GIBBONS

LAWRENCE S. LUSTBERG
Director

Gibbons P.C.
One Gateway Center
Newark, New Jersey 07102-5310
Direct: (973) 596-4731 Fax: (973) 639-6285
llustberg@gibbonslaw.com

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Honorable Dennis Cavanaugh
United States District Judge
U.S. Post Office & Federal Courthouse
Newark, NJ 07102

Re: United States v. Paul W. Bergrin
Criminal No. 09-369

Dear Judge Cavanaugh:

Please accept this brief response to the Government's letter of March 2, 2013, which seeks to admit a portion of Mr. Bergrin's opening statement from the 2011 trial against him, as an admission under Federal Rule of Evidence 801(d)(2)(A), or, in the alternative, to preclude Mr. Bergrin from "arguing or implying during summation that Anthony Young lied when he testified about that call." Gov. Ltr. at 1. There is no basis for introducing Mr. Bergrin's prior argument into evidence because the Government has failed to point to an assertion of fact inconsistent with similar assertions in this trial or otherwise meet the strenuous burden for the admission of prior opening statements.

As an initial matter, although the Government seeks to frame Mr. Bergrin's opening remarks as "admissions," as Your Honor has told the jury, and will reiterate in your final instructions to the jury, opening statements simply are not evidence. *See United States v. De Peri*, 778 F.2d 963, 978 (3d Cir. 1985); *see also* Third Circuit Model Criminal Jury Instruction 1.07 ("The opening statements are simply an outline to help you understand what each party expects the evidence to show. What is said in the opening statements is not itself evidence."). Moreover, the seminal case governing such a request, *United States v. McKeon*, 738 F.2d 26, 33 (2d Cir. 1984), imposes a heightened standard for the admission of opening remarks as evidence in a subsequent trial. *Id.* at 31 ("We are not willing … to subject such statements to the more expansive practices sometimes permitted under the rule allowing use of admissions by a party-opponent."); *see also United States v. Butler*, No. 11-4440, 2012 U.S. App. LEXIS 19148, at *6 (3d Cir. 2012) (noting heightened *McKeon* standard applies to jury arguments in previous trials).[1] As set forth in *McKeon*, before permitting the evidentiary use of prior jury argument:

[1] Although the Government asserts that Mr. Bergrin's use of Thomas Moran's bail motion on cross-examination effectively somehow renders admissible his opening statement, Gov. Ltr. at 3, the Government did not contend that the statements in Mr. Moran's bail motion were subjected to the heightened *McKeon* standard that is applicable here, as they most certainly were not. Indeed, as Mr. Bergrin contended in his February 25, 2013 letter with respect to the use of Moran's bail motion pursuant to Rule 613, pleadings may be used as evidentiary admissions, while arguments made during court may not. *Compare Athridge v. Aetna Cas. & Sur. Co.*, 474 F. Supp. 2d 102, 111 (D.D.C. 2007), *with United States v. Cuevas Pimentel*, 815 F. Supp. 81, 83 (D. Conn. 1993).

> the district court must be satisfied that the prior argument involves an assertion of fact inconsistent with similar assertions in a subsequent trial. Speculations of counsel, advocacy as to the credibility of witnesses, arguments as to weaknesses in the prosecution's case or invitations to a jury to draw certain inferences should not be admitted. The inconsistency, moreover, should be clear and of a quality which obviates any need for the trier of fact to explore other events at the prior trial.

Id. at 33. Notwithstanding this heavy burden, the Government seeks to introduce Mr. Bergrin's prior opening remarks to rebut his advocacy in this trial as to Young's lack of credibility and weaknesses in the prosecution's case.[2] Significantly, the "inconsistency" they seek to redress is not even at odds with his prior remarks.

In fact, the Government mischaracterizes Mr. Bergrin's opening statement in this trial when it contends that "Bergrin has materially backed off his 2011 admission." Gov. Ltr. at 2. When read in its full context (and without the ellipses in the Government's letter), the relevant portion quoted by the Government actually sets forth Mr. Bergrin's position that, of all of Young's testimony, the only corroborated evidence linking Mr. Bergrin to the Kemo murder conspiracy is his testimony that Mr. Bergrin passed the name of the informant to Hakeem Curry — which Mr. Bergrin asserts he did for legitimate reasons and which, in any case, in no way facilitated that crime, as the Curry organization already knew the identity of the informant. Thus, Mr. Bergrin's position has not, in fact, changed at all. As Mr. Bergrin argued during his opening statement at this trial:

> [Anthony Young] then says that he was in a car when Hakeem Curry received a call from me, and he swore multiple times that Rakim Baskerville was in the front seat of the car with him. Then he's confronted with the fact that Rakim Baskerville could not have been in the car with him and completely changes his testimony and says, Okay, Rakim wasn't in the car. He says that all Paul Bergrin did to Hakeem Curry was read off the complaint, says that William Baskerville made a sale on this date of this amount, William

[2] As the Government notes in its letter, the intercepted telephone call during which Mr. Bergrin mentioned to Hakeem Curry that the informant was "Kamo" is inadmissible as a result of the Government's sealing error. Gov. Ltr. at 1. The Government has already taken advantage of Mr. Bergrin's cross-examination of FBI Special Agent Stephen Cline to admit the substance of the first telephone call Mr. Bergrin made to Mr. Curry on the day of William Baskerville's arrest. Tr. (2/6/13) at 3014-3020. It now seeks to use Mr. Bergrin's opening arguments from the last trial to satisfy its burden of proving the substance of the second call. *See* Gov. Ltr. at 1. *But see McKeon*, 738 F.2d at 32 ("In criminal cases, the burden rests on the government to present a coherent version of the facts, and defense counsel may legitimately emphasize the weaker aspects of the government's case."). This effort to bypass the consequences of the sealing error should not be permitted.

> Baskerville made a sale on this day of this amount, and that instead of Paul Bergrin saying CW, confidential witness, that's on the complaint, Paul Bergrin mentioned the name Kemo. But William Baskerville already knew that, the evidence will show. The evidence will prove that, and that William Baskerville had already called his family or called his family that night to tell them who the informant was. The evidence will prove that on November 25th, as an obligation and for me to know anything about what to argue on a bail hearing, you have to find out the background of individuals, especially Kemo. How can you argue to a judge about the credibility of a witness if you don't ask people about it? The evidence will prove all I did was what any defense counsel will do is try to represent to the best of my ability. Every time Anthony Young talked, he lied. Every time he gave a version, it changed. The inconsistencies are mind-boggling.

Tr. (1/22/13) at 163-64. Notably, those comments are remarkably similar to Mr. Bergrin's opening statement at the last trial:

> And my intent of using the word 'Kemo' is -- and the bail statute specifically provides that I have to argue in Federal Court before a judge that I have the right, that I have the obligation to argue the weight, the weight of the evidence, the credibility of the witnesses, the reliability of the witnesses. How would I ever be able to make that argument without learning everything that I can, everything humanly possible about the credibility of the witness, about the case, about the strengths and weaknesses of the case? That was my intent and that was my motive; to learn about the case, to represent my client effectively pursuant to my constitutional obligation … The evidence will prove that they knew that William Baskerville would be able to figure out who the informant was. It didn't matter that the words in the complaint said 'CW' for 'confidential witness,' because there was four listed transactions in very specific small amounts that William Baskerville did not deal in.

Tr. (10/17/11) at 60-61. Thus, there is no basis for the Government to contend that "Bergrin is attempting to mislead the jury by suggesting that Young fabricated his testimony that Bergrin relayed to Curry the identity of the informant in Baskerville's case." Gov. Ltr. at 2. To be sure, Mr. Bergrin here contends that, as the Government brought out in 2011 and again in 2013, Richard Hosten and William Baskerville had ascertained Kemo McCray was the informant and

Baskerville called his brother directly to communicate that information. Tr. (10/26/11) at 73-74; (11/7/11) at 111; (2/1/13) at 2060. Accordingly, Mr. Bergrin argued here — based on the Government's evidence — that the Curry gang had independent means to learn of Kemo's identity. *See McKeon*, 738 F.2d at 32 ("Trial tactics may also change because of the earlier trial. If prior jury argument may be freely used for evidentiary purposes, later triers of fact will be forced to explore the evidence offered at earlier trials in order to determine the quality of the inconsistency between positions taken by a party. This will result in a substantial loss of time on marginal issues, diversion from the real issues and exposure to evidence which may be otherwise inadmissible and prejudicial."). But this, of course, is in no way inconsistent with his opening at the 2011 trial, let alone "clear and of a quality which obviates any need for the trier of fact to explore other events at the prior trial." *McKeon*, 738 F.2d at 33.

Finally, there is no basis for the Court to preclude Mr. Bergrin "from arguing or implying on summation that Anthony Young lied about the contents of the 4:00 p.m. call." The fact that the call occurred in no way precludes Mr. Bergrin's defense that Young is lying about being present with Curry at the time it took place (as evidenced by other aspects of his testimony regarding that call), or anything else. Indeed, that was the defense at the 2011 trial, as it is in this case. Accordingly, precluding Mr. Bergrin from such argument on summation would violate his constitutional rights to present a complete defense. *See O'Dell v. Netherland*, 521 U.S. 151, 171 (1997) ("When a defendant is denied the ability to respond to the state's case against him, he is deprived of 'his fundamental constitutional right to a fair opportunity to present a defense.'") (quoting *Crane v. Kentucky,* 476 U.S. 683, 690 (1986)).

For the reasons discussed above, the Government's application should be denied. Thank you for your kind consideration of this matter.

Respectfully submitted,

s/ Lawrence S. Lustberg
Lawrence S. Lustberg

cc: John Gay, Assistant U.S. Attorney
Joseph N. Minish, Assistant U.S. Attorney
Steven G. Sanders, Assistant U.S. Attorney
Paul W. Bergrin