year that the Esteves Plot "involves allegations of an unconsummated conspiracy to kill a witness, *similar to that which is alleged to have actually occurred with respect to Kemo five years previously*," C99 (emphasis added). Bergrin's earlier assessment was correct, as the Government has explained before. GB26 (citing C123-25; C191-92; C235-41; C274-77; C299-301).

More disturbing is Bergrin's claim that the events of the previous trial show that intent will not be a contested issue with respect to the Kemo Murder. BB21-22. Bergrin made the same argument to the Third Circuit, which bluntly rejected it. First, the Court agreed with Judge Martini's assessment that "intent was a key issue in the case" in faulting him for excluding the Pozo Evidence on Rule 403 grounds. Bergrin II, 682 F.3d at 280 n.24. At the same time, the Court rejected Bergrin's claim that intent was not at issue just because he denied saying the words "No Kemo, no case." "The question of Bergrin's intent is not only relevant to determining what 'No Kemo, no case' may mean, but also to ascertaining Bergrin's purpose in telling Curry who the witness against Baskerville was." Id. Thus, the Esteves Plot is just as relevant to that issue as the Pozo Plot, and Bergrin's effort to claim that intent is not in issue is beyond the pale.[4]

Bergrin trots out his claim that the admission he made to Esteves is too ambiguous to be probative because it is unclear that Bergrin was referring to Kemo. BB22. But that goes to weight, not admissibility. See United States v. Martin, 9 F.3d 113, 1993 WL 430154, at *5 (7th Cir 1993) (table) (reversing order excluding defendant's statement "I want to confess" and rejecting defendant's argument that his statement "was so

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[4] Bergrin claims that his use of the term "no witness, no case" is not sufficiently idiosyncratic to show a distinctive *modus operandi*. BB20-21. That misses the point. The Esteves Plot would show (among other things) that the phrase means "murder the witness" (because Bergrin made his intent to kill explicit in speaking to Esteves and Cordova), and would help the jury decide what Bergrin intended when he related Kemo's identity to Curry and later said "No Kemo, no case" to Curry Organization members. Also incorrect is Bergrin's claim that the Esteves Plot is too remote in time to be probative. BB20. Bergrin refuses to acknowledge the series of witness-tampering episodes that connect the Kemo Murder to the Esteves Plot, which reinforces the inference that the Esteves Plot is probative of a common scheme and of Bergrin's intent. GB26.

ambiguous absent a specification by Martin of the crime to which he was confessing that the statement's prejudicial effect outweighed its probative value," because "every incriminating statement has some prejudicial effect, and here Martin's statements were not so ambiguous that they could not be given to a jury"); cf. United States v. Kingbird, Crim. No. 11-148, 2011 WL 3468369, at *4 (D. Minn. July 22, 2011) (that "Defendant may have been talking about some other incident when he confessed may go to the credibility and weight of any admissions").

Finally, Bergrin's reliance on United States v. Murray, 103 F.3d 310 (3d Cir. 1997), is puzzling. BB23. In that case, an uncharged murder was admitted to prove a charged murder despite having no proper Rule 404(b) purpose. The erroneous admission of that evidence, the Court found, was reversible error. Here, in sharp contrast, the Esteves Plot is plainly relevant to several proper purposes, and (as noted earlier) Bergrin is hard-pressed to show that proof of an unconsummated attempted murder is so inflammatory that (even with proper limiting instructions) it would cause the jury to suspend rationality in considering an actual murder. Bergrin cannot make that showing given the far more damaging other acts district courts have properly admitted. E.g., United States v. Green, 617 F.3d 233, 249 (3d Cir. 2010) (finding no Rule 403 violation where trial court, in a narcotics-distribution trial, admitted evidence that defendant also wanted to buy dynamite to murder an undercover police officer, where that evidence rebutted defendant's attack on the cooperating witness's motive to testify) (citing cases).

B. The Pozo Plot Is Plainly Admissible, And Deferring Decision On Its Admissibility Would Violate Fed. R. Crim. P. 12(d).

Bergrin argues that the Pozo Plot should be excluded from a stand-alone trial on Counts 12 and 13. BB24-26. Accepting that argument would violate the Third Circuit's mandate, as the record still shows no valid Rule 403 objection requiring exclusion. GB24-25. So Bergrin hedges his bets by asking this Court to defer decision on the Pozo Plot until trial. BB26. This Court must reject that request.

First, Federal Rule of Criminal Procedure 12(d) "expressly prohibits . . . deferring decision on a pretrial motion if 'a party's right to appeal is adversely affected,'" United States v. Voigt, 89 F.3d 1050, 1068 n.7 (3d Cir. 1996) (quoting former Fed. R. Crim. P. 12(e)), and the Government may appeal rulings excluding evidence only before jeopardy attaches, 18 U.S.C. § 3731. Second, pretrial rulings on Rule 404(b) evidence—if such rulings are even necessary—permit the Government to prepare its witnesses and draft its opening statement appropriately.

C. The Drug Conspiracy Evidence Is Admissible To Prove Bergrin's Motive To Murder Kemo.

Despite telling the jury in summation that he wished that this had been a drug case, A4219, Bergrin now reverses course and moves to preclude evidence that he was engaged in narcotics dealing with Hakeem Curry, A8-9. Bergrin argues that the evidence actually introduced failed to establish the purpose for which it was admitted, *i.e.*, to prove his motive to murder Kemo. BB26-30. That is incorrect, and it fails to account for the corroborative evidence Bergrin persuaded Judge Martini to exclude.

1. Factual Background.

The evidence at trial showed that Jimenez, who worked at Bergrin's law office, attempted to set up a cocaine transaction between supplier Julio Claudio ("Changa") and drug kingpin Hakeem Curry (Bergrin's client). A1313-19, A1329-24. Bergrin learned about Jimenez's overtures to Curry and told Jimenez not to make drug deals with clients without Bergrin's permission. A1335-38. Jimenez suspected that Bergrin was cutting him out of the deal, A1345-46, and he later saw Curry, Bergrin, and Changa meet at Isabella's Restaurant, A1362-73, a meeting Jauregui witnessed as well and believed involved drugs, A1730-37, A1753-58. Lachoy Walker, a former Curry associate, testified that Curry admitted in late 2002 that he was obtaining multi-kilogram quantities of cocaine "from Paul's connect." A1846-48.[5] The evidence also showed a pattern of phone calls among Bergrin, Changa, and Curry. A3814-18.

In addition to this evidence, Judge Martini—at Bergrin's urging—kept from the jury a key piece of evidence that would have greatly strengthened the evidence of Bergrin's involvement with Curry. That exclusion should be reconsidered given Bergrin II and given that this is a new trial. (Of course, declining to sever counts would obviate the need to decide this issue, as the full scope of the drug conspiracy charged in Count 5 would be before one jury.) Specifically, the Government attempted to introduce

[5] Bergrin claims that the relationship between Changa and Curry ended when Curry stopped selling cocaine in early 2003, which somehow negates any motive by Bergrin to prevent Curry from cooperating. Putting to one side that the phone activity among Curry, Bergrin, and Changa continued into 2004, A4066, Curry could have cooperated against Bergrin for prior crimes, not just ongoing ones.

statements that coconspirator Alejandro Barraza-Castro made to Jauregui about Castro's, Changa's and Bergrin's involvement in supplying cocaine to Curry. A1694-96, A1762-81. The statements, which occurred after the Kemo Murder, described the drug conspiracy as it existed before the murder and would have directly implicated Bergrin, A1767-68, and were made when Jauregui was a coconspirator. A1766, A1770-71.

2. Analysis.

Evidence is relevant if "it has any tendency to make a fact more or less probable than it would be without the evidence" and "the fact is of consequence in determining the action." Fed. R. Evid. 401. "The definition of relevant evidence is very broad and . . . Rule 401 does not raise a high standard." Gibson v. Mayor & Council of Wilmington, 355 F.3d 215, 232 (3d Cir. 2004) (internal quotations omitted). "[W]hile Rule 401 gives judges great freedom to admit evidence, [it] diminishes substantially their authority to exclude evidence as irrelevant." Id.

Here, the evidence the Government introduced at trial was sufficient, standing alone, to allow a rational jury to infer that Bergrin was involved with supplying cocaine to Curry, and thus infer Bergrin's motive to murder Kemo McCray. As the Government explained, when Baskerville was arrested, there was a risk that he would cooperate against Curry, who in turn could cooperate against Bergrin. Preventing Kemo from testifying against Baskerville prevented this chain of events from unfolding. GB29 (citing C120-22; C233 35; C283-85). This was sufficient under Rule 401's very liberal standard for probity, and was not substantially outweighed by any danger of unfair prejudice under Rule 403, especially given the limiting instruction given during trial. A1335-36.

Bergrin nonetheless complains that, because there is no direct evidence of his involvement in narcotics dealing beyond setting up the meeting with Changa and Curry, the evidence the Government adduced failed to show the Rule 404(b) purpose for which it was offered (*i.e.*, motive). BB27-29. For example, Bergrin claims that there was no evidence that he reaped a financial benefit from the arrangement between Curry and Changa. BB28. Bergrin's argument confuses weight with admissibility.

"A piece of evidence . . . need not conclusively prove a fact beyond a reasonable doubt in order to be admissible." United States v. Clifford, 704 F.2d 86, 90 (3d Cir. 1983); accord United States v. Abu-Jihaad, 630 F.3d 102, 132 (2d Cir. 2010). "Non-conclusive evidence should still be admitted if it makes a proposition more probable than not." United States v. Schultz, 333 F.3d 393, 416 (2d Cir. 2003). Bergrin is free to raise at trial all of the alleged weaknesses in the motive theory he raises in his brief. But Bergrin's participation in setting up the meeting between Curry and Changa is sufficient to establish a motive for Bergrin to prevent Baskerville from turning on Curry.[6] When the statements by Jauregui are factored into the mix, the question is not even close. See United States v. Kemp, 500 F.3d 257, 295 (3d Cir. 2007) ("At bottom, the government aimed to prove that Hawkins joined a conspiracy to corrupt Kemp. . . . Of course, this evidence alone does not prove Hawkins's guilt on any count, but as the notes to Rule 401 explain, 'a brick is not a wall.'") (citations omitted); see also Carter v. Hewitt, 617 F.2d 961, 968 (3d Cir. 1980)

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[6] Bergrin claims that the Government never established that it was likely or possible that Baskerville or Curry would cooperate. In fact, Young testified that everyone believed Curry would cooperate if arrested because he was "soft." A2606.

("While some inferences, no doubt, must be drawn from Carter's letter to reach the conclusion that he had a plan[,] ... these inferences only render the letter less probative, not less admissible.").

Bergrin's Rule 403 argument is similarly unpersuasive. BB30. Given the evidence that Bergrin was house counsel to the Curry Organization, BB28 n.11, evidence that Bergrin supplied cocaine to Curry is hardly so inflammatory that there would be a residual danger of unfair prejudice after proper limiting instructions. See United States v. Saada, 212 F.3d 210, 223 (3d Cir. 2000).

D. The Law Of The Case Doctrine Does Not Preclude This Court From Admitting Evidence That Judge Martini Excluded.

Bergrin makes yet another argument that shows even more clearly why trying Counts 1 through 26 next would be the wisest course. He claims that this Court cannot reconsider in a stand-alone retrial of Counts 12 and 13 any adverse evidentiary rulings that the Government did not formally appeal. BB14 n.7. Bergrin is wrong.

"A retrial following a mistrial is both in purpose and effect a new trial. . . . [T]he two are entirely separate affairs." United States v. Palmer, 122 F.3d 215, 221 (5th Cir. 1997). A district court "retains the power to reconsider previously decided issues as they arise in the context of a new trial." United States v. Todd, 920 F.2d 399, 403 (6th Cir. 1990). Given this decisional law, Judge Martini could have reconsidered every one of his prior evidentiary rulings even had there been no appeal and no reassignment. Cf. 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").

Bergrin nonetheless claims that, because the Government appealed, it was required to formally contest every adverse ruling even though it sought reassignment and even though there would be a retrial on remand. Because the Government appealed only three specific rulings, Bergrin argues, all of Judge Martini's other evidentiary rulings carry through to a retrial on Counts 12 and 13, BB14 n.7— except of course those that Bergrin wishes this Court to reconsider, BB30 n.14.

Bergrin appears to invoke the mandate rule to claim that the Third Circuit's instruction to reconsider four rulings means that this Court may not consider any other rulings. But Bergrin reads the opinion too narrowly: the Court noted that the prior Judge's "discomfort with the Indictment may well have prompted its evidentiary and case management rulings," *i.e.*, all such rulings, and then specifically directed this Court to reconsider four of them: the two severances and, as necessary, the admissibility of the Pozo Plot and Esteves Plot. Bergrin II, 682 F.3d at 284. In so doing, the Third Circuit quoted Rimbert v. Eli Lilly & Co., 647 F.3d 1247, 1252 (10th Cir. 2011), for the proposition that the "law of the case doctrine has no bearing on the revisiting of interlocutory orders, even when a case has been reassigned from one judge to another." Given that "[i]nterlocutory orders ... remain open to trial court reconsideration, and do not constitute the law of the case," Perez–Ruiz v. Crespo-Guillen, 25 F.3d 40, 42 (1st Cir. 1994), this Court clearly may revisit rulings beyond the four "evidentiary and case management rulings" the Third Circuit specified.

Further, because the Third Circuit concluded that the prior Judge's "impartiality might reasonably be questioned," it would undermine public confidence in the Judiciary were this Court to leave in place rulings that may well have been prompted by the prior Judge's "discomfort with the Indictment." For example, prior to trial, Judge Martini ruled that Abdul Williams could testify that he was serving as a courier in Bergrin's drug-trafficking operation in 2007 to explain why Bergrin would have felt comfortable confiding in Williams about his concern that Baskerville might cooperate with authorities. A12. During trial, however, Judge Martini invoked the very severance ruling that the Third Circuit has directed this Court to revisit to exclude that evidence. A3380-93. Similarly, the testimony from Jauregui discussed above, which would have significantly strengthened the Government's motive theory, was excluded in part because it occurred after the Kemo Murder. A1770. It was rulings like these that led the Government to seek reassignment: they unfairly precluded the Government from corroborating important evidence simply because they occurred after the Kemo Murder.[7]

Once again, all of this is "essentially moot" if this Court "disagrees with the approach to severance that had been followed," Bergrin II, 682 F.3d at 282 n.25, because a single trial on Counts 1 through 26 will obviate the question of what evidence should be admitted in a stand-alone trial of Counts 12 and 13.

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[7] Indeed, the Government cited those rulings in the section of its Third Circuit brief seeking reassignment. Brief for Appellant, United States v. Bergrin 2012 WL 371818, at *64 (Nos. 11-4300 & 11-4552).

III. This Court Should Deny Those Pretrial Motions That Bergrin Re-Raises Here To Preserve For Appeal.

To "preserve these issues in the event of further appeal," Bergrin asks this Court to consider and deny the various other pretrial motions that Judge Martini denied. BB37-38. Those issues were resolved in an opinion filed on September 19, 2011. Dkt. 238. The Government's July 2011 opposition brief, Dkt 219, and its sur-reply letter, Dkt. 222, address all of the issues Bergrin identifies. Like Bergrin, the Government will supply a hard copy of that brief upon request.

CONCLUSION

For all of the foregoing reasons, the Government respectfully requests that the Court deny Bergrin's pretrial motions.

Respectfully submitted,

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Date: August 24, 2012
Newark, New Jersey

CERTIFICATE OF SERVICE

I today caused the foregoing Brief to be served on Defendant Paul Bergrin by serving a true and accurate copy of same on his stand-by counsel (by prior agreement) addressed as follows:

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I certify that the foregoing is true and correct.

Executed on: August 24, 2012

s/ Steven G. Sanders, AUSA