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Yyyyyy Xxxx  
7

8 UNITED STATES DISTRICT COURT  
9 CENTRAL DISTRICT OF CALIFORNIA  
10 WESTERN DIVISION  
11

12 UNITED STATES OF AMERICA,	)	NO. CR ZZZZZZZZZZZZZZ
13 Plaintiff,	)	NOTICE OF MOTION; MOTION
14 v.	)	FOR SEVERANCE AND TRIAL
15 Yyyyyy Xxxx,	)	ON STIPULATED FACTS IF
16 Defendant.	)	COURT DENIES MOTION TO
17	)	SUPPRESS EVIDENCE AND
	)	GOVERNMENT REFUSES TO
	)	AGREE TO CONDITIONAL
	)	GUILTY PLEA; MEMORANDUM
	)	OF POINTS AND AUTHORITIES

18 Hearing Date: Nov. 30, 2004  
19 Hearing Time: 8:30 a.m.

20 TO: UNITED STATES ATTORNEY DEBRA W. YANG, AND ASSISTANT  
21 UNITED STATES ATTORNEY MARK AVEIS.  
22

23 PLEASE TAKE NOTICE that on November 30, 2004, at 8:30 a.m., or as soon  
24 thereafter as counsel may be heard, in the courtroom of the Honorable S. James  
25 Otero, United States District Judge, if and only if defendant's presently pending  
26 Motion to Suppress Evidence is denied, defendant will bring on for hearing the  
27 following further motion:  
28

MOTION

1  
2  
3         Defendant, Yyyyyy Xxxx, through his counsel of record, Deputy Federal  
4 Public Defender Carlton F. Gunn, hereby moves this Honorable Court, if and only if  
5 his Motion to Suppress Evidence is denied, for permission to enter a conditional  
6 guilty plea to Count Three of the indictment, pursuant to Rule 11(a)(2) of the Federal  
7 Rules of Criminal Procedure. In the alternative, if the government will not agree to a  
8 conditional guilty plea, defendant moves the Court for a severance of Count Three of  
9 the indictment from Counts One and Two and permission to waive jury and closing  
10 argument on Count Three and proceed to trial before the Court on that count with all  
11 facts stipulated to by the parties. This motion is made pursuant to Rule 11(a)(2) and  
12 Rule 14 of the Federal Rules of Criminal Procedure, and is based upon the attached  
13 memorandum of points and authorities, all files and records in this case, and such  
14 evidence and argument as may be presented at the hearing on the motion.

15  
16   Respectfully submitted,  
17   MARIA E. STRATTON  
18   Federal Public Defender

19 DATED: July \_\_, 2012

20   By \_\_\_\_\_  
  CARLTON F. GUNN  
  Deputy Federal Public Defender  
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1 MEMORANDUM OF POINTS AND AUTHORITIES

2  
3 I.

4 INTRODUCTION

5  
6 Yyyyyy Xxxx is charged in a three-count indictment with possession of  
7 cocaine with intent to distribute, in violation of 21 U.S.C. § 841; possession of a  
8 firearm in furtherance of a drug trafficking crime, in violation of 18 U.S.C. § 924(c);  
9 and being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1).  
10 The defense has filed a Motion to Suppress Evidence, and that motion is scheduled  
11 for hearing on the day of trial, November 30, 2004. The defense believes the Court  
12 should grant the motion and is hopeful that the Court will do so, but is filing this  
13 motion in the event the Court does not rule as the defense hopes.

14  
15 Mr. Xxxx has no basis for contesting the felony possession of a firearm charge  
16 if the motion is denied, and so as to that charge, he will seek only to preserve his right  
17 to appeal if the motion is denied. The defense’s preference is that he do that by  
18 entering a conditional guilty plea to that charge, under Rule 11(a)(2) of the Federal  
19 Rules of Criminal Procedure. That rule provides that a defendant “may enter a  
20 conditional plea of guilty . . . , reserving in writing the right to have an appellate court  
21 review an adverse determination of a specified pretrial motion.” Fed. R. Crim. Pro.  
22 11(a)(2).

23  
24 The government has an apparently absolute right to reject a conditional plea  
25 under Rule 11(a)(2), however. See id. (requiring consent of court and government).  
26 If the government takes that position here, Mr. Xxxx will move in the alternative to  
27 sever the trial of the felon in possession of a firearm count, waive jury for the trial on  
28 that severed count, stipulate to all the facts necessary for conviction, and waive

1 closing argument. In particular, Mr. Xxxx will stipulate that (1) he has a prior felony  
2 conviction, (2) he was in possession of the firearm described in the indictment on or  
3 about June 3, 2004, and (3) his possession was in and affecting interstate and foreign  
4 commerce. See Exhibit A. He will also stipulate to any other facts the government  
5 believes are necessary to conviction on this count.

6  
7 The Court should grant this motion if it must be made because it is the best  
8 accommodation of the concerns which guide the resolution of severance motions.  
9 Those concerns are, on the one hand, the prejudice which arises when a jury hears  
10 that a defendant has a prior felony conviction, and, on the other hand, a concern for  
11 judicial economy by avoiding multiple and duplicative criminal trials. Prejudice is  
12 eliminated by the severance of the felon in possession of a firearm charge. And any  
13 impact on judicial economy is minimized, for the extra trial on the felon in possession  
14 of a firearm charge alone can be a 15-minute affair in which the Court reads the  
15 stipulated facts and finds Mr. Xxxx guilty.

16  
17 II.

18 STATEMENT OF FACTS

19  
20 On June 3, 2004, Mr. Xxxx was bringing his wife, Evelyn Torres, and his  
21 three-year old son home from his wife's mother's house. He pulled into the driveway  
22 of his apartment building. As he did so, police officers pulled in behind his car and  
23 approached Mr. Xxxx to investigate the possibility that he was involved in a drug  
24 offense.

25  
26 The exact circumstances of the contact -- which are disputed by the parties --  
27 are the subject of a Motion to Suppress Evidence and are discussed more fully  
28 therein. What is agreed is that the officers eventually searched Mr. Xxxx's apartment

1 and found cocaine and a gun inside. It is also agreed that Mr. Xxxx provided a  
2 written statement saying that the cocaine and the gun were his responsibility and his  
3 wife had nothing to do with it.

4  
5 Further investigation revealed that Mr. Xxxx has a prior felony conviction that  
6 he sustained in 1999. That is a conviction for taking a vehicle without the owner's  
7 consent, in violation of California Vehicle Code § 10851(a). This is the conviction  
8 that is alleged in support of the felon in possession of a firearm charge in Count Three  
9 of the indictment.

10  
11 III.

12 ARGUMENT

13  
14 The rules governing joinder and severance of charges are Rule 8 and Rule 14  
15 of the Federal Rules of Criminal Procedure. Charges may be severed under Rule 14  
16 even if their joinder is proper under Rule 8. Rule 14 provides:

17 If it appears that a defendant or the government is  
18 prejudiced by joinder of offenses or of defendants in an  
19 indictment or information or by such joinder for trial  
20 together, the court may order an election or separate trials of  
21 counts, grant a severance of defendants or provide whatever  
22 other relief justice requires.

23 Fed. R. Crim. Pro. 14.

24  
25 The Ninth Circuit considered application of Rule 14 to the joinder of a felon in  
26 possession of a firearm charge and other charges in United States v. Lewis, 787 F.2d  
27 1318 (9th Cir. 1986). The court began its discussion by recognizing that “[t]here is ‘a  
28 high risk of undue prejudice whenever . . . joinder of counts allows evidence of other

1 crimes to be introduced in a trial of charges with respect to which the evidence would  
2 otherwise be inadmissible.” Id. at 1321 (quoting United States v. Daniels, 770 F.2d  
3 1111, 1116 (D.C. Cir. 1985)). The court explained:

4           The use of other crimes evidence is not looked on favorably  
5           and its use must be narrowly circumscribed and limited.  
6           United States v. Hodges, 770 F.2d 1475, 1479 (9th Cir.  
7           1985).

8           Our reluctance to sanction the use of evidence  
9           of other crimes stems from the underlying  
10          premise of our criminal justice system, that the  
11          defendant must be tried for what he did, not for  
12          who he is. Under our system, an individual  
13          may be convicted only for the offense of which  
14          he is charged and not for other unrelated  
15          criminal acts which he may have committed.

16          Therefore, the guilt or innocence of the accused  
17          must be established by evidence relevant to the  
18          particular offense being tried, not by showing  
19          that the defendant has engaged in other acts of  
20          wrongdoing.

21          Id. Accord Daniels, 770 F.2d at 1116. The danger that a  
22          jury will infer present guilt from prior convictions cannot be  
23          ignored by the court in deciding whether to sever a charge  
24          that necessitates the introduction of other crimes evidence.

25          Lewis, 787 F.2d at 1321. While upholding a conviction on a joined larceny charge as  
26          to which the evidence was overwhelming, the court vacated a murder conviction as  
27          to which the evidence was not overwhelming. See id. at 1322-23. It held that the  
28          district court should have severed the felon in possession of a firearm charge which

1 had been joined with the larceny and murder charges.

2  
3 Lewis concededly does not establish a per se rule. And the Ninth Circuit has  
4 affirmed the refusal to sever felon in possession of a firearm charges in some cases.  
5 See, e.g., United States v. Von Willie, 59 F.3d 922, 930 (9th Cir. 1995); United States  
6 v. Burgess, 791 F.2d 676, 678-79 (9th Cir. 1986). But in the later case of United  
7 States v. Nguyen, 88 F.3d 812 (9th Cir. 1996), the court reemphasized the concerns  
8 underlying the reversal in Lewis. The court indicated that it was publishing the  
9 opinion in Nguyen

10 To alert trial judges and prosecutors that the practice of  
11 consolidating “felon in possession charges” without  
12 properly safeguarding the defendant from the prejudicial  
13 effect of introducing evidence of the prior felony with other  
14 unrelated felony charges is not looked upon with favor by  
15 this Circuit, or, for that matter, by other Circuits.

16 Id. at 815. The court went on to point out that “trying a felon in possession count  
17 together with other felony charges creates a very dangerous situation because the jury  
18 might improperly consider the evidence of a prior conviction when deliberating about  
19 the other felony charges.” Id. The court concluded by stating that “severance or  
20 bifurcation is the preferred alternative,” and declined to reverse only because of the  
21 strength of the evidence in that case. Id. at 817-18.

22  
23 The concerns evidenced by the Ninth Circuit’s opinions in Lewis and Nguyen  
24 must be given even more weight after the Supreme Court’s decision in Old Chief v.  
25 United States, 519 U.S. 172. The issue in Old Chief was the application of Federal  
26 Rule of Evidence 403 to evidence of a defendant’s felony conviction when the  
27 defendant had offered to stipulate to the fact of conviction. The Supreme Court, like  
28 the Ninth Circuit in Lewis and Nguyen, recognized the powerful prejudicial effect

1 that evidence of a defendant’s prior criminal record may have.

2 [I]mproper grounds [which constitute “unfair prejudice”  
3 under Rule 403] certainly include the one that Old Chief  
4 points to here: generalizing a defendant’s early bad act into  
5 bad character and taking that as raising the odds that he did  
6 the later bad act now charged (or worse, as calling for  
7 preventive conviction even if he should happen to be  
8 innocent momentarily). As then-Judge Breyer put it,  
9 “although . . . ‘propensity evidence’ is relevant, the risk that  
10 a jury will convict for crimes other than those charged -- or  
11 that, uncertain of guilt, it will convict anyway because a bad  
12 person deserves punishment -- creates a prejudicial effect  
13 that outweighs ordinary relevance.”

14 Old Chief v. United States, 519 U.S. at 180-81 (quoting United States v. Moccia, 681  
15 F.2d 61, 63 (1st Cir. 1982)). Because of this concern, Old Chief held that the  
16 government could be compelled to accept a stipulation in lieu of presenting evidence  
17 about the defendant’s felony conviction.

18  
19 Old Chief does give a defendant the ability to lessen the prejudice, by requiring  
20 the government to stipulate that he had been convicted of a felony without specifying  
21 the felony he was convicted of. That still leaves the prejudice of knowing there is  
22 some felony conviction, however. And in some instances a stipulation can place the  
23 defendant in a worse position, for it will leave the jury to speculate about such violent  
24 offenses as murder, assault, robbery, and rape and/or whether there is another drug  
25 offense. This problem was discussed at length by the California Supreme Court in  
26 another context in People v. Rollo, 20 Cal. 3d 109, 569 P.2d 771, 141 Cal. Rptr. 177  
27 (1977).

28 [I]t is highly unlikely that a jury which is advised only that



1 the defendant has been convicted of "a felony" will let the  
2 matter rest. Normal human curiosity will inevitably lead to  
3 brisk speculation on the nature of that conviction, and the  
4 range of such speculation will be limited solely by the  
5 imaginations of the individual jurors. Some may assume,  
6 for example, that the defendant's prior conviction was  
7 similar to or identical with the charge for which he is on  
8 trial. (Footnote omitted.) Others may speculate that the  
9 conviction involved some form of unspeakable conduct,  
10 such as torture murder, gang rape, or child molestation.  
11 Why else, the jurors might naturally ask, was the name of  
12 the crime withheld from them?

13 Rollo, 20 Cal. 3d at 119. See also United States v. Shaw, 701 F.2d 367, 385 (5th Cir.  
14 1983) (approving district court reasoning that evidence of nature of prior convictions  
15 "would result in less prejudice . . . than would allowing the jury to speculate as to  
16 whether the prior offenses were similar shootings or murders"), cert. denied, 465 U.S.  
17 1067 (1984). While the choice Old Chief gives is better than nothing, it falls short of  
18 the protection provided by severance.

19  
20 The concern which a court normally must consider on the other side of the  
21 balance in deciding a severance motion is not present here, moreover. That concern  
22 is what the case law describes as "the dominant concern with judicial economy."  
23 United States v. Hutchison, 22 F.3d 846, 853 (9th Cir. 1993) (quoting United States  
24 v. Whitworth, 856 F.2d 1268, 1277 (9th Cir. 1998), cert. denied, 489 U.S. 1084  
25 (1989)). This is a legitimate concern to which the courts have given great weight, but  
26 it is not present here in light of Mr. Xxxx's offer of a conditional plea and/or  
27 stipulated facts bench trial with closing argument waived. Either procedure will take  
28 approximately 15 minutes of the court's time. And Mr. Xxxx will be prepared to

1 enter the conditional plea or proceed with a stipulated facts trial first, so there can be  
2 no concern that he will change his mind when it is too late to conduct a joint trial.<sup>1</sup>

3  
4 IV.

5 CONCLUSION

6  
7 If the Court denies Mr. Xxxx's motion to suppress, it should either accept the  
8 conditional plea to the felon in possession of a firearm charge, if there is no objection  
9 by the government, or sever the felon in possession charge, accept a jury waiver, a  
10 complete stipulation of facts, and a waiver of closing argument for the trial on that  
11 charge, and then find Mr. Xxxx guilty of that charge on the stipulated facts. The  
12 court should then proceed with the jury trial on the 21 U.S.C. § 841(a)(1) charge and  
13 the 18 U.S.C. § 924(c) charge.

14  
15 Respectfully submitted,

16 MARIA E. STRATTON  
17 Federal Public Defender

18 DATED: July \_\_, 2012

19 By \_\_\_\_\_  
20 CARLTON F. GUNN  
21 Deputy Federal Public Defender

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23  
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25  
26 \_\_\_\_\_  
27 <sup>1</sup> The government can probably be compelled to accept the proposed  
28 stipulation of facts under Old Chief. While it cannot be compelled to accept a jury  
waiver and/or conditional plea, it is hoped that the government will not reject those  
proposals. If it does, it should not be able to use such intransigence to bootstrap  
prejudicial evidence into a joint trial.