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 REPLY BRIEF FOR ITS MOTION *IN LIMINE*

The United States of America respectfully submits the following Reply to the Defendant's Response to the Government's Motion *in Limine* ("Response"), DE 41:

In replying to the Response, let's start here: that in the defense's first five perfunctory oppositions, it does not cite a *single* case to support its positions, much less explain an evidentiary basis for excluding the proposed evidence. Rather, the defense argues for each based solely on red herrings and non sequiturs, offering purported rebuttal evidence but nothing about the *admissibility* or *relevance* of the proposed evidence at all. As to the March 28 incidents that notified the Defendant of the danger of operating his vessel, the defense merely argues whether the evidence will be enough to prove the Government's case, not whether it should be admitted. Next, as to the Palm Beach County Emergency Order, the defense again does not argue against the admissibility or relevance of the evidence but instead merely presents evidence he claims to rebut his knowingly violating the order. Then, as to the Defendant's failure to have enrolled in a drug testing program, the Defendant addresses a different rule than the one requiring him to enroll in a testing program, ignoring the one that does so while acknowledging that such evidence is relevant if "there [wa]s a legal requirement for him to do so." Resp. at 7. For the

Response's fourth objection, to the Defendant's failure to report his grounding the vessel to avoid colliding with a bridge, the defense again speaks not to the admissibility or relevance of the evidence but instead only offers this Court a theory—about which the defense is free to cross examine and argue in closing—that the Defendant running his new vessel aground on March 28 was a voluntary action that did not require reporting in the first place, while ignoring the mechanical failures aspect of the regulation. The Defendant's fifth objection, this time to the April 9 Captain of the Port ("COTP") Order to show that the Defendant's business was shut down, completes this category of nonresponsive responses by again challenging neither the admissibility nor relevance of the evidence but instead offering only claims that (he submits) will overcome it by presenting rebuttal evidence.

That leaves just the defense's sixth objection, where the Defendant does cite some law but nevertheless fails to explain why this Court should exclude the prior failed safety inspection. On this final front the defense begins as with the others, arguing not against the evidence itself but instead submitting that the Government would be other evidence to prove his knowledge and absence of mistake. From there, the Defendant cites the correct Rule 404(b) framework only to misapply it, claiming that (1) the evidence does not show knowledge of the rules when it's a formal inspection to ensure compliance with them, (2) there is not enough evidence to prove his failed inspection when the Government will present paperwork and a witness who conducted the inspection, and (3) the evidence is unduly prejudicial when there is nothing about the inspection that would tend to prejudice a jury against the Defendant beyond the bare fact of his being on notice about his obligations. For those reasons, this Court should dispose of this sixth objection just as it does with the other five, thereby granting the Government's Motion in all respects.

1. The Defendant's Objection to the Three March 28 Events Has No Grounding in Law or Logic and is Against the Interests of Justice.

To start, the defense fails to challenge the relevance or admissibility of the March 28 incidents, citing not a single case or even a legal theory about why they should not be admitted. Instead, the Response offers only the defense theory they will apparently use to try to rebut it at trial: claiming a lack of adequate investigation based on the notion that a "mechanical report" of the engine or propulsion system would be required to establish that the systems were not working properly, citing not a single case to support its position for a simple reason: there is none. *See* Resp. at 4-5. In this way, the Defendant does not respond to the Government's legal position about the admissibility or relevance of this evidence at all, and the Response fails to present a colorable opposition as a result. Rather, the defense merely argues that its own preferred type of evidence is required, when the Eleventh Circuit has long made clear that "no distinction is to be made between the weight given to either direct or circumstantial evidence" so long as "reasonable inferences … support the conviction." *United States v. Gonzalez*, 719 F.2d 1516, 1521 (11th Cir. 1983). *see also United States v. Soto*, 591 F.2d 1091, 1099-1100 (5th Cir. 1979) ("It is clear that connection of physical evidence with a defendant may be shown by circumstantial evidence. Furthermore, proof of the connection goes to the weight of the physical evidence rather than its admissibility." (citations omitted)).[1]

So while the defense is free to raise those issues at trial to the jury, they have nothing to

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[1] *See also, e.g., United States v. Sarmiento-Perez*, 724 F.2d 898, 900 (11th Cir. 1984) ("Proof of the connection of physical evidence with a defendant goes to the weight of the evidence rather than its admissibility."); *United States v. Clifford*, 704 F.2d 86, 91 (3d Cir. 1983) ("Effective rebuttal by the defense attorney will lessen any danger that the jurors might assign improper weight to their comparisons. Any evidentiary arguments, however, are properly addressed to the weight and not to the admissibility of the cursive correspondence."); *Bob Willow Motors, Inc. v. General Motors Corp.*, 872 F.2d 788, 798 (7th Cir. 1989) (holding that while rebuttal evidence "obviously weakened Willow's theory of damages, it did not preclude Strachota's testimony altogether. Rather, it goes to weight, not admissibility.").

do with whether this Court should preclude the Government from presenting evidence tending to prove its theory of the case: that through these many mechanical failures, the Defendant was on notice that there was a problem that could cause danger to his passengers, with that danger ultimately leading to M.C.G.F.'s death. Because the defense fails to offer any valid objection, this Court should admit the Government's critically important evidence of the March 28 incidents that put the Defendant on notice of the danger his vessel presented.

2. The Response's Arguments about the Palm Beach County Emergency Order Ignore the Relevance and Admissibly of the Evidence.

The Defendant's second objection, to the Palm Beach County Emergency Order, is a variation on the first: instead of claiming a lack of evidence for the Defendant violating the Emergency Order, the Response claims that the Defendant will be able to rebut it. This Court should reject the Defendant's one-paragraph argument on this front for two reasons:

First, the Response again disputes not whether the evidence is relevant or admissible but instead the weight that the jury should ultimately assign it. *See Gonzalez*, 719 F.2d at 1521; *Soto*, 591 F.2d at 1099-1100. The Response objection says nothing about whether the Defendant violating the Emergency Order tends to show his negligent conduct but instead focuses on the evidence the defense claims it will present to rebut it. *See* Resp. at 5-6. In that way, his argument speaks only to the weight of the evidence, not to whether it is relevant and admissible, and that is a question for the jury to decide in weighing the Government's evidence of the Defendant's negligent conduct on March 29. For that reason alone, this Court should reject the Defendant's second objection just like the first.

But that's not all. Beyond the argument's failure to attack the relevance of the evidence, the Defendant's claims also don't make sense on their own terms. The Defendant states in his Response that he "was permitted to continue fishing as long as he delivered essential items to residence in the area," Resp. at 6, but that does not explain why he would be allowed to take out scuba divers on paid passenger outings. In that way, the Defendant's supposed excuse fails to cast his violation of the Emergency Order as anything less than the negligent conduct that it was, which is an independent basis for this Court to find that his argument does not hold water and that the proposed evidence should be admitted as a result.

3. The Defendant's Objection to the Defendant's Failure to Enroll in a Drug Program Ignores the Relevant Regulation and Does Not Address Relevance or Admissibility.

Third, as to the Defendant's failure to register in a drug testing program before taking out paying passengers, the Defendant's objection again fails for two separate reasons. First, the Defendant fails to address whether the evidence is relevant and admissible, even agreeing that such evidence is relevant if "there [wa]s a legal requirement for him to do so." Resp. at 7. In that way, the Response fails to address whether the evidence should be admitted at trial and fails on that ground alone. But second, the Defendant's argument again fails even on its own terms because it selectively quotes from the Code of Federal Regulations, failing to cite the full regulations the Government cited to in the Motion. Specifically, the Government cited to 46 C.F.R. §§ 4.06-5 and 16.230(b), *see* Mot. at 15, but the defense only quotes part of 4.06-05 when it's 16.230(b) that contains the drug testing program enrollment requirement—a fact that the Government outlined in its trial brief. *See* Resp. at 6-7; Trial Brief, DE 29 at 12-13. In this way, the Defendant's argument fails even taking its evidentiary argument at face value because it selectively quotes the regulations cited in the Motion and ignores the subparts that are germane to this issue. This Court should thus dispose of this third objection just as it does the rest.

4. The Defendant's Objection to Admitting the Defendant's Failure to Report His March 28 Running Aground and Propulsion Problems Again Fails to Address Relevance or Admissibility.

For the Defendant's failure to report his unintended grounding the day before M.C.G.F.'s death, the defense contests not the relevance or admissibility of his violation but instead whether the violation occurred at all. The defense's argument on this front appears to be "[t]he vessel did not experience an accidental grounding," Resp. at 8, presumably because (the defense would argue) the Defendant intentionally grounded his vessel to avoid colliding with a bridge. Of course, the Government's witnesses will testify, as the jurors' common sense will reinforce, that deciding to run a vessel aground to avoid colliding with a bridge qualifies as an "unintended grounding," and in that way we do not disagree about the facts but instead how to characterize them. That, of course, will be a question for the jury as they hear testimony about the Defendant's negligent conduct—and one that the defense will be able to cross examine the Government's witnesses and offer its own. Yet none of that impugns the relevance and admissibility of this evidence, speaking only to the weight that the defense believes should be assigned it. And beyond that, the defense fails to address the vessel's "loss of main propulsion, primary steering, or any associated component or control system" at all, which the Government explained to be another basis for introducing this failure to report evidence. *See* Mot. at 13 ("second, he failed to report the Vessel's mechanical failure and running aground from the day prior"). In this way, this Court should hold as with the other objections here that the defense has failed to show why this Court should preclude its admission, here because it not only fails to raise a colorable legal objection but also because, as with the drug testing program, the defense's Response does not even address the full scope of the proposed evidence.

5. The Defense's Objection to the COTP Order Fails to Attack Its Relevance or Admissibility.

As to the COTP Order, the defense again offers only one paragraph in opposition with no case law support. *See* Resp. at 8-9. In that paragraph, the defense makes one argument: that the COTP Order "did not effectively shut down the Defendant's business" because it "restricted the operation of the boat" but "did not terminate the business itself." Resp. at 9. This objection, however, amounts to claiming that the defense will offer evidence to meet the Government's evidence here that the Defendant's business was shut down. It does *not*, however, negate the fact that the COTP Order, which prohibited the Defendant from operating a vessel that he didn't sell until November 2020, tends to show that was not operating during the 2020 period upon which the Defendant premised his 2021 PPP loan application and is thus relevant evidence. *See Gonzalez*, 719 F.2d at 1521; *Soto*, 591 F.2d at 1099-1100. And while the Defendant now claims that he will present evidence to rebut that evidence, the Government should still be permitted to admit its evidence because the weight it should receive considering the defense's supposed evidence is an issue for the jury to decide, not for this Court's decision whether to admit the evidence or not. For those reasons, this Court should admit the COTP Order into evidence.

6. The Response Fails to Explain Why the Defendant's Prior Failed Inspection is Inadmissible.

The Defendant's final objection, to the Government's proposed Rule 404(b) evidence concerning his prior vessel inspection, finds the defense citing some case law but ultimately falling woefully short of mounting a colorable objection to the Government's proposed evidence. Indeed, the defense neither cites nor distinguishes the Government's examples of courts admitting similar evidence, *see* Mot. at 18; Resp. at 9-13, instead opting for a rote recitation of the basics of Rule 404(b) analysis before engaging in a conclusory argument as to the three showings that the Government must make for this Court to admit the proposed evidence.

Indeed, the defense points to the correct three requirements for admissible Rule 404(b) evidence: the other act must be relevant, there must be sufficient proof for the other act, and the other act must have probative value that is not substantially outweighed by its prejudicial effect. Resp. at 10; Mot. at 9-10 (citing *United States v. Edouard*, 485 F.3d 1324, 1344 (11th Cir. 2007)). But having laid the proper foundation, the Defendant fails to build anything that bears any weight, offering this Court only conclusory claims about relevance and required proof that do not stand up. As to the relevance analysis, the defense appears to agree that the "prior failed inspection[] ha[s] probative value as to the primary contested issue at trial—whether Defendant Sean McCabe was negligent in his operation" of the vessel, Resp. at 12-13, and thus concedes its relevance.[2] But even aside from his admitting the fact, the Defendant's failed inspection is undoubtably relevant because this case centers around the Defendant's knowledge of and adherence to regulations, both in his negligent operation of the vessel and in his falsely stating under penalty of perjury to the United States Coast Guard that the vessel was only to be used for recreational purposes. The Defendant's response to those will necessarily be negating his culpability as to his noncompliance with regulations (as to the manslaughter charged in Count One) and lying when purporting to comply with the regulations (as to the false statement charged in Count Two). For those reasons, this Court should find that the prior failed inspection is relevant to the Defendant's knowledge and absence of mistake in committing the crimes at issue in this case.

[2] Elsewhere, the Defendant submits the conclusory claim that "the evidence the Government is seeking to admit is not relevant to, and probative of, McCabe's knowledge of the marine and boating rules," Resp. at 12, but the Defendant fails entirely to explain why that's so.

As to proving up the violation, the Defendant claims that "there is insufficient evidence for the jury to determine that the Defendant engaged in the other acts," Resp. at 12, but the Government will be introducing a certified copy of the failed inspection and will also have the person who conducted the inspection as a witness—evidence that is more than sufficient to meet the preponderance burden. *See, e.g., United States v. Barrington*, 648 F.3d 1178, 1187 (11th Cir. 2011) ("Jacquette's uncorroborated testimony was sufficient, since he had personal knowledge of Barrington's conduct."); *United States v. Bowe*, 221 F.3d 1183, 1192 (11th Cir. 2000) ("In this circuit, the uncorroborated word of an accomplice such as Aldereguia provides a sufficient basis for concluding that the defendant committed extrinsic acts."); The defense does not explain why that would fail to be enough and cites no law to support its conclusory claim.

Finally, as to whether the prejudice outweighs the probative value, it first bears noting that Rule 404(b) is a rule "of inclusion[,] which allows [extrinsic] evidence unless it tends to prove *only* criminal propensity." *United States v. Ellisor*, 522 F.3d 1255, 1267 (emphasis added), and that excluding evidence for this reason "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). Moreover, in conducting its analysis, this 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). Both of those foundational legal principles point in the same direction: that the evidence in question is nowhere close to being prejudicial in a way that would warrant its preclusion. As already noted, this case's manslaughter and false statement charges involve the Defendant's knowing—and his having the intent to circumvent—the industry standards governing the commercial venture he was conducting. In that way, showing that he had previously been cited for violating industry standards is probative of both his knowing those standards to exist and his absence of mistake in violating them.

In his Response, the Defendant does nothing to contest this probative value aside from make conclusory statements about the more general lack of relevance and claiming that the entire case will turn upon the testimony of one witness. *See* Resp. at 13. As with the Defendant's other five objections, though, these claims about the strength of the Government's broader case is beside the point in its deciding whether this specific evidence is relevant and admissible. And when the defense specifically addresses prejudice, it offers nothing but conclusory claims that the evidence is "offered to show his propensity to commit the crime charged," Resp. at 13, ignoring entirely the permissible uses the Government cited in the Motion, *see* Mot. at 17-18. Yet the truth remains that the defense here will necessarily have to contest the Defendant's violation of rules at trial, likely either that he actually abided them (for Count One) or because (as to Count Two) he didn't understand them and thus unknowingly violated them. That's so because the Government's case inherently involves proving the opposite to be true: that the Defendant was breaking the rules not through some accident but because the charged conduct was what he decided to do, disregarding the possible consequences of (as to Count One) killing someone and (as to Count Two) committing perjury. Those showings warrant this Court admitting the evidence to show the Defendant's awareness of the rule and prior disregard of them as evidence of his knowledge and absence of mistake with a limiting instruction, and the Defendant has done nothing to show the opposite in his Response. This Court should therefore admit the evidence over defense objection.

CONCLUSION

For these reasons, this Court should grant the Government's Motion in all respects.

Respectfully submitted,

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Date: January 22, 2025

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on January 22, 2025, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF.

/s/ Zachary A. Keller
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Assistant United States Attorney