

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA**

CASE NO. 24-CR-80103-CANNON

UNITED STATES OF AMERICA

v.

DUSTIN SEAN McCABE,

Defendant.

GOVERNMENT'S MOTION *IN LIMINE*

The Government moves in *limine* for the Court to make the following seven pretrial rulings, each of which relate to the seaman's manslaughter charge in this case. The first five of these rulings concern inextricably intertwined evidence necessary to complete the story of how the Defendant's negligence proximately caused M.C.G.F.'s death on March 29, 2020, while the sixth concerns evidence that is admissible under Federal Rule of Evidence ("FRE") 404(b) and the seventh concerns irrelevant evidence that should not play a role in trial. The Defendant opposes each of these rulings except the seventh:

1. The Government may present evidence about three events occurring on March 28, 2020, which was the day before the instant offense, that gave the Defendant notice of the propeller issue that proximately caused M.C.G.F.'s death;
2. The Government may present evidence about the Defendant violating a local ordinance preventing vessels like his from taking out paying passengers the day of M.C.G.F.'s death;
3. The Government may present evidence about the Defendant negligently failing to enroll in a narcotics testing program until after the outing that led to the victim's death;
4. The Government may present evidence about the Defendant negligently failing to report the vessel's mechanical failure or its running aground on March 28 as required by regulation;
5. The Government may present evidence about the Captain of the Port barring the Defendant from operating the vessel on April 9, 2020;

6. The Government may present evidence about the Defendant's failure of a safety inspection less than a year before the March 29 incident, which tends to show his knowledge of the rules and an absence of mistake or accident in refitting this vessel himself; and
7. The defense may *not* refer to the State of Florida not prosecuting the Defendant for the March 29 incident that lies at the center of this case.

These requested rulings are consistent with the FRE and essential for the jury to have the full information needed to evaluate whether the Defendant was negligent on March 29 as charged.

I. STATEMENT OF FACTS

A. The Defendant's Purchase of the M/V SOUTHERN COMFORT and Refitting the Vessel for Scuba Charters. (Count 2)

In March 2020, the Defendant bought a charter fishing type vessel called the M/V¹ PERSISTENCE in Palm Beach County, re-christening it the M/V SOUTHERN COMFORT (the "Vessel"). He completed paperwork with the United States Coast Guard ("USCG") on March 5, 2020, swearing under penalty of perjury that he intended to use the Vessel for "recreational" purposes, rather than as a "commercial vessel" taking passengers for hire.² Yet that wasn't so. Instead, the Defendant had already begun acquiring the accessories he needed to refit the Vessel for his use in providing scuba chartering services, which he had been doing through a Florida corporation called Florida Scuba Charters, Inc. ("Florida Scuba") for years. After acquiring dive benches and the like, he also modified the Vessel by refitting the interior, including by removing engine controls so that only the captain could steer the Vessel from the bridge.

B. The Death of M.C.G.F. (Count 1)

Shortly after the Defendant bought the Vessel, COVID hit. That mattered to his business because Palm Beach County had issued Emergency Order Number 1 on March 22, 2020, and its

¹ In maritime jargon, the term "M/V" designates a "motorized vessel."

² A "commercial vessel" can mean any commercial activity including taking on paying passengers for hire, with the USCG splitting that classification into vessels taking (1) six or fewer passengers or (2) more than six passengers.

Amendment on the following day (collectively, the “Emergency Order,” attached as **Attachment A**), which held that venues used for launching vessels were closed.

Undeterred, the Defendant brought out a set of paying passengers for his scuba charter on March 28, 2020. On March 28, three events put the Defendant on notice that his Vessel had significant mechanical issues, particularly with the Vessel’s propulsion system.³ The first came with an early dive, where a passenger (“J.H.”) was instructed by the Defendant that it was safe to approach the Vessel’s rear, where scuba passengers enter and exit the boat and where the propellers are also located. While holding onto the platform, J.H. felt herself being pulled toward the port side propeller; J.H. pushed away from the Vessel in response to avoid being sucked into the propeller, but her spear gun got sucked into instead and was shot back at her by the engaged propeller, causing a large bruise on her leg. At this point she discussed the issue with the Defendant, with the Defendant insisting that the Vessel’s engine was in neutral while J.H. told him that the port propeller was engaged.

During a second dive that day, the Vessel lost the ability to go into reverse through the captain’s use of the Vessel controls, which resulted in the divers needing to swim to the boat. As J.H. did so, she again saw the propeller engaging while the engine was supposed to be in neutral. This time, J.H. messaged the Defendant about the issue on Facebook messenger, writing “swimming up to the boat after second dive I was watching the props. Port side is engaging and releasing, engaging and releasing. Starboard side was still.” McCabe responded, “Port side was the one with the short. Shouldn’t do it now,” and then, “Picking you up for dive 2 the port side was off,” to which J.H. responded, “It was engaging.”

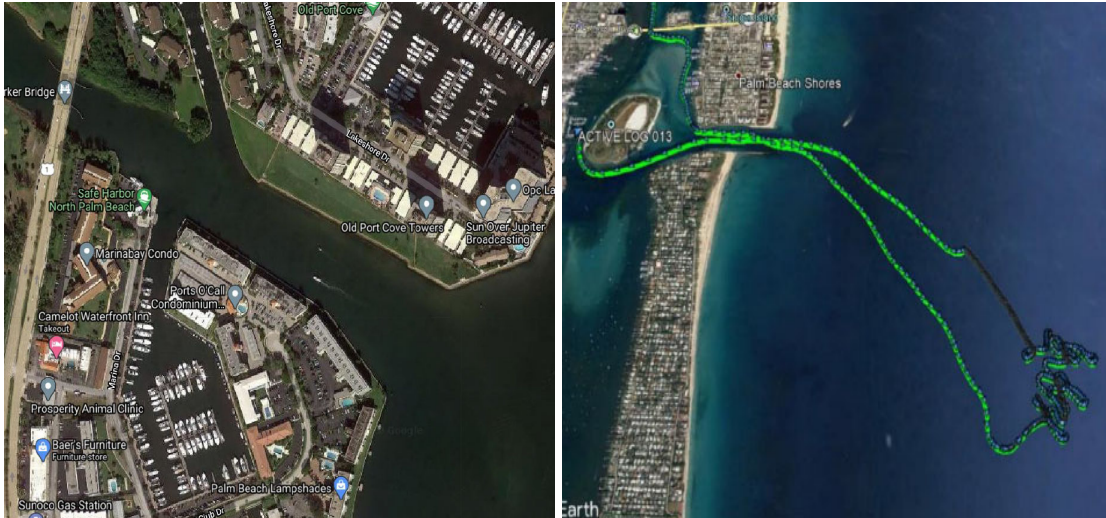
³ While it is possible that the mechanical issues existed when the Defendant purchased the Vessel, the issues were likely a result of modifications the Defendant had made to the system. The phrase “propulsion system” refers to the entire mechanical system used to propel the vessel, including the throttle, the engine, the transmission, the shafts, and ultimately the propellers.

Finally, at the end of the March 28 outing, the Defendant needed to refuel the Vessel and radioed to the local dockmaster requesting that a North Palm Beach Police vessel move from a specific refueling slip. The Defendant requested that specific slip because of the issues with the Vessel's propulsion system, which led to limited maneuverability that left him only able to maneuver into the slip where the police vessel was located. As the Defendant approached the fuel dock, though, the police vessel remained in place, which meant the Defendant couldn't pull in like he wanted. As a result, the Defendant passed the fuel dock and began approaching the US1 bridge/overpass. The Defendant had his crew prepare for an allision⁴ with the bridge—which, suffice to say, is not something boat captains are looking to intentionally do. The Defendant made a wide turn in the channel and avoided the bridge allision but grounded the vessel on the south side of the channel in the process. After the grounding a mechanic swam out to the boat, made several adjustments, and the Defendant maneuvered back to the dock. The Defendant did not report this grounding, or any of the mechanical propulsion issues that occurred on March 28, to the USCG as required.

Despite the many mechanical issues, the Defendant took a group out the following day, on March 29, 2020. That day, the paying scuba passengers included the victim, M.C.G.F., and her husband, S.F. The couple, along with others, went out for their first dive that day at approximately 8:05am. The Garmin and Furuno GPS data⁵ from the boat tells the story from there. The general trajectory of the voyage was to leave Safe Harbor North Palm Beach Marina and to travel about 2.5 miles offshore to the dive site:

⁴ An "allision" is when a moving vessel strikes a stationary object.

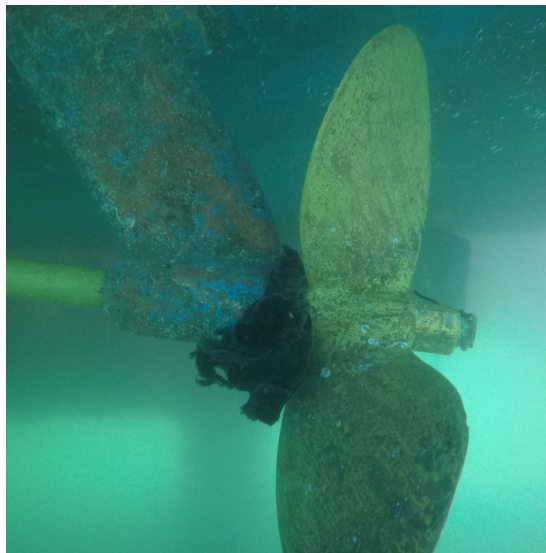
⁵ The Government will be calling an expert witness to testify about this Garmin and Furuno data.



The first dive that day began a few minutes after 9am, as evidenced by the Vessel slowing down as it reached the dive site. After deploying the divers, the Vessel moved northward at slow speeds. Then, at 9:44am, the Defendant steered the Vessel to the west before making a counterclockwise loop indicative of reaching his divers, and then came to a near stop. After the near stop, and still at 9:44am, the Vessel then made several slow-speed maneuvers at the location before again coming to a stop. After this stop, the Vessel crawled north for 26 minutes, covering .6 miles during that time, before heading back to the marina with M.C.G.F.'s lifeless body.



That one minute—9:44am—was the critical moment: the victim M.C.G.F. and her husband S.F. had surfaced near the boat, the Defendant put the Vessel in neutral and gave the OK sign to approach, and that's when things went wrong. Instead of M.C.G.F. making it onto the boat like usual, she was instead sucked underneath the boat by the activated, unguarded propeller, which then inflicted several severe chop wounds in her shin region, nearly cutting both legs off, while grabbing hold of her wetsuit and holding her under until she drowned. A photo of the unguarded propeller with M.C.G.F.'s wetsuit still entangled in it was taken right after the incident:



When M.C.G.F. was sucked under, her husband S.F. alerted everyone to what was happening and tried to help her along with others. He tried to get her wetsuit untangled from the propeller but couldn't; he tried to swiftly cut her wetsuit back with a knife, but it wasn't enough. A crew member jumped in as S.F. tried to get a knife but couldn't set M.C.G.F. free. By the time they pulled her out of the water, she was unresponsive, and the impossibly deep wounds in her legs were not even bleeding. She was dead.

The Defendant departed for the marina at around 10:13am, and M.C.G.F. was pronounced dead upon first examination. The cause of her death was ruled to be drowning, with the deep chop wounds she sustained exacerbating her condition. Florida Fish and Wildlife

Conservation Commission and the USCG, both of whom were unaware of the March 28 malfunctions at the time, arrived on scene and began an investigation. The agencies photographed the Vessel and examined it but not impounding it because the Defendant lived on the Vessel and they did not want to take his home away. And while the agencies wanted the Defendant and his crew members to take drug tests immediately, it turned out to be impossible because the Defendant had not registered himself or his crew members for drug testing like passenger vessels were supposed to. From there, law enforcement continued to investigate. On April 9, the USCG Captain of the Port, Miami, barred the Defendant from further operation of the Vessel, having determined that “operation of your vessel with passengers for hire represents a significant unsafe condition and environmental threat to the port.”

C. The Defendant’s Paycheck Protection Program Fraud. (Counts 3-5)

After M.C.G.F.’s death, the Defendant stopped operating the Vessel and, necessarily, his Florida Scuba Charters, Inc. business as well. In fact, the Defendant sold the Vessel in November 2020. Indeed, by March 31 the Defendant was text messaging a USCG officer that his “business [was] shut down, and no income.” Yet that did not stop the Defendant from capitalizing on the CARES Act once Paycheck Protection Program (“PPP”) loans became available. Indeed, just four days after the Defendant texted that his business was “shut down,” he forwarded a marina employee a blank PPP loan application and then had him scan and email a handwritten one completed by the Defendant himself. In that April 3 handwritten copy, the Defendant recorded a \$7,300 monthly payroll so that he could get a \$18,250 loan. When he actually applied the following month through Celtic Bank, his monthly payroll had increased to \$7,500, for a loan amount of \$18,750. Then, on February 2, 2021, the Defendant applied for and received his second PPP loan, this one for even more money, \$20,285.

But things didn't end there. The Defendant formally dissolved Florida Scuba on May 13, 2021, only to apply for loan forgiveness on his first PPP loan through Cross River Bank the very next day. The loan forgiveness application the Defendant submitted was riddled with falsehoods, including that he had five employees at the time, that he spent every nickel of the loan on payroll, and that he'd complied with the spending rules for PPP loans. The Defendant then did the same thing for the second PPP loan in August 2021, again claiming five employees despite Florida Scuba being dissolved, again claiming that he spent every nickel of the loan on payroll, and again claiming that he'd complied with the spending rules for PPP loans.

II. LEGAL STANDARD

FRE 404 generally prohibits the use of so-called “propensity” evidence to show that a person possesses a particular character trait or committed an act that shows that trait “to prove that on a particular occasion the person acted in accordance with the character.” FRE 404(a)(1) & (b)(1); *see United States v. Ellisor*, 522 F.3d 1255, 1267 (11th Cir. 2008). Rule 404(b) more specifically pertains to “other acts,” with “other” limiting the Rule to acts outside the scope of the instant offense. *See Ellisor*, 522 F.3d at 1267. As a result, a court must first determine whether FRE 404(b) applies at by deciding whether the evidence is “intrinsic,” or within the scope of this case and not subject to that analysis, or “extrinsic,” or outside the scope of this case and thus subject to FRE 404(b). *See United States v. Church*, 955 F.2d 688, 700 (11th Cir. 1992) (“because the evidence is intrinsic, not extrinsic, we do not engage in a Rule 404(b) analysis”).

Evidence is “intrinsic”—and therefore outside 404(b)’s scope—when it has any of three qualities. First, evidence is intrinsic if it is “an uncharged offense which arose out of the same transaction or series of transactions as the charged offense.” *United States v. Edouard*, 485 F.3d 1324, 1344 (11th Cir. 2007) (quotations omitted). This category includes offenses committed in

furtherance of the charged conduct but not charged in the indictment. *See, e.g., United States v. Joseph*, 978 F.3d 1251, 1263 (11th Cir. 2020) (admitting evidence of identity theft that furthered securing a stash house). Second, evidence is intrinsic if it is “necessary to complete the story of the crime.” *Edouard*, 485 F.3d at 1344 (quotations omitted). To this end, evidence that is “not part of the crime charged but [that] pertain[s] to the chain of events explaining the context, motive, and set-up of the crime[] is properly admitted if linked in time and circumstances with the charged crime.” *Id.* (quotations omitted). Finally, evidence is intrinsic if it is “inextricably intertwined with the evidence regarding the charged offense.” *Edouard*, 485 F.3d at 1344 (quotations omitted). This type of intrinsic evidence includes acts that “‘form[] an integral and natural part of an account of the crime,’” *id.* (quoting *United States v. McLean*, 138 F.3d 1398, 1403 (11th Cir. 1998)), or a natural part “of the witness’s accounts of the circumstances surrounding the offenses for which the defendant was indicted,” *United States v. Foster*, 889 F.2d 1049, 1053 (11th Cir. 1989).

Yet even “extrinsic” evidence—evidence that lies outside the scope of the charged crimes—is often admissible. *United States v. Jernigan*, 341 F.3d 1273, 1280 (11th Cir. 2003). Indeed, FRE 404(b) is a rule “of inclusion[,] which allows [extrinsic] evidence unless it tends to prove *only* criminal propensity.” *Ellisor*, 522 F.3d at 1267 (emphasis added). While FRE 404(b) prohibits other acts to show that a defendant acted in accordance with that prior act, it permits evidence that “prov[es] motive, opportunity, intent, preparation, knowledge, identity, absence of mistake, or lack of accident.” FRE 404(b)(2). For an act “to be admissible under Rule 404(b), (1) it must be relevant to an issue other than defendant’s character; (2) there must be sufficient proof to enable a jury to find by a preponderance of the evidence that the defendant committed the act(s) in question; and (3) the probative value of the evidence cannot be substantially outweighed

by undue prejudice, and the evidence must satisfy Rule 403.” *Edouard*, 485 F.3d at 1344.

Like with any other type of evidence, both intrinsic and extrinsic 404(b) evidence must pass muster under FRE 401 for relevance and FRE 403 for undue prejudice. *See, e.g., United States v. Perpall*, 856 F. App’x 796, 799–800 (11th Cir. 2021). As to relevance, the evidence must simply have “any tendency to make a fact more or less probable than it would be without the evidence” and be “of consequence to determining the action.” FRE 401. Once evidence is deemed relevant, it must pass FRE 403’s balancing test. On that front, finding probative value to be outweighed by its prejudicial effect “is an extraordinary remedy which the district court should invoke sparingly, and the balance should be struck in favor of admissibility,” *United States v. Nerey*, 877 F.3d 956, 975 (11th Cir. 2017) (citation omitted), while “maximizing [the evidence’s] probative value and minimizing its undue prejudicial impact,” *United States v. Tinoco*, 304 F.3d 1088, 1120 (11th Cir. 2002). “To determine whether the evidence is more probative than prejudicial, a district court must engage in a common sense assessment of all the circumstances ..., including prosecutorial need, overall similarity between the extrinsic act and the charged offense, as well as temporal remoteness.” *United States v. Brown*, 587 F.3d 1082, 1091 (11th Cir. 2009) (cleaned up). Courts should further consider whether a limiting instruction was given, *see, e.g., United States v. Calderon*, 127 F.3d 1314, 1333 (11th Cir. 1997), whether “the district court was careful to preclude the admission of certain especially prejudicial aspects of [the defendant’s] prior convictions,” *Jernigan*, 341 F.3d at 1282, and “whether the prior convictions revealed heinous acts.” *Perpall*, 856 F. App’x at 800 (citing *United States v. Williams*, 816 F.2d 1527, 1532 (11th Cir. 1987)).

III. ARGUMENT

The Defendant's negligence on March 29 is the central fact of this case: it's why M.C.G.F. was killed, it's why Florida Scuba shut down at the end of March 2020, and it's what ultimately led the Defendant to file for PPP loans to buoy his finances afterward. As it happens, the Defendant's negligence that day covers a lot of ground, from (1) his ignoring sure signs of the real danger his malfunctioning propeller presented and failing to warn his passengers of the same, to (2) his failure to report the malfunctions from the day before or his running aground to the USCG, to (3) his failure to obey the Emergency Order in departing with his passengers in the first place, to (4) his failure to enroll in a drug testing program or have his crewmembers and himself perform a post-casualty drug test as required. The result of all of this was an April 9 order preventing him from operating the Vessel for hire, which in turn led to the shuttering of Florida Scuba and the Defendant's financial need—which were his motives for the PPP fraud he then committed. To prove that case, the Government respectfully submits that the Court should permit it to present the following admissible, relevant evidence at trial.

A. The Three Events that Occurred on March 28 are Intrinsic Evidence Tending to Show the Defendant's Negligence.

To start, this Court should admit evidence of the Vessel's malfunctions from the day before M.C.G.F.'s death because the malfunctions are necessary to complete the crime's story and are powerful evidence of the Defendant's negligence on March 29. This case centers around the malfunctioning of a vessel's propulsion system, which resulted in the Vessel's propeller killing M.C.G.F. A key aspect of the case will be showing that the Defendant knew or should have known about the malfunctioning propulsion system because it proves his negligence in operating that day and in failing to warn his passengers of the danger. In that way, the story of this crime necessarily starts the day before M.C.G.F.'s death, when three things happened that

put the Defendant on notice: (1) J.H. was injured by the propeller, (2) J.H. later saw the propeller again malfunctioning and messaged the Defendant about it, and (3) the Defendant nearly allided with a bridge and ultimately grounded the Vessel due to its malfunctioning propulsion system.

This Court should admit evidence of these three events because they tend to show that the Defendant breached his duty of care on March 29 in bringing M.C.G.F. and her co-passengers out on the Vessel and that he failed to warn them of the danger. That crucial purpose is why courts have long recognized that prior incidents are “admi[ssible] for the purpose of showing notice ... of the unusual danger and the existence of a dangerous condition” in negligence actions. *Young v. Illinois C. G. R. Co.*, 618 F.2d 332, 339 (5th Cir. 1980) (quotations omitted); *see also Stoler v. Penn Central Transportation Co.*, 583 F.2d 896 898 (6th Cir. 1978) (cited in *Young*).⁶ That same principle holds in the seaman’s manslaughter context, where courts have similarly recognized that prior events are necessary to tell the negligence story. *See also United States v. Alvarez*, 809 F. App’x 562, 564 (11th Cir. 2020) (“But before we get to the terrible incident on April 1, we pause to discuss three events leading up to that fateful day....); *United States v. O’Keefe*, 426 F.3d 274, 276 (5th Cir. 2005) (During the trial, evidence showed that O’Keefe admitted to using cocaine three to four days before the accident.”). Both the negligent nature of the conduct and its role in the story thus render it relevant and admissible.

B. The Defendant Violating the Emergency Order, Failing to Report the Vessel’s Mechanical Failures and Running Aground, and Failing to Enroll in a Drug Testing Program are Each Prove His Negligence on March 29.

Beyond the Defendant ignoring sure signs of the Vessel’s malfunctioning propulsion system the prior day, he was also negligent in three other ways on March 29 that involved his

⁶ The Supreme Court has held railroad cases to inform maritime tort cases. *See, e.g., Kernan v. American Dredging Co.*, 355 U.S. 426, 439 (1958) (“The deceased seaman here was in a position perfectly analogous to that of the railroad workers allowed recovery ...”).

disregarding USCG and local regulations: first, he violated the Emergency Order by bringing passengers out on the Vessel; second, he failed to report the Vessel's mechanical failure and running aground from the day prior, as required under 46 C.F.R. § 4:05-1; and third, he failed to enroll in a drug testing program as required under the rules. This Court should admit each as direct evidence of his negligence that day, which is an element of the seaman's manslaughter charge,⁷ as well as circumstantial evidence tending to show his negligence as to the failure to warn and report described in the prior section.

This Court admitting this evidence in both respects is not only correct on its own terms but also tracks the appellate law evaluating seaman's manslaughter prosecutions. In *United States v. O'Keefe*, for example, the defendant had recklessly driven a tugboat in a manner that led to an accident and capsizing that killed the victim, and in proving that up the prosecution introduced evidence of two forms of negligence that related to the accident: (1) the defendant's cocaine use that day and (2) the fact that the defendant had the victim on the tugboat when she wasn't authorized to be on it. 426 F.3d at 276. Both these additional forms of negligent conduct led to the victim's death and were probative of both the *O'Keefe* defendant's broader negligence. The same types of evidence were involved in *Alvarez*, where the defendant's drug use was again an issue along with his operating without a license. *See Alvarez*, 809 F. App'x at 564. Indeed, the Supreme Court has long observed regarding negligence at sea that "the legal duties placed on the stevedore and the vessel's justifiable expectations that those duties will be performed are relevant in determining whether the shipowner has breached its duty." *Scindia Steam Navigation Co. v. De Los Santos*, 451 U.S. 156, 176 (1981), and each of these three types of negligence are

⁷ More specifically, this conduct qualifies as both "negligent" conduct in the Defendant's capacity as a captain or operator of the Vessel as well as a "violation of law" in his capacity as the owner of the Vessel. *See* 18 U.S.C. § 1115.

similarly relevant here.

To start, the Court should admit the Defendant's having violated the Emergency Order because it was a negligent act and it was a reason M.C.G.F. was on the Vessel on March 29 in the first place. Had M.C.G.F.'s death been the type of injury that the Emergency Order was created to prevent, the Defendant's violation would have been negligence *per se*. See *Reyes v. Vantage S.S. Co.*, 609 F.2d 140, 143 (5th Cir. 1980) ("The failure to follow *any* Coast Guard regulation which is a *cause* of an injury establishes negligence *per se*."); see also *Marshall v. Isthmian Lines, Inc.*, 334 F.2d 131, 134 (5th Cir. 1964) ("The law is well established that violation of a statute which is intended to protect the class of persons to which a plaintiff belongs against the risk of the type of harm which has in fact occurred is negligence in itself."). That said, the "determination that negligence per se does not here apply does not mean that the regulations have no relevance at all in a negligence action." *Isthmian Lines*, 334 F.2d at 136. Rather, the question goes back to "general principles" of whether "the defendant had a duty to protect the plaintiff from a particular injury" and whether "the defendant breached that duty." *Willis v. Royal Caribbean Cruises, LTD*, 77 F.4th 1332, 1136-37 (11th Cir. 2023). In *O'Keefe*, for example, the prosecution admitted evidence of the defendant's having had the victim on board without authorization to show the defendant's negligence in having her aboard even though there were other reasons for the vessel ultimately capsizing. See 426 F.3d at 276. So too here, where the Defendant's disregard of the Emergency Order resulted in M.C.G.F. being out there in the first place to ultimately be killed that day. In this way, the evidence of his Emergency Order violation is itself a negligent act that led to M.C.G.F.'s death, is necessary to fully tell the story of what happened here, and further demonstrates the Defendant's broader negligence in that it shows his disregard for rules and safety that day. Any one of these reasons would be cause

enough for this Court to admit this Emergency Order violation, and the Court should accordingly permit the Government to elicit testimony about it.

The same logic shows why this Court should admit the second regulatory violation: the Defendant's not having reported the mechanical failure and running aground from the day prior, as required under 46 C.F.R. § 4:05-1. As a USCG officer will testify at trial, the Defendant may have been prohibited from operating the Vessel on March 29 altogether had he reported the grounding or mechanical failures of the prior day to the USCG as required; but at the very least, though, the report would have resulted in an investigation and supervisory process likely would have resulted in the propulsion system being inspected and fixed. In that way, the Defendant's failure to report the incidents is a negligent act that led to M.C.G.F. being placed in danger and that ultimately led to her death.

The Defendant's third regulatory violation is not causally related to M.C.G.F.'s death in the same way as the prior two on its own terms, but it still shows the Defendant's negligence on March 29 by failing to have himself or his crew members enrolled in drug testing programs, as required under 46 C.F.R. §§ 4.06-5 and 16.230(b). Drug use is a theme of seaman's manslaughter cases, *see O'Keefe*, 426 F.3d at 276 (cocaine); *Alvarez*, 809 F. App'x at 566 (cocaine), but here the Defendant was not enrolled in a drug testing program at all. Courts have approved of admitting evidence relating to drug testing even where the court found that the drug use at issue did not cause the tort. *See Brunet v. United Gas Pipeline Co.*, 15 F.3d 500, 505 (5th Cir. 1994) (concerning prior instances of drug and alcohol use as well as the results of a drug test two days post-accident). In this respect, the Defendant's failure to comply with drug testing regulations lies squarely within the scope of negligent conduct that is admissible to show that he violated a duty to his passengers on March 29 in the same way that the *O'Keefe* and *Alvarez*

defendants violated a duty by actually taking drugs. For that reason, this Court should admit the Defendant's violation of the drug testing requirements just like it should the other forms of negligent conduct.

C. The Captain of the Port Ordering the Defendant to Cease Operations Tends to Show His Negligence and His Lies about Florida Scuba Operating Thereafter.

Next, this Court should admit that the Captain of the Port issued an order in the days after M.C.G.F.'s death, attached as **Attachment B**, that required the Defendant to cease any for-hire Vessel operations immediately because it is relevant in two respects. First, this evidence is admissible because it is necessary to complete the story and tends to show that the Defendant was negligent on March 29, reflecting that the USCG took action to address the situation. *See Alvarez*, 809 F. App'x at 566 ("After the incident, a USCG inspector responded to Monument Island along with other law enforcement. There, the inspector wrote Alvarez yet another citation for operating a paid charter without a USCG captain's license."); *see also United States v. Livoti*, 756 F. App'x 841, 850 (11th Cir. 2018) (admitting evidence of SEC proceedings relating to scheme because "[t]he very reason for [the defendant]'s trial was to determine whether Livoti was part of that scheme."). In that way, the order is relevant to complete the story of the Defendant's negligent conduct. In addition, the order is powerful circumstantial evidence tending to prove the wire fraud charges relating to the Defendant's PPP fraud. The main question that will confront the jury in determining the Defendant's false statements relating to the PPP fraud will relate to whether Florida Scuba was legitimately operating during the period covered by his PPP loans. The death of M.C.G.F. on March 29 and its fallout—in particular, this very order preventing the Defendant from operating—is essential evidence for proving that fact. In that way, the order is relevant to proving that the Defendant engaged in the fraud that he is accused of, and this Court should admit it for that purpose.

D. The Defendant's Vessel Inspection Report from the Year Before the Instant Offense is Permissible 404(b) Evidence Because It Tends to Prove His Knowledge of Safety Standards and an Absence of Mistake or Accident in Violating Them.

Alongside the foregoing inextricably intertwined evidence, this Court should also admit the Defendant's vessel inspection report from the prior year under FRE 404(b)⁸ because it tends to prove his knowledge of the safety expectations that attend owning and captaining a vessel and his absence of mistake or accident in violating them. The evidence the Government would introduce on this front consists of an April 2019 report, which was authored by Chief Warrant Officer ("CWO") Sean Goodman⁹ and is attached as **Attachment C**, documenting deficiencies to the Defendant's prior vessel. Specifically, CWO Goodman documented four deficiencies to the Defendant's prior vessel, each of which affected the vessel's safety and three of which affected areas of the vessel that were relevant to the death of M.C.G.F. First, the Defendant's prior vessel had a corroded flying bridge deck that rendered the vessel unsafe and which required temporary repairs followed by permanent repairs made at dry dock. Second, the Defendant's prior vessel had embarkation stations—the areas where passengers get on and off the vessel, which is where M.C.G.F. was killed—that had no railing installed on them as required. Third, the Defendant maintained life jackets on the prior vessel that failed to comply with USCG regulations, requiring that they be sealed and have reflective tape applied to them. And fourth, the Defendant's prior vessel had noncompliant bilge alarms, which are another safety feature.

This Court should admit these reprimands under FRE 404(b) as admissible other acts evidence because they tend to show knowledge and absence of accident or mistake on the Defendant's part in operating his vessel negligently on March 29, 2020. The Defendant's

⁸ The Government gave notice of its intent to introduce this evidence to the defense on December 13, 2024. *See* DE 25.

⁹ CWO Goodman will testify at trial regardless of whether this evidence is admitted because he has personal knowledge relating to the March 29 incident.

negligent management of the Vessel that day lies at the heart of the seaman’s manslaughter charge here.¹⁰ By pleading not guilty, the defendant is necessarily arguing that he was not negligent and that he operated the Vessel that day in accordance with the rules and regulations of seafaring. The Government should be permitted to meet that defense by showing that the Defendant’s mismanagement of vessels within the year before this incident puts the lie to that defense—that this defendant had disregarded vessel safety to the extent that he failed a vessel inspection less than a year before M.C.G.F.’s death, particularly considering the failures implicated. *See United States v. Shortman*, No. 97-10054, 1997 U.S. App. LEXIS 27052, at *3-4 (9th Cir. Sept. 26, 1997) (affirming admission drunk driving citation occurring eight months after drunk driving-related involuntary manslaughter in Indian country); *see also Alvarez*, 809 F. App’x at 564 (“Despite having no formal training in operating such a large vessel, Alvarez served as charter captain on the Miami Vice at least forty times between October 2017 and the date of the accident.”). For that reason, this Court should permit the Government to elicit evidence about the Defendant’s 2019 vessel inspection.¹¹

E. The State of Florida’s Not Prosecuting the Defendant is Irrelevant and Inadmissible.

Finally, and as the defense does not oppose, this Court should preclude the defense from eliciting testimony about the State of Florida not prosecuting this case. To be sure, the defense is free to argue that the time that elapsed between the incident itself in March 2020 and the indictment in August 2024 should make jurors skeptical—that is a classic form of defense. But

¹⁰ The Government will brief the precise contours of negligence in a trial brief, but for present purposes it suffices to say that *O’Keefe* and *Alvarez* hold that simple or “mere” negligence, as opposed to gross negligence, is the standard of proof in seaman’s manslaughter prosecutions. *See O’Keefe*, 426 F.3d at 278-79; *Alvarez*, 809 F. App’x at 567-69.

¹¹ If the Court were not to admit this evidence for the Government’s case-in-chief, the Government would seek to introduce it as rebuttal evidence should the Defendant choose to put on a case.

that argument does not make a prior declination to prosecute by a different sovereign relevant. To the contrary, “[t]he evidence of declinations of prosecution had very little probative value on the issue of intent,” *United States v. Lichenstein*, 610 F.2d 1272, 1277-78 (5th Cir.), *cert. denied*, 447 U.S. 907 (1980), and “whether a state prosecutor had declined to prosecute the case was irrelevant to whether he could be convicted on federal charges,” *Broomfield v. United States*, No. 20-13372, 2020 U.S. App. LEXIS 41649, at *4 (11th Cir. Dec. 29, 2020) (denying 2255 relief). Indeed, the States often decline to prosecute cases for reasons that have nothing to do with the strength of a case when it’s indicted by the federal government, which is why the evidence has not just little probative value but also can prejudice the jury by confusing the issues or improperly affecting the weight they assign the evidence they see at trial. *See United States v. Hamdan*, 901 F.3d 351, 354 & 358 (7th Cir. 2018) (affirming preclusion of state declining to prosecute); *United States v. Chavis*, 772 F.2d 100, 108 (5th Cir. 1985) (affirming where district court precluded reference to declinations to prosecute by the United States). For these reasons, this Court should preclude the defense from referencing any other sovereign’s decision not to prosecute this case.

IV. CONCLUSION

For the foregoing reasons, the United States respectfully requests that the Court permit the Government to (1) present evidence about three events occurring the day before the instant offense that gave the Defendant notice of the propeller issue that caused M.C.G.F.’s death; (2) present evidence about the Defendant negligently violating a local ordinance preventing vessels like his from taking out paying passengers on March 29, 2020; (3) present evidence about the Defendant negligently failing to enroll in a narcotics testing program until after the outing that led to the victim’s death on March 29; (4) present evidence about the Defendant negligently

failing to report the Vessel's mechanical failure or its running aground on March 28 as required by regulation; (5) present evidence about the Captain of the Port barring the Defendant from operating the Vessel on April 9, 2020; (6) present evidence about the Defendant's failure of a safety inspection less than a year before the March 29 incident, which tends to show his knowledge of the rules and an absence of mistake or accident in refitting this Vessel himself; while also ruling (7) that the defense may *not* refer to the State of Florida not prosecuting the Defendant for the incident.

Respectfully submitted,

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Date: December 30, 2024

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CERTIFICATE OF CONFERENCE

I HEREBY CERTIFY that on December 16-17 & 30, 2024, I conferred with Calisha Francis, counsel for the Defendant, who indicated that the defense opposes this motion.

/s/ Zachary A. Keller
ZACHARY A. KELLER
Assistant United States Attorney

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on December 30, 2024, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF.

/s/ Zachary A. Keller
ZACHARY A. KELLER
Assistant United States Attorney