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**BY E-MAIL**

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

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

Dear Judge Cavanaugh:

For the reasons set forth below, this Court should admit, under Federal Rule of Evidence 801(d)(2)(A), Defendant Paul Bergrin's opening statement assertion on October 17, 2011, in which he admitted relaying the name "Kemo" from William Baskerville to Hakeem Curry over the telephone on November 25, 2003. Alternatively, this Court should preclude Bergrin from arguing or implying during summation that Anthony Young lied when he testified about that call.

Background

Part of the Government's proofs as to the Kemo McCray murder involve Bergrin's relaying to Curry McCray's identity during a 3:49 p.m. phone call after Baskerville's initial appearance on November 25, 2003. As this Court now knows, the Government intercepted that call pursuant to a valid wiretap but did not timely seal it. Thus, absent a door-opening event, the call itself cannot be introduced.

At the 2011 trial on Counts 12 and 13, the Government proved the fact and contents of the 4:00 p.m. call through (1) telephone records, (2) testimony from reporters John Martin and Wayne Parry to the effect that Bergrin admitted to having passed McCray's identity to Curry, (3) testimony from Thomas Moran to the effect that Bergrin admitted relaying the name of the informant, and (4) Anthony Young's testimony that he was in Curry's Range Rover when Curry

received the 4:59 call, during which Bergrin mentioned that "Kamo" was the informant, which Young concluded was in fact "Kemo."

Beyond that, in his opening statement at the 2011 trial, Bergrin made specific and detailed factual assertions about the nature and content of the 4:00 p.m. telephone call:

> And I called Hakeem Curry and I spoke to Hakeem Curry, and I told him -- read off the complaint to him. There was a transaction involving so many sold grams on this date, there was a transaction involving so many sold grams on this case, a transaction, a third transaction, a fourth transaction. Instead of using the word "with a confidential witness," I used the name "Kemo."

Oct. 17, 2011 Tr. at 60. The Government treated this admission as an assertion of fact in its Third Circuit Brief, Brief for Appellant, United States v. Bergrin, 2012 WL 371818, at *3, and in its August 21, 2012 Pretrial Motions Brief, Dkt. No. 381 at 18 (using page number in ECF legend)—both times without any objection from Bergrin.

In this RICO trial, Bergrin has materially backed off his 2011 admission. In opening statement, Bergrin suggested that Young was lying about what he learned when he overheard Curry's side of the November 25, 2003 call from Bergrin:

> [Anthony Young] 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 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. . . . Every time Anthony Young talked, he lied. Every time he gave a version, it changed. The inconsistencies are mind-boggling.

Tr. at 163-64. Thus, 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.

Discussion

Federal Rule of Evidence 801 exempts from the definition of hearsay any statement that "is offered against an opposing party and . . . was made by the party

in an individual or representative capacity." Fed. R. Evid. 801(d)(2)(A). A statement by a party at a prior court proceeding is, quite clearly, a statement that "was made by the party in an individual . . . capacity." See Williams v. Union Carbide Corp., 790 F.2d 552, 55-56 (6th Cir. 1986) ("An opening statement made by an attorney is admissible in a later lawsuit against his client.") (citation omitted); accord United States v. Blood, 806 F.2d 1218, 1221 (4th Cir. 1986) ("Further, a clear and unambiguous admission of fact made by a party's attorney in an opening statement in a civil or criminal case is binding upon the party.").

To be sure, some courts have applied a heightened standard when the Government attempts to introduce *a defense attorney's* prior statements against the attorney's client under Rule 801(d)(2)(D). See United States v. McKeon, 738 F.2d 26, 30 (2d Cir. 1984); accord United States v. Butler, No. 11-4440, 2012 WL 3985323, at *2 (3d Cir. 2012) (not precedential) ("Although the Second Circuit in McKeon, addressing the admissibility of statements made by counsel to a jury in a previous trial, has articulated a heightened standard for admitting such statements, that standard applies only to jury arguments in previous trials."). But even the Second Circuit permits a district court to admit an attorney's opening statement from a prior trial against the client in a subsequent trial if the prior opening statement contained factual assertions that are at odds with the client's litigating position at the subsequent trial. McKeon, 738 F.2d at 34 ("If an innocent explanation for the inconsistency existed, but McKeon's counsel was unwilling to reveal it in open court for reasons explained above, this offer gave him ample opportunity to apprise the trial judge of that explanation without risk of a waiver of McKeon's rights or exposure of work product, trial tactics or legal theories.").

Here, this Court need not consider whether Bergrin's assertions in the prior trial are inconsistent with his position in the current trial. Bergrin represented himself and, thus, cannot claim any unfairness in having his own in-court assertions used against him. Indeed, in *this* trial, Bergrin cross-examined Government witness Thomas Moran with arguments Moran's lawyers had made in court-filed bail motions. Tr. 6649-57. If the statements of Moran's attorneys were sufficiently attributable to Moran for purposes of Rule 613, then surely Bergrin's own first-person statements to the jury qualify as admissions of a party opponent under Rule 801(d)(2)(A). And Bergrin can no longer credibly claim, as he did in pretrial motions, that his opening statement assertions were merely "argument." Moran's bail motion contained "argument," but that did not deter Bergrin from portraying it as a statement of Moran that was inconsistent with his trial testimony.

Even if this Court denies the Government's request to introduce Bergrin's 2011 opening statement assertions, this Court should preclude Bergrin from arguing or implying on summation that Anthony Young lied about the contents of the 4:00 p.m. call. Based on the unambiguous content of the improperly sealed call (a transcript of which can be provided to the Court upon request), Bergrin knows full well that Young truthfully testified that Bergrin relayed the name "Kamo" to Curry. Tr. at 2243. Bergrin should not be permitted to dispute that fact in front of the jury. See United States v. Burnett, Crim. No. 08-201-03, 2009 WL 2180373, at *5 (E.D. Pa. July 17, 2009) ("Mr. Burnett's counsel may not present evidence or arguments on Mr. Burnett's behalf that directly contradict the admissions made by Mr. Burnett during his proffer sessions"); accord United States v. Lauersen, Crim. No. 98-1134, 2000 WL 1693538, at *8 (S.D.N.Y. Nov. 13, 2000) (finding that "[t]his Court is duty bound to protect the integrity of the proceeding and to ensure that matters presented to the jury are grounded in good faith" and barring defense counsel from taking positions "that directly contradict specific factual statements made by Binion in the FBI-302 statement"). If Bergrin in summation contradicts the content of the intercepted call, this Court should permit the Government to reopen its case in chief to introduce either Bergrin's 2011 opening statement admission, or the 4:00 p.m. call, or both.

Respectfully submitted,

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