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**United States District Court
Central District of California**

UNITED STATES OF AMERICA,
Plaintiffs,
v.
ALEXANDER SMIRNOV,
Defendants.

Case No 2:24-CR-00091-ODW

**ORDER RE MOTIONS IN LIMINE
[146]–[154]**

I. INTRODUCTION

Pending before the Court are Defendant Alexander Smirnov’s four Motions in Limine, (ECF Nos. 146–149), and the Government’s five Motions in Limine, (ECF Nos. 150–154). For the reasons discussed below, the Court rules as follows.

II. BACKGROUND

Defendant was indicted on two counts: (1) making false statements to federal law enforcement in violation of 18 U.S.C. § 1001 (Count I); and (2) causing the creation of a false record in a federal investigation in violation of 18 U.S.C. § 1519 (Count II). (Indictment ¶¶ 56–58, ECF No. 1.) Defendant has pleaded not guilty to both charges.

1 **III. DEFENDANT’S MOTIONS IN LIMINE**

2 Defendant moves to exclude or admit certain evidence at trial in four motions in
3 limine (“DMIL”).

4 **A. Defendant’s MIL No. 1, ECF No. 146: GRANTED**

5 Defendant moves to preclude any reference to his nine lawfully owned firearms
6 as not relevant and unduly prejudicial. (DMIL1, ECF No. 146.) The Government
7 responds that it does not intend to introduce evidence concerning Defendant’s lawfully
8 owned firearms that were seized from Defendant’s residence in its case in chief, but
9 reserves the right to do so with photographs or references only if Defendant disputes
10 that other items seized from his residence belong to him. (Gov’t Opp’n DMIL1, ECF
11 No. 172.) The Government intends to introduce electronic devices and a hat seized
12 from Defendant’s residence, which it contends are evidence of Defendant’s bias
13 against Public Official 1 and relevant to Defendant’s motive for providing false and
14 derogatory information to the FBI. (*Id.*)

15 That the Government seized firearms that Defendant undisputedly owns from
16 Defendant’s residence does not make it more or less likely that Defendant owns other
17 items also seized from the residence, so it is simply not relevant. Fed. R. Evid. 401,
18 402. Further, to the extent this fact could be considered relevant, evidence that
19 Defendant lawfully owns nine firearms is inflammatory and likely to inflict unfair
20 prejudice on Defendant. Fed. R. Evid. 403.

21 Accordingly, the Court **GRANTS** Defendant’s Motion in Limine No. 1. (ECF
22 No. 146.)

23 **B. Defendant’s MIL No. 2, ECF No. 147: GRANTED IN PART, DENIED IN**
24 **PART**

25 Defendant moves to preclude any references to his alleged disloyalty,
26 anticipating that the Government will “dirty him up” as a “Russian Spy”; he asks the
27 Court to prohibit evidence or references suggesting that Defendant was “unpatriotic”
28 or a “double agent.” (DMIL2, ECF No. 147.) The Government responds that it has

1 no intention of “dirty[ing]” Defendant up, and Defendant’s purported loyalty or
2 patriotism are wholly irrelevant to the case. (Gov’t Opp’n DMIL2, ECF No. 173.)
3 The Government intends to present evidence that Defendant lied and deceived his FBI
4 handler when he falsely reported the facts *charged in the indictment*, and that by doing
5 so Defendant betrayed the trust and confidence the FBI had bestowed on him. (*Id.*)

6 The parties argue past each other. To the extent Defendant seeks to preclude
7 evidence of his *general characteristics* of loyalty, disloyalty, patriotism, or lack
8 thereof, the Court grants the motion. However, the Government asserts that it has no
9 intention of introducing evidence to *generally* paint Defendant as a disloyal character
10 and instead will *specifically* tether any references to Defendant’s falsehoods to the
11 indictment and charges in this case. Thus, to the extent Defendant seeks to exclude
12 such specifically relevant references, the Court denies the motion. Additionally, if
13 Defendant opens the door by offering reputation or opinion testimony about his
14 loyalty, then the Government may rebut such testimony. (*See* discussion *infra* Section
15 IV.E. (addressing Defendant’s ability to offer evidence regarding his loyalty to the
16 United States).)

17 Accordingly, the Court **GRANTS IN PART** Defendant’s Motion in Limine
18 No. 2, (ECF No. 147), but **only to the extent** Defendant seeks to exclude untethered
19 evidence of Defendant’s general character of disloyalty or untruthfulness. The
20 Government may introduce evidence and argument that Defendant lied and deceived
21 his FBI handler with respect to the conduct charged in the indictment.

22 **C. Defendant’s MIL No. 3, ECF No. 148: DENIED**

23 Defendant moves for judicial notice of the July 26, 2023, hearing transcript in
24 *United States v. Biden*, CR 23-61-MN & CR 23-mj-274-MN (D. Del. 2023), the plea
25 hearing concerning the Hunter Biden firearms and tax cases. Defendant contends this
26 transcript is relevant to his theory of defense that his prosecution “smacks of political
27 bias.” (DMIL3 at 7.) The Government responds that Defendant’s motion is frivolous,
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1 the transcript has no relevance, and it is inadmissible. (Gov't Opp'n DMIL3, ECF
2 No. 175.)

3 The proffered transcript is not relevant here; it does not involve Defendant or
4 any witnesses in this case. An irrelevant fact is not an adjudicative fact for purposes
5 of Federal Rule of Evidence ("FRE") 201 and the Court does not take judicial notice
6 of this irrelevant transcript. Accordingly, the Court **DENIES** Defendant's Motion in
7 Limine No. 3. (ECF No. 148.)

8 **D. Defendant's MIL No. 4, ECF No. 149: DENIED**

9 Defendant moves to exclude evidence from his September 27, 2023 FBI
10 interview because he claims it is "uncharged, *post-hoc* conduct [the Government will
11 use] to establish an adverse character trait," Defendant's dishonesty. (DMIL4 at 4,
12 ECF No. 149.) The Government responds that evidence from the 2023 FBI interview
13 is not character evidence at all, but instead is a party opponent admission, admissible
14 pursuant to FRE 801(d)(2). (Gov't Opp'n DMIL4, ECF No. 176.) The Government
15 argues Defendant's statements at the 2023 interview are highly probative: the 2023
16 statements are evidence that Defendant's 2020 statements, as charged in the
17 indictment, are false because Defendant could not keep his story straight in 2023
18 about his previous reporting; and where Defendant's 2020 statements *are* the charged
19 conduct, his 2023 statements are *evidence proving* that conduct. (*Id.*)

20 The Court finds Defendant's statements during the September 27, 2023 FBI
21 interview are admissible as party opponent admission. These statements are not being
22 used as inadmissible character evidence, and they are highly probative with a specific
23 admissible purpose, to prove the charged conduct. Accordingly, the Court **DENIES**
24 Defendant's Motion in Limine No. 4. (ECF No. 149.)

25 **IV. GOVERNMENT'S MOTIONS IN LIMINE**

26 The Government moves to exclude certain evidence at trial in five motions in
27 limine ("GMIL").
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1 **A. Government’s MIL No. 1, ECF No. 150: GRANTED**

2 Defense offers Gregory Scott Rogers as an expert in the use of confidential
3 informants and undercover operations. (GMIL1 at 1, ECF No. 150; Decl. Leo J. Wise
4 ISO GMIL1 (“Wise Decl.”) Ex. 1 (“Expert Report”), ECF No. 150-2.) According to
5 his Expert Report, Rogers plans to offer the following testimony:

- 6 • Defendant was poorly handled as a confidential human source (“CHS”) from
7 the outset, and even though numerous deficiencies on the part of his handler
8 were noted over the years, the handler was allowed to continue operating
9 Defendant as a CHS, “likely due to how effective” he was as a CHS.
- 10 • One of the clearly demonstrable problems noted by the file reviewer was a
11 repeated lack of required reporting on the part of the handler.
- 12 • A CHS providing the type and amount of information provided by
13 Defendant should be handled with the utmost diligence.
- 14 • Defendant should have been polygraphed concerning his reporting on the
15 Biden family in an effort to verify the accuracy of that reporting.

16 (Expert Report 5.) The Government moves to exclude Rogers’s testimony for several
17 reasons: (1) his report fails to comply with Federal Rule of Criminal Procedure 16,
18 (2) his testimony will not be helpful to the trier of fact because it is irrelevant and
19 therefore should be excluded under FRE 702, and (3) his opinions are not based on
20 sufficient facts or reliable methodology as required for expert testimony under
21 FRE 702. (See GMIL1.) Defendant responds that Rogers’s testimony is material and
22 essential to Defendant’s theory of defense, that Defendant disclosed the Burisma
23 information to his handler in 2017, but his handler did not record it, consistent with
24 his poor handling of Defendant. (See Def. Opp’n GMIL1, ECF No. 167.)

25 Rogers’s opinion concerning whether Defendant’s handler was sloppy or
26 shoddy in his handling of Defendant in general is not relevant to whether Defendant
27 lied or caused a false report in 2020. At most, as discussed in the next section, only
28 certain instances of the FBI handling agent’s mistakes may be relevant and, to the

1 limited extent relevant, an expert is unnecessary to offer these purported mistakes.
2 Additionally, that Defendant should have been handled with the “u[t]most diligence,”
3 that he should have been polygraphed, and that the Government used Defendant
4 “likely due to how effective” he was, are not relevant to the issues here. As Rogers’s
5 proffered expert opinion is not relevant, it will not help the trier of fact resolve any
6 fact of consequence to the charged conduct and is excluded.

7 Accordingly, the Court **GRANTS** the Government’s Motion in Limine No. 1,
8 (ECF No. 150), and **EXCLUDES** Rogers’s expert testimony.

9 **B. Government’s MIL No. 2, ECF No. 151: GRANTED IN PART,**
10 **DEFERRED IN PART**

11 The Government moves to exclude the “alleged mistakes,” i.e., documentation
12 errors, of Defendant’s FBI handling agent. (GMIL2, ECF No. 151.) The Government
13 argues that evidence of the FBI handling agent’s purported documentation errors has
14 no relevance to the charged offenses and will only muddy the waters for the jury. The
15 Government identifies three administrative reports that defense counsel has indicated
16 an intent to use: (1) a February 13, 2013 Human Source Validation Report; (2) a
17 February 13, 2013, to March 18, 2021 Standard Validation Report; and (3) a
18 March 18, 2021, to November 16, 2023 Standard Validation Report. (GMIL2 at 1–2.)
19 Defendant responds that these reports are relevant and material to his defense, which
20 is, in part, that he made the disclosure in 2017 but his handler failed to document it.
21 Defendant seeks to use these reports to establish that the handling agent made
22 documentation errors during the time period at issue. (Def. Opp’n GMIL2, ECF
23 No. 168.) Defendant also argues the reports contain evidence of specific incidents of
24 conduct demonstrating his character for truthfulness, as they reflect that he cooperated
25 and assisted the government for more than a decade. (*Id.*)

26 The Court finds the third report irrelevant and it is therefore excluded.
27 Defendant’s proffer about the contents of the report do not relate to the handler’s past
28 documentation errors. Instead, Defendant states that the report shows that Defendant

1 was no longer fully under the handler's control; that Defendant may be committing
2 unauthorized illegal activity; and that the media's reporting of Defendant would vitiate
3 his ability to continue to function as a CHS. These points are not relevant to this case.

4 In contrast, the first and second report reflect potentially relevant information.
5 According to Defendant, the reports show that the handler did not properly document
6 certain information; for example, the handler identified Defendant's wrong country of
7 birth in his file. However, without more, these documentation errors are simply not
8 relevant. The Government appears to intend to offer as evidence the fact that
9 Defendant's allegedly false statements do not appear in any pre-2020 reports as proof
10 that Defendant made a false statement when he did report them in 2020. If the
11 Government intends to prove that such statements would have been in the reports had
12 Defendant actually made them at the time, then Defendant should be allowed to rebut
13 this fact with evidence that the handler has omitted or presented inaccurate
14 information in past reports. Such evidence concerning previous documentation errors
15 could be relevant in minimizing the importance of the absence of Burisma statements
16 and meetings in past reports.

17 However, at this time, the parties have not provided the Court with the
18 information necessary to make this determination, including how the Government
19 intends to prove that the reports would have had Defendant's statements about
20 Burisma if he had made them, or how Defendant intends to prove that the information
21 in the reports he seeks to admit is incorrect or false. As one example, if the
22 Government offers FBI policy as evidence that the information would have been in
23 the reports if it had been disclosed, then Defendant should be able to use such policies
24 to show that the handler has not properly documented information in the past, making
25 it more likely that the handler did not document the disclosure at issue. Ultimately,
26 without additional information, the Court cannot yet rule on the admissibility of the
27 documentation errors appearing in the first two reports, until the Government has
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1 introduced the fact that pre-2020 reports contain no Burisma-related statements from
2 Defendant at trial.

3 Accordingly, The Court **GRANTS IN PART** and **DEFERS IN PART** ruling on
4 the Government’s Motion in Limine No. 2. (ECF No. 151.) The Court **GRANTS IN**
5 **PART** the motion and **EXCLUDES** the third, March 18, 2021, to November 16, 2023
6 Standard Validation Report. The Court **DEFERS IN PART** regarding whether to
7 permit introduction of documentation errors appearing in the first February 13, 2013
8 Human Source Validation Report and the second February 13, 2013, to March 18,
9 2021 Standard Validation Report.

10 **C. Government’s MIL No. 3, ECF No. 152: GRANTED**

11 The Government moves to exclude “specific instances of conduct” evidence
12 that Defendant intends to use, as impermissible pursuant to FRE 405(b). (GMIL3,
13 ECF No. 152.) Defendant responds that “specific instances of conduct” evidence is
14 admissible here under FRE 405(b) as evidence of his character for truthfulness,
15 honesty, helpfulness, or reliability. (Def. Opp’n GMIL4, ECF No. 169.) He argues he
16 will use this evidence to negate the mens rea of the charged conduct, “knowingly,” by
17 establishing he is a truthful and reliable source. (*Id.*)

18 FRE 404(a)(2)(A) permits a defendant to offer evidence of the defendant’s
19 pertinent character trait, subject to the limitations of FRE 405. FRE 405(b) permits
20 “specific instances of conduct” evidence to establish a character trait only where that
21 character trait is an “essential element of a charge, claim, or defense.” Otherwise, a
22 defendant is limited to proving the pertinent character trait through reputation or
23 opinion evidence, with an exception for cross examination. Fed. R. Evid. 405(a). To
24 establish a character trait is an “essential element” for purposes of FRE 405(b), the
25 court considers whether “proof, or failure of proof, of the character trait by itself
26 [would] actually satisfy an element of the charge, claim or defense.” *United States v.*
27 *Keiser*, 57 F.3d 847, 856 (9th Cir. 1995).

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1 Here, Defendant's character for truthfulness is *not* an essential element of the
2 charges or defense, so specific instances tending to show that character trait are
3 inadmissible under FRE 405(b). The two-count indictment charges Defendant with
4 (1) making specific false statements to a government agent, in violation of 18 U.S.C.
5 § 1001; and (2) causing falsification of specific records in a federal investigation, in
6 violation of 18 U.S.C. § 1519. Defendant's general character for truthfulness plays no
7 part in establishing whether he lied and/or caused a false report on the *specific*
8 occasion charged here. Defendant argues his character for truthfulness is an essential
9 element of his defense, to show he was truthful and was never flagged as suspicious in
10 his time as a CHS. But whether he was generally truthful in other specific instances
11 over multiple years provides no defense if he was not truthful on the occasion
12 charged.

13 Accordingly, the Court **GRANTS** the Government's Motion in Limine No. 3
14 and **EXCLUDES** Defendant's "specific instances of conduct" evidence. (ECF
15 No. 152.)

16 **D. Government's MIL No. 4, ECF No. 153: GRANTED**

17 The Government moves to preclude Defendant from introducing evidence,
18 argument, or questioning that suggests the prosecution is "politically motivated, that
19 the government is selectively or vindictively prosecuting him, that government agents
20 or prosecutors engaged in outrageous government misconduct," that his prosecution is
21 unlawful, costly, or inappropriately funded, or that the prosecutors or agents are
22 conflicted. (GMIL4, ECF No. 153.) Defendant does not specifically oppose these
23 arguments, and instead responds that evidence and inquiry into the FBI's conduct,
24 bias, and shoddy record-keeping are relevant and essential to Defendant's defense.
25 (Def. Opp'n GMIL4 at 5, ECF No. 170.) He argues that the heart of his defense is
26 that his handler's shoddy work and negligent record keeping is consistent with the
27 handler's failure to record Defendant's disclosure related to Burisma. (*Id.*) However,
28 this defense concerns his handler's behavior, not the prosecution's.

1 The Court **GRANTS** the Government’s Motion in Limine No. 4, (ECF
2 No. 153), and **EXCLUDES** evidence, argument, or questioning that suggests the
3 prosecution is politically motivated, vindictively prosecuting Defendant, or the other
4 inflammatory accusations the Government lists for exclusion.

5 **E. Government’s MIL No. 5, ECF No. 154: GRANTED IN PART, DENIED**
6 **IN PART**

7 The Government moves to exclude five factual issues that it contends are
8 irrelevant to the case: **(1)** Defendant’s potential punishment; **(2)** Defendant’s pretrial
9 detention status and medical condition of his eyes; **(3)** Defendant’s claims that the
10 United States directed him to meet with Burisma in April 2017 and with a foreign
11 intelligence in 2023; **(4)** that Defendant’s handler used a personal phone to
12 communicate with Defendant; and **(5)** that Defendant is “loyal” to or a “servant of”
13 the United States. (GMIL5, ECF No. 154.)

14 Defendant responds to each issue: **(1)** Defendant will not raise potential
15 punishment; **(2)** Defendant will not raise his pretrial detention status but contends that
16 his eye condition may arise in a factual context where his ability to perceive events is
17 at issue; **(3)** there is evidence that suggests the United States directed him to meet with
18 Burisma in April 2017; **(4)** Defendant’s handler’s use of a personal phone to
19 communicate with Defendant is relevant to the type of informal relationship
20 Defendant shared with the handler; and **(5)** Defendant intends to use specific instances
21 of his good conduct as well as reputation and opinion evidence to establish his
22 character for lawfulness and loyalty. (Def. Opp’n GMIL5, ECF No. 171.)

23 As discussed below, the Court **GRANTS IN PART** the Government’s Motion
24 in Limine No. 5, (ECF No. 154), and **EXCLUDES** evidence, arguments, or references
25 to categories (1), (2), and (3), and specific instances of conduct evidence in
26 category (5). The Court **DENIES IN PART** the Government’s Motion in Limine
27 No. 5 as to evidence in category (4) and reputation or opinion testimony in
28 category (5).

1 1. *Potential Punishment*

2 Defendant does not oppose and will not raise his potential punishment at trial.
3 The Government’s Motion in Limine No. 5 as to category (1) is therefore **MOOT**.

4 2. *Pretrial Detention Status and Medical Eye Condition*

5 Defendant agrees not to raise his pretrial detention status at trial. Defendant has
6 not explained how his eye condition is relevant to the issues in the case, and the Court
7 does not see how his ability to perceive events at the 2015 and/or 2016 allegedly
8 nonexistent meetings with Burisma will be relevant. Accordingly, the Government’s
9 Motion in Limine No. 5 as to category (2) is tentatively **GRANTED**. However, if the
10 Government opens the door to Defendant’s ability to perceive events or Defendant
11 proffers why this ability to perceive events is relevant, the Court may reconsider
12 whether Defendant can introduce evidence regarding his eye condition.

13 3. *Claims that U.S. Government Directed Defendant to Certain Meetings*

14 The indictment charges Defendant with lying to his handler in 2020 about
15 meetings with Burisma that he claims occurred in 2015 and/or 2016. (Indictment
16 ¶¶ 6(b)–(c).) And the indictment already alleges that Defendant had contact with
17 executives from Burisma in 2017. (*Id.* ¶ 6(d).) Whether the United States directed
18 him to meet with Burisma in April 2017 (as opposed to the fact that he met with
19 Burisma in 2017) has no bearing on the charges. Accordingly, the Court **GRANTS**
20 the Government’s Motion in Limine No. 5 as to category (3).

21 4. *Handler’s Personal Phone*

22 That Defendant’s handler used a personal phone to communicate with
23 Defendant may be somewhat relevant to the charges in this case. Defendant contends
24 the informal relationship he shared with his handler supports that Defendant reported
25 things to the handler that the handler did not document. This could support a defense
26 that Defendant had previously reported a 2015/2016 Burisma meeting, even though no
27 such meeting appears in the FBI reports. The Government does not address whether
28 the evidence is relevant, and instead contends that “[t]here is no evidence to support

1 this claim.” That may be true, and if Defendant offers no admissible evidence about
2 the handler using his personal phone, then, as with any argument, Defendant would
3 not be permitted to argue at opening or closing that Defendant’s handler used a
4 personal phone. Until that time, Defendant may offer *evidence* that his handler used a
5 personal phone to communicate with him. Accordingly, the Court **DENIES** the
6 Government’s Motion in Limine No. 5 as to category (4).

7 5. *Loyalty; Patriotism*

8 Finally, Defendant’s loyalty, patriotism, or service to the United States may be
9 relevant to the charges or defense. If Defendant is truly loyal and patriotic, a jury
10 could find that makes it less likely that he would lie to the federal government. As a
11 general matter, FRE 404 prohibits evidence of a person’s character or character trait to
12 prove that on a particular occasion the person acted in accordance with the character
13 or trait. Fed. R. Evid. 404(a)(1). However, there is an exception where a defendant
14 may offer evidence of the defendant’s *pertinent* trait, and if the evidence is admitted,
15 the prosecutor may offer evidence to rebut it. Fed. R. Evid. 404(2)(A). FRE 405(a)
16 permits a defendant to use reputation or opinion testimony to prove a pertinent
17 character or trait. Therefore, Defendant may use reputation or opinion evidence to
18 show his loyalty, patriotism, or service to the United States. If so offered, the
19 Government may cross-examine Defendant’s character witness with relevant specific
20 instances of Defendant’s conduct. Accordingly, to the extent Defendant seeks to use
21 reputation or opinion testimony to prove his character trait for loyalty or patriotism,
22 the Government’s Motion in Limine No. 5 as to category (5) is **DENIED IN PART**.

23 However, to the extent Defendant seeks to use “specific instances of conduct”
24 evidence, it is impermissible under FRE 405(b). As discussed above, FRE 405(b)
25 permits such evidence only when a person’s character or character trait is an essential
26 element of a charge, claim, or defense. But loyalty, patriotism, and service are not
27 essential elements of the charges or defense. As such, specific instances of conduct
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1 evidence is excluded and the Government’s Motion in Limine No. 5 as to category (5)
2 “specific instances” evidence is **GRANTED IN PART**.

3 In sum, the Court **GRANTS IN PART** the Government’s Motion in Limine
4 No. 5, (ECF No. 154), and **EXCLUDES** evidence, argument, or questioning
5 concerning categories (1), (2), and (3), and specific instances evidence in category (5).
6 The Court **DENIES IN PART** the Government’s Motion in Limine No. 5 regarding
7 evidence in category (4) and reputation or opinion testimony in category (5).

8 V. CONCLUSION

9 For the reasons discussed above, the Court rules as follows on the parties’
10 Motions in Limine:

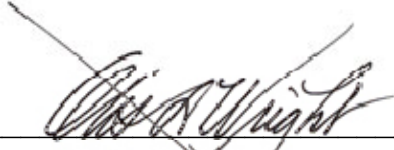
- 11 • Defendant’s MIL No. 1, to preclude reference to Defendant’s lawfully
12 owned firearms, ECF No. 146: **GRANTED**;
- 13 • Defendant’s MIL No. 2, to preclude reference to Defendant’s alleged
14 disloyalty, ECF No. 147: **GRANTED IN PART, DENIED IN PART**;
- 15 • Defendant’s MIL No. 3, to take judicial notice of hearing transcript, ECF
16 No. 148: **DENIED**;
- 17 • Defendant’s MIL No. 4, to preclude evidence from Defendant’s FBI
18 interview on September 27, 2023, ECF No. 149: **DENIED**;
- 19 • Government’s MIL No. 1, to preclude proposed defense expert witness
20 Gregory Scott Rogers, ECF No. 150: **GRANTED**;
- 21 • Government’s MIL No. 2, to exclude FBI handling agent’s alleged mistakes,
22 ECF No. 151: **GRANTED IN PART, DEFERRED IN PART**;
- 23 • Government’s MIL No. 3, to exclude impermissible “specific instances of
24 conduct” evidence, ECF No. 152: **GRANTED**;
- 25 • Government’s MIL No. 4, to exclude alleged defects in prosecution, ECF
26 No. 153: **GRANTED**; and

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- Government’s MIL No. 5, to exclude irrelevant factual issues, ECF No. 154:
GRANTED IN PART, DENIED IN PART.

IT IS SO ORDERED.

November 26, 2024



OTIS D. WRIGHT, II
UNITED STATES DISTRICT JUDGE