No. 21-_____

IN THE

SUPREME COURT OF THE UNITED STATES

COMMONWEALTH OF PENNSYLVANIA

Respondent,

v.

KEITH ANTHONY ROSARIO

Petitioner.

On Petition for Writ of Certiorari
to the Superior Court of Pennsylvania

APPENDIX VOLUME II TO

PETITION FOR A WRIT OF CERTIORARI

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IN THE COURT OF COMMON PLEAS OF WASHINGTON COUNTY, PENNSYLVANIA

CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA,	)	No. 2611-2017
	)	
v.	)	
	)	
KEITH A. ROSARIO	)	
	)	
Defendant.	)	
COMMONWEALTH OF PENNSYLVANIA,	)	
	)	
v.	)	No. 2610-2017
	)	
RICHARD D. LACKS	)	
	)	
Defendant.	)	

OPINION AND ORDER

Presently before this court are numerous pretrial motions filed on behalf of Defendant Keith Rosario, Defendant Richard Lacks, and the Commonwealth of Pennsylvania. On December 5, 2017, Defendant Rosario filed an Omnibus Pretrial Motion, which included a Motion for Discovery, Motion to Suppress (telephone calls and handgun), Motion to Dismiss as Multiplicitous and Duplicitous, Motion for Severance of Offense, Motion for Severance of Trials, Motion for Writ of Habeas Corpus, Motion for Change of Venue, and Motion for Modification of Bail. He had also filed a Motion for Return of Property and Motion to Suppress (Defendant's

Statement), but withdrew them at the time of the hearing. On February 2, 2018, the Commonwealth filed a Motion for Joinder of Defendants at Trial. On February 28, 2018, Defendant Lacks filed an Omnibus Pretrial Motion, which included a Motion to Suppress (telephone calls and handgun), Motion for Severance of Offense, and Motion for Modification of Bail. He had also filed a Motion to Dismiss Under Rule 600, but withdrew it at the time of the hearing. Further, at the time of the hearing, the Commonwealth consented to both Defendants' Motions for Severance of Offense.

PROCEDURAL HISTORY

On September 6, 2017, Defendant Rosario was charged by Trooper Thomas Kress of the Pennsylvania State Police with Criminal Attempt-Homicide, two counts of Aggravated Assault, two counts of Kidnapping, Criminal Conspiracy, and Possession of Firearm Prohibited. Defendant Lacks was arrested and charged several days later with the same offenses, plus an additional charge of Receiving Stolen Property. The charges arose from an incident alleged to have occurred on September 5, 2017, in South Franklin Township, Washington County, Pennsylvania. Defendant Rosario was arraigned on September 6, 2017 and bail was initially denied. On October 12, 2017, his bail was modified and set at $2,000.000. Defendant Lacks was arraigned on September 11, 2017 with bail set at $1,000.000.

On May 4, 2018, a hearing was held on all of the above-mentioned pretrial motions. Following the hearing, the parties were given thirty days to submit briefs. The Commonwealth and, Defendant Rosario's attorney, Herbert A. Terrell, Esquire, submitted timely briefs. At the time of the hearing, Defendant Lacks was represented by Gary J. Graminski, Esquire, who failed to submit a brief on his behalf. Subsequently, on June 1, 2018, Defendant Lacks was assigned a new court-appointed attorney, Renee Colbert, Esquire. On July 10, 2018, the court-appointed James Jeffries, Esquire as Defendant Lacks' new counsel. Defendant Lacks' current attorney of record, Zachary Mesher, Esquire, was appointed by the court on August 23, 2018.

DISCUSSION

I. Motion for Supression.

a.) .40 Caliber Handgun

At the May 4, 2018 hearing, Defendant Rosario argued that the .40 caliber handgun found at 449 Ewing St., Washington, PA. 15301 on September 5, 2017 should be suppressed because it was the product of a warrantless search violating the Fourth Amendment to the U.S. Constitution. Generally, the Fourth Amendment prohibits the warrantless entry of a person's home whether for purposes of arrest or to search for specific objects. *Payton v. New York,* 445 U.S. 573, 575 (1980); *Johnson v. United States,* 333 U.S. 10, 15 (1948). Additionally,

Defendant Rosario argued the handgun should be suppressed because there was no evidence that the weapon belonged to Rosario or that Rosario knew of the handgun's presence. (Def's. Br., June 4, 2018, 6-11.) Finally, Defendant Rosario argued that the handgun should be suppressed because the consent given to enter the premises was given by a sixteen year old house-sitter, Tyree King (hereinafter "King"). (Def's.Br. 6-11.)

It is well settled that the Fourth Amendment's prohibition does not apply to situations in which voluntary consent has been obtained from the individual whose property is searched. See *Schneckloth v. Bustamonte,* 412 U.S. 218, 219 (1973). Likewise, the prohibition does not apply when a third party who possesses common authority over the premises consents to the search. *United States v. Matlock,* 415 U.S. 164, 171 (1974). Defendant Rosario contends that because no evidence was proffered to the court to show that King possessed a key to the premises, had unlimited access to the property, stored possessions on the premises, or had the ability to exclude other persons from the property, that the consent was invalid. (Def's. Br. 8.) Moreover, Defendant Rosario argues that King's actual age calls into question his ability to consent to the search, noting that age is one consideration in the totality of the circumstances of determining a minor's consent; however, maturity and authority are also factors to be considered. Compare *In the Interest of Jermaine,* 582 A.2d 1058, 1064 (Pa. Super. 1990) (16 and 12-year-old juveniles were sufficiently mature to voluntarily consent to search), with

Commonwealth v. Garcia, 387 A.2d 46, 55 (Pa. 1978) (16 year-old daughter did not have equal dominion over home with her mother). The court remains unpersuaded by the comparison of facts in this case with those in *Garcia* because the relationship between King and Defendant Rosario is not that of a parent-child. At the time police received permission from King to enter the premises, they were not aware of any familial relationship between King and Defendant Rosario.

There are two exceptions to the warrant requirement which are applicable to the instant case. First, a third party "possess[ing] common authority over or other sufficient relationship to the premises or effects sought to be inspected" may give consent for a search. *Matlock,* 415 U.S. at 171. Second, a third party with apparent authority over the area to be searched may provide police with consent to search. *Commonwealth v. Strader,* 931 A.2d 630, 634 (Pa. 2007). The consent given in this case need only satisfy one of these two exceptions for it to be valid.

Under the apparent authority exception, if police reasonably believe a third party has authority to consent then that consent is valid. *Strader,* 931 2d at 634 (citing *Illinois v. Rodriguez,* 497 U.S. 177, 188-89 (1990)). The police must make a determination on whether the facts available to them at the moment would lead a reasonable person of reasonable caution to believe that the consenting party had authority over the premises. *Strader,* 931 A.2d at 634. However, even if the person asserting authority over the premises did not have actual authority to consent, the mistake is constitutionally excusable if the police had reasonable belief that the

consenting party had authority and acted on "facts leading sensibly to their conclusions of probability." *Id.* at 634 *(*quoting *Brinegar v. United States,* 338 U.S. 160, 176 (1949)). Where a situation is ambiguous -- one that would cause a reasonable person to question a consenting party's actual authority – a police officer should make further inquiries to attempt to determine the status of the consenting party. *Commonwealth v. Basking,* 970 A.2d 1181, 1191 (Pa. Super 2009) (quoting *Commonwealth v. Blair,* 575 A.2d 593, 598 (Pa. Super. 1990)).

Commonwealth v. Hughes, 836 A.3d 893, 896-904 (Pa. 2003) provides a comparable factual scenario where the consent of a minor is being called into question. In *Hughes,* the police arrived at the believed residence of the defendant and found three teenaged girls standing on the porch. *Id.* at 896. The officers asked the girls if the defendant was home and were told he was not. *Id.* The officers then proceeded to inquire if they could enter the home to search for the defendant and the girls consented. *Id.* The court in *Hughes* noted that the girls showed no hesitation when they gave the officers consent, opened the door for the officers, and followed them into the home. *Id.* at 901. The court concluded that it was reasonable to believe, from the totality of the circumstances, that the girls consent was valid. *Id.*

In the case *sub judice*, King, a sixteen year-old and two unidentified females were inside the residence on Ewing Street on the night of September 5, 2017 when the officers first arrived there. (OPTM Hr'g Tr. 42-43) They were directed outside

where Corporal Fred Scott testified that he first came into contact with King and two females. (OPTM Hr'g Tr.43.) Neither of the two females that exited the house with King contradicted his claim that he was house-sitting. (OPTM Hr'g Tr.42-44.) King's position of being inside the house when the officers initially arrived lends credence to the Commonwealth's contention that he had apparent authority to give consent. In *Hughes*, the officers encountered three teenaged girls on a porch and the court concluded that those girls had apparent authority to consent to a search. Therefore, it follows that the officer's belief that King had authority to consent to a search of the premises was reasonable. Moreover, given the totality of the circumstances, King's age by itself does not invalidate his consent for the search of the premises.

Strader is analogous to the present case in several distinct aspects and distinguishable in others. In *Strader*, a parole officer relayed a tip for the location of Cecil Shields, a parole absconder, to a Wilkinsburg Police Department detective. *Strader,* 931 A.2d at 632-22. The detective and other officers went to the apartment in search of Shields. *Id.* at 633. The detective knew from prior contacts that Shields was the leaseholder at the apartment. *Id.* Upon knocking on the apartment door, a man who identified himself as Thornton answered. *Id.* at 632-33. Police showed Thornton a picture of Shields and asked if he recognized him. *Id.* Thornton said he did not. *Id.* Then, police asked if Shields was inside the apartment, and Thornton again responded in the negative. *Id.* Thornton stated he

was there temporarily and had only been there for a day. *Id.* The detective asked Thornton if he was in charge of the apartment and Thornton responded, "yes." *Id.* The detective then proceeded to ask Thornton for permission to search the apartment for Shields to which Thornton consented. *Id.* While searching for Shields, the officers discovered heroin and heroin packaging materials in plain view. *Id.* at 632. The trial court denied the appellant's motion to suppress the evidence seized during the search, concluding that Thornton had apparent authority to consent to the search. *Id.* at 633. Both the Superior Court and the Supreme Court affirmed the trial court's ruling. *Id* at 632, 635.

In the instant case, the police questioned King in front of the two females that were inside the house and King indicated Rosario was not presently there and that he was house-sitting. (OPTM Hr'g Tr.43.) At this point, police believed King and the females did not live at the Ewing Street house, which is similar to the *Strader* case in that the detective's questioning led them to the conclusion that Thornton did not live there and had only been at the apartment for a day. Despite knowing that Thornton did not live at the apartment, the police still asked if he controlled access to the premises and were told "yes," so they proceeded by asking permission to enter and search for Shields. Likewise, when King gave consent to the officers to search the residence for Defendant Rosario, King clearly acted as though he controlled access to the premises. The only distinction from *Strader* is that Thornton was an adult and King was a juvenile. Given the substantial

similarities in *Strader* to the present case, however, the court finds that the police acted reasonably in their belief that King controlled access to the premises and had apparent authority to consent to a search.

b.) Telephone calls and Transcripts of Telephone Calls Made to or from the Washington County Jail

Defendants Rosario and Lacks argued in their Omnibus Pretrial Motions that the interception of telephone calls made to or from the Washington County Correctional Facility by each of them were violations of the Pennsylvania Wiretapping and Electronic Surveillance Control Act. They contend that prisoners were not notified in writing and anyone calling into the facility may not have been informed that the call could be subject to monitoring as required under said act.

The case of *Commonwealth v. Baumhammers,* 960 A.2d 59 (Pa. 2008), *cert. denied,* 558 U.S. 821 (2009) held that actual knowledge by the defendant or those calling into the facility concerning the possibility that calls could be recorded or monitored was enough to override lack of written notice to an inmate because written notice would not have afforded any greater protection to the right to privacy of the inmate or his parents. In *Baumhammers,* the inmates received notice through computer generated messages on the telephone itself that were audible to both the inmate and the party on the other end of the conversation. *Id* at 78-79.

In the case *sub judice,* Chris Cain, Deputy Warden at the Washington County Correctional Facility, testified at the May 4, 2018 hearing that inmates were

advised at the time of their telephone calls that all calls are subject to recording and monitoring via an auditory automatic recording which played prior to every call being initiated. (OPTM Hr'g Tr. 9-10.) The warning is automatically played on each and every phone call placed by an inmate in the Washington County Correctional Facility. (OPTM Hr'g Tr. 11.) Mr. Cain explained that the verbal warning heard on the recording was audible to the inmates through the receiver on the telephone. (OPTM Hr'g.Tr.11.) When asked whether the same warning was audible to persons being called by the inmate, Mr. Cain said he did not know. (OPTM Hr'g Tr. 13.) However, it was demonstrated by the Commonwealth, through a portion of the recorded phone calls, that the person receiving the call from the prison is given warning that the call is subject to being recorded or monitored before they accept the call. (OPTM Hr'g Tr.22.) The Commonwealth played a portion of a recording from phone calls made from both Defendant Rosario and Defendant Lacks demonstrating that anyone receiving a call from the defendants heard an auditory warning. (OPTM Hr'g Tr. 22-24.) Considering the testimony of Mr. Cain and the evidence presented by the Commonwealth, it is reasonable to conclude that inmates calling out of the facility are given an auditory warning that their calls are subject to monitoring or recording and that those who are called by the inmates receive that same warning. (OPTM Hr'g Tr.11-24.)

Furthermore, Mr. Cain testified that prior to January 1, 2017, every time an inmate was booked into the jail, they received a new written notification that

their telephone calls could be subject to recording or monitoring (OPTM Hr'g Tr. 15.) When questioned as to whether Defendant Rosario or Defendant Lacks had been inmates at the county jail during the time the old system was used, Mr. Cain testified that Rosario had been incarcerated under the old system several times. (OPTM Hr'g Tr.16.) Specifically, Mr. Cain testified that Defendant Rosario had been checked into the jail around five or six times under the old system and that Defendant Lacks was also an inmate in the facility before January 1, 2017, which is the date the new system became effective. (OPTM Hr'g Tr. 16.) According to Mr. Cain's testimony, both defendants would have been presented with written notification concerning their telephone calls each time they were booked into the prison before January 1, 2017. (OPTM Hr'g Tr. 16-17.)

Considering the testimony provided by Mr. Cain, it is apparent that both Defendants were given written notice about recorded phone calls during periods of prior incarceration at the Washington County Correctional Facility; therefore, it is reasonable for the court to conclude that Rosario and Lacks had actual knowledge that their phone calls would be recorded on this new system. Defendants' actual knowledge that their phone calls could be subject to recording and the auditory warning they received makes the facts in this case analogous to those in *Baumhammers*. This court concludes that the actual knowledge Defendant Rosario and Defendant Lacks possessed (from the written notice they had received at the prison prior to January 1, 2017 in conjunction with the auditory warning which was

heard each time a call was initiated) provided the same, if not greater, protection of their right to privacy than would have resulted from another written notice. Accordingly, both Defendants' Motions to Suppress the telephone calls are denied.

II. Motion for Joinder of Defendants at Trial/Severance of Trials

Pursuant to Pa.R.Crim.P. 582, the Commonwealth filed a Motion for Joinder of Defendants at Trial. Rule 582 states, in pertinent part:

> **(A) Standards**
> (1) Offenses charged in separate indictments or informations may be tried together if:
> (a) the evidence of each of the offenses would be admissible in a separate trial for the other and is capable of separation by the jury so that there is no danger of confusion; or
> (b) the offenses charged are based on the same act or transaction.
> (2) Defendants charged in separate indictments or informations may be tried together 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.

Pa.R.Crim.P 582(A). In response, Defendant Rosario moved for severance of the co-defendants' trials in his Omnibus Pretrial Motion. Severance of defendants is governed by Rule 583 of the Pennsylvania Rules of Criminal Procedure, which states: "The court may order separate trials of offenses or defendants, or provide other appropriate relief, if it appears that any party may be prejudiced by offenses or defendants being tried together." Pa.R.Crim.P. 583.

Defendant Rosario asserts that while "[n]o credible evidence exists that Rosario had any on-going acquaintanceship or relationship with the victim,"

Defendant Lacks "is alleged to have had a relationship with the victim which includes substantial drug use, possession of additional hand guns, and sexual liaison." (Def.'s Br.13, June 4, 2018.) He argues that the introduction of evidence indicating Defendant Lacks and the victim engaged in criminal activity together, including that the victim was a "drug runner" for Lacks and that they "used cocaine together," will prejudice Defendant Rosario. (Def.'s Br.13.) Moreover, Lacks provided investigators "with a full statement which imputes to lacks a motive of animosity or ill will towards the victim based upon the victim allegedly owing or stealing Lacks' money." (Def.'s Br.13.) Additionally, Defendant Rosario claims that because both defendants are charged with Possession of Firearm Prohibited, the Commonwealth will be able to introduce evidence of Lacks' prior convictions, and that this will further prejudice Rosario. (Def.'s Br. 14.) In Rosario's Motion to Supplement/Amend Defendant's Omnibus Pretrial Motion, he states that the Commonwealth recently disclosed to him numerous recordings of telephone conversations that it intends to introduce at trial. (Def.'s Mot.1, Aug. 9, 2018.) Defendant Rosario asserts that he does not have any relationship with "an of the various participants" in these conversations, and that because this evidence "pertains solely to Richard Lacks," Rosario will be prejudiced by its introduction at trial. (Def.'s Mot.3.)

The decision whether to sever the trials of co-defendants is one within the sound discretion of the trial judge and will not be disturbed on appeal absent a

manifest abuse of that discretion. *Commonwealth v. Morales,* 494 A.2d 367, 372 (Pa. 1985). An abuse of discretion is more than just errors in judgment by the trial court, and, in fact, contemplates actions unsupported by the evidence, at odds with governing law, or arising from improper motives personal to the judge. *Commonwealth v. Brookins,* 10 A.3d 1251, 1255 (Pa. Super. 2010). When considering whether to grant a motion for severance, the central inquiry is "whether undue prejudice has inured to the defendant." *Commonwealth v. Gribble,* 863 A.2d 455, 462 (Pa. 2004). In conducting this analysis, the court must balance "the inconvenience and expense to the government of separate trials against prejudice to the defendants in a joint trial, and the burden is on the movant to show prejudice." *Commonwealth v. Lambert,* 603 A.2d 568, 573 (Pa. 1992). Furthermore, "[p]rejudice… should be real, not fanciful, and must be considered together with the desirability of joint trials." *Id.* The Supreme Court of Pennsylvania has formulated a three-part test in analyzing the merits of a motion to sever:

> (1) Whether the evidence of each of the offenses would be admissible in a separate trial for the other; (2) whether such evidence is capable of separation by the jury so as to avoid danger of confusion; and, if the answers to these inquiries are in the affirmative, (3) whether the defendant will be unduly prejudiced by the consolidation of offenses.

Commonwealth v. Melvin, 103 A.3d 1, 29 (Pa. 2014) ((citing *Commonwealth v. Collins,* 703 A.2d 418, 422 (Pa. 1997). Additionally, the Superior Court of Pennsylvania has identified three factors to consider such cases:

> (1) Whether the number of defendants or the complexity of the evidence as to the several defendants is such that the trier of fact probably will

> be unable to distinguish the evidence and apply the law intelligently as to the charges against each defendant; (2) Whether evidence not admissible against all the defendants probably will be considered against a defendant notwithstanding admonitory instructions; and (3) Whether there are antagonistic defenses.

Commonwealth v. O'Neil, 108 A.3d 900, 910 (Pa. Super. 2015).

After a thorough review of the record and of the parties' arguments, this court concludes that Defendant Rosario would suffer undue prejudice if he and Defendant Lacks were joined for trial, and thus, a severance of the trials is appropriate in this case. Although joint trials are preferred where the crimes charged arose from the same acts or transactions and much of the same evidence is necessary or applicable to all defendants, "[s]everance may nevertheless be proper where a defendant can show that he will be prejudiced by a joint trial." *Commonwealth v. Childress,* 680 A.2d 1184, 1187 (Pa. Super. 1996). Here, the court finds Defendant Rosario has met this burden. Evidence of Lacks' close relationship and criminal activity with the victim, Lacks' motive to harm the victim and Lacks' prior convictions do not in any way pertain to Defendant Rosario. Furthermore, the majority of the recorded telephone conversations which the Commonwealth intends to introduce at trial "have nothing to do with [Rosario]." (Def.'s Mem. 2, Aug. 9, 2018.)

In this case, there are only two defendants and the evidence does not appear to be extraordinarily complex, and as such, a jury in a joint trial would probably be capable of separating the evidence against each defendant. Furthermore, there is

no indication that the defenses which the defendants intend to present at trial are antagonistic to one another. However, the evidence regarding Lacks' relationship and criminal activity with the victim, his motive to harm the victim, his prior convictions and the telephone conversations involving only Lacks are not connected in any way to Defendant Rosario or the crimes charged against him. The instant case is similar to *Commonwealth v. Montalvo,* 986 A.2d 84, 97 (Pa. 2009), where the Supreme Court of Pennsylvania found that evidence of an accomplice's criminal history was "simply not relevant to a defendant's guilt or innocence," and ultimately ruled that such evidence was properly excluded. As such, the evidence involving Lacks would not be admissible in a trial solely against Defendant Rosario.

Because much of the evidence the Commonwealth intends to present does not pertain to Defendant Rosario, there is a real danger of prejudice towards Defendant Rosario if a joint trial were to occur. The Superior Court of Pennsylvania has discussed three ways by which a defendant could suffer prejudice in a joint trial with a co-defendant:

> (1)[H]e may become embarrassed or confounded in presenting separate defenses; (2) the jury may use the evidence of one of the crimes charged to infer a criminal disposition on the part of the defendant from which is found his guilt of the other crimes charged; or (3) the jury may cumulate the evidence of the various crimes charged and find guilt when, if considered separately, it would not so find.

Commonwealth v. Mullen, 324 A.2d 410, 412 (Pa. Super. 1974). Here, the court believes the evidence pertaining solely to Defendant Lacks will cause a jury to infer criminal disposition on the part of Defendant Rosario, or alternatively, a jury will

cumulate the evidence and find guilt on Defendant Rosario's part when it would not so find if a separate trial were to occur. This court finds that the danger of prejudice is legitimate and that a fair trial for Defendant Rosario can only be achieved if his trial is severed from that of Defendant Lacks. The danger of prejudice is especially strong considering that much of the evidence pertaining to Defendant Lacks involves his criminal background and his motive to harm the victim. Clearly, the prejudice to Defendant Rosario outweighs the inconvenience to the Commonwealth; the Commonwealth remains free to seek convictions for each defendant in two separate trials. Accordingly, Defendant Rosario's Motion for Severance of Trial is granted.

III. Motion for Writ of Habeas Corpus at Count Seven

Within Defendant Rosario's Omnibus Pretrial Motion is a Motion for Writ of Habeas Corpus related to the charge of Possession of a Firearm Prohibited. It is well established that a *prima facie* case is proven when the Commonwealth produces evidence that, if accepted as true, would warrant the trial judge to allow the case to go to a jury. *Commonwealth v. Marti,* 779 A.2d. 1177, 1180, (Pa. Super. 2001) (citing *Commonwealth v. Martin,* 727 A.2d 1136, 1142 (Pa. Super 1999), *appeal denied,* 745 A.2d 1220 (Pa. 1999)). The *prima facie* standard merely requires evidence of the existence of each and every element of the crime charged, not that the elements be proven beyond a reasonable doubt. *Marti,* 779 A.2d at 1180. Furthermore, the weight and credibility of the evidence are not factors at this stage,

and the Commonwealth need only demonstrate sufficient probable cause to believe the person charged has committed the offense. *Id.* The evidence must be read in the light most favorable to the Commonwealth's case. *Id.* The Commonwealth bears the burden of establishing that a crime has been committed and the accused is the one who committed it. *Commonwealth v. Ricker,* 120 A.3d 349, 355 (Pa. Super. 2015).

Possession of Firearm Prohibited is defined by section 6105(a)(1) of the Pennsylvania Crimes Code as follows:

(a) Offense defined.---

> (1) A person who has been convicted of an offense enumerated in subsection (b), within or without this Commonwealth, regardless of the length of sentence or whose conduct meets the criteria in subsection (c) shall not possess, use, control, sell, transfer or manufacture or obtain a license to possess, use, control, sell, transfer or manufacture a firearm in this Commonwealth.

18 Pa.C.S.§ 6105(a)(1). It is undisputed that Defendant Rosario was convicted of offenses which render him ineligible to possess under subsection (c); specifically, Defendant Rosario has been convicted of two felony drug offenses. However, the issue is whether the Commonwealth presented a *prima facie* case that Rosario possessed, used, or controlled a firearm. At the preliminary hearing, the victim, Marcus Stancik (hereinafter "Stancik"), testified that in a two-week period leading up to the shooting, he had seen Defendant Rosario at the Ewing Street residence "almost every day," and that it became apparent to Stancik that the residence was

Rosario's. (Prelim. Hr'g Tr.44). Furthermore, Stancik testified that Rosario came home one day looking for the nine millimeter firearm, which Rosario and Lacks later accused Stancik of having stolen when it was never found at the residence. (Prelim. Hr'g Tr. 47.)

Additionally, Stancik testified that he observed both a .40 caliber and a .22 caliber firearm on the dining room table of the Ewing Street residence, and that "Richie was loading the .22 and Keith had the .40 caliber." (Prelim. Hr'g Tr.50-52.) Further, Stancik placed both of those guns in the possession of Defendants Rosario and Lacks again while they were wearing rubber gloves and waiting for Stancik to go on a drug run, which he used as his means to escape the house. (Prelim. Hr'g Tr. 54.) Finally, Stancik testified that on the day of the alleged shooting, Rosario and Lacks stopped at the Ewing Street residence for the .22 caliber gun and that Rosario used that gun to shoot him in the back of the neck. (Prelim. Hr'g Tr.66-70.) Moreover, Trooper Webb indicated that a .22 caliber round was located at the scene of the shooting and Trooper Kress testified that a .40 caliber handgun was found inside the Ewing Street residence during the search of the premises. (Prelim. Hr'g Tr. 24, 105.) The record is replete with instances where Defendant Rosario and Defendant Lacks were in possession of either the .40 or .22 caliber firearms. Upon review of the record, this court finds that the Commonwealth met its burden for establishing a *prima facie* case on the charge of Possession of a Firearm Prohibited. Accordingly, Defendant Rosario's Motion for Writ of Habeas Corpus is denied.

IV. Motion to Dismiss As Multiplicitous or Duplicitous

Included in Defendant Rosario's Omnibus Pretrial Motion is a Motion to Dismiss as Multiplicitous and Duplicitous. Specifically, Rosario argues that count three is multiplicitous or duplicitous to count two, and that count five is multiplicitous or duplicitous to count four. Though the title to this section of Defendant Rosario's brief contains the word "duplicitous," Defendant Rosario does not set forth any argument in this section that the counts were duplicitous. Therefore, this court will not address the concept of duplicity.

Defendant Rosario also argues that counts three and five should be dismissed because of multiplicity, which is defined by the United States Court of Appeals for the Third Circuit as "the charging of a single offense in separate counts of an indictment." *United States v Kennedy,* 682 F.3d 244, 254-255 (3d. Cir. 2012) (citing *United States v. Carter*, 576 F.2d 1061, 1064 (3d Cir. 1978)). Defendant Rosario contends that "[m]ultiple sentences for a single violation are prohibited by the Double Jeopardy Clause." *United States v. Stanfa,* 685 F.2d 85, 87 (3d. Cir. 1982) (citing *North Carolina v. Pearce,* 395 U.S. 711, 717 (1969)).

Multiplicity is a concept of federal law and not Pennsylvania law, and thus, this Court will not address multiplicity. However, the crux of Defendant's argument appears to be that he is entitled to protection under the Double Jeopardy Clause. It is well settled that Pennsylvania courts "employ a unitary analysis of the state and federal double jeopardy clauses since the protections afforded by each

constitution are identical." *Commonwealth v. Noss,* 165 A.3d 503, 509 (Pa. Super. 2017). The Double Jeopardy Clause provides three separate guarantees: (1) it protects against a second prosecution for the same offense after acquittal, (2) it protects against a second prosecution for the same offense after conviction; and (3) it protects against multiple punishments for the same offense. *Commonwealth v. Britcher,* 563 A.2d 502, 505 (Pa. Super. 1989) (citing *Pearce,* 395 U.S. at 717). Here, Defendant Rosario is asserting that he cannot be *tried* for counts three and five because it may lead to multiple punishments for the same offense. This contention is incorrect and does not implicate any of the Double Jeopardy Clause's three guarantees. *Britcher,* 563 A.2d at 505. Therefore, Defendant Rosario's claim must fail.

Assuming, arguendo, Defendant Rosario is entitled to double jeopardy protection, his claim would still fail because the offenses are not the "same offense" for double jeopardy purposes. The test to determine whether two offenses are the same is commonly referred to as the *Blockburger* test, which "inquires whether each offense contains an element not contained in the other; if not, they are the 'same offence' and double jeopardy bars additional punishment and successive prosecution." *United States v. Dixon,* 509 U.S. 688, 696 (1993). Pennsylvania courts apply the *Blockburger* test in determining whether prosecution is barred by double jeopardy. *Commonwealth v. Farrow,* 168 A.3d 207, 215 (Pa. Super. 2017).

Aggravated Assault is defined in sections 2702(a)(4) and 2702 (a)(1) of the Pennsylvania Crimes Code as follows:

> (a) Offense defined. –A person is guilty of aggravated assault if he:
> (1) attempts to cause serious bodily injury to another, or causes such injury intentionally, knowingly or recklessly under circumstances manifesting extreme indifference to the value of human life; […]
> (4) attempts to cause or intentionally or knowingly causes bodily injury to another with a deadly weapon.

18 Pa.C.S. §2702(a)(1), (4). Because Aggravated Assault at count three contains the additional element of attempting to cause or causing "bodily injury to another with a deadly weapon," and Aggravated Assault at count two contains the additional element of attempting to cause or causing "serious bodily injury," the two offenses are not the same for double jeopardy purposes. The Superior Court of Pennsylvania reached the same conclusion regarding these two offenses in *Commonwealth v. Rhoades,* 8 A.3d 912, 918 (Pa. Super 2010). Similarly, Kidnapping is defined by sections 2901(a)(2) and 2901(a)(3) as follows:

> (a) Offense defined.—Except as provided in subsection (a.1), a person is guilty of kidnapping if he unlawfully removes another a substantial distance under the circumstances from the place where he is found, or if he unlawfully confines another for a substantial period in a place of isolation, with any of the following intentions: […]
> (2) To facilitate commission of any felony or flight thereafter.
> (3) To inflict bodily injury on or to terrorize the victim or another.

18 Pa.C.S.§2901(a)(2), (3). Both offenses contain a statutory element the other does not, and thus, the two offenses are not the same. Accordingly, this Court denies Defendant Rosario's Motion to Dismiss as Multiplicitous or Duplicitous.

V. Motion for Change of Venue

Defendant Rosario's Omnibus Pretrial Motion also included Motion for Change of Venue based on pretrial publicity. Such relief would be warranted only if the trial court concludes that a fair and impartial jury cannot be selected in the county where the crime occurred. *Commonwealth v. Drumheller,* 808 A.2d 893, 902 (Pa. 2002). The decision to grant defendant's motion rests within the sound discretion of the trial judge, whose ruling will not be disturbed on appeal absent an abuse of that discretion. *Commonwealth v. Drumheller,* 808 A.2d 893, 902 (Pa. 2002) (quoting *Commonwealth v. Marinelli,* 690 A.2d 203, 213 (Pa. 1997)). The Supreme Court of Pennsylvania has recognized that the trial court is in the best position to assess the atmosphere of the community and to judge the necessity of any requested change. *Commonwealth v. Briggs,* 12 A.3d 291, 313 (Pa. 2011); *Commonwealth v. Tharp,* 830 A.2d 519, 529 (Pa. 2003).

Generally, the person claiming that he has been denied a fair trial due to pretrial publicity must show actual prejudice in the empaneling of the jury. *Drumheller,* 808 A.2d at 902. In certain cases pretrial publicity can be so pervasive or inflammatory that the defendant need not prove actual juror prejudice. *Id* at 902. There are three factors which determine if pretrial prejudice is presumed: "(1) The publicity is sensational, inflammatory, and slanted toward conviction rather than factual and objective; (2) the publicity reveals the defendant's prior criminal record, or if it refers to confessions, admissions or reenactments of the crime by the

accused; and (3) the publicity is derived from police and prosecuting officer reports." *Id.* However, even when pretrial prejudice is presumed, a change of venue is not warranted unless the defendant shows that the pretrial publicity was so extensive, sustained, and pervasive that the community must be deemed to have been saturated with it, and the time between the publicity and the trial was insufficient for any prejudice to have dissipated. *Id.* The test the court usually follows for determining if there has been a sufficient cooling off period is an investigation of what a panel of prospective jurors has said about its exposure to the publicity in question. *Commonwealth v. Chambers,* 685 A.2d 96, 104 (Pa. 1996).

In *Drumheller,* the court was presented with seven newspaper articles about the defendant's case and the most recent article was dated four months prior to the commencement of jury selection. *Drumheller,* 808 A.2d at 903. The defendant also presented radio broadcast transcripts, the last of which was more than seventeen months prior to jury selection. *Id.* The court presumed pretrial prejudice because of the nature of the newspaper articles and radio broadcast transcripts, which were sensational and inflammatory, mentioned prior drug convictions, and were based on police and prosecution information. *Id.* Due to the presumed prejudice, the court had to determine whether the pretrial publicity saturated the community and whether there was a sufficient cooling off period. *Id.* The *voir dire* process lasted over five days with interviews of eighty-nine potential jurors, sixty of which had read or heard something about the case, and the trial court ultimately concluded

that the community was not saturated by pretrial publicity and that there had been a sufficient cooling off period. *Id.* The Supreme Court of Pennsylvania agreed and ruled that the trial court did not abuse it discretion. *Id.*

Meanwhile, in *Briggs,* the appellant submitted 117 articles to the trial court, which related details of the deaths of police deputies, other events that transpired and also mentioned the defendant's confession. *Briggs,* 12 A.3d 291 at 307-08. The Commonwealth countered by pointing out the coverage had diminished significantly by the time of the hearing. *Id.* at 308. After consideration, the trial court denied the motion. *Id.* On appeal, the Supreme Court of Pennsylvania noted the trial court's conclusion that there had been a sufficient cooling off period after the time of the most extensive media coverage of the manhunt, preliminary hearing, and the funerals for the deputies. *Id.* at 316. The record indicated that *voir dire* was conducted one year and nine months after the shooting of the deputies and that only twelve percent of the jurors possessed a fixed opinion on appellant's guilt. *Id.* On the basis, the Court concluded that the trial court did not abuse its discretion in denying the motion for change of venue. *Id.* at 318.

In the instant case, Defendant Rosario provided four newspaper articles as evidence that the pretrial publicity was prejudicial towards him. (Def. Rosario's OPTM Ex. C.) The first of the articles was dated September 6, 2017, the day after the shooting, and the last of the articles was dated October 13, 2017. (Def. Rosario's OPTM Ex. C.) Currently, it has been approximately ten months since the last

newspaper article mentioned this case and, by the time the *voir dire* process begins, that time will only have grown larger. The defense has argued the articles are sensational, inflammatory, and slanted toward conviction rather than factual and objective. However, in the article dated September 6, 2017, the paper specifically used language such as "alleged" and even referenced the claim Defendant Rosario made at arraignment that the charges were "just allegations." (Def. Rosario's OPTM Ex. C.) The second article dated September 7, 2017 mentioned Defendant Lacks by name as a second suspect in the "alleged kidnapping and shooting" as the state police continued to investigate the case. (Def. Rosario's OPTM Ex. C.) The third article published on September 16, 2017 mentioned Defendant Rosario was, at one time, a suspect in an unsolved murder. Though the mentioning of this incident could be considered inflammatory, it should be noted that the article also mentioned Rosario was not the only man to come under suspicion for the murder and named Patrick Speer as another suspect. (Def. Rosario's OPTM Ex. C.) The fourth and final article, dated October 13, 2017, was merely a summary of the victim's preliminary hearing testimony. (Def. Rosario's OPTM Ex. C.) None of the language that appears in these four articles appears to be inflammatory or slanted toward conviction.

Three of the four articles mention Defendant Rosario's prior criminal history in brief paragraphs. (Def. Rosario's OPTM Ex. C.) While it does not appear that some of the content of the first article was taken from the affidavit supporting

Rosario's arrest, it does not appear that police or prosecuting officer reports related to this case were sources of publicity in any of the subsequent articles. (Def. Rosario's OPTM Ex. C.) However, because the articles contain information relating to Defendant Rosario's prior criminal record, one of the three factors for presumed prejudice has been met. Thus, prejudice may be presumed in this case.

After determining that there is presumed prejudice, the court must then determine whether the defendant proved that the publicity was so extensive, sustained and pervasive that the entire community was saturated with it. *Drumheller,* 808 A.2d at 902. Here, Defendant Rosario provided the court with four articles pertaining to pretrial coverage of the incident, the last of which was dated October 13, 2017, over ten months ago. (Def. Rosario's OPTM Ex. C.) There is no evidence on record indicating that coverage has persisted or been sustained since October 2017. In *Drumheller,* the articles pertaining to the case were dated four months prior to jury selection; in the present case, however, the last article was published roughly ten months ago and jury selection has yet to occur. Furthermore, there are only four articles that the defense claims constitute pretrial publicity in this case, while in *Briggs* where were 117 articles submitted by the appellant, and the court still denied the motion for change of venue. Clearly, if 117 articles are not considered extensive, sustained, and pervasive enough to saturate the community, then the four articles in this case certainly are not. Furthermore, the cooling off period, or the time between the publicity and the trial (which will be approximately

one year), is considerable. Accordingly, for all of the above-mentioned reasons, Defendant Rosario's Motion for Change of Venue is denied.

ORDER

AND NOW, this 11th day of September, 2018, upon consideration of the Motion for Joinder of Defendants at Trial filed by the Commonwealth, the Omnibus Pre-Trial Motion filed by Defendant Rosario, the Omnibus Pre-Trial Motion filed by Defendant Lacks, testimony presented at the hearing before the undersigned on March 4, 2018, a review of the briefs submitted by the Commonwealth and Defendant Rosario, and a review of pertinent case law, it is hereby ORDERED, ADJUDGED, and DECREED as follows:

1. The Commonwealth's Motion for Joinder of Defendants at trial is DENIED.
2. Defendant Lack's Motion to Suppress is DENIED.
3. Defendant Lack's Motion for Severance of Offense is GRANTED.
4. Defendant Lack's Motion for Modification of Bail is DENIED.
5. Defendant Rosario's Motion for Discovery is GRANTED.
6. Defendant Rosario's Motion to Suppress is DENIED.
7. Defendant Rosario's Motion to Dismiss as Multiplicitous and Duplicitous is DENIED.
8. Defendant Rosario's Motion for Severance of Trials is GRANTED.
9. Defendant Rosario's Motion for Severance of Offenses is GRANTED.

10. Defendant Rosario's Motion for Writ of Habeas Corpus is DENIED.

11. Defendant Rosario's Motion for Change of Venue is DENIED.

12. Defendant Rosario's Motion for Modification of Bail is DENIED.

BY THE COURT:

s/Valarie Costanzo J.
VALARIE COSTANZO, JUDGE

IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA,	:	No. 137 WAL 2021
	:	
Respondent	:	Petition for Allowance of Appeal
	:	from the Order of the Superior
	:	Court
	:	
v.	:	
	:	
KEITH ANTHONY ROSARIO,	:	
	:	
Petitioner	:	

ORDER

PER CURIAM

AND NOW, this 8th day of September, 2021, the Petition for Allowance of Appeal is DENIED.

A True Copy Patricia Nicola
As Of 09/08/2021

Attest:/s/ Patricia Nicola
Chief Clerk
Supreme Court of Pennsylvania