

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

THE UNITED STATES OF AMERICA,
Plaintiff,

Criminal Action
No. 1:25-76

vs.

Washington, DC
December 5, 2025

CORTNEY MERRITTS,
Defendant.

1:02 p.m.

**TRANSCRIPT OF PRE-TRIAL CONFERENCE
BEFORE THE HONORABLE JIA M. COBB
UNITED STATES DISTRICT MAGISTRATE JUDGE**

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*** Proceedings recorded by stenotype shorthand.

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P R O C E E D I N G S

DEPUTY CLERK: Your Honor, we are now calling for the record Criminal Case 25-76, *United States of America vs. Cortney Merritts*.

Counsel, beginning with the government, please approach the lectern and state your appearances for the record.

MR. KELLY: Good morning, Your Honor. Brian Kelly and Emily Miller for the United States.

THE COURT: Okay. Good morning.

MR. DiRUZZO: Good morning, Your Honor. Joseph DiRuzzo on behalf of Cortney Merritts, who is directly to my left and seated.

THE COURT: Okay. All right. Good morning, everyone. We are here for the pretrial conference. I just want to confirm that both sides will be ready for trial.

Government, you intend to be ready for trial?

MR. KELLY: Yes, Your Honor.

THE COURT: Okay. And defense ready for trial?

MR. DiRUZZO: Yes.

THE COURT: I just also wanted to confirm the length of trial just so we can know for purposes of coordinating with the jury office. My understanding is the parties expect this to be about a week?

MR. KELLY: That's correct, Your Honor.

1 **THE COURT:** Okay.

2 You agree with that?

3 **MR. DiRUZZO:** I concur.

4 **THE COURT:** Okay. I don't typically sit on
5 Fridays, although if the parties want me to, I think I can.
6 If it could be the difference between finishing versus
7 carrying over to Monday, does the government have a
8 preference?

9 **MR. KELLY:** I mean, Your Honor, I think, without
10 looking at a calendar, that Monday may be Martin Luther King
11 Day.

12 **THE COURT:** Oh, it is.

13 **MR. KELLY:** So that would have us carrying over to
14 that following Tuesday.

15 **THE COURT:** Okay.

16 **MR. KELLY:** We are happy to sit on Friday, if
17 that's not an inconvenience for the Court.

18 **THE COURT:** Okay.

19 **MR. KELLY:** Ultimately, we'll defer to your
20 preference.

21 **MS. MILLER:** My guess is that you're going to have
22 jurors taking three-day weekends.

23 **THE COURT:** Okay. Yeah, that's a good point.
24 What is the defense preference?

25 **MR. DiRUZZO:** Our preference is to go on Friday.

1 Hopefully, we'll already be into either closings or
2 deliberation, but given that counsel for Mr. Merritts and
3 Mr. Merritts, everyone is from out of town. Our preference
4 is to get it done as soon as possible.

5 **THE COURT:** Okay. Let me -- I'm just going to
6 look at my calendar to make sure. I think what we can do is
7 we can plan to sit on Friday. I can see about moving
8 around. I have a hearing but I can move that around. If
9 we're running into a problem confirming jurors and the only
10 issue is people are planning to be away Friday, we can
11 revisit that, but hopefully that doesn't become an issue.

12 Okay. One housekeeping thing before we start
13 'cause I always forget to do this, I usually have each side
14 pick a seat for alternates. So defense, for first
15 alternate, just pick a number 1 through 14. That will be
16 the first alternate juror seat.

17 **MR. DiRUZZO:** I'm lost.

18 **THE COURT:** Okay. So there's going to be two
19 alternate jurors. I don't do the alternates 13 and 14,
20 because they know they're alternates and they don't pay
21 attention. So I have each side pick a number between 1 and
22 14. So if you pick 2, that means whoever is in seat
23 number 2 will be the first alternate. And the government
24 will pick a number and then that will be the second
25 alternate. Sorry.

1 **MR. DiRUZZO:** Okay. Understood.

2 **THE COURT:** Okay.

3 **MR. DiRUZZO:** Nine.

4 **THE COURT:** Nine, okay.

5 Government?

6 **MR. KELLY:** Four, Your Honor.

7 **THE COURT:** Okay. So the juror in seat number 9
8 will be our first alternate, and the juror in seat number 4
9 will be the second alternate. All right. Give me one
10 second.

11 Okay. I've reviewed the parties' pretrial
12 statement. The first thing that I want to do is just put
13 the plea offer on the record. Mr. Merritts, I don't do this
14 because I'm suggesting that you should plea, but part of my
15 responsibility is to just make sure that all plea offers
16 were conveyed to you, that you received them, had an
17 opportunity to discuss it with your attorney and that you
18 declined them.

19 So can the government just put on the record from
20 your pretrial statement what the -- I think there were maybe
21 two plea offers extended at some point. If you wouldn't
22 mind just putting that on the record, and I'll confirm what
23 is represented in the pretrial statement that both of those
24 offers were rejected.

25 **MR. KELLY:** Yes, Your Honor.

1 On June 6th, 2024, the government extended a
2 pre-indictment plea offer which would have been for
3 Mr. Merritts to plead guilty to one count of bank fraud in
4 violation of 18 U.S.C. Section 1344.

5 And then on June 16th, 2025, the government
6 extended a post-indictment plea offer, which would have been
7 for Mr. Merritts to plead guilty to one count of wire fraud
8 in violation of 18 U.S.C. 1343.

9 **THE COURT:** Okay.

10 And Mr. DiRuzzo, you communicated those offers to
11 Mr. Merritts?

12 **MR. DiRUZZO:** My co-counsel has, yes.

13 **THE COURT:** Okay. Okay.

14 And Mr. Merritts, if you could just speak into
15 that microphone. I just want to confirm that -- I want to
16 make sure this is not the first time that you are hearing
17 that those plea offers were extended to you.

18 **THE DEFENDANT:** No, ma'am. It's not the first
19 time.

20 **THE COURT:** Okay. All right.

21 Okay. So let's just start with the voir dire. I
22 had received the parties' proposed questions, and then I
23 have a standard voir dire. So I essentially took the
24 parties' questions and, where there was duplication with my
25 standard voir dire, I just consolidated the questions or

1 used my standard question.

2 Just so the parties know, I only ask yes-or-no
3 questions of the jury panel. So, essentially, all of the
4 jurors, potential jurors that come in will get a notecard.
5 I will read off each voir dire question. If they have a
6 "yes" answer, they will put the number of the question on
7 their notecard. So if they have a "yes" answer to number 1,
8 they'll write "1" on the notecard and so on.

9 Then we clear the courtroom and bring every single
10 juror in, in the panel individually at least up until we
11 have enough that we've qualified enough to proceed with
12 peremptory strikes.

13 So even if someone doesn't ask -- answer any
14 questions, we'll bring them in, make sure they understood
15 all the questions. And I do allow attorneys to do brief
16 follow-up. So some of the questions that were proposed, I
17 didn't include in the voir dire, that does not prohibit
18 parties, if someone gives a "yes" answer and you want more
19 information, to probe -- to follow up on the questions that
20 they've given.

21 So again, I try to, you know, keep the questions
22 broad and to, you know, not ask more questions than
23 necessary to make sure that we're getting a fair jury panel
24 and I do allow follow-up questions.

25 So I did want to address a specific voir dire

1 question because it relates to a motion *in limine* that I'll
2 resolve. And that is the defense wanted a question about
3 Mr. Merritts' wife who is a former Congresswoman. I know
4 the government had objected.

5 I'll hear from the parties about whether she's
6 going to be a witness or not or the extent to which she
7 could be mentioned in trial. But regardless, I think, given
8 that there is a chance, you know, depending on what happens
9 in trial, that her name could come up, I don't want a
10 situation where jurors might be familiar with her and we
11 don't know if they have strong feelings.

12 And so I think it's actually important for both
13 sides to know whether jurors have feelings, positive or
14 negative, that might make them unfair in the event that
15 she's called as a witness, particularly that the defense has
16 included her on their witness list.

17 Again, maybe she doesn't get called or maybe there
18 is some limit to her testimony or maybe, after a proffer,
19 it's determined she's not relevant. But I just don't want
20 any mid-trial issues. So I just wanted to explain why I
21 included that question.

22 So with that, I'll start with the government. Do
23 you have other objections, edits, additions? Any questions
24 that I didn't include that you wanted that you feel strongly
25 about, we can discuss that now.

1 **MR. KELLY:** No, Your Honor. We didn't have any
2 other objections or issues with the proposed voir dire.

3 **THE COURT:** Okay.

4 **MR. KELLY:** I think, as to the question about
5 Ms. Bush being included in voir dire, we understand
6 Your Honor's concern that it is prudent to front a potential
7 juror bias or prejudice issue in either direction. And to
8 the extent that she is brought into the trial --

9 **THE COURT:** Yeah.

10 **MR. KELLY:** -- I just want to know, and I
11 understand you'll hear argument on this later that, one of
12 our concerns is that the defense is attempting to sort of
13 insert her into this case, either through voir dire or
14 opening statements or through cross-examination of the
15 government's witnesses with no actual intention of ever
16 calling her, in part, because she has no relevant testimony
17 to offer.

18 **THE COURT:** Okay.

19 **MR. KELLY:** So we are concerned about, sort of,
20 the confusion that it may inject to the jury. Why are we
21 being asked about Congresswoman Corey Bush? But we do
22 understand, you know, sort of the prudential reason for
23 Your Honor wanting to do that.

24 **THE COURT:** Okay. And like I said, we'll address
25 some of those issues when we get into the motions in limine.

1 Does the defense have any objections, additions,
2 edits?

3 **MR. DiRUZZO:** No, none that were otherwise before
4 the Court.

5 **THE COURT:** Okay. All right, great.

6 Okay, we're just going to take a minute to get
7 back online.

8 (Brief pause.)

9 **MR. KELLY:** Are we back on, Your Honor?

10 **THE COURT:** Yes.

11 **MR. KELLY:** I apologize. I actually have one
12 other thing that isn't necessarily an objection.

13 **THE COURT:** Sure.

14 **MR. KELLY:** I just wanted to make sure that
15 Your Honor had noted in the proposed statement of the case.
16 We were fine with all of it. There had been the one
17 reference to, at the end, "the government has the burden to
18 prove beyond a reasonable doubt, if it can."

19 **THE COURT:** Oh, okay.

20 **MR. KELLY:** And we had objected to the inclusion
21 of the words "if it can" as being superfluous. It sort of
22 puts the thumb on the scale a little bit in our opinion
23 without really adding anything --

24 **THE COURT:** Okay.

25 **MR. KELLY:** -- to the defense, you know, position

1 obviously that we do bear the burden of proof. But we had
2 just included that objection in the filing.

3 **THE COURT:** I see, okay.

4 **MR. KELLY:** And to the extent Your Honor saw that
5 and rejected our objection, that's fine. But to the extent
6 that you had not seen it or considered it we did want to
7 flesh that out.

8 **THE COURT:** Okay. What is the defense's position
9 about -- I mean, it doesn't really add anything. What is
10 the defense's position?

11 **MR. DiRUZZO:** It's not wrong, I would say that.
12 So I think that the Court would be well within its
13 discretion to keep it.

14 **THE COURT:** Okay. What is -- why is it included?
15 I'm just curious what you think it adds.

16 **MR. DiRUZZO:** Well, I think it's an inappropriate
17 statement of the law and -- that's it, Judge.

18 **THE COURT:** Okay. Well, the way I -- I mean, I
19 don't think it's wrong. I don't think it adds anything.
20 The way I usually approach this is unless it is not
21 accurate, I usually let the defense frame their, kind of,
22 part of the statement the way they want to.

23 The same way, when the government was outlining
24 its allegations, I did take out the initial additional
25 language that the defense had proposed that I thought was

1 kind of redundant to the element. So I'll leave it just
2 because I don't think it's prejudicial if the defense wants
3 to keep it.

4 **MS. MILLER:** Your Honor.

5 **THE COURT:** Yes, come on up.

6 **MS. MILLER:** Going back to the voir dire for just
7 a moment.

8 **THE COURT:** Yes. Yes.

9 **MS. MILLER:** A thought that occurred to us is, to
10 not create confusion in the panel about why Ms. Bush might
11 be mentioned, could we amend the question to somehow
12 indicate that she is a family member or a spouse or
13 something like that and so you may hear something about her?

14 **THE COURT:** Oh, sure. I think that's fair. Do
15 you have any problem with that? "So you heard that you may
16 hear from or about former U.S. Congresswoman Corey Bush, who
17 is Mr. Merritts' wife" or who -- any problem with that?
18 What does the government propose?

19 **MR. KELLY:** I think maybe we would propose family
20 member, Your Honor.

21 **THE COURT:** Okay. I don't have any problem with
22 that.

23 And again, the defense is fine with -- I think
24 it's fair to explain.

25 **MR. DiRUZZO:** Yes.

1 **THE COURT:** Okay. Then moving to the preliminary
2 jury instructions which are very standard from the Red Book.
3 The only addition are the elements. I think the elements
4 that I've included are elements that have been given in this
5 district and are very -- they're probably closer to what the
6 government proposed, but the parties weren't that far apart.
7 I think the only difference is this one gives a little bit
8 more detail about what a wire communication is.

9 Does the government have any objections to the
10 statement of the elements? And again, for purposes of the
11 preliminary instructions, I just give the basic elements.
12 Obviously, at the final charging conference, we'll discuss
13 instructions concerning definitions as they relate to these
14 elements.

15 But just in terms of the basic mechanical elements
16 of the charge of wire fraud, does the government have any
17 problem with the instructions as I've articulated them?

18 **MR. KELLY:** The only point we'd like to make,
19 Your Honor, is that the first element of Your Honor's
20 proposed instructions, I believe, say that the government
21 must prove the defendant, "entered into a scheme to
22 defraud."

23 **THE COURT:** Okay.

24 **MR. KELLY:** And in our proposed jury instruction,
25 which was taken from the 11th Circuit, we had proposed that

1 the defendant devised or participated in a scheme. And we
2 think that the "or participated in a scheme" language is
3 important to make clearer to the jury that the defendant
4 could be convicted even if he did not personally submit one
5 or either of the charged loan applications himself.

6 To that point, the Indictment does allege that the
7 defendant "transmitted and caused to be transmitted and did
8 aid and abet." That's Paragraph 37 and throughout the
9 statement of the case the parties proposed as the defendant
10 "prepared and submitted and caused to be submitted."

11 **THE COURT:** Sure, okay. I think that's accurate.

12 Does the defense disagree? I mean, you can be
13 convicted if you participated in wire fraud and all of these
14 elements are met.

15 **MR. DiRUZZO:** My only concern, Your Honor, is I'm
16 a little worried that we might be getting into what would be
17 more of like conspiracy land or Section 2, like aiding and
18 abetting.

19 If I remember correctly, the Indictment did not
20 charge anything in respect to aiding and abetting or have
21 any mention of *Pinkerton*. So I'm a little concerned that if
22 we start bringing in the possibility of other individuals
23 that you might unnecessarily or improperly expand the scope
24 of the Indictment.

25 **THE COURT:** What is the government's response?

1 **MR. KELLY:** Just that, again, Your Honor, the
2 Indictment literally says in the charging language that the
3 defendant "transmitted and caused to be transmitted and did
4 aid and abet."

5 The language that we proposed from the Eleventh
6 Circuit "devised or participated in a scheme," I mean, that
7 seems to be black-letter law. We'd be happy to brief the
8 issue.

9 **THE COURT:** No, no. I don't think this is an
10 inaccurate statement of law. If you participate in a scheme
11 to defraud and meet all of these elements, it seems clear to
12 me that you'd be guilty of wire fraud the same as if you are
13 the master mind or a participant. So I don't see a concern
14 here. So I will make that edit over defense objection.

15 So "the defendant knowingly and willingly devised
16 or participated in a scheme to defraud or to obtain money or
17 property by means of false or fraudulent pretenses,
18 representations or promises."

19 **MR. KELLY:** Yes, Your Honor. Thank you.

20 **THE COURT:** All right. Okay. So I will make that
21 correction or edit, again, over defense objection.

22 Any other concerns from the government about the
23 proposed elements?

24 **MR. KELLY:** No, Your Honor.

25 **THE COURT:** Okay.

1 So for the defense, I've ruled on this first
2 issue. Any other concerns about any of the other elements?

3 **MR. DiRUZZO:** No, Judge.

4 **THE COURT:** Okay. All right. So -- and anything
5 else about the preliminary instructions generally? Again,
6 they're Red Book instructions but if someone has something
7 additional?

8 **MR. KELLY:** No objections, Your Honor.

9 **THE COURT:** Okay. Anything from the defense?

10 **MR. DiRUZZO:** No.

11 **THE COURT:** Okay. So just for purposes of exhibit
12 objections, if the objection is something like relevance,
13 foundation, authentication, I'll deal with that at the time
14 of trial just because, without context, it's hard for me to
15 rule on that.

16 Some of these documents relate to Motions in
17 Limine, so we'll resolve those shortly. But are there any
18 exhibit-related issues from either side that are not covered
19 by a motion *in limine* that the parties think would be
20 helpful to have a pretrial ruling on?

21 **MR. KELLY:** Not for the government, Your Honor.

22 **THE COURT:** Okay. For the defense?

23 **MR. DiRUZZO:** No, Your Honor.

24 **THE COURT:** Okay. All right. Great. Just give
25 me one second, here.

1 Okay. So I'm prepared to rule on the Motion to
2 Dismiss the Indictment. I'll put my reasoning on the
3 record.

4 I'm going to deny the motion. The -- and I'm
5 referring to ECF-13. It's the Motion to Dismiss the
6 Indictment pursuant to the Federal Rule of Criminal
7 Procedure 12. An Indictment is sufficient if it contains
8 the elements of the offense charged and fairly informs the
9 defendant of the charge against which he must defend.

10 And two, enables him to plead an acquittal or
11 conviction and bar of future prosecutions for the same
12 offense. That's from *Hamling v. United States*, 418 U.S. 87
13 (1974).

14 The defendant argues that the Indictment fails to
15 inform him as to which of the 11 mentioned wire
16 communications constitute the basis for the two counts of
17 wire fraud. I have reviewed the Indictment. I do find the
18 Indictment to be clear. There are two counts at issue in
19 this case.

20 One is based on defendant's transmission of his
21 EIDL application on July 8th, 2020. And the other is based
22 on defendant's submission of his PPP loan application on
23 April 22nd, 2021; that's clear in the Indictment.

24 While the Indictment certainly mentions other
25 acts, the government has not alleged that those other

1 communications satisfy the elements of wire fraud. They are
2 not pled as separate counts in the Indictment. Essentially,
3 I think this Indictment actually has probably much more
4 information than even required to describe the specific
5 crimes with which Mr. Merritts has been accused of.

6 So I do find that the Indictment has satisfied the
7 requirements of the Sixth and Fifth Amendments. I find that
8 defendant was properly charged by the grand jury, is on
9 notice of the charged conduct and can prepare his defense.
10 So I will deny ECF-13.

11 There's also a Motion to Dismiss for selective
12 prosecution which is ECF-14. I do want to understand kind
13 of what the class is that Mr. Merritts is suggesting that
14 he's part of that's distinct from others who have not been
15 prosecuted for this offense. If you can just clarify that
16 and then I'll be prepared to rule.

17 **MR. DiRUZZO:** Your Honor, it's our position that
18 Mr. Merritts is in a class of individuals that, according to
19 the government's theory, he admitted PPP fraud for a very
20 modest amount of \$22,000. And given that -- putting aside
21 police officers who hold a special position of authority and
22 respect and they get some of the benefits, like qualified
23 immunity but are held to a higher standard, putting aside
24 those individuals, that my client was indicted when very few
25 to, you know, hardly ever individuals are indicted.

1 Now, the government has in its moving papers or in
2 its opposition papers cited to five cases. Your Honor, I
3 would submit we have five instances nationwide. And using
4 some basic math, if there are a thousand PPP fraud cases
5 that would be .5 percent, half a percent, if there are
6 10,000 PPP fraud cases, which I think is a little more
7 realistic in a country of over 300 million, that is .05.
8 That's five basis points.

9 So when you look at the number of cases, you know,
10 number of fraud cases out there and the number that have
11 been indicted for such a small number, it leads to what I
12 think the natural question is: Why and why wasn't this case
13 brought in the context of some type of civil resolution?

14 And it's our position, Your Honor, that it is
15 selective that the thrust of the underlying investigation
16 wasn't to Congresswoman Bush and my client. And then when
17 there was nothing that was to be found, you know, they
18 pivoted and then -- and that's why we're here.

19 I would say, Your Honor, that I think, if the
20 Court has concerns, I think that the Court should consider
21 exercising its discretion to allow discovery. To quote
22 Justice Brandeis, "Sunlight is the best of disinfectants."

23 I would think, if the government truly believes
24 that there is nothing to see here, that, you know, I'm going
25 proverbial open kimono, would allow everyone to make sure

1 that nothing untoward has happened.

2 So with that being said, Your Honor, I submit
3 that, given the rather small dollar amount, something that,
4 in my view, I think best case scenario for the government
5 look at zone B, in my experience you don't get too many
6 federal criminal indictments where in the government's best
7 day you're looking at a zone B as compared to a zone D.

8 And so that, again, just reiterates the
9 strangeness of this Indictment in comparison to the most
10 federal criminal fraud cases.

11 **THE COURT:** Okay. And then what's your response
12 to the government's argument about why are you picking
13 30,000 as the baseline? Aren't you kind of arbitrarily...

14 **MR. DiRUZZO:** Well, at some -- I mean, at some
15 level it is arbitrary. We could have picked 25,000. We
16 could have picked, you know, 35,000, 50,000, but I don't
17 think that number -- I think, if you look at that number in
18 comparison -- and again, putting aside the police officers,
19 if you picked 50,000, I don't think that it would move the
20 analysis, it would move the proverbial needle.

21 Personally, I think if -- I think 35, if my
22 recollection of (2)(b) is correct, I think that's the next
23 level that kicks you up. I think it's under 2B subsection
24 (b)(1), like, at (D) perhaps. And I think that's where, you
25 know, it takes you into the next level.

1 But that's my recollection, Your Honor. You can't
2 hold me to that and obviously the guidelines are what the
3 guidelines are.

4 **THE COURT:** And then why are we removing police
5 officers?

6 **MR. DiRUZZO:** Because, again, you know, police
7 officers have a special role in our criminal justice system.
8 For example, they get special protections. Many
9 jurisdictions have, you know, battery and law enforcement.
10 It takes a normal battery to a -- and enhancements and
11 police officers are given qualified immunity.

12 **THE COURT:** Well, not for fraud, though. There's
13 no immunity for PPP loan fraud.

14 **MR. DiRUZZO:** No, of course. Just as a general
15 proposition, police officers are given certain protections
16 in a society and are held to a higher standard. That's in
17 particular given that they are the ones that are on the
18 front lines and enforcing the law and they are literally law
19 enforcement.

20 **THE COURT:** Okay. Does the government have
21 anything to add in addition to what's in its briefs?

22 **MR. KELLY:** Not necessarily anything that's in
23 addition to our briefs, Your Honor. If I could just respond
24 to a couple points quickly.

25 **THE COURT:** Sure.

1 **MR. KELLY:** One, as to the limited number of cases
2 that we cited in our opposition, that was literally based
3 off of a 10-minute Google search.

4 **THE COURT:** Okay.

5 **MR. KELLY:** It was by no means intended to be, you
6 know, sort of a 50-state survey of every PPP fraud case
7 that's been prosecuted in the last several years.

8 And, Your Honor, I think you hit it on the point
9 that this does appear to be a somewhat arbitrary and
10 artificially narrow comparison group. And courts actually
11 have rejected artificially narrow comparators for purposes
12 of selective prosecution claims.

13 To that point, we didn't actually raise this in
14 our opposition, but it occurs to the government it's not
15 even clear why we would be limiting the universe of similar
16 prosecutions to PPP fraud.

17 **THE COURT:** I was thinking the same thing. It's
18 really just wire fraud.

19 **MR. KELLY:** It's just fraud. It's just fraud,
20 Your Honor.

21 **THE COURT:** Yeah.

22 **MR. KELLY:** It could even be -- it could be
23 healthcare fraud. It could be wire fraud. It could be mail
24 fraud. It could be bank fraud. And I guarantee, Your
25 Honor, without having done the research but I'll stake my

1 reputation on it, there are going to be plenty of cases out
2 there in this office and throughout the country of cases of
3 similar magnitude that have been prosecuted.

4 And as to sort of the open-the-kimono,
5 what's-the-harm, in terms of requesting discovery, a
6 selective prosecution standard is extremely high. And the
7 burden is on the defendant to meet that standard of showing
8 discriminatory effect and discriminatory intent.

9 And for the reasons stated in our motion, the
10 defendants have just fallen woefully short of providing any
11 evidence for that. And, Your Honor, it is cited in our
12 opposition but the -- to even obtain discovery related to a
13 selective prosecution claim under D.C. Circuit and U.S.
14 Supreme Court law, the defendant still has to make a
15 colorable claim of selective prosecution, which requires,
16 quote, from *U.S. v. Bass*, 536 U.S. at 863, it requires a
17 defendant to offer some evidence of both discriminatory
18 effect and discriminatory intent.

19 And in *U.S. v. Armstrong*, 517 U.S. at 464, 468,
20 that is a, quote, "rigorous standard," which, quote, "itself
21 is a significant barrier to the litigation of insubstantial
22 claims."

23 According to *U.S. v. Stone*, 394 F.Supp.3d 1 at 31,
24 a DDC case from 2019, quoting *Armstrong*, "a defendant must
25 provide something more than mere speculation or personal

1 conclusions based on anecdotal evidence."

2 Simply stated, Your Honor, there is no colorable
3 claim here and the defendant is not entitled to discovery.

4 **THE COURT:** Okay. Thank you.

5 All right. Anything more from the defense before
6 I rule?

7 **MR. DiRUZZO:** No.

8 **THE COURT:** Okay. So I appreciate the defense's
9 arguments. I will deny the motion.

10 To begin, the presumption of regularity applies to
11 prosecutorial decisions. And in the absence of clear
12 evidence to the contrary, courts presume that prosecutors
13 have properly discharged their official duties. That's from
14 a D.C. Circuit decision from 2016, *United States v. Fokker*
15 *Services B.V.*, 818 F.3d 733.

16 To dispel that presumption, a criminal defendant
17 must present clear evidence to the contrary that the
18 prosecutor's actions had a discriminatory effect and were
19 motivated by a discriminatory purpose. That's from *U.S.*
20 *v. Armstrong*, which the parties have cited in their briefs.

21 I find that the defendant has not shown that he
22 was singled out for prosecution from among other similarly
23 situated or that the prosecution was improperly motivated,
24 for example, based on race, religion or another arbitrary
25 classification, here, political affiliation or connection to

1 political affiliation.

2 First, I find that the defense has failed to
3 properly identify the group to which he is similarly
4 situated. The defense initially suggested that the group is
5 all subject to the jurisdiction of the United States
6 Attorney's Office for the District of Columbia, who has
7 allegedly submitted false PPP or EIDL claims for losses
8 under 30,000.

9 I do agree with the government that, you know,
10 it's not clear to me why 30,000 is the threshold. I also
11 agree with the argument made today that the defendant is
12 charged with two counts of wire fraud. So I do think it
13 would be appropriate to consider wire fraud more broadly.

14 Second, even taking this group that the defense
15 has identified for comparison, you know, there is just some
16 evidence that there are other similarly situated that have
17 been prosecuted for this type of loan fraud in this amount.
18 I don't think that there is a meaningful difference between
19 MPD officers in this context, although I appreciate that in
20 some circumstances they have special protections.

21 But the government has pointed to individuals that
22 were charged with PPP fraud for amounts even lower than what
23 Mr. Merritts is charged with. And, you know, the argument
24 that the defendant is not similarly situated to MPD officers
25 because the U.S. Attorney's Office has increased interest in

1 prosecuting wrongdoing within, just continues to narrow the
2 group for comparison, including excluding other evidence
3 that the U.S. Attorney's Office has prosecuted other people
4 in this district for similar amounts for specifically
5 pandemic loan fraud not to mention what I can say from my
6 personal experience fraud generally in this district.

7 So I also find that the defense has failed to
8 offer any evidence, even in direct evidence, of improper
9 motive that would justify discovery on this issue. So
10 because I find that the defense has failed to demonstrate
11 discriminatory effect and offers only speculation as to
12 discriminatory motive, the Court will deny that motion. And
13 again, I agree that it's a high standard for dismissal and
14 even for discovery.

15 Okay. So both of the Motions to Dismiss have been
16 denied which means we are going to trial. So let's get into
17 the motions in limine.

18 So I want to start with the defendant's motion
19 related to the corporate records which is ECF-21. Before I
20 get into the meat of the parties' arguments, can I ask the
21 government, I'm wondering if there is a real dispute here.
22 If you could just explain to me or maybe proffer, how do you
23 plan to introduce and discuss the evidence at trial when you
24 say you want to attribute it to him? I mean, is it -- are
25 you going to get out that it was obtained pursuant to a

1 subpoena?

2 **MS. MILLER:** My plan at this juncture, Your Honor,
3 would be to elicit that Vetted was subpoenaed, that Vetted
4 voluntarily responded to the subpoena, and the subpoena
5 asked for the universe, which is in evidence.

6 And in response to the universe received these
7 limited documents. This is going a little bit further but
8 then, in addition, although that purported to be everything
9 they could find at the time, they provided additional
10 documents of a similar nature, more text messages, it
11 appears, of the defendants and their exhibit list, their
12 defense exhibit list.

13 Taking all of these together and the way that they
14 are relevant is that there are lots of discussions about
15 business of the defendant, potential moving jobs, what he
16 would charge, what he did charge. And if you took all of
17 those jobs -- and I haven't done this yet but I plan to.

18 **THE COURT:** Okay.

19 **MS. MILLER:** But just from a quick looking at the
20 text messages, if you added up everything that he produced
21 to us, it doesn't come close to justifying the amount of
22 revenue that he stated that he made when he submitted his
23 loan applications. And so it is probative of the falsity of
24 those statements, along with like the bank records and
25 everything else.

1 So I think being able to say "that's about him and
2 what he produced" is important because it's really tying my
3 hands behind my back to try and say "well Vetted produced
4 them." It almost sets up this weird false narrative that
5 Vetted is something other than him. And maybe he has
6 records that Vetted didn't have when he and Vetted are, in
7 fact, one and the same.

8 And he is claiming that they gave us everything.
9 It was through counsel. You know, in response to the
10 subpoena, they're claiming they gave us everything they
11 could find. Apparently they did find some more, but that
12 would be the gist of the argument.

13 **THE COURT:** Okay. So I guess that was my question
14 because initially you had said that you were going to elicit
15 that Vetted was subpoenaed, that Vetted voluntarily
16 responded to the subpoena. But then later you want to say
17 that Mr. Merritts produced the documents, not Vetted.

18 **MS. MILLER:** Well, that he is a -- that Vetted is
19 a sole proprietorship and that the documents that we have
20 show that he owns it 100 percent.

21 **THE COURT:** Okay.

22 **MS. MILLER:** And that, as a matter of law, there's
23 no legal distinction. It's just a doing-business-as name.
24 There is no legal distinction between him and Vetted. And
25 so when you are looking at this evidence and seeing what he

1 voluntarily produced in response to the Vetted subpoena,
2 what you are looking at doesn't add up to what he said.

3 **THE COURT:** Right. I guess I'm just interested
4 in, when you put the witness on the stand, what do you
5 intend to elicit in terms of, because you're not going to
6 ask the witness to describe what a sole proprietorship is.

7 **MS. MILLER:** I would put on through the witness
8 did -- was the grand jury, through the summary witness we
9 would put on, did you -- was a subpoena issued? Yes. Is
10 this the subpoena? Yes. What does it ask for? Highlight
11 all the relevant -- it asked for the universe. Did the
12 government receive a response? Yes, it did. Is government
13 X, you know, the response? Yes.

14 Did you pick out all of the messages that have
15 anything to do with business, potential business, actual
16 business?

17 **THE COURT:** Yeah.

18 **MS. MILLER:** Yes. And did you, you know, add it
19 all up and -- I haven't done that much yet.

20 **THE COURT:** Yeah. No, no, no.

21 I am just trying to understand, it sounds -- and
22 again, I will resolve the legal issue but it sounds like the
23 defense's concern was eliciting that Mr. Merritts produced
24 the documents. And if you don't intend to elicit
25 specifically Mr. Merritts produced documents, then we don't

1 really have a dispute. And if we do, that's fine. I'm not
2 suggesting you can't do that, but I just want to know if
3 this is even an issue before I dig in.

4 **MS. MILLER:** As I understood their objection, it's
5 not just saying that he produced them but it's attributing
6 them to him, like saying that these somehow have anything to
7 do with him and his defense.

8 **THE COURT:** Oh, okay.

9 **MS. MILLER:** Or the prosecution of them.

10 **THE COURT:** Yeah, I'm going to ask them a
11 clarification about the attribution issue. I mean, once
12 they're in evidence, are these texts from his cell phone?

13 **MS. MILLER:** Well, that's part of the reason that
14 I think it's important to attribute to the fact that they
15 came from Vetted and that Vetted is a sole proprietorship.
16 And so when you say "Vetted" you can say him because, while
17 you can look at the face of the screenshots, I think we can
18 authenticate them through the fact that they were produced
19 by his counsel in response to a subpoena to his company that
20 he is the 100 percent owner of.

21 **THE COURT:** Okay.

22 **MS. MILLER:** And then I think if you look at the
23 face of the screenshots, you will see his name, Cortney, you
24 will see his phone number at the -- you know, in certain
25 ones of them which we can authenticate with other records or

1 with witnesses.

2 So I think that it's important to say that these
3 things came through his counsel. I think that that's
4 obviously slightly different for the items he produced in
5 connection with his exhibit list because that wasn't in
6 response to a request for production. But again, I think,
7 for authentication purposes, we can look at those and say,
8 do they look like the other ones that his lawyer also gave
9 us?

10 **THE COURT:** Okay. Sure.

11 Okay. Can I hear from the defense and just try to
12 understand -- I want to understand your argument, because
13 obvious -- it sounds like, based on the proffer that these
14 are relevant documents. You don't disagree with that, do
15 you?

16 **MR. DiRUZZO:** At this stage I don't.

17 **THE COURT:** Okay. So the government is going to
18 have to lay a foundation for their authentication and
19 admissibility at trial. What exactly are you objecting to
20 in terms of how they do that?

21 **MR. DiRUZZO:** Well, Your Honor, it's, from my
22 perspective, when the government issues a grand jury
23 subpoena to an entity and the entity responds, I think it's
24 fair for the government to say that these documents came
25 from the entity.

1 But what I have a problem with is the government
2 skipping over his evidentiary burden and immediately
3 attributing documents from an entity to an individual if
4 that makes sense.

5 **THE COURT:** Okay. So you don't have a problem
6 with -- again, before I get into the legal issue, I'm just
7 trying to flesh out if we have a dispute.

8 You heard Ms. Miller's, kind of, summary of what
9 she would ask. She's going to get out that there was a
10 subpoena to Vetted; that the defendant is the sole
11 proprietor of Vetted; that, you know, there was a response
12 to the subpoena, this is what was produced.

13 **MR. DiRUZZO:** I think all of that with the
14 exception of the, you know, it's a sole proprietorship,
15 because I'm going to anticipate that the individual that's
16 going to testify is going to lack personal knowledge as to
17 whether the entity is a sole proprietorship. And that
18 crucial piece of information is going to have to come in
19 through other witnesses and other bits of evidence.

20 **THE COURT:** Sure. And you can object. Assume
21 that they can -- they call a witness with knowledge and
22 that's before the jury either through the witness for these
23 documents, part of their investigation through documents,
24 through business records, they determined that there was a
25 sole proprietorship. So just assume -- again, you can

1 object if the witness isn't qualified to testify about that,
2 but just assume, for the sake of argument, that they are
3 able to do that.

4 What is the problem with that line of questioning
5 and what exactly are you objecting to?

6 **MR. DiRUZZO:** There's no problem with that line of
7 questioning.

8 **THE COURT:** Okay.

9 **MR. DiRUZZO:** The problem that we have is skipping
10 over the evidentiary foundation and just saying "Vetted
11 equals Cortney Merritts."

12 There needs to be some evidentiary foundation in
13 the proverbial chain in order to make the connection. And
14 from my perspective, what the government is trying to do is
15 skip over their evidentiary burden and automatically connect
16 the dots.

17 **THE COURT:** Okay. But what Ms. Miller suggested
18 would connect -- I mean, you want to connect the dots
19 because the jury is not going to know who Vetted is versus
20 Mr. Merritts.

21 You know, this sounds more like a foundation issue
22 than a potential Fifth Amendment issue. Your problem is,
23 you know, the government, if it has evidence, can establish
24 it served a subpoena to Vetted. Vetted -- again, assuming
25 that they have the evidence for this, Vetted is a sole --

1 Mr. Merritts is the sole proprietor of Vetted, that the sole
2 proprietorship, which Mr. Merritts, responded to the
3 subpoena. These are the documents produced. This is what
4 they show.

5 You don't have a problem with any of that. Right?

6 **MR. DiRUZZO:** No, because I think, being
7 realistic, that's coming in. Right? And so I think it's
8 coming in.

9 **THE COURT:** Okay.

10 **MR. DiRUZZO:** But, you know, I think for me, the
11 real problem I have is the possibility of the witness
12 saying, "I got this from Vetted." Vetted is Mr. Merritts.
13 And then all of that additional evidentiary foundation, you
14 know, the government doesn't have to do that work and the
15 jury hears that Vetted is Mr. Merritts.

16 **THE COURT:** Okay. You're going to lay the
17 foundation to connect Vetted, and the connection is the sole
18 proprietorship?

19 **MS. MILLER:** Yes, Your Honor.

20 **THE COURT:** Okay.

21 **MS. MILLER:** We, in fact, laid out numerous pieces
22 of evidence that the defendant so admitted that starting at
23 Page 3 of our opposition.

24 **THE COURT:** Okay. All right. I mean, the reason
25 I wanted to go this route is because it didn't really seem

1 like a Fifth Amendment issue. I'm not being called upon,
2 when the subpoena is served, to resolve any disputes about
3 whether Mr. Merritts had to respond to the subpoena. I
4 mean, you know, based on the case law, Mr. Merritts could
5 have resisted responding on behalf of Vetted and made this
6 argument that it's a sole proprietorship. But instead
7 documents were produced and now the documents have been
8 turned over.

9 And so if the question is just: What is the
10 evidentiary foundation that the government needs to lay to
11 admit these documents and to sufficiently tie them to
12 Mr. Merritts, you know, it sounds like the government plans
13 to do that. And if the government doesn't do that, as with
14 any evidence, you're free to object during trial if you
15 think the proper evidentiary foundation hasn't been laid.
16 So I'm going to deny ECF-21.

17 You know, again, it was framed as a Fifth
18 Amendment issue. I didn't see anything in the moving papers
19 that demonstrated that, you know, a defendant's, kind of,
20 failure or decision not to assert a Fifth Amendment
21 privilege and resist production of documents, that then on
22 the back end I would limit the government's attribution of
23 the records to the defendant as a remedy for that.

24 So I was prepared to deny it, but it sounds like
25 we really don't even have a dispute about whether or not

1 these documents could come in if the appropriate foundation
2 is laid and whether they could be attributed to Mr. Merritts
3 if the appropriate foundation is laid.

4 So again, I'm going to deny that motion with the
5 caveat that obviously you are free to object at trial if the
6 government doesn't lay a foundation for the admissibility of
7 those documents and does not tie them to Mr. Merritts before
8 attributing them to him.

9 Okay. All right. For ECF-22, that's the
10 defendant's motion regarding expert testimony, I'm going to
11 deny that as moot. The government has confirmed that it
12 will not be seeking to introduce expert testimony at trial.
13 I'll address some separately the issue of the summary
14 exhibits and whether those exhibits are appropriately
15 admitted.

16 Again, for Mr. Merritts, if at trial the
17 government asks questions of a witness that seeks to elicit
18 testimony based on the witness's training and experience
19 that seems to veer into expert testimony, again, you're free
20 to object. But I accept the government's representation
21 that it didn't disclose any expert testimony because it
22 doesn't have any expert testimony that it plans to introduce
23 at trial.

24 So that, ECF-22 is denied as moot.

25 Okay, now we're at ECF-23, which is the

1 government's motion to admit evidence. I understand the
2 motion to encompass three types of records. One is what
3 I'll categorize as kind of routine business records; two are
4 government records; and then three, there is the issue of
5 summary exhibits.

6 I did not understand the defendant to be objecting
7 to the admissibility and authentication of the routine
8 business records; is that correct? There was no objection
9 there?

10 **MR. DiRUZZO:** That's correct.

11 **THE COURT:** Okay.

12 **MR. DiRUZZO:** At least as for his business records
13 portion.

14 **THE COURT:** Okay. So I'm going to grant that
15 portion of the government's motion to admit business records
16 and documents under Rule 902.11 and .13. Again, the
17 government is required to lay any sufficient foundation for
18 records to establish their relevance and admissibility at
19 trial. So the defendant can object on those grounds at
20 trial, but I will grant the government's motion.

21 With respect to the motion to introduce the
22 self-authenticating signed and sealed government records
23 under 902.1, I would grant that motion, except I want the
24 government's position with respect to the documents that
25 certify the absence of records, because the defense is

1 objecting to that coming in.

2 **MR. DiRUZZO:** That's correct.

3 **THE COURT:** So there's been an objection. Will
4 you have the person who conducted the search prepared to
5 testify at trial?

6 **MS. MILLER:** Yes, Your Honor.

7 **THE COURT:** Okay. All right. So I'll grant in
8 part and deny in part the government's motion to introduce
9 those self-authenticating signed records. And those records
10 will come in as self-authenticating, except with respect to
11 the documents that certify the absence Of records.

12 There has been an objection to the two IRS
13 Forms 3050, 3050 certifications under Rule 803.10. So the
14 government must and will produce a witness to testify about
15 the lack of those records; and that person will be available
16 for Mr. Merritts to cross-examine.

17 Let me ask, just to confirm with Mr. Merritts, are
18 there any other government records, apart from those two IRS
19 certifications, that the government intends to introduce at
20 trial that you object to under --

21 **MR. DiRUZZO:** Confrontation clause.

22 **THE COURT:** -- confrontation clause?

23 There was some reference to some SBA records but I
24 wasn't exactly clear.

25 **MR. DiRUZZO:** Yes, Your Honor.

1 I think I can make it easy for you. Any type of
2 government certification of lack of --

3 **THE COURT:** Yes.

4 **MR. DiRUZZO:** -- lack of absence, that would fall
5 under this general claim.

6 **THE COURT:** Okay. But are there other records
7 that the government intends to introduce?

8 **MS. MILLER:** Lack of records?

9 **THE COURT:** Lack of, yeah.

10 **MS. MILLER:** No, Your Honor.

11 **THE COURT:** Okay. All right. So it sounds like
12 the only lack of records would be from the IRS. Just to be
13 clear, the defense has objected, so if there is some other
14 entity from which the government wants to elicit that there
15 were no records found, they would have to produce a witness
16 to testify about their efforts so that that person could be
17 available for cross-examination.

18 Okay. Finally, I will grant, over the defense
19 objection, the government's motion to permit the summary
20 exhibits under Rule 1006. I do find it appropriate to allow
21 the government to introduce charts and graphs summarizing
22 the voluminous financial information at issue in this case.

23 The Circuit has repeatedly permitted similar
24 accounting summaries that utilize basic calculations of
25 financial invoices and other data to create charts, graphs

1 or timelines.

2 Mr. Merritts will have the opportunity to
3 cross-examination the FBI agents who prepared these summary
4 exhibits to contest any categories, labels or underlying
5 data that the defendant disputes the accuracy of. And the
6 government has also noted that it will instruct its
7 witnesses not to provide any improper opinion or influential
8 testimony in relation to those exhibits.

9 I also will, as I understand case law, be prepared
10 to give a limiting instruction, if the parties want,
11 advising what the purpose of the summary exhibits are.

12 Oh, did you?

13 Yes.

14 **MS. MILLER:** Sorry, Your Honor.

15 I believe that, if I'm correct, with respect to
16 1006 there is a limiting instruction.

17 **THE COURT:** Yes.

18 **MS. MILLER:** I think that applies when you do
19 summary exhibits before the jury.

20 **THE COURT:** Okay.

21 **MS. MILLER:** Like the ones that are not admitted
22 into evidence.

23 **THE COURT:** I see, to let them know that it's an
24 aid but not required.

25 **MS. MILLER:** Yes. I don't --

1 **THE COURT:** Okay.

2 **MS. MILLER:** I don't think the limiting
3 instruction rule applies to Rule 1000 --

4 **THE COURT:** To summarizing the voluminous records?

5 **MS. MILLER:** [Nodded]

6 **THE COURT:** Okay.

7 I was just going to suggest that, if there is any
8 explanation I need to give to the jury about what they're
9 seeing, I'd be prepared to do that. But the parties can let
10 me know if they think that's appropriate, but I will permit
11 the government to introduce the summary exhibits.

12 Okay. Now moving on to the government's Motion to
13 Exclude Evidence, which I believe is ECF-24. First, I'll
14 deny as moot the government's Motion to Exclude Evidence or
15 arguments seeking jury nullification because the defense has
16 represented that he will not make such arguments or
17 introduce such evidence.

18 Again, I know we have to get into the weeds of
19 some of the specific issues, which we will do shortly, but,
20 you know, I trust that the defense knows that jury
21 nullification would be improper to ask the jury to do in any
22 way. And if the defense makes any arguments or asks any
23 questions and attempts to do that, the government can object
24 and I will instruct the jury accordingly. So I'll deny that
25 as moot.

1 Second, I will deny in part the government's
2 Motion to Exclude Character Evidence and Prior Good Acts. I
3 say "in part" because, to the extent that it covers any
4 general statements of good character, which can't be
5 offered, I don't understand the defense to understand they
6 could do that. But just to be clear, that's not
7 permissible.

8 But the federal rules clearly allow a defendant to
9 offer character evidence under 404 and 405 of a pertinent
10 trait that's relevant to an element of the offense. So, for
11 example, in this case, it's a fraud case, so evidence that
12 demonstrates a character for qualities like truthfulness
13 could be pertinent in a case about fraud.

14 So I won't preclude the defense from introducing
15 appropriate character evidence, if that's what he chooses to
16 do. Again, if there's an issue with respect to the extent
17 of that testimony, I can deal with those objections during
18 trial.

19 Okay. Third, with respect to the government's
20 Motion to Exclude Statements about Punishment or Collateral
21 Consequences of Conviction, I'm going to deny that as moot
22 because the defendant has represented that he will not
23 introduce evidence about punishment or consequences or make
24 any such arguments.

25 You know, I do think, you know, in closing, can a

1 defendant say, you know, please consider all of the evidence
2 carefully because this is a very serious matter and is
3 important to Mr. Merritts? Sure.

4 Can he say, you know, "if you convict,
5 Mr. Merritts is looking at X time"? No. Can they talk
6 about collateral consequences? No.

7 So again, I think this is one of those things
8 where I trust the defense understands what's appropriate and
9 what's not. And if the defense starts down a line of making
10 an argument or asking a question that seems to be attempting
11 to elicit statements about punishment or collateral
12 consequences, government can object and I will deal with it
13 and instruct the jury accordingly if I need to instruct them
14 as to what's permissible and not.

15 But I accept that Mr. Merritts has experienced
16 counsel that knows that he can't make arguments about
17 punishment or collateral consequences.

18 Okay. So then -- okay. So now we're at the issue
19 of the investigation of former Congresswoman Corey Bush.
20 Let me hear from the government on this. Am I right that my
21 understanding, from the limited information I have, is there
22 was an investigation into Ms. Bush and Mr. Merritts and that
23 these -- this alleged fraud was discovered in connection
24 with that investigation?

25 **MR. KELLY:** That's correct, Your Honor.

1 **THE COURT:** Okay.

2 **MR. KELLY:** So, yes. There was the campaign --
3 the misuse of campaigns funds investigation.

4 **THE COURT:** Okay.

5 **MR. KELLY:** Primarily focused on Ms. Bush that
6 also, of course, included Mr. Merritts. Since the
7 allegations included that she had misused campaign funds to
8 pay him for security services.

9 **THE COURT:** Okay.

10 **MR. KELLY:** During the course of that
11 investigation, the agents were investigating whether or not
12 Mr. Merritts actually had any sort of security-related
13 company or firm. And as part of that investigation, they
14 queried whether he had ever applied for any COVID
15 relief-related loans for any business.

16 Nothing came back for a security business, but the
17 loans at issue in this case did come back as to his
18 purported moving business. And the agents realized, from
19 having reviewed his financial records, that the
20 representations in the loan applications were not consistent
21 with what they had seen in his financial records.

22 And at that time point in time, the decision was
23 made to open -- you can call it a separate -- I mean it's
24 not a separate investigation -- it is a separate
25 investigation because they're investigating completely

1 separate crimes --

2 **THE COURT:** Different issues.

3 **MR. KELLY:** -- different people, different
4 timeframes, different conduct, different criminal statutes.
5 But, yes, it was somewhat happenstance that the evidence
6 that led to the charges of this case was uncovered during
7 the other investigation.

8 **THE COURT:** Okay. And then let me be clear, so
9 you're moving to exclude that. So you have no intention, if
10 I were to grant the motion and I'll hear from the defense,
11 you're not going to explain to the jury kind of how
12 Mr. Merritts ended up in this seat by laying out any of this
13 information?

14 **MR. KELLY:** No, Your Honor.

15 I mean I think that it could be appropriate for
16 testimony to be elicited in general terms that there was,
17 you know, an ongoing investigation and during that
18 investigation, you know, they uncovered this evidence that I
19 just very rudimentary -- you know, rudimentarily -- I don't
20 know if that's a word, Your Honor -- laid out.

21 But just as if, if the evidence in this case had
22 been uncovered while Mr. Merritts or Ms. Bush were being
23 investigated for murder, I guarantee, Your Honor, the
24 defense would be taking the complete opposite position here
25 that the government should in no way be allowed to get into,

1 whatsoever, the details or the outcome or anything having to
2 do with that murder investigation. And we think it's
3 equally true here.

4 **THE COURT:** Sure. So I'm just trying to
5 understand before I ask the defense for more information on
6 this. You know, if I were to grant this motion, you would
7 or you would not, in general terms, have an investigating
8 agent testify about how Mr. Merritts came -- I mean, you
9 would just start with this investigation, not kind of the
10 investigative steps that led to it; is that right?

11 **MR. KELLY:** Court's indulgence. I just want to --

12 **THE COURT:** Sure. Yeah.

13 (Discussion off the record between government counsel.)

14 **MR. KELLY:** Your Honor, it's just -- I think we
15 could do something very general, such as, during an
16 unrelated investigation in which Mr. Merritts was not a
17 target, you know --

18 **THE COURT:** Okay.

19 **MR. KELLY:** -- you uncovered X, Y, Z.

20 **THE COURT:** Yeah, I'm not even trying to -- I'm
21 not even there yet. I just want to know kind of what your
22 intention was. You know, if I were to say I'm granting this
23 motion in full, is it your preference not even to do it in
24 general terms? I'm not asking for like a concession between
25 your position and the defense.

1 I just want to know, you know, from your
2 perspective, like if you got your way and you could try this
3 case exactly how you want, you wouldn't even mention it in
4 general terms or you would?

5 **MR. KELLY:** I don't think that we would need to,
6 Your Honor.

7 **THE COURT:** Okay.

8 **MR. KELLY:** I mean, if an investigation was
9 launched because, you know, there was a whistleblower
10 complaint for example, we wouldn't necessarily elicit
11 testimony from the agent that there was an anonymous
12 complaint and that caused you to look into this.

13 We would just say, you know, "did you open that
14 investigation into whether or not Mr. Merritts had submitted
15 fraudulent COVID loan applications?" And they would say
16 "Yes." And then we could say, you know, "What did you do as
17 part of that investigation?"

18 So I think we would steer as far clear from any
19 reference to a separate investigation as possible, you know,
20 short of somehow causing juror confusion but --

21 **THE COURT:** Okay.

22 **MR. KELLY:** -- that would be our preference.

23 **THE COURT:** All right. I'll hear from the
24 defense.

25 First, do you intend to get into this prior

1 investigation if you had your way?

2 **MR. DiRUZZO:** Yes, Your Honor.

3 **THE COURT:** Okay. And the relevance is?

4 **MR. DiRUZZO:** Well, Your Honor, I'll put it to you
5 this way. I think you've probably seen in the course of
6 your career some people make the argument of law enforcement
7 spend a tremendous amount of time, effort and money in an
8 investigation that was, you know, dead on arrival.

9 And in order to save face, you know, save their
10 career prospects, you know, that they had to find something
11 and, lo and behold, what do they find? They found X. And
12 I've personally, you know, made those arguments, you know,
13 myself in different cases.

14 And of course the witness is going to be allowed
15 to say, if it's true that, no, that's not the case. But
16 then the argument is going to be to the jury that, of
17 course, law enforcement -- just like everyone has a vested
18 interest to make sure that what they do is not a waste of
19 time that, if a law enforcement, for example, you know, if I
20 pose the question: Well, it's your job to investigate cases
21 and make arrests? Invariably the answer is going to be to
22 investigate cases but not necessarily make arrests.

23 And the follow-up is often, Well, if you didn't
24 make any arrests, it wouldn't look like you were doing a
25 very good job as an investigator. Right? That's going to

1 play out and I think that that's fair game because I don't
2 know how much time, effort and money went into the initial
3 investigation of my client and Ms. Bush.

4 It seems they both were being investigated for
5 possible conspiracy, either to commit some type of campaign
6 finance violation. But the fact that there was no their
7 there and then, lo and behold, what do we have, a mere PPP
8 fraud case for a mere \$20,000. I think that's fair game, at
9 a minimum, to be argued to the jury that, like, this is not
10 something that you would typically see and that goes to the
11 witness's sloppiness.

12 **THE COURT:** Well, let me stop you there. So I was
13 with you until you said this is not something you typically
14 see because, what do you mean? What is not something you
15 typically see?

16 **MR. DiRUZZO:** That you've got a rather substantial
17 federal investigation into campaign finance and then you get
18 a fraud case for a mere 20,000, 22,000.

19 **THE COURT:** Where is that? I don't know if that's
20 true or not. So how is the jury -- what evidence do you
21 expect to come out that's going to substantiate that?

22 **MR. DiRUZZO:** I can ask the law enforcement, you
23 know, how many cases has he been involved with that results
24 in a -- criminal charges for only \$22,000.

25 **THE COURT:** But I guess, okay, so I denied the

1 selective prosecution claim.

2 **MR. DiRUZZO:** Uh-huh.

3 **THE COURT:** And so the only question for the jury
4 is whether the government has proved these allegations
5 beyond a reasonable doubt or not. And so it's not a matter
6 of -- I mean, I think there's a line -- you know, it can't
7 be the government has proven the allegations beyond a
8 reasonable doubt. There's evidence but this is unusual and
9 it's for a low amount so, jury, you should acquit. Right?
10 That's not permissible.

11 **MR. DiRUZZO:** Well --

12 **THE COURT:** What could be permissible is, you
13 know, there is nothing here. The evidence is not
14 sufficient. And this is to save face because the
15 investigators were embarrassed but that doesn't require the,
16 you know --

17 **MR. DiRUZZO:** The discussion of \$22,000? That's
18 fine, Judge.

19 **THE COURT:** Yeah, I'm concerned about that
20 because, first of all, you know, I don't know -- it sounds
21 like you don't know -- you know, this is not discovery.
22 This is actually the trial, so I don't know that that's a
23 true statement. And it sounds like you don't have any
24 information to suggest that it is the case that this is
25 unusual or not.

1 **MR. DiRUZZO:** I would agree with that.

2 **THE COURT:** Okay.

3 **MR. DiRUZZO:** I'd be willing to, to make it easy
4 for you, Judge, not talk about the dollar amount but be able
5 to say that the witness -- you know, the law enforcement,
6 you know, put a lot of time, resource and effort and
7 manpower into an investigation that went nowhere, and then
8 it morphed into a totally unrelated investigation of my
9 client. I think that that's fair game.

10 **THE COURT:** Okay. Let me hear from the
11 government. I'll hear from the government.

12 And let me just explain, kind of, what I think is
13 the issue, here. On one hand, I don't want this prior
14 investigation to turn into a sideshow, a mini trial. I'm
15 not even sure, for the point you want to make, that it
16 matters what the initial investigation was about. You know,
17 I don't know that you need to say any details to ask those
18 questions.

19 But I do think I have to let the defense question
20 witnesses about potential bias. So, you know, if the
21 witness -- again, I'm not suggesting this is the case. But
22 imagine a case where a witness made an arrest without
23 evidence because -- for some reason or another than the
24 evidence, they are worried about, you know, blow-back from
25 supervisors, whatever it is.

1 So let me hear about specifically that because I
2 can't shut the defense down in a theory where they want to
3 confront specific witnesses about bias. I am very concerned
4 about mentioning this dollar amount, which I've said that I
5 would not permit that.

6 I'm not going to permit selective prosecution
7 arguments. I've denied that motion. It's not -- you know,
8 if I thought there was selective prosecution, it would be
9 dismissing the case. That would never go to the jury.

10 So let me hear from the government about what you
11 think appropriate bias cross is, understanding that I have
12 to let a defendant do that, and what your response is to the
13 defense's argument.

14 **MR. KELLY:** Yes, Your Honor.

15 A few points. One, this is all pure conjecture.
16 There is actually no good-faith basis whatsoever in any of
17 the discovery that the agents or anybody involved in this
18 case was somehow frustrated that the investigation into
19 Ms. Bush didn't lead to charges, so they pivoted to target
20 Mr. Merritts.

21 And it's our position there has to be a good faith
22 basis on which to attack someone's credibility through bias
23 cross-examination. I just want to be very clear,
24 Your Honor. The campaign funds investigation, the only
25 target in that case was Ms. Bush. Mr. Merritts was not a

1 target of that investigation. The only reason that he had
2 any involvement in terms of the investigation was because he
3 was one of the people --

4 **THE COURT:** So I guess your point is that, if
5 Ms. Bush was the defendant here, that might be a more
6 appropriate argument but --

7 **MR. KELLY:** Yes, Your Honor. The actual
8 investigation as to Ms. Bush was whether she had provided
9 false statements to the FEC. Mr. Merritts, by definition,
10 could have never been guilty of making false statements to
11 the FEC. He was never a target, so this is not a situation
12 where the agents were going after Mr. Merritts and couldn't
13 get him on one thing, and so they decided to get him on
14 something else.

15 **THE COURT:** Okay.

16 **MR. KELLY:** And Your Honor, I mean, that seems
17 like back door to a selective or even a vindictive
18 prosecution claim by the defense.

19 And as to the sideshow, Your Honor, we're not
20 really sure how that could be avoided. I mean, the defense
21 counsel is speaking about Ms. Bush being exonerated. And
22 I'll just note that the government's position has never been
23 that Ms. Bush was exonerated. We'll concede charges haven't
24 been brought.

25 But would the government be entitled to present

1 evidence in detail about the allegations as to Ms. Bush and
2 the defendant, for example, that Ms. Bush paid her
3 boyfriend, now husband, over \$100,000 for security services
4 that were alleged to have never been provided or that the
5 FEC issued a complaint against her?

6 Should we be allowed to get into the agents about
7 all of the evidence of wrongdoing that they did uncover as
8 part of that investigation? Should we be allowed to ask
9 them why criminal charges haven't been brought in that case?

10 Your Honor, if that door is opened, this case is
11 no longer going to be about whether or not two loan
12 applications that Mr. Merritts submitted were fraudulent,
13 which is what this case is about. And our fear throughout
14 all of the briefing has been that the defendant isn't
15 interested in having that conversation. The defense is
16 interested in having a conversation about the investigation
17 into Ms. Bush.

18 And I will also note, Your Honor, that -- I mean
19 to the extent that it matters, the applications at issue
20 here are from well before actually the time period of the
21 investigation into Ms. Bush in terms of the relevant offense
22 conduct.

23 So we just -- this seems like a back door for a
24 selective prosecution argument. We don't know how we
25 couldn't open the door wide open for a complete sideshow

1 here and Mr. Merritts was not the target of that
2 investigation, Your Honor.

3 **THE COURT:** Okay. Well, let me ask the defense
4 your response to that because, if you were to make a
5 suggestion or ask a witness, you know, you're investigating
6 Ms. Bush and you couldn't find anything so you pivoted and
7 the government has evidence that they in fact did find
8 things, I mean, why wouldn't they be able to put forth
9 everything they found, which I don't think you would want
10 and I don't want that sideshow either.

11 So how does that -- I mean, you agree that I can't
12 let you ask questions about the investigation and what it
13 turned up and what it didn't without letting the government
14 respond?

15 **MR. DiRUZZO:** Your Honor, I think there's a happy
16 medium here. Right? I think I should be allowed to get
17 into the amount of -- I'll give a nice example. Imagine
18 this were Enron all over again, an accounting fraud case.
19 Right?

20 And then you have all of the government law
21 enforcement auditors spending hundreds of thousands of
22 dollars, hundred of thousands of man hours and then, for
23 whatever reason, they don't make the case but a small
24 additional case is found on the side, you know, a 1001
25 violation. Right?

1 I think that it's appropriate to say that the
2 investigators who have a personal interest in their own
3 career to say that they weren't wasting hundreds of
4 thousands of dollars on a lark and a detour on an
5 investigation that turned up nothing. Right?

6 **THE COURT:** Well, right, but let me stop you right
7 there. That's the issue. You're assuming that it turned up
8 nothing. And the government is saying, if you want to go
9 down this road, what they're going to -- they want to show
10 that they did turn up something. There was a complaint, an
11 agency complaint filed. There was evidence of payments for
12 services not rendered.

13 **MR. DiRUZZO:** I think I would agree to limit it
14 to -- we could say that just charges were never brought.

15 **THE COURT:** And then do they get to ask: Can you
16 explain why charges have not been brought?

17 **MR. DiRUZZO:** I would say at that point, if the
18 government wants to go there, I would, to be actually
19 honest, I think they would be able to do it.

20 **THE COURT:** Right. I mean, do you want -- you
21 don't know what the answer to that question is going to be.
22 Do you want that answer? I mean, this is what I'm a little
23 bit concerned about.

24 Let me just be clear. I don't want to cut you off
25 in any way from questioning witnesses about bias. And so

1 I'm not trying to do that, and I want to find a way for you
2 to ask questions that get at witness's bias, their motives
3 to curry favor with the government, what could have tainted
4 the investigation --

5 **MR. DiRUZZO:** Uh-huh.

6 **THE COURT:** -- that the jury could then use to
7 either doubt the credibility of the investigation or to, you
8 know, make other conclusions that the government hasn't
9 carried its burden. But I don't want this to be, you know,
10 opening the door based on speculation.

11 So you know, I don't know how much was spent on
12 the investigation or how much time. I mean, how long was
13 the investigation into Ms. Bush?

14 **MR. DiRUZZO:** Unfortunately, Judge, I can't say
15 that because I'm rather new to the case.

16 **THE DEFENDANT:** Your Honor.

17 **THE COURT:** Do you want to consult with your
18 client?

19 (Discussion off the record between Mr. Merritts and
20 Mr. DiRuzzo.)

21 **MR. DiRUZZO:** It's my understanding that the
22 investigation into Ms. Bush was approximately a year through
23 an IG investigation and in addition to the DOJ
24 investigation.

25 To answer your question, Judge, how about this:

1 Trying to be intellectually honest, I think if I go there,
2 I've got to pick my poison. And it's kind of you're in for
3 a penny, you're in for a pound and then the door is opened.
4 Just because the door is opened, then the government needs
5 to make their own tactical decisions of whether they want to
6 walk through.

7 **THE COURT:** Well, no, I also have to be concerned
8 with turning this into a mini trial about an unrelated
9 investigation. So I need to know kind of what could come
10 out and what specifically you want to ask.

11 I mean, if you want to confront a witness with --
12 I'm not saying I'm going to let you do that. I'm just kind
13 of thinking out loud.

14 **MR. DiRUZZO:** Sure.

15 **THE COURT:** So you want a -- the FBI investigator
16 is going to testify. You want to ask the FBI investigator,
17 you know, Mr. Merritts, you found out about this alleged
18 loan fraud because you were actually investigating his wife
19 for something unrelated.

20 **MR. DiRUZZO:** Ms. Bush. You spent a year of your
21 life and thousands of hours or hundreds of hours working on
22 the case and that case did not amount to an indictment.
23 Correct? Yes.

24 **THE COURT:** And then the government gets to
25 explain why it didn't amount to an indictment?

1 **MR. DiRUZZO:** Well, I think then, again, to be
2 fair, you know, the government is going to have to make the
3 tactical decision whether they want to walk through that
4 door themselves. Although I personally think that there
5 is -- I'm not entirely sure that the case agent would be
6 able to make that representation as to the thought
7 processes.

8 **THE COURT:** Right. They're going to -- that's the
9 problem. Then are they going to have to call some other
10 witness to testify about that? I mean, that's what I don't
11 want to happen.

12 **MR. DiRUZZO:** I understand, Judge. I understand.
13 But looking back at it or looking at it from the
14 10,000 foot, you know, I think it's fair game and I should
15 be able to go into the biases, prejudices and motivations of
16 law enforcement. And at some level, it's law enforcement's
17 job to make a case.

18 And so to save, you know, that time and effort of
19 a year, you know, and then voila, you've got a \$20,000 PPP
20 case, I think that's fair game understanding I will not be
21 able to get into a dollar amount.

22 **THE COURT:** All right. Let me here from the
23 government and then I'm just going to -- now that I have
24 some specifics, I'll think about this. I might just issue a
25 short Minute Order in the next day or so. But let me hear

1 from the government.

2 Is there anything that you think would be
3 appropriate for them to get into that relates to this bias
4 issue? I'm just trying to draw a line. I share your
5 concern. I don't want to cut the defense off from
6 questioning witnesses about bias. I don't think I can do
7 that.

8 I also do not want this case to turn into a case
9 about this former Congressperson's investigation. I
10 actually think it could potentially be damaging to --
11 probably more damaging to Mr. Merritts than the government
12 if that door is open, quite frankly.

13 So let me hear from -- is there any piece of what
14 the defense is saying that you agree is appropriately
15 inquired into on cross and then I'll take this under
16 advisement?

17 **MR. KELLY:** Your Honor, I am happy to answer that
18 question if I could just make one other brief point.

19 **THE COURT:** Sure. Yeah.

20 **MR. KELLY:** So you know, it occurs there are a lot
21 of -- this goes back to my good faith basis point from
22 before, Your Honor, to exploring bias. And it occurs that
23 there are a lot of assumptions being made here.

24 The example that was just given by defense counsel
25 is they would like to ask the agent, you know, would it --

1 you know, you pursued this case because you wanted a
2 promotion or you could get in trouble with your job if you
3 didn't, et cetera.

4 They would have to lay the foundation for the
5 potential bias first by asking the more neutral question:
6 Is your job tied to how many cases you closed? Or, you
7 know, if you were to, you know, investigate a case and then
8 it didn't lead to charges, you know, what repercussions
9 could that have for you?

10 They would have to lay some sort of foundation
11 that what they were hoping to explore as to the other
12 investigation would actually have some potential bias impact
13 for the witness.

14 And Your Honor, I think, you know, at most -- and
15 this goes back to sort of what we were talking about before
16 in terms of how much would the government want to get into
17 the other investigation in terms of laying, you know,
18 providing contacts for this investigation. And frankly,
19 again, we don't think we need to get into it at all in order
20 to make out the charges here.

21 But after laying a proper foundation for potential
22 bias through the more sort of neutral questions that would
23 normally be required, if the defense wants to try to elicit
24 testimony from the agents about, you know, efforts that were
25 put into another investigation during which they uncovered

1 the evidence that ultimately led to these charges, it would
2 still add literally nothing but would certainly invite jury
3 nullification, confuse the issues, greatly expand the scope
4 of this trial, for them to get into whatsoever any of the
5 details of that investigation, the nature of that
6 investigation, the fact that Ms. Bush was the target of that
7 investigation, which, again, seems to be what the defense
8 has been trying to do all along during -- through all of the
9 briefing in this case.

10 So if Your Honor is inclined or if, during
11 testimony, a foundation is laid for a potential bias based
12 on the fact that resources had been expended in an unrelated
13 investigation, there is no justification at all to get into,
14 as I just said, any of the details of that investigation.

15 Court's indulgence, Your Honor.

16 **THE COURT:** Sure.

17 **MR. KELLY:** Oh, and one other point, just -- and I
18 don't think this is a technical point. I think it's an
19 important one. The investigating agents don't make the
20 charging decisions here. The U.S. Attorney's Office does.

21 **THE COURT:** Yeah. Yeah.

22 **MR. KELLY:** So to the extent -- it's just they're
23 not -- they're not even the decision-maker here, which is
24 another reason that sort of -- if they want to attack the
25 thoroughness of this investigation as to Mr. Bush and what

1 was done in terms of interviewing people who he may have
2 provided moving services to or people that he were employed
3 by or look into his financial records, that's certainly fair
4 game. But there's really no reason to get into what was
5 done. In our opinion, substantively is an unrelated
6 investigation.

7 **THE COURT:** Okay. Thank you.

8 Can I hear from defense counsel? One is, I forgot
9 to ask you your response to the government's argument about
10 the mismatch, meaning, you know, maybe this would be a
11 closer question if Ms. Bush were the defendant. But because
12 Mr. Merritts was not the target of the investigation, this
13 idea that, you know, you had to find something, doesn't that
14 suggest that they would have -- if they were going to kind
15 of pin something on someone, wouldn't they pin it on the
16 target of their investigation?

17 **MR. DiRUZZO:** Well, I think we all know that, just
18 because one individual is the target, that doesn't mean that
19 individuals close to that person might not be in the
20 proverbial blast radius.

21 **THE COURT:** Well, no I'm just saying that your --
22 again, this has to be tied to the government's lack of
23 evidence or inability to prove beyond a reasonable doubt.
24 So what's going on in the background is that, you know, he
25 doesn't have to prove his innocence.

1 But like the argument is Mr. Merritts didn't do
2 these things. The government can't prove these things. The
3 evidence is lacking and he's only -- you want to say he's
4 only here because they couldn't make this other
5 investigation.

6 The government's response was, you know, that
7 theory might work for the target of the investigation,
8 meaning we couldn't find anything so we just kind of pinned
9 something that wasn't sound on Ms. Bush. You know, he
10 wasn't the target.

11 So there's a mismatch between -- you know, if you
12 can just respond to that if you understand what I'm trying
13 to say.

14 **MR. DiRUZZO:** I understand. There is not a
15 mismatch. And I think for the simple reason that all of the
16 money, Judge, you heard it all of the time from the
17 government. Where did the money come from? Ms. Bush, her
18 and her campaign. Where did it go to? Mr. Merritts.

19 **THE COURT:** Okay.

20 And then what is your response to the government's
21 noting that, well, you're going to ask these investigators
22 these questions and they don't make charging decisions. So
23 you have the wrong person in the chair to confront about,
24 you know, why there wasn't an indictment against Ms. Bush.

25 **MR. DiRUZZO:** There is no indictment is a fact.

1 And the witness can say that, can testify to that. And
2 then, to the extent that the government wants to
3 rehabilitate on redirect to say something that you don't
4 make the charging decisions, those are above your proverbial
5 pay grade, that's fair.

6 **THE COURT:** Okay. And so, again, I'm going to
7 take this under advisement. But it would be helpful if --
8 do you have, you know, any authority that you can submit in
9 short order of this kind of bias cross being permissible?
10 That would be helpful if you could submit or supplement your
11 briefs with authority.

12 **MR. DiRUZZO:** And what is the Court looking for in
13 short order, Your Honor? And the reason I am hesitating is
14 we're on a Friday afternoon and I've got a Third Circuit
15 oral argument --

16 **THE COURT:** No problem. So trial is January 12th.
17 And so I'm not even saying it needs to be a brief. I
18 just -- if you have authority. You don't have to. I'm just
19 saying I'm inviting, I'm giving you the opportunity to
20 submit some authority in support of your position now that
21 you've articulated very clearly what you intend to do.

22 **MR. DiRUZZO:** It's my question, 24 hours? Half a
23 week? One week?

24 **THE COURT:** You tell me when you can do it.

25 **MR. DiRUZZO:** My co-counsel is in the middle of a

1 two-week trial.

2 **THE COURT:** Okay. You don't have to. I'm just
3 inviting you to supplement the record before I rule.

4 **MR. DiRUZZO:** Give me a week, Judge. I think --
5 I'll be able to find someone in my firm to do the research
6 and come up --

7 **THE COURT:** Okay. I think by the 12th, that's
8 still a month before trial. So that if by the 12th -- and
9 again, if you don't intend to, just let me know so I'm not
10 waiting.

11 **MR. DiRUZZO:** Yes.

12 **THE COURT:** But if you -- you know, now that
13 you've identified specifically what you intend to do, and
14 the government, you're free to as well but I'm more
15 interest -- you've made your point. I'm more interested if
16 the defense has authority in which this specific type of
17 questioning has been admitted. But I will give you the same
18 opportunity. If you have additional authority that you want
19 to add, you don't have to.

20 **MR. KELLY:** Thank you, Your Honor. We would just
21 ask that if the defense does submit something, we just be
22 given a short period of time --

23 **THE COURT:** Sure.

24 **MR. KELLY:** -- even a couple of days to just make
25 a response.

1 **THE COURT:** Respond, sure. Okay. Thank you.

2 All right. I will take that issue under
3 advisement.

4 Okay. So the next piece of this is somewhat
5 related and it probably will be in the same bucket. It has
6 to do with the government's Motion to Exclude Evidence and
7 Arguments about Political Motivation. You know, I can
8 clearly grant the government's Motion to Exclude any
9 discussion of a purported legal defense of selective
10 prosecution.

11 Selective prosecution, as I indicated, I denied
12 that motion. But I agree with the government's position
13 that that is not an issue for the jury. That doesn't have
14 to do with guilt or not guilt. And so it would be
15 inappropriate to make a selective prosecution argument in
16 any way, shape or form during the trial.

17 So I won't permit anything of that nature. I
18 trust that the defense understands that. Again, if there is
19 something that is on the line, the government is free to
20 object but, you know, I think specifically I have made clear
21 that this kind of idea that this is a unique amount or a
22 small amount, I'm worried about that and the jurors
23 thinking, oh, this is not serious and so they think that
24 that means that they don't have to look at the evidence and
25 apply it to the elements. Right?

1 He's charged. He will get -- he should get a
2 robust defense to the elements and an opportunity to attack
3 the government's evidence however he sees fit to do so
4 within the confines of the law. But the amount of -- for,
5 you know, that this is a small amount relatively. First of
6 all, I don't even know how that would be elicited in
7 evidence that the jury could consider but I don't think
8 that's relevant to anything.

9 So I just want to be clear that suggestions that
10 this is a unique case because of the amount, that this is
11 smaller than what the government tends to prosecute, that
12 this is not a lot of money, I don't think is relevant to any
13 of the elements. So I'm not permitting anything of that
14 nature.

15 Okay. So let me ask the defense, in terms of any
16 type of political motivation-type evidence, what, if
17 anything, are you intending to elicit in line with my
18 rulings that I've made so far? Is there anything I need to
19 rule on here? Do we understand --

20 **MR. DiRUZZO:** I think you made yourself loud and
21 clear, Judge. I know where you're going.

22 **THE COURT:** Okay.

23 **MR. DiRUZZO:** And we get it.

24 **THE COURT:** Okay.

25 **MR. DiRUZZO:** Although I just I -- do leave open

1 the possibility that there might be something said on the
2 witness stand that might open the door to a more -- a line
3 of questioning that we hadn't considered. But other than
4 that, Judge, I think we're good.

5 **THE COURT:** Okay. Okay. And I want to be clear.
6 I'm going to take this under advisement because I want to be
7 very clear. I appreciate that I have an obligation to
8 ensure that Mr. Merritts can cross witnesses about relevant
9 bias. So I admit that sometimes these lines get blurry and
10 they can be fine.

11 So, you know, if there is a bias question you want
12 to ask a witness that you think is on the line of something
13 political, I don't want you to take my ruling as that I'm
14 saying that you can't confront witnesses about bias, but I
15 want to kind of flesh that out in advance so that we don't
16 run into issues.

17 So I'm not suggesting that -- I've not ruled that
18 it would be inappropriate to ask bias questions. But I
19 think, because of the line, if there's something that you
20 think you might want to do, I'm asking that you raise it
21 earlier because...

22 For example, if a witness, if you had a reason to
23 believe that a witness had some sort of political animus
24 against Mr. Merritts or a political animus against someone
25 affiliated with him, you know, that could be permissible to

1 ask about. Again, I would want to discuss that earlier and
2 not be finding out, surprise, that you're going to ask these
3 questions because I do think that there is a fine line here.
4 I just want to be very clear that I am not shutting the
5 defense down from pursuing bias cross-examination.

6 But I think we just need to be clear about what is
7 appropriately bias and what veers into inappropriate topics.
8 Does that make sense?

9 **MR. DiRUZZO:** Understood.

10 **THE COURT:** Okay.

11 Does the government understand kind of where I am
12 going?

13 **MR. KELLY:** Yes, Your Honor. That makes sense.

14 **THE COURT:** Okay. All right.

15 Okay. So I will take the balance of ECF -- wait,
16 is this 24?

17 **MR. DiRUZZO:** It's 23.

18 **MR. KELLY:** This one is 24, Your Honor.

19 **THE COURT:** I will take the balance of that under
20 advisement. If Mr. Merritts wants to provide some
21 additional authority, he will do so by the 12th which is a
22 week from today. I will give the government an opportunity
23 to respond.

24 When you get the submission, if you could
25 just -- you can even do this by email to chambers copying

1 Mr. Merritts' counsel. Just let me know how much time you
2 need for a response so I know to wait.

3 **MR. KELLY:** Of course, Your Honor.

4 **THE COURT:** Okay. And then we will resolve this
5 issue.

6 Okay. There's also the government's Motion for
7 Disclosure of Tax Return and I'm not sure if I have the
8 defense position on that.

9 **MR. DiRUZZO:** No, Your Honor. That came in in the
10 last couple of days.

11 **THE COURT:** Right. Are you prepared to provide a
12 position or did you want to respond in writing?

13 **MR. DiRUZZO:** Oh, no. We definitely want to
14 respond in writing. We'd just ask that we be allowed to
15 brief it in the normal course.

16 **THE COURT:** Okay. Okay. All right.

17 And then the government had also filed an
18 evidentiary notice at ECF-20, Notice of Other Acts Evidence,
19 that I don't believe Mr. Merritts filed a response. Is
20 there any objection or issue with this?

21 **MR. DiRUZZO:** It wasn't a motion. It was just a
22 404(b) notice?

23 **THE COURT:** Yeah, it was just a 404(b) notice.
24 And you didn't file a Motion to Exclude, so I'm assuming
25 that there is no dispute?

1 **MR. DiRUZZO:** I think it's fine.

2 **THE COURT:** Okay.

3 **MR. DiRUZZO:** I would say that we can take it as
4 it comes during the course of the trial. But in general, I
5 don't find 404(b) stuff to be really that contentious when
6 you actually get down to it. And so this is not a drug
7 case. This is not --

8 **THE COURT:** Yeah, okay.

9 Okay. Well, if there's no dispute, I don't need
10 to rule on it. But I just wanted to put on the record that
11 the government has filed a Notice of Other Acts Evidence,
12 and I did not receive a motion *in limine* from the defense to
13 exclude other acts evidence. So I'm taking that to mean
14 that the government can proceed as it intends to unless
15 there is an objection that I need to resolve which I am not
16 hearing one. Okay. All right.

17 Okay. So we got through all of the motions,
18 except the one issue that I am receiving further submissions
19 on and that I'll need to take under advisement -- or the two
20 issues because we have the tax return issue, which I'll get
21 a written response for, and this issue about the other
22 investigation.

23 Let me just clarify, with respect to the other
24 investigation though, the defense is on board, to the extent
25 I let anything in, of not getting into the specifics of what

1 it was. Or what is it -- just so I understand exactly what
2 you are trying to do, what is it that you want to elicit
3 about the former investigation in terms of what it was for?

4 **MR. DiRUZZO:** I don't actually need what exactly
5 what it's for. It's just -- it can be a: You had an
6 investigation into Ms. Bush and her then boyfriend, you
7 know, now husband, Mr. Merritts. The amount of time,
8 effort, money, manpower in that investigation that's entered
9 on Ms. Bush, you know, it didn't go anywhere.

10 **THE COURT:** Okay.

11 **MR. DiRUZZO:** But here we are on something, you
12 know, that sprung out of that investigation.

13 **THE COURT:** Okay. I just wanted to get an
14 articulation of what he was trying to do. You can respond.
15 I was just trying to get an articulation of what he was
16 trying to do so I know clearly what his intention -- I'm not
17 saying that I am allowing him to do that. But I just wanted
18 to know exactly what he wanted to confront the witness with
19 so that, when I get the supplemental authority, I can
20 compare it to the facts of this case.

21 **MR. KELLY:** Your Honor, and I don't think I need
22 to repeat myself.

23 **THE COURT:** Okay.

24 **MR. KELLY:** We've made our position pretty clear
25 on that. Just to hit the two high points very quickly, one,

1 there's really no reason to reference, again, the nature of
2 what was being investigated or who was the target of that
3 investigation being Ms. Bush or anyone else for that matter.
4 And I go back to my point of, had it been a murder
5 investigation, you know, I think we would be having a
6 different conversation. It just adds absolutely nothing to
7 what defense counsel seems to be seeking to achieve here.

8 And the second point being, you know, defense
9 counsel just said again they want to get into that Ms. Bush
10 was being investigated and that investigation led nowhere or
11 didn't lead to an indictment, et cetera.

12 That just brings me back to the point that we've
13 been making all along, Your Honor, which is that seems to,
14 you know, just -- it just -- the door flies wide open at
15 that point and the government believes that we would have
16 the right and obligation to present evidence as to what, if
17 anything, was found in the course of that investigation.

18 And for all the reasons we said before, that just
19 it's not relevant, it's a sideshow, there's no need to get
20 into the substance of what was being investigated.

21 **THE COURT:** Okay.

22 And then I think -- I don't know if there was a
23 specific request to exclude Ms. Bush as a potential witness,
24 but it's kind of lurking in the background of the pleadings
25 related to this. And I'll say this, I don't think you need

1 to say now if you're definitively planning to call her or
2 not.

3 But if you do get to a point at trial where you
4 are planning to call her for something other than as a
5 potential character witness, I want to -- before she takes
6 the stand and before you say our next witness is Ms. Bush,
7 knowing that the government might have an objection, I'm
8 just going to ask that you bring it to my attention so that
9 I can rule on -- get a proffer at that time and hear from
10 the government.

11 **MR. DiRUZZO:** Understood.

12 **THE COURT:** Okay. Is that acceptable to the
13 government?

14 **MR. KELLY:** I think we're halfway there,
15 Your Honor.

16 We're still concerned -- we don't know what, if
17 anything, the defense would want to say about Ms. Bush in
18 their openings.

19 **THE COURT:** Okay.

20 **MR. KELLY:** I think that will somewhat be
21 constrained by whatever Your Honor ends up ruling as
22 to -- you've already denied the selective prosecution
23 motion.

24 **THE COURT:** Yes.

25 **MR. KELLY:** Depending on what Your Honor orders as

1 to the motion *in limine* to exclude evidence or testimony
2 about the prior investigation, that will certainly or it
3 could put, you know, pretty clear guardrails on what I can
4 and can't say.

5 **THE COURT:** Okay, yeah.

6 **MR. KELLY:** We just are still concerned about, you
7 know, somehow trying to plant the seed in the jurors' minds
8 that, you know, Mr. Merritts is married to a former
9 Congresswoman and, you know, any sort of implication that it
10 had anything to do with the government's charging decisions
11 here, which they would not be permitted to do based on
12 Your Honor's ruling.

13 **THE COURT:** Right.

14 **MR. KELLY:** And so that sort of is why all along
15 we've been seeking some kind of proffer even ex parte
16 frankly, Your Honor --

17 **THE COURT:** Okay.

18 **MR. KELLY:** -- just to assure the Court at the
19 very least that, you know, generally what she would be
20 testifying to in order to put in place proper guardrails for
21 opening statements and cross-examination of the government's
22 witnesses and the like.

23 **THE COURT:** Okay. What's the defense's response?

24 **MR. DiRUZZO:** Your Honor, I think at this point
25 it's a little premature. Obviously, we haven't made the

1 decision on whether to call any witnesses and whether to
2 affirmatively put on anyone in our case-in-chief.

3 I have no problem for recalling any witness. If
4 the Court would like us to front it at sidebar so that we
5 could address that outside of the hearing of the jury, that
6 I don't have a problem with. And as to the possibility of
7 opening, at this point, I'm going to have to say that I --
8 it's going to depend on how you rule and -- at least in
9 part. And so it's a little premature.

10 **THE COURT:** Okay. Why don't I get the supplement
11 rule and then, if I need to set a further hearing, even if
12 it's just by Zoom, because I understand you're traveling,
13 just to clear any issues about what's permissible in opening
14 when we get a little closer to trial, I can do that.

15 But I've made clear to the defense that, because I
16 know that there will be an objection to this witness, before
17 this witness is potentially called, we'll deal with the
18 issue. But we'll deal with the openings and what's fair
19 game in openings sufficiently in advance of trial as it
20 relates to this issue.

21 Okay. All right. Is there anything -- oh, go
22 ahead. Sorry.

23 **MR. KELLY:** Sorry, Your Honor.

24 **THE COURT:** No, it's okay. I was going to ask:
25 Is there anything else that we need to cover?

1 **MR. KELLY:** Just since we're on the topic, I
2 hadn't wanted to revisit it until it made sense.

3 As to the voir dire question as to identifying
4 Ms. Bush, I think it's Your Honor's proposed Question 22 --

5 **THE COURT:** Yes.

6 **MR. KELLY:** -- I think that we had suggested and
7 everyone had agreed that she could be referred to as the
8 defendant's family member. We actually prefer something
9 even more neutral than that and just say: You heard that
10 you may hear from or about former U.S. Congresswoman Corey
11 Bush, who is a potential witness, during this trial. And
12 not sort of identify what the connection is between the
13 defendant and Ms. Bush.

14 **THE COURT:** Okay. Yeah. Any problem with that?

15 **MR. DiRUZZO:** That's fine.

16 **THE COURT:** Okay. And let me be clear, the only
17 reason that -- well, I said why I included this question.
18 But I assumed that, in response to -- I usually ask the
19 government and defense counsel to identify names of people
20 or entities that they may hear from or even about during the
21 trial.

22 And so I thought that Ms. Bush would be listed on
23 the defendant's list. So I'm happy to say who may be a
24 potential witness as well in 22. But, again, if, you know,
25 I thought that the defense might identify her in 6. Okay.

1 That's fine. No problem. I will make that adjustment.

2 **MR. KELLY:** And Your Honor, just one quick matter,
3 and I apologize if this has already been done in this case
4 before I was an assigned prosecutor.

5 **THE COURT:** Yes.

6 **MR. KELLY:** I just wanted to put on the record,
7 and I raised this with defense counsel before that we were
8 planning on doing this, that Mr. Merritts has previously
9 waived in writing in March of this year any venue challenge
10 for the charged offenses being brought in the District of
11 Columbia as opposed to elsewhere.

12 **THE COURT:** Okay.

13 Was that something that was submitted on the
14 docket?

15 **MR. KELLY:** It was an email, Your Honor.

16 **THE COURT:** Okay.

17 **MR. KELLY:** Which I believe is sufficient between
18 the parties.

19 **THE COURT:** Okay.

20 **MR. KELLY:** If Your Honor would like us to file
21 something, we certainly can. But in my experience, just
22 putting it on the record orally that there is a written
23 waiver of venue, assuming that defense counsel and
24 Mr. Merritts, don't object to that.

25 **THE COURT:** That's fine, okay. Okay.

1 **MR. DiRUZZO:** I'm sure my co-counsel, if he sent
2 that email, and I have no reason to doubt the
3 representations of the AUSA --

4 **THE COURT:** Okay.

5 **MR. DiRUZZO:** -- then we will abide by it.

6 **THE COURT:** Okay. All right.

7 **MR. KELLY:** Thank you, Your Honor.

8 **THE COURT:** Okay. Anything else from the
9 government that we need to cover before trial?

10 **MR. KELLY:** No, Your Honor.

11 **THE COURT:** Okay. Anything else from the defense?

12 **MR. DiRUZZO:** If you could indulge me a little
13 bit, Your Honor. So --

14 **THE COURT:** If you want to come up, maybe come on
15 up just so we can make sure that we hear you.

16 **MR. DiRUZZO:** If you could indulge me. So how
17 many potential jurors do you pull from the pool and like
18 where do you seat them?

19 **THE COURT:** Sure. So how many -- I'm trying to
20 think. Usually they send up maybe about 40 to 50 people.

21 **MR. DiRUZZO:** Okay.

22 **THE COURT:** They're going to start, initially, in
23 the gallery.

24 **MR. DiRUZZO:** Oh you don't start them --

25 **THE COURT:** No, not to begin with.

1 **MR. DiRUZZO:** Okay.

2 **THE COURT:** And they will start in the gallery.

3 You're going to have a sheet that identifies them by juror
4 number, their name, which we won't use on the record.

5 **MR. DiRUZZO:** Yep.

6 **THE COURT:** You'll have information. It may have
7 address information and certainly where they work or their
8 profession.

9 I'll do the voir dire. I'll ask the questions.
10 Then I'll clear the room, and they'll come in one by one and
11 sit on the stand here. And I'll put their number on the
12 record so you'll be able to follow along. We'll do the voir
13 dire process.

14 Then when they come back, the first 14 that have
15 not been struck for cause and that are a part of the pool
16 will sit in the box. One is the seat closest to me. It
17 goes 1 through 7, 8 through 14.

18 **MR. DiRUZZO:** So left to right, front to back?

19 **THE COURT:** Yes.

20 **MR. DiRUZZO:** The same thing when they're sitting
21 in the gallery, left to right, front to back?

22 **THE COURT:** No. I think they --

23 **MR. KELLY:** Your Honor, I think the way I've seen
24 it done before --

25 **THE COURT:** Well, Erika can tell me.

1 **MR. KELLY:** I'll defer to the expert here.

2 **THE COURT:** How are they lined up in the gallery
3 in order?

4 **DEPUTY CLERK:** So they will be the first ones will
5 be coming in this way.

6 **THE COURT:** Okay. So left to right?

7 **DEPUTY CLERK:** Yes.

8 **MR. DiRUZZO:** Okay.

9 **THE COURT:** Okay. All right, yes. Okay. And
10 then you'll have time for your strikes.

11 **MR. DiRUZZO:** Okay. So you bring the 14 in?

12 **THE COURT:** When it's time for strikes. So you
13 can see, like if we didn't strike anyone, this is our jury
14 and you can see who is coming up next. And so if you
15 strike, we play musical chairs. Does that make sense?

16 **MR. DiRUZZO:** Are you doing musical chairs?

17 **DEPUTY CLERK:** Well, I do it at the end but, yeah.

18 **MR. DiRUZZO:** Presumptive 14 after the cause?

19 **THE COURT:** Sorry.

20 **MR. DiRUZZO:** The presumptive 14 after the cause,
21 they'll be there.

22 **DEPUTY CLERK:** Yes.

23 **MR. DiRUZZO:** And then do the parties do their
24 pre-emps at sidebar, Judge?

25 **THE COURT:** No, you'll do it at your tables.

1 **MR. DiRUZZO:** Okay.

2 **DEPUTY CLERK:** Hold on.

3 Two courtrooms individual and then they do strikes
4 first. I don't put the 14 until they've done all of their
5 strikes.

6 **THE COURT:** Oh no, I thought when they came in we
7 put the 14 in so they can see who is in the box before they
8 start their strikes.

9 **MR. DiRUZZO:** From what I remember when we did
10 it --

11 **THE COURT:** I usually put them in the box so they
12 can see kind of what the jury looks like and then they start
13 striking because they might strike from the box.

14 **DEPUTY CLERK:** Okay. That's fine.

15 **THE COURT:** Yeah, yeah.

16 **MR. DiRUZZO:** And then I say, Judge, we strike
17 juror number 1.

18 **THE COURT:** No, no. You don't say anything.
19 You'll get a sheet of paper.

20 **MR. DiRUZZO:** Okay, okay.

21 **THE COURT:** And you guys will trade back and forth
22 then, when you're done, when everyone has made their
23 strikes, give it to Ms. Duncan. And then she'll move
24 everyone around, and then I'll make sure you're satisfied
25 with the jury.

1 **MR. DiRUZZO:** Like I go then they go and then I go
2 or is it like -- or it's like --

3 **THE COURT:** No. No. I have you do it in rounds.
4 It will be clear on the sheet.

5 **MR. DiRUZZO:** Okay. Okay.

6 **THE COURT:** Yeah. And then I do a round for
7 alternates too.

8 **MR. DiRUZZO:** Okay. And then if there is an
9 objection like under *Batson*, like how does one --

10 **THE COURT:** Well, you would make that -- once you
11 get the government sheet, if you have an issue, you would
12 ask to approach and we would deal with that. Yeah.

13 **MR. DiRUZZO:** Okay. Okay. Understood. Thanks,
14 Judge.

15 **THE COURT:** Okay.

16 All right. Anything else from the defense?

17 **MR. DiRUZZO:** No, Your Honor.

18 **THE COURT:** All right. Okay. Thanks, everyone.
19 Happy holidays. I will see you in January.

20 **MR. KELLY:** Thank you, Your Honor.

21 **MR. DiRUZZO:** Thank you.

22 **DEPUTY CLERK:** All rise.

23 (Proceedings concluded at 12:54 p.m.)
24
25

C E R T I F I C A T E

I, **Lorraine T. Herman, Official Court Reporter,**
certify that the foregoing is a true and correct transcript
of the record of proceedings in the above-entitled matter.

December 10, 2025

DATE

/s/ Lorraine T. Herman

REPORTED BY