

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA	:	
	:	
v.	:	Case No. 25-cr-00076-JMC
	:	
CORTNEY MERRITTS,	:	
	:	
Defendant.	:	

GOVERNMENT’S MOTION *IN LIMINE*
TO EXCLUDE CERTAIN EVIDENCE AND ARGUMENT

The United States of America respectfully moves *in limine* for an order excluding certain evidence and argument. In support of its motion, the United States relies on the following points and authorities, and such other points and authorities as may be cited at a hearing on this motion.

I. LEGAL STANDARDS

Motions *in limine* assist the Court in serving its gate-keeping function to keep incompetent evidence or improper argument from the jury by permitting it to exclude it in advance of trial. *United States v. Zeese*, 437 F. Supp. 3d 86, 92 (D.D.C. 2020) (“Pretrial motions *in limine* effectuate [Rule 103(d)’s] directive” that inadmissible evidence not be suggested to the jury by any means, and a “pre-trial ruling, if possible, may generally be the better practice, for it permits counsel to make the necessary strategic determinations”) (quoting *United States v. Jackson*, 627 F.2d 1198, 1209 (D.C. Cir. 1980)).

“To the extent practicable, the court must conduct a jury trial so that inadmissible evidence is not suggested to the jury by any means.” Fed. R. Evid. 103(d); *see also United States v. Young*, 470 U.S. 1, 10 (1985) (“[T]he trial judge has the responsibility to maintain decorum in keeping with the nature of the proceeding; the judge is not a mere moderator, but is the governor of the trial for the purpose of assuring its proper conduct.”) (internal quotations omitted). In service of

this responsibility, the Court has broad discretion to determine whether evidence or argument can properly be presented at trial. *See United States v. Morgan*, 581 F.2d 933, 936 (D.C. Cir. 1978) (“The district court has wide discretion to admit or exclude evidence where the question is one of relevancy or materiality”); *United States v. Tarantino*, 846 F.2d 1384, 1410 (D.C. Cir. 1988). This includes excluding evidence or argument whose only purpose is to encourage the jury to nullify. *See United States v. Gorham*, 523 F.2d 1088, 1097-98 (D.C. Cir. 1975) (affirming trial court’s exclusion of evidence relevant only to jury nullification) (citing *Sparf v. United States*, 156 U.S. 51, 106 (1895)); *United States v. Boone*, 458 F.3d 321, 329 (3d Cir. 2006) (“[A] juror . . . who commits jury nullification violates the sworn jury oath and prevents the jury from fulfilling its constitutional role.”). Here, the Court has a sufficient basis to rule in advance of trial to exclude improper evidence and argument so that it is not suggested to the jury in any way.

II. EVIDENCE AND ARGUMENT THAT SHOULD BE EXCLUDED FROM TRIAL

A. Defendant Should Not Be Allowed to Offer Evidence or Argument that May Lead to Improper Jury Nullification

The Defendant, Cortney Merritts, should be precluded from arguing or seeking to admit evidence for the purpose of encouraging the jury to nullify its verdict; such argument and evidence is not admissible. Federal courts have universally excluded evidence and arguments that encourage jury nullification. *See United States v. Washington*, 705 F.2d 489, 494 (D.C. Cir. 1983) (“A jury has no more ‘right’ to find a ‘guilty’ defendant ‘not guilty’ than it has to find a ‘not guilty’ defendant ‘guilty,’ and the fact that the former cannot be corrected by a court, while the latter can be, does not create a right out of the power to misapply the law. Such verdicts are lawless, a denial of due process and constitute an exercise of erroneously seized power.”); *see also United States v. Wilkerson*, 966 F.3d 828, 835 (D.C. Cir. 2020) (federal courts have “categorically reject[ed] the idea that, in a society committed to the rule of law, . . . courts may permit [jury nullification of the

law] to occur when it is within their authority to prevent”) (quoting *United States v. Thomas*, 116 F.3d 606, 614 (2d Cir. 1997)); *Gorham*, 523 F.2d at 1097-98 (affirming exclusion of evidence sought to entice jury nullification and agreeing that introduction of the evidence “would have been unnecessarily confusing and potentially prejudicial”); *United States v. Moss*, 297 F. App’x. 839, 841 (11th Cir. 2008) (granting government motion *in limine* to exclude defense evidence “intended to inspire a jury to exercise nullification”); *United States v. Sepulveda*, 15 F.3d 1161, 1190 (1st Cir. 1993) (“[N]either the court nor counsel should encourage jurors to [nullify] . . . A trial judge, therefore, may block defense attorneys’ attempts to serenade a jury with the siren song of nullification.”).

More specifically, the D.C. Circuit has explained why jury nullification is improper:

This so-called right of jury nullification is put forward in the name of liberty and democracy, but its explicit avowal risks the ultimate logic of anarchy. This is the concern voiced by Judge Sobeloff in *United States v. Moylan*, 417 F.2d 1002, 1009 (4th Cir. 1969), cert. denied, 397 U.S. 910, 90 S.Ct. 908, 25 L.Ed.2d 91 (1970):

To encourage individuals to make their own determinations as to which laws they will obey and which they will permit themselves as a matter of conscience to disobey is to invite chaos. No legal system could long survive if it gave every individual the option of disregarding with impunity any law which by his personal standard was judged morally untenable. Toleration of such conduct would not be democratic, as appellants claim, but inevitably anarchic.

United States v. Dougherty, 473 F.2d 1113, 1133–34 (D.C. Cir. 1972).

Based on these principles, the United States moves the Court to order that Defendant will not be permitted to make jury nullification arguments and to exclude any evidence probative of such arguments. Such arguments and evidence include, but are not limited to, the following topics:

- a. Defendant’s participation in the community. *United States v. Nazzaro*, 889 F.2d 1158, 1168 (1st Cir. 1989) (evidence of “bravery, attention to duty, perhaps community spirit—were hardly ‘pertinent’ to the [charged] crimes”); *United States v. Morison*, 622 F. Supp. 1009, 1010–11 (D. Md. 1985) (“patriotism” not relevant trait to charge);

- b. Defendant's religious beliefs and habits. See *United States v. Bernard*, 299 F.3d 467, 476 (5th Cir. 2002) (approving court's sentencing instruction that jurors should not "consider the religious views of the defendants"); *United States v. Goxcon Chagal*, 885 F. Supp. 2d 1118, 1158–59 (D.N.M. 2012) ("[R]ule 610[] is . . . designed to avoid a jury drawing improper inferences about a witness' character or credibility in light of the witness' religious beliefs. . . ."); see also Fed. R. Evid. 610;
- c. Defendant's marriage or family status. See *United States v. Santana-Camacho*, 931 F.2d 966, 967 (1st Cir. 1991) (excluding evidence that defendant was a good family man because it was not a trait relevant to the offense); *United States v. Paccione*, 949 F.2d 1183, 1201 (2d Cir. 1991) (court properly excluded evidence that defendant had devoted his life to caring for a son with cerebral palsy); and
- d. Defendant's status as a kind, moral, or hard-working person. See *Santana-Camacho*, 931 F.2d at 967 (excluding evidence that defendant was a kind man); *United States v. Perez*, 459 F. App'x 191, 198 (3d Cir. 2012) (family and work life not relevant and "pose[d] an improper risk of jury nullification").

None of these topics are probative of an element of the charged offenses or an affirmative defense available to Defendant, and all of them could lead to improper nullification.

B. Defendant Should Not Be Allowed to Introduce Evidence of His General Good Character and Specific Instances of Good Conduct

Similarly, Defendant should be precluded from offering statements and arguments of his good character and evidence of specific instances of good conduct. Such arguments are made with the improper purpose of inviting jury nullification and are not allowed under Federal Rule of Evidence 404.

Federal Rule of Evidence 404(a)(1) provides that "[e]vidence of a person's character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait." This rule means that "[e]vidence of a person's character is generally not admissible to prove that he acted in conformity therewith on a particular occasion." *Government of the Virgin Islands v. Grant*, 775 F.2d 508, 510 (3d Cir. 1985). The rule applies to prior good acts as well as prior bad acts of the defendant: "[f]or the same reason that prior 'bad

acts’ may not be used to show a predisposition to commit crimes, prior ‘good acts’ generally may not be used to show a predisposition not to commit crimes.” *United States v. Dimora*, 750 F.3d 619 (6th Cir. 2014). In other words, “evidence of good conduct is not admissible to negate criminal intent.” *United States v. Ellisor*, 522 F.3d 1255, 1270 (11th Cir. 2008).

Rule 404(a)(2) provides that a criminal defendant “may offer evidence of the defendant’s pertinent trait, and if the evidence is admitted, the prosecutor may offer evidence to rebut it.” “In the criminal context, a pertinent character trait is one that is relevant to the offense charged[,]” and such a “pertinent trait must be specific, it may not be offered as evidence of one’s general character.” *United States v. Sutton*, 636 F. Supp. 3d 179, 208 (D.D.C. 2022).

Rule 402(a)(2)’s exception to the general rule that defendants may not introduce character evidence does not apply in this case because any purported prior good acts are not pertinent to the charges against Defendant. And even if such prior good acts have some minimal, probative value, such value would be far outweighed by the high likelihood of jury confusion and the risk of jury nullification. *See* Fed. R. Evid. 403; *see also, e.g., United States v. Carpenter*, No. 21-305, 2023 WL 1860978, at *1 (D.D.C. Feb. 9, 2023) (finding that specific instances of good conduct unrelated to a character trait that is an essential element of a charge would violate Rule 405); *Sutton*, 636 F. Supp. 3d at 208 (same); *United States v. Chwiesiuk*, No. 20-0536, 2023 WL 3002493, at *7 (D.D.C. Apr. 19, 2023) (same).

To the extent Defendant wishes to offer character evidence and this Court determines that evidence is admissible, it should be limited to introducing only general reputation or opinion evidence concerning a pertinent character trait.

C. Statements About Punishment or Collateral Consequences of Conviction Should Be Prohibited

The Court should preclude as irrelevant and prejudicial any reference to Defendant's potential sentence during all phases of the trial, including jury selection, opening statements, examination of witnesses—to include Defendant if he elects to testify—and summation. That reference could be as overt as, “You understand the defendant is facing multiple years in prison if convicted,” or more subtle such as, “the defendant is facing a lot of time,” “this case has serious consequences for the defendant,” “the defendant’s liberty is at stake in this trial,” or “your decision will have consequences for a long time to come.”

“The principle that juries are not to consider the consequences of their verdicts is a reflection of the basic division of labor in our legal system between judge and jury.” *See, e.g., Shannon v. United States*, 512 U.S. 573, 579 (1994) (“The jury’s function is to find the facts and to decide whether, on those facts, the defendant is guilty of the crime charged.”). Besides being “irrelevant to the jury’s task,” such “information invites [jurors] to ponder matters that are not within their province, distracts them from their factfinding responsibilities, and creates a strong possibility of confusion.” *Id.* Accordingly, a jury “should be admonished to ‘reach its verdict without regard to what sentence might be imposed.’” *Id.* (quoting *Rogers v. United States*, 422 U.S. 35, 40 (1975)). Under this well-established principle, Defendant and his counsel must be prohibited from referencing in the presence of the jury, whether directly or indirectly, the penalties associated with the charged offenses, or any collateral consequences that the proceedings may cause for Defendant, his livelihood, or his other activities. Any mention of the potential penalties or other consequences faced by Defendant would serve only the improper purpose of jury nullification. Therefore, Defendant should be precluded from making any reference to punishment or the consequences of such punishment on Defendant or his family.

D. All Evidence and Arguments Regarding the Government’s Unrelated Campaign Funds Investigation of Former Missouri Congresswoman Cori Bush Should Be Precluded

It is axiomatic that only relevant evidence is admissible. *See* Fed. R. Evid. 402. “Evidence is relevant if it has any tendency to make a fact more or less probable than it would be without the evidence[,] and the fact is of consequence in determining the action.” *Id.* 401. This case concerns allegations that Defendant submitted fraudulent loan applications to the United States Small Business Administration (“SBA”) under the Economic Injury Disaster Loan Program (“EIDL”) and the Paycheck Protection Program (“PPP”) between July 8, 2020, and April 22, 2021. The fact that the evidence at issue in this case was discovered while an unrelated investigation of Congresswoman Bush (to whom Defendant is now married) relating to potential false statements to the Federal Election Commission was ongoing has absolutely no bearing whatsoever on any fact of consequence in determining Defendant’s guilt or innocence. Nor does the fact that no charges have been filed in that unrelated investigation. That investigation concerned whether Congresswoman Bush had misused campaign funds to pay for personal security services provided by Defendant and others. There is simply no connection between an investigation into the possible misuse of campaign funds by Congresswoman Bush to pay for security services and the facts and evidence that are relevant to the charges against Defendant in *this* case. That alone dictates that evidence about the campaign finance investigation, and its status or outcome, is irrelevant and inadmissible.

Moreover, even if such evidence were marginally relevant (it is not), it would nonetheless be excludable because its probative value would undoubtedly be “substantially outweighed by a danger of ... unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.” Fed. R. Evid. 403. The investigation concerning

Defendant’s fraudulent loan applications and the investigation concerning Congresswoman Bush’s use of campaign funds involved different people, organizations, courses of alleged conduct, and time periods. How would introducing evidence of the unrelated investigation show whether Defendant submitted fraudulent loan applications? It would not. It would, however, serve to confuse the jurors, waste time, and greatly expand the breadth of the trial. If Defendant were allowed to admit evidence about that investigation—perhaps for the impermissible purpose of demonstrating that, if he did nothing wrong there, then he must be innocent here, or otherwise casting the charges in this case as some kind of witch hunt—the government would be required to introduce its own evidence and testimony to the contrary. Because the probative value of the unrelated investigation, if any, is substantially outweighed by the danger of unfair prejudice, confusing the issues, misleading the jury, undue delay, and wasting time, it should be excluded.

E. All Evidence and Arguments Regarding the Government’s Charging Decisions, Alleged Political Motivation, or Alleged Selective Prosecution Should Be Precluded

This Court has recognized that the “Attorney General and United States Attorneys retain broad discretion to enforce the Nation’s criminal laws.” *United States v. Stone*, 394 F. Supp. 3d 1, 10 (D.D.C. 2019) (internal quotations omitted) (quoting *United States v. Armstrong*, 517 U.S. 456, 464 (1996)). This authority “lies at the core of the Executive’s duty to see to the faithful execution of the laws.” *Id.* (internal quotations omitted) (quoting *Cnty. for Creative Non-Violence v. Pierce*, 786 F.2d 1199, 1201 (D.C. Cir. 1986)); accord U.S. Const. Art. II, § 3; see also 28 U.S.C. §§ 516, 547.

“[S]o long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion.” *Bordenkircher v. Hayes*, 434

U.S. 357, 368 (1978); *accord United States v. Cespedes*, 151 F.3d 1329, 1332 (11th Cir. 1998); *see also United States v. Batchelder*, 442 U.S. 114, 124–25 (1979) (“Selectivity in the enforcement of criminal laws is, of course, subject to constitutional constraints.”). The claim that others “could have been charged but were not” is not a factual defense that bears upon whether the defendant is guilty of the crimes charged by the Grand Jury. *See Armstrong*, 517 U.S. at 463-64; *United States v. Smith*, 231 F.3d 800, 807 (11th Cir. 2000). Evidence that some other individual is currently uncharged has no probative value to the issues at trial and serves only to confuse or mislead the jury. *See Fed R. Evid.* 402, 403.

Judged under these legal principles, Defendant should be precluded from introducing evidence or making arguments regarding charging decisions made by the United States, including any argument that the charges in this case were politically motivated or otherwise the result of selective prosecution. *See Washington*, 705 F.2d at 495 (“[T]he issue of selective prosecution is one to be determined by the court, as it relates to an issue of law entirely independent of the ultimate issue of whether the defendant actually committed the crimes for which she was charged.” (citations omitted)); *United States v. Abboud*, 438 F.3d 554, 579 (6th Cir. 2006) (“[T]he defense of selective prosecution is a matter that is independent of a defendant’s guilt or innocence, so it is not a matter for the jury.”); *Sutton*, 636 F. Supp. 3d at 209–10 (granting motion *in limine* and describing selective prosecution argument as “irrelevant, inappropriate for consideration by the jury,” and prone to “invit[ing] jury nullification [] and distract[ing] from the issues at trial”).

To the extent that Defendant seeks to present evidence or arguments: (1) that the charges in this case were politically motivated; (2) that other individuals have not been charged for similar or related conduct; or (3) that it is unfair that Defendant was charged, while other individuals involved in criminal conduct remain uncharged, such evidence is irrelevant, inadmissible, and only

serves to divert the jury's attention to matters unrelated to Defendant's guilt or innocence. *Gorham*, 523 F.2d at 1097–98 (affirming a trial court order precluding defense evidence that might encourage a “conscience verdict” of acquittal).

Finally, for the reasons already discussed, Defendant and his counsel should also be precluded from identifying his wife as Congresswoman Bush or making any reference to her profession or involvement in politics, including during opening statements or closing arguments. Congresswoman Bush's identity is completely irrelevant and immaterial to the charges and facts at issue in this case—she had absolutely no involvement with the charged conduct, and in fact, according to media coverage, they did not even get married until well after Defendant submitted the fraudulent loan applications, received the loan proceeds, and had the loans forgiven. Referencing Congresswoman Bush's identity and political involvement in this trial would serve no legitimate purpose, but it would certainly present a serious risk of undue prejudice and invite possible jury nullification. Any attempt to inject her into this case would be a transparent effort to insinuate to the jury that this prosecution is politically motivated, which, for reasons already explained by the government in its Opposition to Defendant's Motion to Dismiss the Indictment for Selective Prosecution, ECF No. 16, it is not. See *United States v. Smirnov*, No. 2:24-CR-00091-ODW, 2024 WL 4893937, at *5 (C.D. Cal. Nov. 26, 2024) (granting government motion *in limine* and excluding “evidence, argument, or questioning that suggests the prosecution is politically motivated”).

CONCLUSION

To ensure the jury reaches a verdict based on the facts and evidence properly presented at trial, the government hereby asks that the Court grant its motion *in limine*.

Respectfully submitted,

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