

IN THE  
SUPREME COURT  
OF THE UNITED STATES

NO.

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CESAR ABREU, *Petitioner*,

vs.

UNITED STATES OF AMERICA, *Respondent*

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**MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS***

Petitioner, Cesar Abreu, requests leaves to file the annexed Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit without payment of costs, and to proceed *in forma pauperis* pursuant to United States Supreme Court Rule 39. The United States Court of Appeals for the Second Circuit appointed undersigned counsel, David A. Ruhnke, pursuant to the Criminal Justice Act, 18 U.S.C. Section 3006A, to represent Petitioner below. Mr. Ruhnke, also pursuant to the Criminal Justice Act, was appointed to represent Petitioner at his trial in the Southern District of New York. Petitioner has been incarcerated since the commencement of his case, and, on information and belief, is indigent.

/s/ David A. Ruhnke

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Dated: February 27, 2024

## **APPENDIX**

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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 30<sup>th</sup> day of November, two thousand twenty-three.

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

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**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 Leonidas 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.<sup>1</sup>

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

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<sup>1</sup> 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).

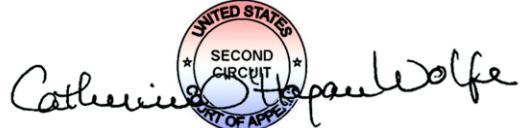
In sum, the district court properly exercised its discretion in identifying a relevant purpose for highly similar prior act evidence that was relevant to knowledge and intent. It further mitigated any potential for unfair prejudice that Abreu may have faced from the evidence through streamlined presentation 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

  
Catherine O'Hagan Wolfe

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1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF NEW YORK  
-----x

3 UNITED STATES OF AMERICA,

4 v.

21 Cr. 300 (JMF)

5 CESAR ABREU,  
6 a/k/a "Cesar Leonidas Abreu Lora,"  
7 a/k/a "Cesar Leonidas Abreu,"  
8 a/k/a "Cesar Leonidas Lora,"  
a/k/a "Caito Abreu,"  
a/k/a "Cesrl Abreu,"  
a/k/a "Cesar Perez,"

9 Defendant.

10 Conference  
-----x

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

13 Before:

14 HON. JESSE M. FURMAN,

15 District Judge

17 APPEARANCES

18 DAMIAN WILLIAMS

19 United States Attorney for the  
Southern District of New York

20 BY: JACOB H. GUTWILLIG  
ANDREW A. ROHRBACH  
Assistant United States Attorneys

21 RUHNKE & BARRETT

22 Attorneys for Defendant  
23 BY: DAVID A. RUHNKE

24  
25 SOUTHERN DISTRICT REPORTERS, P.C.  
(212) 805-0300

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

2                   MR. RUHNKE: Nothing further, your Honor.

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

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

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

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

24                   MR. GUTWILLIG: Yes, your Honor.

25                   So, the brief nature of our treatment of the Eastern

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

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

17 THE COURT: Hold on.

18 (Counsel and defendant conferred)

19 THE COURT: Go ahead.

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

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1 that interview.

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

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

9 THE COURT: Sure.

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

12 MR. GUTWILLIG: Can everyone hear me?

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

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

17 MR. GUTWILLIG: Sure.

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

22 MR. GUTWILLIG: Sure.

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

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

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

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

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

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

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

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

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

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

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

23 Mr. Gutwillig.

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

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1 MR. RUHNKE: Could you speak up, please.

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

12 THE COURT: All right.

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

18 MR. RUHNKE: OK.

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

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

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

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

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

16 There's no identity subset of 404(b) evidence that's  
17 relevant here. There is nothing about the circumstances of any  
18 of the prior investigations, which implicate the current  
19 investigations. They're old. They date back more than a  
20 decade, and the danger of unfair prejudice would not only be a  
21 403 violation, but I believe it would deny Mr. Abreu's right to  
22 a fair trial, as guaranteed by the due process clause of the  
23 Fifth Amendment and the Sixth Amendment trial by jury clause.  
24 There is no limited purpose for which this evidence should be  
25 offered that is of significance to the government's case, and

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1 the overwhelming danger is clear and present.

2 I cited for your Honor in our brief two examples of  
3 Second Circuit cases where convictions were reversed on a  
4 404(b) basis that applied to this case as well. I think you're  
5 being asked to commit reversible error by the government, and I  
6 object to any of this evidence going forward.

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

13 THE COURT: I got it.

14 MR. RUHNKE: OK.

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

25 MR. RUHNKE: Right.

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

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

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

23                   So I'm sorry if I sound --

24                   THE COURT: All right.

25                   Mr. Gutwillig.

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

2 THE COURT: I understand.

3 Mr. Gutwillig, anything else you wish to say?

4 MR. GUTWILLIG: No, your Honor.

5 THE COURT: All right.

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

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

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

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

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

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

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

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

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

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

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m5h3abrl

1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF NEW YORK

-----x

3 UNITED STATES OF AMERICA,

4 v.

21 Cr. 300 (JMF)

5 CESAR ABREU,  
6 a/k/a "Cesar Leonidas Abreu Lora,"  
7 a/k/a "Cesar Leonidas Abreu,"  
8 a/k/a "Cesar Leonidas Lora,"  
a/k/a "Caito Abreu,"  
a/k/a "Cesrl Abreu,"  
a/k/a "Cesar Perez,"

9 Defendant.

Trial

-----x

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

13 Before:

14 HON. JESSE M. FURMAN,

15 District Judge  
16 -and a Jury-

## 17 APPEARANCES

18 DAMIAN WILLIAMS

19 BY: JACOB H. GUTWILLIG  
ANDREW A. ROHRBACH  
20 Assistant United States Attorneys

21 RUHNKE &amp; BARRETT

22 BY: DAVID A. RUHNKE

23 Also Present: Rossana Testino-Burke, Interpreter (Spanish)  
24 Gabriel Mitre, Interpreter (Spanish)  
25 Jacqueline Hauck, Paralegal Specialist  
Siminya Massias, ParalegalSOUTHERN DISTRICT REPORTERS, P.C.  
(212) 805-0300

M5HVABR4

Farley - Direct

1 William Farley.

2 WILLIAM JOSEPH FARLEY,

3 called as a witness by the Government,

4 having been duly sworn, testified as follows:

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

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

8 THE COURT: You may proceed.

9 DIRECT EXAMINATION

10 BY MR. GUTWILLIG:

11 Q. Good afternoon.

12 A. Good afternoon.

13 Q. Where do you work?

14 A. Homeland Security Investigations in Philadelphia,  
15 Pennsylvania.

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

18 A. Fourteen years.

19 Q. What is your current position?

20 A. Supervisory special agent.

21 Q. Are you assigned to a particular squad?

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

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

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Farley - Direct

1 A. Generally, our group is responsible for narcotics  
2 smuggling.

3 Q. In general, what types, if any, of investigative techniques  
4 do you use in investigating those matters?

5 A. We do a number of -- a lot of surveillance. We do  
6 controlled deliveries, we do buy-bust operations, buy-walk  
7 operations.

8 Q. Have you executed search warrants?

9 A. Yes, sir.

10 Q. Approximately how many search warrants have you executed?

11 A. Over the course of my career, approximate -- it's tough to  
12 say, I'd say at least 100.

13 Q. In what types -- just very generally, what types of search  
14 warrants were those?

15 A. Typically, they are all narcotics-related. I've been in  
16 narcotics work most of my career, so the vast majority of the  
17 search warrants that I've been involved in would have involved  
18 drug cases.

19 Q. Directing your attention to approximately 2009, were you a  
20 special agent at the Department of Homeland Security at that  
21 time?

22 A. Yes, sir, I was.

23 Q. What was your position then?

24 A. I was assigned to the Airport Investigations Group at  
25 Philadelphia International Airport.

M5HVABR4

Farley - Direct

1 Q. And, in general, what kind of responsibilities did you have  
2 at that time?

3 A. We were responsible for investigations related to persons  
4 and parcels that would be transiting through the airport in the  
5 international wing, of course.

6 Q. Did there come a time when you became involved in an  
7 investigation of an individual named Cesar Abreu?

8 A. Yes, sir.

9 Q. As part of that investigation, did you execute a search  
10 warrant on a residence?

11 A. Yes, sir, I did.

12 Q. Could you please describe generally the residence that you  
13 searched.

14 A. It was a single-family residence in a mountainous region in  
15 Drums, Pennsylvania.

16 THE COURT: And just to be clear, this is in 2009?

17 THE WITNESS: Yes, sir, this is in 2009.

18 THE COURT: Ladies and gentlemen, let me give you an  
19 instruction regarding this testimony as well.

20 I'm allowing this witness to testify concerning  
21 conduct dating back to 2009. And as I'll expect you'll learn,  
22 it did later result in a prior conviction of the defendant.

23 This is not what the defendant is charged with here;  
24 that is to say that this too is other conduct. You may  
25 consider this evidence on the limited issue of the defendant's

M5HVABR4

Farley - Direct

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

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

11 Counsel, you may proceed.

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

15 BY MR. GUTWILLIG:

16 Q. Do you recognize this?

17 A. Yes, I do.

18 Q. What is it?

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

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

24 A. Yes, sir.

25 MR. GUTWILLIG: The government offers Government

M5HVABR4

Farley - Direct

1 Exhibit 501.

2 MR. RUHNKE: Without objection.

3 THE COURT: Admitted.

4 (Government's Exhibit 501 received in evidence)

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

6 And if you could take that down, please.

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

9 A. Yes.

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

12 A. Yes.

13 Q. What was your role in executing the search?

14 A. My role was pre-surveillance on the residence, as well as  
15 entry into the residence and the subsequent search.16 Q. And in conducting the search, what was your role  
17 specifically as to that?

18 A. To search for evidence of a crime.

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

20 A. Yes, sir.

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

22 A. An amount of cocaine.

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

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

M5HVABR4

Farley - Direct

1 the cocaine you just described?

2 A. In kitchen cabinet.

3 MR. GUTWILLIG: Ms. Hauck, could you please show the  
4 witness, Court, and counsel what's marked as Government Exhibit  
5 506.

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

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

8 MR. GUTWILLIG: The government offers Government  
9 Exhibit 506.

10 THE COURT: Any objection? Mr. Ruhnke?

11 Any objection?

12 MR. RUHNKE: No objection. Sorry.

13 THE COURT: Admitted.

14 (Government's Exhibit 506 received in evidence)

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

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

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

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

M5HVABR4

Farley - Direct

1 507.

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

3 A. Yes, I do.

4 Q. What is it?

5 A. It is a kitchen cabinet, open kitchen cabinet in the  
6 kitchen, above the counter just to the side of the microwave  
7 that contained various items to include clear plastic bag with  
8 a white powdery substance.9 MR. GUTWILLIG: The government offers Government  
10 Exhibit 507.

11 THE COURT: Any objection?

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

13 THE COURT: Admitted.

14 (Government's Exhibit 507 received in evidence)

15 MR. GUTWILLIG: Ms. Hauck, could you please publish  
16 that.17 Q. Is this a close-up of the cabinet you just testified about,  
18 Special Agent Farley?

19 A. I'm still waiting for it.

20 Appears to be the same photo I just looked at.

21 Q. You see it now?

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

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

25 Q. Do you recognize this?

M5HVABR4

Farley - Direct

1 A. Yes.

2 Q. What is it?

3 A. Tupperware container containing a white powdery substance  
4 next to a bottle of Advil.

5 Q. Is this a zoomed-in photo of the kitchen cabinet?

6 A. Yes, sir.

7 MR. GUTWILLIG: The government offers Government  
8 Exhibit 504.

9 MR. RUHNKE: Without objection.

10 THE COURT: Admitted.

11 (Government's Exhibit 504 received in evidence)

12 MR. GUTWILLIG: And, Ms. Hauck, if you could please  
13 publish.14 Ms. Hauck, could you please show the witness what's  
15 marked as Government Exhibit 505.

16 Q. Do you recognize this?

17 A. Yes, sir.

18 Q. Is this another close-up photograph of the kitchen cabinet?

19 A. Yes, sir.

20 MR. GUTWILLIG: The government offers Government  
21 Exhibit 505.

22 THE COURT: Any objection?

23 MR. RUHNKE: Without objection.

24 THE COURT: All right. Mr. Gutwillig, maybe we can do  
25 them a few at a time and that way speed this along.

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Farley - Direct

1 MR. GUTWILLIG: Yes.

2 (Government's Exhibit 505 received in evidence)

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

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

6 A. Yes, sir, I do.

7 Q. What are they?

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

10 MR. GUTWILLIG: Ms. Hauck, could you please publish --  
11 rather, the government offers Government Exhibits 508, 509 and  
12 510.

13 THE COURT: Any objection?

14 MR. RUHNKE: Without objection.

15 THE COURT: Admitted.

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

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

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

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

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

M5HVABR4

Farley - Direct

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

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

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

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

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

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

13 A. Yes, sir.

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

17 THE COURT: You may.

18 (Government's Exhibits 1001 received in evidence)

19 MR. GUTWILLIG: This stipulation marked Government  
20 Exhibit 1001 reads: On April 21, 2011, Cesar Abreu, the  
21 defendant, was convicted in the United States District Court  
22 for the Middle District of Pennsylvania of possession with  
23 intent to distribute 50 grams or more of cocaine base (crack  
24 cocaine), in violation of Title 21, United States Code, Section  
25 841(a)(1).

M5HVABR4

Farley - Cross

1           And if we could take that down, please.

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

3           THE COURT: You may.

4           (Counsel conferred)

5           MR. GUTWILLIG: No further questions, your Honor.

6           THE COURT: Cross-examination.

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

10           Go ahead, Mr. Ruhnke.

11           MR. RUHNKE: Thank you, your Honor.

12           CROSS-EXAMINATION

13           BY MR. RUHNKE:

14           Q. Afternoon, Agent.

15           A. Good afternoon.

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

18           A. Drums, Pennsylvania.

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

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

22           Q. When did you first see them?

23           A. On the day of the search.

24           Q. While you were still out on the premises?

25           A. Yes, sir.

M5HVABR4

Petersohn - Direct

1 Q. So there were other agents involved in the actual seizure,  
2 but you witnessed them as part of the search team?

3 A. Yes, sir.

4 Q. Thank you, sir. No more questions.

5 A. Thank you.

6 THE COURT: All right. You may step down, sir.

7 (Witness excused)

8 THE COURT: And government, next witness.

9 MR. ROHRBACH: The government calls Andrew Petersohn.

10 ANDREW PETERSONH,

11 called as a witness by the Government,

12 having been duly sworn, testified as follows:

13 THE COURT: If you can please pull your chair up,  
14 adjust the microphone. Speak loudly, clearly. If you could  
15 start with your full name and spell it, please.

16 THE WITNESS: Sure. Andrew Petersohn,  
17 P-E-T-E-R-S-O-H-N.

18 THE COURT: You may proceed.

19 DIRECT EXAMINATION

20 BY MR. ROHRBACH:

21 Q. Good afternoon, Mr. Petersohn.

22 Where do you work?

23 A. dBm Engineering.

24 Q. What is your title there?

25 A. I'm a radio frequency engineer.