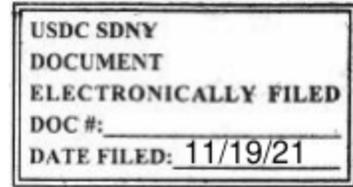


UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK



United States of America,

–v–

Ghislaine Maxwell,

Defendant.

20-CR-330 (AJN)

MEMORANDUM  
OPINION & ORDER

ALISON J. NATHAN, District Judge:

Before the Court is the Defendant’s fourth motion *in limine* to “exclude evidence related to Accuser-3,” to whom the Court refers as Witness-3, on the grounds that the testimony is not direct evidence of the charged conspiracies and is inadmissible under Federal Rules of Evidence 404(b) and 403. Dkt. Nos. 387, 444. The Court has twice heard argument related to this motion, including argument at the November 10, 2021 in camera hearing that was sealed pursuant to Federal Rule of Evidence 412. *See generally* Nov. 1, 2021 Transcript; Nov. 10, 2021 Transcript. At the November 1, 2021 hearing, the Court provided a brief explanation of its current position based on the information then before it, but the Court ultimately reserved ruling pending additional briefing. The Court is now in receipt of the parties’ additional briefing and accordingly is prepared to resolve the motion.<sup>1</sup>

The Government now proffers that the anticipated testimony of Witness-3 will describe how she met the Defendant and her relationship with the Defendant and Mr. Epstein. In particular, Witness-3 is anticipated to testify how Defendant introduced her to Mr. Epstein, how

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<sup>1</sup> This Memorandum Opinion & Order is filed temporarily under seal to permit the parties the opportunity to propose sealing or limited redactions pursuant to *Lugosch v. Pyramid Co. of Onondaga*, 435 F.3d 110 (2d Cir. 2006), and Federal Rule of Evidence 412(c)(2).

massages progressed to involve sexual activity, and Ms. Maxwell's role in facilitating those massages. Based on all of the information now before the Court, including a substantially more detailed proffer by the Government as to the anticipated testimony, *see* Gov. Supp. Ltr. at 2-3 (Nov. 5, 2021); *see also* Dkt. No. 452 at 42-43, the Court concludes that some of the anticipated testimony may serve as direct evidence of the Mann Act counts.

The Government rightly acknowledged at the November 1 pretrial conference that Ms. Maxwell cannot be found guilty on this witness's testimony alone for any of the crimes charged in the Indictment. Nov. 1, 2021 Tr. at 67:12-25, 68:13-19, 69:4-9, 70:23-71:2, 72:22-25. As the Government acknowledged, with respect to the jury's determination in this case, this witness is not a victim of any of the crimes charged in the Indictment. *See id.* at 69:4-9; Nov. 10, 2021 Tr. at 164:19-165:3.<sup>2</sup> However, evidence of legal conduct can of course be relevant evidence of illegality. And conduct that cannot itself form the basis of a conviction can serve as direct evidence of the crimes charged. *See, e.g., United States v. Robinson*, 702 F.3d 22, 37 (2d Cir. 2012) (affirming admission of defendant pimp's relationship with and control over women who worked as prostitutes as direct evidence of 18 U.S.C. § 1591(a) charge). Thus some of the anticipated testimony described above can serve as direct evidence, notwithstanding the fact that the alleged conduct as to Witness-3 was not illegal for the purpose of the charges in this case.

Portions of the anticipated testimony may also serve permissible purposes under Rule 404(b), namely proving motive, intent, and knowledge. *See* Fed. R. Evid. 404(b)(2). The witness is expected to testify about certain statements by Ms. Maxwell. For example, the

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<sup>2</sup> At the November 1 conference, the Court denied the Defendant's motion to preclude the Government from referring to alleged victims as "victims" and "minor victims." Nov. 1, 2021 Tr. at 4. In contrast to the other alleged victim witnesses, it is not (nor could it be) the Government's litigating position that this witness is a victim of the crimes charged in the Indictment. Given this, the Government may not refer to this witness as a "victim" or a "minor victim" in front of the jury. Doing so would constitute prejudicial error for the reasons explained in this Memorandum Opinion & Order.

Government expects the witness to testify: that after the witness massaged Mr. Epstein while he was nude, Ms. Maxwell asked the witness if she “had fun and whether Mr. Epstein liked the massage”; that Ms. Maxwell commented that if the witness were not engaging in sexual activities with Mr. Epstein, performing sexual acts would “fall” more to Ms. Maxwell or someone else; and that Ms. Maxwell commented on Mr. Epstein’s “significant sexual needs.” Gov. Supp. Ltr, at 2-3 (Nov. 5, 2021). These statements are relevant because the jury may conclude that they tend to establish that the Defendant knew the alleged massages were sexualized and the Defendant’s motive for facilitating the encounters. The witness is also expected to testify that the Defendant asked the witness to find other girls to massage Mr. Epstein. *Id.* at 3, 9. This testimony is relevant because the jury may conclude that it tends to establish the Defendant’s intent to recruit girls for sexualized massages. The Court will also permit testimony that Ms. Maxwell provided the witness with a schoolgirl uniform and told the witness to wear the uniform and bring Mr. Epstein tea. *Id.* at 3. Although it is not the only available interpretation of this evidence, the jury could conclude that Defendant’s alleged instruction to an 18-year-old to wear a schoolgirl uniform tends to establish both the Defendant’s knowledge of Mr. Epstein’s sexual preferences for school-age girls and her intent to actively cater to those preferences. Such knowledge and intent are of course proper purposes under Rule 404(b).<sup>3</sup>

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<sup>3</sup> Defendant argues that this witness’s testimony is impermissible propensity evidence as to Mr. Epstein under Rule 404(b). Def. Supp. Resp. at 5-7 (Nov. 11, 2021). The Court is unpersuaded. The testimony is not offered to show that Mr. Epstein acted in accordance with a certain character trait on a particular occasion. Rather, it is probative of whether Ms. Maxwell knew of or at least believed he had a sexual interest in school-age girls, which a jury may find tends to establish the Defendant’s intent and motive as to the charged crimes. *See Roe v. Howard*, 917 F.3d 229, 245-46 (4<sup>th</sup> Cir. 2019) (rejecting argument that husband’s assault of a non-party housekeeper was improper character evidence under Rule 404(b) in a Trafficking Victims Protection Act action against the wife for facilitating husband’s assaults of live-in housekeeper).

The probative value of the anticipated testimony must of course be balanced with any potential prejudice under Rule 403. As the Court noted at the November 1 conference, there is a risk that the jury may confuse the issues and think that the sexual conduct this witness is describing itself constitutes the illegality charged in the Indictment due to the closeness in age of this witness to the age of consent. Nov. 1, 2021 Tr. at 89-90. There is also the risk that the jury may convict Ms. Maxwell due to feelings of immorality or sympathy for the witness despite the lack of illegality with regard to the crimes charged in the Indictment. However, the Court concludes that this risk of prejudice can be sufficiently minimized through two avenues. First, the testimony must be carefully limited. Second, there must be a clear limiting instruction.

As to the first, the witness is limited to stating that sexual activity occurred but is precluded from providing detailed descriptions of the sexual activity. There is little to no probative value of a witness describing sexual activity when that witness's testimony regarding the sexual activity cannot form the basis for the conviction of the crimes charged. For example, any prejudice from the schoolgirl uniform testimony described above is substantially diminished by limiting the proffered testimony to the Defendant's interaction with the witness and testimony indicating that sexual activity allegedly took place without describing the details of that sexual activity. Unlike the details of the sexual conduct itself, this anticipated testimony would not be unduly prejudicial. In contrast, the minimal probative value of the details of sexual conduct would be substantially outweighed by the risk of the jury convicting Ms. Maxwell on an improper basis. The same is true of the witness's subjective experience of the sexual conduct and any emotional or other impact the sexual conduct had on the witness because such testimony cannot form the basis of a conviction in this case. Accordingly, the witness is limited, as the Government phrased it, to describing her "factual experience" as to the lines of testimony

described above. *See* Gov. Supp. Ltr. at 12 (Nov. 5, 2021). For example, in a recent murder trial, the Court permitted the nephew of the victim to describe his uncle's wounds because the nephew, who had served as a caretaker, had some information that was not cumulative of the medical records. The Court expressly cautioned the Government that it would not permit emotional testimony, or the probative value would be outweighed by the prejudice:

[I]t's clearly a 403 line here. You have cumulateness with the medical testimony, you have graphic descriptions from a relative who cared for the victim which could very well produce sympathies and prejudice that would interfere with and overcome the medical facts that you need for purposes of proving causation. . . . I am certainly going to cut off the line at any graphic descriptions. To the extent that walking this person through questions regarding the medical condition is emotional testimony, I think we are – it will have to be stopped.

*United States v. Berry*, No. 20 Cr. 84 (AJN), Dkt. No. 138 at 13; *see also id.* at 15. In that case, the Government agreed that the line had to be carefully guarded. *Id.* at 13-14. The transcript of that ruling is attached for counsel's reference. *See* Exhibit A. The Court cautions the Government to proceed carefully because the Court will not allow testimony that steps over this 403 line. The Court will allow some leading questions for this portion of the testimony to help ensure that it does not.

Finally, the Court concludes that this witness's anticipated testimony as to the sex trafficking counts is inadmissible. Although the Government's letter points to some relevant direct evidence that this witness could provide regarding these counts, *see* Gov. Supp. Ltr. at 6-7, any minimal probative value of this evidence is diminished by its remoteness in time to the charged sex trafficking conspiracy, which is alleged to have run from 2001 to 2004. This evidence does not face the same problem as it relates to the Mann Act conspiracies, which are alleged to have begun in 1994 (and when the Defendant allegedly began her relationship with this witness.). Because the risk of unfair prejudice substantially outweighs the probative value of

this evidence as to the sex trafficking counts, the witness is precluded from testifying that Mr. Epstein paid her for massages when she was an adult.

The Court thus draws the line described above for limiting Witness-3's testimony. Permitting the entirety of the proffered testimony carries a risk that the jury may convict Ms. Maxwell due to conduct that cannot form the basis of a conviction for the charged crimes. But by limiting the testimony to the few categories of relevant testimony outlined above, the prejudice is substantially minimized.

Moreover, whether as direct evidence of the Mann Act counts or offered for a proper purpose under 404(b), this testimony must be paired with a proper limiting instruction to guard against potential juror confusion. The Defense has submitted proposed limiting instructions, and the Government agrees that some sort of instruction is appropriate, although it disagrees with the basis for the instruction. Dkt. No. 452 at 50 n.12; Gov. Supp. Ltr. at 12 (Nov. 5, 2021). In accordance with this ruling, the Court proposes the following instruction before this anticipated witness testifies:

You will hear testimony from the next witness about interactions that she says she had with the Defendant and Mr. Epstein. I instruct you that because the witness was over the relevant age of consent at the relevant time period, any sexual conduct she says occurred with Mr. Epstein was not "illegal sexual activity" as the Government has charged in the Indictment. I instruct you that this witness is not a victim of the crimes charged in the Indictment. To the extent you conclude that her testimony is relevant to the issues before you, you may consider it. However, you may not convict the Defendant on the basis of the testimony regarding the sexual conduct between this witness and Mr. Epstein. Nor may you consider this testimony as any kind of reflection on Mr. Epstein's nor Ms. Maxwell's character or propensity to commit any of the crimes charged in the Indictment.

The Court also proposes the following instruction before any testimony by other witnesses regarding sexual activity that occurred after the relevant age of consent:

I anticipate that you will hear testimony from the next witness about sexual conduct that she says she had with Mr. Epstein in [insert relevant jurisdiction, e.g. New Mexico]. I instruct you that because the witness was over the age of consent in [insert relevant

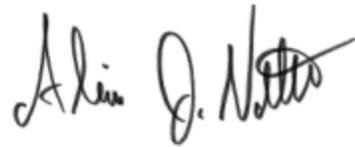
jurisdiction, e.g. New Mexico] at the relevant time period, the sexual conduct she says occurred with Mr. Epstein was not “illegal sexual activity” as the Government has charged in the Indictment. However, to the extent you conclude that her testimony is relevant to the issues before you, you may consider it. However, you may not consider this testimony as any kind of reflection on Mr. Epstein’s nor Ms. Maxwell’s character or propensity to commit any of the crimes charged in the Indictment.

The parties may submit any requested edits to the proposed limiting instructions that are consistent with the Court’s ruling or indicate that they have none on or before November 21, 2021.

This resolves Dkt. Nos. 387, 444.

SO ORDERED.

Dated: November 19, 2021  
New York, New York

A handwritten signature in black ink, appearing to read "Alison J. Nathan", written in a cursive style.

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ALISON J. NATHAN  
United States District Judge

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1 UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

2 -----x  
3 UNITED STATES OF AMERICA,

New York, N.Y.

4 v.

20 Cr. 84 (AJN)

5 RALPH BERRY,

6 Defendant.

7 -----x

8 September 21, 2021  
9:45 a.m.

10 Before:

11 HON. ALISON J. NATHAN,

12 U.S. District Judge  
13 And A Jury

14 APPEARANCES

15 AUDREY STRAUSS

United States Attorney for the  
Southern District of New York

16 BY: [REDACTED]  
[REDACTED]  
17 [REDACTED]

Assistant United States Attorneys

18 LAW OFFICE OF MARK S. DEMARCO

Attorneys for Defendant

19 BY: MARK DeMARCO

20 -AND-

LAW OFFICES OF EZRA SPILKE, PLLC

21 BY: EZRA SPILKE

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1 (Case called)

2 THE DEPUTY CLERK: Counsel, please state your name for  
3 the record, starting with the government.

4 MR. HOBSON: Good morning, your Honor. Adam Hobson,  
5 Jacob Fiddelman, and Dominic Gentile for the government.

6 THE COURT: Good morning.

7 For the defendant?

8 MR. DeMARCO: Good morning. For Mr. Berry, Mark  
9 DeMarco and Ezra Spilke, Ms. Mayerlin Ulerio, and of course  
10 Mr. Berry.

11 THE COURT: Good morning, counsel.

12 Good morning, Mr. Berry.

13 THE DEFENDANT: Good morning.

14 THE COURT: I had hoped to start at 9:00 but Mr. Berry  
15 wasn't brought until now. Hopefully that won't repeat going  
16 forward. We will make sure that things are in place to prevent  
17 that so we can timely get started each day.

18 I thank everyone for being here on time. Let me ask,  
19 as a matter of procedure, we will wait for the jury department  
20 to let us know when the panel is checked in and assembled and  
21 in their seats, and then can head over to 500 Pearl to commence  
22 jury selection. My purpose for today is to confirm the receipt  
23 of the voir dire questionnaire that I sent yesterday with the  
24 noted change, make sure everybody got that. The second is to  
25 confirm that there have been no additional plea offers. And

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1       lastly, I made the note, make sure there are no questions  
2       regarding jury selection now that you have been to the  
3       walk-through in the jury selection room where selection will  
4       take place.

5               So, let me ask, everybody received the voir dire with  
6       the noted changes?

7               MR. HOBSON: Yes, your Honor. We did.

8               THE COURT: Nothing additional, Mr. Hobson?

9               MR. HOBSON: Nothing additional.

10              MR. DeMARCO: Yes, your Honor; and nothing additional.

11              THE COURT: Thank you.

12              Any additional plea offers that I need to allocute on?

13              MR. HOBSON: No additional plea offers have been  
14       extended, your Honor.

15              THE COURT: OK. And then let me confirm if anybody  
16       has any questions about jury selections. To repeat the basic  
17       process, I will qualify 33 potential jurors that represents 12  
18       jurors and three alternates, 10 peremptories as to the main  
19       panel for the defense, six peremptories for the government, one  
20       peremptory per side with respect to the alternates. And the  
21       way that we are operating under the COVID protocols, the jury  
22       department will, after the jury panel members are checked in,  
23       they'll be randomly assigned a number consistent with a list  
24       that the jury department generates, they will be seated in that  
25       numerical order in the jury selection room. I understand 1

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1 through 42 will be in the main jury selection room and then 43  
2 through, I believe 82 -- we will get the final number once we  
3 see what the return on the summons is -- will be seated in  
4 courtroom 9C also at 500 Pearl, with a live feed to 9C of  
5 everything taking place in the jury assembly room.

6 I will make preliminary instructions which you have  
7 seen after you and I enter the courtroom. The panel members  
8 will be seated at that point. I will make my preliminary  
9 remarks, the written questionnaire that the jurors can read  
10 along with will be handed out at that point, both in the jury  
11 assembly room and in 9C simultaneously through court staff. I  
12 will instruct the jurors not to write anything on the  
13 questionnaire with the exception of circling a number if they  
14 have a "yes" response to that question as I read through the  
15 questionnaire.

16 So, at that point I will turn to panel member juror  
17 no. 1 and go through and read the questionnaire getting "yes"  
18 or "no" response to each question. If the answer is "yes"  
19 following up as appropriate. To the extent that the matters  
20 touched upon could influence other jurors or are of a sensitive  
21 nature, we will bring that juror over to the plexiglass area to  
22 my right in the jury assembly room, there is markings on the  
23 floor where folks stand and the noise machine will be on so  
24 that others cannot hear, and I will inquire with the juror as  
25 to any necessary follow-up.

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1           Once we get through, assuming we get through juror  
2 no. 1 without any for-cause issues, I will turn to juror no. 2  
3 and say do you have any "yes" responses? And then we will take  
4 those in order as they come.

5           If any juror needs to be dismissed for cause, let's  
6 say juror no. 2 needs to be dismissed for cause, then we will  
7 proceed with the same process with juror no. 3. Any "yes"  
8 questions, taking those one at a time, continuing until we have  
9 33 qualified jurors.

10           Once we have 33 qualified jurors you will exercise  
11 your peremptory strikes by list and simultaneously, that is,  
12 each side will produce a list with the government's six strikes  
13 as to the main panel and one strike as to the alternate panel,  
14 and the defense will write its list with 10 strikes as to the  
15 main panel and one strike as to the alternate panel.  
16 Obviously, before anyone is dismissed, I will hear from counsel  
17 if any applications or issues need to be raised if you are  
18 satisfied with our jury. Once we get there we will read the  
19 names of the selected jurors, dismiss to the jury department  
20 the unused jurors, and then proceed over back across the street  
21 over here. I believe what we will do is have Ms. Williams take  
22 the jurors to the jury room, which is an outfitted courtroom so  
23 they can put their belongings down, she can give them notebook  
24 and pen, bring them back in. At that point she will swear the  
25 jury and I will give preliminary instructions and opening

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1 statements. Whether that happens today or tomorrow we will  
2 see. Hopefully today.

3 Any questions or issues to raise with the process I  
4 have described? Mr. Hobson?

5 MR. HOBSON: Your Honor, no. One small thing on the  
6 voir dire. We submitted a list of names for the Court to read.  
7 One thing I wanted to flag for the Court is one of the  
8 witnesses' names we asked you to include is Jesus Ortiz, and  
9 that's how he pronounces his name, with a hard J. I want to  
10 flag that for the Court so that his name is read accurately to  
11 the jury.

12 THE COURT: Let me see if there are any other  
13 pronunciation issues.

14 Mr. DeMarco, while I am pulling that up, any other  
15 questions or issues with respect to the process?

16 MR. DeMARCO: No, your Honor.

17 THE COURT: And, Mr. DeMarco, you are going to keep  
18 your mask on so I don't have to keep coming at you about it?

19 MR. DeMARCO: I will do my best.

20 THE COURT: OK. Don't take it off to talk.

21 MR. DeMARCO: Sorry?

22 THE COURT: Don't take it off to talk.

23 MR. DeMARCO: OK. I took it off to listen the last  
24 time.

25 THE COURT: That's an anatomical anomaly.

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1 I should say, of course, once we are in the courtroom  
2 then counsel in the plexiglass box with the HEPA filter will be  
3 able to remove their mask for questioning, and to the extent  
4 outside of the jury we have argument or the like, we can do  
5 that in there to aid that that process.

6 It's Ms. Ulerio, Mayerlin, am I saying that correctly?

7 MS. ULERIO: Yes.

8 THE COURT: And you have another paralegal Dylan  
9 Schneider who may be here?

10 MR. DeMARCO: Yes, your Honor, but he won't be with us  
11 in court.

12 THE COURT: And what about Jeremy Schneider?  
13 Mr. Schneider.

14 MR. DeMARCO: He is unable to be with us.

15 THE COURT: He won't be at trial at any point?

16 MR. DeMARCO: No. I don't expect him to be here.

17 THE COURT: Should I include him in the voir dire just  
18 in case.

19 MR. DeMARCO: I think you should, Judge, because his  
20 name might come up and I just can't see how or where or under  
21 what scenario. But, just to be safe.

22 MR. HOBSON: His name is on the stipulations, so maybe  
23 to be safe.

24 THE COURT: Just to note, when I do introduce counsel  
25 for purposes of the voir dire, and Mr. Berry, and the

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1 paralegals, I will ask each of you to stand as I say your name  
2 so that the jurors can see you, the panelists can see you. So,  
3 I will note Mr. Schneider is part of the team but not present  
4 today and may not be present every day of the trial.

5 Appropriate, Mr. DeMarco?

6 MR. DeMARCO: Yes, Judge.

7 THE COURT: OK. So Jesus Ortiz is the pronunciation.  
8 How about, Mr. Hobson, how do I pronounce no. Q?

9 MR. HOBSON: I believe, your Honor, it is Vyacheslav,  
10 and the last name is Polosin.

11 THE COURT: Vyacheslav Polosin. OK.

12 Special Agent Stefano Braccini?

13 MR. HOBSON: And he is in the courtroom.

14 THE COURT: OK. I think that's it. Other issues to  
15 take up?

16 MR. HOBSON: I don't think so, your Honor.

17 THE COURT: Mr. DeMarco?

18 MR. DeMARCO: No, your Honor. Not now.

19 Judge, how much time do we have before we walk over?  
20 Maybe we could use this time efficiently, because I do have --  
21 I raised with the government an issue I was going to raise with  
22 their first witness so you tell me.

23 THE COURT: I was told around between 10:00 and 10:30  
24 but we won't know until they actually call over so I'm happy to  
25 use the time and if we get the call, we will pause.

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1 MR. DeMARCO: OK.

2 THE COURT: Was it an issue you wanted to speak to the  
3 government about first?

4 MR. DeMARCO: I did consult with the government. I  
5 was unpersuasive. I was hoping to be more successful with your  
6 Honor.

7 THE COURT: OK. And the first witness is?

8 MR. DeMARCO: Mr. Rasheen Vega.

9 THE COURT: Go ahead. And if you could speak into the  
10 mic, please?

11 MR. DeMARCO: It seems to me, your Honor, from my  
12 reading of the 3500 material, that we can expect Mr. Vega to  
13 testify to something like this: That he was the nephew of  
14 Mr. Jones, that he was 11 years old at the time that Mr. Jones  
15 was shot in June of 2000, that he witnessed a portion of that  
16 shooting or the aftermath of that shooting which I am OK with.  
17 The problem that I have with his prospective testimony is this:  
18 It also appears from reading the 3500 that the government will  
19 seek to elicit from Mr. Vega testimony about the horrific,  
20 horrific bedsores or compression sores that Mr. Jones was  
21 suffering from at the time of his death. I believe there is at  
22 least notes that Mr. Vega observed the sores to be oozing,  
23 observed Mr. Jones to be in terrible, terrible pain and  
24 suffering at or near the time of his death, and my concern is  
25 that, A, in light of the fact that two doctors are being called

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1 by the government and, even apart from that, Mr. Vega is not  
2 qualified to testify about the injuries that he observed; and  
3 B, that this type of testimony serves no purpose but to elicit  
4 or garner sympathy from the jury and will be unduly prejudicial  
5 to Mr. Berry.

6 So, that's the basis of my objection to Mr. Vega,  
7 should he be asked those types of questions.

8 THE COURT: Understood.

9 Mr. Hobson?

10 MR. HOBSON: Your Honor, there are two large topics  
11 that Mr. Vega is anticipated to testify about. I think it is  
12 consistent with what Mr. DeMarco says is, one, he was a  
13 percipient witness to the shooting itself; and two, he observed  
14 the victim's injuries after the shooting and was involved in  
15 the victim's care in the 10 years between the shooting and the  
16 victim's death. I take it it is the second category that the  
17 defendant is objecting to. But here, cause of death is  
18 obviously a big issue in this case and it is something that it  
19 is our burden to prove, that the injuries from the shooting  
20 lead to his death. And we expect the evidence to show that, as  
21 a result of the shooting, the victim became paralyzed from the  
22 waist down and that meant that he was confined to a  
23 wheelchair -- whereas he was not in a wheelchair before -- and  
24 developed serious complications as a result of that including  
25 serious sores which later led to infection and the victim's

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1 death.

2 We will not be eliciting expert medical testimony or  
3 opinion from this witness, he will be simply testifying to what  
4 he observed with respect to the victim's physical condition  
5 during the 10 intervening years between the shooting and the  
6 death and that's important evidence, it's evidence that will  
7 then be consistent with things that medical experts to be  
8 qualified as experts will be called to testify about, but those  
9 experts did not observe these injuries during the 10  
10 intervening years. They also did not observe Mr. Jones prior  
11 to the shooting. For instance, they wouldn't be able to tell  
12 you whether he was in a wheelchair before the shooting or after  
13 the shooting. They wouldn't be able to tell you if he  
14 developed those bedsores before the shooting or after the  
15 shooting. It is Mr. Vega's observations that will allow the  
16 jury to connect those dots. Given how important causation is  
17 in this case, we think it is important that the jury understand  
18 those injuries.

19 THE COURT: Will medical records, that will be  
20 introduced, describe the bedsores?

21 MR. HOBSON: They will describe the bedsores at the  
22 time of the autopsy which was in November of 2010.

23 THE COURT: What is the connection between bedsores  
24 and cause of death? Infection?

25 MR. HOBSON: Your Honor, essentially what I expect the

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1 testimony will be from the medical experts is that as a result  
2 of the gunshot wound, that caused paralysis and paraplegia in  
3 the victim. Paraplegia commonly leads to things such as  
4 bedsores or pressure sores from not being able to move one's  
5 body; also other conditions such as a colostomy bag, a  
6 collapsed rectum, a permanent catheter, all of which can lead  
7 to infections and that in this particular case it was the  
8 complications of the paraplegia that led into infections or  
9 sepsis and that it was the sepsis that ultimately, in 2010,  
10 killed Mr. Jones.

11 MR. DeMARCO: Your Honor, if I may?

12 THE COURT: Sure.

13 MR. DeMARCO: In my reading of the 3500 notes that  
14 were disclosed it's more than that. He describes oozing-type  
15 wounds, he describes a horrific odor, I think he described it  
16 as the smell of death in Mr. Jones' apartment at or near the  
17 time of his death. It's facts like these that I am focusing  
18 on.

19 THE COURT: Yes.

20 MR. DeMARCO: The paraplegia, the medical testimony  
21 from the medical examiners will establish that Mr. Jones was a  
22 paraplegic and he was in a wheelchair. But, my concern is  
23 about the graphic description of the bedsores, the compression  
24 sores, and also the horrific odor witnessed by Mr. Vega.

25 MR. HOBSON: Your Honor, we are certainly cognizant of

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1 not crossing the 403 line here. We think it is important that  
2 the jury understand the nature of these injuries and how they  
3 could lead to his death and what the injuries were during the  
4 intervening time between the shooting and the autopsy. We are  
5 not looking to be gratuitous or to pile on here.

6 THE COURT: Yes. Well, it's clearly a 403 line here.  
7 You have cumulativeness with the medical testimony, you have  
8 graphic descriptions from a relative who cared for the victim  
9 which could very well produce sympathies and prejudice that  
10 would interfere with and overcome the medical facts that you  
11 need for purposes of proving causation. So, because this  
12 witness is testifying first it's difficult for me to know  
13 exactly what additional facts you need to extract from the  
14 witness but I am certainly going to cut off the line at any  
15 graphic descriptions. To the extent that walking this person  
16 through questions regarding the medical condition is emotional  
17 testimony, I think we are -- it will have to be stopped.

18 So, I think what you need to think about is what --  
19 and I'm going to allow a little bit of leading to ask the  
20 specific factual questions you believe that you need and that  
21 are not cumulative with the medical testimony, but I'm going to  
22 guard this line very carefully, and you should too.

23 MR. HOBSON: Your Honor, I understand that. I will  
24 say that in meeting with this witness we have tried to follow  
25 that line and I am -- with the ability to maybe construct some

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1 of my questions in a leading way, I will hope to enforce that  
2 line. It is, again, certainly not our intention to be  
3 gratuitous but to simply get in the nature of the injuries and  
4 their relationship.

5 THE COURT: You don't have pre-autopsy medical records  
6 that you are putting in that describes these injuries?

7 MR. HOBSON: No, your Honor.

8 MR. DeMARCO: I'm sorry. What was that? Pre?

9 THE COURT: No. I asked if there were --

10 MR. DeMARCO: I misunderstood your question, Judge.  
11 I'm sorry.

12 THE COURT: I asked if there were pre-autopsy medical  
13 records that describes these infections and injuries and the  
14 answer is no.

15 MR. DeMARCO: The government has disclosed, pursuant  
16 to Rule 16, some of these records that your Honor references,  
17 so.

18 MR. HOBSON: Your Honor's question was I think if we  
19 are introducing them. There are voluminous medical records  
20 that are almost incomprehensible to a layperson. We are not  
21 introducing those records.

22 THE COURT: But you have a medical expert.

23 MR. HOBSON: We do have a medical expert.

24 MR. DeMARCO: Your Honor, if I just might add another  
25 fact to this? Based on the exhibit list and the exhibits

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1 provided to us by the government, the government intends to  
2 introduce, through the medical examiner, photographs of these  
3 bedsores. So, I think that expert testimony, by itself,  
4 sufficiently will describe the bedsores that Mr. Jones was  
5 suffering at the time of his death.

6 MR. HOBSON: To be clear of what photographs we are  
7 introducing, we are not introducing the most graphic pictures  
8 of the bedsores. In fact, we were concerned in introducing  
9 some of the pictures that they wouldn't fully show how serious  
10 the bedsores were but we are not going to be putting in the  
11 most graphic pictures.

12 THE COURT: What I am going to allow is you will have  
13 some permission to lead with respect to the description of the  
14 injuries and sores. It's going to be brief and extraction of  
15 facts that you need that is not cumulative with medical  
16 testimony and evidence that's coming in. We will see how it  
17 goes but I am -- I intend to be extremely cautious given that  
18 this is non-expert medical testimony coming from a relative.  
19 So, the prospect of prejudice and emotion and sympathy is real  
20 and I'm not going to let it happen.

21 MR. HOBSON: Yes, your Honor. We understand.

22 THE COURT: Anything else?

23 MR. DeMARCO: No thank you, your Honor.

24 THE COURT: OK. Any word, Ms. Williams?

25 (Discussion off record)

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1 THE COURT: They said 15 to 20 minutes so I imagine  
2 the marshals need time to get Mr. Berry across the street. So,  
3 unless anyone has anything further, we will break and  
4 re-assemble across the street at 500 Pearl. Thank you.

5 So, one question. Mr. Hobson, is the government ready  
6 to commence trial?

7 MR. HOBSON: Yes, your Honor.

8 THE COURT: Mr. DeMarco?

9 MR. DeMARCO: Yes, Judge.

10 THE COURT: Thank you.

11 MR. DeMARCO: Your Honor, we are going to meet over at  
12 the jury room?

13 THE COURT: We will meet in the alcove outside the  
14 jury assembly room. There will be jury department staff there  
15 to assist.

16 Thank you.

17 (Jury selection contained under separate cover)

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