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March 7, 2013

Hon. Dennis M. Cavanaugh, U.S.D.J.
United States District Judge
Post Office Building & Federal Courthouse, Room 451
Newark, NJ 07101-0999

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

Dear Judge Cavanaugh:

Please accept this brief letter on behalf of defendant Paul Bergrin with regard to the proposed testimony of Bobby Van Noy. The Government objected to the testimony on grounds of hearsay objection, which objection the Court sustained, thereby precluding Van Noy from testifying.

The summary of interview of Van Noy conducted by defendant Bergrin's investigators (DJ-000061, copy attached) contains information about conversations Van Noy overheard between Yolanda Jauregui, Ramon Jimenez, "Changa" and Albert Castro about drug dealing. Van Noy recalls Changa telling the group in his presence that, in effect, he did not trust Bergrin and Bergrin must not find out about their drug dealing. Further, Yolanda and Ramon both stated many times that Bergrin can never know anything. Finally, as recounted in the summary Van Noy was a frequent visitor to Little Street but never observed Bergrin involved in or discussing drugs.

In response to the Government's hearsay objection, we, on behalf of Mr. Bergrin, responded that the testimony regarding the instruction -- not to let defendant Bergrin know anything -- is not hearsay because it is a command or imperative that does not meet the definition of "statement" under Fed. R. Evid. 801(a). Specifically, under the rule a "statement" includes a person's oral assertion, written assertion, or nonverbal conduct, if the person intended it as an assertion. But Courts consistently hold, in conformity with the rule, that imperatives like the commands at issue here are not hearsay because they are simply not assertions of fact. See *Weinstein 's Federal Evidence, §801[2A] citing, United Sates v. Hayes, 369 F.3d 564, 568 (D.C. Cir. 2004)* ("The imperative 'tell the truth' does not expressly assert anything."). See also *United States v. White, 639 F.3d 331, 337, 338 (7th Cir. 2011)* (A command is not hearsay because it is not an assertion of fact) (*citing United States v. Murphy, 193 F.3d 1, 5 (1st Cir.1999)* (explaining that "the out-of-court statements in question were simply directions and therefore not hearsay at all"); *United States v. Thomas, 451 F.3d 543, 548 (8th Cir.2006)* ("Questions and commands generally are not intended as assertions, and therefore cannot constitute hearsay." (citations omitted)). For this reason, at a minimum, the instruction not to let Bergrin know anything is not a statement and accordingly not hearsay; it is, therefore, admissible.

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In the alternative, and to the extent that the Court remains concerned that such a statement is hearsay, we suggest that Van Noy should be permitted to testify in a manner that avoids eliciting the substance of out of court statements. As an alternative, defendant Bergrin proposes to elicit testimony from Van Noy as follows: Van Noy will testify that he was a frequent visitor to the home on Little Street. While there he heard Yolanda, Ramon, Changa and Castro discuss the subject drugs in his presence (without getting into the substance of what was said). Further, Van Noy had discussions with Yolanda and Ramon (without getting into what was said) and based on those discussions it was his understanding that he was not to tell Bergrin about drugs. Finally, Van Noy should certainly be permitted to testify that he never observed Bergrin discuss, mention or that he was otherwise involved in the drug business.

Of course, we will be prepared to discuss this further with Your Honor, in an effort to assure that Mr. Bergrin is able to present his defense and, in furtherance thereof, to elicit this critical, admissible evidence. Thank you for your kind attention to this matter.

Respectfully submitted,



Bruce A. Levy
Director

cc: John Gay, AUSA
Joseph Minish, AUSA
Steven Sanders, AUSA

Privileged & Confidential/Attorney Work Product

Date of Interview:	September 19, 2012
Person Interviewed:	BOBBY VAN NOY 346 Little Street Belleville, New Jersey Cell Phone : 201-878-8958
Interview Conducted By:	Louis F. Stephens

BOBBY VAN NOY is the son of SONJA VAN NOY. TERESA VAN NOY, a/k/a Ashley Jauregui is his sister. BOBBY VAN NOY is a 9th grade public school student in the Belleville, New Jersey school system. He currently resides with YOLANDA JAUREGUI's mother, GLADYS BRACERO. He provided the following information:

He knows nothing about the March 2, 2004 murder of KEMO MCCRAY. He is, of course, familiar with YOLANDA JAUREGUI and is aware that she lived on and off with PAUL BERGRIN in Nutley, New Jersey and that they had a romantic relationship. He is also familiar with ALEJANCRO CASTRO; CHANGA and RAMON JIMENEZ.

VAN NOY stated that between 2004 and 2009 VAN NOY, just a boy, was present at 346 Little Street in Belleville, New Jersey and at other places when YOLANDA, RAMON and CHANGRA met and talked, later to be joined by ALEJANDRO CASTRO. Their discussion regarded the illegal drug business they were conducting. They all agreed that it was critical that BERGRIN never found out that they were involved in the illegal drug business, or even that they were involved with each other. VAN NOY recalls CHANGA telling the group in VAN NOY's presence that he did not trust BERGRIN at all; that BERGRIN was, in his heart, still a prosecutor and if he finds out that the group was in the illegal drug business or even suspects so that "PAUL is gone". VAN NOY stated that YOLANDA and RAMON both stated many times that PAUL can never know anything.

VAN NOY stated that he never observed nor heard BERGRIN, who was a frequent visitor to the home on Little Street, involved in or discuss/mention the illegal drug business.

The interview thus concluded.