10-3150

To Be Argued By:
BRIAN P. LEAMING

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 10-3150

UNITED STATES OF AMERICA,
Appellee,

-vs-

ANTHONY PAGE,
Defendant-Appellant,

JOSEPHINE SULLIVAN,
Defendant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

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BRIEF FOR THE UNITED STATES OF AMERICA

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Statement of Jurisdiction

The district court (Robert N. Chatigny, J.) had subject matter jurisdiction under 18 U.S.C. § 3231. Judgment entered on July 28, 2010. A 78.[1] On August 5, 2010, the defendant filed a timely notice of appeal pursuant to Fed. R. App. P. 4(b). A 82. This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291.

[1] Defendant's Appendix is cited herein as "A __" and Government's Appendix is cited herein as "GA __."

Statement of Issue
Presented for Review

Whether the district court abused its discretion in denying the defendant's motion to sever count six of the superseding indictment, which charged the defendant with possession of a firearm by a convicted felon, from the remaining counts of the superseding indictment, which charged violations of the Controlled Substances Act.

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Preliminary Statement

Beginning in November 2007, law enforcement officers with the Drug Enforcement Administration ("DEA"), the Bureau of Alcohol, Tobacco, Firearms and Explosives ("ATF"), and Norwich Police Department, began investigating a drug trafficking operation involving Anthony Page ("Page"), Josephine Sullivan ("Sullivan")

and others. They engaged in controlled purchases of crack cocaine from Sullivan on December 4, 2007 and from Page on March 7, 2008. They also used confidential informants to engage in controlled purchases of heroin from Page and others out of Page's residence at 143 Hickory Street, in Norwich, Connecticut. On July 24, 2008, officers executed a search warrant at the 143 Hickory Street residence and located approximately 87 bags of heroin and a loaded Smith & Wesson .45 caliber revolver. Page, who was arrested on that same date, denied selling crack cocaine, but admitted that the firearm and heroin recovered from 143 Hickory Street belonged to him.

A federal grand jury in Hartford returned a six-count superseding indictment which charged Page and Sullivan with the narcotics and firearms offenses arising from the controlled purchases and the execution of the search warrant. Prior to trial, Page moved to sever count six, which charged him with being a previously convicted felon in possession of a firearm. The government agreed to sever count three (the March 7, 2008 controlled purchase), but otherwise opposed the defendant's motion on the basis that the remaining charges in the superseding indictment, including the felon in possession charge, arose from a common scheme or course of criminal conduct with overlapping evidence, that a sanitized stipulation and limiting instruction would ensure the defendant a fair trial, and that severance would not promote the principles of judicial economy. The district court denied the defendant's motion to sever, reasoning that the jury would be made aware only of the fact of conviction and would be

provided with a limiting instruction. The district court concluded that this "arrangement will serve the interest in judicial economy without unduly prejudicing the defendant."

Page proceeded to trial on September 21, 2009, and the jury returned guilty verdicts against him on all counts on September 23, 2009. On July 27, 2010, the district court sentenced Page to a total effective term of 210 months' imprisonment.

In this appeal, Page's only claim of error is that the district court improperly denied his motion to sever count six from the superseding indictment. Page argues that he was unfairly prejudiced as to the narcotics charges when the jury heard evidence that he was a previously convicted felon. Page's argument is not persuasive. The district court acted properly and within its discretion in denying Page's motion to sever when it recognized the substantial overlap in the evidence that would be offered at separate trials and concluded that the use of a sanitized stipulation and a limiting instruction regarding Page's prior felony conviction would safeguard him from any potential for unfair prejudice.

Statement of the Case

On July 29, 2008, a federal grand jury returned a one-count indictment charging that, on March 7, 2008, Page possessed with intent to distribute and did distribute 5 grams or more of cocaine base, in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(B). A 3. On October 30, 2008,

the same grand jury returned a six-count superseding indictment against Page and Sullivan. A 17-22. Count one charged that, on December 4, 2007, Sullivan possessed with intent to distribute and did distribute 5 grams or more of cocaine base, in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(B). A 17. Count two charged that, in December 2007, Page and Sullivan conspired to possess with intent to distribute 5 grams or more of cocaine base, in violation of 21 U.S.C. § 846. A 17-18. Count three charged that, on March 7, 2008, Page possessed with intent to distribute and did distribute 5 grams or more of cocaine base, in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(B). A 18. Count four charged that, in July 2008, Page and Sullivan conspired to possess with intent to distribute and to distribute heroin, in violation of 21 U.S.C. § 846. A 18. Count five charged that, on July 24, 2008, Page and Sullivan possessed with intent to distribute heroin, in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(C). A 18-19. Count six charged that on, July 24, 2008, Page possessed a firearm after being previously convicted of a felony, in violation of 18 U.S.C. § 922(g)(1). A 19.

On January 22, 2009, Page moved to sever count six of the superseding indictment. A 6, 22-23. On January 30, 2009, the government filed a memorandum of law in opposition to the defendant's motion. GA 1-12. On September 8, 2009, before jury selection began, the district court heard argument on the motion to sever. GA 35-51. The government agreed to sever count three (the narcotics distribution charge occurring on March 7, 2008), but otherwise opposed severance or bifurcation. GA 35-37.

On September 16, 2009, the district court denied the defendant's motion to sever. A 24.

Trial commenced on September 21, 2009. GA 54. On September 23, 2009, the jury returned guilty verdicts against Page on counts two, four, five and six of the superseding indictment. A 11 (docket entry). On July 27, 2010, the district court imposed a non-guideline sentence of 210 months' imprisonment and eight years' supervised release on each of counts two, four and five, to run concurrently, and a concurrent term of 120 months' imprisonment on count six. A 15, 78-79. The government moved to dismiss the previously-severed count three, and the district court granted that motion. A 79. Judgment entered on July 28, 2010. A 15. On August 5, 2010, Page filed a timely notice of appeal. A 16.

Statement of Facts and Proceedings Relevant to this Appeal

A. Page's Motion to Sever

On January 22, 2009, Page moved to sever count six from the remaining counts in the superseding indictment. A 22-23. In support of his motion, Page relied principally on *United States v. Jones*, 16 F.3d 487, 493 (2d Cir. 1994), to augment his claim that a limiting instruction could not prevent the unfair prejudice stemming from the jury learning his status as a convicted felon. A 22. Page argued that, to sustain its burden of proof, the government would have to offer evidence that Page was previously convicted of "multiple narcotics felonies." A 23. Such

evidence, Page averred, would be particularly prejudicial to him as to the narcotics charges in the superseding indictment. A 23.

B. Government's Response

The government opposed Page's motion on the basis that the charges were part of a common scheme or course of criminal conduct and that the evidence of the narcotics charges was inextricably intertwined with the evidence of the felon in possession charge. GA 1-11. The government argued further that a sanitized stipulation coupled with an appropriate limiting instruction could reasonably assure the defendant of a fair trial. GA 1-11.

In support of its opposition, the government proffered that, from on or about December 2007, through July 24, 2008, Page distributed heroin and cocaine base in the Norwich, Connecticut area. GA 1-11. During this time period, Page conspired with Sullivan and others to run his narcotics trafficking operation. GA 2. On December 4, 2007, a cooperating witness ("CW1") arranged with Page to purchase 28 grams of crack cocaine from him. GA 2 (count two). During this negotiation, Page told CW1 that Sullivan would deliver the crack cocaine and then sent CW1 to meet Sullivan to complete the deal for the ounce of crack cocaine. GA 2. On March 7, 2008, a different cooperating witness ("CW2") arranged with Page to purchase approximately 7 grams of crack cocaine from him, and Page delivered the crack cocaine to CW2 in the parking lot of a gas station in Norwich. GA 2 (count three). On July 24, 2008, officers executed a state search

warrant at 143 Hickory Street, in Norwich, Connecticut. GA 2. Officers believed that Page and Sullivan used this residence as a distribution point for heroin. GA 2. The search resulted in the seizure of approximately 77 bags of heroin and a firearm from a bedroom shared by Page and Sullivan. GA 2-3 (counts four, five and six). Sullivan was present during the search and told investigators in a post-*Miranda* statement that the firearm and heroin belonged to Page. GA 3. Officers arrested Page at another location, and he admitted, in a post-*Miranda* statement, that the gun and heroin belonged to him. GA 3.

The government argued that the narcotics offenses and the firearms offense all arose from the same course of criminal conduct, so that the evidence of the narcotics offenses would be admissible in any trial involving the firearms offense, and the evidence of the firearms offense would be admissible in any trial involving the narcotics offenses. GA 1-11. Indeed, the evidence related to the conspiracy and distribution counts would describe an ongoing narcotics trafficking operation by Page and Sullivan which used Page's residence at 143 Hickory Street as a stash house. GA 2-3. It was this stash house where the officers located and arrested Sullivan, and seized the 77 bags of heroin charged in count five and the loaded firearm charge in count six. GA 2-3.

The government also countered Page's claim that the jury would hear of his multiple felony narcotics convictions by agreeing that a sanitized stipulation -- which would include just the fact of Page's status as a felon, with no mention of the number of felonies or the

nature of the offenses -- would be presented to the jury as the only evidence to support this element of the § 922(g)(1) charge. GA 8-11.

C. District Court Hearing on February 6, 2009

On February 6, 2009, the district court convened a telephonic conference to discuss two pending motions, one of which was Page's motion to sever. GA 13-32. During the conference, Page pressed his motion, reiterating his position that severance was necessary to ensure him a fair trial. GA 30. Page also reported to the district court that he was not prepared to stipulate to the fact of his status as a felon. GA 30. The district court responded by asking the parties to consider whether bifurcation was an appropriate resolution. GA 30-31. Specifically, the district court stated:

> I would ask you to consider the possibility of a bifurcated trial whereby the jury would not be informed about the sixth count until after we had a verdict on the other counts, and we would then keep them for however much longer proved necessary to get a verdict on the sixth count. This jury would have deliberated on the other counts free from any possible prejudice arising from the evidence of his prior convictions, and once we had their verdict on those counts, the defense could make a better informed decision about whether to stipulate with regard to the prior convictions or not.

GA 31.

D. District Court Hearing on September 8, 2009

On September 8, 2009, the district court held jury selection. GA 34. Prior to selecting a jury, the parties again raised the pending motion to sever. GA 34. The government confirmed for the district court that it had agreed to sever count three. GA 35. The decision to sever count three was not memorialized in any recorded or transcribed proceeding, rather it was the result of ongoing discussions between counsel. As count three related to a controlled transaction which did not involve Sullivan or CW1, was not intertwined to the same degree as the drug and gun evidence recovered on July 24, 2008, and would not be discussed during Sullivan's and CW1's testimonies, the government agreed to sever it from the remaining counts.[2]

During the hearing, the government emphasized the substantial overlap of evidence in the remaining counts, the likely admissibility of the same evidence at both trials should the motion to sever be granted, and the duplication of effort in essentially trying the same case twice. GA 40-43. The government explained that it intended to offer evidence from witnesses from the State of Connecticut Forensic Lab who would testify to the collection of DNA material from the firearm and their analysis of the DNA material. GA 46-47. The DNA evidence was not only relevant in establishing Page's possession of the firearm

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[2] After Page was sentenced to 210 months' incarceration, the government decided not to pursue court three and moved to dismiss it.

and his connection to the Hickory Street apartment, but it also corroborated Sullivan's testimony that Page would use the Hickory Street apartment as a distribution location for heroin. GA 43. In response to the district court's question of how the government would proceed if it granted the motion to sever, the government responded:

> [The government] would still offer evidence of the firearm because in the government's estimation, the firearm was found with the heroin that's charged in Count Five. It ties the defendant to the apartment to where the heroin's found. It also corroborates the government's cooperating witness that the heroin and the gun belong to the defendant. So it would offer in substance all the same evidence.

GA 43. The only evidence that would not be included would pertain to Page's felony conviction and the firearm's effect on interstate commerce. GA 43. The district court then confirmed that if Page were convicted on the narcotics charges, the government would "[p]resumably . . . want to go ahead with the severed count, the firearm count, and you would then have a trial on that count." GA 45. The district court then inquired "what would that trial look like?" GA 45. The government confirmed that it would essentially be the "same trial" absent some evidence regarding the weight and chemistry of the narcotic substances seized during the investigation. GA 45.

The government explained further that it would offer testimony from fact witnesses who observed Page with the

gun in both trials because the testimony "ties it to the gun which is in the apartment with the drugs and corroborates other witnesses, including the co-defendant who would testify that the drugs and the guns belong to Mr. Page and that she sells drugs for him but that the gun was brought to the apartment the night before it was found by the agents and the search warrant." GA 47.

The government further reported to the district court that the parties were willing to stipulate to Page's status as a previously convicted felon, without reference to the number of prior felonies or the nature of the prior convictions. GA 43, 48-49.

The government also argued that severance or bifurcation would likely confuse the jury and prejudice the government because a substantial part of the government's evidence related to Page's possession of the firearm, and the jury would be left to speculate as to why this evidence was necessary if they were not told that Page's firearm possession was a violation of federal law. GA 37-38, 40-43. The district court ultimately framed the issue as:

> So it seems that what we're considering is a single trial of all these counts in which the jury will learn about the defendant's prior felony record on the one hand, and on the other, two trials, lasting a few days addressing the drug counts, and a second trial lasting another couple of days. That's what we're considering.

GA 48.

On September 16, 2009, the district court denied Page's motion to sever. A 24. In denying the motion, the district court stated:

> The defendant has agreed to stipulate that he has a prior felony conviction. The jury will be made aware that he has stipulated to having been convicted of a prior felony, but no description of the facts underlying his prior conviction will be provided and no other mention will be made of his criminal record during trial unless he chooses to testify. Together with a limited instruction to the jury, this arrangement will serve the interest in judicial economy without unduly prejudicing the defendant. *See United States v. Gilliam*, 994 F.2d 97, 100 (2d Cir. 1993); *United States v. Smith*, 2008 WL 3200210, at *3 (E.D.N.Y. Aug. 5, 2008). So ordered.

Id.

E. Trial

Based on the evidence presented at trial, the jury reasonably could have found the following facts, which do not appear to be in dispute on appeal.[3] In late November,

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[3] The government's witnesses at trial were Norwich Police Detective Rob Blanch, DEA Special Agent Eric Ebrus, DEA Task Force Agents John Rossetti and Frank Bellizzi, CW1, Josephine Sullivan, Lakeesha Sullivan, Forensic Science Examiner Christine Roy and Latent Print Examiner Kevin

2007, CW1 was arrested by the Norwich Police Department on assorted narcotics charges. GA 80-82. CW1 provided a statement to investigators and agreed to cooperate. GA 82-83. On December 4, 2007, CW1 told investigators that he just spoke to Page about buying an ounce of crack cocaine. GA 194-195. Acting under the supervision of Norwich Police detectives and DEA agents, CW1 placed a monitored and recorded telephone call to Page for the purpose of arranging a narcotics deal. GA 89-91. CW1 knew Page from when they both lived in New Jersey and then re-connected with him after they both came to Connecticut. GA 182. CW1 was buying crack cocaine from Page and an associate of Page, whom CW1 knew as Kareem Swinton. GA 183-185. During the recorded call, Page told CW1 to go see an unnamed female, who CW1 knew was Sullivan, to conduct the deal. GA 87-93, 95, 196-197. CW1 knew that Sullivan was Page's girlfriend, and he had previously purchased drugs from her after negotiating the transaction with Page. GA 95. Sullivan was indeed Page's girlfriend and his accomplice in his drug distribution business since the Summer of 2007. GA 260-264, 267-268.

CW1 was provided with $800 in evidence funds, and was equipped with an audio recorder and transmitter. GA 97-99. CW1 met with Sullivan at her Boswell Street apartment and purchased what was later confirmed to be 27.4 grams of cocaine base for $800. GA 99-102, 349. Upon completion of the deal, CW1 met with investigators at a prearranged location where CW1 turned over the

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crack cocaine. GA 101-102. At the direction of investigators, CW1 placed another call to Page and confirmed that he paid the $800 to Sullivan and that he still owed him money for drugs previously purchased. GA 104-105, 107, 193, 200-201.

In the spring of 2008, Page stopped selling crack cocaine, and began selling heroin. GA 267-268. Soon thereafter, Sullivan moved to 143 Hickory Street. GA 269. Page delivered packaged heroin to 143 Hickory Street on a daily basis to be sold to customers by Sullivan. GA 269. Page, however, set the price and provided the customers. GA 271-272.

On the evening of July 23, 2008, a vehicle driven by Malissa Hurry, Page's other girlfriend, was damaged when someone threw a bottle at the windshield. GA 276-279. Page became enraged. GA 278. Outside *Rumors*, the bar where Hurry's car was damaged, Page angrily waved a gun demanding to know who threw the bottle. GA 278-279. Page, Sullivan, Hurry and others eventually left *Rumors* and went to another Norwich bar where they stayed until closing time. GA 281-282. After the bar closed, Sullivan returned to 143 Hickory Street where Page and Hurry were parked outside the apartment. GA 283. Page's agitation was again evident as he continued to brandish the firearm. GA 284-287. Inside 143 Hickory Street, Page continued to rant about the bottle incident, accusing others of breaking the car window. GA 287-288, 399-400. Eventually, Page prepared to leave. GA 288. Sullivan urged him not to take the gun with him to avoid getting in trouble. GA 288. Page agreed, and Sullivan

placed the gun in her room, near the mattress. GA 288-289.

Law enforcement officers obtained a state search warrant for 143 Hickory Street. GA 110-111. In the early morning hours of July 24, 2008, federal and local law enforcement agents made entry into 143 Hickory Street and executed the search warrant. GA 112. Sullivan and her cousin, Lakeesha Sullivan, were present in the apartment. GA 112-113. A search of the kitchen resulted in the seizure of a bundle (ten dose bags) of packaged heroin in the kitchen. GA 118-119. A search of the bedroom resulted in the seizure of several plastic bags containing marijuana. GA 126-127. Inside an interior pocket of Sullivan's purse, investigators found an additional 77 bags of heroin. GA 128-130, 360-363. The officers also seized a Smith & Wesson .45 caliber revolver, loaded with four rounds of ammunition, from the bedroom floor next to the mattress. GA 131, 133-134.

Officers later located Page at Hurry's residence in South Windham, Connecticut. GA 354. They advised him of his *Miranda* rights, which he acknowledged and waived. GA 355. He admitted that the firearm and heroin recovered at the Hickory Street residence belonged to him. GA 355-356, 508. When officers informed him that he was being arrested for selling crack cocaine, he denied the charge and stated that he only sold heroin. GA 356. Officers transported Page from Hurry's residence to United States District Court in Hartford. GA 506. During the trip, Page again denied selling cocaine, said that he

only sold "dope," and explained how and where he acquired his heroin. GA 510-511.

The firearm seized from 143 Hickory Street, a Smith & Wesson .45 caliber pistol, was submitted to the State of Connecticut Forensic Lab to be swabbed for DNA material and processed for the presence of latent prints. No identifiable latent prints were developed from the firearm. GA 492-495. The firearm did, however, retain DNA material. GA 437. Page's DNA profile was included as a contributor to the DNA mixture collected from the metal frame of the firearm, and the statistical probability of another contributor with the same DNA profile ranged from one in 670 million in the Hispanic population to one in 2.3 billion in the African-American population. GA 465-466.

Upon completion of the testimony, the parties stipulated that the Smith & Wesson .45 caliber revolver was a firearm, as defined in 18 U.S.C. § 921(a)(3), and was manufactured in the Commonwealth of Massachusetts. GA 535-536. The parties further stipulated that "prior to July 24, 2008, Anthony Page was convicted of a crime punishable by imprisonment for a term exceeding one year in New Jersey Superior Court, Essex County, New Jersey." A 536. There was no other evidence of the defendant's felony conviction offered at trial. The district court provided the following limiting instruction regarding the felony conviction:

> [T]he defendant's prior conviction may be considered only for the fact that it exists and not for

> any other purpose. You are not to consider it for any other purpose. You are not to speculate as to what the conviction was for nor may you consider the prior conviction in deciding whether the government has proven that the defendant actually possessed the firearm as alleged in the indictment.

A 57. Page did not object to this charge and made no additional requests for severance.

Summary of Argument

The district court did not abuse its discretion in denying the defendant's motion to sever the felon in possession charge in count six from the narcotics offenses charged in counts two, four and five. Indeed, the district court properly concluded that judicial economy would be served by trying these counts together because there was a substantial overlap in the evidence that would have been offered in separate trials. Moreover, any danger of prejudice was significantly reduced by the use of a sanitized stipulation as to Page's prior felony conviction and a specific, limiting instruction by the district court regarding the jury's extremely narrow consideration of that stipulation.

Argument

I. The district court did not abuse its discretion in denying the defendant's motion to sever the felon in possession offense from the narcotics offenses.

A. Relevant facts

The relevant facts are set forth above in the Statement of Facts.

B. Governing law and standard of review

Rule 8(a) provides for the joinder of offenses "when they are (1) based on the same act or transaction, or (2) based on two or more acts or transactions connected together or constituting parts of a common scheme or plan, or (3) of the same or similar character." *United States v. Turoff*, 853 F.2d 1037, 1042 (2d Cir. 1988). "Joinder is proper where the same evidence may be used to prove each count." *United States v. Blakney*, 941 F.2d 114, 116 (2d Cir. 1991). Joinder is also proper if the counts have a "sufficient logical connection" to each other. *See United States v. Ruiz*, 894 F.2d 501, 505 (2d Cir. 1990).

Rule 8(a) also authorizes joinder of offenses which share a similar character. "Similar" charges include those that are "somewhat alike," or those "having a general likeness" to each other. *See United States v. Werner*, 620 F.2d 922, 926 (2d Cir.1980). Counts that have a "sufficient logical connection" to each other are properly joined, *see Ruiz*, 894 F.2d at 505, as are those "where the same

evidence may be used to prove each count." *Blakney*, 941 F.2d at 116. "[E]vidence of narcotics trafficking may be properly admitted to show knowing possession of a weapon." *United States v. Carrasco*, 257 F.3d 1045, 1048 (9th Cir. 2001) (quoting *United States v. Butcher*, 926 F.2d 811, 816 (9th Cir. 1991). "Firearms are known tools of the trade of narcotics dealing because of the danger inherent in that line of work." *Id.* "There are innumerable precedents of this court approving the admission of guns in narcotics cases as tools of the trade." *United States v. Muniz*, 60 F.3d 65, 71 (2d Cir. 1995) (citing cases); *see also Rosario v. United States*, 164 F.3d 729, 735 (2d Cir. 1998)("in the drug culture, 'firearms are the tools of the trade'"); *United States v. Becerra*, 97 F.3d 669, 671 (2d Cir. 1996) (affirming admission in narcotics prosecution of evidence of ammunition found during search "because drug dealers commonly keep firearms on their premises as tools of the trade").

Even if offenses are properly joined, Fed. R. Crim. P. 14 authorizes severance in certain limited circumstances. Rule 14(a) provides that "[i]f the joinder of offenses or defendants in an indictment . . . appears to prejudice a defendant or the government, the court may order separate trials of counts, . . . or provide any other relief that justice requires." *Id.* A district court's ruling on a motion to sever is reviewed for an abuse of discretion. *See Blakney*, 941 F.2d at 116. The appellate court will not overrule a district court's decision to deny a motion to sever "unless the defendant demonstrates that the failure to sever caused him substantial prejudice in the form of a miscarriage of

justice." *Id.* (internal quotation marks and citations omitted).

"[A] defendant who seeks separate trials under Rule 14 carries a heavy burden of showing that joinder will result in substantial prejudice." *United States v. Amato*, 15 F.3d 230, 237 (2d Cir. 1994) (internal quotation marks and citations omitted). A defendant seeking severance must further show that unfair prejudice resulted from the joinder, not merely that the defendant "might have had a better chance for acquittal at a separate trial." *United States v. Rucker*, 586 F.2d 899, 902 (2d Cir. 1978). Indeed, "a defendant seeking severance must show that the prejudice to him from joinder is sufficiently severe to outweigh the judicial economy that would be realized by avoiding multiple lengthy trials." *United States v. Walker*, 142 F.3d 103, 110 (2d Cir. 1998) (citing *United States v. Panza*, 750 F.2d 1141, 1149 (2d Cir. 1984)). There is no prejudice to the defendant "where a severance of counts would not result in a segregation of evidence." *United States v. Ballis*, 28 F.3d 1399, 1408-1409 (5th Cir. 1994); *see also United States v. Jones*, 880 F.2d 55, 62 (8th Cir. 1989) (finding no prejudice in failure to sever drug distribution charges from felon in possession charge when jury was instructed that it could consider felony conviction only as to gun charge).

Even if prejudice is shown, Rule 14 does not mandate severance. *See Walker*, 142 F.3d at 110 (citing *Zafiro v. United States*, 506 U.S. 534, 538-39 (1993). "Rule 14 does not require severance even if prejudice is shown; rather, it leaves the tailoring of the relief to be granted, if any, to the

district court's sound discretion." *Zafiro*, 506 U.S. at 538-39. "Rules 8(b) and 14 are designed to promote economy and efficiency and to avoid a multiplicity of trials, so long as these objectives can be achieved without substantial prejudice to the right of the defendants to a fair trial." *Id.* at 539 (quoting *Bruton v. United States*, 391 U.S. 123, 131, n. 6 (1968)). "[L]imiting instructions are often sufficient to cure any risk of prejudice." *Id.* (citing *Zafiro*, at 539).

This Court has on more than one occasion confirmed that a stipulation that the defendant was previously convicted of a felony without reference to the underlying nature or facts of the felony offense assures the defendant of a fair trial on a single-count § 922(g) indictment. *See, e.g., United States v. Chevere*, 368 F.3d 120, 121 (2d Cir. 2004) (per curiam) (holding that district court has no discretion to allow a defendant to withhold the prior felony conviction element of the offense from the jury by stipulating to that element); *United States v. Belk*, 346 F.3d 305, 311 (2d Cir. 2003) (holding that "proper curative" instruction and the need for "evidence of a prior conviction to be narrowly tailored to the fact of the conviction itself" reasonably protects the defendant's right to a fair trial). "In a prosecution under § 922(g)(1), there are no circumstances in which a district court may remove the element of a prior felony conviction entirely from the jury's consideration by accepting a defendant's stipulation to that element." *Chevere,* 368 F.3d at 122; *see also United States v. Amante*, 418 F.3d 220 (2d Cir. 2005) (ordering that bifurcation of felon in possession offense

without government's consent was abuse of discretion).

C. Discussion

Page argues that the mere mention of the fact of his prior felony conviction unfairly prejudiced his ability to receive a fair trial on the narcotics charges so that severance of the firearms charge was required. *See* Def.'s Brief at 6. Given the inextricable connection between the firearm and narcotics charges, however, evidence of the narcotics conspiracy and distribution would have been admissible in any separate trial on the felon in possession charge. Therefore, the district court's denial of Page's motion to sever did not cause him "substantial prejudice in the form of a miscarriage of justice." *Blakney*, 941 F.2d at 116.

Severance, if granted, would not have promoted judicial economy as the two trials would have required near identical evidence and burdened multiple witnesses in having to testify to identical information at both trials. If the felon in possession charge had been tried first, substantial evidence underlying the narcotics trafficking charges would have likewise been offered. Sullivan would have testified and, to do so credibly and effectively, she would have needed to explain her full involvement in the drug conspiracy, her guilty plea to distributing drugs to CW1 in the deal orchestrated by Page, and her knowledge of and role in the possession of heroin recovered from the Hickory Street apartment. In fact, Sullivan's delivery of crack cocaine to CW1 in December 2007 resulted in her arrest and conviction and provided her the opportunity to

cooperate. Evidence of the December 2007 distribution of crack cocaine would also have been offered through CW1 to corroborate Sullivan's testimony that she did not act alone in the drug conspiracy and that she had an established relationship between Page and Sullivan. The jury would have needed to understand the nature and scope of the relationship between Page and Sullivan to consider Sullivan's testimony as to how and why Page's gun was found at the Hickory Street apartment.

In the event of a separate trial on the narcotics charges, evidence of the firearm would have been offered as evidence that was inextricably intertwined with the heroin seized from the apartment. The firearm evidence also would have been relevant as a tool of Page's drug trade. Finally, the firearm evidence would have been relevant to establish Page's connection to the Hickory Street apartment and, as a result, his connection to the heroin seized from that apartment. In addition to offering evidence of the firearm itself, the government would have offered the DNA evidence to corroborate Sullivan's testimony and established Page's possession of the firearm before it was left in the Hickory Street apartment. The government also would have offered Page's post-arrest statement that the heroin and gun belonged to him since it directly inculpated him and corroborated Sullivan's testimony. In sum, had the felon-in-possession charge been severed, there would have been little difference in the evidence presented in either trial, and there would have been a significant amount of cross-over and duplication of evidence.

Moreover, bifurcation of the felony conviction element of the § 922(g) offense would have been no more appropriate here than it was in *Chevere*, *Belk* and *Amante* because it would have:

> forc[ed] the jury to deliberate about the issue of [firearm or] ammunition possession without knowing that the charged crime requires a prior felony. This can confuse the jurors and unfairly prejudice the government because the jurors are being asked to deliberate about facts that they most likely would not consider to be a crime: simply possessing a firearm or ammunition.

Amante, 418 F.3d at 224; *see also Old Chief v. United States*, 519 U.S. 172, 189 (1997) ("People who hear a story interrupted by gaps of abstraction may be puzzled at the missing chapters, and jurors asked to rest a momentous decision on the story's truth can feel put upon at being asked to take responsibility knowing that more could be said than they have heard.").

The denial of Page's motion to sever did not cause him substantial prejudice, and he has failed to demonstrate otherwise. The only evidence of Page's prior felony conviction was offered through a sanitized stipulation at the conclusion of the trial. GA 536. The stipulation did not reference the nature or number of Page's prior felony offenses, and it was mentioned only once during closing arguments. Tr. 9/23/09 at 511-512. Based on the quality and quantity of evidence implicating Page in the conspiracy and distribution of narcotics, it is difficult to

imagine how Page could have suffered substantial prejudice through the presentation of his status as a felon in a sanitized stipulation.

In addition and most importantly, the district court provided a very specific limiting instruction that "the defendant's prior conviction may be considered only for the fact that it exists and not for any other purpose." A 57. The court told the jury, "You are not to consider it for any other purpose. You are not to speculate as to what the conviction was for nor may you consider the prior conviction in deciding whether the government has proven that the defendant actually possessed the firearm as alleged in the indictment." A 57; *see also Zafiro*, 506 U.S. at 540 ("[E]ven if there were some risk of prejudice, here it is of the type that can be cured with proper instructions, and juries are presumed to follow their instructions.").

In single-count indictments charging § 922(g) offenses, jurors are routinely instructed to consider the fact of defendant's conviction only as to that element of the offense. Not only are jurors expected to follow the district court's limiting instruction in these cases, but the Second Circuit has mandated that the jury be advised of the defendant's felony conviction. *See Chevere*, 368 F.3d at 122 ("in a prosecution under § 922(g)(1), there are no circumstances in which a district court may remove the element of a prior felony conviction entirely from the jury's consideration by accepting a defendant's stipulation to that element."). If jurors are presumed to follow the instruction in a single count § 922(g) case, they can certainly be expected to follow the same instruction in a

case with multiple counts when a sanitized stipulation is presented along with a limiting instruction. *See Belk*, 346 F.3d at 311 (holding that "proper curative" instruction and the need for "evidence of a prior conviction to the narrowly tailored to the fact of the conviction itself" reasonably protects the defendant's right to a fair trial.). Here, the district court acted properly, and well within its discretion, in denying Page's motion to sever when it limited evidence of Page's prior felony conviction to a sanitized stipulation and instructed the jury to consider it only for the fact that exists on the felon in possession charge and not for any other purpose. By hearing that a defendant was a felon by stipulation without reference to the number of convictions or the nature of the felony, any potential prejudice was minimal. *See id.* at 309 ("risk of unfair prejudice does not outweigh substantially the probative value of the evidence where, as here, it is presented by way of stipulation to the fact of a single prior felony conviction and will be accompanied by a curative instruction.").

Page argues that no limiting instruction could eliminate the prejudice caused when the jury was informed of his status as a felon. Def.'s Brief at 6-7. Page's argument rests almost entirely on this Court's decision in *United States v. Jones*, 16 F.3d 487 (2d Cir. 1994). The decision in *Jones*, however, is readily distinguishable in that it rested on the Court's conclusion that the government intentionally obtained a superseding indictment adding the felon-in-possession charge to buttress a weak case and bias the jury, after nearly losing a trial of a bank robbery charge. *Id.* at 492. The *Jones* court found, first, that there

was insufficient evidence as to the interstate nexus element required for the § 922(g)(1) charge, and, second, that the district court abused its discretion in not severing or bifurcating the § 922(g) charge from the other offenses. In so ruling, the Court reasoned that there was an overwhelming probability that the jurors did not follow the district court's limiting instruction not to consider the defendant's criminal history in deciding those counts other than the § 922(g) count. *See Jones*, 16 F.3d at 493.

The procedural and factual history of *Jones*, however, can be readily distinguished from this case. In *Jones*, the government first sought and obtained an indictment against the defendant on the charges of armed bank robbery and using a firearm during a crime of violence. *See id.* at 489. A mistrial was declared when the jury failed to reach a unanimous verdict. *Id.* In fact, the jurors were deadlocked 10 to 2 for acquittal. *Id.* The government then obtained a superseding indictment which included two additional counts charging possession of a firearm by a convicted felon based on testimony that the defendant was in possession of two firearms during the robbery. *Id.* A second jury trial resulted in the defendant's conviction on four of the five counts of the superseding indictment, including one of the counts charging the defendant as a felon in possession of a firearm. *Id.* The district court had denied the defendant's request for severance or, alternatively, for bifurcation, of the § 922(g) counts. *Id.* The district court did, however, provide the jury with a limiting instruction as to its consideration of the defendant's felony conviction. *Id.*

In ruling that the evidence was insufficient to sustain a conviction on the § 922(g) count, the Second Circuit concluded that the only evidence establishing the interstate nexus element was the testimony of an FBI agent that no handguns were presently manufactured in the state of New York. *See Jones*, 16 F.3d at 491. Since the gun was not recovered or otherwise identified, and firearms were indeed previously manufactured in the State of New York, any inference by the jury that this firearm was manufactured elsewhere was "arbitrary" and therefore the conviction could not be sustained. *See id.* at 492.

The *Jones* court next addressed the district court's decision not to sever or bifurcate the § 922(g) count. In ruling that the district court abused its discretion in not granting defendant's motion, the *Jones* court questioned the tactics of the government in obtaining a superseding indictment after a mistrial in which a majority of jurors were prepared to acquit the defendant. *Id.* The addition of these counts, the Court noted, had no impact on the sentencing guidelines, and there were no new facts which justified their inclusion in the superseding indictment. *Id.* Thus, the Court noted, "the ineluctable conclusion is that the government added the count solely to buttress its case on the other counts." *Id.* When the case was viewed in this context, the Court concluded that the jury did not adhere to the district court's limiting instruction as to the defendant's felony conviction. *See id.* at 493.

The *Jones* court further held that the Government's failure to establish the interstate nexus element created a "retroactive misjoinder" situation, which justified the

reversal of the convictions on the remaining counts. *Id*. "Retroactive misjoinder arises where joinder of multiple counts was proper initially, but later developments - such as a district court's dismissal of some counts for lack of evidence or an appellate court's reversal of less than all convictions - render the initial joinder improper." *Id.* As the *Jones* court explained, "[T]here is an irresistible inference that Jones suffered compelling prejudice because of the improper submission of the unsupported felon in possession count." *Id.*

The unusual circumstances in *Jones* are quite distinct from the facts of this case. First, the superseding indictment in this case was returned before any trial and simply added offenses related to Page's drug trafficking operation with Sullivan. Specifically, it added the firearms offense, four additional narcotics trafficking offenses, and a second defendant (Sullivan). A 17-22. The firearm and the heroin were recovered together at the Hickory Street apartment and were timely charged together in the superseding indictment, after having not been charged in the original indictment. Second, there was no intervening trial resulting in a near-acquittal before the superseding indictment was sought and returned, and therefore there is no suggestion of improper motive. Third, there is no suggestion that the government's inclusion of the § 922(g) offense was intended to buttress claims that were viewed as factually weak. On the contrary, as stated above, the subject firearm was recovered in the same bedroom as the heroin charged in count five, to which the defendant admitted possessing. Moreover, there was ample evidence proving Page's involvement in the crack cocaine and

heroin conspiracies charged in counts two and four. The felon in possession charge was not included to buttress other charges, but rather to complete the story and reflect the full scope of Page's criminal conduct. Lastly, the factual frailties of the interstate nexus element in the *Jones* prosecution did not exist in the present case. The firearm charged in this case was recovered, was offered as a full exhibit at trial, and was the subject of an interstate nexus stipulation. GA 535.

None of the other cases cited by Page are persuasive on his argument that he suffered substantial prejudice by virtue of the denial of his motion to sever. In *United States v. Joshua*, 976 F.2d 844 (3d Cir. 1992), although the court ordered bifurcation, the government had not opposed the defendant's motion for bifurcation. In *United States v. Dockery*, 955 F.2d 50, 54 (D.C. Cir. 1992), the appellate court concluded that the district court abused its discretion in not severing the § 922(g) count, but it specifically relied on the government's refusal to stipulate to the defendant's prior conviction, and the government's repeated reference to the felony conviction during the trial. As acknowledged herein, the government and Page agreed to a sanitized stipulation regarding his felony conviction, that stipulation was mentioned only once during the trial and once during the closing arguments.[4]

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[4] The defendant also relies on a district court decision. In *United States v. Desantis*, 802 F. Supp. 794 (E.D.N.Y. 1992), the district court severed a § 922(g)(1) count from the remaining counts in the indictment where Desantis and his co-defendant were charged with assorted violations arising from

This Court's decision in *Jones* does not stand for the proposition that a felon in possession charge must always be severed from all other charged offenses. Rather, the resolution of the severance issue will rest on the facts of each individual case, as the *Jones* decision itself rested on a unique set of facts and procedural history. Here, the facts underlying the felon-in-possession charge were inextricably intertwined with the facts underlying the narcotics charges, so that separate trials on these counts would have resulted in the presentation of much of the same evidence in both trials. Moreover, the felony conviction itself was presented through a sanitized stipulation, was barely mentioned during the trial and was the subject of a specific and narrowly tailored limiting instruction. Page has failed to demonstrate that substantial prejudice resulted from the denial of his motion to sever and that the district court abused its discretion in failing to sever the § 922(g) count. Courts in other circuits have

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a loansharking conspiracy, but only Desantis was charged with a violation of § 922(g). *See id.* at 796. The district court balanced the potential prejudice to the defendants against the conservation of judicial resources and concluded that the "balance must be struck in favor of prejudice." *Id.* at 802. *Desantis* does not dictate the result here because *Desantis* is a district court decision involving its own unique facts and cannot be read to suggest that the district court here abused its discretion in denying Page's motion to sever. Unlike *Desantis*, there was substantial overlap in the evidence that would have been presented had the felon-in-possession count been severed, and there was no co-defendant proceeding to trial.

held that, where other charges are included with a § 922(g) charge, severance is not required if there is a sanitized stipulation and a limiting instruction. *See United States v. Price*, 265 F.3d 1097, 1105-1106 (10th Cir. 2001) (holding that felon in possession charge properly joined with narcotics charge, and joinder of the charges did not deny defendant of fundamentally fair trial); *United States v. Felici*, 54 F.3d 504, 506 (8th Cir. 1995) (holding that stipulation that defendant convicted of two felonies in 1970 without reference to the nature of the felonies did not result in unfair prejudice in case charging multiple narcotics charges with § 922(g) charge); *United States v. Bullock*, 71 F.3d 171, 174-75 (5th Cir. 1995) (holding that felon in possession charge properly joined with bank robbery and any possible prejudice was cured by proper instruction).

Conclusion

For the foregoing reasons, the judgment of the district court should be affirmed.

Dated: March 4, 2011

Respectfully submitted,

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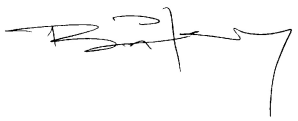

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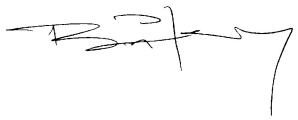
CERTIFICATION PER FED. R. APP. P. 32(A)(7)(C)

This is to certify that the foregoing brief complies with the 14,000 word limitation requirement of Fed. R. App. P. 32(a)(7)(B), in that the brief is calculated by the word processing program to contain approximately 8,075 words, exclusive of the Table of Contents, Table of Authorities and Addendum of Statutes and Rules.



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ADDENDUM

Federal Rules of Criminal Procedure:

Rule 8. Joinder of Offenses or Defendants

(a) Joinder of Offenses.

The indictment or information may charge a defendant in separate counts with 2 or more offenses if the offenses charged -- whether felonies or misdemeanors or both -- are of the same or similar character, or are based on the same act or transaction, or are connected with or constitute parts of a common scheme or plan.

(b) Joinder of Defendants.

The indictment or information may charge 2 or more defendants if they are alleged to have participated in the same act or transaction, or in the same series of acts or transactions, constituting an offense or offenses. The defendants may be charged in one or more counts together or separately. All defendants need not be charged in each count.

Rule 14. Relief from Prejudicial Joinder

(a) Relief.

If the joinder of offenses or defendants in an indictment, an information, or a consolidation for trial appears to prejudice a defendant or the government, the court may order separate trials of counts, sever the defendants' trials, or provide any other relief that justice requires.

(b) Defendant's Statements.

Before ruling on a defendant's motion to sever, the court may order an attorney for the government to deliver to the court for in camera inspection any defendant's statement that the government intends to use as evidence.