

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
WEST PALM BEACH DIVISION
CASE NO. 24-cr-80103-AMC-1

UNITED STATES OF AMERICA, Fort Pierce, Florida

Plaintiff, January 24, 2025

vs. 9:40 a.m. - 11:17 a.m.

DUSTIN SEAN MCCABE,

Defendant. Pages 1 to 88

TRANSCRIPT OF MOTIONS
BEFORE THE HONORABLE AILEEN M. CANNON
UNITED STATES DISTRICT JUDGE

APPEARANCES:

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STENOGRAPHICALLY REPORTED BY:

LAURA E. MELTON, RMR, CRR, FPR
Official Court Reporter to the
Honorable Aileen M. Cannon
United States District Court
Fort Pierce, Florida

1 (Call to the Order of the Court.)

2 THE COURT: Good morning. Please call the case. You
3 may be seated, unless you're addressing the Court.

4 COURTROOM DEPUTY: United States of America v. Dustin
5 Sean McCabe, Case Number 24-cr-80103.

6 will the parties please make your appearance, starting
7 with the United States.

8 MR. KELLER: Good morning, Your Honor. Zachary Keller
9 and Tanner Stiehl on behalf of the United States.

10 THE COURT: Good morning.

11 MR. O'SULLIVAN: Good morning, Your Honor. May it
12 please the Court. Terrence O'Sullivan and Calisha Francis for
13 the defense, along with Mr. McCabe, who is present at the
14 defense counsel's table.

15 THE COURT: Good morning to all of you. And good
16 morning, Mr. McCabe.

17 You may all be seated again, unless you are addressing
18 the Court.

19 This is a motion hearing on two pending motions. There
20 is a motion to sever filed by the defense, which, correct me if
21 I'm wrong, Mr. O'Sullivan, seeks to sever Counts 1 and 2 from 3
22 and 5. Is that correct?

23 MR. O'SULLIVAN: Yes, ma'am, that's correct.

24 THE COURT: Okay. That motion has been fully briefed.
25 There is also a government motion in limine which seeks to

1 introduce various pieces of evidence under Federal Rule of
2 Evidence 404(b), and then also makes a final argument related
3 to irrelevant evidence. And I think there is no dispute on
4 that issue, but we will get to it. That's, again, a motion
5 filed by the government which too is fully briefed.

6 I have reviewed these motions and pertinent authorities
7 cited therein, so I'm prepared to hear argument.

8 Let's start first with the motion to sever.

9 Mr. O'Sullivan.

10 MR. O'SULLIVAN: Thank you, Your Honor.

11 Again, may it please the Court.

12 Judge, looking at the indictment, it's a five-count
13 indictment, and we are looking to sever Counts 1 and 2 from
14 Count 3 and 5.

15 THE COURT: Before you proceed --

16 MR. O'SULLIVAN: Yes, ma'am.

17 THE COURT: As you know, our court reporter is taking
18 down every word. So let's be mindful of that and try to speak
19 slowly for her. Thank you.

20 MR. O'SULLIVAN: Sorry, Your Honor.

21 Basically, the crux of our argument is that there is no
22 rational relationship between the negligence that occurred,
23 causing the unfortunate death of this young lady, and the
24 subsequent wire fraud or PPP loan fraud. The case law suggests
25 that this must be some type of common plan or scheme, which

1 it's not. The negligence, we would argue, was an accident.
2 It's something that happened on the open water, and it had
3 absolutely nothing to do with a financial transaction that
4 occurred well over a year down the road.

5 we would argue that the negligence could be described
6 as a general intent crime, whereas, the PPP loan and the wire
7 fraud would be specific intent crimes.

8 Furthermore, the dates of these incidents are far apart
9 in time; the elements of the crimes are completely and totally
10 different; and the victims are different. The government also
11 mentioned, as far as the interpretations of Rule 8 and Rule 14,
12 for a judicial economy and to not empanel extra jurors and take
13 up more time, that there is going to be an overlap of
14 witnesses.

15 Now, I don't know who the government is going to call
16 for each of the different charges, but, as far as I know, there
17 is 23 witnesses listed, and I can only see one witness that
18 would potentially be able to testify to both. The only
19 overlapping -- and I wouldn't even call it an element -- the
20 over -- the only overlapping part of the government's case
21 would be a witness with the initials of SB, who was on the boat
22 the day that the death occurred and who was also kind of
23 wrapped up in a conversation of getting a PPP loan.

24 So as far as the judicial economy argument that I
25 expect the government to make, we're only looking at one

1 witness, as far as I can tell, that would -- that would testify
2 to both Counts 1 through 2, and then separately through
3 Counts 3 through 5.

4 THE COURT: If we drill down on the chronology -- so
5 Count 1 references an alleged offense date of March 29, 2020 --
6 that's correct?

7 MR. O'SULLIVAN: Yes, ma'am.

8 THE COURT: And then Count 2 has a March 5, 2020, date.
9 So knowing that, can you walk me through just the chronology
10 for the fraud charges so that I can better understand any
11 temporal connection?

12 MR. O'SULLIVAN: Well, the fraud charges were more than
13 a year down the road. And they -- they involved completely
14 different elements and different victims and different
15 witnesses to prove up those charges. So the negligence --

16 THE COURT: Well, in the indictment, for example, I see
17 Count 1 again, "on or about March 29, 2020." And then when I
18 shift to the wire fraud counts, I see "in and around March 2020
19 the defendant caused the vessel to be modified so that its
20 charters could use the vessel for paid charters," with
21 additional allegations in March and then continuing forward
22 into April, with the submission of alleged false PPP loan
23 applications.

24 So would you agree that we don't really have a very
25 significant break in time?

1 MR. O'SULLIVAN: Well, the submission of the actual
2 loan came in February of 2021, which is 11 months after the
3 alleged negligence. The alleged negligence started, I would
4 imagine the government's going to argue, weeks prior to
5 the -- to the untimely death. But it ended on the date of the
6 death. That's when the negligence itself ended.

7 The electronic submission of the false -- alleged false
8 PPP loan was submitted in February of '21, and also May of '21,
9 and August of '21. So we're talking between 11 and about 16 or
10 17 months subsequent.

11 So we would argue that there is a temporal difference
12 as far as time goes, but, more importantly, this was not a
13 common plan or scheme. One has nothing to do with the other.

14 THE COURT: And I have heard you say that. But, of
15 course, the government responded that they do very much relate
16 to one another because the unfortunate passing of the victim
17 formed the impetus for the PPP fraud. So what do you have to
18 say about that?

19 MR. O'SULLIVAN: I would take issue with that, Judge.
20 Obviously, the PPP loan is a unique thing that happened in our
21 history; it happened because of COVID. We don't know whether
22 or not Mr. McCabe would have applied for a loan whether or not
23 this death occurred or not. Lots of businesses, I would argue,
24 tens of thousands of businesses throughout the country applied
25 for PPP loans, and they did not all do it just because their

1 business was failing. A lot of people just wanted extra cash
2 for their payroll. A lot of employees were not working during
3 that time, and -- and small business owners were kind of
4 feeling the squeeze. So the government has argued in their
5 reply brief that the negligence caused the PPP loan, but we
6 don't know that and we can never know that.

7 Mr. McCabe, like other small business owners, may have
8 applied for that loan anyway to meet payroll and to -- and to
9 pay necessary business expenses.

10 So I just think it's a stretch to say that the
11 negligence -- you know, because of that untimely passing, that
12 caused the PPP loan applications. I think there could have
13 been a multitude of reasons why someone would apply for a PPP
14 loan; whether their business was slowing down, whether it was
15 maintaining the status quo, or whether it was excelling.

16 THE COURT: Do you -- this is kind of a more broad
17 question. But do you agree that, in considering this motion to
18 sever, I'm permitted to evaluate not only the indictment but
19 also a government proffer about evidence?

20 MR. O'SULLIVAN: Yes, I would agree with that.

21 THE COURT: Okay. So if that's the case, then I think
22 the government relies on evidence that they believe does draw a
23 connection between the alleged negligence and the PPP fraud.
24 So although, as a theoretical matter, businesses around the
25 country were, of course, seeking federal assistance, given the

1 pandemic in this particular case -- and I will hear from the
2 government in a moment. Is there not evidence that indicates
3 following -- following the incident on the vessel the financial
4 condition of the business was such that an infusion of cash was
5 necessary to keep it afloat; and, therefore, that really does
6 draw that connection that is necessary to avoid severance?

7 MR. O'SULLIVAN: I think that's a fair statement,
8 Your Honor. I think that's part of it. But I think what we
9 have to look at, and what, respectfully, I'm asking the Court
10 to look at, is there a rational relationship beyond just that
11 possibility, between the negligence and the wire fraud?

12 THE COURT: Uh-huh.

13 MR. O'SULLIVAN: But, more importantly, how is the jury
14 going to interpret that? And that's what our concern is, is
15 that the jury is going to look at Counts 1 and 2, negligence,
16 and while it could be the government's job to make a defendant
17 look bad, that's fine in a criminal trial, it's going to unduly
18 prejudice a jury to hear that the negligent and very sad death
19 of this woman, and especially the inflammatory way in which she
20 passed, you know, that's going to inflame the jurors. I don't
21 want a jury to then think that somehow Mr. McCabe used that
22 death to profit.

23 THE COURT: Uh-huh.

24 MR. O'SULLIVAN: I think that that's -- that is my main
25 concern, is that a jury is going to say, well, this lady died

1 and now you're trying to profit off of it. And I think that's
2 going to unduly prejudice them, and that's why we're asking for
3 two separate juries to evaluate each set of facts and each set
4 of circumstances separately.

5 THE COURT: All right. What's your best authority to
6 support severance in this context? The government has cited, I
7 think, several cases where motions to sever have been denied
8 even where, perhaps, at first glance the charges seemed
9 distinct.

10 MR. O'SULLIVAN: Judge, it would be on page 2 of our
11 motion, United States v. Davis. Let me get that cite just so
12 the record is clear. That's 773 F.2d 1180; it's
13 Eleventh Circuit, 1985.

14 Also, Rule 8 and Rule 14, I believe, give the Court
15 wide discretion --

16 THE COURT: Uh-huh.

17 MR. O'SULLIVAN: -- to make that determination based
18 upon -- upon the case law.

19 we would also rely upon United States v. Weaver,
20 905 F.2d, 1466.

21 THE COURT: Can you engage a little bit more with the
22 facts in Davis and Weaver?

23 MR. O'SULLIVAN: If I may have one moment, Your Honor.

24 THE COURT: Okay.

25 MR. O'SULLIVAN: In Davis there was a gun charge and a

1 cocaine charge.

2 THE COURT: Uh-huh.

3 MR. O'SULLIVAN: I would certainly agree that those
4 would not have to be severed, and I wouldn't ask for those to
5 be severed because in narcotics cases guns are often used as
6 part of the tools of the trade; they kind of go hand in hand.
7 However, that case does talk about Rule 8 and whether joinder
8 was -- was proper. In that case, you know, a co-conspirator
9 gave a gun to the other co-conspirator, which was used as part
10 of -- as part of their transaction. So those were closely
11 related. However, that case just does give the outline as to
12 what's not related.

13 Some of the case law that the government relied upon
14 are armed robberies with guns, which kind of have to go
15 together. It would be, I would say, improper to sever those
16 types of cases. The government also heavily relied on a
17 federal housing fraud case where I believe it was -- eight
18 different co-conspirators used the same agent. And those are
19 all intertwined pretty closely together, and I could see why a
20 Court would exercise its discretion and deny a motion to sever.
21 That makes perfect sense.

22 But these -- again, these have different elements,
23 different victims. They're far away in time. And I think,
24 more importantly, it would just unduly prejudice the jury. And
25 that's the crux of our argument, Your Honor.

1 THE COURT: Okay. Thank you.

2 who will be arguing for the United States?

3 MR. KELLER: Zachary Keller, Your Honor.

4 THE COURT: Thank you.

5 MR. KELLER: So I want to begin by highlighting -- and
6 this is something that we talk about in page -- on pages 8
7 through 10 of our motion -- or our response, and that you
8 talked about actually in engaging with Mr. O'Sullivan. That
9 the Eleventh Circuit routinely approves of cases where there
10 is, on the one hand, a component of violence to a type of
11 crime, and then there is fraudulent -- or that type of activity
12 that then happens afterward for some reason. You know,
13 sometimes -- and for the Mentor case, for example, that we
14 discussed, that's a case where someone killed someone in a
15 robbery and then took a mail key, I believe it was, from the
16 victim, and then used it later to commit fraud.

17 And the issue on appeal was, well, should these two
18 things have been treated completely separately in two
19 completely separate trials? Those facts are far more
20 prejudicial, far more challenging, I think, in that sense than
21 here. And the Eleventh Circuit said no. And that's because of
22 the fact that the Eleventh Circuit, like all other circuits,
23 reads Rule 8 and Rule 14 of the federal rules to favor, and
24 strongly favor, keeping trials together, both for reasons of
25 economy and just for reasons of making sure that we're able to

1 run our courts efficiently.

2 THE COURT: I mean, I'm aware of that general
3 proposition. Certainly, there are economies to be served and
4 efficiency. But can you just talk to me more about, really,
5 the connection between -- between the Counts 1 and 2 in this
6 case versus 3 and 5, and why it would -- it would factually
7 make sense to present the case to the jury in one overall
8 bucket?

9 MR. KELLER: Yes, Judge. And that was going to be the
10 next thing I spoke to was the chronology here. And I want to
11 clarify a couple of things from when Mr. O'Sullivan was
12 speaking.

13 And one thing that's worth noting right off the bat --
14 and I actually don't know that I made this clarification in our
15 response -- that specifically Count 4, which is the May 14th of
16 2021 count -- so what that relates to is, there were two
17 separate PPP loans here. And just to talk about the
18 chronology -- so we have the March 5th purchase of the vessel
19 and then the statement that was made about its recreational
20 use. There was MCGF, the victim's death on March 29th. And
21 then -- and I mentioned this in the response -- April 3rd is
22 when the defendant first engaged with someone at the marina to
23 say, Hey, I need you to print out this PPP loan application.
24 I'm going to fill it out.

25 He fills it out that day. He emails -- he has the

1 person email it to him.

2 A month later, so on -- in March of 2020 -- or May of
3 2020, rather, is when the defendant filed his first PPP loan.
4 I mean, I actually do think I make reference to that, now that
5 I think about it, in the recitation of the facts because it's a
6 month after that April application.

7 Let me just -- maybe I didn't make reference to it.
8 But a month later, in May of 2020, he files his first PPP loan
9 with the revenue amount that is slightly higher than this
10 April 3rd handwritten one that he submits. And then the
11 following year he applies for what's called loan forgiveness
12 for PPP loans. And as Your Honor is probably aware, the way it
13 worked was, you got your loan and then later you were able to
14 file to have it completely forgiven.

15 So in these PPP prosecutions, sometimes we charge the
16 initial wire, sometimes we charge the subsequent loan -- or
17 loan forgiveness application. I just want to make clear that
18 here we do have conduct in May of 2020 that is going to be
19 proving this wire fraud count of Count 4 directly because it's
20 the actual loan application that he gets.

21 And then after that, what you have is the defendant
22 sells his vessel in November of 2020. And he then has to --

23 THE COURT: Wait. I'm sorry. I was in 2021, at this
24 point, for Count 4 on the loan forgiveness. Are we going back
25 to 2020 now?

1 MR. KELLER: Yes. I'm sorry.

2 THE COURT: Okay.

3 MR. KELLER: I was at -- May 2020 was the first PPP
4 loan, and then in November he sells the vessel, and then the
5 following year is when he first submits a second PPP loan in
6 February. And then in May, he submits an application for a
7 forgiveness application for the first loan, and then in August
8 he submits a forgiveness application for the second loan.

9 THE COURT: Okay.

10 MR. KELLER: And one of the things to highlight, that I
11 just didn't include in that chronology, but that you had spoken
12 to Mr. O'Sullivan about, is the fact that shortly after the
13 killing, shortly after the March 29th death, Mr. McCabe is
14 speaking or texting two Coast Guard employees, saying, "After
15 this happened, I'm now out of money." And one thing that
16 Mr. O'Sullivan talked to you about, as he was making his
17 argument, is exactly the defense he is going to be using in
18 this case for the PPP. He is going to be saying this was
19 legitimate activity, this was a business operating, trying to
20 cover its expenses. And exactly the things that we have been
21 talking about here are what we're going to do to prove that
22 that wasn't true.

23 That's why it's so important that we're proving up all
24 of this activity that happened before relating to MCGF's death
25 because that is showing why his business went out of business,

1 and the same way that that April 9th Captain of the Port Order
2 in 2020, that is discussed in the motion, does.

3 So -- and, Your Honor, do you have any more questions
4 about the chronology?

5 THE COURT: Would there be any other means of showing
6 that the business was out of business without referencing the
7 death of the female victim?

8 MR. KELLER: The only evidence that doesn't reference
9 that would be the sale of the vessel in November. Of course,
10 our position and our explanation for why he sold the vessel is
11 because he was no longer allowed to operate it because of the
12 fact that he had done this; and that is from the Captain of the
13 Port order about the vessel. So even that one is still, like,
14 part -- part of the story of that is still the fact that he had
15 done this. But that is, kind of, a little more separate.
16 Beyond that --

17 THE COURT: What do you say, though, to the sort of --
18 that general gut instinct that maybe there is this -- this
19 danger that a jury hearing the facts on March 29th, followed
20 quickly by requests for government money to continue operating
21 what effectively was a terminated business would -- would
22 perceive Mr. McCabe as someone who is effectively profiting
23 from alleged negligence as to the death of an innocent
24 passenger?

25 MR. KELLER: So, Judge, my response to that is that

1 there is nothing unusual about that, that we try cases like
2 this all the time where there are multiple crimes. And this
3 danger that you're speaking to is always present. And we have
4 an effective and proven way that we deal with that, which the
5 Eleventh Circuit talks about time and again, which is the jury
6 instructions. That's why we have instructions that say you are
7 to consider evidence for one count solely to that count and
8 then another count solely to that count is because -- and,
9 again, with the Eleventh Circuit wanting these cases to be
10 tried as one case, we do that by having instructions in the
11 same way that, with 404(b) evidence, we will say we understand
12 that there is some type of issue here, which is why we have
13 instructions in the first place. So that's the first thing I
14 would say about that.

15 The second thing is that, you know, a lot of times it's
16 kind of the reverse. They think -- and what I mean by that is
17 the defense's argument is that once they see the manslaughter,
18 they're going to be prejudiced as to the fraud.

19 THE COURT: Uh-huh.

20 MR. KELLER: Whereas, usually it's the other way
21 around. Like, the fraud is -- or the manslaughter is causing
22 the prejudice about the -- or -- I'm sorry.

23 Let me make sure I articulated that correctly.

24 So I'm saying their argument is that the fraud is going
25 to prejudice the manslaughter. So, in other words, they're

1 going to see he tried to profit off of government stuff, and
2 it's going to make them think he was more likely to be
3 negligent, I suppose, is the argument.

4 THE COURT: I think perhaps it was more the other way
5 around; that the manslaughter was going to taint the jury into
6 convicting him on the fraud counts because they will think that
7 he is, you know, brazenly seeking money from the government,
8 despite his negligence on the manslaughter.

9 MR. KELLER: I think that's the more intuitive. I
10 think that's just from the way I was reading the defense's
11 motion, that it was the opposite --

12 THE COURT: Uh-huh.

13 MR. KELLER: -- that I was reading.

14 But to respond to your more intuitive one, first off, I
15 would say that those are exactly the arguments that are
16 addressed in all of those cases that I started out speaking to.
17 And that they have those exact answers, which is that,
18 number 1, we have the instructions and that, number 2, this is
19 how trials are wanted to be done by the Eleventh Circuit, by
20 the federal rules.

21 Also, I would just add, though, that when it comes to
22 this particular case, that -- and this is all the -- more than
23 these other cases, where, for example, with the robbery, Mentor
24 that I was talking about, you could very easily imagine two
25 separate trials that are completely separate about that. You

1 have the robbery, and then you have this fraud that happens
2 totally separate and apart.

3 Here it's different because of PPP. Because of the
4 fact that that type of fraud inherently involves the defendant
5 arguing that that business, Florida Scuba Charters, was
6 legitimate, was operating, was doing things in the normal
7 course. And our evidence against that is, on the one hand,
8 going to be what happened to the money? That he was buying a
9 PGA Club membership, that he was cashing it out on various,
10 you know, random expenses that were not payroll. But, on the
11 other hand, it's also going to be showing how that business was
12 no longer operating, which is that killing, which is what
13 happened after the killing, which is that he, number 1, sends
14 these texts saying "I'm out of money. The business is shut
15 down after this."

16 And then, number 2, the April 9th order from the
17 Captain of the Port of Miami saying because of this, because
18 this happened, we have found that your boat is no longer safe
19 to operate, that you're not allowed to do this anymore.

20 So it's really --

21 THE COURT: Can you point to me in your memorandum the
22 text messages, again, that you're talking about?

23 MR. KELLER: Yes, Judge. This is on page 3. I tried
24 to put them front and center because they are very important
25 evidence. And just as further context, what they're discussing

1 here is that Mr. McCabe had not enrolled in a drug testing
2 program before this happened. And one of the immediate
3 concerns of the Coast Guard was to get drug test results from
4 him and from his crew mates or his people on the vessel. And
5 this is an exchange that happens as they're discussing this.

6 THE COURT: So, factually in this case, what's your
7 strongest evidence of a connection between Counts 1 and 2 and 3
8 and 5? I take it, of course, these text messages you're
9 relying on. Is there anything else?

10 MR. KELLER: So we would point to these text messages
11 as well as the Captain of the Port order, which is something we
12 will discuss in the motion in limine which speaks to the
13 defendant's ability to operate that vessel. Those would be,
14 kind of, the two -- 1A, 1B, most important evidence,
15 after -- in the immediate aftermath of the killing. But we
16 would also submit that the fact of what happened, the fact of
17 how awful it was, the fact of how traumatizing it was, as
18 reflected in his -- is also evidence.

19 And I just want to note, as I say that, that
20 Mr. O'Sullivan said, you know, there is not -- there is not
21 going to be any direct -- he is not going to say, you know,
22 because of this, this happened. But we use circumstantial
23 evidence all the time. And all of this is circumstantially
24 proving that the defendant had this happen. He stopped
25 operating the business. He needed money. He was out of money,

1 as he said. And then he did the PPP loans to get some money.
2 And it's really that simple.

3 THE COURT: Can you speak to me about the
4 inefficiencies, as you say, that would be created by a
5 severance? The defense has said there really wouldn't be a
6 huge burden because the factual witnesses overlap to some
7 degree, but not to a great degree.

8 MR. KELLER: So I spoke in the motion about two
9 witnesses who -- whose testimony, in a very, kind of, direct
10 way, overlaps. The one in particular who is quite important is
11 SB. And the reason that she is so important is because on the
12 one hand, she will testify about the defendant -- and this
13 speaks to Count 2, as well as Count 1 -- that the defendant
14 bought this vessel; that he had told her that the vessel --
15 you know, that it was going to be used for scuba. She knew him
16 as a scuba charter person. So that wasn't surprising to her at
17 the time. She didn't know anything about what he was telling
18 the Coast Guard.

19 And then as this killing happened, she was someone who
20 was talking to and seeing what happened as it happened, in the
21 sense that Jennifer Hester, the day before, had had this
22 injury, and she had seen the injury, that she had engaged with
23 him about this. And then afterwards Mr. McCabe had spoken to
24 her about doing PPP loans. And she is going to testify, at
25 least, you know, from prior witness interviews, that the thing

1 that she found so curious about it is that she looked into it
2 and she was thinking to herself: How is it that he could
3 manage to get \$20,000 for a loan, given how small that business
4 was?

5 so this speaks directly to this issue of him making
6 these representations and then doing these loans and then
7 having them forgiven.

8 And the thing I want to add about her that we've
9 learned since we filed this response is that she lives in
10 Colorado right now. And she actually works on these, kind of,
11 dredge vessels. So getting her here is going to be a
12 challenge. We're actually kind of in the process of securing
13 flight arrangements and hotel for -- I have got our trial, kind
14 of, mapped out for myself because we've got several people that
15 we're flying in.

16 THE COURT: Uh-huh.

17 MR. KELLER: Approximately eight, I think probably more
18 than a half dozen people that we're flying in, and she's one of
19 them. And so that would -- that just kind of adds to the
20 burden here. Because we really would have to just straight
21 call her back from wherever she is, if we were to try this
22 twice.

23 So those are the two witnesses who have [sic] directly
24 overlapping. But she's kind of a special case in the sense
25 that she has these additional issues.

1 THE COURT: So it's SB. And then the other person?

2 MR. KELLER: Is -- I refer to him in the motion as JS.
3 He is an employee of the marina.

4 THE COURT: How many total witnesses do you have
5 planned at this time?

6 MR. KELLER: Judge, at this time -- and I have got,
7 kind of, a little -- I have actually got a draft witness
8 exhibit list, and I have got a, kind of, little chronology for
9 myself. We have about 30 witnesses.

10 THE COURT: And you're projecting how long? I think
11 you have indicated your estimate before, but remind me, please.

12 MR. KELLER: Now that I have mapped it out, I'm
13 thinking that if we begin on the 24th -- and we have one
14 particular witness availability issue which I filed a notice
15 about -- that my estimate is that we should be able to finish
16 by March 5th; although this may be a little ambitious, but I
17 think that we should be able to make it last that long.

18 THE COURT: Okay. Now, you've -- of course, you're
19 leaning heavily on the general notion that we keep cases
20 together that are indicted together -- counts together, rather,
21 and that there is a general presumption against severance. But
22 that rule, essentially, would be that there would be no room
23 for severance ever.

24 And so I guess your final opportunity to explain why,
25 in this particular case, severance wouldn't make sense.

1 MR. KELLER: Well, Judge, let me just say that -- to
2 respond to that about "severance would never be appropriate," I
3 think there is a case -- and I cite -- I talk about it in a
4 footnote because the defendant references it in his motion.
5 And that's Holloway, and that's on page 13 at the footnote 4.
6 That there is a great case and example where severance is
7 appropriate. Where what they had was a robbery spree, and then
8 afterwards the defendant -- there was an arrest warrant for him
9 because he has been charged with this. He is arrested. And he
10 has a gun and he is a convicted felon. And they didn't have a
11 gun recovered from the scene of these robberies, so they didn't
12 have, you know, felon in possession charges there.

13 And the Court said these don't have anything to do with
14 each other. This is a case of crime committed, arrest happens,
15 and these things are totally separate. And there is all this
16 prejudice from the fact that he is going to have to stipulate
17 to being a convicted felon. And this isn't right. This isn't
18 what should be happening.

19 So I just say that to clarify that it's not that
20 severance is never appropriate; it's that the Eleventh Circuit
21 and the other circuits lean heavily in favor of it. And,
22 really, because of that -- so, you know, our best argument is
23 that because they lean heavily in favor of it and because there
24 are all these inextricably intertwined aspects of this case,
25 going from the witnesses which is, you know, comparatively

1 minor compared to the other considerations, to just the fact
2 that -- and this is our big picture position -- is that this is
3 all one story. This is all one scheme. This is all one set of
4 actions that one informs the other in the same way that proving
5 the fact that the defendant did not intend to use the vessel
6 recreationally, like he claimed at the very beginning, is
7 proven false, by not just the Count 1 conduct, the
8 manslaughter, but also the fact that he was referring to this
9 as a business in his PPP loans.

10 And by the same token, each of these counts ends up
11 being inextricably intertwined as one story in that way. So
12 that's kind of the core of our argument.

13 THE COURT: Is it your position in general, I mean, to
14 simplify, that the manslaughter is relevant to the wire fraud
15 because he committed the wire fraud in order to keep the
16 business afloat after the negligent killing rendered the
17 business nonoperational?

18 MR. KELLER: So I would actually make a slightly
19 different argument, which is this: Let's say that we were
20 talking about three wire fraud counts where the defendant had,
21 for example, stolen someone's identity, and then had done,
22 you know, wires in order to generate money so that he could
23 just, like, keep himself afloat, keep his business going.
24 There you would have a much stronger case for severance because
25 those wires and those stealing the identities don't really have

1 any clear connection to the killing, unless we just wanted to
2 argue, and which we do here on one hand, that there was an
3 impetus for it; right? which is an acceptable form of
4 severance. But that would be a weaker claim than what we have
5 here.

6 The real key here is the fact that we're talking about
7 Paycheck Protection Program loans. That -- that when you're
8 talking about the PPP loans, you're inherently arguing, as the
9 defense did when they were speaking to you, that the defendant
10 was legitimately engaging in business. And because --

11 THE COURT: But what does the manslaughter have to do
12 with the PPP loans?

13 MR. KELLER: That the manslaughter is the evidence
14 showing that the business was not actually operating in the way
15 that he claims they are in the PPP loans. So the PPP loans, he
16 is saying this is a real business that is really operating and
17 here is my revenues --

18 THE COURT: But, in reality, it wasn't operating
19 because of the negligent killing, therefore, the business
20 stopped and he had to make money in order to keep it running?
21 Is it just a motive question? I'm really just trying to
22 distill the connection between Count 1 and 3 and 5.

23 MR. KELLER: Yes, Judge. And so it's not just a motive
24 issue.

25 So in the wire fraud for an identity theft, that would

1 be a pure motive issue which is really what I was getting at
2 there. Here it's substantive because part of the defense for a
3 PPP loan specifically is that his representations about the
4 business operating were true. And that's different than if he
5 were doing some other type of fraud. So because of that, the
6 manslaughter, the resulting order saying he is no longer
7 allowed to operate, him texting the Coast Guard saying, "After
8 this killing happened, I am shutting the business down," this
9 becomes direct evidence of not just motive, but also a fact
10 which is that this business was not operating, which is
11 something that is essential to our case in proving the PPP
12 loans were fraudulent.

13 THE COURT: And it wasn't operating because of the
14 negligent killing? Is that the government's case?

15 MR. KELLER: Yes, Judge.

16 THE COURT: Okay. All right. Let me hear any rebuttal
17 argument from defense counsel, after which we will turn to the
18 motion in limine.

19 MR. O'SULLIVAN: Judge, I just -- I keep coming back to
20 whether this was a common plan or scheme. That language, to
21 me, and I think outlined in Davis, is you have to wake up one
22 day and say, "These are the criminal acts that I'm going to
23 commit and this is what -- the result I want." For example, if
24 Mr. McCabe said, "I'm going to sink my boat today," and then
25 start doing insurance fraud or PPP loans, that's a common plan

1 or scheme.

2 The negligence -- and the defense is going to be it was
3 an accident. That it was not a scheme or a plan, that it was
4 an accident. I think one has nothing to do with the other.

5 And as far as these text messages go, where we're
6 talking about his need for money, there is other reasons why.
7 And that was actually in these text messages; that he is going
8 through a divorce. So there is other reasons why, you know,
9 money became an issue.

10 But, again, I think that the standard that the Court
11 has to look at and the case law cites in our motion is: was
12 this a common plan or scheme? And I just don't see how you can
13 tie an accident, which is the negligence, to then say that
14 somehow he knew in the future he was going to commit wire fraud
15 because of an accident --

16 THE COURT: well, I don't know if the law requires that
17 intent to have been formed at the very beginning, to then
18 commit, you know, numerous crimes over the course of two years.
19 There can still be a common plan that builds off of itself
20 based on whatever facts materialize. And I think that's the
21 government's representation, is that after the negligent
22 killing, the business was in such dire straits, it clearly
23 wasn't operating, and yet he represented to the federal
24 government that it was. And so that that's that factual
25 substantive connection that disfavors severance.

1 what do you say about that?

2 MR. O'SULLIVAN: I think that's a fair statement, but I
3 still think that the Court has, you know, wide latitude to
4 determine, you know, A, is there prejudice to the jury? But,
5 again, you know, certainly one built off the other. And as the
6 government said, I would agree with it, it is all part of a
7 story. But this story needs to be told in two different places
8 because he did not wake up in March of 2020 saying, "I'm going
9 to commit these five -- these five crimes that are alleged in
10 the indictment."

11 The manslaughter was an accident. I think that's no
12 surprise that's going to be a big chunk of our defense. And
13 even though the fraud may have been built on that -- and I use
14 the word "may" -- there is other reasons such as, as shown on
15 page 3 of the government's response, the divorce and, you know,
16 the financial cost to him. So it wasn't just the business
17 shutting down.

18 THE COURT: Okay.

19 MR. O'SULLIVAN: And also, just to clarify -- I'm not
20 sure how important this is -- but he never sold the boat. It
21 was repossessed. I'm not sure if that would sway the Court in
22 any way or how much weight the Court would give it, but I just
23 wanted to clarify that fact.

24 THE COURT: Okay. Thank you.

25 All right. I will take the motion under advisement.

1 It would help, nevertheless, factually to entertain the motion
2 in limine so I can delve deeper into the various facts.

3 So, with that, let me hear from the government on its
4 motion in limine, starting with Item Number 1, which, as
5 described in the motion at docket entry 28, concerns evidence
6 about three events occurring on March 28th of 2020, which was
7 the day before the instant offense that's charged in Count 1,
8 that gave the defendant notice of the propeller issue that
9 proximately caused MCGF's death.

10 MR. KELLER: Yes, Judge.

11 And as I begin, I just want to note -- and just to
12 clarify something from the very beginning of this hearing. I
13 think you had mentioned that these were 404(b). I just want to
14 clarify that 1 through 5 are not 404(b); that our argument is
15 that they're inextricably intertwined.

16 THE COURT: Okay.

17 MR. KELLER: And then six -- the sixth one is the one
18 that we do call 404(b) evidence.

19 THE COURT: Okay. Thank you for the clarification.
20 And that is correct.

21 MR. KELLER: And I know that this charge -- you're
22 probably the only judge in this circuit who has briefed this
23 issue because you were one of the attorneys on Alvarez. So --
24 I don't know if you remember that, but -- so I would think that
25 you remember some of the stuff about seaman's manslaughter.

1 That what we're here for and what this case kind of comes down
2 to, as far as the seaman's manslaughter is considered -- or is
3 concerned, is the question of negligence. The question of the
4 things that put the defendant on notice, that there was a
5 problem with this boat, that it presented a danger to the
6 people that got on it on March 29th, and that the defendant
7 didn't take the steps necessary to make it safe. And that's
8 really what this case, as far as the manslaughter, is about.

9 And what these first four things --

10 THE COURT: In Alvarez was there ever a 404(b)
11 challenge or an inextricably intertwined challenge? Or was it
12 just a threshold claim concerning the statute itself and its
13 mens rea component?

14 MR. KELLER: There was nothing on appeal about whether
15 the evidence, such as the defendant's prior cocaine use, his
16 operating it without a license should come in. That was not
17 part of the appeal.

18 The appeal was really about --

19 THE COURT: But in the district court, do you know
20 whether that issue was challenged? It does seem like the
21 evidence was admitted and then used to support the sentence.
22 And so my question is, was there ever an actual dispute in the
23 district court, though, as to whether that evidence should have
24 come in in the first place?

25 MR. KELLER: I do not know the answer to that

1 question --

2 THE COURT: Okay.

3 MR. KELLER: -- right now, Judge. I can get that
4 answer for you and file something, if you would like.

5 THE COURT: We will see if that's necessary.

6 Please continue.

7 MR. KELLER: Sure.

8 So speaking to the first of these -- and this is really
9 some of the most critical evidence in this case as to the
10 manslaughter -- really, the most critical evidence -- which is
11 showing that the defendant was on notice about the back of this
12 vessel, the propeller specifically, having mechanical issues
13 the day before that presented a danger to his passengers.

14 And, Judge, one thing about this case that's really a
15 key framing fact, a thing to understand about scuba as opposed
16 to other types of ventures is that scuba inherently involves
17 going near the propeller; that you have to get on and off the
18 boat from the back because of the fact that you have all of
19 this heavy equipment.

20 And the reason that's important is because when you're
21 a captain of a vessel that's doing scuba, you know that the
22 passengers are going to be going near that propeller.

23 So this is different than something like a fishing
24 expedition. Let's say someone had fallen off a fishing boat
25 and the propeller malfunctions. That would be a very different

1 type of case than this one because what the defendant and what
2 the person who is the captain should be aware of is different.
3 And that fact, that framework, is really what informs why this
4 Court should be permitting us to present evidence from the day
5 before of what happened that day that showed him that there was
6 a danger on the back of this boat, and, namely, the propeller.

7 Number 1, that Jennifer Hester, who is one of the
8 passengers that day, was getting back on the boat as
9 instructed. She suddenly felt herself being sucked under the
10 boat. Her -- she had a spear gun with her. The spear gun gets
11 sucked into the propeller, shot back at her, strikes her in the
12 leg. And there is photographic evidence of the injury that
13 resulted; that she has a large bruise on the inside part of her
14 thigh.

15 Then later in the day, she sees the propeller again
16 engaging, and she sends the defendant a message -- or a
17 Facebook Messenger that same day, saying, "Hey, your propeller
18 is engaging when it's not supposed to, when it's supposed to be
19 in neutral." And this should be -- for any reasonable captain
20 exercising reasonable diligence, it would send out high alerts.
21 This is an extremely dangerous condition, but not for this
22 defendant.

23 Instead, he kept operating the vessel, and he drove it
24 or steered it toward the marina. And this is the third event
25 that's described in the first -- for the first March 28th

1 event -- to put it to dock at the end of a day of scubaing.
2 when he did so, he was unable to park at the very end of the
3 pier. And that was a problem for him because he couldn't
4 really steer this vessel because it was broken, because it was
5 malfunctioning.

6 So what he did was, he ended up having to steer away
7 from the dock, so as not to collide with it. He kept going
8 down the Palm Beach waterway. He is heading towards the bridge
9 which he almost collided with, but, instead, he ran his vessel
10 aground to avoid it. These are all things that are putting him
11 on notice that day that he has a problem, that this vessel is
12 not working properly, that his propeller is malfunctioning.

13 But unlike any other reasonable person who would
14 actually report it like he was supposed to, who would do
15 something about it, instead, this defendant brought out another
16 separate group of passengers the next day, 9:00 in the morning.
17 And this is when the killing happens. This is when MCGF is
18 killed by being sucked under the boat, just like had happened
19 to Jennifer Hester the day before, but Ms. -- but the victim
20 did not have the benefit of a spear gun to protect -- to shield
21 her by, you know, essentially getting sucked into the
22 propeller; instead, she got sucked down. And her wetsuit got
23 entangled into it. Her legs got essentially chopped off right
24 in front of her husband, and she was held down until she
25 drowned. That's really what the heart of this case is about.

1 And those sets of facts from those -- in that two-day span is,
2 really, about -- is really about 24 hours from the morning of
3 March 28th until about 10:00 on March 29th, why -- at the heart
4 of why this defendant should have known there was a problem.

5 So our position is that those March 28th events are
6 inextricably intertwined here. They're a part of the story
7 that's necessary for the jury to understand why the defendant
8 was negligent that day when he did what he did; when he kept
9 having that boat out and he had these passengers go near this
10 propeller that he knew full well was dangerous.

11 THE COURT: How do you intend, if permitted, to
12 introduce these three events? If you could just clarify the
13 evidentiary path.

14 MR. KELLER: Sure.

15 Our very first witness we're going to call -- and this
16 speaks to the notice that we filed about witness
17 availability -- is going to be Ms. Hester who is going to
18 testify about both the initial spear gun incident, as well
19 as -- we have the text message or the Facebook Messenger
20 message that we sent -- that she sent him. She's going to
21 testify about that as well.

22 And then we have another witness from the harbor. So
23 he works there. He was, I believe, in charge of the harbor.
24 And he saw the defendant attempting to tie up to the pier --
25 I'm not conversant in the jargon yet; I will be by next

1 month -- and then have to keep going and ultimately run his
2 vessel aground.

3 So we're basically going to be getting this in through
4 those two witnesses, along with a third witness who will
5 testify in between them, who will testify about Ms. Hester's
6 incidents; that he was there when she had this shot back at
7 her; that Mr. McCabe, who had just got this vessel, did not
8 appear to know exactly how to manage it, and the like.

9 So it's not going to be, you know, ten witnesses for
10 this. It's going to be two to three.

11 THE COURT: Okay. So the date of the alleged killing
12 is March 29, and these three events took place on March 28; is
13 that correct?

14 MR. KELLER: Yes, Judge. And, again, it was really
15 within a 24-hour period.

16 THE COURT: Are you making an alternative 404(b)
17 argument for these, or are you proceeding solely on the
18 inextricably intertwined path?

19 MR. KELLER: So we would argue that these are
20 permissible 404(b) because they're showing knowledge of the
21 fact that there is this danger, that there is no mistake here,
22 et cetera. But, really, our argument is that this is -- the
23 core argument and the correct argument is that this is all part
24 of the story that, to prove negligence, you have to show that
25 there was some type of breach of duty. To do that, you have to

1 be able to go back to what would be the triggering event. And,
2 really, here, for the purposes of that notice of him being --
3 knowing that there was a problem, those triggering events were,
4 again, the day before.

5 THE COURT: Okay. We're going to stay organized here.
6 So we're going to hear now opposition argument on this one
7 topic.

8 Counsel.

9 MS. FRANCIS: Yes. Thank you, Your Honor.

10 Your Honor, if I may ask, is it possible that I may sit
11 for my argument? The heel of my shoe has broken and I am
12 wobbly.

13 THE COURT: That's fine, yes.

14 MS. FRANCIS: Thank you, Judge.

15 And this morning, Judge, we are arguing that the
16 evidence should be excluded as irrelevant under Rule 401. We
17 believe that this is being offered to show the defendant's
18 prior bad acts or his propensity to commit crime. The evidence
19 that the government is seeking to admit is not probative of any
20 issue. It is truly just being used for the sole purpose of
21 demonstrating the defendant's poor character, and, therefore,
22 it should be excluded.

23 So, Judge, going back to the request, number 1. The
24 government is alleging here that the defendant was alerted to
25 significant mechanical issues with this vessel. Particularly,

1 Your Honor, they are harping on the propulsion system through
2 three incidents. Throughout their motion, Judge, they are
3 asserting that these incidents happened because of the
4 propulsion system. And I would like to make sure that that's
5 on the record.

6 Judge, the first incident was where JH reported that
7 she was feeling pulled towards the port side of the propeller.

8 THE COURT: You mean -- do you mean Ms. Hester?

9 MS. FRANCIS: Yes. JH would be referring to
10 Ms. Jennifer Hester, Judge.

11 THE COURT: Okay.

12 MS. FRANCIS: And this is despite the defendant
13 claiming that the engine was in neutral. I believe that JH,
14 Jennifer Hester, did insist that the propeller was engaged,
15 just her testimony, Judge. The second incident is where the
16 government is claiming that the vessel reportedly lost ability
17 to reverse. Again, Ms. Hester in that report observed that the
18 port propeller was engaging. She notified the defendant via
19 Facebook. They have that message, and that's what they're
20 seeking to admit.

21 The final instant, Your Honor, the defendant allegedly
22 encountered restricted mobility. Again, the government is
23 alleging that this is because of a propulsion issue. Although
24 the defendant did manage to successfully avoid a bridge, the
25 vessel did end up being grounded in the channel. After making

1 mechanical adjustments, however, the defendant was able to
2 navigate back to the dock.

3 So, Judge, it would be an error to allow the government
4 to admit this evidence, referring to the propulsion system
5 being the causation. And that is what they state emphatically
6 on March 28th. They will be unable to prove proximate
7 causation.

8 Judge, the government's theory that the jury will be
9 able to easily find proximate causation based on defendant's
10 negligent acts, referring to him still taking the paying
11 passengers out on the 28th, although he experienced propulsion
12 issues on the 28th.

13 Judge, there is no evidence -- they are not seeking to
14 admit anything, no mechanical report, no investigation, no
15 review regarding the boat's engine or the boat's propulsion
16 system. There is nothing that conclusively identifies this
17 being the cause of the vessel's mechanical failures following
18 the incident on March 28th.

19 THE COURT: Counsel, a lot of what you're saying sounds
20 like proper argument for cross-examination, or questioning and
21 then closing. But you would agree the government has to
22 establish negligence. They have to show that, by his
23 misconduct, negligence, and inattention to his duties, this
24 woman, MCGF, lost her life. And so wouldn't it be directly
25 relevant to establishing such negligence that this defendant,

1 one day before, was put on notice that his propeller had caused
2 another passenger to get sucked through temporarily, and that
3 the boat was unable to dock properly and then ultimately ran
4 aground?

5 It's just hard to see how that evidence isn't directly
6 relevant to the essential elements of Count 1.

7 MS. FRANCIS: Yes, Your Honor, that is a key issue
8 here. The government failed to adequately inspect the boat,
9 test the engine, or evaluate the propulsion system. That has
10 led to the conclusion that links that March 28th incident to it
11 being a propulsion issue, and that is what we essentially have
12 to defend against.

13 The government is relying exclusively on testimony from
14 Jen Hester. Jen Hester did not inspect the boat. Jen Hester
15 did not prepare a report. There is nothing that states that it
16 was a propulsion system issue.

17 And so, Judge, that is the issue here. We would have
18 to defend against a propulsion issue when we know for a fact
19 that it was a battery issue.

20 As well, Your Honor, the boat is no longer here. We
21 are not able to inspect it now. So it's almost impossible for
22 us to fight this charge that it's a propulsion issue. And that
23 is what the government is advancing.

24 So, Your Honor, we would -- we would have to say that
25 there would have to be other evidence that the government would

1 be willing to offer, not just these three incidents that
2 they're claiming created a propulsion issue. There is nothing,
3 no report, nothing emphatically that states that this issue was
4 a propulsion issue.

5 If they do have evidence that states that it was a
6 propulsion issue, we would have no objection to it being
7 offered into evidence. But the government offering into
8 evidence these three incidents that happened on the 28th -- and
9 it is based solely on testimony. The government did not
10 inspect the boat, did not start the boat. And they have no
11 record or no report saying that it was a propulsion issue, but
12 yet, Judge, we would have to defend against that --

13 THE COURT: Okay.

14 MS. FRANCIS: -- without having the boat here and able
15 to be inspected.

16 THE COURT: All right. It seems to me that these three
17 events are part and parcel of Count 1 and that all of your
18 arguments go to the weight to be given to the evidence. So
19 you, of course, will be permitted to challenge that evidence
20 through questioning and argument and any evidence, perhaps, you
21 wish to present. But, at the end of the day, the government is
22 required to prove negligence on Count 1. And these events that
23 took place within a day of the alleged manslaughter go to the
24 heart of the negligence element. And so for those reasons, I'm
25 going to grant the government's motion in limine as to topic

1 number 1, although the defense certainly is entitled to object
2 contemporaneously at trial. And I can deal with any
3 on-the-spot objections in the normal course.

4 Any questions before we move on to topic number 2?

5 MR. KELLER: No, Your Honor.

6 MS. FRANCIS: No, Judge. Thank you.

7 THE COURT: Okay. Then let's hear argument from the
8 government on whether to present evidence about the defendant
9 violating a local ordinance preventing vessels like his from
10 taking out paying passengers the day of MCGF's death.

11 And, Counsel for the government, please identify
12 exactly which local ordinance you're referring to.

13 MR. KELLER: So, Judge, the local ordinance, which is
14 attached as Attachment A to the motion in limine, is referred
15 to as -- or defined as "Palm Beach County COVID-19 Public
16 Safety Order Number 1."

17 THE COURT: Okay. I'm aware of that. Doesn't that
18 seem a little bit far afield? I mean, we're talking here about
19 negligence in the operation of this vessel. Whether there was
20 a COVID-19 ban on scuba excursions, why is that directly
21 relevant to the negligence question here?

22 MR. KELLER: So, Judge, one of the things -- and we
23 outlined this, I think, in the motion -- that courts look to
24 when they're talking about "has someone been negligent or not"
25 is the rules that govern whether they can be operating where

1 they are and what they should be doing while they are. And
2 this is something that affects a lot of the subsequent things
3 we're going to be talking about.

4 And the analogy I would draw would be to -- in O'Keefe,
5 which is the Fifth Circuit case, there is a discussion of the
6 fact that the victim in that case was not allowed to be on the
7 boat. So, like, there was a tugboat that the defendant was
8 driving, and the woman who was on it was not allowed to be on
9 there.

10 Now, is that something that directly caused? Perhaps,
11 not. But what it is, is it's evidence of a disregard of the
12 rules on the day and as the incident was unfolding.

13 So our position is that because what we're proving here
14 and what the defense is contesting is whether the defendant was
15 negligent that day, whether he breached a duty, whether he --

16 THE COURT: But the duty here is a duty to operate a
17 safe vessel. What exactly -- how would you articulate it?

18 MR. KELLER: Well, I think that -- if I can take a look
19 at the cases we cited, I believe that there is case law that
20 says that part of the duty is also to abide by the rules, abide
21 by the law when you're operating something like a vessel.

22 If you would bear with me for --

23 THE COURT: It just seems to me that trying to pull in
24 a COVID-19 government order is, you know, factually somewhat of
25 a stretch. I mean, other than obviously he wouldn't have been

1 on the water had he complied with the directive -- but beyond
2 that, how does it factually connect to the alleged negligence
3 here?

4 MR. KELLER: We would argue that the fact that he
5 wouldn't have been out there, that she never would have been
6 killed had he abided by the order is, itself, pretty powerful
7 evidence that shows that he is not abiding by the regulations;
8 he is not someone who was doing the right thing that day.

9 THE COURT: But the regulation that is underpinning the
10 COVID-19 has nothing to do with safe operation of vessels, you
11 would agree?

12 MR. KELLER: Yes, Judge. And that's why we're not
13 arguing the violation. So let's say it did. Then we would be
14 making a slightly different argument, which is that it would be
15 negligence per se, which is basically to say that -- and this
16 is more in the civil context -- but in negligence law, when
17 someone does something that is a violation of a rule that
18 proximately causes something to happen, then it's what's
19 referred to as negligence per se, which basically means that's
20 the end of the discussion.

21 Here, the defense is free to argue that -- exactly as
22 you're doing here: who cares about this order? who cares
23 about this violation? But our argument would be that -- or our
24 position is that that just speaks to the weight that should be
25 assigned it, not to whether it's admissible to show that the

1 defendant was disregarding rules on the day that this killing
2 happened.

3 THE COURT: All right. Defense argument.

4 MS. FRANCIS: Judge, we would have to argue again that
5 it is completely irrelevant. Again, Your Honor, the duty to
6 operate a safe vessel has nothing to do with his duty to abide
7 by that COVID-19 ordinance. Judge, that evidence is not
8 probative of any issue.

9 THE COURT: well, is it probative of just, sort of, his
10 general disregard for rules and regulations, kind of more
11 broadly speaking?

12 MS. FRANCIS: Judge, I would have to argue that it's
13 not probative of his actions towards the negligence charge,
14 Judge. So we would object to request number 2 as well. We
15 really believe that it's just being offered for the sole
16 purpose of demonstrating, again, the defendant's poor
17 character. And, Judge, we would argue that it is irrelevant
18 under Rule 401(b)(1).

19 THE COURT: what do you say that he wouldn't have been
20 on the water had he complied with the COVID ban?

21 MS. FRANCIS: what we're arguing, Judge, is that it's
22 just offered to show a bad act that has nothing to do with the
23 negligence --

24 THE COURT: But how do you say it doesn't have anything
25 to do -- I mean, if he wasn't on the water, then this person

1 would still be alive, presumably.

2 MS. FRANCIS: Even though that may be correct,
3 Your Honor, we would believe that that evidence being offered
4 would seek to prejudice the defendant and be offered just to
5 show his bad acts that has, unfortunately, nothing to do with
6 what happened on that unfortunate date of March 29th.

7 THE COURT: All right. Let's see. Mr. Keller, what's
8 your best relevance connection for this COVID-19 order?

9 MR. KELLER: It's exactly what we've talked about
10 before. That if she would not have been on the boat, this
11 never would have happened, if he had abided by it. And that
12 any argument that it doesn't proximately cause the death,
13 that's not what's required; to have a piece of negligence, to
14 have evidence of negligence for a given day. That, instead,
15 that is a question purely about weight, just like it was in
16 Alvarez with respect to his having a license that day to be
17 operating the boat; and just like in O'Keefe where there was
18 also evidence about the fact that the woman was not allowed to
19 be on the boat.

20 Neither of those had anything to do with the fact that
21 in O'Keefe, for example, the defendant had been using cocaine
22 and capsized his vessel. But what it is, is it's showing
23 negligence and it's showing something that, had it not
24 happened, had she never been on that boat, then the whole thing
25 would have never happened. The charge wouldn't have existed.

1 And the same is true here. So our position is that it should
2 be admitted in the same way.

3 THE COURT: Okay. On this point I agree with the
4 defense. The charge here really concerns misconduct,
5 negligence, and inattention to duties on the vessel. And a
6 COVID-19 ban, although in some senses -- you know, in a pure
7 sense would have meant he wouldn't have been operating at all.
8 I think that that's not sufficiently relevant to the charges
9 here which require the government to prove negligence related
10 to his duties on the vessel.

11 And so, given that dissimilarity, I'm going to deny the
12 government's motion on prong 2, and turn to Item Number 3.

13 Mr. Keller.

14 MR. KELLER: Yes, Judge.

15 So Item Number 3 is evidence about the fact that when
16 this happened, when the casualty occurred, when the vessel goes
17 into port, the Coast Guard, of course, responded, and they
18 wanted to conduct drug testing. But it turned out that the
19 defendant was not registered for a drug testing program, as
20 required by regulation, and that, as a result, no one was
21 tested at the scene. In fact, the crew members who were on the
22 boat never got tested because of the fact that they were not
23 part of this regimen, they were not required to be. And the
24 defendant only tested later.

25 So our position is that, as it, again, comes to proving

1 negligence in this case, showing that the defendant operated
2 the vessel with total disregard to the rules, that he -- that
3 we should also be able to show that we will never know for sure
4 about who was using drugs or drinking alcohol on that vessel
5 that was part of the crew because of the fact that the
6 defendant negligently did not enroll in a program to protect
7 his passengers like he was required to do.

8 THE COURT: Okay. Walk me through just the basic
9 requirements and how you would -- how you would establish this,
10 if allowed.

11 MR. KELLER: Yes, Judge. And if I -- and I have it
12 here, the trial brief. If I could make reference to it.

13 THE COURT: Sure.

14 MR. KELLER: And this is docket entry 29. And this is
15 actually on the third -- the 13th page. And this is subpart B.

16 THE COURT: Okay.

17 MR. KELLER: And it's that marine employers shall
18 establish programs for the chemical testing for dangerous drugs
19 on a random basis of crew members on uninspected vessels.

20 And the evidence that we will have about that is that
21 Heather Spurlock, who was an employee of a company called The
22 Maritime Consortium -- what they do, what that business does is
23 offer services for drug testing.

24 So when you're operating a vessel, you enroll in that
25 program and then you're subject to the testing, you get a

1 compliance certificate. This is something that anyone who is
2 operating one of these vessels needs to do. What happened here
3 is that the defendant was not enrolled in one of those programs
4 until two days after the killing. After he had been spoken to
5 about [sic] the Coast Guard about the testing, he acknowledges
6 that he was not enrolled, and then he got enrolled days later,
7 like he should have been, on the day that this happened.

8 So it's going to be one witness along with a few
9 records from the consortium. And our position is that that is
10 relevant because it's, number 1, showing that the defendant
11 breached his duty to be enrolled like he was supposed to, which
12 the rules and regulations -- the CFR say he needed to be.

13 And then, number 2, that when it comes to what exactly
14 happened here, that there're going to be gaps in our
15 information because we will never be able to know whether there
16 were crew members who were under the influence or anything like
17 that, as this killing happened, because of the fact that the
18 defendant was not enrolled in a program.

19 THE COURT: How does this program work? You -- before
20 you -- you open a scuba business, you then personally get drug
21 tested or each time you take out a crew of -- of customers,
22 they each have to be drug tested?

23 MR. STIEHL: Your Honor, so the way it typically works
24 is, when you start a business, a maritime business, you enroll
25 in this drug testing program, and you enroll whoever is on your

1 staff to be enrolled in this random drug testing program. And
2 they would then offer services that, after the marine casualty,
3 they would also come and test your employees. Because the
4 requirement is on the marine employer, which in this case was
5 Mr. McCabe -- is to ensure the drug testing of everyone that is
6 determined to be directly involved. So --

7 THE COURT: But this is a drug testing requirement on
8 the captain and any staff members operating or working on the
9 vessel?

10 MR. STIEHL: Yes, Your Honor.

11 THE COURT: Okay. Is there any suggestion by the
12 government that Mr. McCabe was under the influence during the
13 date in question?

14 MR. KELLER: So, our position is that we won't ever
15 know for sure because of the fact that we don't have that
16 evidence. Mr. McCabe did testing afterwards, but --

17 THE COURT: Do you know what the results of those tests
18 were after?

19 MR. KELLER: That he did not test positive for anything
20 afterwards. But that -- and then I should say that his crew
21 members were never tested because their attorneys -- according
22 to Mr. McCabe's text messages with the Coast Guard, their
23 attorneys instructed them not to.

24 THE COURT: And so -- and then just backtracking on the
25 actual date of the incident, when the Coast Guard questioned

1 Mr. McCabe about his enrollment in this program, can you walk
2 me through factually what your evidence indicates.

3 MR. KELLER: We have text messages between a
4 Coast Guard officer and Mr. McCabe in which the Coast Guard
5 officer asks him about the drug testing: You know, is testing
6 being done? Mr. McCabe tells him that he conferred with his
7 crew members, that his crew members were told -- well, first
8 off, his crew members were back at what he refers to as "the
9 bar," by which maybe he just means, you know, the marina, but
10 that could be drinking alcohol already; I'm not sure. I'm not
11 sure what that means. But he says that they -- he has
12 conferred with them and that they are not going to comply with
13 any testing, but that he himself will go get testing done. And
14 then he basically sends the Coast Guard documentation for a
15 test that was done, I believe for alcohol.

16 THE COURT: Okay. All right. Let me hear from the
17 defense on this issue.

18 MS. FRANCIS: Thank you, Your Honor.

19 And we would like to point out, first of all, that the
20 crew members that were on the vessel that night -- one was an
21 EMT, one was a firefighter. They're already enrolled, in their
22 own programs through their employers, to be tested. And,
23 again, they are not on trial here; Mr. McCabe is. The crew
24 being tested, we believe, is irrelevant to whether or not he
25 was negligent that day. They are not -- he is not charged with

1 a crime or any type of failure to comply with the code of
2 regulations 406-5, which does outline the drug testing
3 requirements.

4 Judge, any individual engaged or employed on that
5 vessel who was determined to be directly involved in a serious
6 marine incident has to provide blood, breath, saliva or urine
7 "when directed to do so" is the keyword here, Your Honor.
8 Mr. McCabe was not directed to do so. He did not refuse a drug
9 test. In this instance, Judge, he was not detained. He was
10 instructed to return his vessel to his original slip. He was
11 able to drive the boat back to where it belonged. At no point
12 was he found to be directly involved in a significant marine
13 incident or was he required nor refused to provide that.

14 However, what he did do, Judge, is he did engage his
15 own drug testing, a mobile drug testing company, that same day,
16 Your Honor, of the incident. And that drug test was, of
17 course, submitted to the USCG and, of course, it came back
18 negative. So we do believe that it is irrelevant here.
19 Although he did not comply specifically, he did substantially
20 comply by providing his drug samples.

21 Again, the crew -- we believe that is irrelevant here;
22 they are not on trial, but he is. And we do feel that entering
23 this type of evidence that he failed to comply is irrelevant
24 because essentially he did, Your Honor, as the government just
25 stated, and the tests came back negative.

1 THE COURT: So you agree he failed to enroll in this
2 program prior to the date in question? Prior to March 29th?

3 MS. FRANCIS: Yes, Judge, we do agree that he failed to
4 enroll.

5 THE COURT: Okay. Because you are making these
6 relevance arguments and you're saying it's not relevant because
7 we can disprove it. And I'm not quite sure that that actually
8 makes it irrelevant. Whether you can counteract the evidence
9 in some fashion doesn't negate its threshold relevance under
10 401. And so --

11 MS. FRANCIS: Your Honor, we believe it's irrelevant in
12 the fact that it's not really probative of any issue of whether
13 or not he was negligent on March 29th. That he failed to
14 enroll in a drug testing program, we don't feel that that's
15 probative of the negligence issue or any issue that took place
16 on that day, especially when he actually did comply,
17 Your Honor, which the government has admitted that he did
18 submit his drug test.

19 MR. O'SULLIVAN: Your Honor, may I just add to that?

20 THE COURT: Yes.

21 MR. O'SULLIVAN: I don't mean to interrupt. I
22 understand that -- the Court's concerns about whether or not
23 it's relevant. The concern that we have is that it's unduly
24 prejudicial because the government's going to say and kind of
25 make the inference that Mr. McCabe was supposed to, by these

1 rules, enter the drug consortium and he didn't. And that's
2 going to infer to the jury that somehow he failed a drug test
3 or something like that.

4 Now, of course, we can disprove that, but what's the
5 point of telling a jury, from the government's side, he never
6 had the proper drug test, and then us getting up there and
7 saying, well, he got his own drug test that day, and he -- and
8 he passed?

9 THE COURT: Okay.

10 MR. O'SULLIVAN: And that we can --

11 THE COURT: All right. Final argument. Are you --
12 from the government. This is my question: Are you at all
13 concerned that we are going to turn this trial into a civil
14 regulatory compliance rather than a criminal case about whether
15 he had the intent to commit manslaughter and wire fraud?

16 MR. KELLER: No, Judge. Because for each of these
17 we're doing it in a very limited fashion. So I mentioned, with
18 respect to this issue, that we're doing one witness, who is
19 going to be brief, and who will be introducing one document,
20 maybe two.

21 And as far as the issue of whether it's turning into a
22 civil regulatory --

23 THE COURT: Uh-huh.

24 MR. KELLER: The thing is that this case is, in some
25 ways, about some civil issues in the sense that it's a

1 negligence trial. It's different than a lot of other criminal
2 trials because the rules of operating a vessel matter. Because
3 what we're doing here is showing that he breached his
4 obligations to his passengers, which we prove in part by the
5 fact that he was violating these regulations that he should
6 have been abiding. And those regulations have reasons for
7 them. And this is reflected in the case law that I believe I
8 cited in the motion in limine as to -- and that's why they're
9 also admitted in these other trials for seaman's manslaughter
10 because it is about that.

11 THE COURT: Have you considered a limiting instruction
12 directing the jury that violations of municipal ordinances
13 alone perhaps wouldn't amount -- or wouldn't establish criminal
14 liability in a criminal case?

15 MR. KELLER: So my answer to that is that in this
16 specific instance, I actually think that -- if we were talking
17 about it -- and not to go back to number 2, but here we have
18 the same thing where I'm not arguing proximate causation for
19 this specific negligent act, like, that this negligent act
20 caused the death. But we are still talking about simple
21 negligence for this particular crime, which is a little unusual
22 in the criminal context. But what it does is it informs how
23 probative something like this is in this type of case versus a
24 case where there was some type of other mens rea element or
25 mens rea standard.

1 THE COURT: Do you have any evidence to indicate that
2 the crew members were under the influence?

3 MR. KELLER: We will never have any evidence --

4 THE COURT: Okay.

5 MR. KELLER: -- because of the fact --

6 THE COURT: All right. I will take this issue under
7 advisement.

8 Ms. Cassisi, can you advise me what time the next
9 hearing is.

10 COURTROOM DEPUTY: 1:00, Your Honor.

11 THE COURT: Okay. Thank you.

12 All right. Let's turn to Item 4.

13 MR. KELLER: Yes, Judge.

14 So Item 4 kind of relates back to Item 1 in the sense
15 that when these things happened the first -- on March 28th --
16 and by "these things," I mean the mechanical issues that led to
17 Ms. Hester being injured by a propulsion issue, and then
18 ultimately Mr. McCabe running the vessel aground in order to
19 avoid a bridge -- that those issues were reportable to the
20 Coast Guard under their regulations, and that he did not report
21 them.

22 And our position is that that is further evidence of
23 his negligent conduct. And again, here, as far as the direct
24 proximate causation, that had he reported them, like he was
25 supposed to -- we will have testimony -- that the Coast Guard

1 would do something about it; that they would require some type
2 of remedial action; and that as -- or they at least very likely
3 would -- that they would do some type of an intervention. And
4 then, as a result, Mr. McCabe would likely have not been going
5 out the next day to bring the victim out on this boat, this
6 dangerous boat, and have her near this propeller that had not
7 been remediated under supervision.

8 So our position is that those violations of those
9 regulations are direct proof, direct evidence of negligent
10 conduct that the defendant engaged in that led to the --

11 THE COURT: Okay. This reporting requirement, where is
12 it coming from? Is it Title 46, Section 4.06, as listed in
13 your trial brief?

14 MR. KELLER: Yes, Judge, it's on page 11. And it's
15 actually 4.05, "Notice of Marine Casualty." And the two that
16 we're really highlighting here are the unintended grounding --

17 THE COURT: Uh-huh.

18 MR. KELLER: -- or intended grounding. And then also
19 the, number 3, loss of main propulsion, primary steering, or
20 any associated component or control system.

21 THE COURT: Okay. All right. Brief argument on this,
22 please.

23 MS. FRANCIS: Judge, we would argue that the
24 occurrence -- an occurrence involving significant harm or
25 something to trigger the reporting requirement as defined by

1 that statute did not exist. None of these issues were present
2 on March 28th. And the defendant's vessel was not involved in
3 any kind of marine casualty that would trigger that reporting
4 to the U.S. Coast Guard.

5 THE COURT: But there was an unintended grounding;
6 correct?

7 MS. FRANCIS: It was a directed grounding, Your Honor.

8 THE COURT: Okay. Well, then there was an intended
9 grounding, potentially.

10 MS. FRANCIS: Well, it -- that would be -- Judge, it
11 wasn't an accidental grounding, it was not a deliberate
12 grounding that posed a risk, as per the statute says. The
13 statute says that it has to pose a risk. He was entirely out
14 of the channel. He did not obstruct any marine traffic. He
15 was directed to this certain slip because the floating dock
16 wasn't available.

17 THE COURT: Okay. All right. Thank you.

18 I think, on this issue there is a clear, probative
19 component here that ties closely to topic number 1 in the
20 government's motion. Because the grounding took place the day
21 before the manslaughter, there was a reporting requirement that
22 wasn't complied with. Certainly you can dispute that at trial,
23 Counsel, but at the end of the day, on a relevance challenge I
24 disagree and I do agree with the government on this one that it
25 is inextricably intertwined with the alleged conduct in

1 Count 1.

2 So the motion as to topic 4 will be granted in favor of
3 the government.

4 Let's discuss Item 5, please.

5 MR. KELLER: Yes, Your Honor.

6 So Item Number 5 concerns the April 9th Captain of the
7 Port order. In my -- and by the Captain of the Port of Miami.
8 And what that basically is, is the person who is in charge of
9 maintaining the safety of the marinas and the waterways in this
10 district. And what he did on April 9th is that he issued an
11 order saying that the defendant, in operating his vessel, had
12 been found to be a danger, that he was no longer allowed to
13 operate the vessel with any paying passengers. And our
14 position is that this evidence is relevant in two ways as
15 direct evidence.

16 Number 1, it's evidence of remediation that happened --
17 or action that was taken as a response to the defendant's
18 negligent conduct on March 29th. And then, more importantly,
19 or at least as importantly, it's evidence to the PPP fraud that
20 I spoke to during the motion to sever. That this is showing
21 that the defendant had been ordered not to operate that vessel
22 for the purposes of using it for scuba or any other paid
23 passenger services, so that he wasn't allowed to operate this
24 business that he then later claimed that he was, in fact,
25 operating.

1 So our position is that it's relevant in those two
2 ways. Just to get into the how we would be proving this, we
3 have one witness who is already going to be testifying about
4 other things in this case who will also testify about the
5 process for these orders being issued. Because in this case he
6 was someone who reports to the Captain of the Port. And then
7 we're going to have the captain -- the current Captain of the
8 Port testify in a not-long presentation, just about what these
9 orders are.

10 He is going to explain the Captain of the Port order,
11 just because the Captain of the Port order is a one-and-a-half
12 page document in Coast Guard jargon that no jury -- that most
13 lawyers would not be able to understand. So that's going to
14 be, kind of, brief testimony about what it is. So that's the
15 evidence and that's its purpose.

16 THE COURT: Okay. All right. Let me hear from the
17 defense counsel.

18 MS. FRANCIS: Yes, Judge.

19 we feel that there is other evidence -- other evidence
20 does exist that would go to show whether or not the defendant's
21 boat or vessel was shut down. Showing the jury evidence that
22 he, again, failed to comply with another order, we feel, would
23 be prejudicial.

24 Judge, the defendant did continue to work as a dive
25 instructor. He had -- and was offering other services to

1 individuals that hired him for guidance and instruction. So
2 that port order did not effectively shut down the defendant's
3 business; it shut down his operation of the vessel. So while
4 that port order did shut down the operation of the boat, it
5 didn't terminate the business itself. He still continued to
6 work, albeit in a modified way.

7 So we do believe presenting evidence that he failed to
8 comply with the court order -- a court order which he has not
9 been charged with any crime for failing to abide by, would be
10 prejudicial to the jury. There is other evidence that does
11 exist that can show that he was no longer supposed to be
12 operating the boat.

13 THE COURT: Okay. Just to be clear, you don't dispute
14 that there is an order that barred him from operating the
15 vessel on April -- and it was issued on April 9th of 2020?

16 MS. FRANCIS: That's correct, Judge.

17 THE COURT: So what is so highly prejudicial about that
18 fact?

19 MS. FRANCIS: Just the fact that it is showing again a
20 propensity for the defendant to commit another crime, another
21 bad act, although he wasn't charged with any crime or failure
22 to abide by this ordinance. What we're saying is that the
23 government is offering this to show that he lied on his PPP
24 applications because his boat was no longer supposed to be
25 operating.

1 THE COURT: Okay.

2 MS. FRANCIS: There is other evidence that is less
3 prejudicial that can show what the government is trying to
4 offer, Judge.

5 THE COURT: Such as what?

6 MS. FRANCIS: Maybe the Sunbiz applications, the Sunbiz
7 showing that his business was no longer operating, but
8 certainly not a court order that prevented him from operating.
9 We don't believe that that would go to show that he lied on his
10 PPP applications. We feel that that would be prejudicial
11 because it would show that he has a propensity to not abide by
12 orders.

13 THE COURT: All right. Well, because this issue, I
14 think, is connected to the severance question, I'm going to
15 reserve on this too and hear argument on the final contested
16 issue in the motion in limine which is Item Number 6.

17 Mr. Keller.

18 MR. KELLER: Yes, Judge. So Item Number 6 is the one
19 thing that we are moving in specifically under Rule 404(b).
20 And what this is, is an inspection that occurred the year
21 before the March 29th killing where the defendant was found to
22 have failed the inspection. And we're -- and, just to be
23 clear, the witness we're going to have testifying to this is
24 someone we're calling anyway. It's someone who works at the
25 port, who does these inspections, and was later working and

1 involved in the March 29th -- so we're not calling additional
2 witnesses for this.

3 But what it's showing is that the defendant was someone
4 who knew about the rules, that knew that he needed to keep a
5 vessel that was maintained, that was properly operating, and
6 that he didn't. And that he can't later claim, "Oh, this was
7 just some kind of accident. This was a mistake. I didn't know
8 about the rules."

9 THE COURT: Is this -- is there documentation to
10 support this failed safety inspection, or is it just the
11 testimony of that one witness with other --

12 MR. KELLER: So, Judge, Attachment C to the motion in
13 limine is the one record that we would be submitting.

14 THE COURT: Okay.

15 MR. KELLER: And if you see under -- on the top of
16 page 1, under the team lead, in the first -- so it says Sean T.
17 Goodman, that's the person who we would already be calling
18 anyway. So he would be testifying about this as well.

19 THE COURT: Where can I see the failed inspection on
20 this exhibit?

21 MR. KELLER: At the bottom of the first page, you will
22 see where it says under "inspection results," "inspected with
23 deficiencies noted."

24 THE COURT: So you're seeking to introduce the one from
25 which month and year?

1 MR. KELLER: So these "inspections with deficiencies
2 noted" happened on -- April 24th of 2019 is when they were
3 reported. And then in the reports -- so the report goes on a
4 couple more pages. And by the end -- so on page 4 of the
5 report, it notes that there are these deficiencies noted going
6 through July of -- that's of 2019, just to be clear.

7 THE COURT: Do any of these deficiencies, in the
8 government's view, have a factual connection to the failures of
9 the vessel on March 29 of 2020?

10 MR. KELLER: So how they relate to them is that -- so
11 one of the things that's going to come out during trial is that
12 the defendant purchased this vessel and it was a fishing
13 vessel, and he ended up refitting it for scuba, and he did that
14 in a couple of different ways. One of them that's really
15 important is that he removed engine controls from one part of
16 the vessel.

17 So this vessel had a bridge which is kind of the high
18 part of the vessel, and then it had the area in the back which
19 is where the scuba divers do their thing. And in that area,
20 because it was a fishing vessel, there was a set of controls
21 there, that he then manipulated by removing.

22 So we're going to be introducing that as circumstantial
23 evidence of what happened here; the fact that he bought this
24 boat, he modified the boat, and then it's no longer functioning
25 properly.

1 And I bring that up because some of the deficiencies
2 involve not the same type of thing in the sense of, like,
3 modifying controls, but they involve the same areas of the
4 vessel; so, like, the bridge and that sort of thing. That's
5 the connection. And I think that I speak to that -- a moment,
6 Your Honor.

7 So, I speak to that at the -- at the end part of the
8 motion in limine on page 17.

9 THE COURT: I guess I'm just trying to understand. The
10 deficiencies that were found a year before, do they have
11 anything to do with the deficiencies on the boat that the
12 government believes led to the death of the victim? I see here
13 references to temporary repairs on a flybridge. Is there
14 anything more?

15 MR. KELLER: The only other things that -- the only
16 thing besides the flybridge that would be connected would just
17 be the fact that there was no railing in the back, which,
18 again, we're talking about the back of the boat. So it's kind
19 of -- the locations are similar. But, Judge, the thing I would
20 just highlight as to this similarity issue is the fact that
21 here we're really talking about the defendant's knowledge and
22 his absence of mistake. Instead of saying, like, well, because
23 he messed up the specific part of the boat that time, he must
24 have done it this time -- we're, instead, saying that he is
25 going to argue that he wasn't negligent, that he was doing

1 everything like he should have. And that we should be able to
2 show, hey, he has had this prior vessel inspection. He knew
3 the rules. He knew that you couldn't do these types of things,
4 and this wasn't just some kind of accident.

5 THE COURT: Okay. Thank you.

6 Defense argument.

7 MS. FRANCIS: Yes. Thank you, Judge.

8 what we would argue here, and we want to make very
9 clear for the Court, is, number 1, different boat, different
10 mechanical issue. The boat that the government is seeking to
11 issue -- to enter into evidence is a completely different
12 vessel from the one in controversy. Two unrelated annual
13 inspections, Your Honor. They were not safety inspections.
14 Again, this occurred a year before the March 29th incident.
15 And the government is seeking to introduce this evidence to
16 show the defendant's knowledge of rules.

17 THE COURT: Right. But that's what they want to do
18 under 404(b) --

19 MS. FRANCIS: Yes.

20 THE COURT: -- which is permit an avenue for this, if
21 appropriate and balanced, under 403.

22 MS. FRANCIS: Yes.

23 THE COURT: So understanding that it's not the same
24 boat and that it's not the same mechanical issue, why would it
25 not still be relevant to show the defendant's overall knowledge

1 and lack of mistake concerning safety regulations on vessels?

2 MS. FRANCIS: Judge, we would have to say that these
3 issues regarding the inspections were two totally separate
4 issues. The issue that he failed in that inspection was
5 refitting his boat, changing issues on the boat.

6 The government is arguing that there was a propulsion
7 issue with this vessel, the one that is subject to this
8 proceeding.

9 So we have one boat with one issue here. The boat had
10 a propulsion issue, as far as the government is stating. A
11 year prior, we have a completely different vessel with a
12 completely different reason why he failed the inspections. It
13 was failed, not because of safety; it was because he refitted
14 the boat himself.

15 we do not believe this evidence concerns -- concerning
16 the inspection is relevant as to the defendant's knowledge of
17 maritime rules and his absence of mistake.

18 In this case there was no issue with refitting the
19 vessel. That is the reason why he failed the safety -- the
20 annual inspection.

21 Judge, a more appropriate way to show that the
22 defendant has knowledge of rules and regulations would be to
23 present his credentials. That would be a more appropriate
24 vessel.

25 But, Judge, in this case we would have to argue this

1 would just be to show prior bad acts, which is not included
2 under Rule 404(b). It cannot be considered relevant when the
3 issues are completely different and it was a completely
4 different vessel.

5 THE COURT: Okay. Okay. I understand your argument.

6 MS. FRANCIS: Thank you.

7 THE COURT: would the government have any objection to
8 introducing the various inspections he did pass?

9 MR. KELLER: If the defense wants to offer those, we
10 wouldn't object. That would be how they would --

11 THE COURT: All right. I will consider --

12 MR. KELLER: Judge, let me --

13 THE COURT: -- these matters holistically.

14 MR. KELLER: I'm sorry.

15 Let me actually rethink that because I think that would
16 be improper bolstering. But I hear what you are saying that
17 you think that --

18 THE COURT: well, if you want to show that he failed
19 one inspection, it would seem appropriate not to object to the
20 fact that he passed others, but --

21 MR. KELLER: Yes, Judge.

22 THE COURT: -- that remains to be seen.

23 I will consider the remaining arguments that I haven't
24 ruled on today and also consider a potential limiting
25 instruction, given the significant emphasis the government

1 wants to place on regulatory violations in a criminal case.

2 I do want to then cover the final item in the motion in
3 limine, as to which there appears to be no dispute.

4 Am I correct about that, Mr. Keller?

5 MR. KELLER: Yes, Your Honor. There is no dispute
6 about Item 7.

7 THE COURT: So this concerns not referring to a
8 non-prosecution by the state of Florida for the March 29
9 incident. Am I correct that all parties are on board with this
10 decision not to make reference?

11 MR. O'SULLIVAN: Yes, Your Honor, I think that's
12 appropriate.

13 THE COURT: Okay. Then I will deny this aspect of the
14 motion as moot in light of the absence of any objection.

15 So I think that covers the two motions we had today on
16 the agenda. We remain scheduled for trial on the 24th. I know
17 there is the notice of witness unavailability beyond the 24th.

18 Mr. Keller, is there any chance that you can ensure
19 this witness available for one additional day? I can't
20 anticipate at this point the length of her direct or the extent
21 to which the defense wishes to cross. And what you're
22 essentially presenting is a very truncated timetable on day 1
23 of trial.

24 MR. KELLER: Judge, the problem is that she -- so, just
25 to be clear, Ms. Hester had booked a trip to Colorado for a

1 week in September. And what she did is that -- she originally
2 was scheduled to fly out the 24th -- she moved the flight to
3 the very morning of the 25th. The reason she can't postpone it
4 further is because the way that this trip works is that this
5 group is going out to a remote area that you can't just, like,
6 get to. You have to be part of the lift up, I guess. I'm not
7 conversing --

8 THE COURT: Is this like a vacation or a part of her
9 work? What is it?

10 MR. KELLER: It's a large group vacation of people who
11 in this area go on, like, an annual trip with each other.

12 THE COURT: Okay. How long do you think your direct of
13 Ms. Hester will take?

14 MR. KELLER: Probably 45 minutes to an hour.

15 THE COURT: Do you have any sense, Mr. O'Sullivan, as
16 far as your cross of this witness?

17 MR. O'SULLIVAN: I guess it really depends on the
18 direct.

19 THE COURT: Uh-huh.

20 MR. O'SULLIVAN: Generally speaking, I have tried a lot
21 of cases, and I am fairly brief in my crosses. Obviously, I
22 need to get out what I need to get out, but it kind of depends
23 on the direct.

24 THE COURT: Okay.

25 MR. O'SULLIVAN: I can't see it being more than an

1 hour. If this -- if the government's going to do 45 to an
2 hour, just, generally speaking, I cannot see me, you know,
3 bloviating and going past that. I just need to get what I get
4 to and --

5 THE COURT: Okay. All right. Well, this is helpful in
6 planning. Thank you.

7 we will have our calendar call scheduled for the 18th.
8 Anything further before we adjourn, Mr. Keller?

9 MR. KELLER: No. Thank you, Your Honor.

10 THE COURT: All right. Thank you.

11 Mr. O'Sullivan or Ms. Francis?

12 MS. FRANCIS: Yes, Judge.

13 I just wanted to put on the record, Your Honor, we do
14 plan on filing a motion to dismiss. Should we cross notice
15 that for the calendar call upcoming?

16 THE COURT: Well, that's surprising because the
17 pretrial motion's deadline long expired.

18 MS. FRANCIS: My apologies, Your Honor.

19 THE COURT: So I don't see a basis at this late
20 juncture, approximately a month before trial, to open up the
21 pretrial briefing again. If you want to file a motion for
22 leave to file something out of time, explaining exactly why you
23 couldn't have anticipated this particular argument, I will
24 consider it, but as far as I'm concerned, we have deadlines and
25 a trial scheduled for the end of February.

1 Thank you.

2 MS. FRANCIS: Yes, Judge.

3 THE COURT: That concludes our hearing.

4 (These proceedings concluded at 11:17 a.m.)

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C E R T I F I C A T E

I hereby certify that the foregoing is an accurate
transcription of the proceedings in the above-entitled matter.

DATE: 04-25-2025 /s/Laura Melton
LAURA E. MELTON, RMR, CRR, FPR
Official Court Reporter
United States District Court
Southern District of Florida
Fort Pierce, Florida

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