No. 23-

IN THE

Supreme Court of the United States

CESAR ABREU,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the decision of the United States Court of Appeals for the Second Circuit, affirming Petitioner's conviction of narcotics distribution in the Southern District of New York, was in violation of Federal Rule of Evidence 404(b) and/or the Fair Trial/Due Process guarantees of the Fifth Amendment when, in a federal prosecution for narcotics distribution, the Government was permitted, over timely objection, to present to the jury evidence that Petitioner had been previously convicted of a similar federal narcotics distribution offense, error that was compounded when the trial court also permitted the Government, again over timely objection, to introduce narcotics and related evidence from the prior federal case.

STATEMENT OF RELATED CASES

- *United States v. Abreu*, 21-CR-300. U.S. District Court for the Southern District of New York. Judgment entered October 7, 2022.

- *United States v. Abreu*, 22-2676. U.S. Court of Appeals for the Second Circuit. Judgment entered November 30, 2023.

TABLE OF CONTENTS

TABLE OF APPENDICES

TABLE OF AUTHORITIES

Page(s)

Cases:

Statutes & Other Authorities:

CITATION TO OPINIONS BELOW

The trial court's May 9, 2022 ruling allowing the Government to present the challenged evidence is set out in the transcribed oral opinion of the district court judge, reproduced in the appendix to this petition at Pa10-22a. The November 20, 2023 unpublished summary order of the Second Circuit affirming the conviction is reproduced at Pa1-9.

JURISDICTIONAL STATEMENT

The United States District Court for the Southern District of New York exercised original jurisdiction over this federal criminal prosecution pursuant to 18 U.S.C. § 2321 and entered judgment sentencing Petition to four concurrent custodial terms of 13 years, with fines and other penalties. The Second Circuit had jurisdiction over Petitioner's direct appeal pursuant to 28 U.S.C. § 1291 and entered judgment affirming the conviction below on November 30, 2023. This petition is timely filed pursuant to Supreme Court Rules 13.1, 13.3, and 13.5. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTES, RULES AND REGULATIONS

U.S. Const. Amend. V (in pertinent part):

> No person shall be deprived of life, liberty, or property without due process of law . . . .

F.R.Evid. 403 (in pertinent part):

> The Court may exclude relevant evidence if the probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issue . . . .

F.R.Evid. 404 (in pertinent part):

> (b) Other Crimes, Wrongs, or Acts.
>
> (1) Prohibited Uses. Evidence of any other crime, wrong or act is not admissible to prov a person's character in order to show that on a particular the person acted in accordance with the character.
>
> (2) Permitted uses. This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident.

STATEMENT OF THE CASE.

Petitioner, Cesar Abreu, pursuant to Supreme Court Rules 10(b) and (c), respectfully seeks *certiorari* review of the decision of the United States Court of Appeals for the Second Circuit affirming his conviction following a jury verdict in the Southern District of New York finding him guilty of narcotics offenses.

1. Petitioner's 2022 narcotics prosecution in the SDNY: the case on appeal.

Petitioner respectfully seeks review of his conviction, entered on October 7, 2022, in the SDNY. The summary order of the Second Circuit, and the on-the-record discussion before the trial court, of the Rule 404(b) issues, adequately and accurately summarize the circumstances of this three-day narcotics jury trial. In brief, the Government presented evidence of a search of what it contended was Petitioner's residence, an apartment in Manhattan, during which significant quantities of narcotics and paraphernalia were seized. (5a.) As noted by the Second Circuit, the Government introduced evidence at trial that Petitioner had time-to-time access to

the apartment frow which the drugs were seized. (Evidence summarized at 5a.) In the Circuit's view, accordingly:

> [T]he central issue at trial was whether [Petitioner] was merely present on the premises or whether he knew there were drugs in the apartment and intended to distribute those drugs. Indeed, [Petitioner's] main defense–a mere presence argument–was that he did not live in the apartment and there was no DNA or fingerprint evidence connecting him to the narcotics that were found in the apartment.

(5a.)

As outlined below, in an ostensible effort to prove "knowledge and intent"–neither of which was implicated by proof of Petitioner's access to and occasional presence on the premises–the Government was permitted, over objection, to put before the jury evidence of a 2009 search of Petitioner's residence in Pennsylvania that yielded significant quantities of narcotics, principally crack cocaine. The Government was also permitted to put into evidence Petitioner's subsequent related federal 2010 narcotics conviction in the Middle District of Pennsylvania (MDPA).

2. The "other crimes" evidence from 2009 and 2010.

On May 9, 2022, the district court ruled on the parties' *in limine* pre-trial motions. Those motions included the Government's request to admit certain other crimes evidence and Petitioner's parallel motion to bar such evidence. (10a-22a.) During oral argument, the district court noted its initial intention to allow the evidence, citing each of the exceptions delineated in R. 404(b). (16a.) The court also noted it was disinclined to allow evidence of a separate federal narcotics conviction

from the Eastern District of Pennsylvania (EDPA). Defense counsel responded by noting the obvious risk of the evidence being used by the jury on the impermissible issue of criminal propensity (17a-18a.) Counsel further noted there were no defense contentions in the case raising a knowledge or intent defense of a nature that would implicate the knowledge and intent exceptions of Rule 404(b) and thus allow the evidence. There was no claim, for example, that Petitioner would not have recognized the drugs as such, or that his intent was to possess the drugs for personal use as distinct from distribution. (18a.) The defense at trial was that, although Petitioner had access to the premises searched, he resided elsewhere and had no ownership or other connection to or involvement with the contraband recovered during the search of the premises.

At the conclusion of the argument, the district court ruled that the evidence of the 2010 federal conviction and the search that preceded it could be placed before the jury. (21a-22a.)

3. Trial testimony regarding the 2009 search and the ensuing 2010 conviction.

At trial, as permitted by the trial court's rulings, HSI Agent William Farley testified regarding the background of the federal narcotics conviction incurred by Petitioner in the MDPA in 2010 and concerning the results of the search of Petitioner's residence in 2009 which uncovered the drugs leading to the 2010 conviction. (Agent Farley's testimony is reproduced at 23a-35a.) Just prior to the agent's testimony, the district court presented the jury with a limiting instruction as follows:

> Ladies and gentlemen, let me give you an instruction regarding this testimony as well. I'm allowing this witness to testify regarding conduct dating back to 2009. And as I'll expect you'll learn, it did later result in a prior conviction of the defendant.
>
> This is not what the defendant is charged with here; that is to say this is other conduct. You may consider this evidence on the limited issue of the defendant's intent and knowledge at the time of the charged offenses, that is the offenses charged in this case, including the defendant's understanding of things at the time of the charged conduct.
>
> You are not to consider this evidence as propensity evidence, that is, again, that the defendant had the propensity to commit crimes or as evidence that he committed the crimes he is charged with in this case. Again, you may consider it only for the limited purposes that I just described.

(26a-27a.) Agent Farley then testified that in 2009 he had become involved in an investigation focused on Petitioner. (26a.) The agent also described his participation in the execution in 2009 of a search warrant at Petitioner's residence in Drums, Pennsylvania. (28a.) During the search, a quantity of cocaine was seized from a kitchen cabinet. (32a-33a.) A stipulation was then presented to the jury that "on April 11, 2010, [Petitioner] was convicted in the United States district Court for the Middle District of Pennsylvania of possession with intent to distribute 50 grams or more of cocaine base (crack cocaine," in violation of federal narcotics laws. (33a.)

LEGAL ARGUMENT

In 1925, Judge Learned Hand famously described the law of conspiracy as "that darling of the modern prosecutor's nursery." *United States v. Harrison*, 7 F.2d 259, 263 (2d. Cir. 1925). Nearly a century later, the same may be said of the modern

federal prosecutor's aggressive use of F.R.EVID.404(b) to put before a jury a defendant's history of past bad acts, including, as in this case, a prior federal conviction involving similar drugs. As the leading treatise on the federal evidence rules notes:

> The stakes are high under Rule 404(b), especially in criminal cases. Most criminal defendants (most everyone for that matter) have not led an unblemished life. There is the real risk that if the jury hears about the defendant's misconduct that is not charged in the case, it will convict for that conduct and not for what he is charged. *It is for this reason that Rule 404(b) is the most frequently invoked evidence rule in federal criminal cases*.

Saltzberg, Martin & Capra, FEDERAL RULES OF EVIDENCE MANUAL (12th Ed.), Vol. 2 at 404-18 (footnote omitted; emphasis added); *see also* Imwinklereid, COURTROOM CRIMINAL EVIDENCE § 901 (6TH ED. 2016) noting that Rule 404(b) "has generated more published opinions than any other subsection of the evidence rules."

It may truly be said, therefore, that Rule 404(b) is now among a modern federal prosecutor's "darlings." In this case, the Rule was invoked to justify putting before the jurors the damning information that the man on trial before them for a violation of federal narcotics laws for the illegal distribution of drugs had previously been convicted of an identical offense.

Pursuant to F.R.EVID. 404(b), the Government had placed the defense on notice that it would attempt to introduce evidence of Petitioner's two prior federal drug convictions, both imposed in 2010, one in the Eastern District of Pennsylvania (EDNY) and one in the Middle Districts of Pennsylvania (MDPA). The Government also placed the defense on notice that it would seek to present evidence of a search

related to the MDPA case. By way of context, the convictions, and the conduct which led to the prosecution and convictions, occurred more than a decade before Petitioner's SDNY trial in 2022. Regardless of the passage of time. The Government responded it was entitled to offer such evidence "as proof of the defendant's opportunity, intent, knowledge, and lack of accident."

In deciding Petitioner's pretrial *in limine* motion to exclude the 404(b)-evidence proposed by the Government, the trial court, as noted above, ruled that the Government would not be allowed to introduce evidence of the EDPA conviction, but would be permitted to introduce evidence of Petitioner's 2010 MDPA conviction and the related recovery of narcotics and paraphernalia from a 2009 search of Petitioner's MDPA residence. That search produced evidence leading to the MDPA conviction. However, no proper limited purpose for this evidence was ever identified by the Court or the Government as having been put in issue by the defense, beyond putting the Government to its proofs. Petitioner's Rule 404(b), 403 and constitutional fair-trial objections were overruled. (Ruling at 21a.)

In the final analysis, the jury was instructed that the evidence was admitted on the issues of "intent and knowledge." (26a, 27a.) However, intent and knowledge were not circumstances challenged at trial in any manner that justified the 404(b) presentation. Intent and knowledge are, of course, elements of the offense the prosecution was required to prove beyond a reasonable doubt, but not by proving "once a drug dealer always a drug dealer." Simply putting the Government to its proof is not a door-opener to 404(b) evidence of prior convictions. The thrust of Petitioner's

defense was simply that the apartment residence was not his and he had no connection to the narcotics recovered from the apartment. As noted earlier, there was no suggestion that Petitioner would not have recognized the drugs as such or that he possessed the drugs solely for his personal use.

Allowing the "other crimes" evidence despite the lack of any proper non-propensity basis, denied Petitioner the fair trial guaranteed him by the Due Process Clause of the Fifth Amendment and was otherwise harmful error pursuant to F.R.EVID.Rules 404(b) and 403. The circumstance that intent and knowledge are always elements the Government is required to prove at a trial does not create a *carte blanche* invitation to parade a defendant's past criminal activities before a jury.

Additionally, the simple fact that the crime for which Petitioner had been convicted in the MDPA–the distribution of crack cocaine–was virtually identical to the crimes for which he stood trial in this case, *i.e.*, the distribution of powder and crack cocaine. This aspect of the case further underscored the clear danger of unfair prejudice. Notably, nothing about the circumstances of either drug offense, generic similarities aside, came remotely close to, for example, justifying usage of the evidence on the issue of identity, meaning a so-called "signature crime" where there is proof of distinctive and unusual elements of each offense that are so striking as to likely have been committed by the same person, for the limited purpose of identity. *See generally*, Saltzburg et al., *supra*, Vol. 2 at 404-188 to 404-193. In this case there was nothing about these all-too-common crimes of drug distribution that amounted to a "signature." Nor did the Government so contend at trial or on appeal to the

Second Circuit. Nevertheless, the generic similarity of the type of crime–the illegal distribution of narcotics–and the specific drug distributed in both cases–crack cocaine–served only to highlight the appreciable risk that jurors would misuse the evidence as establishing Petitioner's propensity for committing the crimes for which he was on trial, concluding "He was guilty of this before and so its real likely he's guilty again," or that jurors would convict because, "Let's face it, he's a drug dealer. And that's what they do, deal drugs."

One can hardly imagine a more prejudicial class of evidence than proof that on an earlier occasion the defendant on trial committed a similar federal narcotics offense. The implication is, of course, that he "did it before and now he's done it again." Such propensity evidence, even if otherwise satisfying Rule 404)(b)'s requirements, which it did not in this case, should have been excluded by Rule 403 and the fair trial guarantees of the Fifth and Sixth Amendments.

In *Huddleston v. United States*, 485 U.S. 681 (1983), this Court noted that the admissibility of bad act evidence depends not only on Rule 404(b), but also on "whether the danger of unfair prejudice outweighs the probative value of the evidence in view of the availability of other means of proof and other factors appropriate for making decisions under Rule 403." In this case, while arguing that the evidence was somehow probative of the narcotics charges alleged in the indictment, the Government never suggested any basis for limited admission pursuant to Rule 404(b), other than by a generic recitation of permitted Rule 404(b) purposes and the always present circumstance that knowledge and intent were elements of the crime.

In *United States v. Himelwright*, 42 F.3d 777 (3d Cir. 1994), for example, the Court summarized a proper analytic framework for considering 404(b) evidence as follows:

> [W]hen evidence of prior bad acts is offered, the proponent must clearly articulate how that evidence fits into a chain of logical inferences, no link of which must be the inference that the defendant has the propensity to commit the crime charged. [United States v.) Jemal, 26 F.3d [1267] at 1272 [3d Cir. 1994)]. But even where the proffered evidence tends to prove some fact besides character, admissibility depends upon whether the probative value outweighs its prejudicial effect. As a result, once the proponent articulates a permissible purpose under Rule 404(b), the district court must weigh the probative value of the evidence against its potential to cause undue prejudice. Id. at 1272

Himelwright, 42 F.3d at 782 (footnote omitted). In another Third Circuit case, *United States v. Murray*, 103 F.3d 310, 316 (3d Cir. 1997), in an opinion authored by Justice (then Judge) Alito, the Court emphasized the need for trial judges "to exercise particular care in admitting such evidence." In the opinion, then-Judge Alito noted at least two reasons for the exercise of extreme caution:

> First, the line between what is permitted and what is prohibited under Rule 404(b) is sometimes quite subtle. Second, Rule 404(b) evidence sometimes carries a substantial danger of unfair prejudice and thus raises serious questions under Fed. R. Evid. 403.

Id. As a result of this analysis, the *Murray* court advised trial judges to require a party offering Rule 404(b) evidence "to place on the record a clear explanation of the chain of inferences leading from the evidence in question to a fact 'that is of

consequence to the determination of the action.'" *Id.* That burden was not met in this case.

In this case, the district court's limiting instruction referenced knowledge and intent only. However, nothing from the defense side had put into play the knowledge or intent of the defendant other than the entry of not-guilty plea. In context, therefore, the admission of the evidence and the instruction limiting its use created the wholly unnecessary risk the jury would consider the evidence of Petitioner's' prior federal narcotics conviction and the drugs seized from his Pennsylvania residence in relation to that case as propensity.

The dangers associated with "other crimes" evidence are well-known. A jury hearing that a defendant has engaged in past criminal conduct unrelated to the current charge may be influenced to return a guilty verdict simply because the jury considers the defendant a lawbreaker. The core problem with other crimes evidence, as this Court pointed out in *Michelson v. United States,* 335 U.S. 469 (1948), is not that it *lacks* persuasive value but, instead, that the evidence may "over persuade" a jury because such evidence tends "to weigh too much with the jury and to so over persuade them as to prejudice one with a bad general record and deny him a fair opportunity to defend against a particular charge." *Id.* at 475-76. It is for this reason that Rule 404(b) specifically bars the introduction of "other crimes, wrongs or acts to prove the character of a person in order to show action in conformity therewith."

The issue then is one of assessing relevance *ab initio* and, next, balancing, pursuant to F.R.EVID.403, the asserted relevance against the purposes of Rule 404(b)

– principally the misuse of character or propensity evidence – in the context of the Government's proofs at trial. *See, e.g. United States v. LaFlam*, 369 F.3d 153, 156 (2d Cir. 2004) (summarizing review process of 404(b) error), *United States v. Gordon*, 987 F.2d 902 (2d Cir. 1993) (In prosecution of major drug conspiracy, evidence of prior drug transactions should have been excluded under Rule 403 since the evidence was not sufficiently probative of participation in the alleged conspiracy); see also, *United States v. Levy,* 731 F.2d 997 (2d Cir. 1984) where the Court reversed, as 404(b) error, a ruling by the trial court allowing evidence of a "sample transaction" in a drug case. In so doing, the Second Circuit commented that "it is not inconceivable that acts or crimes that occur almost contemporaneously with the indicted crime may be entirely unrelated to that crime." Here, of course, the "acts or crimes" allowed into evidence had occurred more than a decade prior to the acts and crimes for which Petitioner stood trial in 2022 and were far from contemporaneous with the indicted crimes. In *United States v. Garcia*, 291 F.3d 127 (2d Cir. 2002), the Court reversed a narcotics conviction based on 404(b)-error by the trial judge in admitting evidence of the appellant's prior narcotics conviction. In doing so, the Court noted that the appellant in that case had placed his knowledge and intent in issue by denying knowledge of the drug transaction at issue. *Id.* at 137. But, the Court noted, "our inquiry does not end there, however, because the government still must establish the relevance of the evidence in dispute." *Id.* Among factors cited in *Garcia* to be examined in the relevance inquiry was "[t]he length of time between the events." *Id.* at 138. In *Garcia* the time between events was twelve years. In this case it is eleven.

The trial court's failure to identify a proper limited evidence-based purpose beyond the catch words "intent and knowledge" lends further support to Petitioner's position. Nothing in the record suggests that the large quantities of drugs recovered during the search of Apartment 31N were possessed with anything but an intent to distribute. No claim was advanced at the trial that, for example, the drugs were for personal use. Neither was there any suggestion that knowledge of any relevant fact was lacking. As noted, Petitioner defended below on the theory that the premises searched were not his place of residence and, therefore, possession of the contraband should not be attributed to him.

On the issue of a proper limited purpose, the Rule requires the government to establish that the proffered evidence increases the probability of the existence of a disputed fact that cannot implicate propensity. Identifying a non-propensity material issue is a necessary condition for admission of uncharged misconduct evidence, but it is not sufficient. That material fact must genuinely be in dispute. If it is only technically in dispute, the uncharged conduct should be excluded. *See United States v. Gubelman*, 571 F.2d 1252, 1255 n.8 (2d Cir. 1978). The courts have long held that in arguing for the admission of 404(b evidence, "The Government must do more than demonstrate that the evidence is not offered solely to show that the defendant is a bad person." *United States v. Benedetto*, 571 F.2d 1246, 1248 (2d Cir. 1978.) In this case, the Government failed at the essential task of establishing the relevancy of the evidence. The mere recitation of some of the purposes provided in the Rule itself is insufficient. The real question is whether

proof of the prior conduct would lead to relevant proof of a material fact genuinely in dispute. No such showing was made to the district court and the evidence should have been excluded based on not having met Rule 404(b)'s strict requirements governing the introduction of such evidence. *See, e.g., United States v. Rivera*, 874 F.2d 906 (10th Cir. 1988), *modified on other grounds en banc*, 874 F.2d 754 (10th Cir. 1989). In the *Rivera* panel decision, the conviction was reversed on the basis of the trial court's failure to require proof of a non-propensity-related purpose of the evidence. This evidence should have been excluded *in limine* at the district court. The Second Circuit should have reversed.

CONCLUSION

For the reasons set forth above, this Court should grant the petition for *certiorari* in order to review serious and ongoing issues in the district and circuit courts on the handling of Rule 404(b) evidence involving uncharged crimes and other wrongful acts. It has been 40 years since this Court's *Huddleston* opinion and considering the proliferation of the use of Rule 404(b), this Court should again weigh in, with special attention given to the presentation of evidence that a defendant has been previously convicted of the same class of crime with which the defendant is now charged, raising the already heightened risk of the evidence being misused by a jury for propensity. The need for such evidence should be demonstrated by a high standard for its admission.

Respectfully submitted,

/s/ David A. Ruhnke

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Dated: New York, New York
February 27, 2024

APPENDIX

TABLE OF APPENDICES

Page

22-2676-cr
United States v. Abreu

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 30th day of November, two thousand twenty-three.

PRESENT: **AMALYA L. KEARSE,**
GUIDO CALABRESI,
ALISON J. NATHAN,
Circuit Judges.

United States of America

Appellee,

v. **No. 22-2676-cr**

Cesar Abreu, AKA Cesar Abreu, AKA Cesar Perez, AKA Sealed Defendant 1, AKA Cesar Leonidas Abreu Lora, AKA Cesar Leonidas Abreu, AKA Cesar Leoniidas Lora,

Defendant-Appellant.

FOR DEFENDANT-APPELLANT: DAVID A. RUHNKE, Ruhnke & Barrett, Montclair, NJ

FOR APPELLEE: JACOB H. GUTWILLIG (Nathan Rehn, *on the brief*) *for* DAMIAN Williams, United States Attorney for the Southern District of New York, New York, NY

Appeal from a judgment of the United States District Court for the Southern District of New York (Furman, *J.*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the district court is **AFFIRMED**.

Defendant Cesar Abreu appeals from an October 7, 2022, judgment of the District Court (Furman, *J.*) convicting him after a jury trial of possessing with intent to distribute cocaine and fentanyl in violation of 21 U.S.C. § 841(a)(1) and 841 (b)(1)(a), and of maintaining a drug-involved premises in violation of 21 U.S.C. § 856(a)(1). After trial, Abreu additionally pled guilty to illegal reentry, in violation of 8 U.S.C. § 1326(a) and 1326(b)(2). On appeal, Abreu challenges the district court's evidentiary ruling permitting the admission of evidence of drug trafficking recovered in a search of Abreu's prior residence in 2009 and evidence

of his 2011 prior conviction resulting from that same search. We assume the parties' familiarity with the underlying facts and the record of prior proceedings, to which we refer only as necessary to explain our decision to affirm.[1]

Before trial, the Government moved *in limine* to offer drug-related evidence recovered in the 2009 search of Abreu's residence and evidence of his subsequent conviction for possessing cocaine with intent to distribute. The district court, over Abreu's objection, held that the prior act evidence was admissible because Abreu's knowledge and intent were "squarely at issue." App'x at 39. Then, at trial, the Government entered the evidence via testimony from a government witness, photographs of the paraphernalia and drugs recovered at the search, and a stipulation of the conviction. Defendant argues that this evidence was offered solely to show propensity and is therefore improper character evidence. We disagree.

Federal Rule of Evidence 404(b) provides that "[e]vidence of any other crime, wrong, or act is not admissible to prove a person's character in order to

[1] Abreu additionally argues that the district court's error was not harmless and that he should be resentenced on his illegal reentry charge if this Court vacates and remands on the Rule 404(b) issue. Because we conclude that admission of the evidence was not error, we do not reach either of these arguments.

show that on a particular occasion the person acted in accordance with the character." Fed. R. Evid. 404(b)(1). Rule 404(b) thus "bars the admission of defendant's uncharged crimes to prove propensity to commit the crime charged." *United States v. Williams*, 930 F.3d 44, 62 (2d Cir. 2019) (citation omitted). "Such evidence is admissible, however, when offered to show 'motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.'" *United States v. Mejia*, 545 F.3d 179, 206 (2d Cir. 2008) (citation omitted). Therefore, admissible prior act evidence must be "relevant to an issue at trial other than the defendant's character," and "the probative value of the evidence [cannot be] substantially outweighed by the risk of unfair prejudice." *United States v. Morrison*, 153 F.3d 34, 57 (2d Cir. 1998). Ultimately, under this Court's "inclusionary approach, prior act evidence is admissible if offered for any purpose other than to show a defendant's criminal propensity." *Mejia*, 545 F.3d at 206 (cleaned up).

Our review of the district court's admission of 404(b) evidence is deferential, as "[w]e review . . . for abuse of discretion, and the district court's ruling stands unless it was arbitrary and irrational." *Id.*

At trial, it was clear that Abreu had access to and was present in the apartment where the drugs and drug paraphernalia were found. He had been arrested with keys to the apartment where the drugs were located, law enforcement had observed him enter the apartment after selling a sample of the drugs at issue to a confidential source of information for law enforcement, there was video surveillance from the apartment showing him coming and going, and cell-site location evidence demonstrated that his cellphone was used in the vicinity of the apartment. Given this evidence, the central issue at trial was whether Abreu was merely present on the premises or whether he knew there were drugs in the apartment and intended to distribute those drugs. Indeed, Abreu's main defense—a mere presence argument—was that he did not live in the apartment and there was no DNA or fingerprint evidence connecting him to the narcotics that were found in the apartment.

Because the case turned on Abreu's relationship with the drugs in the apartment, the prior search evidence and criminal conviction were highly probative of his knowledge and intent. As the district court recognized, "the prior conduct with very similar circumstances—namely, possession of drugs and

drug paraphernalia, including some of the very same paraphernalia, namely a grinder . . . is highly probative of his knowledge and intent, and it is for that reason admissible . . . ." App'x at 39.

We have upheld the admission of prior act evidence under similar circumstances on numerous occasions. *See, e.g.*, *United States v. Aminy*, 15 F.3d 258, 260 (2d Cir. 1994); *United States v. Arango-Correa*, 851 F.2d 54, 59–60 (2d Cir. 1988); *United States v. Fernandez*, 829 F.2d 363, 367 (2d Cir. 1987); *United States v. Martino*, 759 F.2d 998, 1004–05 (2d Cir. 1985). In each of these cases, the defendant admitted to being present during a narcotics transaction, but denied wrongdoing. Prior act evidence was then properly admitted to establish the defendant's knowledge and intent. So too here.

Abreu attempts to distinguish this case by arguing that the length of time between his prior search and conviction and the present offenses renders the prior act evidence here inadmissible. Of course, the length of time is relevant to the "potential probative value of the prior conviction," *United States v. Garcia*, 291 F.3d 127, 138 (2d Cir. 2002), but mere "temporal remoteness of [prior] acts does not preclude their relevancy," *United States v. Curley*, 639 F.3d 50, 59 (2d Cir. 2011).

As with the evidence in *Curley*, the prior search evidence and conviction here were not "too attenuated to be relevant," as those prior acts bear a striking similarity to the present ones. *Id.* (internal quotation marks omitted).

Lastly, Abreu argues that the district court failed to identify a proper purpose for the admission of the evidence and failed to limit the jury's consideration of the evidence to that purpose. But the record refutes that contention. The district court gave a limiting instruction explicitly telling the jury to "consider this evidence on the limited issue of the defendant's intent and knowledge at the time of the charged offenses . . . including the defendant's understanding of things at the time of the charged conduct." App'x at 464–65. And the jury was expressly instructed "not to consider this evidence as propensity evidence," but "only for the limited purposes . . . just described." App'x at 465. The district court properly identified the appropriate purpose for admission and instructed the jury to consider it for that purpose alone.

Abreu argues that the evidence of his previous conviction for operating a stash house should also have been excluded pursuant to Fed. R. Evid. 403, which provides in part that the court may exclude even "relevant evidence if its probative

value is substantially outweighed by a danger of . . . unfair prejudice." The trial court's decisions under Rule 403 to admit or exclude evidence are reviewed for abuse of discretion. *See, e.g.*, *United States v. O'Connor*, 650 F.3d 839, 853 (2d Cir. 2011), *cert. denied*, 565 U.S. 1148 (2012); *United States v. Larson*, 112 F.3d 600, 604–05 (2d Cir. 1997). The district court here plainly exercised its discretion in considering the government's proffer of evidence of two prior convictions of Abreu, the 2011 stash house conviction and a 2011 conviction for attempting to possess cocaine through the mail. The court excluded evidence of the latter conviction because it was based on facts that did not include Abreu's physical possession of drugs and thus was not sufficiently similar to the current charges. In contrast, the court found that Abreu's prior stash house conviction involved facts quite similar to those at issue in the present case, including not only his possession of the cocaine but also his possession of the same type of drug-processing paraphernalia. We see no abuse of discretion in the conclusion that the admission of Abreu's prior stash house conviction would not result in undue prejudice. Additionally, the prior conviction was admitted in the form of a "focused and brief stipulation," demonstrating that the court "engag[ed] in a

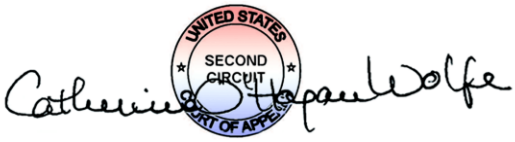
serious effort to minimize the prejudicial effect of the [prior] conviction on the jury." *United States v. Moran-Toala*, 726 F.3d 334, 346 (2d Cir. 2013).

In sum, the district court properly exercised its discretion in identifying a relevant purpose for highly similar prior act evidence that was relevant to knowledge and intent. It further mitigated any potential for unfair prejudice that Abreu may have faced from the evidence through streamlined presentation of that evidence and an appropriate limiting instruction. We discern no error.

* * *

We have considered Abreu's remaining arguments and find them to be without merit. For the foregoing reasons, the judgment of the district court is **AFFIRMED**.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk of Court



UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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UNITED STATES OF AMERICA,

v. 21 Cr. 300 (JMF)

CESAR ABREU,
a/k/a "Cesar Leonidas Abreu Lora,"
a/k/a "Cesar Leonidas Abreu,"
a/k/a "Cesar Leonidas Lora,"
a/k/a "Caito Abreu,"
a/k/a "Cesrl Abreu,"
a/k/a "Cesar Perez,"

Defendant.

Conference

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New York, N.Y.
May 9, 2022
10:00 a.m.

Before:

HON. JESSE M. FURMAN,

District Judge

APPEARANCES

DAMIAN WILLIAMS
United States Attorney for the
Southern District of New York
BY: JACOB H. GUTWILLIG
ANDREW A. ROHRBACH
Assistant United States Attorneys

RUHNKE & BARRETT
Attorneys for Defendant
BY: DAVID A. RUHNKE

THE COURT: Mr. Ruhnke, do you think --

MR. RUHNKE: Nothing further, your Honor.

THE COURT: All right. Let's turn to the motions *in limine*. I'll start with the government's motions, at ECF No. 39. There was no opposition that I received from the defendant, although some of the motions are covering the same ground, so in that sense I got the defense response.

The first and biggest issue is the admissibility of evidence seized during the 2009 search, admissibility of Mr. Abreu's 2011 convictions and admissibility of evidence from his electronic devices.

To start, Mr. Gutwillig -- or Mr. Rohrbach, whoever is addressing this -- I would like you to just elaborate with respect to the 2009 search and the 2011 convictions what exactly you're proposing to offer at trial, and in particular, to elaborate on the Eastern District of Pennsylvania conviction.

There's really only two sentences in your memorandum that concern that conviction, and it doesn't really say anything more than that he quote/unquote played a role in attempting to mail a package from St. Croix to Pennsylvania, which is very different from the nature of the conduct charged here. Can you answer those questions, please?

MR. GUTWILLIG: Yes, your Honor.

So, the brief nature of our treatment of the Eastern

District of Pennsylvania investigation and conviction is reflective of the amount of testimony or evidence we would seek to elicit about that.

What happened is that there was initially investigation that was happening in the Eastern District of Pennsylvania, and as part of that investigation, as we understand it, there was a package that was mailed to Pennsylvania. That package contained approximately a kilogram of cocaine. It was intercepted, and law enforcement conducted a controlled delivery of that. Law enforcement -- that was in January of 2009. So law enforcement conducts a controlled delivery to another individual, who is not the defendant. In the course of interviewing that individual, who was charged as well as part of this conspiracy, the defendant -- rather, I'm sorry. I'll just use that individual's name, which is Harold Marigildo. So Mr. Marigildo discussed --

THE COURT: Hold on.

(Counsel and defendant conferred)

THE COURT: Go ahead.

MR. GUTWILLIG: Mr. Marigildo referenced that this was being done in conjunction with an individual he knew as Gao, or Gaito, and not who law enforcement identified as Mr. Abreu. Gao or Gaito's, or Mr. Abreu's, phone number was contained in the individual who was arrested's phone, and he was calling, as I understand it, Mr. Abreu was calling this individual during

that interview.

So we are not seeking to talk about much of that, but that serves as context, because this Eastern District of Pennsylvania investigation assisted with a Middle District of Pennsylvania investigation that was ongoing at about the same time. This controlled delivery --

MR. RUHNKE: Your Honor, can I ask the government to speak up a little bit or more into the microphone.

THE COURT: Sure.

And Mr. Gutwillig, you're also welcome to use the podium if that makes it easier.

MR. GUTWILLIG: Can everyone hear me?

I can also pull down my mask if that would be acceptable.

THE COURT: We're not supposed to be doing that. Masks are on for a reason.

MR. GUTWILLIG: Sure.

THE COURT: At least in my limited experience, there are plenty of cases out there at the moment, and it seems to be going up. So I'd rather err on the side of caution. But keep your voice up and speak directly into the microphone, please.

MR. GUTWILLIG: Sure.

So, the Eastern District of Pennsylvania investigation provided, as I understand it, probable cause for parts of the Middle District of Pennsylvania investigation, which included

obtaining Title III intercepts on a phone used by Mr. Abreu. None of that is anything that we want to talk about at this trial.

What is important and what is outlined in our motions is that based on some of this information from the Eastern District of Pennsylvania investigation, there was a search warrant conducted in April of 2009 in the Middle District of Pennsylvania, and this is the search warrant that's outlined in the government's motion and was a search warrant conducted of the defendant's residence there, where drugs were seized, including cocaine.

So what the government would seek to admit at trial would be testimony from one law enforcement agent who participated in both investigations, and the Eastern District of Pennsylvania investigation would really just serve as context that he was being investigated in the Eastern District of Pennsylvania; that he was referenced as Gao as part of that investigation; and then as an outgrowth of that or kind of in tandem with it, there was a search warrant executed on his residence in the Middle District of Pennsylvania, and that's the one where drugs were recovered, including cocaine. And that goes directly, in the government's view, to intent, knowledge, which are elements here, and is similar, of course, to the search warrant that was conducted in April of 2021 on his residence here.

So that's kind of all the background for it, but in terms of what we would seek to admit at trial, it would be relatively limited testimony from one law enforcement agent in addition to photographs from the 2009 search. So I don't anticipate that that testimony or that evidence would really be more than a half hour to an hour of testimony in total, and it would be limited in scope and really geared to knowledge, intent, absence of mistake here.

I'm happy to answer any other questions if I didn't cover your Honor's questions.

THE COURT: All right. That's helpful. Let me tell you my inclination, and then I'll hear from Mr. Ruhnke as well, obviously.

I would be inclined to allow the evidence of the 2009 search and the Middle District of Pennsylvania conviction that emerged from it. I'm not inclined to allow the Eastern District of Pennsylvania investigation or conviction. It seems, No. 1, that the conduct is dissimilar to the conduct here. It involves the mailing of drugs, not the possession of drugs, drugs in the defendant's physical possession. It doesn't sound like we know a whole lot about his involvement in that, and it's also obviously cumulative of the other conviction.

I take it from what you just said that really you're offering it as context for the 2009 search and the other

conviction. Strikes me that it's not necessary for that purpose; that the witness can testify that they received information; that based on that information, and it doesn't need to be elaborated upon, they obtained a search warrant to search the premises that were searched; that they searched it, and here's what they found and he was then convicted of possessing those drugs.

My inclination is that that is squarely admissible under the cases cited by the government in its memorandum. Unless Mr. Ruhnke can persuade me otherwise, it seems to me that the main, if not sole, issue in this case is knowledge, intent, absence of mistake, that there's no dispute that drugs and drug paraphernalia were found in a residence tied to Mr. Abreu, and in that sense it seems like a classic case for admission of prior similar conduct. But it strikes me that the Eastern District of Pennsylvania conduct is not similar enough. It's cumulative of the other conduct. And if it's being offered only as context, all the more reason to think that the danger of unfair prejudice outweighs the minimal probative value given that, I think, the jury doesn't need to be told what led to the search. The important thing is the search itself.

Mr. Gutwillig.

MR. GUTWILLIG: I'll just add one thing to that, your Honor, which is to the extent that --

MR. RUHNKE: Could you speak up, please.

MR. GUTWILLIG: Just to add one thing to that, which is to the extent the defendant argues, for example, that he doesn't know how the drug business operates or know anything about that, I think it might open a door to a little bit more of the Eastern District of Pennsylvania conduct. And just as a technical issue, my understanding is that the Eastern District case was transferred by Rule 20 over to the Middle District. So we could separate that out, but I just wanted to flag for your Honor that they weren't two separate districts and two separate convictions in those districts.

THE COURT: All right.

Mr. Ruhnke, my inclination, as you heard, is to allow evidence of the 2009 search and 2011 Middle District conviction that relates to the search but not to allow the Eastern District of Pennsylvania investigation or conviction. Again, it seems to me that --

MR. RUHNKE: OK.

THE COURT: -- that is the right balance to strike, and given what appears to be in dispute in this case, that the Middle District search and conviction would be admissible under the theories articulated by the government in its memorandum.

But am I missing something? Do you care to respond?

MR. RUHNKE: Your Honor, we objected, of course, in the motions *in limine* to any evidence of a prior conviction,

any evidence of prior searches that resulted in the production of narcotics, because the overwhelming danger is that a jury will say, just conclude propensity, which is the operative word, because he did it before, oh, look, he's doing it again. And that's the Rule 403 aspect.

But under the 404(b) aspect, the government has yet to identify a limited purpose for which the evidence is permissible under 404(b), and as the proponent of the evidence, they should prepare or provide what the limiting purpose would be. There is no issue in this case of knowledge. In other words, there's no claim that Mr. Abreu didn't know drugs when he saw them. There's no claim of a lack of intent, that he somehow possessed these drugs but he wasn't going to do anything with them. There is no claim of -- this is not a signature crime.

There's no identity subset of 404(b) evidence that's relevant here. There is nothing about the circumstances of any of the prior investigations, which implicate the current investigations. They're old. They date back more than a decade, and the danger of unfair prejudice would not only be a 403 violation, but I believe it would deny Mr. Abreu's right to a fair trial, as guaranteed by the due process clause of the Fifth Amendment and the Sixth Amendment trial by jury clause. There is no limited purpose for which this evidence should be offered that is of significance to the government's case, and

the overwhelming danger is clear and present.

I cited for your Honor in our brief two examples of Second Circuit cases where convictions were reversed on a 404(b) basis that applied to this case as well. I think you're being asked to commit reversible error by the government, and I object to any of this evidence going forward.

Sorry if I sound a little bit intense about it, but if they go to the jury with evidence of prior narcotics dealing that's not charged in the indictment, that's not really relevant to any of the 404(b) purposes, I can't imagine what the limiting instruction sounds like that would have any effect on a jury beyond simply --

THE COURT: I got it.

MR. RUHNKE: OK.

THE COURT: Can you just explain, what is the nature of the defense in this case? Because my understanding is that drugs and drug paraphernalia were found in an apartment that is linked to the defendant; that the agents opened the door with keys that they had seized from him. This is obviously after the transaction involving the confidential source. So if he's in possession of the drugs, it seems to me that the only dispute is whether that possession was with the intent to distribute, and that's where the 404(b) would be highly probative and suggest that that was his intent --

MR. RUHNKE: Right.

THE COURT: -- it wasn't mistake. It wasn't an absence of knowledge, but he knew precisely what he was doing and had the intent to distribute them.

MR. RUHNKE: One defense could simply be that's not his apartment. He's got a key to the apartment, it's not his apartment; it's not where he lives. And the government has sort of previewed that in their papers. But none of that is absence of -- none of it is a mistake.

Mistake, under 404(b), refers to a situation where the defendant picked up something he thought was, you know, flour and it turned out to be narcotics. It's not a lack of intent. It's not like saying, oh, there were all these drugs here but they were for personal use. None of that is in the case, and the danger is just overwhelming that he will not receive a fair trial from any jury who hears that evidence. And in terms of jury selection, I suppose that we will have to propose -- if your Honor does allow the evidence, we will have to propose a question for the jurors as to if they heard evidence that on a prior occasion he had possessed drugs, even though it's not charged in this case, would that basically be an overwhelming circumstance that would be very difficult to limit to some purpose?

So I'm sorry if I sound --

THE COURT: All right.

Mr. Gutwillig.

MR. RUHNKE: I object to the evidence, your Honor.

THE COURT: I understand.

Mr. Gutwillig, anything else you wish to say?

MR. GUTWILLIG: No, your Honor.

THE COURT: All right.

I am going to rule, as I indicated, based on the cases cited by the government at page 9 of its memorandum and page 12 of its memorandum. The defense being put forth by the defendant really is a mere presence defense. There is no question he is tied to the apartment by virtue of having the keys and, obviously, the events that led the agents to the apartment. And given that, his intent and knowledge are squarely at issue, and given that, I think the prior conduct with very similar circumstances -- namely, possession of drugs and drug paraphernalia, including some of the very same paraphernalia, namely, a grinder, as I understand it, is highly probative of his knowledge and intent, and it is for that reason admissible, and that is true notwithstanding the passage of time.

I will not, however, allow the government to introduce the investigation or conduct at issue in the Eastern District of Pennsylvania case or that conviction. If that requires that the parties stipulate to evidence of the Middle District conviction but not the conviction that originated in the Eastern District of Pennsylvania, then so be it. I rely on you

to sort that out, but that's the way I will parse it. I think the Middle District conduct, the search and the conviction that relates to the search are plainly admissible. I think the other should be kept out largely on 403 grounds, but in any event, I will not let it in.

For related reasons, Mr. Ruhnke, I'm inclined to think that the electronic device evidence is either direct evidence of the charges here and, in that sense, not even subject to analysis under 404(b), but you didn't address that in your written submission.

Do you wish to address it here? Do you dispute that?

MR. RUHNKE: Your Honor, in terms of the direct evidence or what the government characterized as direct evidence, I recognize that there's potentially direct evidence as outlined by the government.

Just for one housekeeping matter, may we have authorization to order a transcript of today's proceedings so we are absolutely clear 100 percent what your Honor ruled on so we're careful.

THE COURT: I think you need to submit that request through e-voucher. Certainly I have no problem authorizing it, but you need to file it on e-voucher.

MR. RUHNKE: Thank you, your Honor. We'll take care of that.

THE COURT: I will allow the government's motion with

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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UNITED STATES OF AMERICA,

v. 21 Cr. 300 (JMF)

CESAR ABREU,
a/k/a "Cesar Leonidas Abreu Lora,"
a/k/a "Cesar Leonidas Abreu,"
a/k/a "Cesar Leonidas Lora,"
a/k/a "Caito Abreu,"
a/k/a "Cesrl Abreu,"
a/k/a "Cesar Perez,"

Defendant. Trial

----------x

New York, N.Y.
May 17, 2022
9:00 a.m.

Before:

HON. JESSE M. FURMAN,

District Judge
-and a Jury-

APPEARANCES

DAMIAN WILLIAMS
United States Attorney for the
Southern District of New York
BY: JACOB H. GUTWILLIG
ANDREW A. ROHRBACH
Assistant United States Attorneys

RUHNKE & BARRETT
Attorneys for Defendant
BY: DAVID A. RUHNKE

Also Present: Rossana Testino-Burke, Interpreter (Spanish)
Gabriel Mitre, Interpreter (Spanish)
Jacqueline Hauck, Paralegal Specialist
Siminya Massias, Paralegal

William Farley.

WILLIAM JOSEPH FARLEY,

called as a witness by the Government,

having been duly sworn, testified as follows:

THE COURT: Please loudly and clearly state and spell your full name.

THE WITNESS: William Joseph Farley, F-A-R-L-E-Y.

THE COURT: You may proceed.

DIRECT EXAMINATION

BY MR. GUTWILLIG:

Q. Good afternoon.

A. Good afternoon.

Q. Where do you work?

A. Homeland Security Investigations in Philadelphia, Pennsylvania.

Q. For approximately how long have you worked for Homeland Security Investigations?

A. Fourteen years.

Q. What is your current position?

A. Supervisory special agent.

Q. Are you assigned to a particular squad?

A. Yes, sir. I'm assigned to the Seaport BEST Group, which is the Border Enforcement Security Task Force.

Q. In general, what types of matters do you investigate as part of that squad?

A. Generally, our group is responsible for narcotics smuggling.
Q. In general, what types, if any, of investigative techniques do you use in investigating those matters?
A. We do a number of -- a lot of surveillance. We do controlled deliveries, we do buy-bust operations, buy-walk operations.
Q. Have you executed search warrants?
A. Yes, sir.
Q. Approximately how many search warrants have you executed?
A. Over the course of my career, approximate -- it's tough to say, I'd say at least 100.
Q. In what types -- just very generally, what types of search warrants were those?
A. Typically, they are all narcotics-related. I've been in narcotics work most of my career, so the vast majority of the search warrants that I've been involved in would have involved drug cases.
Q. Directing your attention to approximately 2009, were you a special agent at the Department of Homeland Security at that time?
A. Yes, sir, I was.
Q. What was your position then?
A. I was assigned to the Airport Investigations Group at Philadelphia International Airport.

Q. And, in general, what kind of responsibilities did you have at that time?
A. We were responsible for investigations related to persons and parcels that would be transiting through the airport in the international wing, of course.
Q. Did there come a time when you became involved in an investigation of an individual named Cesar Abreu?
A. Yes, sir.
Q. As part of that investigation, did you execute a search warrant on a residence?
A. Yes, sir, I did.
Q. Could you please describe generally the residence that you searched.
A. It was a single-family residence in a mountainous region in Drums, Pennsylvania.
THE COURT: And just to be clear, this is in 2009?
THE WITNESS: Yes, sir, this is in 2009.
THE COURT: Ladies and gentlemen, let me give you an instruction regarding this testimony as well.
I'm allowing this witness to testify concerning conduct dating back to 2009. And as I'll expect you'll learn, it did later result in a prior conviction of the defendant.
This is not what the defendant is charged with here; that is to say that this too is other conduct. You may consider this evidence on the limited issue of the defendant's

intent and knowledge at the time of the charged offenses, that is, the offenses charged in this case, including the defendant's understanding of things at the time of the charged conduct.

You are not to consider this evidence as propensity evidence, that is, again, that the defendant had the propensity to commit crimes or as evidence of bad character or as direct evidence that he committed the crimes that he's charged with in this case. Again, you may consider it only for the limited purposes that I just described.

Counsel, you may proceed.

MR. GUTWILLIG: Ms. Hauck, could you please publish for the witness, Court, and counsel what's marked as Government Exhibit 501.

BY MR. GUTWILLIG:

Q. Do you recognize this?

A. Yes, I do.

Q. What is it?

A. That is the residence in Drums, Pennsylvania that we conducted the search warrant on.

Q. Is it a fair and accurate representation of what that residence looked like at approximately the time you executed the search warrant?

A. Yes, sir.

MR. GUTWILLIG: The government offers Government

Exhibit 501.

MR. RUHNKE: Without objection.

THE COURT: Admitted.

(Government's Exhibit 501 received in evidence)

MR. GUTWILLIG: Ms. Hauck, could you please publish. And if you could take that down, please.

Q. Special Agent Farley, was Mr. Abreu present at the residence when that search warrant was executed?

A. Yes.

Q. Was he arrested at approximately the time the search warrant was executed?

A. Yes.

Q. What was your role in executing the search?

A. My role was pre-surveillance on the residence, as well as entry into the residence and the subsequent search.

Q. And in conducting the search, what was your role specifically as to that?

A. To search for evidence of a crime.

Q. And did you seize anything in searching that residence?

A. Yes, sir.

Q. And what, if anything, did you seize?

A. An amount of cocaine.

MR. GUTWILLIG: Ms. Hauck, could you please show -- well, strike that.

Q. Special Agent Farley, where in the residence did you find

the cocaine you just described?

A. In kitchen cabinet.

MR. GUTWILLIG: Ms. Hauck, could you please show the witness, Court, and counsel what's marked as Government Exhibit 506.

Q. Special Agent Farley, do you recognize this image?

A. Yes, I do. It appears to be the kitchen in the residence.

MR. GUTWILLIG: The government offers Government Exhibit 506.

THE COURT: Any objection? Mr. Ruhnke?

Any objection?

MR. RUHNKE: No objection. Sorry.

THE COURT: Admitted.

(Government's Exhibit 506 received in evidence)

MR. GUTWILLIG: And Ms. Hauck, could you please publish.

Q. Special Agent Farley, could you please describe the kitchen.

A. It's a medium-size kitchen. There was kitchen counters, there was -- there was, you know, various items within the kitchen. There was countertops to -- above the kitchen cabinets, one either side of the microwave, refrigerator, stove. Basic kitchen.

MR. GUTWILLIG: Ms. Hauck, could you please show the witness, Court and counsel what's marked as Government Exhibit

507.

Q. And do you recognize this, Special Agent Farley?

A. Yes, I do.

Q. What is it?

A. It is a kitchen cabinet, open kitchen cabinet in the kitchen, above the counter just to the side of the microwave that contained various items to include clear plastic bag with a white powdery substance.

MR. GUTWILLIG: The government offers Government Exhibit 507.

THE COURT: Any objection?

MR. RUHNKE: No objection, your Honor. Thank you.

THE COURT: Admitted.

(Government's Exhibit 507 received in evidence)

MR. GUTWILLIG: Ms. Hauck, could you please publish that.

Q. Is this a close-up of the cabinet you just testified about, Special Agent Farley?

A. I'm still waiting for it.

Appears to be the same photo I just looked at.

Q. You see it now?

THE COURT: I think it's on his screen.

MR. GUTWILLIG: Ms. Hauck, could you please show the witness what's marked as Government Exhibit 504.

Q. Do you recognize this?

A. Yes.
Q. What is it?
A. Tupperware container containing a white powdery substance next to a bottle of Advil.
Q. Is this a zoomed-in photo of the kitchen cabinet?
A. Yes, sir.
MR. GUTWILLIG: The government offers Government Exhibit 504.
MR. RUHNKE: Without objection.
THE COURT: Admitted.
(Government's Exhibit 504 received in evidence)
MR. GUTWILLIG: And, Ms. Hauck, if you could please publish.
Ms. Hauck, could you please show the witness what's marked as Government Exhibit 505.
Q. Do you recognize this?
A. Yes, sir.
Q. Is this another close-up photograph of the kitchen cabinet?
A. Yes, sir.
MR. GUTWILLIG: The government offers Government Exhibit 505.
THE COURT: Any objection?
MR. RUHNKE: Without objection.
THE COURT: All right. Mr. Gutwillig, maybe we can do them a few at a time and that way speed this along.

MR. GUTWILLIG: Yes.

(Government's Exhibit 505 received in evidence)

MR. GUTWILLIG: Ms. Hauck, could you please show Special Agent Farley Government Exhibits 508, 509, and 510.

Q. And Special Agent Farley, do you recognize those?

A. Yes, sir, I do.

Q. What are they?

A. They are all close-up pictures of items that we seized from the cabinets.

MR. GUTWILLIG: Ms. Hauck, could you please publish -- rather, the government offers Government Exhibits 508, 509 and 510.

THE COURT: Any objection?

MR. RUHNKE: Without objection.

THE COURT: Admitted.

(Government's Exhibits 508, 509, 510 received in evidence)

MR. GUTWILLIG: Ms. Hauck, could you please publish Government Exhibit 508.

Q. Special Agent Farley, could you please describe what you see there?

A. It's a close-up photo of contents inside the kitchen cabinet, clear plastic bag containing a white substance inside.

MR. GUTWILLIG: Ms. Hauck, could you please publish Government Exhibit 509.

Q. Could you please describe what you see there, Special Agent Farley.

A. Again, it's another close-up photo of a clear plastic bag containing a white powdery substance.

MR. GUTWILLIG: And, Ms. Hauck, could you please publish Government Exhibit 510.

Q. Special Agent Farley, if you could just describe what you see there, please?

A. Yes, sir. It's a black bag, black plastic bag inside the cabinet that was later seized.

Q. And all of the photographs we've just seen, did you seize those items from the residence?

A. Yes, sir.

MR. GUTWILLIG: Your Honor, at this time I'd like to read a stipulation into the record. It's marked as Government Exhibit 1001, and offer that as evidence.

THE COURT: You may.

(Government's Exhibits 1001 received in evidence)

MR. GUTWILLIG: This stipulation marked Government Exhibit 1001 reads: On April 21, 2011, Cesar Abreu, the defendant, was convicted in the United States District Court for the Middle District of Pennsylvania of possession with intent to distribute 50 grams or more of cocaine base (crack cocaine), in violation of Title 21, United States Code, Section 841(a)(1).

And if we could take that down, please.

If I could have a moment, please, your Honor.

THE COURT: You may.

(Counsel conferred)

MR. GUTWILLIG: No further questions, your Honor.

THE COURT: Cross-examination.

And, ladies and gentlemen, just if it's not clear, this conviction relates to the search that this witness testified to, just so there's no ambiguity about that.

Go ahead, Mr. Ruhnke.

MR. RUHNKE: Thank you, your Honor.

CROSS-EXAMINATION

BY MR. RUHNKE:

Q. Afternoon, Agent.

A. Good afternoon.

Q. Just so I understand, the seizures we're talking about here, what was the town in Pennsylvania?

A. Drums, Pennsylvania.

Q. Okay. Did you personally seize all these items?

A. The items were seized by the Drug Enforcement Administration.

Q. When did you first see them?

A. On the day of the search.

Q. While you were still out on the premises?

A. Yes, sir.

Q. So there were other agents involved in the actual seizure, but you witnessed them as part of the search team?
A. Yes, sir.
Q. Thank you, sir. No more questions.
A. Thank you.
THE COURT: All right. You may step down, sir.
(Witness excused)
THE COURT: And government, next witness.
MR. ROHRBACH: The government calls Andrew Petersohn.
ANDREW PETERSOHN,
called as a witness by the Government,
having been duly sworn, testified as follows:
THE COURT: If you can please pull your chair up, adjust the microphone. Speak loudly, clearly. If you could start with your full name and spell it, please.
THE WITNESS: Sure. Andrew Petersohn, P-E-T-E-R-S-O-H-N.
THE COURT: You may proceed.
DIRECT EXAMINATION
BY MR. ROHRBACH:
Q. Good afternoon, Mr. Petersohn.
Where do you work?
A. dBm Engineering.
Q. What is your title there?
A. I'm a radio frequency engineer.