

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued March 24, 2025

Decided August 12, 2025

No. 23-3100

UNITED STATES OF AMERICA,
APPELLEE

v.

DEMETRIUS GREEN,
APPELLANT

Appeal from the United States District Court
for the District of Columbia
(No. 1:20-cr-00222-1)

Molly E. Runkle, Assistant Federal Public Defender, argued the cause for appellant. With her on the briefs was *A. J. Kramer*, Federal Public Defender. *Tony Axiom Jr.*, Assistant Federal Public Defender, entered an appearance.

Eric Hansford, Assistant U.S. Attorney, argued the cause for appellee. With him on the brief were *Matthew M. Graves*, U.S. Attorney, at the time the brief was filed, and *Chrisellen R. Kolb* and *Elizabeth H. Danello*, Assistant U.S. Attorneys.

Before: HENDERSON, PAN and GARCIA, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* HENDERSON.

Opinion concurring in part and concurring in the judgment filed by *Circuit Judge* GARCIA.

Appendix A

KAREN LECRAFT HENDERSON, *Circuit Judge*: On January 20, 2020, reports of gunfire took police to a rowhouse in Southeast Washington, D.C. There, officers found spent shell casings but no witnesses and no suspect. They reviewed footage from a nearby pole-mounted surveillance camera, installed days earlier for an unrelated investigation. The video showed someone stepping from the rowhouse, firing a gun into the air and retreating inside. Later that day, officers executed a search warrant at the residence. Inside, they recovered a large quantity of narcotics, digital scales and a firearm. As the officers entered, Demetrius Green tried to flee through the back door but was arrested. A jury later convicted him of several federal drug and firearm offenses based on the surveillance footage and the evidence recovered from the house.

Green now challenges his convictions on three grounds. First, he contends that the use of the pole camera violated the Fourth Amendment, asserting that it constituted a warrantless search infringing on his reasonable expectation of privacy. Second, he argues that the evidence at trial was insufficient to establish that he constructively possessed the drugs found in the rowhouse. Third, he claims that the district court erred by admitting two exhibits—a photograph of a bag of powder on top of a digital scale and a text message referring to a drug sale—arguing that both amounted to impermissible character evidence and any probative value was substantially outweighed by the risk of unfair prejudice. We disagree. The use of the pole-camera footage did not constitute a search under the Fourth Amendment. The evidence at trial was sufficient to establish constructive possession, given Green’s documented connection to the residence and the items recovered. And the challenged exhibits were relevant and properly admitted. Alternatively, even if the exhibits were admitted in error, any error was harmless. Accordingly, we affirm.

I. Background

A. Factual Background

In the early morning hours of January 20, 2020, an officer of the Metropolitan Police Department (MPD) heard gunshots in her patrol area in Southeast Washington, D.C. ShotSpotter (a gunshot-detection system) also alerted nearby, close to 917 Wahler Place, Washington, D.C. (917 Wahler), a rowhouse in a public-housing complex. When officers responded, they discovered several spent shell casings scattered on the rear steps of the residence but saw no immediate suspects or eyewitnesses.

Seeking more evidence, MPD officers reviewed surveillance footage from a pole-mounted camera that had been installed two days earlier by the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF), which was conducting a separate investigation. An ATF agent testified that the camera was monitoring the open-air courtyard behind the rowhouses in response to reports of drug trafficking and gun violence in the area. The camera continuously recorded activity in the shared courtyard and the rear entryways of several rowhouses, including 917 Wahler. *See* Gov't Ex. 52.

When MPD officers examined the footage from the time of the reported gunfire, they observed an individual emerging from the rear door of 917 Wahler at around 4:45 a.m. The individual—a male dressed in a dark hooded sweatshirt, white pants and tennis shoes—raised a firearm and appeared to discharge multiple rounds into the air before retreating inside. *Id.* The handgun's muzzle flash was clearly visible on the recording. *See* Gov't Exs. 53 & 54. The footage also showed a male stepping out of the same door at around 12:25 p.m. *See* Gov't Ex. 52. An ATF agent later identified him as Demetrius Green.

Based on that investigation, officers applied for and obtained a search warrant for unlawful firearms or ammunition

at 917 Wahler. The warrant was executed later the same day. As officers approached, Green attempted to exit through the back door but, after seeing police, retreated into the residence. Officers entered the residence and took Green into custody without incident. No one else was present at the house. In the kitchen, officers discovered a clear plastic bag containing 700 oxycodone pills, sorted into smaller bags based on strength, hidden inside a toaster oven. In a nearby cabinet, officers recovered three bags containing 288 hydromorphone pills (another opioid). In other cabinets, they discovered sandwich bags, two digital scales, a Pyrex cup containing white residue and a bank card bearing the name “Demetrius Green.”

Upstairs, officers found a loaded firearm—a Glock 23 fitted with a “conversion device” that allowed the handgun to fire automatically.¹ DNA testing on the gun revealed a major male contributor and a minor contributor. A DNA expert later excluded Green as the major contributor but concluded that there was “moderate support” that he was the minor contributor. App. 870-71. A firearms examiner determined that the recovered shell casings were from rounds fired by that gun. There were three bedrooms upstairs (identified at trial as *Bedrooms A, B* and *C*). Of the three, *Bedroom A* appeared to be the most occupied room. There, officers found a driver’s license, a learner’s permit and a bank card, all bearing Green’s name. They also found a shoebox containing thirty-three small packages of crack cocaine, several articles of clothing consistent with those worn by the shooter appearing on the pole-camera footage and a set of green-and-black headphones. In *Bedroom B*, they found a shoebox containing a DHL label addressed to Green at 917 Wahler. There was also a pre-employment drug testing form in Green’s name and a notarized letter—dated several months earlier—from his sister stating

¹ The ATF classifies such devices as “machineguns” within the meaning of 26 U.S.C. § 5845(b). See 27 C.F.R. § 479.11 (invalidated in part by *Garland v. Cargill*, 602 U.S. 406 (2024)).

that Green was temporarily residing with her at 102 Irvington Street. Green's identification cards listed the same address. In *Bedroom C*, officers found a "significant amount" of cash but did not seize it. App. 690-91.

When officers arrested Green, he had a Motorola cellphone and another pair of green-and-black headphones. Officers later extracted information from the phone, which included an array of photographs, GPS data, text messages and emails, some of which appeared to link Green to 917 Wahler. Relevant here, the government later introduced two exhibits from that data extraction that Green challenges: (1) a photograph of a bag filled with white powder resting on a digital scale reading "13.4g" (Exhibit 101), and (2) a text message Green sent on December 30 saying: "I got sum tree come support my hustle" (Exhibit 110).

B. Procedural Background

On October 15, 2020, a grand jury indicted Green on unlawful possession of a firearm by a convicted felon in violation of 18 U.S.C. § 922(g)(1) (Count 1); unlawful possession of a machinegun in violation of 18 U.S.C. § 922(o) (Count 2); three counts of unlawfully possessing with intent to distribute cocaine base, oxycodone and hydromorphone in violation of 21 U.S.C. § 841(a)(1), (b)(1)(C) (Counts 3-5); and possessing a machinegun in furtherance of a drug trafficking offense in violation of 18 U.S.C. § 924(c)(1)(B)(ii) (Count 6). The government later voluntarily dismissed Count 2. App. 79.

Before trial, Green moved to suppress the footage obtained from the pole camera, arguing that its use violated the Fourth Amendment prohibition on unreasonable searches. App. 40-48. The district court denied the motion. App. 373-84. It was not convinced that Green had established any Fourth Amendment standing in relation to 917 Wahler, given his unclear connection to the residence. App. 382-83. But even assuming Green had standing, the court found that he did "not have an expectation of privacy in the particular exposed,

undifferentiated space captured [by the pole camera], particularly given the limited period of time of the surveillance and the manner in which the surveillance was being conducted.” App. 383. And the court determined that, to the extent Green did have any expectation of privacy in that space, “he voluntarily waived it” by firing the handgun there. *Id.*

The government moved *in limine* to admit two exhibits from Green’s cellphone: the photograph of a digital scale with a bag of powder (Exhibit 101) and the text message referencing “tree” (Exhibit 110). The district court admitted both under Federal Rules of Evidence 404(b) and 403. As to Exhibit 101, the court found that the photograph’s presence on Green’s cellphone was “relevant to show identity, knowledge and intent” and concluded that Green’s objections went “largely to [the exhibit’s] weight and not its admissibility.” App. 431-33. As to Exhibit 110, the court acknowledged that the message referenced marijuana rather than the drugs charged in the indictment but held it was nevertheless “relevant to the question of whether the defendant had the intent to distribute [narcotics] on January 20, 2020.” App. 103. The court noted that any risk of unfair prejudice could be mitigated by a limiting instruction under Rule 105, clarifying that the exhibits were not to be used for an improper purpose. App. 103, 432. At trial, however, Green’s counsel opposed giving such an instruction, explaining that doing so might unduly emphasize the exhibits—“a strategic trial decision made by thoroughly vetted counsel.” App. 1183. The district court required counsel to confirm that, by declining the instruction, he was “waiving the right to argue later that the jury must have used it for an improper purpose.” App. 1182-83. With that understanding, no limiting instruction was given as to either exhibit.

After a five-day trial, the jury convicted Green on four of five counts, failing to reach a verdict on Count 6. App. 107-08. The government later dismissed that charge. App. 105. On June 16, 2023, the district court sentenced Green to 84 months of imprisonment, followed by 36 months of supervised

release. Green timely appealed. The district court had jurisdiction under 18 U.S.C. § 3231 and we have jurisdiction under 28 U.S.C. § 1291.

II. Standards of Review

Green’s challenges require us to apply different standards of review. First, in reviewing a denied motion to suppress, we review “legal conclusions *de novo* and factual findings for clear error.” *United States v. Brown*, 125 F.4th 1186, 1201 (D.C. Cir. 2025).

Second, in assessing a challenge to the sufficiency of the evidence, we examine the evidentiary record *de novo* but “consider it in the light most favorable to the government, and . . . will affirm a guilty verdict where ‘any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.’” *United States v. McGill*, 815 F.3d 846, 917 (D.C. Cir. 2016) (quoting *United States v. Wahl*, 290 F.3d 370, 375 (D.C. Cir. 2002)).

Third, we review the district court’s admission of evidence under Rules 403 and 404(b) for an abuse of discretion. *Id.* at 880. But “[a]n erroneous admission of other crimes evidence must be disregarded as harmless error unless it had a substantial and injurious effect on the jury’s verdict.” *Id.* (citation modified).

III. Analysis

Green raises three issues on appeal. First, he contends that the pole-camera evidence violated his Fourth Amendment rights and should have been suppressed. Second, he asserts that there was insufficient evidence that he constructively possessed the drugs found at 917 Wahler. Third, he challenges the admission of Exhibits 101 and 110 as impermissible character evidence and improperly risking unfair prejudice.

A. Pole-Camera Evidence

Green’s primary claim is that the district court erred by denying his motion to suppress the video evidence recovered from the pole camera with an unobstructed view of the rear of 917 Wahler. Accessing that footage, he argues, was an unreasonable search that violated his reasonable expectation of privacy as protected by the Fourth Amendment. He contends that because the pole-camera evidence was obtained unlawfully and was the foundation for the later warrant, the rest of the evidence against him should also have been excluded as tainted by that unconstitutional search.

The Fourth Amendment provides: “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated.” U.S. Const. amend. IV. Warrantless searches are ordinarily “*per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions.” *Katz v. United States*, 389 U.S. 347, 357 (1967). If the government oversteps that constitutional boundary, the remedy is generally exclusion—courts must suppress the unlawfully obtained evidence and any derivative evidence tainted by the violation unless an exception applies. *Utah v. Strieff*, 579 U.S. 232, 237 (2016).

The fundamental question Green poses is whether the government’s use of a pole camera under the circumstances here constituted a “search” within the meaning of the Fourth Amendment. The U.S. Supreme Court has set forth two tests to assess whether government conduct constitutes a search. First, the “common-law trespassory test” considers whether the government has physically intruded on private property. *United States v. Jones*, 565 U.S. 400, 409 (2012); *see also Florida v. Jardines*, 569 U.S. 1, 5-10 (2013). That test is not relevant here because the pole camera did not physically intrude at 917 Wahler. Second, the government performs a search when it intrudes upon a defendant’s reasonable

expectation of privacy. *See Katz*, 389 U.S. at 361 (Harlan, J., concurring); *Jones*, 565 U.S. at 406. Determining whether such an expectation exists involves a two-step inquiry: first, whether the defendant exhibited an actual, subjective expectation of privacy; and second, whether that expectation is one society is prepared to recognize as objectively reasonable. *Smith v. Maryland*, 442 U.S. 735, 740-41 (1979). If both prongs are satisfied, the conduct qualifies as a search and any resulting evidence is subject to suppression absent a warrant or a valid exception. *See, e.g., Carpenter v. United States*, 585 U.S. 296, 304 (2018). Here, Green’s challenge implicates two strands of Fourth Amendment jurisprudence: the public-view doctrine and the mosaic theory. We consider each in turn.

1. Public View

The Supreme Court has consistently held that individuals have no reasonable expectation of privacy in areas exposed to the public. *See Katz*, 389 U.S. at 351 (“What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection.”); *Kyllo v. United States*, 533 U.S. 27, 32 (2001) (“[E]xamining the portion of a house that is in plain public view . . . is no ‘search’ at all” under the Fourth Amendment.). It is nearly axiomatic that “Fourth Amendment protection of the home has never been extended to require law enforcement officers to shield their eyes when passing by a home on public thoroughfares.” *California v. Ciraolo*, 476 U.S. 207, 213 (1986); *see also Dow Chem. Co. v. United States*, 476 U.S. 227, 239 (1986) (taking aerial photos of an industrial plant was not a search); *Collins v. Virginia*, 584 U.S. 586, 600 (2018) (affirming the “ability to observe inside curtilage from a lawful vantage point”). Our court has similarly recognized that “there is no reasonable expectation of privacy in the movement of objects outside a residence where they can be viewed from a public route or adjoining premises, nor in activities conducted in the curtilage of a home, even behind a hedge or fence, if they may be viewed by naked-eye observation.” *Brennan v.*

Dickson, 45 F.4th 48, 62 (D.C. Cir. 2022) (citation modified) (discussing a constitutional challenge to an agency rule regarding drone flights). Courts have referred to this principle as the “public-view doctrine”: an observation of an area exposed to public sight from lawful vantage points does not constitute a Fourth Amendment search.²

Both *Carpenter* and *Jones* also noted that the public-view doctrine remains good law. *See Carpenter*, 585 U.S. at 316 (“We do not . . . call into question conventional surveillance techniques and tools, such as security cameras.”); *Jones*, 565 U.S. at 412 (“This Court has to date not deviated from the understanding that mere visual observation does not constitute a search.”). Apart from Judge Barron’s concurrence in *Moore-Bush*, every circuit court to consider whether a pole camera observing a public area violates a reasonable expectation of privacy has held it does not.³ Instead, pole cameras “qualify as

² The government incorrectly refers to this concept as the “plain-view doctrine,” which typically applies to the permissible seizure of visible contraband without a warrant. *See, e.g.*, Gov’t Br. 34. The principle at issue here, which involves whether an individual has a reasonable expectation of privacy in his public conduct, is a related but distinct doctrine. *See* 1 Wayne R. LaFare, *Search & Seizure* § 2.2(a) & n.10 (6th ed. 2024) (discussing the distinction). We refer to the latter principle as the public-view doctrine.

³ Nearly every circuit to have considered the issue has held that the use of pole cameras is not a search under the Fourth Amendment. *See United States v. Bucci*, 582 F.3d 108, 116-17 (1st Cir. 2009); *United States v. Harry*, 130 F.4th 342, 348-51 (2d Cir. 2025); *United States v. Vankesteren*, 553 F.3d 286, 291 (4th Cir. 2009); *United States v. Dennis*, 41 F.4th 732, 740-41 (5th Cir. 2022), *cert. denied*, 143 S. Ct. 2616 (2023); *United States v. May-Shaw*, 955 F.3d 563, 567-69 (6th Cir. 2020); *United States v. Tuggle*, 4 F.4th 505, 510-11 (7th Cir. 2021); *United States v. Hay*, 95 F.4th 1304, 1313-18 (10th Cir. 2024), *cert. denied*, 145 S. Ct. 591 (2024); *United States v. Gregory*, 128 F.4th 1228, 1240-44 (11th Cir. 2025).

a conventional surveillance technique” to observe areas open to public view, as specifically blessed by *Carpenter*. *Tuggle*, 4 F.4th at 526 (citation modified).

Under the standard application of the public-view doctrine—that is, without considering the mosaic theory—this case is not a close one.

The first question under *Katz* is whether Green exhibited an actual, subjective expectation of privacy in the rear of 917 Wahler Place.⁴ A defendant manifests such a desire if he, at a minimum, takes “normal precautions to maintain his privacy,” such as installing a high fence to prevent “casual, accidental observation” from sidewalk traffic. *Ciraolo*, 476 U.S. at 211-12 (quoting *Rawlings v. Kentucky*, 448 U.S. 98, 105 (1980)); see also *Florida v. Riley*, 488 U.S. 445, 450 (1989) (holding that a defendant who had taken “precautions . . . against ground-level observation” exhibited a subjective expectation of privacy). Several circuits have noted the relevance of defendants’ failures to exhibit a subjective expectation of privacy in areas surveilled by pole cameras. See, e.g., *United States v. House*, 120 F.4th 1313, 1317 (7th Cir. 2024); *Harry*, 130 F.4th at 348.⁵

The First Circuit, sitting *en banc*, affirmed the use of pole-camera footage in a criminal case based on its earlier decision in *Bucci* and applying the good-faith exception to the warrant requirement, but evenly split over whether the surveillance constituted a search after *Carpenter*. Contrast *United States v. Moore-Bush*, 36 F.4th 320, 328 (1st Cir. 2022) (Barron, J., concurring) (finding a search), *with id.* at 363 (Lynch, J., concurring) (finding no search).

⁴ The issue is not whether Green *had* such an expectation but whether he *showed* one by seeking to preserve his actions as private. See *Smith*, 442 U.S. at 740.

⁵ Some jurists and scholars have dismissed the subjective prong of *Katz* as a “phantom doctrine” due to its frequent minimization. Orin Kerr, *Katz Has Only One Step: The Irrelevance of Subjective*

Green exhibited no expectation of privacy in the rear of 917 Wahler. As the district court observed, the area was “well lit,” “entirely open to public view” and was not differentiated “from the space behind any of the other adjacent townhouses.” App. 377. Although a chain-link fence surrounded the rear area of all the townhouses, no fence or hedge separated 917 Wahler from its neighbors. *Id.* Green has also not established—and indeed disclaims—that 917 Wahler was his residence or abode, where a subjective expectation of privacy might be more readily established. Granted, Green is correct that none of those facts precludes him from establishing a subjective expectation of privacy, *see* Appellant Br. 37, but he has offered nothing in their stead. Moreover, if Green ever did show a subjective expectation of privacy, he plainly did not when he stepped outside to fire a handgun into the air in full view of the neighborhood. *See* App. 378.⁶

Green fares no better under *Katz*’s second prong. The rear of 917 Wahler was plainly visible from multiple public vantage points—including the adjacent parking lot, a public walkway and the windows of nearby residences. *See* App. 377. The pole camera was mounted in a lawful location and recorded only what was already in plain sight. It did not enter the property,

Expectations, 82 U. Chi. L. Rev. 113, 115 (2015); *Carpenter*, 585 U.S. at 346 (Thomas, J., dissenting). But the trend is unsurprising—defendants can often easily show at least *some* minimal effort to conceal misdeeds or contraband. If such an intent is less obvious, a manifest expectation can still be relevant. Moreover, although the Supreme Court has not required a showing of a manifest subjective expectation of privacy in some recent cases involving the mosaic theory (discussed *infra*), it has also recognized that part of what renders certain information protected is that individuals take steps “to preserve [it] as private.” *Carpenter*, 585 U.S. at 310. In public-view cases, at least, the consideration remains relevant.

⁶ Our conclusion aligns with the district court’s view, although cast in different terms. *See* App. 383 (describing Green as having “voluntarily waived” his expectation of privacy).

peer through barriers or use any technology to reveal what was otherwise hidden. *Cf. Kyllo*, 533 U.S. at 40 (holding that use of “a device that is not in general public use” can sometimes constitute a search). It captured what any passerby or neighbor could have seen with the naked eye. That the observation was recorded and extended over time does not alter that analysis. The camera saw no more—and, except for its elevation, no differently—than the public could have seen all along. *See* Gov’t Ex. 52. Under the public-view doctrine, then, the surveillance here did not violate any objectively reasonable expectation of privacy.⁷

2. The Mosaic Theory

The crux of Green’s challenge—indeed all of the recent challenges to the use of pole cameras—is that the aggregation of surveillance over time violates a reasonable expectation of privacy, even if any brief or isolated observation would not. The argument rests on the so-called “mosaic theory,” which suggests that the government’s collection of numerous discrete data points over time can create an impermissibly invasive picture of an individual’s private life, even if any individual

⁷ The parties devote substantial attention to whether the rear step at 917 Wahler qualifies as curtilage. But that inquiry does little work in the public-view analysis. The Fourth Amendment protects curtilage as an extension of the home, *United States v. Dunn*, 480 U.S. 294, 300-01 (1987); areas that do not meet that definition are “open fields” subject to warrantless search, *see Oliver v. United States*, 466 U.S. 170, 177-80 (1984). That distinction plays a central role when a court applies the trespass-based test for searches, as set out in *Jardines*, 569 U.S. at 5-7. But where no trespass has occurred, as here, and the government has merely observed from a lawful vantage point, the curtilage question has little significance. *See Moore-Bush*, 36 F.4th at 369-70 (Lynch, J., concurring) (critiquing attempts to merge trespass-based reasoning with public-view analysis). Thus, whether the back step is part of 917 Wahler’s curtilage is irrelevant to our analysis.

data point, standing alone, would not constitute a search. *See generally Tuggle*, 4 F.4th at 517 (collecting academic discussions of the theory).

The mosaic theory first emerged in our court’s decision in *United States v. Maynard*, in which case we concluded that tracking a car using a planted GPS device constituted a search. 615 F.3d 544, 560-62 (D.C. Cir. 2010), *aff’d sub nom. Jones*, 565 U.S. at 400. We held:

[T]he whole of a person’s movements over the course of a month is not actually exposed to the public because the likelihood a stranger would observe all those movements is not just remote, it is essentially nil. It is one thing for a passerby to observe or even to follow someone during a single journey as he goes to the market or returns home from work. It is another thing entirely for that stranger to pick up the scent again the next day and the day after that, week in and week out, dogging his prey until he has identified all the places, people, amusements, and chores that make up that person’s hitherto private routine.

Id. at 560. The court continued: “Prolonged surveillance reveals types of information not revealed by short-term surveillance, such as what a person does repeatedly, what he does not do, and what he does ensemble. These types of information can each reveal more about a person than does any individual trip viewed in isolation.” *Id.* at 562.

The Supreme Court reviewed that decision in *United States v. Jones*, 565 U.S. at 400. There, the Court’s majority avoided the question of whether aggregated data could ever amount to a search, relying instead on the trespassory test. *Id.* at 404-07. Concurring, Justice Alito—joined by Justices Ginsburg, Breyer and Kagan—noted that, although “relatively short-term monitoring of a person’s movements on public

streets accords with expectations of privacy,” it was possible that “longer term GPS monitoring” could impinge on such expectations. *Id.* at 430 (Alito, J., concurring). Writing separately, Justice Sotomayor similarly voiced a concern that the capabilities of GPS monitoring—including its inexpensiveness, precision, efficiency and limitless storage—posed serious concerns: “GPS monitoring generates a precise, comprehensive record of a person’s public movements that reflects a wealth of detail about [a defendant’s] familial, political, professional, religious, and sexual associations.” *Id.* at 415 (Sotomayor, J., concurring). Those attributes, she wrote, should be considered when assessing societal expectations of privacy. *Id.* at 416.

Since *Jones*, the Supreme Court has signaled a continuing willingness to consider the aggregation of data as distinctively problematic. *See, e.g., Riley v. California*, 573 U.S. 373, 394 (2014) (noting that the “sum of an individual’s private life” can be adduced from a warrantless search of a cellphone). In *United States v. Carpenter*, the Court concluded that collecting seven days of cell-site location information (CSLI) was a search under the Fourth Amendment (despite precedent suggesting a contrary result). 585 U.S. at 315, 310 n.3.⁸ The Court endorsed the theory propounded by Justices Sotomayor and Alito and found that “individuals have a reasonable expectation of privacy in the whole of their physical movements,” even if exposed to public view, and that accessing the CSLI data contravened that expectation. *Id.* at 310-11. It noted that the CSLI data presented “even greater privacy concerns” than the vehicle GPS data in *Jones* because a cellphone “follows its owner beyond public thoroughfares and into private residences, doctor’s offices, political headquarters, and other potentially revealing locales,” allowing

⁸ The government’s primary argument in that case was that an individual usually has no expectation of privacy in information voluntarily given to third parties. *See Smith*, 442 U.S. at 743-44.

the government to create a comprehensive map of a person's movements with "just the click of a button." *Id.* at 311-12.

At the same time, the Court cautioned that its decision was "a narrow one" and that it did not "call into question conventional surveillance techniques and tools, such as security cameras." *Id.* at 316. It also left undisturbed the holding in *Knotts*, in which case it held that using a more "rudimentary tracking" device that simply "augmented visual surveillance" for discrete intervals was not a search. *Id.* at 306 (citing *United States v. Knotts*, 460 U.S. 276, 281-85 (1983)) (citation modified).

Pole cameras pose a special challenge to the mosaic theory. In one sense, they are among the most common forms of surveillance. They rely on a public, unobstructed vantage point and off-the-shelf technology, not unlike an agent with binoculars perched atop a telephone pole. But unlike that unfortunate agent—who will get bored, blink or need to stretch—a pole camera never looks away. It records everything, 24/7, for weeks or months, even years, preserving everything it sees. By aggregating that data, critics worry, the government can reconstruct not only what happens at a location, but also the patterns and relationships of the individuals who pass through it. Little about the underlying camera technology has changed in recent years but *Carpenter's* embrace of the mosaic theory has made pole-camera challenges newly relevant to the Fourth Amendment. And as other technologies like artificial intelligence and facial recognition improve, the potential capabilities of ubiquitous cameras may grow exponentially.

Still, other circuit courts have consistently rejected attempts to extend the mosaic theory to pole cameras. *See supra* n.3. Those decisions primarily rely on the continuing vitality of the public-view doctrine as the Supreme Court has articulated it, including *Carpenter's* reassurance that it did not invalidate the use of traditional surveillance techniques like

“security cameras.” See, e.g., *Tuggle*, 4 F.4th at 525-26 (quoting *Carpenter*, 585 U.S. at 316). They also sometimes note that, even if pole-camera surveillance could violate the Fourth Amendment, the duration of the evidence in their respective cases was not sufficient to establish such a violation. See, e.g., *id.* (18 months permissible but noting the “obvious line-drawing problem: How much pole camera surveillance is too much?”); *Harry*, 130 F.4th at 348 (50 days); *Hay*, 95 F.4th at 1316-17 (68 days); see also *Carpenter*, 585 U.S. at 322-23 (Kennedy, J., dissenting) (deriding the arbitrariness of the majority’s six-day cutoff).

More fundamentally, there seems a material difference between the types of data the Supreme Court has found to implicate mosaic-type concerns—such as omnipresent location tracking—and the more limited information a fixed pole camera can capture. The cell-site location data in *Carpenter*, like the GPS data in *Jones*, “provide[d] an all-encompassing record of the holder’s whereabouts,” revealing “not only his particular movements, but through them his ‘familial, political, professional, religious, and sexual associations.’” *Carpenter*, 585 U.S. at 311 (quoting *Jones*, 565 U.S. at 415 (Sotomayor, J., concurring)). Those kinds of data have a “retrospective quality” that allows the government to reconstruct a suspect’s past—surveilling him before he was ever a suspect—and to access “a category of information otherwise unknowable.” *Id.* at 312.

By contrast, the observational power of a single pole camera is both fixed and limited. The Fourth Amendment “protects people, not places,” *Katz*, 389 U.S. at 351, so the simple fact that a public-facing camera records a location continuously is not itself constitutionally suspect. The question is what the government in fact learns about an individual from that camera’s limited perspective. The information may still be meaningful—agents might see when a person comes and goes, who visits him or how often he mows the lawn—but it would tell them nothing about him outside the frame. The

footage, in other words, “only depict[s] one small part of a much larger whole.” *Tuggle*, 4 F.4th at 524. There is a difference between location-tracking technologies, which follow a person broadly but shallowly, and fixed surveillance tools, which observe narrowly but in greater depth. As an analogy, if an individual’s daily patterns were the surface of the ocean, CSLI or GPS data would be a buoy drifting across the water, reporting any contacts along the way. But a pole camera is anchored in place—it might provide complete information about the reef it rests on but say little about the sea beyond.

In any event, this case is a poor candidate for applying the mosaic theory to pole-camera surveillance. The footage here spanned only two days—far shorter than the weeks or months involved in other cases where courts have had reservations about cumulative observation. Given that brief duration, the government had no opportunity to compile a retrospective record of Green’s movements or reconstruct his patterns of life. Nor did the footage itself reveal much—the camera captured just two fleeting moments in which Green stepped outside, offering no insight into his associations, routines or private conduct in the manner condemned in *Carpenter*. Whatever the outer bounds of the mosaic theory may be, they are not approached here. This was short-term, public-facing surveillance, limited in scope. It did not implicate the privacy concerns the mosaic theory is intended to address.⁹

We emphasize, however, the limits of our holding. We do not suggest that pole-camera surveillance could never amount to a Fourth Amendment search. In another case, the technology might be used over longer periods, with more cameras, or in combination with other tools—such as facial recognition,

⁹ The parties dispute whether and how *Katz*’s first prong applies to a case in which the defendant relies on the mosaic theory. We need not resolve that dispute because we hold that Green independently fails to establish an objectively reasonable expectation of privacy on these facts.

automated tracking or artificial intelligence—to build a far more comprehensive portrait of an individual’s life. Whether such surveillance would raise constitutional concerns, however, is a question left for another day.

In sum, the rear of 917 Wahler was exposed to public view and the surveillance was brief and unsophisticated. Under the public-view doctrine, Green lacked any objectively reasonable expectation of privacy. And because the observation was both limited and discrete, the mosaic theory does not change that result.¹⁰

B. Sufficiency of the Evidence

Green next challenges the sufficiency of the evidence supporting his constructive possession of the drugs undergirding three of his convictions. To convict Green, the government was required to prove that Green possessed crack cocaine for Count 3, oxycodone for Count 4 and hydromorphone for Count 5. *See App. 37-38*. Green contends that there was insufficient evidence that he had constructive possession of any of those drugs.

In a challenge to the sufficiency of the evidence, we consider the evidentiary record *de novo* but “consider it in the light most favorable to the government, and . . . will affirm a guilty verdict where ‘any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.’” *McGill*, 815 F.3d at 917 (quoting *Wahl*, 290 F.3d at 375). That is a “highly deferential standard,” reflecting that the jury is “entitled to draw a vast range of reasonable inferences from evidence, but may not base a verdict on mere

¹⁰ In light of our holding, we do not consider Green’s Fourth Amendment standing to challenge the use of the pole-camera footage, *see Byrd v. United States*, 584 U.S. 395, 411 (2018), or whether the good-faith exception to the warrant requirement could apply to the police officers’ conduct here, *see Davis v. United States*, 564 U.S. 229, 238-41 (2011).

speculation.” *United States v. Slatten*, 865 F.3d 767, 792 (D.C. Cir. 2017) (citation modified).

Possession of contraband may be either actual or constructive. *See United States v. Alexander*, 331 F.3d 116, 127 (D.C. Cir. 2003). Actual possession requires “direct physical control.” *Henderson v. United States*, 575 U.S. 622, 626 (2015). Because Green was not found in actual possession of any controlled substances, the government had to prove that he constructively possessed them. “Constructive possession is established when a person, though lacking such physical custody, still has the power and intent to exercise control over the object,” thus “maintaining control” over the object. *Id.* We generally permit an inference of constructive possession in two circumstances. First, it may be inferred that a “sole occupant” of a residence exercises dominion and control over its entire contents. *United States v. Morris*, 977 F.2d 617, 620 (D.C. Cir. 1992) (“A jury is entitled to infer that a person exercises constructive possession over items found in his home.”). Alternatively, if the home is shared or if the defendant is simply discovered close to the contraband, there must be other evidence connecting him to it. *See United States v. Dorman*, 860 F.3d 675, 679-81 (D.C. Cir. 2017). For example, “connection with a gun, proof of motive, a gesture implying control, evasive conduct, or a statement indicating involvement in an enterprise—coupled with proximity may suffice.” *Alexander*, 331 F.3d at 127 (citation modified).

Green argues that no reasonable jury could find that he was the sole occupant of 917 Wahler because evidence suggested a link to at least one other person, including a bank card in the name of “Roneka Eaton.” *See* Appellant Br. 45-47. He is incorrect.

A jury could have permissibly found that Green was the sole occupant of 917 Wahler. As described above, one room of the residence was the most lived in and it was full of Green’s possessions. Indeed, Green’s possessions were found

throughout the house, including in multiple bedrooms and the kitchen. *Cf. United States v. Dykes*, 406 F.3d 717, 722 (D.C. Cir. 2005) (holding that a defendant constructively possessed contraband where his personal belongings were found in the same bedroom as drugs and paraphernalia). There was further evidence that Green had used 917 Wahler for some time, including a shipping label bearing his name along with several text messages and emails from his cellphone linking him to 917 Wahler. *See, e.g.*, App. 795-802. Law enforcement also observed Green in the pole-camera footage as the only occupant for the day and night before his arrest and no one else was seen coming or going during that time.

It is true that Green was neither the owner nor lessee of 917 Wahler and some items were discovered that did not appear to be his. For example, Green points to Eaton's bank card and a letter addressed to "Ronnika Jennings." Appellant Br. 45-46. There was also evidence that Green was temporarily living with his sister on Irvington Street. *Id.* at 46. But much of that evidence was contradicted. *See, e.g.*, App. 688 (ATF agent's testimony that she had found no evidence of a woman living at 917 Wahler). And, as the government points out, although that evidence *might* have led a jury to find that Green was not an occupant of 917 Wahler, none of that evidence would *require* it to do so. *See Dykes*, 406 F.3d at 722 (noting that the jury may infer dominion and control over a residence even if it is shared, although the inference may be less strong); *see also Morris*, 977 F.2d at 620. Because the jury *could* have reasonably concluded that Green exercised dominion and control over the whole residence, that is enough.

In sum, there was sufficient evidence for the jury to conclude that Green was the sole occupant of 917 Wahler and thus was in constructive possession of all of the contraband discovered therein.

C. Evidentiary Issues

Green finally challenges the district court's admission of Exhibits 101 and 110 under Federal Rules of Evidence 404(b) and 403. Exhibit 101 consists of a photograph found on Green's cellphone depicting a white powdery substance on a digital scale and Exhibit 110 contains a text message in which Green apparently inquired about selling marijuana ("I got sum tree come support my hustle"). *See* App. 207, 236.

1. Admissibility

Relevant evidence is admissible, subject to certain limits. Fed. R. Evid. 402. Whether a piece of evidence is relevant turns on whether it tends to make any fact of consequence to the determination of the action more or less probable. Fed. R. Evid. 401. Whether a piece of evidence is relevant may depend on an underlying factual predicate. For example, a photograph is relevant only if there is sufficient evidence to establish that it depicts what the proponent claims it does. In such circumstances, a proponent must produce enough evidence to permit a reasonable jury to find the predicate fact by a preponderance of the evidence. Fed. R. Evid. 104(b); *Huddleston v. United States*, 485 U.S. 681, 689-90 (1988).

Rule 404(b)(1) separately restricts one type of otherwise relevant evidence—that offered to prove a criminal character or propensity (*i.e.*, that because a defendant committed a previous crime, he more likely committed the charged one). The prohibition does not apply, however, if the same evidence is offered for other purposes “such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident.” Fed. R. Evid. 404(b)(2). Even if the evidence could conceivably be used in an improper way, it is still admissible under Rule 404(b)(2) provided it has *any* purpose other than seeking to prove a criminal propensity. *See United States v. Cassell*, 292 F.3d 788, 792 (D.C. Cir. 2002).

Otherwise admissible evidence may also be excluded “if its probative value is substantially outweighed by a danger of . . . unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.” Fed. R. Evid. 403. A risk of “unfair prejudice” can arise when “some concededly relevant evidence [could] lure the factfinder into declaring guilt on a ground different from proof specific to the offense charged.” *Old Chief v. United States*, 519 U.S. 172, 180 (1997). That said, “Rule 403 ‘tilts, as do the rules as a whole, toward the admission of evidence in close cases,’ even when other crimes evidence is involved.” *Cassell*, 292 F.3d at 795 (quoting *United States v. Moore*, 732 F.2d 983, 989 (D.C. Cir. 1984)).

Green was charged with three counts of possessing with intent to distribute certain controlled substances—hydromorphone, oxycodone and crack cocaine. To convict him of those charges, the government was required to prove that, on January 20, 2020, Green possessed the controlled substance, knowingly and intentionally, with the specific intent to distribute it. *See* 21 U.S.C. § 841(a)(1), (b)(1)(C). Green’s identity, knowledge and intent were thus all relevant as facts of consequence to the verdict.

Combining the applicable standards, the district court was charged with answering three questions: was the proffered evidence relevant to at least one of the charged offenses, was it improperly offered to show Green’s criminal character and was its probative value substantially outweighed by the risk of unfair prejudice?

a. Exhibit 101

The district court determined that Exhibit 101 was relevant because it could be used to show Green’s identity as well as his knowledge or intent to distribute illegal drugs. App. 431-33. Because it was being offered for those purposes, the court reasoned, it did not breach Rule 404(b). *Id.* The court also found there was a low risk of any unfair prejudice, particularly

with a limiting instruction, and thus the photograph's probative value outweighed that concern under Rule 403. *Id.* Green argues that Exhibit 101 should have been prohibited under Rule 404(b) because a picture of one powdery substance "proved nothing" about any other drugs concealed in 917 Wahler, the identity of the person in the photo was not at issue at trial, the government did not prove the powdery substance was any kind of narcotic, the government did not prove the photo was taken by Green and a two-month-old photograph was too remote to bear on Green's knowledge and intent at the time of his arrest. *See* Appellant Br. 59-61.

Relevance. Exhibit 101 was relevant but its relevance was conditioned on several predicate facts. Although couched in Rule 404(b), Green's objections primarily contest the photograph's relevance—or conditional relevance—not its use as improper character evidence. To illustrate, if the photograph was taken by Green and the substance pictured was cocaine packaged for sale, there is no dispute that it would be relevant to show his identity (as the person in possession of the cocaine found at 917 Wahler), knowledge (of cocaine or other illegal narcotics), or intent (to distribute those drugs). None of those purposes makes it impermissible propensity evidence. Green attacks the predicate factual bases of those conclusions (who took the photograph and what it shows), which bear on conditional relevance under Rule 104(b), requiring only evidence sufficient for a reasonable jury to find the predicate facts by a preponderance of the evidence. *Huddleston*, 485 U.S. at 689-90.

The district court determined the photograph was relevant because it was taken on Green's cellphone and it showed what appeared to be illegal narcotics packaged and weighed for distribution on one of the scales recovered during the government's search of 917 Wahler. App. 431. It then properly decided (albeit implicitly) that a reasonable jury could find those predicate facts by a preponderance of the evidence. *See Huddleston*, 485 U.S. at 689-90. At least some evidence

suggested that Green had taken the photograph, given that the image was recovered from his cellphone, contained a distinctive green-and-black headphone cord resembling ones found in his possession and depicted a digital scale similar to those seized from 917 Wahler. Likewise, the powdery substance pictured could have reasonably been found to be an illegal drug packaged for distribution, based on its appearance, the expert testimony describing how drugs are typically weighed and prepared for sale and the presence of identical scales found alongside the recovered narcotics. Of course, the jury could also have rejected those conclusions and disregarded Exhibit 101 but that fact did not make the photograph irrelevant.

Green also suggests that, even if the photograph depicts him with a bag of suspected narcotics, it was taken too long before his arrest to be relevant. Once again, that is not a challenge to improper character evidence under Rule 404(b) but a straightforward relevance objection. But time does not entirely strip evidence of its relevance, provided it is not excessively remote and the context is sufficiently similar. *See United States v. Douglas*, 482 F.3d 591, 597-98 (D.C. Cir. 2007) (holding that evidence of an earlier arrest for possession with intent to distribute crack cocaine was relevant to a new charge more than a year later); *Cassell*, 292 F.3d at 793 (three-year-old arrest on the same crime relevant to new charge). Although the passage of time may bear on the probative value of the evidence, that consideration is properly the domain of Rule 403 or fodder for cross-examination, not the relevance inquiry. The district court was therefore well within its discretion in determining that a two-month interval was not so remote as to render Exhibit 101 irrelevant, especially given its connection to narcotics distribution activities involving similar (or even the same) paraphernalia. App. 431-32.

Propensity. Because Exhibit 101 was relevant, the next question is whether it was offered to show Green's criminal propensity and thus prohibited under Rule 404(b).¹¹ It was not. The government introduced Exhibit 101 to establish Green's knowledge of and intent to distribute illegal narcotics—both disputed elements of the charged offenses. This court has repeatedly found that evidence of past drug distribution is admissible to establish the charged offense, provided at least some of the characteristics are the same. *See, e.g., United States v. Pettiford*, 517 F.3d 584, 590 (D.C. Cir. 2008) (evidence of earlier distribution of crack cocaine admissible to show knowledge of the substance and intent to distribute it again); *United States v. Crowder*, 141 F.3d 1202, 1208-09 (D.C. Cir. 1998) (en banc); *Douglas*, 482 F.3d at 600. Here, the government used Exhibit 101 for a permissible purpose and thus Rule 404(b) did not bar its admission.

Risk of Unfair Prejudice. Green finally argues that even if Exhibit 101 was relevant and otherwise admissible, it should have been excluded because its probative value was outweighed by the risk of unfair prejudice under Rule 403. The district court did not gravely abuse its discretion in finding the contrary. *See Douglas*, 482 F.3d at 596. The photograph was at least somewhat probative of Green's identity, intent and knowledge. App. 431. On the other side of the ledger, the risk of unfair prejudice posed by the photograph Green raises was the potential that it would be used as improper propensity evidence. Yet the district court acknowledged that potential hazard and found that any such prejudice could be eliminated

¹¹ Green's assertion that the photograph's admission violated Rule 404(b) would have to rely on the predicate findings that he took the photograph and the substance pictured is an illegal narcotic because, if neither of those facts were so, the photograph would not be evidence of his past bad acts in the first place. That confusion illustrates why it is critical to keep the inquiries distinct. *Cf. Douglas*, 482 F.3d at 598 n.9 (noting the importance of separating the relevance and prejudice inquiries).

through a limiting instruction. App. 432. Such an instruction would ordinarily be sufficient to alleviate the risk identified by Green, absent some showing of “compelling or unique evidence of prejudice.” *Cassell*, 292 F.3d at 796 (citation modified); *Douglas*, 482 F.3d at 601. Here, Green’s defense asked that no such instruction be given at trial. App. 1182-83. In such cases, we “only look to that prejudice which would have accrued despite the giving of a proper limiting instruction.” *Moore*, 732 F.2d at 990. But the question at this point is not whether Exhibit 101 in fact resulted in unfair prejudice; it is whether the district court correctly conducted the Rule 403 balancing test at the time the issue was raised. From that perspective, the district court was well within its discretion to consider the effectiveness of a limiting instruction to mitigate any risk of unfairness and the fact that Green later made a tactical decision not to request one does not affect our review. The district court therefore did not abuse its discretion in finding Exhibit 101 passed Rule 403.

In sum, the district court properly concluded that Exhibit 101 was relevant, was offered for a permissible purpose and passed Rule 403 balancing.

b. Exhibit 110

As to Exhibit 110, the district court found the text message relevant to Green’s intent to distribute drugs (of a different sort from those charged) because its language suggested distribution, rather than personal use, and it had been sent shortly before the search warrant was executed. App. 102-03.¹² It also determined, under Rule 403, that any risk of unfair prejudice would be mitigated by a limiting instruction to the

¹² The district court erroneously said that the message had been sent the day before the search warrant was executed but in fact it was sent approximately three weeks before that date. *Compare* App. 103, *with* App. 236. Although that discrepancy is notable, it does not affect our holding.

jury. *Id.* Green argues, in effect, that evidence of his possible distribution of another drug (marijuana) was irrelevant to his alleged intent to distribute the drugs at issue here. *See* Appellant Br. 61-64. With no permissible use, he suggests, its only remaining use would be as prohibited propensity evidence. *Id.* He also asserts that the evidence should have been excluded under Rule 403. *Id.* at 61.

Relevance. Exhibit 110 was likely at least marginally relevant. As discussed, evidence of past drug sales of one drug is usually relevant to show knowledge or intent to sell the same drug. *See, e.g., Douglas*, 482 F.3d at 600; *United States v. Washington*, 969 F.2d 1073, 1081 (D.C. Cir. 1992), *cert. denied*, 113 S. Ct. 1287 (1993); *United States v. Clarke*, 24 F.3d 257 (D.C. Cir. 1994). As our colleague discusses in more detail, Concurring Op. 1-9, whether past sales of one drug are still relevant to show knowledge or intent to sell a *different* drug can be a closer question. In *United States v. Mitchell*, we noted that “we have frequently upheld the admission of evidence regarding other drug transactions as relevant to intent in a charged drug transaction.” 49 F.3d 769, 775 (D.C. Cir. 1995). There, the court upheld the admission of evidence of an uncharged methamphetamine deal as relevant to two coconspirators’ efforts to obtain cocaine and cocaine base. *Id.* at 775-76. Green seeks to distinguish *Mitchell* on the ground that the defendants there were part of an ongoing conspiracy and both were involved in the previous methamphetamine deal. *See* Appellant Br. 61. But it is unclear why either of those distinctions is material. The essential question there and here is the same: is a previous sale of *Drug A* relevant to show a later intent to sell *Drug B*?¹³ Green also cites our court’s decision in *United States v. Watson*, 171 F.3d 695 (D.C. Cir. 1999). In dicta, the court suggested that the district court on remand might wish to reconsider its admission of the

¹³ To be clear, this question bears only on the relevance of the evidence, not its admissibility under other rules, including Rule 403 and Rule 404.

defendant's seven-year-old conviction for selling cocaine (rather than the cocaine base at issue in the case), as its probative value under Rule 403 might not reach the contested issues. *Id.* at 702-03. In dissent, Judge Garland remarked that neither the seven-year interval nor the differences between the drugs rendered the conviction inadmissible and the district court had committed no error. *Id.* at 708 & n.8 (Garland, J., dissenting). In any event, that disagreement does not bind us here. Moreover, our court has previously upheld the admission of evidence involving different drugs on different occasions if it has some relevance other than the forbidden character inference. *See United States v. Gaviria*, 116 F.3d 1498, 1532-33 (D.C. Cir. 1997) (evidence of uncharged heroin transactions relevant to conspiracy to distribute cocaine); *see also Moore*, 732 F.2d at 987-88 (evidence of uncharged transactions involving multiple drugs relevant to the defendants' intent to sell cocaine).

Multiple circuit courts have also squarely considered whether past distribution of one drug is relevant to show knowledge or intent to distribute another and have generally determined that it is. *See, e.g., United States v. McLean*, 581 F. App'x 228, 234-35 (4th Cir. 2014) (heroin in a cocaine case); *United States v. Carpenter*, 30 F. App'x 654 (8th Cir. 2002) (cocaine in a methamphetamine case); *United States v. Hernandez*, 896 F.2d 513, 522 (11th Cir. 1990) (marijuana in a cocaine case); *United States v. Broussard*, 80 F.3d 1025 (5th Cir. 1996) (same); *United States v. Rubio-Villareal*, 927 F.2d 1495, 1503 n.9 (9th Cir. 1991) (“[W]here evidence is offered to show knowledge and intent, it is not necessary that the illegal drug involved in the prior offense be identical to the illegal drug involved in the charged crimes.”).

Ultimately, the bar for relevance is low and the district court reasonably found that evidence of Green's marijuana sale just three weeks before his arrest was relevant to his intent here. As the court noted, the fact that the drugs were different “diminished” its probative value but did not eliminate it.

App. 103. The mental states required for both are the same, thus “evidence that [Green] previously had the state of mind—the knowledge and intent—to distribute illegal drugs is probative and thus relevant to whether he had the knowledge and intent to commit the crime charged here.” *McLean*, 581 F. App’x at 235. The proximity of the time the message was sent further supports the same conclusion. *Cf. id.* (a six-year interval did not render a past conviction irrelevant). Thus, the district court did not abuse its discretion in concluding the proffered text message was relevant.

Propensity. Exhibit 110 was used for a permissible purpose—showing Green’s knowledge and intent to sell controlled substances—not to show any criminal propensity proscribed by Rule 404. Indeed, the government specifically stated in its closing argument that the text message was “good proof of [Green’s] possession with the intent to distribute the drugs that were seized in this case,” not that Green had a propensity to deal drugs or was a “drug dealer.” App. 1237. Because the evidence was offered for a permissible purpose, it was admissible under Rule 404(b).

Risk of Unfair Prejudice. Exhibit 110’s probative value was not substantially outweighed by the risk of unfair prejudice under Rule 403. Granted, the probative value of Exhibit 110 was limited. The text message involved a different drug with no clear link between the message and 917 Wahler and the message was unmoored from any physical evidence. But as the probative value was low, so too was the risk of unfair prejudice. The message was neither inflammatory nor likely to mislead the jury and its weight could be readily challenged by the defense. As before, the district court also properly considered using a limiting instruction, even if none was ultimately given due to defense counsel’s tactical judgment. *See Moore*, 732 F.2d at 990. On balance, although Exhibit 110’s probative value was not particularly strong, neither was its potential for undue prejudice and the district court was justified in concluding that it met the Rule 403 test.

In sum, the district court correctly determined that Exhibit 110 bore some relevance to the charged offenses, was introduced for a permissible purpose and survived scrutiny under Rule 403.

2. Harmless Error

Even if we concluded that Exhibits 101 or 110 were admitted in error, however, that alone would not compel reversal. *See* Fed. R. Crim. P. 52(a) (“Any error, defect, irregularity, or variance that does not affect substantial rights must be disregarded.”). “For nonconstitutional errors like the one[s] [Green] asserts here, ‘an error is harmless’ and thus does not compel reversal ‘if it did not have a substantial and injurious effect or influence in determining the jury’s verdict.’” *United States v. Milligan*, 77 F.4th 1008, 1012 (D.C. Cir. 2023) (quoting *United States v. Powell*, 334 F.3d 42, 45 (D.C. Cir. 2003)). Because Green timely objected to the introduction of both exhibits, the “burden of showing the absence of prejudice” is on the government. *United States v. Olano*, 507 U.S. 725, 741 (1993). Only if we are “in grave doubt about the harmlessness of the error” must the conviction be reversed. *United States v. Smart*, 98 F.3d 1379, 1390 (D.C. Cir. 1996) (citation modified).

“The introduction of other crimes evidence to illuminate intent carries an inherent risk of . . . prejudice” because the permissible inference (intent) is “very close” to the impermissible one (propensity). *Mitchell*, 49 F.3d at 777. The “most significant factor” that can negate an error’s impact on the verdict is “the weight and nature of the evidence against the defendant.” *Milligan*, 77 F.4th at 1012 (quoting *McGill*, 815 F.3d at 886). Limiting instructions that “guard the space between the permissible and impermissible inferences” can also reduce the impact of any erroneously admitted evidence. *Mitchell*, 49 F.3d at 777. Conversely, “dramatic [or] compelling” evidence that might “rivet the jury’s attention on [the defendant’s] bad character” could increase the chance of a

harmful error. *United States v. Brown*, 597 F.3d 399, 405 (D.C. Cir. 2010); *see also United States v. Sheffield*, 832 F.3d 296, 309 (D.C. Cir. 2016).

Here, to the extent either exhibit was incorrectly admitted, any error was harmless. Because Green constructively possessed the contraband inside 917 Wahler, there was substantial evidence of his involvement in drug distribution even without the photograph or text message, including numerous digital scales, sandwich baggies, cutting agents and significant amounts of cash. The jury also heard testimony from the government's witnesses about Green's possessions (including identification cards) in the house, his occupancy there and the typical operations of stash houses, all of which further minimize the impact of both exhibits. Moreover, the quantity of the drugs found and the fact that they were packaged for street distribution further supports the reasonable inference that Green had an intent to distribute them. *See United States v. Williams*, 233 F.3d 592, 595 (D.C. Cir. 2000) (a reasonable jury may infer from "the quantity of drugs possessed" and "the fact that [the] drugs were segregated into 'baggies'" that a defendant had an intent to distribute). Neither the photograph nor the text message was dramatic or compelling such that the jury's attention would have been riveted on it as evidence of Green's character. Instead, they were small pieces of the evidence connecting him to at least some of the drugs in 917 Wahler. Although Green argues that the exhibits were the only direct evidence of drug distribution, *see* Appellant Br. 63-64, the volume of the *indirect* evidence is sufficient to render any misstep in admitting them harmless.

The government further suggests that, for the purpose of the harmless-error analysis, we should assume that the district court gave a limiting instruction in light of Green's tactical decision to decline one. *See* Gov't Br. 61. Green responds that he was "not required to reiterate this damaging evidence to the jury in the form of an instruction to preserve his claim that it should never have been introduced in the first place." Reply

Br. 31. Green's argument is misplaced—the relevant issue is not preservation (which is uncontested), but whether the purportedly inadmissible evidence resulted in prejudicial error, a risk that could have been mitigated by an instruction.

Although the caselaw on declined limiting instructions is sparse, several circuit courts have held that declining such an instruction at least weakens a later claim of undue prejudice. *See, e.g., United States v. Wheeler*, 540 F.3d 683, 693 (7th Cir. 2008) (“Because [defendant] waived the opportunity to alleviate the risk of unfair prejudice, we decline to reverse the district court’s evidentiary ruling on the grounds that the [Rule 404(b)] evidence was unfairly prejudicial”); *United States v. Monks*, 774 F.2d 945, 955 (9th Cir. 1985) (“[W]e will uphold a district court’s refusal to grant a mistrial where the prejudice resulting from introduction of the improper character evidence is minimal, and the judge’s offer to give a limiting instruction is rejected.” (citation modified)); *United States v. Tejada*, 974 F.2d 210, 215 (1st Cir. 1992) (harmless Rule 404(b) error after defendant declined limiting instruction); *cf. Moore*, 732 F.2d at 990. Relatedly, a tactical decision by defense counsel not to seek a limiting instruction—and a district court’s resultant failure to give one—does not preclude finding harmless error. *See United States v. Williams*, 212 F.3d 1305, 1311 (D.C. Cir. 2000) (concluding that an officer’s prejudicial statement was harmless error given the strong evidence of defendant’s guilt and the fact that defense counsel did not seek a limiting instruction to address the comment). Taken together, these cases reflect a common-sense principle that a defendant who declines a limiting instruction bears at least some responsibility for the risk of prejudice the instruction might have averted.

Accordingly, although we uphold the admission of Exhibits 101 and 110, in the alternative, any error was also harmless and their admission does not warrant reversal.

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* * *

For the foregoing reasons, Green's convictions are affirmed.

So ordered.

GARCIA, *Circuit Judge*, concurring in part and concurring in the judgment:

I join the court's opinion except for Part III.C.1.b. There, the majority affirms the district court's ruling that Federal Rule of Evidence 404(b) did not bar Exhibit 110's admission despite powerful arguments that the exhibit amounted to impermissible character evidence. That holding is unnecessary to resolve this case, as we all agree that any error in admitting Exhibit 110 was harmless. *See United States v. Burnett*, 827 F.3d 1108, 1118–19 (D.C. Cir. 2016) (deeming any error harmless and declining to address 404(b) issue). By nonetheless reaching the question of Exhibit 110's admissibility, the majority needlessly wades into a complex area of the law that has deeply divided the circuits. And it extends our precedent in ways that contradict Rule 404(b)'s text and core purpose. I write separately to identify the difficult issues our cases and now the majority here have breezed past, and to explain why I do not join the court's holding on this issue.

Rule 404(b)(1) prohibits the introduction of propensity evidence: “Evidence of any other crime, wrong, or act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character.” Rule 404(b)(2) then states that evidence of other bad acts “may” nonetheless “be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident.”

In criminal cases, Rule 404(b) serves the important purpose of ensuring that a defendant is tried for his alleged conduct, and not based on a character-related assumption “that he is by propensity a probable perpetrator of the crime.” *Michelson v. United States*, 335 U.S. 469, 475 (1948). Put another way, the Rule prohibits evidence suggesting “that because the defendant committed *another* bad act, he is more likely to have committed the charged act.” *United States v.*

Mitchell, 49 F.3d 769, 774 (D.C. Cir. 1995); *see also United States v. Caldwell*, 760 F.3d 267, 276 (3d Cir. 2014) (explaining that the Rule ensures “an accused is tried for *what* he did, not *who* he is”).

Reconciling that principle with the “Permitted Uses” listed in Rule 404(b)(2) can sometimes prove difficult. “Intent,” for example, is a permitted use. So, focusing myopically on Rule 404(b)(2), one might say that the Rule poses no bar to admission whenever the government ostensibly introduces a prior bad act as evidence of a defendant’s “intent” rather than his “character.” But what if the only way the act is probative of a defendant’s “intent” is through an inference that he has a propensity to commit bad acts, the very “character”-based reasoning that Rule 404(b)(1) prohibits? Is that truly sufficient to evade Rule 404(b)(1)?

This case illustrates the dilemma. Demetrius Green was tried for possessing with intent to distribute oxycodone, hydromorphone, and cocaine base. To help establish his intent to distribute, the government introduced Exhibit 110, a text message in which Green purportedly offered to sell someone marijuana (it said: “I got sum tree come support my hustle,” App. 236). As the majority correctly notes, the text message does not suggest anything except that Green had once offered to distribute drugs: “The text message involved a different drug with no clear link between the message and 917 Wahler [Place,] and the message was unmoored from any physical evidence.” Maj. Op. 30. The text message did not show, for example, that Green had previously attempted to sell drugs in a manner similar to how he allegedly intended to distribute the drugs at issue here. Nor did the text message insinuate that he had used similar paraphernalia to sell drugs, or that he had sold drugs in the same location or to the same person.

Logically, the only way a bare allegation of Green’s intent to sell marijuana on one occasion could be thought relevant to show he intended to distribute other drugs on this occasion is by reasoning that Green is the type of person who intends to distribute the drugs he possesses—in other words, that he is a drug dealer. This means the conclusion the government asked the district court to draw (that Exhibit 110 was relevant to Green’s intent to distribute) rested exclusively on an intermediate inference sounding in propensity reasoning (that because Green had acted like a drug dealer once, he was more likely to have acted that way again). *Cf. United States v. Matthews*, 431 F.3d 1296, 1313 n.1 (11th Cir. 2005) (Tjoflat, J., concurring in the judgment) (“It is difficult to argue that a person had an intention to do something on a particular occasion because he or she demonstrated that intention previously without implicitly suggesting that the person has a proclivity towards that intent.”).

The government’s view is not easy to square with Rule 404(b). There is a strong intuition that it *must* be improper for the government to introduce evidence whose relevance to the defendant’s intent rests entirely on a propensity inference: here, that the defendant has a propensity for dealing drugs. The text of the Rule suggests as much. Rule 404(b)(1) prohibits the use of prior bad acts “to prove a person’s character” and to show that the person “acted in accordance with the character.” If the government’s only theory of relevance relies on the inference that a defendant “acted in accordance with” how he has acted before, the evidence is seemingly inadmissible, full stop.

Rule 404(b)(2) does not say otherwise. The “Permitted Uses” it lists do not constitute exceptions to Rule 404(b)(1), but rather examples of ways to admit other-act evidence “for another purpose”—that is, a purpose other than the one forbidden by Rule 404(b)(1). A natural reading of Rule 404(b), and one that fits its commonly accepted purpose, is therefore

that the proponent of the other-act evidence must establish its relevance to a permitted use *without* relying purely on character-based inferences.

Indeed, at trial, the government seemed to share that intuition about the Rule. As the court recounts, the government was careful to assert that it did not introduce Exhibit 110 to show “that Green had a propensity to deal drugs or was a ‘drug dealer.’” Maj. Op. 30. The government said it introduced the text message for the supposedly different purpose of showing Green’s “intent to distribute the drugs that were seized in this case.” *Id.* (quoting App. 1237). I fail to see the distinction. The government offered no explanation for how the text message could show that Green intended to distribute the narcotics at issue except insofar as it suggested that he had a propensity for drug dealing.

To frame the concern in more practical terms, imagine that a juror received a limiting instruction telling her not to use the text as evidence of Green’s “character,” but that she could use it as evidence of his “intent.” It strikes me that any reasonable person would have no earthly idea how to proceed. The juror might gather that she may not look to Green’s one-time offer to sell drugs as a reflection of his “character” and reason that he is the type of person who more likely intended to distribute drugs this time around. But if that is so, how else could she conclude the evidence is relevant to Green’s intent?

Commentators have repeatedly criticized the government’s question-begging logic. As one puts it, “it is hard to see how this use avoids the propensity inference from character; namely, that a person with a history of selling drugs has a propensity to sell drugs and that is therefore what the defendant intended to do with the drugs in this case.” Paul S. Milich, *The Degrading Character Rule in American Criminal Trials*, 47 Ga. L. Rev. 775, 786–87 (2013). Another explains:

“[C]ourts too often fail to demonstrate how the mental leap from possessing a particular state of mind on one occasion to possessing the same state of mind on a different occasion does not involve the use of a character-propensity inference.” David P. Leonard, *The New Wigmore: Evidence of Other Misconduct and Similar Events* § 7.5.2 (2d ed. Supp. 2025). Similar criticisms from respected authorities abound. *See, e.g.*, Julius Stone, *The Rule of Exclusion of Similar Fact Evidence: America*, 51 Harv. L. Rev. 988, 1033 (1938) (describing permissive admission of other-act evidence as “utter perversions of the object of the original rule”); 1 Edward J. Imwinkelried, *Uncharged Misconduct Evidence* § 5:2 (2025 ed.) (explaining that evidence should not be admissible to prove intent under Rule 404(b) if “the prosecution must rely on an intermediate bad character inference”); Daniel J. Capra & Liesa L. Richter, *Character Assassination: Amending Federal Rule of Evidence 404(b) to Protect Criminal Defendants*, 118 Colum. L. Rev. 769, 789–95 (2018).

As these scholars lament, some courts have (mostly without acknowledging these concerns) admitted other-act evidence when it is relevant in any way to a defendant’s intent. *See* Maj. Op. 29 (collecting cases). But several others—including at least the Third, Fourth, and Seventh Circuits, and one panel for the Sixth Circuit—have articulated limits on such use of other-act evidence. Those courts guard against the danger of “intent . . . blend[ing] with improper propensity uses” by “not just ask[ing] *whether* the proposed other-act evidence is relevant to a non-propensity purpose but [also asking] *how* exactly the evidence is relevant to that purpose . . . without relying on a propensity inference.” *United States v. Gomez*, 763 F.3d 845, 856 (7th Cir. 2014) (en banc); *United States v. Miller*, 673 F.3d 688, 698 (7th Cir. 2012); 1 Robert P. Mosteller et al., *McCormick on Evidence* § 190.11 (9th ed. Feb. 2025 update) (endorsing Seventh Circuit’s approach); *see also Caldwell*, 760 F.3d at 277 (requiring “a chain of inferences that

does not contain a propensity link”); *United States v. Hall*, 858 F.3d 254, 277 (4th Cir. 2017) (demanding “propensity-free chains of inferences”). Applying that requirement, some of these courts exclude evidence of other drug activity unless the government can show a meaningful, non-propensity “linkage . . . in time, manner, place, or pattern of conduct” between the charged and uncharged acts. *Hall*, 858 F.3d at 261 (citation modified); *see id.* at 272–75; *see also Miller*, 673 F.3d at 700; *United States v. Bell*, 516 F.3d 432, 443 (6th Cir. 2008) (permitting evidence of other distribution activity only if it was “part of the same scheme or involved a similar *modus operandi*”). *But see United States v. Hardy*, 643 F.3d 143, 151 (6th Cir. 2011) (casting doubt on *Bell* but requiring that the other act be “substantially similar and reasonably near in time” to charged conduct (quotation omitted)).

Courts of appeals, in short, “sharply disagree” over how to reconcile Rule 404(b)’s prohibition against propensity reasoning with its list of permitted purposes. Capra & Richter, *supra*, at 794. Some of the basic questions underlying that disagreement include: Is other-act evidence admissible when its relevance to a permitted purpose rests entirely on propensity inferences? If not, what counts as a permissible non-propensity inference? These questions are no doubt difficult to resolve in a way that facilitates practical application. To my eye, however, our cases to date have not grappled with them in the slightest. Instead, our cases fall into the group that seems to proceed as if the only question when a Rule 404(b) objection is raised is whether the evidence is relevant in any way to a permitted use. *See Maj. Op.* 28–30.

Still, our precedent by no means dictates the majority’s conclusion here. For one thing, the majority uncritically endorses the government’s assertion that it is not “propensity” reasoning to use Green’s alleged offer to distribute marijuana as evidence that he subsequently intended to distribute

oxycodone, hydromorphone, and cocaine base. *Id.* at 30. I have already explained why that logic, without more, is indistinguishable from “the very kind of reasoning—*i.e.*, once a drug dealer, always a drug dealer—which 404(b) excludes.” *Bell*, 516 F.3d at 444 (citing *Old Chief v. United States*, 519 U.S. 172, 180–81 (1997)); *see also Miller*, 673 F.3d at 700.

For another, our cases have not blessed the introduction of evidence whose relevance is so purely based on propensity inferences as the text message here. To illustrate the point, consider the in-circuit cases cited by the majority. In most of them, the other-act evidence featured the defendant distributing the same type of drug as the one charged in the indictment. *See* Maj. Op. 26–28. And in each, the other-act evidence shared some meaningful similarity with the charged conduct that made it probative of something beyond a generic proclivity to distribute drugs. *See id.* For example, in *United States v. Pettiford*, 517 F.3d 584 (D.C. Cir. 2008), the defendant was indicted after officers recovered cocaine from his car’s center console; the other-act evidence was that officers had recovered cocaine from another car’s center console after observing the defendant reach inside the car and then conduct a cocaine sale. *See id.* at 586–87. In *United States v. Crowder*, 141 F.3d 1202 (D.C. Cir. 1998) (en banc), the other-act evidence involved the defendant selling cocaine “on the same block” where he was alleged to have possessed heroin and cocaine with intent to distribute. *Id.* at 1203–04. And in *United States v. Douglas*, 482 F.3d 591 (D.C. Cir. 2007), the other-act evidence “involved sale of the same substance in almost the same neighborhood.” *Id.* at 601; *see also id.* at 599 (noting that charged drug sales occurred around the time and place of prior sales introduced under Rule 404(b)); *United States v. Washington*, 969 F.2d 1073, 1081 (D.C. Cir. 1992) (emphasizing “similarity of the transactions” where other drug sale occurred around the same time and place as charged offense, and involved same paraphernalia); *United States v.*

Clarke, 24 F.3d 257, 263–66 (D.C. Cir. 1994) (admitting evidence of other drug sales at same drugstore parking lot and to same middleman).

So too in *Mitchell*, the principal case the majority highlights from our court in which the prior act involved a different type of drug from the one charged in the indictment. The similarities between the charged act and the uncharged drug-distribution activity there were also notable. For one of the two defendants, the charged and uncharged conduct occurred contemporaneously, and each incident involved him allegedly providing transportation services for his co-conspirator. 49 F.3d at 775–76. For the other, the uncharged conduct showed him orchestrating a complex drug transaction in ways that mirrored the charged offense. *Id.* at 772–75; *see also United States v. Gaviria*, 116 F.3d 1498, 1532–33 (D.C. Cir. 1997) (describing contemporaneous drug sales arranged by same co-conspirators using code words just as in the charged incident); *United States v. Moore*, 732 F.2d 983, 988 (D.C. Cir. 1984) (describing the other acts evidence as showing “a pattern of drug possession and dealing taking place immediately before the conspiracy alleged in the indictment”).

In each of these cases, the other-act evidence helped demonstrate the defendant’s intent to distribute narcotics in a particular place, or in a particular manner. Each piece of evidence would, at least arguably, be admissible under the more careful approach taken by some of our sister circuits.

No such similarity is present here. The text message is an unadorned statement of intent to sell one drug (marijuana) on one occasion, and its sole purpose at trial was to invite the inference that Green was more likely to distribute different drugs (oxycodone, hydromorphone, and cocaine base) on a different occasion. *Cf.* Maj. Op. 28 (framing the question as “is a previous sale of Drug A relevant to show a later intent to

sell Drug B?”). We have never affirmed the admission of evidence under Rule 404(b) that sounds so loudly in propensity reasoning.*

To be sure, precisely because our cases thus far have not grappled with the difficult questions this case illustrates, the majority’s decision today may well be a defensible application of our precedent. But that does not mean it is a sound one. The majority reaches its holding by reading our cases broadly and extending their logic to new terrain, all while giving short shrift to the countervailing interests underlying Rule 404(b). The result is to place our precedent in greater tension with the text and basic purpose of the Rule, the weight of informed scholarship, and the decisions of other courts of appeals. Particularly because doing so was unnecessary to resolve this case, I do not join that analysis.

* The majority opinion states several times that Green allegedly sent the text message offering to sell someone marijuana three weeks before his arrest. *See* Maj. Op. 27–30. The government did not make any argument based on temporal proximity on appeal, and so I would not consider it. *See* Appellee’s Brief 59–60; *Al-Tamimi v. Adelson*, 916 F.3d 1, 6 (D.C. Cir. 2019) (“A party forfeits an argument by failing to raise it in his opening brief.”). In any event, without evidence establishing a more specific link between the charged and uncharged conduct, I doubt it should make a difference that Green *recently* acted like a drug dealer.

1 THE COURTROOM DEPUTY: Good morning, Your Honor.
2 This morning we are scheduled for a pretrial conference. We
3 have criminal case No. 20-222, the *United States of America*
4 *versus Demetrius Green*. The defendant is not yet in the
5 courtroom, Your Honor. He is on his way.

6 Will counsel for the government please identify himself
7 and his colleague for the record?

8 MR. HENEK: Good morning, Your Honor. David A. Henek
9 for the government. I'm joined by my colleague Gilead Light.

10 THE COURTROOM DEPUTY: You can do it from the table,
11 as long as you have the green light. One of the defense
12 counsel identify himself for me.

13 MR. COLLINS: Good morning, Your Honor. Kevin
14 Collins from Covington on behalf of Mr. Green. I'm joined by
15 my colleagues Taylor Glogiewicz, Shadman Zaman, and Shelli
16 Peterson from the federal defender's office.

17 THE COURT: All right. Good morning. Given the fact
18 that -- you can be seated. Given the fact that Mr. Green is
19 not yet here and you haven't had the opportunity to consult
20 with him about whether he wishes to waive his appearance for
21 any of this, I want to tread very, very carefully this morning.

22 But I do believe there are a few things we can do that
23 are purely legal and are relatively straightforward. Even some
24 of the legal things like ruling on the motions, I'm sure he has
25 an interest in them and I'm going to wait until he gets here to

1 do that. I'm certainly not going to do the *Frye* inquiry
2 without him, but I think we can talk for a few minutes about
3 voir dire, the witness list, and perhaps the exhibits -- to
4 which there were mercifully few objections -- and maybe move
5 things along. But I understand the government has the
6 scheduling issue it wishes to bring to my attention, and that,
7 too, we may not be able to resolve until we have the defendant.
8 But, let's just hear what that issue is.

9 MR. HENEK: That's correct, Your Honor. I did want
10 to flag this for you as early as possible. Last evening we
11 were informed that one of our critical witnesses, Mr. Wayne
12 Gerrish, who is the seizing officer of almost all of the
13 evidence in this case, is on medical leave and he is unable to
14 testify. The government is still interested in proceeding to
15 trial. So, we have crafted a stipulation that we think could
16 resolve the issue. We did present that to the defense. I
17 think at this point they are disinclined to agree with it. So
18 if that's the case, we will most likely be needing a
19 continuance in this case.

20 But, again, it was our hope to reach some type of
21 stipulation to chain of custody, so there's no chain of custody
22 at issue here. We believe that we could present a case without
23 this witness. But, again, the defense needs to consult with
24 their client on that. And --

25 THE COURT: All right. When you say he's the seizing

1 officer, is he the one who would say, you know, I went in the
2 house and I saw the pills on this counter, in this drawer, or
3 is he the one that would say I took a picture of them and
4 carried them off to --

5 MR. HENEK: Essentially both, Your Honor. He is
6 important because he can identify where everything was found,
7 specific location where everything was found.

8 THE COURT: Okay. And given their defense related to
9 constructive possession and knowledge where things were found,
10 I imagine it's going to be something they're going to want to
11 cross-examine a human about, potentially. So, we'll have to
12 see how that goes.

13 When you say he's unavailable to testify, is this
14 something like, you know, he has COVID or he has the flu and
15 he's going to be gone for four days, or he's broken something,
16 or he's had surgery and he's going to be out for a month?

17 MR. HENEK: It's a serious medical leave and he'll be
18 out through at least, we anticipate, October. So we would be
19 looking for a November trial date.

20 THE COURT: Okay. So is everyone else. But this is
21 an older case and the defendant is incarcerated. And at this
22 point is there anything the defense wants to say about any of
23 this? I take it you need to discuss it with Mr. Green before
24 you can tell me anything? Everybody is nodding their heads.

25 MR. COLLINS: I'm Kevin Collins, Your Honor. I

1 suspect he would oppose the continuance, vehemently. He's
2 locked up, he's been locked up for almost two years. And the
3 government's right, we will not agree to that stipulation that
4 eliminates witnesses central to the case.

5 THE COURT: Well, if the witness had gone off to
6 Disney World it would be something, but these do seem to be
7 exigent circumstances, and they're not asking for a lengthy
8 continuance. And I think that the Speedy Trial Act would
9 recognize the medical unavailability of a witness.

10 I certainly have been trying to get this thing to trial
11 for a long time, and I could say that there were a lot of
12 points in the way where the defense moved to push things off
13 and push things off and push things off. So if he can't be
14 there, given his centrality -- and you have a right not to
15 stipulate. But if you're not going to stipulate, then it seems
16 to me we have to have him and we may need to grant a short
17 continuance for that reason, notwithstanding his objection.
18 But let's see what happens.

19 When he comes, I would like to talk about what we can
20 talk about. But maybe I can give you an opportunity to talk
21 with him, either in the courtroom -- and I can leave and the
22 prosecution leave -- or you can talk to him in the back about
23 anything that you had planned to talk to him about this
24 morning, including this.

25 Okay. So, some of the things that I would have talked

1 about this morning, that I think I can discuss without him, is,
2 first of all, I have sent you the voir dire questions. Those
3 are the ones I'm going to use as the questions for the full
4 panel. They're based on what both the defense and the
5 government submitted, but shortened somewhat and put into the
6 appropriate format. And that's finished.

7 I did also supply you with copies of -- oh, one question
8 I have about the voir dire is that the potential witness list I
9 have is quite lengthy. And, so, I wanted to know if there's
10 been some trimming of the list of names that you'd asked me to
11 read the jury? The government -- I think the defense list was
12 quite short; the government's list was quite long. Do I still
13 need to read all those names, or is there a shorter version
14 that I can insert in the voir dire?

15 MR. HENEK: Your Honor, I think before trial we can
16 get you a shorter list. But right now I think that list is our
17 witness list. What we did for the court and for the defense is
18 we bolded the names of the witnesses we are likely to call.
19 But we still do need to include those names as, obviously,
20 things come up during trial, and we need to include all those
21 witnesses at this point.

22 THE COURT: All right. Well, if this trial is going
23 next week, then -- what's today, Wednesday? I would need
24 the -- before trial, list by Friday at noon. If it doesn't go
25 next week, then you can give it to me a week before. And if I

1 need to read all the names, I'll read all the names. But, I
2 need to paste it in and be good to go.

3 With respect to the voir dire instructions, I've sent
4 you what I usually do. But I had some questions about what the
5 parties had actually agreed to as the description of the case.
6 The description of the case is virtually a cut-and-paste from
7 the indictment, which is usually something that you don't even
8 want the juries to see and now you're essentially having me
9 read it out loud. It has a lot of information in it.

10 When we say one of the charges is that he's charged with
11 the illegal possession of a firearm, we explain that -- right
12 then and there, previously convicted of a crime punishable by
13 imprisonment for a term exceeding one year, and we've got the
14 case numbers, we've got the description of the firearm at great
15 length.

16 And the only purpose of putting this information up
17 front, before voir dire is even started, is to say, Okay, this
18 case is about possession with intent to distribute the
19 following substances and this case is about the unlawful
20 possession of, you know, a firearm. And, in particular, a
21 firearm that's converted to be a machine gun, and the
22 possession of that machine gun in furtherance of the alleged
23 drug trafficking. But, that's all they need to know to answer
24 the questions about does that give you pause? Does that make
25 you feel you can't be fair? Do you know something about this?

1 So, does anybody have an objection to my compressing
2 this to really just say pretty much what I just said: There's
3 six counts and this is what they are. Because I think this is
4 an incredible amount of detail to be reading to the whole jury
5 panel early in the proceedings.

6 MR. HENEK: The government agrees, Your Honor, and
7 we're fine with condensing it.

8 MR. COLLINS: We think that's a much better approach.

9 THE COURT: All right. Well, then I will fix that
10 and do that, and transmit copies to you the way I did with
11 this, so that you'll have it. And that's all I have to say
12 about voir dire.

13 And, so, since that was really just procedural and legal
14 matters, I don't think we need to take it up again when the
15 defendant returns. Do you agree with that, Mr. Collins?

16 MR. COLLINS: Yes, Your Honor, that's fine.

17 THE COURT: Okay. All right. And the witness lists
18 are going to get shortened for me, possibly.

19 I would prefer not to rule on the motion in limine and
20 the motion to suppress until the defendant is here. There may
21 be factual -- I don't really plan to hear a lot of argument and
22 I don't plan to ask you a lot of questions. But, there may be
23 factual things that he wants to whisper in your ear about, and
24 I think he needs to hear those. So I'm not going to rule on
25 those in his absence and I don't believe you can waive his

1 appearance because you haven't had a chance to talk to him
2 about it.

3 I do think, if people are comfortable, we could go on
4 and talk about some of the objections to exhibits, other than
5 the objections raised in those motions.

6 Do you have a position about whether we can proceed with
7 some of that at this point?

8 MR. COLLINS: The defense thinks that's probably
9 okay, Your Honor.

10 THE COURT: All right. And if we get to any
11 particular exhibit that gives you pause, you can let me know.
12 I mean, I think the Federal Rules of Criminal Procedure call
13 for the defendant to be present at all critical phases, but it
14 excepts periods of time where we're basically just discussing
15 legal issues, and that tends to be what we're about to do.

16 There's an objection to Exhibit 9. I'm looking now at
17 the exhibit list that was filed at docket 59-5 as an attachment
18 to the joint pretrial statement, which has the chart that I
19 requested with the list of exhibits and the objections.

20 So Exhibit 9 was 42.3 assorted, clear baggies -- I have
21 no idea what a .3 of a baggie is, but maybe it's one of those
22 really small ones -- containing 389 white pills, which was ATF
23 Exhibit 17. And defense objects to it on relevance grounds.
24 So, I wanted to know why. Are these not pills charged in any
25 count?

1 MS. GLOGIEWICZ: Good morning, Your Honor. I can
2 address this issue.

3 THE COURT: Can you just put your name on the record
4 for the court reporter?

5 MS. GLOGIEWICZ: Taylor Glogiewicz on behalf of
6 Mr. Green.

7 We understand that this -- these clear baggies
8 containing 389 white pills are actually sleeping pills and not
9 part of any charged conduct in the indictment. As you can see
10 there, it's 389 pills. The relevance of which could be the
11 same as Advil. You know, other items collected from the house.
12 In addition, they could also be quite prejudicial to Mr. Green
13 insofar as a jury could take this bag of sleeping pills in any
14 different reaction that could cause prejudice to Mr. Green. So
15 we also have the 403 objection as well.

16 THE COURT: All right. What is the relevance of
17 these pills?

18 MR. HENEK: Your Honor, may I address the court from
19 here?

20 THE COURT: Yes.

21 MR. HENEK: Your Honor, the relevance --

22 THE COURT: If you can sort of tilt the microphone to
23 you, I'll --

24 MR. HENEK: I'm sorry. It was off, Your Honor.

25 THE COURT: That's good.

1 MR. HENEK: The evidence here is -- or, the relevance
2 is this would be evidence of distribution. These pills were
3 not charged in the indictment. Arguably, they could have been,
4 but they were not charged because they do not fall under the
5 definition of a narcotic controlled substance. But here we
6 have multiple baggies and 389 prescription pills with no
7 evidence of a prescription. Therefore, it's clear evidence of
8 distribution and knowledge.

9 This is, obviously, a pill case. All of the drugs
10 seized, other than the crack cocaine, were pills. It also
11 shows knowledge of the other pills that were found. It's clear
12 evidence of distribution, Your Honor.

13 THE COURT: So, you're seeking to admit it under Rule
14 404(b) as -- this is not charged.

15 MR. HENEK: Yes, Your Honor, it is not charged.

16 THE COURT: Okay.

17 MR. HENEK: We believe that it is intrinsic evidence
18 of drug trafficking, that would be our first position. Second,
19 our next position, our fallback position, so to speak, would be
20 that it's admissible under 404.

21 THE COURT: Now, you said "prescription," she said
22 it's like Advil. Are these over-the-counter sleeping pills or
23 are these prescription sleeping pills?

24 MR. HENEK: This would be a prescription sleeping
25 pill. It's Ambien, Your Honor, is what it is.

1 THE COURT: All right. And is somebody going to
2 testify to that?

3 MR. HENEK: We have proposed a stipulation that
4 includes the Ambien. We're working that out. I think defense
5 has agreed to stipulate to all of the drugs, with the exception
6 of this Ambien. So we're still in the process of figuring this
7 out.

8 THE COURT: All right. This is your motion,
9 essentially, to exclude it, so I'll give you the last word.

10 MS. GLOGIEWICZ: Yes, Your Honor. Again, these are
11 not part of the charged conduct. They don't show knowledge of
12 drug distribution because they're unrelated to the drugs at
13 issue. And, again, we think they're substantially more
14 prejudicial than probative on the charged counts.

15 THE COURT: Are the pills divided up into the 42
16 baggies, or is it a stack of 42 baggies and then a bottle of
17 389 pills?

18 MR. HENEK: I believe, Your Honor, that they are in
19 separate baggies.

20 THE COURT: All right. Given that, and given the
21 fact that the indictment charges possession with intent to
22 distribute the other substances, I think that even if you
23 couldn't find that it's all part of this --

24 All right. I'm sorry. Yes, is the defendant here?

25 THE MARSHAL: Yes. Do you want him out here?

1 THE COURT: Yes. Let's take a minute to bring the
2 defendant out.

3 (Whereupon the defendant enters the courtroom.)

4 THE COURT: Now that he is here, would this be a good
5 time for you to consult with him, tell him where we are right
6 now and what we're doing, rather than just dropping him into a
7 hearing in progress?

8 Mr. Green, we're glad you made it. We know that it's no
9 fault of your own that you haven't been here. We tried to get
10 started and do just a few procedural things. But what I think
11 we should do is -- would the marshals prefer that I let them
12 confer with him if they can just remain here and do that with
13 you? Or do we need to have everybody parade back to the back?

14 THE MARSHAL: That's fine, judge. We can do that.

15 THE COURT: Okay. So we're going to take about a
16 ten-minute break. And I'm going to ask the prosecutors and any
17 members of the public to just step out so that counsel can
18 consult with Mr. Green and bring him up-to-date, and then I'll
19 come back and we'll move forward with the pretrial conference.

20 Okay. Thank you. Everybody, you can remain seated.

21 (Recess.)

22 THE COURTROOM DEPUTY: Your Honor, recalling criminal
23 case No. 20-222, the *United States of America v. Demetrius*
24 *Green*. Mr. Green is present and in the courtroom. Counsel for
25 the government are Mr. Henek and Mr. Light. Counsel for the

1 defendant are Ms. Peterson, Mr. Collins, and Mr. Zaman and
2 Ms. Glogiewic -- if I pronounced that correctly.

3 THE COURT: I think we should go back and discuss the
4 date of the trial, which is an important issue, it affects
5 everyone sitting here. Having been advised of the
6 unavailability of the witness for medical reasons and the
7 recency of this information, the exigency of the information,
8 do you have a position at this point about whether you're
9 prepared to enter into the stipulation the government has
10 proposed or whether we need to -- and I understand it might be
11 over your objection, whether we need to put off the trial so
12 that he can be here?

13 MR. COLLINS: Your Honor, Kevin Collins for
14 Mr. Green. We oppose the continuance. We're ready to proceed
15 to trial, and we don't agree to the stipulation.

16 THE COURT: All right. Do you know anything more
17 about the nature of the medical emergency?

18 MR. HENEK: Your Honor, we want to discuss that with
19 you at sidebar, if the court is requiring more.

20 THE COURT: All right. I don't seem to have my
21 little phones, but I don't -- can counsel -- one counsel for
22 the defendant and one counsel for the government come up --

23 MR. HENEK: I'm sorry, Your Honor. I meant to say
24 ex parte.

25 THE COURT: Oh, okay. All right. Well, I'm not sure

1 why that would be necessary.

2 MR. HENEK: Well, Your Honor, it's a private medical
3 issue, that's why. It -- it's a medical issue that I think --
4 again, just it's private. We don't actually have that much
5 information about it. We just know that in this case, this
6 witness will not be available until at least a month.

7 THE COURT: I trust your representation, but in
8 making a finding over the defendant's objection that we have to
9 continue the trial, I think it would be helpful to have on the
10 record some information about the nature of the medical
11 absence. And it would be sealed and the defense would be under
12 strict obligation to not share the information. But I think
13 defense counsel and I at least need to hear this
14 representation. And so I'll ask you to -- since apparently I
15 don't seem to have the little telephones, I don't see why you
16 can't come to the bench and we can try to deal -- talk around
17 this plexiglass here.

18 THE COURTROOM DEPUTY: I'll have to disconnect the
19 public line.

20 THE COURT: Okay.

21 MR. HENEK: Your Honor, we can make a representation
22 we don't have any more information. We just know that this
23 witness is in some type of medical treatment facility and we
24 can't make any representation at this point beyond that with
25 any specifics.

1 THE COURT: Well, given his unavailability, given the
2 essential role he played in the execution of the search
3 warrant, which is the whole case, pretty much, and given the
4 defendant's justifiable decision not to stipulate to what this
5 witness would have said, I believe it is necessary to postpone
6 the trial for the shortest period of time as possible, and that
7 that time would be excludable under the Speedy Trial Act, given
8 the witness's unavailability and given the fact that he is an
9 essential witness. So I want to pick --

10 THE COURTROOM DEPUTY: Do you want me to get the line
11 hooked back up?

12 THE COURT: Oh, yes. I don't see any reason why we
13 can't go on and do everything else we were going to do today,
14 though, since we're all here and we all planned to do it.

15 (Pause.)

16 THE COURTROOM DEPUTY: Thank you, Your Honor.

17 THE COURT: All right. So, what is the government's
18 understanding about when we can try this case?

19 MR. HENEK: The government's understanding, Your
20 Honor, is that this witness is unavailable in October, but most
21 likely will be available in November. So we would propose a
22 trial date November 1st or thereafter.

23 And, Your Honor, again, it might not even be an issue
24 based on the court's availability, but my colleague is out of
25 town those first weeks of November, so we propose the 15th or

1 thereafter.

2 THE COURT: That runs us right into Thanksgiving.
3 That's going to be a very difficult time to find jurors. I
4 have another trial scheduled to begin on the week of the 7th,
5 but that defendant is not incarcerated and so this case would
6 take precedence over that. Since what we would be doing would
7 be selecting a jury, which is likely to take the better part of
8 the 7th and possibly sometime into the 8th, then we have to
9 open and start with two days' worth of evidence before a
10 holiday on Friday and then we're back the week of the 14th.

11 Is there any reason that we can't set it for the 7th,
12 given the limited amount of what co-counsel would miss?

13 MR. HENEK: Your Honor, I apologize. My colleague is
14 out that week and he's an essential part of the case.

15 THE COURT: Okay. He's out the week of the 7th?

16 MR. HENEK: Correct.

17 MR. LIGHT: Essentially.

18 THE COURT: And you're saying we could start the week
19 of the 14th?

20 MR. COLLINS: Your Honor, I'm -- I'm out the 16th,
21 17th, 18th, back Sunday, the 29th.

22 THE COURT: And we don't think we could go to, say,
23 October 24th or October 31st?

24 MR. COLLINS: Defense would certainly like that.
25 We're available.

1 THE COURT: Do you -- do you need to get more
2 information about this witness before we pick a date?

3 MR. HENEK: I think that's a good idea, Your Honor.
4 I'm just really reluctant to commit to any time before November
5 1st. Obviously, if we can do it October 24th and we receive
6 additional information that the witness would be available, I
7 think that would be an acceptable date. But we just don't have
8 that information at this time.

9 THE COURT: All right. Well, what I'm going to do
10 now is grant the motion to continue the case, and then I'm
11 going to ask each side to basically write down their conflicts
12 and give them to Mr. Haley and then I'm going to ask the
13 government to get more information about the earliest possible
14 date we can set this trial with confidence, because what I
15 don't want to do is reset it at that time. And then we'll have
16 a telephone conference later this week and pick the next date.
17 I think that's the only way that we can proceed. But we've got
18 plenty of other things we can do right now.

19 And I appreciate the defendant's position and I know he
20 wants to go to trial and I'm prepared to have this trial. But
21 I don't see how the government can be forced to go to trial
22 without a witness of this level of importance.

23 Yes?

24 MR. COLLINS: Your Honor, I would be remiss if I
25 didn't raise the issue of potentially revising his bond state.

1 I mean, this is the second time the trial has been delayed
2 because of the government's actions. It was delayed in May
3 because of the late disclosure of the DNA we then had to
4 respond to. This is the second delay by the government. It's
5 their witness. Mr. Green is ready to go, has been ready to go
6 since May. I would ask the Court to at least consider some
7 type of release, home monitoring, so that -- I suspect this is
8 heading into a December trial, based on the conference that I'm
9 hearing.

10 THE COURT: Well, as you know, the reason the
11 defendant is locked up is because I gave him the chance to
12 comply, with fairly reasonable conditions. And I believe the
13 word Ms. Shroff used to describe it the last time she asked me
14 to let him out was abject failure to comply. So, as we get
15 closer and closer and closer to trial, and closer and closer to
16 the extraordinary potential consequences of a conviction, it
17 gets more and more concerning. While, on the other hand, the
18 fact that he is being detained pretrial, under provisions that
19 aren't generally supposed to last this long, is also
20 concerning.

21 What exactly would you propose as conditions? What I
22 think you should do is put them in writing and get it to me as
23 soon as possible. I will consider it. But, now that we've
24 done a great deal to look at what he's facing and I know a lot
25 more about the strength of the evidence, and I have a history

1 of not failure to comply with some other judge's conditions,
2 but a history of failure to comply with my conditions that I
3 told him if he violated he was going to be locked up, I can't
4 say I'm terribly inclined to do it. But, I am sympathetic to
5 how long it's been and the fact that this has all been during,
6 you know, the harshest, most difficult period of time, given
7 COVID.

8 MR. COLLINS: We will endeavor to do that right away,
9 Your Honor.

10 THE COURT: Okay. And the government probably -- you
11 can wait for their motion to respond or you can file something
12 at the same time, but you can put your position in writing as
13 well.

14 MR. HENEK: Understood, Your Honor.

15 THE COURT: All right. We were talking about
16 exhibits and we were talking about Exhibit 9, which was 42
17 baggies with prescription sleeping pills inside of them. This
18 is uncharged conduct. I don't believe it falls under the
19 category of intrinsic to the offense because he's not charged
20 with a drug distribution conspiracy, he's charged with multiple
21 counts of possessing with intent to distribute other drugs.

22 So I think this is more classic 404(b) evidence, other
23 crimes or other acts, and it is permissible under Rule 404(b)
24 for other purposes than, essentially, habit, to show motive,
25 opportunity, intent, preparation, plan, knowledge, et cetera.

1 And I think that it falls squarely -- the fact that we're
2 seeing this packaging of pills in a manner consistent with
3 distribution, falls squarely within Rule 404(b). And I don't
4 believe it's so prejudicial that the prejudice outweighs the
5 probative value.

6 I do think that we may need to think about whether some
7 limiting instruction is necessary to indicate that he's not
8 charged with possessing these pills with intent to distribute,
9 there's no charge associated with them, and what the limited
10 purposes are for which they can be considered. But, they'll be
11 admitted for that limited purpose.

12 MR. HENEK: Your Honor, and I apologize. I meant to
13 grab you before you issued your ruling. I want to make clear
14 one thing: Over the break I did go out and I contacted the
15 agent to see about these drugs. The drugs are 389 white pills
16 in one big plastic bag. The government's position is still the
17 same. We don't believe this is 404(b) because of the quantity
18 of the pills, the fact that they are not prescribed.

19 Again, the -- they essentially match and show knowledge,
20 purpose, and intent of all the other large sandwich bags filled
21 with pills that were found throughout the residence. So our
22 position remains the same. But I just want to make sure the
23 court's ruling is not premised on my misrepresentation.

24 THE COURT: All right. So he's charged with
25 possessing a bag of this that's illegal, a bag of that that's

1 illegal, and a bag of something else that's illegal. And now
2 you're saying now there's another bag of something illegal in
3 the house. Why -- what does that do? What is the probative
4 value of that, if you didn't charge him with it?

5 MR. HENEK: Your Honor, again, what we need to focus
6 on is the fact that these are pills that he's charged with.
7 He's charged with a substantial amount of hydromorphone and
8 oxycodone. Those pills were packaged in multiple sizes, but
9 mostly large quantities in similar Ziploc-style bags. And, in
10 addition, he had, in a medicine cabinet, obviously over which
11 he had access, another bag of additional pills that were not --
12 there's no evidence that those were legally prescribed and
13 they're in distribution quantities.

14 So our argument is that they're are evidence of
15 distribution, but also they show, again, his knowledge of the
16 other pills in the house, his intent to distribute the other
17 pills in the house, and his motive --

18 THE COURT: How does one more bag with a bunch of
19 pills in it reflect on his knowledge or intent of the other
20 bags?

21 MR. HENEK: Well, particularly with respect to the
22 location. Your Honor, in this case the defense has indicated
23 that they intend to argue that Mr. Green was not aware of the
24 other pills in the house because they were in a toaster oven,
25 for example, but because they were in kitchen cabinets. Here

1 there's only one bathroom in the house and Mr. Green -- the
2 argument from the government would be he's clearly using that
3 bathroom. He had direct, you know, custody, control of the
4 items in the medicine cabinet. Therefore, he knew those pills
5 were there and that was one additional place where he was
6 keeping his narcotics.

7 THE COURT: So what is the reference to the 42 bags?
8 Were the 42 empty bags there with --

9 MR. HENEK: No, Your Honor. That is -- again, this
10 is the way that it was written up. I believe that's probably
11 the weight of the drugs, 42.3 grams.

12 THE COURT: Wow.

13 MR. HENEK: By I wanted to clarify with the court, it
14 is one bag containing 389 white pills.

15 THE COURT: And there's a photograph of that
16 somewhere so the defense knows exactly what we're talking
17 about?

18 MR. HENEK: Yes, Your Honor.

19 THE COURT: All right. All right. I think,
20 actually, the probative value is somewhat diminished, given the
21 fact that -- originally understood it to bear on a methodology
22 of potential distribution of all of them. But, I think it
23 still goes to knowledge, essentially, a modus operandi that
24 he's got bags of pills. I do think, though -- all right.
25 Well, actually, I'm going to think about this. We don't have

1 to do this this minute because I understand the probative
2 value, but it's also really just, well, here's just something
3 else that he had that he wasn't supposed to have. And that's
4 pretty much how you've just described it. And I understand
5 that you're saying the location bears on knowledge, but it
6 bears on the knowledge of that. I'm not sure -- it's a little
7 more attenuated to say the knowledge of the other.

8 This is the first time I've understood that there was
9 404(b) evidence in this case. And I've understood that there
10 are pills in this case that aren't the charged pills. And so,
11 you're going to -- if you have to talk about the fact these are
12 prescription and he didn't have a prescription and he's got
13 them, then we're a little bit putting some time into putting on
14 evidence of an offense, but he's not charged with that offense.
15 So, I'm going to hold that to the side, since I will let you
16 know well before trial. But, I'm going to take that one under
17 advisement.

18 MS. GLOGIEWICZ: Your Honor, may I also briefly
19 respond to the government's arguments?

20 THE COURT: All right.

21 MS. GLOGIEWICZ: Again, Your Honor, just to
22 reiterate, these were not illegal substance. And, frankly, I
23 feel that the bathroom -- finding the pills in the bathroom is
24 actually indicative of personal use and could go to -- and
25 would not go to his knowledge of dealing drugs, as the

1 government commented --

2 THE COURT: Well, you say they're not illegal and he
3 says you can only have them with a prescription.

4 MS. GLOGIEWICZ: Correct.

5 THE COURT: So, what does that mean?

6 MS. GLOGIEWICZ: Mr. Green could well have had a
7 prescription for these drugs. The government has not
8 represented to us that he did not have a prescription for
9 sleeping pills.

10 THE COURT: Does any prescription give you 389
11 sleeping pills at a time?

12 MS. GLOGIEWICZ: Your Honor, I'm not aware, but --

13 THE COURT: We're not just going to speculate at this
14 point. If they're just in a baggie, I understand your point
15 and I'm obviously taking it seriously. So I don't think I need
16 to hear anything further on this right now.

17 MS. GLOGIEWICZ: Okay.

18 THE COURT: The next -- yes?

19 MR. HENEK: Your Honor, there's a solution to this,
20 and we'll fully brief the issue and we'll file a motion on
21 404(b).

22 THE COURT: All right. That sounds helpful.

23 MR. HENEK: Your Honor, and as we go through the
24 exhibits, we anticipate a similar motion on our cell phone
25 evidence with -- which is also what the defense is going to

1 object to. We have a photo of -- a picture of drugs on a
2 scale, as well as some additional cell phone evidence. So we
3 might as well just include that in the motion and fully brief
4 it, because I think it's going to be a very similar issue that
5 the court --

6 THE COURT: All right. Tell me what exhibit that is
7 so I know which one to take under advisement.

8 MR. HENEK: Yes, Your Honor. This is Exhibit 101,
9 photo of drugs on scale. We've provided the full Cellebrite
10 extraction to the defense's 96, and what they objected to was
11 the photo of the drugs on the scale. This was taken, the photo
12 was taken -- the metadata indicates that it was taken in
13 November. The charged conduct is -- this was in November
14 preceding the January month in which the actual conduct in this
15 case occurred.

16 So this would be -- our argument is going to be that
17 it's intrinsic because it was seized from the defendant's cell
18 phone on -- which was seized from him on the date in question.
19 But if it's not intrinsic, we'll be arguing that it's
20 admissible under 404(b). So we'll fully brief that for Your
21 Honor.

22 THE COURT: All right. I don't recall any other
23 404(b) objections that are going to implicate that. And, so, I
24 will let -- when can you have that to me?

25 MR. HENEK: Two weeks, Your Honor?

1 THE COURT: All right.

2 MR. HENEK: If that's acceptable to the court.

3 THE COURT: We don't know when the trial date is yet.
4 So why don't you get it to me in a week and the defense can
5 object in a week.

6 And any bond motion, give you as much time as you think
7 you need to file it. As soon as you file it, the opposition
8 will be due in a week.

9 MR. HENEK: Your Honor, did you say one week or two
10 weeks?

11 THE COURT: I said one week for you and one week for
12 them, and I don't think I need a reply. Because I don't --
13 this trial could end up being in November. And I did
14 everything to get ready for today and I'm not doing it all at
15 the last minute a second time.

16 MR. HENEK: Understood, Your Honor.

17 THE COURT: So this is enough. We need to get to the
18 bottom of all these issues.

19 The next objections that aren't covered by the pending
20 motions, which we will take up, as I understand it, is Exhibit
21 40. Sounds of gunshots, Wahler Place. Says Bundy body-worn
22 camera.

23 So what is the date and time -- what is this exactly?
24 One of the officers, you can hear gunshots at a particular time
25 on his body-worn camera? At what time?

1 MR. HENEK: Your Honor, in terms of Exhibit 40, we
2 don't know what the specific objection is. This is -- there
3 are no gunshots on the body-worn camera. This officer is
4 merely responding to the scene from which gunshots -- he was
5 responding to the scene after being notified that ShotSpotter
6 had identified gunshots. There's no gunshots recorded --

7 THE COURT: Okay. I'm looking at exhibit list that
8 says Exhibit 40, sounds of gunshots. So that's not why Exhibit
9 40 is being admitted?

10 MR. HENEK: No, Your Honor. It's being admitted to
11 show the responding officer's body-worn camera, to the scene.

12 THE COURT: The direction that he's just being sent
13 there?

14 MR. HENEK: Correct, Your Honor.

15 THE COURT: Okay. It's like a radio run,
16 essentially, but it's being picked up on his camera?

17 MR. HENEK: Your Honor, it's literally just the name
18 of the file. So it's really not a good description. This is
19 the officer responded to the scene and then recovered the shell
20 casings from 917 Wahler. I don't know what the defense
21 objection is to that.

22 THE COURT: All right. So understanding that this
23 isn't -- that this is just his body-worn camera. I take it
24 he's going to testify and then his body-worn camera will be
25 shown, or somebody else who can testify and authenticate it,

1 it's going to be shown?

2 MR. HENEK: That's correct, Your Honor. Yes, his
3 body-worn camera of him collecting shell casings and going to
4 the back of 917 Wahler Place.

5 THE COURT: All right. Okay. So, your objection is
6 under Rule 403?

7 MS. GLOGIEWICZ: That's correct, Your Honor. So we
8 initially included this objection because the government had
9 listed the body-worn camera of several different responding
10 officers, but at that time had not provided us with the
11 particular clips that they intended to introduce. So this was
12 just a note that if the evidence were to get cumulative
13 regarding the body-worn camera, the defense would object.

14 I'll add that just last night the government provided a
15 proposed revised exhibit list to the defense. And, frankly, we
16 have not had a chance to review the particular clips that are
17 now included as to the body-worn camera. But would reserve our
18 right to object to any additional revised exhibit being
19 presented through that revised exhibit list.

20 THE COURT: All right. By a week from now I want the
21 revised exhibit list annotated the way this exhibit list was
22 supposed to, with your objections.

23 MR. HENEK: Understood, Your Honor.

24 THE COURT: And I think, generally, often the
25 body-worn camera shows different angles or whatever. If the

1 officer is going to be here and they're going to testify and
2 they're going to show -- I've seen most of the body-worn camera
3 of the recovery of the shell casings. And are you planning to
4 use officer -- is it Mulrooney who --

5 MR. HENEK: Yes. We haven't made a final decision
6 yet on whether we'll be using Officer Mulrooney or Officer
7 Antonio Bundy. But we'll be using one of them, Your Honor.

8 THE COURT: All right. Well, even if it was both, I
9 don't think that's terribly cumulative. She's the one who
10 spots them, and you can hear her spotting them on the body-worn
11 camera, and then they back up and then they go back and pick
12 them up, and they're sort of two different time points. So I'm
13 not sure that that is so cumulative to upset Federal Rule of
14 Evidence 403. But, the main concern I had was what were they
15 talking about with the gunshots? So I think maybe we can do a
16 little better naming the exhibits so it doesn't add unnecessary
17 confusion.

18 All right. That enables us to move forward to -- now
19 we're getting into some of the reports. And Exhibit 63.
20 Identified as CCN-20011971, combined report, objected to on
21 hearsay grounds. It was not in the binder or on the thumb
22 drive, so I don't know what it is.

23 MR. HENEK: Yes, Your Honor. We have --

24 THE COURT: You can be seated. That's easier for the
25 microphone. I, like you, stand. I grew up standing up in a

1 courtroom and don't even know how to function sitting down.
2 But given COVID, we're all kind of trying to cooperate with
3 that and to limit the same people that have to use the same
4 microphones. So you can sit down.

5 MR. HENEK: Understood, Your Honor. Understood.
6 Since we amended our exhibit list, we removed all of these
7 items that are indeed just reports and are hearsay. We
8 included them originally in an excess of caution. The defense
9 objections are correct. We do not intend to introduce any of
10 these exhibits at trial. So I think that resolves --

11 THE COURT: 63 has been withdrawn. 77 has been
12 withdrawn. Even the list of what was seized? That was one
13 that I wasn't sure had the same kind of hearsay problems that
14 80 had, a narrative. And so I was going to exclude it, but 79
15 is just, basically, sort of like the search warrant return,
16 it's a list of things that were seized. Is that one also --

17 MR. HENEK: I believe 79 we included in our amended
18 list. So if they still have an objection, we'll have to
19 resolve that one. But other than that, all the reports have
20 been removed.

21 THE COURT: Okay. So that includes, for now, 63, 77,
22 80, 91, 92 -- and 93 is a CV, that's a different issue -- 94
23 and 95?

24 MR. HENEK: Correct, Your Honor.

25 THE COURT: All right. So those will not be

1 admitted, so we don't have to talk about them.

2 So what's your -- what's the defense position with
3 respect to just the list of things that were seized and where
4 they were seized? I wouldn't permit its introduction unless
5 the officer testified and then, you know, he says it's a list I
6 prepared of all the things that I've just testified that I
7 seized in those locations. But it doesn't just waltz in on its
8 own. But assuming that the officer is here to testify and be
9 cross-examined about it, what's your objection to 79?

10 MS. GLOGIEWICZ: Your Honor, of course, standing by
11 itself, as you noted, just a list of those items would prove --
12 it would be for the truth of the matter asserted insofar as it
13 would go to show that these items were indeed recovered from
14 the residence. Whether the government intends to make an
15 argument that an exception applies, I would -- I would be happy
16 to respond. But, that is why we included that objection there.

17 THE COURT: All right. And I think it does imply
18 that these items are actually found in these locations. I have
19 less of a problem with it if he's going to be here and he's
20 going to testify to those things and be able to be
21 cross-examined on all of that, and then this would essentially
22 be a summary of that testimony. How were you planning to use
23 Exhibit 79?

24 MR. HENEK: Exactly in that way, Your Honor.

25 THE COURT: All right. Well, what we'll do, is

1 assuming that he's here and he testifies and he's
2 cross-examined about it at that point, you can move it in
3 evidence and I'll rule on it at that time. But I think it will
4 likely come in if he's been available and it's really just a
5 memorialization of what he's just explained and been subject to
6 cross-examination about.

7 80 is not coming in. 91, 92 are not coming in.

8 So we're up to the CV of the expert. One problem I had
9 with that is at the top of the first page it says something
10 like "Qualifications as an expert." I don't think that's quite
11 fair. I do think that expert CVs are often admitted in
12 evidence, but I had a little problem with that. And also, I
13 think, there was something like a summary of times he's
14 testified as an expert before. I wasn't sure that that was
15 entirely appropriate either. But, these are the publications,
16 these are the, kind of, list-like items in the CV. What would
17 be your objection to this otherwise? I mean, isn't that --
18 aren't they often admitted if the expert is here and he's been
19 cross-examined?

20 MS. GLOGIEWICZ: Your Honor, again, we objected on
21 hearsay grounds. I'm not familiar with the precise language in
22 this particular expert's CV, but the idea would be that the
23 writings in that report would go to the truth of the matter
24 asserted, that being that this expert is in fact -- does have
25 those qualifications. It's an out-of-court statement.

1 THE COURT: All right. Well, I think -- I don't
2 think anyone wants to listen to this expert testify about every
3 single time he's taught at a facility, which goes on for about
4 two pages of the CV, or every single time he's written an
5 article. So I think they can use the CV to aid his testimony.
6 I mean, he has to testify about his educational background, his
7 training and his experience, his degrees and all of that. And
8 then I think we can -- he can say that he's lectured many times
9 and that -- if he does that and says it's his CV and he created
10 it, that it can come in. But I don't think -- where was it,
11 93?

12 You've got to get rid of "Qualifications as a Forensic
13 Witness" at the top. I didn't understand what the case
14 statistical summary was on page 9. But, that also seems to be
15 going beyond what a typical CV is and more something that he
16 needs to testify about; I've done this numerous examinations.
17 So I was going to omit page 9 and this little heading. But
18 otherwise, if he testifies, he can say I have a CV where I've
19 listed all the times I've spoken, published.

20 MR. HENEK: Understood, Your Honor.

21 THE COURT: And then the photo of the drugs on the
22 scale is going to be a subject of the dual memoranda, so I'll
23 wait for that before I rule on it.

24 Is there metadata about the location or just the date?

25 MR. HENEK: Our understanding, Your Honor, is that

1 there's no metadata that indicates the location. We do want to
2 consult with our cell phone witness on that.

3 THE COURT: All right.

4 MR. HENEK: And we'll include that in the motion,
5 Your Honor.

6 THE COURT: Okay. So that brings us to the
7 defendant's exhibit list. And, therefore, with the limited
8 exception of the items that I am taking under advisement or
9 we're going to discuss later, or the one where I said the
10 foundation had to be laid first, all the other exhibits are
11 admitted. You can refer to them as Government's Exhibit 1.
12 You don't have to walk around the courtroom and say, "Your
13 Honor, I move Government's Exhibit 1 into evidence." They are
14 in.

15 All right. With respect to the defense exhibits, you
16 have the search warrant photographs that are not objected to.
17 And then, also, items from the same cell phone report. And I
18 had a little trouble looking at them and figuring out exactly
19 what aspect of them you're seeking to utilize and then how it
20 would fall under Rule 404(a)(1) character evidence, that would
21 be inadmissible under that rule.

22 So if the defense could explain to me, first, what
23 Exhibits 9 and 10 are, that would be helpful, too.

24 MS. GLOGIEWICZ: Yes, Your Honor. So as you noted,
25 these are the cell phone extraction that includes the metadata

1 and other various reports on the phone that was recovered.
2 These particular pages, the metadata indicate, are from the
3 date where the search was executed on 917 Wahler Place. And,
4 in particular, these line items show that Mr. Green was
5 conducting searches on his phone or, alternatively, received
6 emails from companies such as Indeed.Com or other job search
7 sites.

8 We understand that part of the government's major
9 theory, of course, is going to be that Mr. Green was engaging
10 in drug dealing at this time and that he was receiving money
11 from that and was sustaining his lifestyle that way. We intend
12 to introduce these exhibits to refute that theory, indicating
13 that he was in fact looking for legitimate employment at this
14 time. And that's why we hoped to introduce these exhibits.

15 THE COURT: And these just get moved in evidence by
16 someone who says -- I guess government witness -- that they
17 were recovered from this cell phone and they're just coming in
18 for the fact that they were transmitted, and not any truth of
19 any matter asserted within them. All right. What's the
20 government's objection? I don't think it's quite character
21 evidence.

22 MR. HENEK: Well, Your Honor, that's exactly what
23 they're admitting it. For the defense is claiming that they're
24 admitting this evidence to show that he was not a drug
25 trafficker and that he was actively engaged in seeking

1 employment. That would be improper character evidence. It
2 would also be -- it's improper character evidence and it's
3 really not relevant, Your Honor. If the defendant wants to say
4 that he was searching for jobs, he can take the stand and do
5 so. But to take this back door approach and show his cell
6 phone extraction, there's -- I don't even know how the defense
7 would get it in. Would they use our cell phone expert to get
8 this in and say, yes, there appears to be a search on the
9 phone? It's -- from our perspective, if --

10 THE COURT: Well, you're planning to move in some
11 cell phone extractions, correct?

12 MR. HENEK: Yes, Your Honor, but the defense had --

13 THE COURT: So they could ask if these are from that
14 during the cross.

15 MR. HENEK: Yes, they could, Your Honor.

16 THE COURT: All right.

17 MR. HENEK: But, again, our argument is, number one,
18 it's not relevant and, two, it's improper character evidence.

19 THE COURT: Well, I don't think it's quite character
20 evidence. I'm not sure that it's mutually exclusive that he's
21 looking for a job and he's possessing drugs with the intent to
22 distribute them on the same day. But I also -- I think
23 character evidence is: He's a good person and so he's a good
24 person that day. Or, you know, he's always hated drugs and he
25 hated drugs that day. I mean, I think saying he was doing

1 something -- so trying to say he was doing something legitimate
2 that day, so maybe he wasn't doing something illegitimate that
3 day is the most character evidencie way I could put it. But, I
4 think it bears slightly on whether he had the intent to
5 distribute the material in the house. Whether they're going to
6 choose to introduce it, at the end of the day, I'm not sure
7 it's prohibited by rule 404(a)(1). So I'm not going to exclude
8 it on that basis.

9 I think, again, without any further testimony, there has
10 to be some instruction that says this is just coming in for the
11 fact that it was on his phone, end of story. But, I don't
12 think it really falls under what Rule 404 is all upset about.
13 So I'm not going to exclude that right now.

14 So that takes care of the exhibits, with the exception
15 of the few that are going to be further briefed that have a
16 Rule 404(b) character to them.

17 And that brings us to the motions. Are you the lawyer
18 on the pole camera motion?

19 MS. GLOGIEWICZ: I would be happy to address it, Your
20 Honor.

21 THE COURT: You can stay there. But to tell you the
22 truth, I don't have too many questions for you. All right.
23 First, we've got the defendant's motion to suppress,
24 essentially, the pole camera evidence, it's docket 71, it was
25 opposed at docket 72. And I guess I want to ask you, do you

1 agree that there's no binding precedent that would require me
2 to suppress this evidence on the grounds that the use of the
3 pole camera violated the Fourth Amendment?

4 MS. GLOGIEWICZ: Your Honor, the defense is not aware
5 of a particular case addressing this exact issue. In part
6 because the context for this motion is quite rare. As you'll
7 recall, the government initially sought to introduce evidence
8 regarding ShotSpotter through expert --

9 THE COURT: All right, I'm not talking about
10 ShotSpotter now. I'm on the pole camera, docket 71.

11 MS. GLOGIEWICZ: My apologies. The defense is simply
12 not aware of a case in this circuit finding that the pole
13 camera is a search under the Fourth Amendment.

14 THE COURT: And you admit that even the case you
15 relied upon in your motion, the First Circuit case, went the
16 other way?

17 MS. GLOGIEWICZ: Yes, Your Honor.

18 THE COURT: What the Constitution forbids is not all
19 searches and seizures, but unreasonable searches and seizures.
20 That's *Elkins versus United States*, 364 U.S. 206 at 222, and
21 the capacity to claim the protection of the Fourth Amendment,
22 according to *Rakas versus Illinois*, 439 U.S. 128, at 143,
23 depends not upon a property right in the invaded place, but
24 upon whether the person who claims the protection of the
25 amendment has a legitimate expectation of privacy in the

1 invaded space.

2 Fourth Amendment jurisprudence usually begins at the
3 threshold of one's home. And here we're talking about a
4 stationary camera that covered an area that happened to include
5 the outdoor area directly behind 917 Wahler Place.

6 D.C. Circuit has not directly addressed whether pole
7 cameras surveillance constitutes a search under the Fourth
8 Amendment. It has made a reference to the fact that pole
9 camera evidence was used to conduct an investigation in *U.S.*
10 *versus Gaskins*, 690 F.3d 569, at 574, and noted simply in that
11 opinion that law enforcement had used a mounted pole camera to
12 investigate a narcotic conspiracy, but it hasn't addressed the
13 Fourth Amendment issue directly.

14 There have also been a couple district court opinions,
15 *United States versus Franklin*, 2009 WL 8626050 from 2009. That
16 noted that the government's case rested on a mountain of
17 evidence, including video from a pole cam, that didn't get into
18 the constitutionality of it.

19 *United States versus Muschetta*, 118 F.Supp.3d 340, at
20 342, that noted law enforcement officers employed multiple
21 investigative techniques, including court authorized wiretaps,
22 from February 10th through May 29th 2015, pen registers, pole
23 cameras, physical surveillance, stops, seizures, and search
24 warrants.

25 So the courts have known that these have been around,

1 but there's no opinion out of building saying that they are --
2 they implicate the Fourth Amendment, and certainly none that
3 say they violate the Fourth Amendment.

4 The Fifth Circuit has held that the government's use of
5 a pole camera that looked into a backyard surrounded by a fence
6 qualified as a search for purposes of Fourth Amendment because
7 the defendant had a subjective expectation of privacy in the
8 curtilage of his home. But there was no constitutional
9 violation found, as the surveillance was pursuant to a valid
10 warrant based on probable cause. That's *U.S. versus*
11 *Cuevas-Sanchez*, 821 F.2d 248, from the Fifth Circuit in 1987.

12 But the Fourth, Sixth, Seventh, and Tenth Circuits have
13 all found that the use of a pole camera to surveil, even
14 without a warrant, did not violate the Fourth Amendment.
15 *United States versus Vankesteren*, 553 F.3d 286, from the Fourth
16 Circuit in 2009, there was a camera that operated from January
17 11th to January 30th, 2007, only during daylight hours. It was
18 motion activated and had a viewing area of 12 by 12 feet.

19 *United States versus Houston*, 813 F.3d 282, from the
20 Sixth Circuit in 2016, had a pole camera capturing ten weeks of
21 footage that agents would have observed if they'd driven down
22 the public road surrounded by the farm.

23 *United States versus Tuggle*, 4 F.4th 505, from the
24 Seventh Circuit in 2001. Three cameras were installed on
25 public property that captured the outside of defendant's home

1 and surveilled him for 18 months, and that was found not to be
2 a violation. And then the Tenth Circuit also upheld the use of
3 a pole camera in 2000, 213 F.3d 1269.

4 The First Circuit, as we discussed, sitting *en banc* in
5 *United States versus Moore-Bush*, 36 F.4th 320, in 2022, split
6 internally on the issue. And, therefore, the binding circuit
7 precedent in the jurisdiction is still a case called
8 *United States versus Bucci*, 582 F.3d 108, from 2009, where the
9 Court found that the defendant did not have a reasonable
10 objective expectation of privacy in the front of his home as
11 viewed by the pole camera. Indeed, even the judges who were
12 troubled by the technique in the *Moore-Bush* case agreed that
13 the evidence should not be suppressed in that case, given the
14 good faith exception in *United States versus Leon*.

15 So even if I was inclined to agree with the reasoning of
16 the Fifth Circuit and/or the concurring judges in *Moore-Bush*,
17 when presented with the facts of those cases, this case doesn't
18 have facts that are similar. In *Moore-Bush* the surveillance
19 was for eight months. Here it was for two days.

20 In *Cuevas-Sanchez* the district-court-authorized video
21 surveillance of the exterior of the defendant's property in
22 particular, with the pole camera for 30 days. The surveillance
23 was then extended another 30 days. And the Fifth Circuit found
24 that the actions qualified as a search because the defendant
25 had a reasonable expectation to be free from that sort of

1 surveillance in his own backyard. They said, "We don't doubt
2 that Cuevas manifested the subjective expectation of privacy in
3 his backyard necessary to satisfy the first part of the
4 inquiry. He erected fences around his backyard, screening the
5 activity within from views by casual observers. In addition,
6 the area monitored by the camera fell within the curtilage of
7 his home, an area protected by traditional Fourth Amendment
8 analysis, and the fence was 10 feet high and bordered the back
9 of the yard."

10 Those distinctions point out the fundamental problem for
11 the defendant here. This area is entirely open to public view.
12 There is no fence, there are no shrubs, there is no
13 differentiation of this space from the space behind any of the
14 other adjacent townhouses. And the spaces extend all the way
15 to a public walkway that takes one from the parking lot of the
16 development all the way to the kind of courtyard area behind
17 all the houses. And the area is extremely well lit.

18 I think I can take notice of material that is on my
19 docket. Government's Exhibit 3 in the motion to suppress is a
20 video that show the officer plainly walking down a public
21 walkway from the parking lot that crossed directly behind the
22 houses, that was not separated by any kind of fence or barrier.
23 You could see Officer Mulrooney walk, as she testified, down
24 the steps from the parking lot and along the sidewalk that runs
25 behind the whole block of houses on Wahler Place.

1 One thing that's made this entire discussion of this
2 issue awkward during that hearing and in the briefing of the
3 original motion to suppress was that the defense repeatedly
4 used the term "curtilage." And that's the term that also
5 appears in the Fifth Circuit case, which is generally defined
6 as land within a fence surrounding a house and which can be
7 accorded Fourth Amendment protection. But here we don't have a
8 fence. We're talking about undifferentiated yards behind row
9 houses, between the backs of the individual units in a row and
10 a public walkway.

11 So, putting aside for a moment the problem that the
12 defendant is now saying it's not even my house, I was just
13 couch surfing there, and the fact that he hasn't produced any
14 facts to show how long he was there or what the circumstances
15 might be that would give rise to any expectation of privacy in
16 the house as a guest, the notion that there was any expectation
17 of privacy here is also somewhat problematic, given that the
18 defendant stepped outside to fire an automatic weapon in that
19 well-lit space at 4 o'clock in the morning.

20 So when you're talking about manifesting an intention
21 and an expectation of privacy, I'm not sure you're doing that
22 when you are waking up the entire neighborhood and you're not
23 shielded by any fence or barrier whatsoever.

24 The Supreme Court said there's no reasonable expectation
25 of privacy that inures in what is left visible to the naked

1 eye. *Florida versus Riley*, 488 U.S. 445; *Katz versus United*
2 *States*, 389 U.S. 347, at 351, the Supreme Court said, "What a
3 person knowingly exposes to the public, even in his own home or
4 office, is not a subject of Fourth Amendment protection."

5 In *United States versus Santana*, 427 U.S. 38, that court
6 up -- the Supreme Court upheld a warrantless arrest of a woman
7 who was seen standing in her doorway and then retreated back
8 into her residence. The Court observed that because the
9 defendant was not only visible to the public, but also exposed
10 to public view, speech, hearing, and touch, as if she'd been
11 standing completely outside of her house, she was not in an
12 area where she had any expectation of privacy.

13 So, we have the problem that this area was exposed to
14 public view and no one was taking any efforts or making any
15 efforts to have it be otherwise. But even if you were to say,
16 well, some portion of the space immediately behind the house
17 was specifically related to 917 Wahler -- I think Ms. Shroff,
18 in the motion hearings, talked a lot about the step, the stoop
19 right when you come out of the door. And even if you're to
20 say, well, some of this is really Wahler Place's backyard, even
21 if it's undifferentiated, and the government can't just post a
22 camera that watches a person come and go from the house and
23 utilizes that space on an ongoing basis that old fashioned
24 human surveillance couldn't accomplish, that that would be a
25 Fourth Amendment violation. But we don't have that situation

1 either.

2 A critical factor in the cases where a court found a
3 problem with pole camera surveillance, and in the Supreme Court
4 case with the GPS device stuck on the bottom of the car, was
5 the length of the surveillance, and the fact that the use of
6 the device captured more than a typical stakeout or an effort
7 to follow a suspect could achieve. But here the camera was
8 utilized for only two days, and that doesn't raise the issues
9 that concerned the judges in *Moore-Bush* or the Supreme Court in
10 the GPS case.

11 Also, the camera in the Fifth Circuit case was directed
12 at the defendant's property, at the point that he would have an
13 expectation of privacy. But here, capturing the back of 917
14 Wahler was incidental to the effort to observe the larger
15 common public area, which at that time was a suspected drug
16 market. And Officer Mulrooney testified that the focus of the
17 cameras was the open courtyard area.

18 But I do have a question for the defendant and I am
19 curious, what is the basis now for your claim of an expectation
20 of privacy? The defendant's standing to move to suppress what
21 was seized by the warrant was not disputed at the time of the
22 original motion to suppress, and the shell casings, given the
23 extended discussion of the curtilage of his home.

24 In his own motion, docket 31, the defense wrote, "The
25 *Horton* case best states Mr. Green's argument that law

1 enforcement acted in a constitutionally impermissible manner
2 when they walked onto property, the curtilage which formed part
3 of his home, in which Mr. Green had an expectation of privacy,
4 and seized the shell casings at issue in this case." It also
5 referred to the officers trespassing on the property of
6 another. At that point, then, the defendant posited it was his
7 home for purposes of the motion.

8 Now, it's true that the law permits temporary visitors
9 to have an expectation of privacy, at least in some spaces
10 within someone else's home. But we never explored whether this
11 defendant would have one just outside the door because he said
12 it was his.

13 So how can you now ask me to instruct the jury about
14 couch surfing as a matter of law and have it both ways? That's
15 a problem that I have here. And let me ask you this: Let's
16 say the new version is accurate, he didn't live there, he was
17 just staying there. What is the expectation of privacy or
18 standing to object to the camera that he has? An overnight
19 guest may have a reasonable expectation of privacy that
20 supports the invocation of the Fourth Amendment under *Minnesota*
21 *versus Olson*, 495 U.S. 91. But merely being on the premises
22 with permission is not enough. That's *Minnesota versus Carter*,
23 525 U.S. 83, from 1998.

24 The defendant has a burden to establish his standing by
25 a preponderance of the evidence. How have you done that in

1 this case? What facts are in the record that show that he has
2 any expectation of privacy in this area, whether you call it
3 curtilage or whatever you want to call?

4 MS. GLOGIEWICZ: Your Honor, Mr. Green was arrested
5 within 917 Wahler Place. We understand it will be disputed at
6 trial really how long he had been in that residence, and
7 whether he had a reasonable expectation of privacy is
8 certainly -- is certainly a weakness in regards to this motion.

9 In regard to the question that you had asked about why
10 Mr. Green is now asserting this motion, the development --
11 recent development in *Moore-Bush*, while not precedential,
12 indicated to the defense that the law at some point in the
13 future may shift favorably to Mr. Green, and given the lengthy
14 sentence that he faces potentially, may want to preserve and
15 raise these issues upon appeal.

16 THE COURT: Well, I don't have any problem with
17 preserving and raising issues. I guess I'm trying to figure
18 out how can you tell me he's just passing through and nothing
19 in there is his, but now the backyard is so much his that he
20 has an expectation of privacy. Which is it? I take it you're
21 not planning to introduce any statement from anyone about his
22 permission to be there, how long he was staying there, and what
23 portions of the house he had free access to, are you?

24 MS. GLOGIEWICZ: That's correct, Your Honor.

25 THE COURT: So, as you, I appreciate, conceded, his

1 reasonable expectation of privacy in the premises is certainly
2 a weakness in this motion and I believe I could deny it on that
3 basis alone. But, I will also find, without reaching the
4 question of the legality of the pole camera video directed at a
5 particular home for an extended period of time, or a camera
6 that captures an area that is fenced in from public view, that
7 even if you assume the defendant was a welcome, longstanding
8 guest, with all the privileges of a resident, he does not have
9 an expectation of privacy in the particular exposed,
10 undifferentiated space captured on film in this case,
11 particularly given the limited period of time of the
12 surveillance and the manner in which the surveillance was being
13 conducted.

14 Also, that to the extent that he did have any
15 expectation of privacy in this exposed, undifferentiated space
16 that was visible to the public, he voluntarily waived it with
17 the firing of the weapon outdoors in that open space, and that
18 the limited search in this case, even assuming it had Fourth
19 Amendment implications because there was some lingering modest
20 expectation of privacy in that back space, was not unreasonable
21 under all the circumstances, which ultimately is the test for
22 the Fourth Amendment.

23 So the motion to suppress the video obtained from the
24 pole camera surveillance, docket 71, will be denied. And so
25 the exhibits that were subject to objection on that basis are

1 now admitted.

2 But there is also a motion in limine with respect to the
3 ShotSpotter audio recording and the witness who, I take it,
4 they're going to utilize to introduce that audio recording.
5 And so, actually, I don't think I have any questions for you at
6 this time, so I'm not going to make you stand there while I
7 read another ruling, unless you want to. But you can return to
8 counsel table.

9 And I do have a question for the prosecutor, which I
10 just want to make sure I understand the scope of Mr. Collier's
11 testimony. He's going to say, basically, that he accessed the
12 system to obtain the audio recording from X date at X time and
13 this government's exhibit is that recording?

14 MR. LIGHT: That's correct, Your Honor, with the
15 addition of the time and the date of the --

16 THE COURT: Right. That's what I said, X date and X
17 time. I figured you were going to have the exact one.

18 MR. LIGHT: Yes, that's correct. And if I may, just
19 to make sure we're clear?

20 THE COURT: Okay.

21 MR. LIGHT: There will be limited testimony about how
22 the dispatch system works and that that location -- that
23 approximate location was where the ShotSpotter system directed
24 officers to go and that's how this all started in the first
25 place.

1 THE COURT: All right. The fact that the ShotSpotter
2 told people to go there, that's one thing. But you said the
3 system -- what are you anticipating he's going to say?

4 MR. LIGHT: I'm anticipating that -- there are four
5 audio recordings that were recorded, sounds of gun -- suspected
6 gunfire, that the system that's in place in the District of
7 Columbia is set up to record these things as they happen. And
8 this system recorded those sounds at that date, at that time,
9 produced to police an approximate location within 60 seconds,
10 as the system does, and police responded in turn, and that
11 these exhibits, these four audio exhibits are admissible and
12 are what they say they are, audio recordings.

13 THE COURT: All right. This witness is not going to
14 say -- I think the problem they have is -- and that I might
15 also have, is the linkage between ShotSpotter for this and --
16 because it interprets it as a gunshot, it sent the officers to
17 those locations. So, I think you can have ShotSpotter recorded
18 this, ShotSpotter sent the police -- dispatched the police to
19 this location. And I think that that's it. What you said was:
20 Going to limit Mr. Collier's testimony to that, essentially, of
21 a custodian of records to introduce the evidence captured by
22 the system, limited to the audio recording of the incident and
23 the fact of the system's notification to police. That much is
24 what you said you wanted to do.

25 And I think what you just described, the system is set

1 up to notify if it hears gunshots, that exceeds what you told
2 me in your motion. If you're going to do what you want to do
3 in your motion, I'm fine with you, and I'm fine with what
4 you're doing.

5 The defendant moved in limine to exclude any lay
6 testimony concerning the ShotSpotter information and the audio
7 recordings, it's docket 68, on the grounds that any testimony
8 regarding ShotSpotter is inherently expert testimony. The
9 government opposed it at docket 68 and there's a reply at 69.
10 According to the defendant, quote, data produced by any machine
11 purporting to measure or detect something, such as an x-ray, a
12 radar gun, a Breathalyzer device, and the like, is typically
13 authenticated through Rule 901(b)(9), which not only requires
14 evidence describing a process or system that can't be provided
15 by a lay witness here, they say, under Rule 701, but would
16 require expert testimony. And, also, evidence showing that
17 ShotSpotter produces an accurate result. So that was their
18 objection to the evidence.

19 Given the government's retreat after the last motion,
20 we're no longer dealing with an intention to introduce data
21 that purports to measure, detect something, the accuracy of
22 which needs to be established. That's the part I'm not going
23 to let you do. The government has explained that it only
24 intends to utilize the ShotSpotter information for a very
25 limited purpose. It said, and I'll read it again, the

1 government's opposition, at page 68, "it would limit
2 Mr. Collier's testimony to introduce specific evidence captured
3 by the notification system. That is, the audio recordings on X
4 date and X time, limited to the audio recording of the incident
5 and the fact of a notification sent to the police, which the
6 police can also testify about, without eliciting any expert
7 opinions in support of that evidence."

8 Federal Rule of Evidence 901 provides: To satisfy the
9 requirement of authenticating or identifying an item of
10 evidence, the proponent must produce evidence sufficient to
11 support a finding that the item is what the proponent claims it
12 is. That's all authenticity is. Evidence that satisfies this
13 requirement can include testimony that an item is what it's
14 claimed to be or evidence describing a process or system and
15 showing that it produces an accurate result.

16 Admitting audio recordings into evidence is a process
17 that's "committed to the sound discretion of the trial court,
18 so long as the tapes are authentic, accurate, and trustworthy."
19 And, "There's no single rigid standard for determining whether
20 a tape recording may be admitted into evidence." It's
21 *United States versus Dale*, 991 F.2d 819, at 842, from the D.C.
22 Circuit in 1993.

23 "The standard for authentication is that 'the
24 possibilities of misidentification and adulteration must be
25 eliminated, not absolutely, but as a matter of reasonable

1 probability.'" *U.S. versus Sandoval*, 709 F.2d 1553, at 1555,
2 D.C. Circuit in 1983, quoting *Haldeman*, 559 F.2d 31, also from
3 this circuit.

4 Again, all we're doing is authenticating a recording of
5 a sound on a certain date and time, not its identification of
6 it as machine gunfire or the number of shots, et cetera. In
7 *United States versus Celis*, 608 F.3d 818, D.C. Circuit, in
8 2010, said, "The government introduced evidence that the
9 equipment used to record phone calls was in proper working
10 order and that only authorized personnel had access to the
11 recordings... One of the officials responsible for copying the
12 tapes stated that the duplication process resulted in an exact
13 copy of the original recording... The district court heard
14 evidence relating to the integrity of the duplication
15 procedures... Based on this showing, we conclude that the court
16 did not abuse its discretion in determining that the recordings
17 were authentic as a matter of reasonable probability."

18 In *United States versus Strothers*, 77 F.3d 1389, the
19 D.C. Circuit found that audio tapes were properly admitted at
20 trial since the "police witness described the taping and
21 copying process and testified that the copies admitted at trial
22 accurately represented what had occurred."

23 Now, we don't have that sort of testimony here, but it's
24 also not that sort of recording. We do have other evidence,
25 though, that bolsters the reliability and accuracy of the

1 recording of the sounds at that date and time because we have
2 an officer's testimony that she heard something that sounded
3 like gunshots at that date and time and there is pole camera
4 video from the exact same time and place.

5 Examples of other recording technology that's been
6 admitted, in *United States versus Fadayini*, 28 F.3d 1236, the
7 D.C. Circuit, in 1994, permitted ATM photographs to be properly
8 authenticated. There were bank personnel who talked about the
9 cameras and the time and date imprints on the photographs
10 themselves, and those were sufficient to permit a reasonable
11 juror to find that the evidence is what its proponent claimed.
12 And, therefore, I conclude, in my discretion, that the -- I'm
13 not going to exclude the evidence. I think it's admissible for
14 the limited purpose for which it's being proffered.

15 If the government was seeking to use the recording for
16 the purpose of establishing that a weapon was indeed fired at
17 any particular location at the time in question, the court
18 would be required to determine whether expert testimony was
19 necessary. But here, the fact that ShotSpotter sent a signal
20 and then it prompted the officers to take action doesn't
21 require expert testimony and a lay custodian can testify that
22 the recording was obtained from the device and not adulterated
23 in any way before it was produced to the government.

24 Therefore, I'm going to deny the motion in limine, in my
25 discretion. Although, after we've heard the testimony of the

1 authenticating witness the defendant may renew its objection
2 after that witness has testified and the government at that
3 time says we move the video recordings in evidence. So I'm not
4 ruling that they're in evidence, what I'm ruling is that the
5 motion in limine to exclude them as a matter of law in advance
6 is denied.

7 That takes cares of all of the evidence and the
8 evidentiary objections. And moving chronologically through the
9 trial, after the voir dire, the exhibits, we would be at the
10 jury instruction stage, and there's a lot I can say about those
11 now. The court reporter has been typing for a little while, so
12 I'm going to take a ten-minute break and --

13 (Off-the-record discussion between the court and court
14 reporter.)

15 THE COURT: Okay. All right. I'm going to go
16 forward. There's really not -- actually, before I do that, I
17 think we need to do something that we do need to put on the
18 record, in case we run out of time, because we can always talk
19 about the jury instructions in the future.

20 And that is, I believe, that it's incumbent upon me to
21 conduct another thorough inquiry pursuant to the *Frye* case.
22 And I believe -- I received the government's notice of the
23 penalties, I asked you to supplement with information about the
24 actual plea offer that's been extended, but I don't know that I
25 had an opportunity to reap that from ECF this morning, so you

1 may have to put it on the record.

2 But, I think I would like to start by asking counsel and
3 Mr. Green to come to the lectern, because it's very difficult
4 for me to see him from here.

5 MR. LIGHT: Your Honor, if I may?

6 THE COURT: Yes.

7 MR. LIGHT: We did not understand that request for an
8 update on plea offers to have been to ask us to put it in
9 writing, so we did not. But we are prepared to discuss that.

10 THE COURT: All right. Well, that's why I didn't
11 find it.

12 Okay. Mr. Green, I understand that you've talked about
13 a lot of matters with your lawyer. And there are limited
14 exceptions when a court can ask you about your conversations
15 with your lawyer, and this is one of those times where I not
16 only can, but I have to. I want to make it clear, though, I am
17 not asking you to tell me what advice he gave you, or any of
18 them gave you, or what their recommendations are, that's a
19 private conversation between you and your lawyer. But I do
20 have to make sure that certain facts have been conveyed to you.
21 And that's what I'm going to do right now.

22 You are charged in this case with six offenses,
23 according to the information I've been provided by the
24 government.

25 First of all, does the defense dispute any of the

1 calculations or the maximum sentences set out in the notice
2 that was filed at docket 75?

3 MR. COLLINS: No, Your Honor.

4 THE COURT: Okay. So, Count 1, you're charged with
5 possession of a firearm -- felon in possession of a firearm.
6 So that doesn't have anything to do with the machine gun aspect
7 of it, it's just that it's a firearm and you weren't allowed to
8 have it. And the maximum sentence, if you were found guilty of
9 that offense, could be up to ten years of incarceration and a
10 \$250,000 fine. Have you been told that about Count 1 and the
11 possession of the firearm?

12 THE DEFENDANT: Yes, Your Honor.

13 THE COURT: All right. Count 2, you're charged --
14 it's the same gun, but it's a different provision of law,
15 unlawful possession of a machine gun, in violation of 18 U.S.
16 Code § 922(o). That offense itself carries a maximum sentence
17 of up to ten years of incarceration and a \$250,000 fine. Have
18 your lawyers told you that?

19 THE DEFENDANT: Yes, ma'am.

20 THE COURT: And Count 3, you're charged with unlawful
21 possession with intent to distribute cocaine base, in violation
22 of 21 U.S. Code 841(a)(1) and 841(b)(1)(C). That offense, if
23 you were found guilty, could expose you to 20 years of
24 incarceration and a million dollar fine. Have you been told
25 that?

1 THE DEFENDANT: Yes, ma'am.

2 THE COURT: And with respect to each one of these
3 counts, has it been explained to you that they could all --
4 each sentence could be consecutive, come after the one before;
5 they don't have to all be served at the same time. I could
6 sentence you to serve one and then the other and then the
7 other. Are you aware of that?

8 THE DEFENDANT: Yes, ma'am.

9 THE COURT: Okay. Count 4, you're charged with
10 possession with intent to distribute oxycodone, in violation of
11 21 U.S. Code 841(a)(1) and 841(b)(1)(C). Has it been explained
12 to you that that offense alone could expose you to 20 years
13 incarceration and a \$1 million fine?

14 THE DEFENDANT: Yes, ma'am.

15 THE COURT: Count 5 is unlawful possession with
16 intent to distribute hydromorphone, in violation of 21 U.S.
17 Code 841(a)(1) and 841(b)(1)(C), which also could expose you to
18 a sentence of 20 years of incarceration and a \$1 million fine.
19 Are you aware of that?

20 THE DEFENDANT: Yes, ma'am.

21 THE COURT: And, finally, Count 6, you're charged
22 with using, carrying or possessing a firearm, the machine gun,
23 during or in furtherance of a drug trafficking offense, in
24 violation of 18 U.S. Code 924(c)(1)(B)(ii). That is an offense
25 for which you could receive a sentence, a maximum sentence of

1 up to life imprisonment. Are you aware that?

2 THE DEFENDANT: Yes, ma'am.

3 THE COURT: And I could sentence you also to pay a
4 \$250,000 fine.

5 THE DEFENDANT: I understand.

6 THE COURT: But the thing about Count 6 that's
7 different is that I must sentence you to Count 6 consecutive,
8 or after any other sentence you get for the drug counts or
9 anything else. Do you understand that?

10 THE DEFENDANT: Yes, ma'am.

11 THE COURT: And do you understand that if you were
12 found guilty of Count 6, possession of the firearm in
13 furtherance of the drug trafficking that you're charged with, I
14 must -- I don't have any choice -- I must sentence you to 30
15 years of incarceration. I have to lock you up for 30 years
16 consecutive to any sentence you get for any other count.
17 Whatever you get for the drugs, it's 30 more years tacked on
18 after that. Has your lawyer explained that to you?

19 THE DEFENDANT: Yes, ma'am.

20 THE COURT: Now, when judges sentence people they are
21 required to pay attention to what the U.S. Sentencing
22 Guidelines would recommend as a sentence in your case when
23 deciding where, up to the maximum, they should be sentenced.
24 Congress created a commission that established a bunch of
25 recommended ranges for sentences depending on the offense,

1 depending on the facts related to the offense, and those can go
2 up or down depending on what your prior criminal record is.
3 The government has estimated -- and your lawyer apparently
4 agrees with this estimate -- that if you were convicted at
5 trial on all six counts in the indictment, Count 1 would put
6 you, under § 2K2 of the guidelines, at what they call a base
7 offense level of 26.

8 Count 2 would be the same. And Counts 3 through 5 would
9 start at the base offense level in the guidelines of 28. The
10 way they combine counts for purposes of the guidelines, that
11 means you start with the highest one. So you would be starting
12 on the chart for the guidelines at a level 28. But, the Count
13 6, again, is 30 years after that.

14 So, based on that, and given what we know about your
15 criminal history at this point, the guidelines would
16 recommend -- I don't have to follow them, but that's what they
17 would recommend as a sentencing range in your case, would be
18 110 to 137 months, which is -- I usually have the years in
19 front of me. Can somebody tell me what 110 to 137 months is?

20 THE COURTROOM DEPUTY: 108 months is nine years, Your
21 Honor.

22 THE COURT: Okay. So it's 9 --

23 THE COURTROOM DEPUTY: 13.

24 THE COURT: -- to 13 years, is what the guidelines
25 would be recommending for Counts 1 through 5, and then Count 6

1 would be an additional 30 years thereafter, is what the
2 guidelines would recommend. Do you understand that if you're
3 found guilty of those offenses, that's what the sentencing
4 guidelines would be suggesting that I do in your case?

5 THE DEFENDANT: Yes, I understand.

6 THE COURT: And do you understand that no matter what
7 the guidelines say and no matter what I want to do, I would
8 have no choice whatsoever about the additional 30 years for the
9 machine gun?

10 THE DEFENDANT: I understand.

11 THE COURT: Okay. Now, that's what you're facing if
12 you went to trial and you were convicted. I would like the
13 government to explain to me whether there's a plea offer in
14 this case and what the consequences of the plea offer would be
15 and how it would affect those calculations.

16 MR. LIGHT: Your Honor -- excuse me. Thank you, Your
17 Honor. We have discussed a resolution of this case. There was
18 a plea offer placed on the record at our last -- or, a prior
19 status hearing in the spring, which called for an estimated
20 guidelines range of approximately four years to just the drug
21 charge, that the defendant rejected at that time. When
22 Ms. Peterson came on to the case, we had a discussion with her
23 about the possibility for a resolution. We were informed that
24 the defendant is not interested in any plea that the government
25 had to offer.

1 I can assure the court that if there was interest in
2 obtaining a plea, we could resolve this case tomorrow, I
3 believe, and that a plea very similar to that which was put on
4 the record in the spring would be extended. But we have not
5 really gotten to that point with defense because there has not
6 been interest in a plea. There would be an ability to resolve
7 this case, but we're just not at that point.

8 THE COURT: All right. And the plea offer that was
9 on the record before, that you would consider offering either
10 the same or something similar, involved pleading to the
11 possession with intent to distribute the drugs and did not
12 involve a plea that would subject him to the mandatory minimum,
13 is that correct?

14 MR. LIGHT: That's correct, Your Honor.

15 THE COURT: And the guideline range you were looking
16 at at that point, did you say was four years?

17 MR. LIGHT: Approximately four years of incarceration.

18 THE COURT: As opposed to 9 to 13, plus 30?

19 MR. LIGHT: That's correct.

20 THE COURT: Okay. Mr. Green, once again, I don't
21 want you to tell me what your lawyers recommended to you or
22 what you said to your lawyers, that's private. But I do want
23 to make sure that your lawyers told you that you have the
24 chance to plead guilty and avoid the mandatory minimum sentence
25 that we just discussed if you accepted responsibility for

1 possession of the drugs.

2 THE DEFENDANT: Yes, I discussed it with them. I
3 understand.

4 THE COURT: Okay. And at this point it's your
5 decision not to accept the plea offer and to go to trial, given
6 the risks that I've just laid out?

7 THE DEFENDANT: That's correct.

8 THE COURT: All right. Mr. Collins, is there
9 anything you want to add to this discussion?

10 MR. COLLINS: I have nothing to add.

11 THE COURT: All right. Is there anything further the
12 government thinks we need to put on the record at this time?

13 MR. LIGHT: No, Your Honor.

14 THE COURT: All right. And just to be clear, because
15 one of the purposes of this inquiry is so that in the future
16 you can't come back to court and say, well, my lawyer didn't
17 tell me that. I just want to make sure that you've had this
18 discussion about the plea and about the possible sentencing
19 with both Mr. Collins and his team and the federal public
20 defender.

21 THE DEFENDANT: Yes, ma'am.

22 THE COURT: I'm just asking you, did you discuss this
23 with Ms. Peterson and also with Mr. Collins and his team?

24 THE DEFENDANT: Yes, ma'am.

25 THE COURT: Okay. All right. I have nothing further

1 with respect to that right now.

2 What I did want to do today and what I was prepared to
3 do today was to talk through the few objections with respect to
4 the jury instructions. I think it is quite clear from the law
5 that knowledge that the gun possessed the characteristics that
6 make it a machine gun, as opposed to knowledge of the fact that
7 the law treats those characteristics as a machine gun. But the
8 fact of the features of the gun is a required element of the
9 possession of a machine gun count. The law is quite clear in
10 this circuit, it is not an element of Count 6. And so the
11 defendant's suggestion that that should be added to the
12 instructions for Count 6 will be denied, and the government's
13 objection is well taken.

14 With respect to the couch surfing, mere proximity
15 instruction, at this point I don't know what the evidence is in
16 the record that would support that. I don't know that "couch
17 surfing" is a term of art that I plan to instruct the jury
18 about. I will provide all of the standard instructions on
19 possession and constructive possession. And if there's
20 something that's justified by the facts in the record at the
21 end of the case, we can talk about it. But what was proffered
22 to me seemed to be my offering up a legal defense that we don't
23 know if there's even going to be any facts to dispute.

24 There were objections to charts, but I don't think there
25 are any charts in the exhibit list at this point, or they're

1 very limited. So once we get the revised exhibit list, we'll
2 figure out if there's even anything further to discuss.

3 The defense objected to some of the instructions about
4 the gun, saying the defense is stipulating to drugs. But I
5 don't know what "stipulating to drugs" means, and so we'll have
6 to see what actually is being stipulated before we can
7 determine what instructions have been obviated by the
8 stipulations.

9 I don't believe that dealing with the felon in
10 possession, saying that the defendant has a prior conviction
11 for purposes of that is Rule 404(b) evidence, as it is an
12 element of the offense. The jury will not be told what the
13 felony is. Hopefully we can deal with that with a stipulation.
14 But it does have to be something that they have to find, unless
15 it's stipulated and then we tell them it's stipulated.

16 Generally, there's some instructions that have been
17 offered up that are different from the Red Book instructions, I
18 tend to use them. There was some instructions at the end where
19 I'm not sure where they came from, that there are objections
20 to, about what "possession" means and what "in furtherance"
21 means. And I think it would be -- it would have been helpful
22 to have some citations from the government, if that came from
23 something; if it's from the Red Book, it's from *O'Malley*. The
24 defense gave me a bunch from another jury instruction
25 collection. But I think that gives you some guidance.

1 Anything you've agreed to is good to go. And we'll have a more
2 specific jury instruction conference when we get closer to the
3 date. But I think you know what's happening and what's not
4 happening generally with respect to that, and the exhibits and
5 the voir dire and everything else.

6 So, we'll deal with the Rule 404(b) material and bond
7 and everything else when I get the written submissions. And
8 we'll deal with the trial date -- when can you get back -- when
9 did I tell you to get back to me on the witness? I gave you,
10 like, two days to do that, correct? No, I didn't?

11 MR. HENEK: My understanding, Your Honor, was that we
12 had a week. We would certainly appreciate a week. This has
13 been a very difficult process to ascertain and get the
14 information. So if we could have a week, we would appreciate
15 it.

16 THE COURT: All right. I think I asked all the
17 parties to at least give Mr. Haley their conflicts now. And I
18 would ask you to let Mr. Haley know what the first date is that
19 you think we could move forward with this trial as soon as
20 possible, no later than next Wednesday. But, really, I think
21 it would be -- it's incumbent upon you to let us know as soon
22 as possible so that we can get this on everybody's calendar as
23 soon as possible.

24 And once that information has been provided, I think,
25 Mr. Haley, we will set up a telephone conference and get a

1 trial date set.

2 MR. HENEK: Understood, Your Honor.

3 THE COURT: All right. Okay. Is there anything else
4 I need to take up right now on behalf of the government?

5 MR. LIGHT: No.

6 MR. HENEK: Nothing further from the government, Your
7 Honor.

8 THE COURT: Anything further I need to take up on
9 behalf of the defendant?

10 MR. COLLINS: No, Your Honor. Thank you very much.

11 THE COURT: All right. Well, thank everybody for
12 your time and patience this morning. I think we got a lot
13 accomplished. And I also think this means -- just because we
14 have additional time, doesn't mean that we have reopened the
15 door to more motions to suppress and more motions in limine. I
16 think everything -- we've had multiple opportunities to brief
17 everything, and those dates have passed.

18 All right. Mr. Haley, thank you.

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CERTIFICATE OF OFFICIAL COURT REPORTER

I, JANICE DICKMAN, do hereby certify that the above and foregoing constitutes a true and accurate transcript of my stenographic notes and is a full, true and complete transcript of the proceedings to the best of my ability.

Dated this 30th day of October, 2022

Janice E. Dickman, CRR, RMR, CCR
Official Court Reporter
Room 6523
333 Constitution Avenue, N.W.
Washington, D.C. 20001

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23-3100

September Term, 2025

1:20-cr-00222-ABJ-1

Filed On: October 6, 2025

United States of America,

Appellee

v.

Demetrius Green,

Appellant

BEFORE: Srinivasan, Chief Judge, and Henderson, Millett, Pillard, Wilkins,
Katsas, Rao, Walker, Childs, Pan, and Garcia, Circuit Judges

ORDER

Upon consideration of appellant's petition for rehearing en banc, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:

Clifton B. Cislak, Clerk

BY: /s/

Daniel J. Reidy

Deputy Clerk

Appendix C