NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

SAMUEL TERRAYE WINDOM,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Law enforcement obtained a warrant to search Mr. Windom's apartment after he participated in a controlled buy of methamphetamine that took place away from his home. Other than the controlled buy, the only information linking the apartment to drug sales was months-old vague, uncorroborated information provided by an unnamed informant. Mr. Windom argued below that the controlled buy, having taken place outside of his home, was insufficient to establish the requisite nexus between the criminal activity and the place to be searched. The Tenth Circuit rejected Mr. Windom's argument, noting that it had repeatedly held that is "merely common sense that a drug supplier will keep evidence of his crimes at his home." *United States v. Windom*, Nos. 22-1077 and 22-1119, 2023 WL 2136499, *3 (10th Cir. Feb. 21, 2023).

The question presented is:

Whether a controlled drug transaction that takes place away from a suspect's home is sufficient to establish a nexus between the offense and the suspect's home, providing law enforcement with probable cause that drugs or contraband will be found in the home?

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Samuel Terraye Windom, respectfully petitions for a writ of certiorari to review the order and judgment of the United States Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The unpublished decision of the United States Court of Appeals for the Tenth Circuit, *United States v. Windom*, Nos. 22-1077 and 22-1119, 2023 WL 2136499 (10th Cir. Feb. 21, 2023) is at Appendix A. The judgment on conviction and the district court's order denying Mr. Windom's motion to suppress evidence are found at Appendix B and C, respectively.

JURISDICTION

The Tenth Circuit entered judgment on February 21, 2023. (*See* App. at A_). Pursuant to 28 U.S.C. § 2101(c), the deadline to file a petition for writ of certiorari is May 22, 2023.

The United States District Court for the District of Colorado had jurisdiction pursuant to 18 U.S.C. § 3231. The Tenth Circuit Court of Appeals had jurisdiction under 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a). This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or

> affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. Amend. IV.

STATEMENT OF THE CASE

This case arose after local law enforcement obtained and executed a warrant to search Mr. Windom's home. The warrant was obtained after officers conducted a controlled drug purchase from Mr. Windom, during which he allegedly sold a police informant an undisclosed amount of methamphetamine. The sale took place some distance from Mr. Windom's home, and officers never conducted surveillance on the home or observed heavy foot traffic suggestive of ongoing dealing in his home.

Other than the controlled buy, the only other information provided in support of a probable cause determination was that an unnamed informant had advised that Mr. Windom "was selling" methamphetamine from his apartment, and that the informant had been in the apartment "during the past six months" and had observed methamphetamine and firearms inside the apartment. The informant also related that he had bought methamphetamine from Mr. Windom in his apartment, but gave no date or timeframe.

Mr. Windom moved to suppress the evidence recovered during the search, arguing that: 1) the statements made by the informant were stale and vague as to time; and 2) the warrant failed to establish a nexus between the controlled drug sale and Mr. Windom's home. The district court denied the motion (Appendix C), and Mr. Windom was convicted after a trial and sentenced to 120 months custody, plus an additional two years for violating supervised release. (Appendix B).

Mr. Windom appealed the denial of the motion to suppress to the Tenth Circuit, which affirmed. Despite the age and vagueness of the information provided by the confidential informant, the Court found that it was sufficient to establish ongoing drug trafficking. *Windom*, *supra*, at *2 (Appendix A). The Court also rejected Mr. Windom's claim that the fact that the controlled transaction took place away from his apartment meant that there was an insufficient nexus to justify a search of his home, commenting that "it is merely common sense that a drug supplier will keep evidence of his crimes at his home." *Id.* at *3.

REASONS FOR GRANTING THE PETITION

Drug offenses make up over thirty percent of crimes prosecuted in federal court (*see* FY 2022 Sourcebook of Federal Sentencing Statistics, https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2022/Figure02.pdf), and controlled buys – in which an undercover officer or confidential informant arrange to purchase drugs from a suspected dealer – are a frequently used investigative tool.

At the same time, as this Court has repeatedly recognized, searches of a person's home are among the most invasive intrusions by government; during a home search, officers rummage through personal belongings, empty out the contents of closets, drawers and cupboards, seize personal papers, and in some cases, destroy permanent fixtures such as doors, walls and windows. Recognizing how invasive such searches are, this Court has repeatedly held that the Fourth Amendment is at its most protective when it comes to government breaches of the

home. *See, e.g., Florida v. Jardines*, 599 U.S. 1, 6 (2013) ("[W]hen it comes to the Fourth Amendment, the home is first among equals. At the Amendment's "very core" stands "the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion"); *Payton v. New York*, 445 U.S. 573, 586 (1980) (government intrusion into the home is the "chief evil" against which the Fourth Amendment protects); *United States v. Martinez-Fuerte*, 428 U.S. 543, 561 (1966) ("the sanctity of private dwellings [is] ordinarily afforded the most stringent Fourth Amendment protection").

The question posed by this Petition is whether the mere fact that a defendant sold drugs to an officer or informant outside of his home gives rise to probable cause to search his home.

Different circuits have responded differently to this question. Some courts have held that the mere fact that a putative defendant engages in drug sales – regardless of the location of the sale – gives rise to probable cause that drugs or other evidence of drug dealing will be found in the home. *See, e.g., United States v. Zamudio*, 909 F.3d 172, 176 (7th Cir. 2018) (" '[i]n the case of drug dealers," this circuit has recognized, 'evidence is likely to be found where the dealers live.' "); *United States v. Garcia-Villalba*, 585 F.3d 1223, 1234 (9th Cir. 2009) (collecting cases holding that drug sales outside of a suspects home provide a sufficient basis to conclude drugs would be present inside the residence); *United States v. Hodge*, 246 F.3d 301, 306 (3rd Cir. 2001) (mere act of selling drugs provides sufficient nexus to drug dealer's home).

Other courts have explicitly declined to adopt a *per se* rule, and have required further evidence establishing a connection to the suspect's home. *See, e.g. United States v. Roman*, 942 F.3d 43, 51 (1st Cir. 2019) (noting that although a nexus can be inferred from the type of crime and nature of items to be sought, "we have not permitted this inference to be applied lightly" and "have rejected a per se rule automatically permitting the search of a defendant's home when he has engaged in drug activity"); *United States v. Moya*, 690 F.3d 944, 948 (8th Cir. 2012) (declining to adopt per se rule that drug sales alone provide nexus giving rise to probable cause to search the home).

Some courts have found a statement from the affiant to the effect that based on their training and experience, drug dealers are likely to store evidence of drug dealing in their homes, to be sufficient to establish probable cause. *See, e.g., United States v. Joseph*, 709 F.3d 1082, 1100 (11th Cir. 2013), *overruled on other grounds*, *United States v. Heaton*, 59 F.4th 1226 (11th Cir. 2023). Other courts have explicitly found such statements to be insufficient. *See, e.g. United States v. Rios*, 881 F. Supp. 772, 775-76 (D. Conn. 1995).

The Tenth Circuit, for its part, has issued guidance that is less than clear. Initially, the court explicitly departed from other circuits' per se rule that mere observation of drug activity provided probable cause to search a suspect's residence. *United States v. Nolan*, 199 F.3d 1180, 1183 (10th Cir. 1999). In a later case, the court reversed course, noting that "we think it merely common sense that a drug supplier will keep evidence of his crimes at his home." *United States v. Sanchez*,

555 F.3d 910, 914 (10th Cir. 2009). In a later case, the court qualified its holding in *Sanchez*, stressing that evidence of drug trafficking *might* provide probable cause to search the suspect's home, but only where there was substantial evidence of ongoing, large-scale trafficking. *United States v. Mora*, 989 F.3d 794, 801 (10th Cir. 2021). In Mr. Windom's case, the affidavit provided scant evidence of ongoing drug sales, and provided no evidence of the amounts or types of drugs allegedly sold to the unnamed informant in the past.

A Sixth Circuit case, decided just weeks before Mr. Windom's, illustrates the inconsistency in how different circuits treat the issue. In *United States v. Sanders*, a case with strikingly similar facts to Mr. Windom's, the court reversed the denial of a motion to suppress, finding that the defendant's status as a drug dealer, standing alone, was insufficient to give rise to probable cause that drugs would be found in his home. 59 F.4th 232, 239 (6th Cir. 2023). In *Sanders*, as in Mr. Windom's case, police initially received a tip from a confidential informant that Sanders "was selling" drugs from his apartment. *Id.* at 235. Acting on that information, officers set up two controlled buys, both of which took place away from Sanders' home. *Id.* Based on the two controlled buys and the confidential tip, officers obtained a warrant to search Sanders' home. The district court denied Sanders' motion to suppress the evidence seized during the search, and Sanders appealed.

The Sixth Circuit reversed. Noting that the informant's tip was the only direct connection to Sanders' home, and that there was no information as to the informant's reliability or veracity, the Court discounted the tip. Left with only the

two controlled buys, the Court rejected the district court's reasoning that the fact that Sanders was a drug dealer and was verified to live at that address, along with the inference that drug dealers tend to store drugs in their home, was sufficient to establish a nexus giving rise to probable cause to search the apartment. *Id.* at 239-240.

The *Sanders* case underscores how differently a defendant might fare, depending on the jurisdiction in which he was located. And, the patchwork of standards among the circuits that govern this issue demonstrates the need for a consistent framework within which courts should evaluate this very common situation. This Court should therefore grant review to determine the extent to which drug selling activity away from a suspect's home gives rise to probable cause to search the home.

CONCLUSION

For the foregoing reasons, Mr. Windom respectfully requests that his petition for a writ of certiorari be granted.

DATED this 12th day of May, 2023

Respectfully submitted,

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APPENDIX A

2023 WL 2136499
Only the Westlaw citation is currently available.
United States Court of Appeals, Tenth Circuit.

UNITED STATES of America, Plaintiff - Appellee,
v.
Samuel Terraye WINDOM, Defendant - Appellant.
United States of America, Plaintiff - Appellee,
v.
Samuel Terraye Windom, Defendant - Appellant.

No. 22-1077, No. 22-1119
|
FILED February 21, 2023

(D.C. No. 1:20-CR-00068-CMA-1) (D.C. No. 1:15-CR-00202-RM-1) (D. Colorado)

Attorneys and Law Firms

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Elizabeth Ford Milani, Susan Diane Knox, Jena Rose Neuscheler, Office of the United States Attorney, Denver, CO, for Plaintiff - Appellee United States of America.

Before PHILLIPS, MURPHY, and EID, Circuit Judges.

ORDER AND JUDGMENT *

Michael R. Murphy, Circuit Judge

I. INTRODUCTION

***1** In September 2019, a confidential informant notified Denver police detective, Joshua Vance, that someone named Trey "was selling" methamphetamine from his apartment in south Denver. The tipster, who Vance described as previously reliable, said he or she had purchased methamphetamine "in the past" from Trey's apartment and had observed firearms and drugs inside his residence "during the past six months." Further investigation revealed the identity of "Trey" to be Appellant, Samuel Windom. Authorities successfully arranged a controlled buy to corroborate this information, at which Windom was observed selling methamphetamine to a confidential informant. [1] As a result, Vance submitted an affidavit to support the search of Windom's residence. A warrant was issued, and officers executed a search of Windom's home on December 2, 2019. The search yielded approximately 78 grams of methamphetamine and two semi-automatic guns. Windom admitted to police that he owned both guns and had previously sold methamphetamine.

Windom was charged with possession of a gun by a previously convicted felon in violation of 18 U.S.C. § 922(g)(1) (Count 1); knowingly and intentionally possessing methamphetamine with the intent to distribute in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(B)(viii) (Count 2); and knowingly using and carrying a firearm in relation to a drug trafficking crime in violation of 18 U.S.C. § 924(c)(1)(A)(i) (Count 3). Prior to trial, Windom moved to suppress the evidence recovered during the search of his apartment. He argued the warrant failed to establish probable cause for two reasons: first, it did not prove a sufficient nexus between the purported drug sales and his residence; and second, the information provided by the informant was several months old and, thus, stale. In turn, he asserted the affidavit was so lacking in probable cause that executing officers could not have relied upon the resulting warrant in good faith. Windom requested an evidentiary hearing on the issue of suppression, which the district court denied on the grounds that his motion did not raise any material factual dispute.

The district court denied Windom's motion to suppress. It determined the informant's tip was not stale because it demonstrated ongoing drug activity and was effectively corroborated by the controlled buy. Further, the district court concluded an appropriate nexus was formed by an investigation linking Windom to the apartment and the informant's direct implication of Windom's residence. A jury trial was set for July 26, 2021, and concluded with guilty verdicts on Counts 1 and 2 of the superseding indictment. On appeal, Windom argues the district court erred in denying a hearing on the motion to suppress and renews his probable cause challenges. We conclude the district court did not abuse its discretion by forgoing a suppression hearing and affirm the district court's rulings that neither staleness nor lack of nexus undermined the probable cause supporting a search of Windom's home.

II. ANALYSIS

***2** Review of a district court's analysis on the validity of a warrant is *de novo*. *United States v. Pulliam*, 748 F.3d 967, 970–71 (10th Cir. 2014). This court, however, "must accord 'great deference' to the probable-cause assessment of the state court judge who issued the warrant." *Id.* at 971. Probable cause requires "only a probability or substantial chance of criminal activity, not an actual showing of such activity." *Illinois v. Gates*, 462 U.S. 213, 243 n.13 (1983). When making such a probable cause determination "we look to the totality of the circumstances as detailed in the affidavit accompanying the application for the search warrant." *Pulliam*, 748 F.3d at 971.

a. SUPPRESSION HEARING

This court reviews the denial of an evidentiary hearing on a motion to suppress for abuse of discretion. *See United States v. Glass*, 128 F.3d 1398, 1408 (10th Cir. 1997). A trial court is required to grant a suppression hearing only when a defendant both presents facts justifying relief and demonstrates disputed issues of material fact. *Id.* An evidentiary hearing on suppression is warranted when the motion raises "factual allegations that are sufficiently definite, specific, detailed, and nonconjectural to enable the court to conclude that contested issues of fact going to the validity of the search are in issue." *United States v. Chavez-Marquez*, 66 F.3d 259, 261 (10th Cir. 1995) (internal quotations omitted). A hearing is not required when a motion only challenges questions of law and not any underlying facts. *United States v. Mathews*, 928 F.3d 968, 978 (10th Cir. 2019).

Rather than outline factual disputes, Windom's motion to suppress offered three legal arguments—staleness, nexus, and lack of good faith—for why the affidavit was insufficient to support a search warrant. These arguments contained only perfunctory factual references, with none rising to the level of definite, detailed, and nonconjectural allegations. *See United States v. Barajas-Chavez*, 358 F.3d 1263, 1266–67 (10th Cir. 2004). This absence of disputed facts and primary reliance on issues of law alone demonstrate the district court did not abuse its discretion by proceeding without a hearing. Recognizing this deficiency in his motion, Windom argues on appeal that the affidavit raised several material factual disputes on its face, including the exact timing and number of drug sales between the informant and Windom, and whether the original tipster was the same informant who participated in the controlled buy. Not only was this argument not presented to the district court, thereby subjecting it to the heightened standard of plain error review, but it also lacks definite, material facts "that, if established, would entitle [Windom] to relief." *Chavez-Marquez*, 66 F.3d at 261. Given the totality of the circumstances, the timing, numerosity, and party identity of Windom's drug exchanges do not alter the probable cause determination in this case. Thus, even if disputed facts were present on the face of the affidavit, the district court did not err in bypassing a suppression hearing.

b. STALENESS

"[P]robable cause to search cannot be based on stale information that no longer suggests that the items sought will be found in the place to be searched." *United States v. Burkhart*, 602 F.3d 1202, 1206 (10th Cir. 2010) (internal quotations omitted). Whether staleness exists depends "on the nature of the criminal activity, the length of the activity, and the nature of the property to be seized." *United States v. Mathis*, 357 F.3d 1200, 1207 (10th Cir. 2004) (internal quotations omitted). Indication of "ongoing and continuous activity makes the passage of time less critical" when making determinations of staleness. *Id.* (internal quotations omitted). Additionally, "otherwise stale information may be refreshed by more recent events" for the purpose of probable cause analysis. *United States v. Cantu*, 405 F.3d 1173, 1178 (10th Cir. 2005).

***3** As the district court articulated, staleness is not at issue here because the allegations offered by the informant indicated Windom's drug activity was ongoing and the controlled buy effectively refreshed the information provided. The informant offered three critical pieces of information: a) Windom "was selling" methamphetamine from his apartment; b) he or she had purchased methamphetamine "in the past from [Windom's] apartment;" and c) he or she had observed drugs and guns inside Windom's apartment "during the past six months." Although these details are not highly specific, they collectively suggest the type of ongoing trafficking that diminishes the significance of when the alleged activity took place. *See United States v. Iiland*, 254 F.3d 1264, 1269 (10th Cir. 2001). Despite Windom's arguments to the contrary, there is no reason to doubt the reliability of the informant. The affidavit clearly contains hallmark indicia of trustworthiness: the informant

had provided prior accurate tips to police and gave ample facts that were successfully corroborated by authorities. *United States v. Quezada-Enriquez*, 567 F.3d 1228, 1233 (10th Cir. 2009). Most significantly, the officers fully corroborated the informant's core drug trafficking allegation through a carefully constructed controlled buy. To the degree any information offered by the informant was in danger of being stale, the controlled buy cured this threat by comprehensively refreshing the allegation that Windom was, in fact, dealing methamphetamine.

c. NEXUS

Probable cause also requires a nexus between the suspected criminal activity and the place to be searched. *United States v. Gonzales*, 399 F.3d 1225, 1228 (10th Cir. 2005). Personal knowledge of illegal activity taking place in the area to be searched is not required to establish nexus. *United States v. Biglow*, 562 F.3d 1272, 1279 (10th Cir. 2009). Rather, "a sufficient nexus is established once an affidavit describes circumstances which would warrant a person of reasonable caution in the belief that 'the articles sought' are at a particular place." *Id.* (internal quotations omitted).

Although the controlled buy did not take place at Windom's home, the informant's tip directly implicated his apartment. The tip referenced purchasing and observing drugs inside Windom's residence. Further, independent investigation by police makes it clear that the apartment searched both belonged to Windom and was the scene of the tip's allegations. This court has held it is "merely common sense that a drug supplier will keep evidence of his crimes at his home." *United States v. Sanchez*, 555 F.3d 910, 914 (10th Cir. 2009); *see also* *United States v. Garcia*, 707 F.3d 1190, 1195 (10th Cir. 2013); *United States v. Sparks*, 291 F.3d 683, 689–90 (10th Cir. 2002). Given this context, the strong evidence that Windom was engaged in drug trafficking, and the direct implication of his residence as a part of his drug activity, a reasonable person could certainly believe Windom kept drugs in his home. Accordingly, the affidavit successfully established a proper nexus to support the search warrant. [2]

III. CONCLUSION

The judgment [3] of the United States District Court for the District of Colorado is hereby AFFIRMED.

All Citations

Not Reported in Fed. Rptr., 2023 WL 2136499

Footnotes

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

1 At one point in its description of the controlled buy, the affidavit appears to refer to the dealer of drugs as "Anthony" and not Samuel or Windom. R. Vol. I, at 45. The same paragraph correctly identifies the subject of the controlled buy as Samuel seven times. *Id.* Further, the name Anthony appears at no other point throughout the affidavit. Given the context of the description and the singularity of the reference, this court interprets the use of Anthony as a simple error that does not affect the substance of the affidavit. Therefore, we do not conclude the affidavit is inherently suspect on these grounds.

2 Windom argues that if this court were to deem the search warrant invalid, the "good-faith exception" should not apply. *See* *United States v. Leon*, 468 U.S. 897, 922 (1984). This court concludes the warrant in this case is valid, and therefore, it need not reach the application of the exception.

3 Because no party makes any argument about the second appeal, we dismiss that appeal as abandoned. *See* *Johnson v. Unified Gov't of Wyandotte Cnty./Kan. City*, 371 F.3d 723, 727 (10th Cir. 2004) ("The cross-appeals were not briefed and deemed to have been abandoned. Accordingly we dismiss the cross-appeals."). Similarly, Appellant's Second Unopposed Motion to Supplement the Record on Appeal is denied as moot because it only supplemented the second appeal and did not implicate any argument made to this court.

End of Document

APPENDIX B

UNITED STATES DISTRICT COURT

District of Colorado

UNITED STATES OF AMERICA
v.
SAMUEL TERRAYE WINDOM

JUDGMENT IN A CRIMINAL CASE

Case Number: 1:20-cr-00068-CMA-1

USM Number: 41114-013

Julia Marie Stancil and Carey Linwood Bell, IV
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) 1 and 2 of the Superseding Indictment after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
18 U.S.C. § 922(g)(1)	Possession of a Firearm by a Prohibited Person	12/02/2019	1
21 U.S.C. § 841(a)(1) and (b)(1)(A)(viii)	Possession with the Intent to Distribute 50 Grams and More of Pure Methamphetamine	12/02/2019	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) 3 of the Superseding Indictment.

☐ 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.

March 3, 2022
Date of Imposition of Judgment

Christine M. Arguello
Signature of Judge

Christine M. Arguello, United States District Judge
Name and Title of Judge

3/8/2022
Date

IMPRISONMENT

DEFENDANT: SAMUEL TERRAYE WINDOM
CASE NUMBER: 1:20-cr-00068-CMA-1

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a total term of: **One hundred twenty (120) months;** consisting of one hundred twenty (120) months as to Count 1, and one hundred twenty (120) months as to Count 2, concurrent to Count 1.

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

☒ 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: SAMUEL TERRAYE WINDOM
CASE NUMBER: 1:20-cr-00068-CMA-1

SUPERVISED RELEASE

Upon release from imprisonment, you will be on supervised release for a term of: **Five (5) years;** consisting of two (2) years as to Count 1, and five (5) years as to Count 2, concurrent to Count 1.

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 a maximum of 20 tests per year of supervision thereafter.
   - ☐ 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.

Judgment — Page 4 of 7

DEFENDANT: SAMUEL TERRAYE WINDOM
CASE NUMBER: 1:20-cr-00068-CMA-1

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, after obtaining Court approval, notify the person about the risk or 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: SAMUEL TERRAYE WINDOM
CASE NUMBER: 1:20-cr-00068-CMA-1

SPECIAL CONDITIONS OF SUPERVISION

1. You must participate in a program of testing and/or treatment for substance abuse approved by the probation officer and follow the rules and regulations of such program. The probation officer, in consultation with the treatment provider, will supervise your participation in the program as to modality, duration, and intensity. You must abstain from the use of alcohol or other intoxicants during the course of treatment. You must not attempt to obstruct, tamper with or circumvent the testing methods. You must pay for the cost of testing and/or treatment based on your ability to pay.
2. You must participate in a program of cognitive behavioral treatment (CBT) program approved by the probation officer and follow the rules and regulations of such program. The probation officer, in consultation with the treatment provider, will supervise your participation in the program as to modality, duration, and intensity. You must pay for the cost of treatment based on your ability to pay.
3. You must submit your person, property, house, residence, papers, computers (as defined in 18 U.S.C. § 1030(e)(1)), other electronic communications or data storage devices or media, or office, to a search conducted by a United States probation officer. Failure to submit to search may be grounds for revocation of release. You must warn any other occupants that the premises may be subject to searches pursuant to this condition. An officer may conduct a search pursuant to this condition only when reasonable suspicion exists that you have violated a condition of your supervision and that the areas to be searched contain evidence of this violation. Any search must be conducted at a reasonable time and in a reasonable manner.
4. You must not knowingly associate with or have contact with any individuals you know to be or have reason to believe are gang members and must not participate in gang activity, to include displaying gang paraphernalia.

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CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on the following page.

	Assessment	Restitution	Fine	AVAA Assessment*	JVTA Assessment**
TOTALS	$ 200.00	$ 0.00	$ 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.

Name of Payee	Total Loss***	Restitution Ordered	Priority or Percentage

TOTALS $ _____ $ _____

☐ 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 the following page 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:

* Amy, Vicky, and Andy Child Pornography Victim Assistance Act of 2018, Publ. L. No. 115-299.
** 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.

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DEFENDANT: SAMUEL TERRAYE WINDOM
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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:

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

Case Number Defendant and Co-Defendant Names *(including defendant number)*	Total Amount	Joint and Several Amount	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: 9mm pistol, bearing serial number XD154669; the Colt pistol, bearing serial number DR09240; and the associated ammunition seized from defendant.

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) AVAA assessment, (5) fine principal, (6) fine interest, (7) community restitution, (8) JVTA assessment, (9) penalties, and (10) costs, including cost of prosecution and court costs.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge Christine M. Arguello

Criminal Action No. 20-cr-00068-CMA

UNITED STATES OF AMERICA,

Plaintiff,

v.

SAMUEL TERRAYE WINDOM,

Defendant.

ORDER DENYING MOTION TO SUPPRESS

This matter is before the Court on Defendant's Motion to Sever Count One. (Doc. # 39). The Motion is denied for the following reasons.

I. BACKGROUND

Defendant was arrested after police found methamphetamine and firearms in his apartment. He was later charged with: Count One, felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1); Count Two, possession with intent to distribute 50 grams or more of methamphetamine in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(B)(viii); and Count Three, possession and carrying a firearm in furtherance of a drug trafficking crime in violation of 18 U.S.C. § 924(c)(1)(A)(i). (Doc. # 1).

Defendant now seeks to sever Count One, felon in possession of a firearm, from the remaining counts. He argues that Count One is the only count that requires proof of a prior conviction, and that the jury would be "tainted" if were allowed to hear such

evidence before deciding Counts Two and Three. (Doc. # 39, p. 2). Therefore, he asks that Counts Two and Three be tried first, and when the jury returns a verdict on those counts, that the parties immediately proceed to a second trial, before the same jury, on Count One. (Doc. # 39-1).

The Government counters that severance is not appropriate because (1) Defendant has failed to demonstrate that he would suffer actual prejudice if all three counts are tried together, and (2) that considerations of efficiency and judicial economy weigh in favor of a single trial. (Doc. # 40).

The Court agrees with the Government.

II. LEGAL STANDARD

The Court may order separate trials if the joinder of offenses for trial "appears to prejudice a defendant." Fed. R. Crim. P. 14(a). However, the defendant seeking separate trials must demonstrate that he would suffer "real prejudice" if the counts were tried together. *United States v. Martin*, 18 F.3d 1515, 1518 (10th Cir. 1994). To do so, he must demonstrate that the alleged prejudice outweighs "the expense and inconvenience of separate trials." *United States v. Parra*, 2 F.3d 1058, 1062 (10th Cir. 1993) (quoting *United States v. Hollis*, 971 F.2d 1441, 1456 (10th Cir. 1992)). "'Neither a mere allegation that defendant would have a better chance of acquittal in a separate trial, nor a complaint of the 'spillover effect' [of evidence pertaining to certain other charges] is sufficient to warrant severance.'" *United States v. Bailey*, 952 F.2d 363, 365 (10th Cir. 1991) (quoting *United States v. Cardall*, 885 F.2d 656, 667-68 (10th Cir. 1989)).

III. DISCUSSION

Defendant has failed to demonstrate that severance of Count One is either necessary or warranted.

First, Defendant has failed to demonstrate that severance would serve any useful purpose. Defendant's Motion is based on the premise that evidence of his prior conviction, though relevant and admissible with respect to Count One, might not be admitted in a separate trial on Counts Two and Three alone. (Doc. # 39, p. 2). But Defendant offers no authority to support this premise. As the Government correctly observes, evidence of Defendant's prior conviction is likely admissible to prove Count Three, possession and carrying a firearm in furtherance of a drug trafficking crime. That charge requires proof that Defendant possessed a firearm for a specific purpose: namely, to further, advance, or help a drug trafficking crime. 10th Cir. Pattern Crim. Jury Instr. § 2.45.1. One way the Government can prove that element is by demonstrating that Defendant was legally barred from possessing firearms, and therefore did not have some other, legitimate purpose for possessing such weapons. *Id*. Defendant offers no authority whatsoever to suggest that such evidence would be excluded if the Court held separate trials.[1] Thus, Defendant has failed to demonstrate that severance would, in fact, prevent the jury from hearing about his prior convictions.

Next, even if Defendant could prove that his prior conviction would be inadmissible in a trial on Counts Two and Three only, he has nevertheless failed to

[1] Further, Defendant concedes that he may testify in his own defense with respect to Counts Two and Three. (Doc. # 39, p. 2). If he does so, his prior conviction would become admissible for purposes of impeachment under F.R.E. 609, negating any benefit of severance.

show that he would suffer "real prejudice" if all three counts were charged together. *Martin*, 18 F.3d at 1518. A defendant cannot demonstrate "real prejudice" merely by arguing that evidence of one charge might have a "spillover" impact on the jury's determination of other charges. *Bailey*, 952 F.2d at 365. Rather, he must demonstrate a "serious risk" that trying the charges together "would compromise a specific trial right, or prevent the jury from making a reliable judgment about guilt or innocence." *Zafiro v. United States*, 506 U.S. 534, 539 (1993). Defendant has not made such a showing. Defendant argues only that the jury's determination might be "tainted by evidence of Mr. Windom's criminal background" (Doc. # 39, p. 2) – i.e., that the "spillover effect" requires severance. This is not sufficient to warrant severance. *Bailey*, 952 F.2d at 365.

Further, the jury will be instructed regarding the elements of each offense charged, and Defendant will have the opportunity to request a limiting instructing instruction with respect to any evidence that is relevant to one charge but not the others. The Tenth Circuit has long recognized that such instructions are sufficient to prevent prejudice to a defendant of a prior conviction. *See, e.g. United States v. Roe*, 495 F.2d 600, 604 (10th Cir. 1974) ("The court's instruction limiting the consideration of proof of the previous conviction to the third count, together with similar reference in the general instructions, was adequate to protect the accused from prejudice on the first two counts.") *and United States v. Strand*, 617 F.2d 571, 575-76 (10th Cir. 1980) ("the Court properly instructed the jury on the separate nature of the offenses charged . . . . We hold that the trial court did not err in refusing to grant [Defendant's] motion to sever.").

Finally, even if Defendant could prove prejudice, severance would still not be warranted because Defendant has failed to justify the "expense and inconvenience" of separate trials. *Parra*, 2 F.3d 1062. Defendant concedes that "the set of facts [is] the same for all three counts." (Doc. # 39, p. 2). Thus, Defendant is essentially asking the Court to hold the same trial twice based on the speculative possibility that his criminal history – though likely relevant in both trials – might be admitted in one and not the other. This justification does not suffice. Therefore, Defendant has failed to demonstrate that severance is necessary.

IV. CONCLUSION

For the forgoing reasons, Defendant Samuel Terraye Windom's Motion to Sever Count One (Doc. # 39) is DENIED.

DATED: April 27, 2021

BY THE COURT:

Christine M. Arguello

CHRISTINE M. ARGUELLO
United States District Judge