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March 6, 2013

BY ECF AND 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:

The Government moves to preclude defense expert James Reames from testifying to the first and third opinions described in the March 5, 2013 letter from Bruce A. Levy, Esq. (The Government has no objection to the second proffered opinion—i.e., that someone could convert the Hawk recording to .wav format, tamper with the .wav file, and then record the tampered .wav file back into the Hawk device.)

Mr. Reames proposes to opine, first, that "[t]he Hawk recording device used in this case is not tamper proof" because "[t]he device itself may be tampered with during recording so that voices become inaudible." Levy Letter at 1. Mr. Reames goes on to explain that the informant could cover one or both microphones in an intentional effort to render portions of the conversation inaudible. Id. The problem with that proffered opinion testimony is that it purports to rebut an opinion that the Government's expert, Attila Mathe, never gave or offered to give. It is thus beyond the scope of the limited purpose for which this Court authorized Mr. Bergrin to use C.J.A. funds to retain an expert, as this Court has already concluded during trial.

Specifically, in its December 28, 2012 letter responding to Mr. Bergrin's authenticity challenges, the Government represented that Attila Mathe would opine that

> *the data stored on the recorder* is effectively tamper-proof because the software that extracts and plays the recordings employs a proprietary computer algorithm that prevents the media player from playing any recording that has been altered

Letter from AUSA Steven G. Sanders, dated Dec. 28, 2012, at 4 (emphasis added). On January 3, 2013, this Court permitted Mr. Bergrin to use C.J.A. funds to retain an expert for the limited purpose of rebutting that anticipated testimony. During trial, Mr. Bergrin attempted to elicit sensitive information from DEA Special Agent Robert Afanasewicz about where on Cordova's body the recorder was located. Tr. 6902. When the Government objected, Mr. Bergrin said that his expert—who had yet to produce a report—would testify to audibility issues arising from the recorder's location. And when the Government objected that it had received no such disclosure, this Court reiterated "the very limited purpose" for which it had authorized Mr. Bergrin to retain an expert, and agreed that what Mr. Bergrin had described was beyond that limited purpose. Tr. 6903. The same holds true now.

Mr. Reames also proposes to opine that "the July 17, 2008 recording (Exhibit CWl-000004 and CWl-00005)" allegedly revealed "eight anomalies or 'drop-outs' in the right channel of the recorder. Reames's analysis shows that the electronics of this particular device was failing on the date of this recording; he knows this from analyzing the recorded time domain waveform." Levy Letter at 2. Mr. Levy's letter attaches a report, dated February 25, 2013, from Mr. Reames describing the so-called anomalies and attaching purported scientific data.

The Government objects to Mr. Reames opining on this subject because it, too, is beyond the limited scope for which this Court authorized Mr. Bergrin to retain an expert. Further, Reames's third opinion plainly fails to meet Rule 702s' helpfulness requirement. Briefly, "Rule 702 has three major requirements: (1) the proffered witness must be an expert, i.e., must be qualified; (2) the expert must testify about matters requiring scientific, technical or specialized knowledge [, i.e., reliability]; and (3) the expert's testimony must assist the trier of fact," *i.e.*, fit. Pineda v. Ford Motor Co., 520 F.3d 237, 243 (3d Cir. 2008). In affirming the exclusion of expert testimony as insufficiently helpful, the Third Circuit recently

explained that, "[i]n assessing whether an expert's proposed testimony 'fits,' we are asking whether [the] expert testimony proffered ... is sufficiently tied to the facts of the case that it will aid the jury in resolving a factual dispute." United States v. Schiff, 602 F.3d 152, 173 (3d Cir. 2010) (citations and quotation marks omitted).

Mr. Reames claims to have detected eight anomalies in the first fifteen minutes of a single recording. But Mr. Reames never claims, let alone suggests, that the recording in question has been tampered with or is anything other than an accurate depiction of the conversation it captured. Without such a contention, his opinion about supposed anomalies adds nothing whatsoever to this case. Put another way, Mr. Reames's opinion cannot "assist the trier of fact to understand the evidence or to determine a fact in issue," Fed. R. Evid. 702, because it does not make any fact that is of consequence to the litigation more or less likely than it would be without his opinion, Fed. R. Evid. 401. See United States v. Cocchiola, 358 F. App'x 376, 379 (3d Cir. 2009) (not precedential) (affirming exclusion of expert testimony that had no relevance to matters in issue); United States v. Geiger, 303 F. App'x 327, 331-32 (6th Cir. 2008) (unpublished); United States v. Hayez, 260 F. App'x 615, 619-20 (4th Cir. 2008) (unpublished) (expert testimony about "seven primary indicators" of tax fraud was properly excluded as too abstract); United States v. Powers, 59 F.3d 1460, 1471-73 (4th Cir. 1995) (expert testimony irrelevant to facts of case); United States v. Fletcher, 928 F.2d 495, 503-04 (2d Cir. 1991) (same).

Even were there some minimal probative value to testimony about supposed anomalies without any testimony as to their cause, this Court retains discretion to exclude such testimony under Rule 403. See United States v. Ford, 481 F.3d 215, 219 n.6 (3d Cir. 2007); United States v. Iskander, 407 F.3d 232, 237-39 (4th Cir. 2005) (expert testimony was irrelevant and "potentially confusing"); United States v. Rouco, 765 F.2d 983, 995-96 (11th Cir. 1985) (similar).

Finally, the Government alternatively objects to Mr. Reames testifying as to the first or third opinion on the ground that the disclosure is untimely. Mr. Bergrin received the Government's expert notice in December 2009, and thus has had three years to prepare to cross-examine Mr. Mathe. While this Court authorized Mr. Bergrin to retain an expert on January 3, 2013, Mr. Bergrin waited until the eve of his defense case to make the disclosure required by Rule 16(b)(1)(C). Further, the defense received on February 25th the most technical aspect of Mr. Reames's report (the third opinion described above), and yet waited eight days to

disclose it, depriving the Government of the time needed to meaningfully analyze Mr. Reames's opinion, to have its own expert evaluate the supposed anomalies, and to cross-examine Mr. Reames. This Court has ample discretion to preclude a defense expert from testifying due to late or insufficient notice. See United States v. Hoffecker, 530 F.3d 137, 186-88 (3d Cir. 2008) (affirming exclusion of defense experts where "the Government only received notice of the experts three business days before jury selection," which "simply did not give the Government enough time to prepare for these three experts"). Here, the Government asks this Court to preclude the first and third of the three opinions to which Reames proposes to testify, a sanction short of outright preclusion, but one that nonetheless cures the principal harm of the late disclosure.

Respectfully submitted,

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December 28, 2012

BY ELECTRONIC 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:

In his December 21, 2012 letter, Defendant Paul Bergrin claims that the secretly recorded conversations the Government intends to introduce into evidence—especially those recorded by confidential informant Oscar Cordova—do not meet the standard for authenticity prescribed by Federal Rule of Evidence 901(a). But instead of seeking a pretrial Rule 104 hearing, Bergrin asks this Court to preclude the Government from mentioning the recordings in its opening statement in the event this Court deems them inadmissible at trial. Because the Court may wish to address this issue at the January 3, 2013 conference, the Government explains why Bergrin's arguments are meritless.

As an initial matter, it is hardly surprising that Bergrin wants to prevent a jury from hearing the conversations recorded by Cordova. The "critical December 8, 2008 recording," Bergrin Letter at 4, contains the following conversation with respect to the plot to tamper with witnesses against Bergrin's client, Vicente Esteves:

CORDOVA: I got everything lined up. I talked with [Moran]. [UI] gonna come to you. Is it gonna help our case? Is it gonna help your case or is it's gonna hurt it? It's gonna help it?

BERGRIN: They'll never figure it out.

CORDOVA: Because they'll never bring [UI]

BERGRIN: Ski mask, like a fuckin' robbery cause there's a lot of money in the house.

CORDOVA: So listen to me, listen to me. Hit-em, you keep the cash. Money, you need money? I have money. Fuck his money. He's a rat.

BERGRIN: No, we gotta make it look like a robbery. It cannot under any circumstances look like a hit.

CORDOVA: Smart. I was saying, fuck his money. We, I got the money.

BERGRIN: No. I'm not worried about the money man. We have to make it look like a home invasion robbery. We have to hit-em when his girlfriend's at work. We don't want… We don't want her around. Just want him. She's nothing.

With that context, the Government first explains why the recordings plainly meet the liberal standard for authenticity, and then why Bergrin's legal and factual assertions are meritless. The Government next explains that, even if there is doubt about the authenticity of any particular recording, it should be resolved before trial.

I. The Recordings Easily Satisfy Rule 901(a)'s Liberal Standard For Authenticity.

"To satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is." Fed. R. Evid. 901(a). "The burden of proof . . . is slight. 'All that is required is a foundation from which the fact-finder could legitimately infer that the evidence is what the proponent claims it to be.'" Link v. Mercedes-Benz of North America, Inc., 788 F.2d 918, 927 (3d Cir. 1986) (citations omitted)). Thus, "there need be only a *prima facie* showing, to the court, of authenticity, not a full argument on admissibility. Once a *prima facie* case is made, the evidence goes to the jury and it is the jury who will ultimately determine the authenticity of the evidence, not the court." United States v. Goichman, 547 F.2d 778, 784 (3d Cir. 1976). Simply stated, "[t]he burden of authentication does not require the proponent of the evidence to rule out all possibilities inconsistent with authenticity, or to prove beyond any doubt that the evidence is what it purports to be. Rather, the standard for authentication, and hence for admissibility, is one of reasonable likelihood." United States v. Holmquist, 36 F.3d 154, 168 (1st Cir. 1994).

Rule 901(b) provides an illustrative list of methods a proponent can use to satisfy Rule 901(a)'s lenient standard. Three such methods are "[t]estimony that a matter is what it is claimed to be," "[i]dentification of a voice, whether heard firsthand or through

mechanical or electronic transmission or recording, by opinion based upon hearing the voice at any time under circumstances connecting it with the alleged speaker," and "evidence describing a process or system used to produce a result and showing that the process or system produces an accurate result." Fed. R. Evid. 901(b)(1), (5), (9).

Under Rule 901, "a *prima facie* showing . . . of authenticity" can consist of testimony by a participant in (or even a percipient witness to) a conversation that the recording accurately captured the events that were recorded. Thus, where *X* conversed with *Y*, *X* may testify that a recording accurately reflects the conversation in which he participated. See United States v. Lance, 853 F.2d 1177, 1181 (5th Cir. 1988) ("Under these liberal rules, the government's tapes were adequately authenticated to be admissible" where "Pettitt and the law enforcement agents who participated in the taped conversations testified that, according to their memories, the audio and video tapes contained accurate recordings of the conversations that occurred.").

Similarly, where an agent provided a recording device to (and then retrieved it from) an informant, the agent may authenticate the conversations captured on the device even if the informant does not testify. See United States v. Fuentes, 563 F.2d 527, 532 (2d Cir. 1977) ("There simply is no requirement that the tapes be put in evidence through the person wearing the recorder or, for that matter, through a contemporaneous witness to the recorded conversation."); accord United States v. Rengifo, 789 F.2d 975, 978 (1st Cir. 1986) (neither testimony of participant in conversation, nor that of person who monitored recording, is necessary to authenticate recording). All that Rule 901(a) requires is testimony showing that a conversation was recorded and identifying the voices on the recording. See United States v. Santana, 898 F.2d 821, 823-24 (1st Cir. 1990).

Finally, under Rule 901(b)(9), testimony showing the reliability of the process used to create piece of evidence is sufficient to authenticate it. See United States v. Simms, 351 F. App'x 64, 65-66, 68 (6th Cir. 2009) (finding the sufficient foundation where sheriff department computer specialist testified about the process by which voice recordings were retrieved from the jail's computer server, saved on a CD, and then provided to law enforcement); United States. v. Pageau, 526 F. Supp. 1221, 1224 (N.D.N.Y. 1981) (finding videotape of prison guard's assault on inmate authentic under Rule 901(b)(9) based on testimony about the reliability of the process used to create it); cf. United States v. Rembert, 863 F.2d 1023, 1027-28 (D.C. Cir. 1988) (photograph may be authenticated by testimony about the reliability of the process that created it); United States v. Taylor, 530 F.2d 639, 641-42 (5th Cir. 1976) (same).

A. The Cordova Recordings Easily Satisfy Rule 901(a).

Cordova will testify that: (1) he participated in the conversations with Bergrin and others; (2) he carried a recording device provided to him by a DEA Agent; (3) he knew how to activate the device; (4) he has reviewed the original recordings; (5) he recognizes

and can identify the voices on those recordings; and (6) the recordings accurately reflect the conversations in which he participated. That alone is sufficient to authenticate the recordings under Rule 901(a). See Hamilton, 334 F.3d at 186.

Further, the DEA Agent in question will testify that he: (7) provided the recording device to Cordova; (8) retrieved it from Cordova; (9) provided the device to a DEA technician; (10) personally observed the DEA technician (a) transfer the recordings to a "once-write" CD-ROM (meaning that no one can add to or delete the files initially burned to the CD-ROM), (b) make two copies of the original, and (c) provide the properly marked original and two copies to the DEA Agent; (11) delivered the original and copies to the DEA's evidence custodian, and (12) the recordings were not altered in any way. This would be sufficient, standing alone, to authenticate the recordings even without Cordova's testimony. See Fuentes, 563 F.2d at 532.

Finally, a representative from Adaptive Digital Systems, Inc. ("ADS"),[1] the company that designed and manufactures the recording device, will testify that: (13) the device is a digital recorder (not an analog tape recorder); (14) the device creates a separate file or "session" every time it is turned off, such that it is impossible to create a misleading recording by selectively turning the recorder on and off; (15) the data stored on the recorder is effectively tamper-proof because the software that extracts and plays the recordings employs a proprietary computer algorithm that prevents the media player from playing any recording that has been altered; (16) ADS does not release the source code for the security algorithm to any customer (including the Federal Government); and (17) he is unaware of any instance in 22 years in which a court excluded or questioned the integrity of data captured on an ADS recording device. Such testimony is plainly relevant as it would constitute "evidence describing a process or system used to produce a result and showing that the process or system produces an accurate result," Fed. R. Evid. 901(b)(9), which "is of consequence in determining the action," Fed. R. Evid. 401(b), because it augments the reliability of the recordings, see Pageau, 526 F. Supp. at 1224; cf. Taylor, 530 F.2d at 641-42 (affirming where the "only foundational evidence was introduced by government witnesses not present at the time of the robbery, who testified as to the manner in which the film was installed in the camera, how the camera was activated, the removal of the film immediately after the robbery, the chain of possession, and the method of development").

B. The Corriea Recordings Easily Satisfy Rule 901(a).

The Government also expects to introduce four conversations recorded by then-cooperating witness Maria Corriea. As Corriea will not be testifying as a Government

[1] Bergrin received notice of this testimony in December 2009. See Exhibit A.

witness at trial, the Government will employ a different, but equally well-accepted, method of authenticating the recordings under Rule 901(a).

Specifically, FBI Special Agent Shawn Brokos will testify that she personally: (1) provided an ADS digital recording device to Corriea; (2) retrieved the device from Corriea; (3) listened to the recordings captured on the device; (4) used ADS's proprietary computer software to extract the digital recordings and burn them onto a "once-write" CD-ROM, (4) submitted the CD-ROMs to the FBI's evidence custodian; (5) reviewed the originals prior to trial and confirmed that they contain the same conversations she heard on the recorder itself; and (6) she recognizes the voices on the recordings. This testimony, coupled with testimony from the ADS representative, easily satisfies Rule 901(a)'s authenticity standard.

* * *

The testimony proffered above far surpasses the minimal *prima facie* test for authenticity required by Rule 901(a).

II. This Court Should Reject Bergrin's Effort To Impose A Rigid, Multi-Factor Test As Precondition To Admissibility.

Despite Rule 901(a)'s liberal authenticity standard, Bergrin asserts that United States v. Starks, 515 F.2d 112 (3d Cir. 1975), prescribes a "clear and convincing evidence" burden of proof and requires the Government to satisfy an eight-factor test in order to establish authenticity. Bergrin Letter at 3-4. Bergrin misreads Starks, which issued before Rule 901(a) was enacted. Regardless, as set forth in Point I, the Government's foundation far surpasses the "clear and convincing evidence" standard.

A. Starks Has Been Abrogated by Rule 901(a).

The Third Circuit observed in Starks that because "**[t]ape recordings** are not readily identifiable as the original version," they are "peculiarly susceptible of alteration, tampering, and selective editing." 515 F.2d at 121 (emphasis added). The Court then noted that "[b]ecause proffer of [tape-recorded] evidence ***may***, in the particularized circumstances of a given case, involve one or more . . . problems in varying degrees it is difficult to lay down a uniform standard equally applicable to all cases." Id. (emphasis added). To address the problems that might arise in a particular case (such as those that arose in Starks itself), the Court quoted a seven-factor list from United States v. McKeever, 169 F. Supp. 426, 430 (S.D.N.Y. 1958), characterizing it as "a useful exposition" of a basis upon which the foundation for admissibility of tape-recorded evidence could be established. The Court held that "the burden is on the government 'to produce clear and convincing evidence of authenticity and accuracy as a foundation for

the admission of such recordings.'" Starks, 515 F.2d at 121 (quoting United States v. Knohl, 379 F.2d 427, 440 (2d Cir. 1967)).

Bergrin misreads Starks as holding that the Government must establish authenticity by "clear and convincing evidence," which it can do only by satisfying all of the McKeever factors. Bergrin's approach suffers from four fatal flaws.

First, "Starks was decided before the Federal Rules of Evidence took effect on July 1, 1975." See United States v. Tubbs, Crim. No. 89-498, 1990 WL 27365, at *3 (E.D. Pa. Mar. 12, 1990). With the enactment of Rule 901(a), many courts have rejected the rigidity of the McKeever approach. See, e.g., United States v. Hamilton, 334 F.3d 170, 186 (2d Cir. 2003) (the Second Circuit "has expressly and repeatedly declined to adopt the McKeever approach, refusing to 'adopt[ ] a rigid standard for determining the admissibility of tape recordings'") (quoting United States v. Fuentes, 563 F.2d 527, 532 (2d Cir. 1977)); United States v. Westmoreland, 312 F.3d 302, 310-11 (7th Cir. 2002) ("We have rejected the formalistic approach of [United States v. Faurote, 749 F.2d 40 (7th Cir. 1984)] for the more inclusive approach of Federal Rule of Evidence 901(a)[.]"); Lance, 853 F.2d 1181 at ("Lance overlooks that we have expressly rejected [United States v. McMillan, 508 F.2d 101 (8th Cir. 1975)]'s rigid test.") (citations omitted); United States v. Smith, 692 F.2d 693 (10th Cir. 1982) (quoting Fuentes for the proposition that the McKeever factors are mere guideposts, not preconditions to authenticity).[2]

Second, and relatedly, the "clear and convincing evidence" burden of proof that Starks imposed is fundamentally incompatible with the plain text of Rule 901(a). See United States v. Stills, Crim. No. 04-680, 2006 WL 1737496, at *2 (E.D. Pa. June 22, 2006) ("The Starks opinion required the government to produce 'clear and convincing evidence' of the recording's authenticity. However, the opinion was issued before the adoption of [901(a)], which governs authentication of evidence.") (citation omitted). See generally United States v. Toler, 444 F. App'x 561, 564 (3d Cir. 2011) (not precedential) (acknowledging the Government's argument that Rule 901(a) abrogated Starks's "clear and convincing evidence" standard). Simply put, the "clear and convincing evidence"

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[2] Accord Clifford S. Fishman, Recordings, Transcripts, and Translations as Evidence, 81 Wash. L. Rev. 473, 478-81 (2006) (explaining that Rule 901(a) abrogated decisional law adopting rigid multi-pronged foundations for admitting recordings) (footnotes omitted); Edward M. Inwinkelried, An Hegelian Approach To Privileges Under Federal Rule of Evidence 501: The Restrictive Thesis, The Expansive Antithesis, And The Contextual Synthesis, 73 Neb. L. Rev. 511, 539-40 (1994) ("At common law, many jurisdictions imposed special, rigid restrictions on the authentication of certain types of evidence such as tape recordings. . . . The Federal Rules hence overturn these common-law restrictions.") (footnotes omitted).

standard is inappropriate under Rule 901(b)(5)." 7 Michael H. Graham, Handbook of Federal Evidence § 901:5 n.12 (7th ed. 2012) (citing Rule 901(a)).[3]

Third, Bergrin selectively quotes Starks, misleadingly substituting the phrase "recorded conversations" for "tape recordings." Bergrin Letter at 3. Bergrin thus attempts to portray Starks as having adopted a rigid authenticity requirement due to concerns over all recordings, even those made with devices that had not been invented at the time Starks issued. Here, as set forth above, the Government used ADS digital recorders that cannot be manipulated or tampered with. Further, ADS's proprietary software downloads the "original" onto a "once-write" CD-ROM, which can be copied but not altered. Even were Starks still good law (and it is not), it did not address and does not cover such unalterable digital recordings. Cognizant of this reality, Bergrin repeatedly and misleadingly refers to the recordings as "tapes" in an a vain effort to suggest that Starks applies here.

Fourth, in quoting the seven factors from McKeever that might govern in a case where the authenticity of tape-recorded conversations is legitimately contested, Starks did not imply, much less hold, that the list created a "uniform standard" for admitting recordings. Indeed, no Third Circuit decision has held that a district court reversibly erred by not demanding proof of all seven McKeever factors as a precondition to admissibility. E.g., United States v. Hodge, 85 F. App'x 278, 281 (3d Cir. 2003) (not precedential) ("While we have acknowledged that identifying speakers on a tape is one factor to consider in examining their foundation, this is not dispositive.") (citing Starks); United States v. Kerr, Crim. No. 11-188, 2012 WL 3929380, at *8 (W.D. Pa. Sept. 7, 2012) (stating that the McKeever "factors provide useful guidance in assessing the admissibility of a challenged recording" and rejecting defendant's request for Starks hearing based on the Government's pretrial proffer); accord United States v. Branch, 970 F.2d 1368, 1372-73 (4th Cir. 1992) (McKeever factors simply "provide guidance to the district court when called upon to make rulings on authentication issues") (citations omitted).

In sum, all the Government must do is produce sufficient evidence for this Court to conclude that a rational jury could find by a preponderance of the evidence that the recordings are what the Government claims they are. Fed. R. Evid. 901(a). The proffered evidence described in Point I easily satisfies that standard.

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[3] Granted, some courts that have rejected the rigid test for authenticity still apply the "clear and convincing" burden. E.g., Westmoreland, 312 F.3d at 310-11; Fuentes, 563 F.2d at 532. But even those courts find that burden satisfied by a witness who testifies that the recording accurately reflects the conversation, Westmoreland, 312 F.3d at 311 (citing Smith v. Chicago, 242 F.3d 737, 741 (7th Cir. 2001)), or by a third party who can identify the speakers, Fuentes, 563 F.2d at 532. In other words, these courts effectively apply Rule 901(a) as written, demanding only *prima facie* evidence of authenticity.

B. In Any Event, The Proffered Evidence Easily Satisfies The "Clear And Convincing Standard."

Even if this Court concludes that Starks's "clear and convincing evidence" standard still governs, or that some of the McKeever factors are relevant to establishing authenticity, the foundation the Government expects to lay at trial far exceeds whatever showing Starks requires.

As set forth in Point I above, the Government will adduce testimony that: (1) the ADS device is capable of recording sound; (2) the informants who used the device knew how to activate it; (3) neither the device nor the recordings can be tampered with; (4) the recordings were extracted from the device and written onto a "once-write" CD-ROM; (5) the original recordings were placed in evidence, (6) the recordings have not been tampered with, and (7) one or more witnesses recognizes the voices on the tape. Compare United States v. Flood, Crim No. 04-36, 2007 WL 1314612 (W.D. Pa. May 4, 2007) (questioning whether Starks remains good law after Rule 901(a) but deciding to apply Starks in an abundance of caution), with United States v. Flood, Crim No. 04-36, 2007 WL 1366782 (W.D. Pa. May 8, 2007) (holding that the Government proved by clear and convincing evidence that its recordings were authentic). Nothing more is required.

C. Bergrin's Specific Complaints Are Woefully Insufficient To Garner A Rule 104 Hearing, Much Less Defeat Authenticity.

Bergrin nonetheless complains about alleged anomalies that, he claims, defeat authenticity under Rule 901(a) as a matter of law. Bergrin's complaints are meritless.

For example, Bergrin asserts that one recording on July 17, 2008 captured agents showing Cordova how to turn the recorder on and off using a pen. Bergrin Letter at 4. According to Bergrin, this "unorthodox method of manipulating a recording device eviscerates any potential foundation for admission premised upon the integrity of the device itself, or the competence of its operator." Id. Far from "unorthodox," a pen or paper clip is the only way to activate and deactivate the particular recording device that Cordova used on that occasion. To the extent Bergrin insinuates that allowing a confidential informant to activate the recorder creates a potential for creating misleading recordings, he ignores the type of device that was employed in this case, which makes it impossible for anyone handling the recorder to erase or record over prior recordings. See generally Fuentes, 563 F.2d at 532 ("it is hard to believe that [the party wearing the recorder] could have effectively changed the character of a running conversation, by turning the device on and off, without such attempts being immediately obvious to those present as well as to anyone listening to the tapes").

Bergrin also complains that there are gaps between the July 17 recordings, which he interprets as "deletions or changes." Bergrin Letter at 4. In fact, as reflected by the

"screen print" of the proprietary player (see Exhibit B), the CD-ROM to which Bergrin refers contains four recordings or "sessions:"

Session	Date	Start Time	End Time	Length	Status
1	07/17/2008	13:07:48	13:25:24	17 min, 36 sec	
2	07/17/2008	13:37:15	13:37:26	0 min, 11 sec	
3	07/17/2008	13:37:40	13:37:45	0 min, 5 sec	
4	07/17/2008	18:14:46	21:19:22	184 min, 36 sec	FE

The first three reflect the Agents showing Cordova how to operate the device and ensuring that it is working. The fourth session, which starts five hours later and lasts over three hours, contains the conversation with Bergrin that Cordova recorded without any interruption. In short, Bergrin takes no issue with the fourth session, excerpts from which will be introduced at trial; yet he attempts to contest authenticity because the first three sessions (which will not be admitted) show that the recorder was turned on and off while agents were showing Cordova how to operate it. That hardly undermines the authenticity of the recording.

Equally meritless is Bergrin's claim that the "critical December 8th" recording "is cut off" immediately after Cordova and Moran left the restaurant. Bergrin Letter at 4. While the Government is verifying this information, it appears that the recorder ran out of space. Again, that is insufficient to raise any question as to the authenticity of the December 8th recording, let alone defeat authenticity as a matter of law.

Bergrin also attacks the chain of custody for the December 8th recording. He complains that Cordova may have had the recorder for several days before returning it to the DEA Agent. "Since the tape may well have been tampered with or inadvertently corrupted while Mr. Cordova held it," Bergrin speculates, "there can be no support for the authenticity of this evidence." Bergrin Letter at 4 n.5 (emphasis added). Not so.

Initially, Bergrin misstates the facts. Cordova used a digital recorder to record a conversation that took place on the evening of December 8, 2009. No "tape" was created. Further, the very DEA report to which Bergrin cites shows that a DEA Agent retrieved the recorder the next day and had the digital recording transferred directly onto a CD-ROM. (See Exhibit C). Thus, Cordova had the recorder for less than 24 hours. But even if Cordova had kept it longer, he could not have "tampered with or inadvertently corrupted" the digital files stored on the recorder, as the Government's witnesses will make clear. Besides, even a theoretical possibility of such tampering would not defeat authenticity as a matter of law. See United States v. Dent, 149 F.3d 180, 189 (3d Cir. 1998) (evidence

about breaks in the chain of custody goes to weight and not admissibility); United States v. Jardina, 747 F.2d 945, 950-51 (5th Cir. 1984) (same); see also United States v. Tatum, 548 F.3d 584, 587-88 (7th Cir. 2008) (same). Recordings "are not inadmissible merely because 'one can conjure up hypothetical possibilities that tampering occurred,'" United States v. Rengifo, 789 F.2d 975, 978 (1st Cir. 1986) (quoting United States v. Haldeman, 559 F.2d 31, 109 (D.C. Cir. 1976)), and "any argument about [Cordova's] tampering or selective editing of this tape must be dismissed as specious," Fuentes, 563 F.2d at 532.

Bergrin also complains that the DEA Agent waited until December 15th to deliver to the DEA's evidence custodian the CD-ROMs containing the December 8th recording, although he does not explicitly accuse the Agent of having tampered with the CD-ROMs while they were in his custody. Regardless, Bergrin's complaint cannot defeat chain of custody. The Agent will testify that after he received the CD-ROMs from the technician on December 9th, he secured them until his supervisor was available to review and sign the report documenting the receipt of the recording. Once the DEA Agent had obtained that signature, he delivered the CD-ROMs to the DEA's evidence custodian, consistent with DEA procedure. That is plainly sufficient to establish a proper chain of custody. See United States v. Stewart, 104 F.3d 1377, 1383 (D.C. Cir. 1997) ("because the evidence was at no point missing or accessible to unauthorized persons, the [twelve-day] delay in transferring the drugs from the vault at the Narcotics Branch to the DEA did not constitute a break in the chain of custody"); see also United States v. Matta-Ballesteros, 71 F.3d 754, 768-69 (9th Cir. 1995) ("The evidence presented by the prosecution is sufficient to meet this burden, and there is arguably no defect in the chain of custody since there is evidence tracing the tapes from Matta-Ballesteros's codefendant's possession to trial."); accord United States v. Celis, 608 F.3d 818, 842 (D.C. Cir. 2010) (affirming finding of proper chain of custody for recording where agents testified that they followed proper techniques in making the recording and delivering it to an evidence custodian).

Bergrin's complaints about the audibility of the December 8th recording are likewise meritless. "The fact that the tape has some unintelligible portions does not automatically render the entire recording inadmissible." United States v. Wesley, 417 F.3d 612, 620 (6th Cir. 2005) (citation omitted). To the contrary, recordings are admissible "'[u]nless the unintelligible portions are so substantial as to render the recording as a whole untrustworthy.'" United States v. DiSalvo, 34 F.3d 1204, 1220 (3d Cir. 1994) (citing United States v. Arango-Correa, 851 F.2d 54, 58 (2d Cir. 1988)). Bergrin's complaints fall woefully short of making that showing, as most of the three-hour recording is audible, including the critical portion at the restaurant, as demonstrated by the block quotation starting on the first page of this letter.

Bergrin's next challenge is beyond the pale. Based solely on his unsworn assertions, which he relays through stand-by counsel, Bergrin claims that the recordings

are not authentic because they do not reflect alleged exculpatory statements he recalls having made. Bergrin Letter at 4-5 (citing alleged examples). According to Bergrin, "[t]hese are just a few examples of missing statements, based on Mr. Bergrin's recollection of events, which demonstrates that the recordings were altered to his detriment." Bergrin Letter at 5. Bergrin also denies having made certain statements clearly reflected on the recordings. Id.

Bergrin's self-serving assertions are just that: assertions unsupported by evidence. As set forth above, the Government will prove at trial that the digital recordings cannot be and have not been altered in any way. If the recorder failed to capture exculpatory statements by Bergrin, the most logical explanation is that he did not make any. See United States v. Santiago, Crim. No. 07-03, 2011 WL 1464941, at *4 (W.D. Va. Apr. 18, 2011) ("Other than Santiago's own speculation that the CD had somehow been edited to make someone else sound like him, he offers no viable evidence on which counsel could have argued that the recordings on the CD had been edited or were otherwise not accurate representations of the calls recorded by the prison's equipment."); United States v. Van Sach, Crim. No. 09-03, 2009 WL 3232989, at *7 (N.D.W. Va. Oct. 1, 2009) ("Defendant offers absolutely no evidence that the digital recording in this case has been altered or tampered with."). See generally United States v. Wilson, 973 F.2d 577, 580 (7th Cir. 1992) ("Wilson has failed to support his speculations that the tapes were not authentic."). Further, since witnesses will testify that Bergrin's voice appears on the tape, and since the jury will have a first-hand opportunity to hear Bergrin's voice, it can decide for itself whether Bergrin's voice appears on a particular recording. See generally United States v. Sliker, 751 F.2d 477, 499 (2d Cir. 1984) (jury that heard defendant testify had adequate basis to conclude that his voice appeared on tape admitted into evidence).

Finally, Bergrin complains that "the Government has not provided the original recordings, *i.e.*, those recorded on the digital recording device itself as opposed to the copies replicated onto compact disks." Bergrin Letter at 5. This argument is specious. As explained above, the ADS recorder is designed so that the digitally recorded files cannot be altered while stored on the recorder or in the process of transferring those files to a "once-write" CD-ROM. Thus, the recordings stored on the digital recoding device—what Bergrin calls "the original"—are transferred without any alteration onto the CD-ROM, which is marked as the original. That original is then immediately copied onto several additional "once-write" CD-ROMs and all are logged as evidence. The CD-ROMs will be introduced into evidence at trial, which is plainly proper. See Fed. R. Evid. 1003; United States v. Stewart, 420 F.3d 1007, 1021 n.13 (9th Cir. 2005) (affirming admission of recording where officials "did not preserve the original digital recording device but instead downloaded the data to disk and offered a duplicate of the recording at trial"); Simms, 351 F. App'x at 65-66, 68 (rejecting authenticity challenge to admission of CD-ROM which was a copy of a CD-ROM onto which defendant's jail calls had been downloaded). Bergrin has no more right to demand that the digital recordings be

preserved on the recorder that was used to capture them than he has to demand that pictures taken with a digital camera be preserved on the camera. See generally Lorraine v. Markel American Ins. Co., 241 F.R.D. 534, 561 (D. Md. 2007) ("An original digital photograph may be authenticated the same way as a film photo, by a witness with personal knowledge of the scene depicted who can testify that the photo fairly and accurately depicts it."). Further, the Government produced a duplicate set of CD-ROMS to Bergrin in 2009. Bergrin may object if he detects any discrepancy between the audio clips played at trial and the CD-ROMs he received in discovery.[4]

III. Bergrin Cannot Simultaneously Claim That The Government Must Satisfy Starks's Heightened Standard For Authenticity While Refusing To Demand A Rule 104 Hearing To Resolve Any Authenticity Issues.

Bergrin's December 21st Letter is most notable for its effort to convince this Court to apply Starks at trial while disavowing any request for a pretrial Rule 104 hearing. Bergrin prefers to wait until after jeopardy attaches—when the Government can no longer appeal—to raise objections that could lead to the exclusion of evidence. This Court should reject such gamesmanship. If Bergrin has identified "colorable" issues affecting the authenticity of any recording (and he has not), then the proper course is for this Court to hold a Rule 104 hearing to resolve any such issues before trial.

Bergrin nonetheless claims that he is justified in waiting until trial to raise authenticity challenges because the Government is continually updating its exhibit list. But Bergrin elides the fact that he has possessed all of the recordings since 2009, and has known all along that the Government would seek to introduce into evidence a large number of the Cordova recordings (including the December 8, 2009 recording). It is sophistical for Bergrin to suggest that he started analyzing alleged authenticity issues only upon receiving the most updated version of an Exhibit List he received in October 2011. This is especially so given that Bergrin's severance motions repeatedly complained about how evidence of the Esteves Plot evidence (especially the "make it look like a home invasion robbery" recording) would influence the jury. As Bergrin's prior arguments

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[4] Bergrin cites United States v. Brown, Crim. No. 02-146, 2008 WL 510126 (M.D. Pa. Feb. 22, 2008), for the proposition that examiners must have access to the original recoding device due to the ease with which digital recordings can be edited. Bergrin Letter at 5. But Bergrin neglects to mention that the conversations in Brown were recorded using an analog recorder and then digitized by law enforcement agents, id. at *9, creating the potential for editing. Here, in contrast, the conversations were recorded digitally, preserved in digital format, and cannot be replayed by the ADS media player if they have been altered. At any rate, the Third Circuit *affirmed* Judge Rambo's finding that the tapes in Brown had *not* been edited. 595 F.3d 498, 512-13 (3d Cir. 2010).

always accepted that the recordings would be admissible, his current arguments bespeak a desperate effort to prevent a jury from hearing the most damaging evidence against him.

Bergrin also cites the missing Brokos-Corriea texts as evidence of alleged Government wrongdoing that somehow justifies his desire to raise authenticity objections only after trial commences. Bergrin Letter at 2-3.[5] As Bergrin sees it, the Government's disclosure of the fact that certain text messages were not preserved somehow permits him to infer that the recorded conversations may suffer from some as-yet disclosed defect. But even if one could survive that astonishing leap of logic, all it would mean is that Bergrin can raise previously *unknown* authenticity issues as they arise. But that hardly means that Bergrin should be permitted to wait until trial to raise *known* authenticity objections.

In sum, Bergrin has failed to mount even a "colorable attack" on the authenticity of the recordings. See Starks, 515 F.2d at 122. Accordingly, this Court should admit the recordings at trial once the Government lays the foundation proffered above. But if this Court has reason to doubt the authenticity of any of the recordings, this Court should address and resolve those doubts now rather than holding a series of time-consuming Rule 104 hearings while the jury sits idle.

Respectfully submitted,

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[5] As the Government explained in its December 20, 2012 letter, FBI servers did not preserve Agent Brokos' texts messages between March 14, 2009 through May 17, 2010. The Government, however, is not introducing recordings Ms. Corriea made during that period. Further, Agent Brokos will authenticate recordings made by Ms. Corriea in mid-August 2008. The Government has produced to Bergrin text messages exchanged during that period, in compliance with its Jencks and Giglio obligations.

keeping it safe.

Q. The recording of December 9th of 2008, isn't it a fact that also wasn't turned over until December 10th?

A. It was turned over the next day, yes, sir.

Q. And do you know where it was stored or where it was kept?

A. I assumed with Cordova, --

Q. Yes, sir.

A. -- but did I physically see it? No.

MR. BERGRIN: Excuse me for a moment. I might be done, sir.

(Brief pause)

MR. BERGRIN: May I have the Court and the jury's indulgence? I'm just checking my notes.

(Pause continues)

Q. Now, where on Oscar Cordova's body was the recorder placed?

MR. GAY: Judge, I'm going to object to this for reasons we discussed before. If we're going to start getting into this, there's a critical law enforcement --

THE COURT: What's the relevance of it anyway?

MR. BERGRIN: Can I be heard at sidebar out of the presence of the witness?

THE COURT: No, I don't want to go to sidebar. No, I'm going to sustain the objection. We've discussed

EXHIBIT B

this matter before.

MR. BERGRIN: Judge, we have an expert, and the expert -- it's an important issue because of all the unintelligibles and because of other things that are contained within the transcript, Your Honor. It's an important question, based upon my expert, who trained the prosecution's expert.

MR. GAY: It's news to me, Judge, that there's this expert. We haven't gotten notice of this.

MR. LUSTBERG: We provided the resume' --

THE COURT: You know, wait a second.

MR. GAY: -- of what this person is going to say?

THE COURT: There's an order that I signed regarding an expert --

MR. BERGRIN: Yes, Your Honor.

THE COURT: -- for a very limited purpose; and I don't remember this as being part of the purpose.

No, I'm going to sustain the objection.

Go ahead, Mr. Bergrin.

BY MR. BERGRIN:

Q. Now, you have no evidence, sir, to indicate that either Oscar, Paul Bergrin, or anybody associated with this case ever even made reservations or attempted to travel to the Dominican Republic; correct?

A. To the Dominican Republic?