

APPENDIX

19-189-cr

United States v. Griffin

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

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

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

PRESENT: GUIDO CALABRESI,
RICHARD C. WESLEY,
RICHARD J. SULLIVAN,
Circuit Judges.

UNITED STATES OF AMERICA,

Appellee,

v.

No. 19-189-cr

JUNIOR GRIFFIN,

Defendant-Appellant,

MARC BENVENUTTI, VERDELL PICKNEY,
AKA VERDELL DAVIS, AKA V-12, PAUL GIST,
AKA PEEWEE, AKA SWEET PEA, ROBERT GIST,

AKA G-BABY, CICERO WILLIAMS, AKA TUBES,
JOSEPH ENCARNACION, AKA CABEZA,
KELVIN POLANCO, AKA PSYCHO, AKA FRESH,
JABARI ADAMS, AKA FLEA, AKA BARI, BRANDON
SMITH, AKA SKILLZ, JOSEPH RIVERA, AKA JOJO,
CYNTHIA WOODS, AKA BROOKLYN, KEITH
NESBITT, AKA BALDY, GREGORY HERNANDEZ,
AKA KANE, EDUARDO ROSA, AKA LIL BRO ED,
LUIS CABAN, AKA JAY, DANIEL RENVIL, AMANDA
LOPEZ, MADELINE OLIVARES, LANCE WRIGHT,
KENNETH LACEN, AKA MONTANA, JONATHAN
PEREZ, MALIK ABDUL,

Defendants.

FOR APPELLANT:

JAMES E. NEUMAN, Law Office
of James E. Neuman, New
York, NY.

FOR APPELLEE:

DANIELLE R. SASSOON,
Assistant United States
Attorney (Michael K. Krouse,
Jacob Warren, Won S. Shin,
Assistant United States
Attorneys, *on the brief*), for
Geoffrey S. Berman, United
States Attorney for the
Southern District of New York,
New York, NY.

Appeal from a judgment of the United States District Court for the Southern District of New York (Gregory H. Woods, *Judge*).

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

Junior Griffin appeals from a judgment of the district court (Woods, *J.*) following a jury trial in which Griffin was convicted of one count of conspiracy to distribute or possess with intent to distribute 280 grams or more of cocaine base and 500 grams or more of cocaine, in violation of 21 U.S.C. § 846, and one count of distribution or possession with intent to distribute a quantity of cocaine in violation of 21 U.S.C. § 841(b)(1)(C). On appeal, Griffin argues that the district court erred in denying his motion to sever Counts One and Two under Federal Rules of Criminal Procedure 8(a) and 14(a), and in excluding certain recorded communications under Federal Rule of Evidence 807's residual hearsay exception. We assume the parties' familiarity with the underlying facts and the record of prior proceedings, to which we refer only as necessary to explain our decision to affirm.

1. Severance of Counts

"We review the District Court's denial of a Rule 8(a) motion to sever counts *de novo*, and conduct a twofold inquiry: whether joinder of the counts was proper, and if not, whether misjoinder was prejudicial to the defendant." *United States v. Litwok*, 678 F.3d 208, 216 (2d Cir. 2012) (internal quotation marks and citations omitted). As relevant here, joinder under Rule 8(a) is appropriate where counts "are of the same or similar character." Fed. R. Crim. P. 8(a). "'Similar' charges include those that are 'somewhat alike,' or those 'having a general likeness' to each other." *United States v. Rivera*, 546 F.3d 245, 253 (2d Cir. 2008). We find no error in joining the two counts at issue here. Counts One and Two are clearly "somewhat alike," as they both involved the sale and purchase of the same narcotic, in the same city, within the same approximately one-year period. *Id.* Although the counts involved sales to different individuals, and Count One charges a conspiracy while Count Two charges a single substantive sale, they share a "general likeness," making joinder appropriate. *Id.*

Notwithstanding proper joinder, a court may sever counts to prevent prejudice to a party pursuant to Rule 14. "The denial of a motion to sever under

Rule 14 is reviewed for abuse of discretion.” *United States v. Sampson*, 385 F.3d 183, 190 (2d Cir. 2004). To succeed on appeal, Griffin must demonstrate that joinder caused “substantial prejudice in the form of a miscarriage of justice.” *United States v. Page*, 657 F.3d 126, 129 (2d Cir. 2011) (internal quotation marks omitted). Griffin cannot show such prejudice. Notably, evidence of the substantive sale would likely have been admissible in a separate trial for Count One – and similarly, evidence of his participation in the narcotics conspiracy would likely have been admissible in a separate trial for Count Two – under Federal Rule of Evidence 404(b) as evidence of intent, knowledge, or opportunity. *See, e.g., United States v. Pitre*, 960 F.2d 1112, 1119 (2d Cir. 1992) (finding that where the government was required to prove that defendants “knowingly or intentionally conspired to distribute [a narcotic], or to possess it with intent to distribute,” “the intent or knowledge of [defendants] were clearly at issue, and evidence of their involvement in prior narcotics transactions was probative of their intent or knowledge in connection with the crime charged”); *see also United States v. Roldan-Zapata*, 916 F.2d 795, 804 (2d Cir. 1990) (noting that under the Second Circuit’s “inclusionary approach,” evidence of other crimes or acts “is admissible

for any purpose other than to show a defendant's criminal propensity" (internal quotation marks omitted)). Given the likelihood of admissibility, the district court's limiting instructions to the jury to consider the counts separately, and the fact that the court adjourned the trial by a week to enable Griffin to prepare for the added count, we cannot say that the district court abused its discretion in denying the Rule 14 motion.

2. Exclusion of Recordings

At trial, the government introduced text messages and calls between Griffin and his co-conspirator, Jonathan Perez, to establish that Griffin supplied cocaine to Perez as part of the conspiracy charged in Count One. Griffin unsuccessfully sought to introduce additional call recordings and text messages between Perez and other suppliers in order to rebut the government's position that Griffin had supplied Perez with cocaine on specific occasions. On appeal, Griffin challenges the district court's exclusion of the evidence as inadmissible hearsay, arguing that the communications should have been admitted under Federal Rule of Evidence 807, the so-called "residual" exception to the rule against hearsay. We review the

district court's evidentiary ruling for abuse of discretion subject to harmless error analysis. *United States v. Dhinsa*, 243 F.3d 635, 649 (2d Cir. 2001).

"To be admissible pursuant to the residual exception, the evidence must fulfill five requirements: trustworthiness, materiality, probative importance, the interests of justice[,] and notice." *Parsons v. Honeywell, Inc.*, 929 F.2d 901, 907 (2d Cir. 1991). "Congress intended that the residual hearsay exceptions will be used very rarely, and only in exceptional circumstances." *Id.* (internal quotation marks omitted). We find no abuse of discretion in the district court's determination that Rule 807's requirements were not met, including but not limited to its findings that Griffin failed to satisfy the notice and probative importance requirements. Since Griffin first requested to introduce the evidence after the court impaneled the jury and after the government had prepared and provided its exhibits for trial, the district court reasonably found that Griffin failed to give sufficient notice to the government of his intent to admit the evidence. The court also had reason to conclude that Griffin lacked good cause for the delay, given the extended discovery period and additional time Griffin was afforded to prepare the case. Nor did the district court abuse its discretion in finding that the

evidence was not more probative on the point for which it was offered than other evidence the defense might have introduced. Because Griffin did not establish that all five requirements were met, the court permissibly excluded the evidence under Rule 807.

We have considered Griffin's remaining arguments and conclude that they are without merit. For the foregoing reasons, the judgment of the District Court is AFFIRMED.

FOR THE COURT:

Catherine O'Hagan Wolfe, Clerk of Court

A handwritten signature of Catherine O'Hagan Wolfe in black ink. To the left of the signature is a circular official seal. The seal has "UNITED STATES" at the top, "SECOND CIRCUIT" in the center, and "COURT OF APPEALS" at the bottom. There are small stars on either side of the text.

UNITED STATES DISTRICT COURT

Southern District of New York

UNITED STATES OF AMERICA)	JUDGMENT IN A CRIMINAL CASE
v.)	
JUNIOR GRIFFIN)	Case Number: 1:16-cr-656-GHW
)	USM Number: 78178-054
)	James E. Neuman, Esq.
)	Defendant's Attorney

THE DEFENDANT:

pleaded guilty to count(s) _____

pleaded nolo contendere to count(s) _____ which was accepted by the court.

was found guilty on count(s) Count 1ssss and Count 2ssss. _____ after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
21 U.S.C. § 846	Conspiracy to distribute and possess with intent to distribute Cocaine Base and Cocaine.	September 2016	1
21 U.S.C. § 812	Distribute and possess with intent to distribute Cocaine.	Summer of 2015	2

The defendant is sentenced as provided in pages 2 through 7 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

The defendant has been found not guilty on count(s) _____
All open

Count(s) _____ is are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

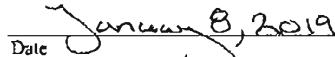
January 8, 2019

Date of imposition of judgment



Signature of Judge

Name and Title of Judge



USDC SDNY
DOCUMENT
ELECTRONICALLY FILED
DOC #:
DATE FILED: <u>1/8/19</u>

DEFENDANT: JUNIOR GRIFFIN
CASE NUMBER: 1:16-cr-656-GHW

IMPRISONMENT

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a total term of:

120 months on each of counts 1 and 2, to be served concurrently.

The court makes the following recommendations to the Bureau of Prisons:

The Court recommends that the Bureau of Prisons designate the defendant to an institution close to New York City.

The defendant is remanded to the custody of the United States Marshal.

The defendant shall surrender to the United States Marshal for this district:

at _____ a.m. p.m. on _____.

as notified by the United States Marshal.

The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

before 2 p.m. on _____.

as notified by the United States Marshal.

as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____
at _____, with a certified copy of this judgment.

UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: JUNIOR GRIFFIN

CASE NUMBER: 1:16-cr-656-GHW

SUPERVISED RELEASE

Upon release from imprisonment, you will be on supervised release for a term of:

5 years on count 1, and 3 years on count 2, to run concurrently.

MANDATORY CONDITIONS

1. You must not commit another federal, state or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.
 - The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse. (check if applicable)
4. You must make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A or any other statute authorizing a sentence of restitution. (check if applicable)
5. You must cooperate in the collection of DNA as directed by the probation officer. (check if applicable)
6. You must comply with the requirements of the Sex Offender Registration and Notification Act (34 U.S.C. § 20901, et seq.) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in the location where you reside, work, are a student, or were convicted of a qualifying offense. (check if applicable)
7. You must participate in an approved program for domestic violence. (check if applicable)

You must comply with the standard conditions that have been adopted by this court as well as with any other conditions on the attached page.

DEFENDANT: JUNIOR GRIFFIN
CASE NUMBER: 1:16-cr-656-GHW

STANDARD CONDITIONS OF SUPERVISION

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.
2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.
4. You must answer truthfully the questions asked by your probation officer.
5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).
11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
12. If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.
13. You must follow the instructions of the probation officer related to the conditions of supervision.

U.S. Probation Office Use Only

A U.S. probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. For further information regarding these conditions, see *Overview of Probation and Supervised Release Conditions*, available at: www.uscourts.gov.

Defendant's Signature

Date

DEFENDANT: JUNIOR GRIFFIN
CASE NUMBER: 1:16-cr-656-GHW

SPECIAL CONDITIONS OF SUPERVISION

The defendant shall submit his person, residence, place of business, vehicle, and any property or electronic devices under his control to a search on the basis that the probation officer has reasonable suspicion that contraband or evidence of a violation of the conditions of the defendant's supervised release may be found. The search must be conducted at a reasonable time and in a reasonable manner. Failure to submit to a search may be grounds for revocation. The defendant shall inform any other residents that the premises may be subject to search pursuant to this condition.

The defendant shall provide the probation officer with access to any requested financial information.

The defendant shall obey the immigration laws and comply with directives of immigration authorities.

The defendant shall be supervised in his district of residence.

DEFENDANT: JUNIOR GRIFFIN
CASE NUMBER: 1:16-cr-656-GHW

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

<u>TOTALS</u>	<u>Assessment</u>	<u>JVTA Assessment*</u>	<u>Fine</u>	<u>Restitution</u>
	\$ 200.00	\$ 0.00	\$ 0.00	\$ 0.00

The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case* (AO 245C) will be entered after such determination.

The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

<u>Name of Payee</u>	<u>Total Loss**</u>	<u>Restitution Ordered</u>	<u>Priority or Percentage</u>
TOTALS	\$ 0.00	\$ 0.00	

Restitution amount ordered pursuant to plea agreement \$ _____

The defendant must pay interest on restitution and a fine of more than \$2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

The court determined that the defendant does not have the ability to pay interest and it is ordered that:

the interest requirement is waived for the fine restitution.

the interest requirement for the fine restitution is modified as follows:

* Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22.

** Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: JUNIOR GRIFFIN
CASE NUMBER: 1:16-cr-656-GHW

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

- A Lump sum payment of \$ _____ due immediately, balance due
 - not later than _____, or
 - in accordance with C, D, E, or F below; or
- B Payment to begin immediately (may be combined with C, D, or F below); or
- C Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of \$ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after the date of this judgment; or
- D Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of \$ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or
- E Payment during the term of supervised release will commence within _____ (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or
- F Special instructions regarding the payment of criminal monetary penalties:

The special assessment in the amount of \$200.00 dollars shall be paid immediately.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

Joint and Several

Defendant and Co-Defendant Names and Case Numbers (including defendant number), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

- The defendant shall pay the cost of prosecution.
- The defendant shall pay the following court cost(s):
- The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) JVTA assessment, (8) penalties, and (9) costs, including cost of prosecution and court costs.