

## Commonwealth v. Popovich

### *Pa.R.Crim.P. 583 — Severance — Codefendant Case — Prejudice*

The court refused to sever defendant's criminal trial from that of his codefendant in accordance with Pa.R.Crim.P. 583 where the codefendant's statements to police regarding the underlying double homicide were not so prejudicial to defendant as to warrant such relief. The court granted defendant's pretrial motion to sever.

The commonwealth accused defendant Caden Popovich of being involved in a double homicide on Feb. 25, 2018. On that date, an individual named Anthony Valentino Jr. transported Popovich and codefendant Donovan Millerto Justin Bobosky's residence. While there, defendant got into a confrontation with Justin Luca, who had a semi-automatic firearm and allegedly threatened defendant with the gun. Valentino said that as he went to leave, he heard gunshots and saw defendant with a semiautomatic gun in his hand, firing shots toward the back of the apartment. Valentino left the apartment and ran to his vehicle. Defendant and Miller followed him to the car wherein defendant allegedly threatened to kill Valentino if he said anything about the incident. These three individuals then purchased and smoked marijuana together. Defendant allegedly informed Valentino that he and Miller had killed Luca and another person, Cameron Martwinski, in the apartment. However, defendant allegedly admitted to Valentino that he shot both victims. After the commonwealth filed criminal charges against both defendant and Miller, defendant filed a pre-trial motion asserting that his trial should be severed from Miller's trial in accordance with Pa.R.Crim.P. 583 since Miller made statements to police that were prejudicial to him. Rule 583 states that a "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." The prejudice suffered by a defendant seeking severance must be greater than the general prejudice suffered by defendants when the commonwealth links them to a crime, the court explained. Citing *Commonwealth v. Lauro*, the court noted that the prejudice described in rule 583 is not merely evidence linking the defendant to the crimes charged, but evidence which tends to convict the defendant only by demonstrating his propensity to commit crimes due to the jury being incapable of separating the evidence, or it results in cumulative evidence. Here, Miller made a statement to police in which he recalled the events in question. He described the altercation at Bobosky's apartment prior to the victims being shot. However, Miller insisted that he did not remember the shooting as he was struck in the

head with a hammer. Apparently, Miller did not use anyone's name in setting forth his rendition of the events. The court found it clear that Miller did not identify defendant while speaking to police, as he referred to the person he was with as "somebody else." When asked to identify that person, Miller terminated the interrogation. The court reasoned that Miller's statement to police was less prejudicial than the statement of the co-conspirator in *Commonwealth v. Presbury*, as the statement did not require redaction and there was no means of identifying defendant as the other person except through other admissible evidence. Accordingly, the court denied defendant's request.

C.P. Lawrence County, PICS Case No. 20-0513

COX, *J.*, March 25, 2020—Before the Court for disposition is the Omnibus Pretrial Motion filed on behalf of the defendant Caden Michael Popovich, which asserts the following:

I. Defendant's trial should be severed from the trial of his co-defendant Donovan Miller in accordance with Pa.R.Crim.P. 583 as Mr. Miller made statements to police officers which are prejudicial to Defendant;

II. Defendant's trial for the charge of Receiving Stolen Property should be severed from the trial for the remaining offenses pursuant to Pa.R.Crim.P. 583 as it would confuse the jury and it would be unduly prejudicial as it implicates Defendant's character;

III. Recorded telephone conversations obtained from the Mercer County Corrections involving Defendant should be suppressed as they violate the Pennsylvania Wiretap Act;

IV. Statements made by Defendant to his father following his preliminary arraignment which were overheard by Officer Nathaniel Miller should be suppressed as he

is a juvenile and he had a reasonable expectation of privacy when speaking with an interested adult;

V. All evidence obtained from the search of the cell phone associated with telephone number 724-570-1104 should be suppressed as the search warrants lack factual averments constituting probable cause because there is no connection between the phone and the crimes charged;

VI. The Court should order a change of venire pursuant to Pa.R.Crim.P. 584 as the pretrial publicity has been so pervasive and inflammatory along with the victims' families having strong ties to the community which will prevent the selection of a fair and impartial jury;

VII. Defendant requests the Court order the Commonwealth to provide the complete criminal histories of Defendant, co-defendant and any civilian witnesses in this case;

VIII. Defendant filed a Motion for Bill of Particulars requesting the Commonwealth explain in writing its theory for the charge of criminal homicide; and

IX. In his Petition for Writ of Habeas Corpus, Defendant contends the Commonwealth has failed to establish a prima facie case for the charge of Receiving Stolen Property.

On November 25, 2018 at approximately noon, Anthony Valentino, Jr., Cameron Martwinski and Justin Rodriguez were helping Justin Bobosky move from his apartment located at 844 Franklin Avenue, New Castle, Lawrence

County, Pennsylvania, to Mr. Bobosky's aunt's residence. When they finished moving Mr. Bobosky's possessions, Mr. Valentino, Mr. Martwinski and Mr. Rodriguez returned to the apartment where they were joined by Mr. Rodriguez's girlfriend, one of her friends, and Justin Luca. Mr. Valentino subsequently contacted his friend who he referred to as "Sheard" to obtain marijuana, which Sheard stated he would deliver to the apartment. Mr. Valentino then received a telephone call from Dohnovin Miller asking if Mr. Valentino could find marijuana for him. Mr. Valentino informed him of the arrangement with Sheard to deliver marijuana to the apartment. Arrangements were made with Sheard to obtain marijuana for Mr. Miller as well. Mr. Miller also asked Mr. Valentino to transport him and Defendant to the apartment, which Mr. Valentino agreed to do.

After Mr. Valentino retrieved Mr. Miller and Defendant from each of their residences, they traveled to Mr. Bobosky's apartment. When they arrived, Mr. Martwinski was in the restroom and, once he returned, Mr. Valentino introduced him to Mr. Miller and Defendant. Defendant began questioning Mr. Martwinski if he knew a person he referred to as "Leaky's sister". The conversation became increasingly confrontational. Mr. Martwinski then proceeded to go down the stairs and exit the apartment. He returned approximately five minutes later accompanied by Justin Luca, who had a semi-automatic firearm in his hand. As Mr. Luca reached the top of the stairs leading to the bedroom containing Mr. Valentino, Defendant and Mr. Miller, he was pointing the firearm straight forward. Mr. Luca then walked directly toward Defendant and

placed the muzzle of the firearm to Defendant's head while repeatedly saying, "Are you talking s—t?" Mr. Luca subsequently shifted his attention to Mr. Miller by doing the same thing as he did with Defendant. Mr. Miller reacted by punching Mr. Luca and they began fighting. Mr. Martwinski approached Defendant as Mr. Valentino unsuccessfully attempted to break up the fight between Mr. Miller and Mr. Luca.

Mr. Valentino was preparing to leave the apartment when he heard a gunshot from the rear bedroom where the altercations were occurring. He observed Defendant with a semiautomatic firearm in hand and firing shots toward the back room of the apartment. Mr. Valentino heard several more gunshots and one additional gunshot which sounded different from the others as he was running to exit the apartment. Mr. Valentino proceeded to his vehicle where he momentarily froze without placing his keys in the ignition. Defendant and Mr. Miller then entered the vehicle with Defendant occupying the back seat and Mr. Miller in the front passenger seat. Defendant threatened Mr. Valentino by stating, "If you say anything, I will kill you" while holding a firearm to the back of Mr. Valentino's head. Defendant instructed Mr. Valentino to drive to Mr. Miller's residence. They subsequently traveled to Defendant's residence where Defendant entered the house while Mr. Miller and Mr. Valentino remained in the vehicle. Defendant returned to the vehicle holding a bag. They proceeded to meet an individual to purchase marijuana, which all three of them smoked together. Defendant informed Mr. Valentino that he and Mr. Miller killed Mr. Luca and Mr. Martwinski. He again threatened

Mr. Valentino to remain silent about the events of that night. Defendant admitted to Mr. Valentino he shot both of the victims.

Detective Brandon Hallowich of the New Castle Police Department participated in the investigation concerning the deaths of Mr. Martwinski and Mr. Luca, which included processing the scene along with Detective Brian Cuscino. While reviewing Mr. Bobosky's apartment, they discovered three live .9 millimeter rounds with red tips located in the hallway near the doorway of the rear bedroom similar to the bullets which were discovered during the autopsies of the victims. There were five spent .9 millimeter shell casings found in the apartment near the doorway to the bedroom where the victims' bodies were found. Police officers also discovered two .380 caliber shell casings and three live .380 caliber bullets inside of the rear bedroom.

Detective Hallowich subsequently obtained a warrant to search Defendant's residence where he discovered and seized a Glock 19.9 millimeter handgun with an empty magazine in Defendant's bedroom. There was a separate 30 round magazine containing .9 millimeter bullets with red tips. Detective Hallowich also discovered a Ruger LCP .380 caliber handgun in Defendant's residence containing an empty magazine. Detective Hallowich learned the Glock 19 handgun was reported as stolen.

Detective Justin Crumb of the New Castle Police Department attended the autopsies of the victims at Beaver Valley Medical Center, which were performed by Dr. Todd Luckasevic and surgical pathology technician Timothy Manzewitsch. It was determined Mr. Luca suffered two

gunshot wounds to the head with one being to his right cheek and one above his right eye. Mr. Martwinski suffered four gunshot wounds consisting of one wound to the back of his head, one through his neck, one in his right chest and one in his lower left back area. It was determined the manner of death for both victims were homicide by gunshot wounds.

On June 20, 2018, the Commonwealth filed an Information charging Defendant with two counts of Criminal Homicide<sup>1</sup>, two counts of Possession of a Firearm by a Minor<sup>2</sup>, Firearms not to be Carried without a License<sup>3</sup> and Receiving Stolen Property<sup>4</sup>. The Commonwealth filed a Motion to Amend Criminal Information on March 8, 2019, seeking to add one count of Criminal Conspiracy<sup>5</sup>, which was granted by this Court on the same date. On October 11, 2019, Defendant filed his Omnibus Pretrial Motion and he filed a Supplemental Omnibus Pretrial Motion on January 2, 2020. This Court held hearings on Defendant's Omnibus Pretrial Motion on November 8, 2019, and December 16, 2019, which was continued to January 6, 2020. Following the January 6, 2020 hearing, the parties were granted thirty days from the completion of the transcript, which was January 17, 2020, to brief the issues raised by Defendant's Omnibus Pretrial Motion.

At the second hearing concerning Defendant's Omnibus Pretrial Motion, the Commonwealth presented the testimony of Officer Nathaniel Miller of the New

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1. 18 Pa.C.S.A. § 2501(a).

2. 18 Pa.C.S.A. § 6110.1(a).

3. 18 Pa.C.S.A. § 6106(a)(1).

4. 18 Pa.C.S.A. § 3925(a).

5. 18 Pa.C.S.A. § 903(a)(1).

Castle Police Department. On February 27, 2018, Officer Miller was directed to proceed to Defendant's residence to execute an arrest warrant for Defendant; however, Defendant was already in custody, so Officer Miller returned to his patrol duties. He subsequently proceeded to Mr. Miller's residence to execute an arrest warrant, but Mr. Miller was not present. On the same date, Officer Miller aided in transporting Defendant and Mr. Miller to their preliminary arraignments at Magisterial District Judge Melissa A. Amodie's office located in the Lawrence County Government Center. After the preliminary arraignment was completed, Defendant and his father Brian Popovich wished to have a conversation, which was permitted by the police. Defendant and Mr. Popovich were permitted to speak with each other in the waiting room located outside of Magisterial District Judge Amodie's courtroom while Officer Miller was present and approximately five or six feet away from them. During that conversation, Mr. Popovich asked Defendant what was going on to which Defendant replied that some of the information contained within the Affidavit of Probable Cause was false, but most of the information was true. According to Officer Miller, Defendant and Mr. Popovich were aware of his presence as the room is rather small and he remained visible to them for the duration of the conversation.

Defendant presented the testimony of Mr. Popovich, who explained he knew many of the police officers due to his employment as a school principal. Shortly after Defendant was arrested, Mr. Popovich went to the New Castle Police Station and had a conversation with Police Chief Robert Salem. Mr. Popovich was permitted to speak



with Defendant as an interested adult due to Defendant being a minor. At that time, Mr. Popovich spoke with Defendant in a separate room outside of the presence of police officers. He informed police officers he was not allowing Defendant to speak with them at that time. Following Defendant's preliminary arraignment, Mr. Popovich asked Detective Crumb to speak with Defendant and was granted permission to do so. Mr. Popovich explained Officer Miller was seated a little bit further than five to six feet away from him and Defendant during their conversation. However, he believed his conversation with Defendant was private similar to the conversation they had at the police station. He also explained he was not aware Officer Miller was listening to them. Mr. Popovich testified Defendant informed him some of the information in the Affidavit of Probable Cause is true while most of it is false.

### I. Severance of Co-Defendant

In his Omnibus Pretrial Motion, Defendant asserts his trial should be severed from the trial of his co-defendant Donovan Miller in accordance with Pa.R.Crim.P. 583 as Mr. Miller made statements to police officers which are prejudicial to Defendant.

Pa.R.Crim.P. 583 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." The prejudice suffered by a defendant seeking severance must be greater than the general prejudice suffered by all defendants when the Commonwealth's evidence links them to a crime.

*Commonwealth v. Ferguson*, 107 A.3d 206, 210 (Pa. Super. 2015). The prejudice described by Rule 583 is not merely evidence linking defendant to the crimes charged, but evidence which tends to convict the defendant only by demonstrating his propensity to commit crimes or due to the jury being incapable of separating the evidence or it results in cumulative evidence. *Commonwealth v. Lauro*, 819 A.2d 100, 107 (Pa. Super. 2003). “[T]he admission of relevant evidence connecting a defendant to the crimes charged is a natural consequence of a criminal trial, and it is not grounds for severance by itself.” *Id.*

Allowing the presentation of a hearsay statement made by a co-defendant during trial violates an accused’s right to confront witnesses guaranteed in the Sixth Amendment of the United States Constitution despite the trial court providing an instruction to only consider the statement as evidence against the co-defendant. *Bruton v. United States*, 391 U.S. 123, 126-127, 88 S.Ct. 1620, 1622-1623, 20 L.Ed.2d 476 (1968). The Court cited to the Advisory Comment concerning F.R.E. 14 as follows:

A defendant may be prejudiced by the admission in evidence against a co-defendant of a statement or confession made by that co-defendant. This prejudice cannot be dispelled by cross-examination if the co-defendant does not take the stand. Limiting instructions to the jury may not in fact erase the prejudice.

The *Bruton* Court acknowledged there are some contexts in which the jury will not or cannot follow an instruction, which cannot be ignored. *Id.*, 391 U.S. at 135. “Such a context is presented here, where the powerfully

incriminating extrajudicial statements of a co-defendant, who stands accused side-by-side with the defendant, are deliberately spread before the jury in a joint trial.” *Id.*

It is apparent the use of a confession of a non-testifying co-defendant implicates the Confrontation Clause of the Sixth Amendment. *Commonwealth v. Oliver*, 635 A.2d 1042, 1044 (Pa. Super. 1993). “Perhaps the optimal solution to this problem would have been to sever [defendant’s] trial from his co-defendants’ trials; that way, the confessions could have been properly admitted against their authors, but not against [defendant].” *Id.* “But the potential prejudice to a defendant from the use of non-testifying co-conspirators’ statements must be balanced against the demands of judicial economy and desire for verdict consistency.” *Id.* The response to the *Bruton* Court’s decision declaring the admission of non-testifying co-defendant’s statement being remedied by a curative instruction is unconstitutional was to redact any reference to the defendant’s name in the statement. *Id.* This practice was approved by the Pennsylvania Courts in *Commonwealth v. Johnson*, 378 A.2d 859 (Pa. 1977). *Id.*, 635 A.2d at 1045. The *Oliver* Court stated:

Redacting testimony is not a magic curative elixir, but still requires a court to balance the potential prejudice to the defendant against the probative value of the evidence, the possibility of minimizing prejudice, and the benefits to the criminal justice system of conducting joint trials. Redacted testimony may still violate the *Bruton* rule if it is “powerfully incriminating” and lends “‘substantial, perhaps critical weight’ to the prosecution’s case.” *Commonwealth v. Rawls*, 276

Pa.Super. 89, 97, 419 A.2d 109, 113 (1980).

*Id.*, 635 A.2d at 1045 (1993). In reaching a determination as to whether a co-conspirator's statement violates a defendant's Sixth Amendment rights, the Court must evaluate the evidence properly admitted at trial against the defendant to determine whether the verdict is sufficiently supported by said properly admitted evidence. *Id.*

In cases where conspiracy is charged, defendants may be joined where they allegedly participated in the same act or transaction. *Commonwealth v. Presbury*, 665 A.2d 825, 828 (Pa. Super. 1995)(Admission of the redacted confession of a co-conspirator did not unconstitutionally prejudice the appellant). The *Presbury* Court noted the Pennsylvania Supreme Court rejected the "contextual implication" argument in *Commonwealth v. Chestnut*, 512 A.2d 603 (Pa. 1986), as it would likely render all statements by a co-defendant inadmissible, hi The Court held the redacted admission of the appellant's co-conspirator did not unconstitutionally prejudice the appellant as the only reference made to anyone other than the co-conspirator was by the term "other guy" and the only way to link the appellant to the "other guy" was the evidence also tying the appellant to the murder. *Id.*

In the case *sub judice*, police officers obtained a statement from Mr. Miller recalling the events of February 25, 2018. In that statement, he explains the altercation which occurred at Mr. Bobosky's apartment prior to the victims being shot as he insisted he did not remember the shootings based upon being struck in the head with a hammer. However, it does not appear Mr. Miller used

anyone's name in setting forth his rendition of the events of that night. It is clear Mr. Miller did not identify Defendant when speaking with police officers as he referred to the person he was with as "somebody else". When asked to identify that person, Mr. Miller quickly terminated the interrogation. Mr. Miller's statement is less prejudicial than the statement of the co-conspirator in *Presbury* as it does not require redaction and there is no means of identifying Defendant as the other person except through other admissible evidence at trial proving he was the other person and was involved in the murders. In addition, the Pennsylvania Supreme Court has explicitly rejected Defendant's contextual implication argument in *Chestnut*. Therefore, Defendant's request to sever defendants is denied.

## II. Severance Concerning the Charge of Receiving Stolen Property

Next, Defendant contends a trial for the charge of Receiving Stolen Property should be severed from the trial for the remaining offenses pursuant to Pa.R.Crim.P. 583 as it would confuse the jury and it would be unduly prejudicial as it implicates Defendant's character.

In deciding joinder or severance of offenses, the court must examine whether the evidence of each of the offenses would be admissible in a separate trial for the other, 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, whether the defendant will be unduly prejudiced by the consolidation. *Commonwealth v. Thomas*, 879 A.2d 246

(Pa. Super. 2005). Where the crimes charged grew out of the same acts and much of the same evidence is necessary or applicable to all defendants, joint rather than separate trials are to be preferred. *Commonwealth v. Childress*, 680 A.2d 1184 (Pa. Super. 1996). In *Commonwealth v. Wholaver*, 989 A.2d 883 (Pa. 2010), the Pennsylvania Supreme Court held the trial court did not err in declining to sever the charges related to defendant's murder of his wife and daughters from sexual offenses involving his daughters as evidence of each charge would be admissible in separate trials and there was no danger in confusing the jury. *Id.* Moreover, in *Wholaver*, the charges all arose from the same events and were part of the same story. *Id.*

In the current matter, the receiving stolen property charge arises from the same series of events as the murders as they were perpetrated with the allegedly stolen firearm. It would be necessary for the Commonwealth to provide the suspected murder weapon at trial, which is the firearm involved in the receiving stolen property charge. Moreover, evidence of the murders would be admissible in a separate trial for receiving stolen property as the homicide investigation is incorporated in the series of events leading to the discovery of the firearm at issue. In addition, there is not a substantial danger of undue prejudice based upon the charge of Receiving Stolen Property being tried with the remainder of the charges filed against Defendant as it would be necessary for the Commonwealth to establish how Defendant obtained a firearm as he was a minor at the time the homicides occurred. It would be erroneous to limit the Commonwealth from explaining the origin of the firearm used to perpetrate a homicide at trial under the

current circumstances as the murder weapon constitutes vital evidence to present to a jury. As such, the firearm and background as to how Defendant obtained the firearm would be admissible at trial regardless of whether the charge of Receiving Stolen Property is decided at the same trial. Thus, Defendant's request to sever the charge of Receiving Stolen Property is denied as he is not entitled to severance as all of the charges arise from the same acts or transactions and there is a very low probability of confusing the jury.

### III. Recorded Telephone Conversations

Defendant further asserts the recorded telephone conversations obtained from Mercer County Corrections involving Defendant should be suppressed as they violate the Pennsylvania Wiretap Act. Despite providing numerous recorded telephone conversations to Defendant in discovery, the Commonwealth has indicated it does not intend to introduce any of those conversations at trial. It is also important to note neither party has presented any evidence as to whether the recorded conversations were obtained in compliance with the Pennsylvania Wiretap Act. Resultantly, the Court finds Defendant's motion to suppress is moot based upon the Commonwealth's assurances it does not intend on presenting those to the jury at trial. In the event the Commonwealth seeks to admit any recorded telephone conversation at trial, Defendant's motion to suppress is denied without prejudice and he may reassert this argument at that time.

### IV. Admissibility of Conversation Between Defendant and His Father

Defendant also contends the statements made by Defendant to his father following his preliminary arraignment which were overheard by Officer Miller should be suppressed as he is a juvenile and he had a reasonable expectation of privacy when speaking with an interested adult.

It is well established by Pennsylvania law that statements made by a juvenile when not provided with the opportunity to consult with an interested adult may be suppressed. *Commonwealth v. McCutchen*, 343 A.2d 669 (Pa. Super. 1975). The failure to allow a juvenile to consult with an interested adult creates a rebuttable presumption the statement should be suppressed. *Commonwealth v. Christmas*, 465 A.2d 989 (Pa. 1983). This presumption may be overcome by the Commonwealth presenting evidence that the totality of circumstances clearly demonstrated a knowing, intelligent and voluntary waiver of the right to consult with an interested adult. *Id.*

The evidence presented to this Court demonstrates Defendant was permitted to speak with an interested adult when asked to provide a statement to police officers after he was placed in custody. In fact, Defendant presented the testimony of his father Brian Popovich, who explained Chief Salem permitted him to speak with Defendant at the New Castle Police Station when Defendant was deciding whether or not assert his right to remain silent. They were allowed to converse in a separate room without police officers present at that time and Defendant decided not to participate in a custodial interrogation. As a result, Defendant was permitted to consult with an interested adult at the critical moment when he was deciding whether



to waive his *Miranda* rights as intended by the Courts' rulings in *McCutchen* and *Christmas*.

Defendant argues his right to consult with an interest adult was infringed upon when Officer Miller remained in the waiting room at Magisterial District Judge Amodie's office, which allowed Officer Miller to overhear Defendant's conversation with his father. In support of that argument, Defendant contends communications between a juvenile defendant and an interested adult are privileged and inadmissible at trial. The Court cannot find any applicable case law to support Defendant's contention in that regard.

In addition, Defendant made the objected to statements with Officer Miller clearly present within a small waiting room waiving any privilege he is attempting to assert. The well established law in Pennsylvania is any protection of privileged communications can be waived when the alleged privileged statements are made in the presence of third parties. *See Commonwealth v. Small*, 980 A.2d 549, 561 (Pa. 2009)(The Court held the marital privilege was waived because the statements were made in the presence of third parties). Therefore, Defendant waived any privilege he is attempting to assert when he spoke freely with Mr. Popovich in the presence of Officer Miller. Based upon the foregoing, Defendant's motion to suppress the statement he made following his preliminary arraignment in the presence of Officer Miller is denied.

#### V. Suppression of Evidence Seized from Defendant's Cell Phone

Defendant contends any evidence obtained from

the search of the cell phone associated with telephone number 724-570-1104 should be suppressed as the search warrants lacked factual averments constituting probable cause because there is no connection between the phone and the crimes charged.

According to Pa.R.Crim.P. 203(b), “No search warrant shall issue but upon probable cause supported by one or more affidavits sworn to before the issuing authority in person or using advanced communication. The issuing authority, in determining whether probable cause has been established, may not consider any evidence outside of the affidavits.” In determining whether probable cause existed for the issuance of a search warrant, the Court is not permitted to consider oral testimony or any facts discovered outside of the four corners of the written affidavit. *Commonwealth v. Edmunds*, 526 Pa. 374, 382, 586 A.2d 887, 891 (1991) (citing *Commonwealth v. Simmons*, 450 Pa. 624, 626, 301 A.2d 819, 820 (1973)). Probable cause exists when a police officer has knowledge of facts and circumstances to warrant a prudent man to believe that a crime has been committed or will be committed. *Commonwealth v. Hicks*, 434 Pa. 153, 158, 253 A.2d 276, 279 (1969). The issuing authority must examine the totality of circumstances to determine if probable cause exists. *Commonwealth v. Huntington*, 924 A.2d 1252, 1255 (Pa. Super. 2007) (citing *Commonwealth v. Gray*, 509 Pa. 476, 503 A.2d 921 (1985)). “The task of the [issuing authority]...is to make a practical, common sense assessment’ of whether, ‘given all the circumstances set forth in the affidavit,’ a “fair probability’ exists that contraband or evidence of a crime will be found ‘in a

particular place.” *Id.*, (quoting *Commonwealth v. Murphy*, 916 A.2d 679, 682 (Pa. Super. 2007)).

In *Commonwealth v. Freeman*, 128 A.3d 1231 (Pa. Super. 2015), the Superior Court of Pennsylvania addressed a similar situation as the one currently before the Court. In that case, the affidavit of probable cause was based almost solely upon the statement given by the appellant’s co-defendant, which stated the appellant drove the co-defendant and two other individuals to commit a robbery. The appellant then waited a short distance away while the robbery occurred and the co-defendants called the appellant’s cell phone when they were ready to be picked up to leave. The victim eventually died as a result of injuries sustained from gunshots fired by one of the other individuals during the robbery. The appellant was then instructed to drive from the scene of the incident. During their investigation, police officers went to the appellant’s residence where they spoke with his girlfriend. She provided written consent for them to search the residence. The police officers also asked if she knew the location of the appellant’s cell phone and she responded that the appellant had multiple cell phones. She called one of the cell phones and a loud ringing was heard in the garbage can where two cell phones were discovered.

The police officers then obtained search warrants for the residence and to seize the appellant’s cell phones. The appellant was arrested and charged with homicide, kidnapping, robbery, persons not to possess a firearm, receiving stolen property, false imprisonment and conspiracy to commit each of those offenses. He subsequently filed an omnibus pretrial motion seeking the

suppression of physical and testimonial evidence, which included arguing the cell phones should be suppressed as being the result of an illegal search and the search warrant was not supported by probable cause. The appellant's suppression motions were denied and he was convicted of second-degree murder, robbery, kidnapping, conspiracy to commit kidnapping and conspiracy to commit robbery at the conclusion of a jury trial. He appealed to the Superior Court asserting 12 issues for the Court's consideration, which included the trial court erred in admitting the cell phones as the search warrant for the data stored on those phones lacked probable cause.

The appellant asserted the affidavit of probable cause was insufficient as it was based entirely upon the confession of the appellant's co-conspirator. However, the *Freeman* Court held the trial court did not err in holding there was a substantial basis for concluding that probable cause existed as it contained the co-conspirator's narrative of the crimes along with a statement of the appellant's girlfriend indicating they were looking out of the window when police arrived and the appellant may have discarded the cell phones. *Id.*, 128 A.3d at 1243. Moreover, the Court recognized the appellant gave false statements to the police officers by stating he only possessed one cell phone and providing false locations within the residence for that phone. *Id.* The *Freeman* Court stated, "The facts contained within [the detective's] affidavit of probable cause provided the issuing magistrate with a substantial basis to conclude that there was a fair probability that evidence of criminal activity would be found on [the appellant's] cell phones." *Id.*

In the current case, police officers presented two applications for search warrants concerning a cell phone seized at Defendant's residence, which were intended to search for the subscriber account information, incoming and out-going calls, voicemail messages, text messages, data contents, internet browsing history, global positioning data stored on the device, data usage, and photographic or video files. The affidavits of probable cause supporting the issuance of the search warrants were based in large part upon the statement provided by Mr. Valentino. He explained having observed Defendant utilize his cell phone during the events of February 25, 2018. Resultantly, the data or information provided on the cell phone could help place Defendant at the scene of the homicides at the time of the gunshots as well as substantiating Mr. Valentino's rendition of the facts as to the locations he was ordered to drive Defendant and Mr. Miller. Moreover, Mr. Valentino indicated Defendant and/or Mr. Miller contacted an unidentified drug dealer to obtain marijuana following the homicides. In a homicide investigation, it may be critical to obtain information concerning who the accused spoke with before, during or after the alleged events transpired. Mr. Valentino's statement and the remaining information in the affidavit of probable cause created a substantial basis to conclude there was a fair probability evidence of criminal activity would be found on Defendant's cell phone, which is strikingly similar to the statement of the co-conspirator in *Freeman*. Therefore, Defendant's motion to suppress evidence seized as it relates to Defendant's cell phone information and data is denied.

## VI. Change of Venire

Defendant contends the Court should order a change of venire pursuant to Pa.R.Crim.P. 584 as the victims' families have strong ties to the community and the pretrial publicity has been so pervasive and inflammatory, which will prevent the selection of a fair and impartial jury.

Pa.R.Crim.P. 584(a) states, "All motions for change of venue or for change of venire shall be made to the court in which the case is currently pending. Venue or venire may be changed by that court when it is determined after hearing that a fair and impartial trial cannot otherwise be had in the county where the case is currently pending." A change of venue or venire is necessary when the trial court determines that a fair and impartial jury cannot be selected from the county in which the crime was committed. *Commonwealth v. Weiss*, 565 Pa. 504, 514-515, 776 A.2d 958, 964 (2001) (citing *Commonwealth v. Karenbauer*, 552 Pa. 420, 433, 715 A.2d 1086, 1092 (1998)). Typically, a defendant who claims he or she was denied a fair trial because of pretrial publicity must demonstrate there was actual prejudice in the empanelling of the jury. *Id.*, 565 Pa. at 515, 776 A.2d at 964 (citing *Commonwealth v. Carter*, 537 Pa. 233, 249, 643 A.2d 61, 69 (1994)). However, prejudice from pretrial publicity may be presumed, if the following occurs: "(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.* (citing *Commonwealth v. Pursell*, 508 Pa. 212, 221, 495 A.2d 183, 187(1985)). "If any of these factors exists, the

publicity is deemed to be inherently prejudicial, and we must inquire whether the publicity has been so extensive, so sustained, and so pervasive that the community must be deemed to have been saturated with it.” *Commonwealth v. Chambers*, 546 Pa. 370, 385, 685 A.2d 96, 103 (1996) (citing *Commonwealth v. Breakiron*, 524 Pa. 282, 288, 571 A.2d 1035, 1037 (1990)).

A similar situation as the case *sub judice* was addressed in *Commonwealth v. Drumheller*, 808 A.2d 893 (Pa. 2002). In that case, the appellant was involved in a turbulent relationship with the victim, which resulted in the victim obtaining a protection from abuse order against the appellant. She subsequently provided police officers with information concerning the appellant’s drug trafficking activities. The victim became a confidential informant and spoke with police officers on numerous occasions. On the date of the homicide, the victim was visiting the residence of a co-worker, during which the victim stated the appellant obtained access to her residence and began physically assaulting her. At approximately 1:30 a.m., the victim and her co-worker were startled by a loud noise and the front door swung open. The co-worker testified he observed the appellant holding a knife. The appellant walked into the residence and he began arguing with the victim. He then stabbed the victim in the left side of her torso. The co-worker attempted to convince the appellant to stop and the appellant moved in the co-worker’s direction. The appellant stabbed the co-worker in the chest. At that time, the victim made a call on the phone. The appellant grabbed the phone and destroyed it. The co-worker left the residence to obtain help from a neighbor. When the police

and paramedics arrived, the victim was lying on the floor motionless as she was stabbed 21 times.

The appellant was charged with murder, attempted murder, two counts of aggravated assault, two counts of aggravated assault with a deadly weapon and burglary. The appellant filed an omnibus pretrial motion seeking a change of venue or venire, which the trial court continued until jury selection. The trial court eventually denied the motion for a change of venue or venire and reasoned the press releases concerning the crime were not so inflammatory that a jury could not be selected from the local community. The trial court also reserved the right to revisit that issue if it became clear during jury selection the pretrial publicity prevented the selection of an impartial jury. However, a jury was selected without the trial court revisiting the appellant's request for a change of venue or venire. At the conclusion of the trial, the appellant was convicted of all of the crimes charged. Defendant was sentenced to death and appealed to the Supreme Court of Pennsylvania. On appeal, the appellant raised numerous issues, which included an assertion the trial court erred in failing to grant a change of venue or venire due the pretrial publicity his case received in the local community.

The *Drumheller* Court recognized the decision to grant a change of venue or venire rests within the sound discretion of the trial court and will not be disturbed absent an abuse of that discretion. *Id.*, 808 A.2d at 902. In order to obtain a change of venue or venire, the accused must demonstrate there is actual prejudice in selecting the jury, unless the pretrial publicity is so pervasive or inflammatory that the defendant need not prove actual prejudice. *Id.* In



*Drumheller*, the appellant presented seven newspaper articles about his case with the most recent being four months prior to the commencement of jury selection. He also presented radio broadcast transcripts with the most recent being seven months prior to jury selection. The *Drumheller* Court noted jury selection occurred over a period of five days with 89 potential jurors being interviewed and 60 of them had read or heard something regarding that case, but most of the jurors indicated they read or heard very little about the case or could not remember what they read or heard. *Id.* The Court emphasized the jurors selected stated they were able to set aside what they read or heard and decide the case fairly and impartially with some of them confirming they did not read or heard anything about the case. *Id.* The Court explained, “The actual jurors empanelled remembered very little of what they had read or heard; three of the actual jurors had no knowledge of the case.” *Id.* The *Drumheller* Court held the trial court did not abuse its discretion in denying the motion for change of venue or venire and stated, “As the trial court correctly determined, the voir dire process demonstrated that the community was not saturated by pre-trial publicity about this case and that there had been a cooling-off period sufficient to ensure that the selected jurors would be able to fairly and impartially consider the case against [the appellant].” *Id.*

In the current case, Defendant has provided 13 newspaper articles regarding the murders of the victims. All of those articles contain objective factual developments of the case and investigation or a summary of the procedural posture of the ongoing litigation. None of the articles provided by

Defendant contain any content which is unduly prejudicial to Defendant or would prevent the empanelling of a fair and impartial jury. It is also important to note the most recent article was published on June 3, 2019, which explains the homicide arrest rate of the New Castle Police Department and contains summaries of numerous other homicides investigated by that department. Again, there is nothing unduly prejudicial as it relates to Defendant contained within that article. Moreover, it is likely there will be a sufficient cooling off period to allow any potential prejudice to subside prior to the commencement of jury selection as was the case in *Drumheller*.

Defendant also provided the Court with a Facebook post from the New Castle Police Department dated February 27, 2018, informing the public of the double homicide and stating Defendant and Mr. Miller were placed in custody as the individuals responsible for the homicides. Similar to the aforementioned newspaper articles, the Facebook post only contains factual allegations and does not have any statements by police officers or prosecutors commenting on the guilt or innocence of Defendant. More concerning are the comments to the Facebook post in which numerous individuals posted disparaging comments concerning Defendant and Mr. Miller. While there are a significant number of troublesome comments, there is no indication the comments were solely made by members of the local community. Even in the event all of the comments were made by local citizens, it would only constitute a small percentage of the overall community available as potential jurors.

Based upon the foregoing, the Court finds the approach

adopted by the trial court in *Drumheller* is appropriate in this matter. The pretrial publicity is not so pervasive and prejudicial to completely foreclose the ability to select a fair and impartial jury. Hence, Defendant's request for a change of venue or venire is denied without prejudice and the Court is willing to revisit this issue, if it appears an impartial jury cannot be selected once *voir dire* commences.

#### VII. Criminal Histories for Witnesses and Co-Defendant

Defendant requests the Court order the Commonwealth to provide the criminal history of Defendant, co-defendant and any civilian witnesses in this case.

It is well established a criminal defendant is entitled to the relevant criminal histories of witnesses pursuant to Pa.R.Crim.P. 305. *Commonwealth v. Copeland*, 723 A.2d 1049, 1051 (Pa. Super. 1998). A witness's criminal history is a valuable tool for the defense, such as the witness's convictions for *crimen falsi* within the previous ten years or charges which are currently pending as the witness's testimony may be favorable to the Commonwealth in the hopes of achieving leniency in sentencing. *Id.*, 723 A.2d at 1052. However, the Pennsylvania Courts have placed limits on what is discoverable as it relates to witnesses' entire criminal records. *Commonwealth v. Smith*, 540 A.2d 246, 254-255 (Pa. 1988)(The trial court did not err in refusing the appellant's request for all of the criminal records for civilian witnesses who were to testify at trial). In the event a defendant is concerned the Commonwealth is not providing all of the relevant records in relation to

*crimen falsi* or pending criminal charges, the appropriate procedure is to request an *in camera* review of the entire records to allow the Court to decide which records are appropriate. *Id.*

“[E]vidence of prior convictions can be introduced for the purpose of impeaching the credibility of a witness if the conviction was for an offense involving dishonesty or false statement, and the date of conviction or the last day of confinement is within ten years of the trial date. If a period greater than ten years has expired the presiding judge must determine whether the value of the evidence substantially outweighs its prejudicial effect.” *Commonwealth v. Randall*, 528 A.2d 1326, 1329 (Pa. 1987)(The Pennsylvania Supreme Court overruled its prior rulings in *Commonwealth v. Bigham*, 307 A.2d 255 (Pa. 1973) and *Commonwealth v. Roots*, 393 A.2d 364 (Pa. 1978), as those cases required the trial court evaluate several factors in determining whether to admit a prior conviction for *crimen falsi* regardless of when the convictions occurred). The trial court is not required to weigh the evidentiary value of defendant’s prior *crimen falsi* conviction against its prejudicial effect when deciding if it may be used for impeachment when the conviction or last date of confinement occurred within ten years of trial. *Commonwealth v. Jackson*, 561 A.2d 335, 339 (Pa. Super. 1989). The aforementioned principles were incorporated in Pa.R.E. 609, which requires the admission of convictions for *crimen falsi* at trial for impeachment if the witness was convicted within ten years of trial. However, if the conviction occurred more than 10 years prior to trial then the probative value must substantially

outweigh the prejudicial effect and the proponent must provide the adverse party with reasonable written notice of the intent to reference the conviction at trial. Pa.R.E. 609(b)(1) and (2).

In the current matter, Defendant is requesting the entire criminal records for Defendant, Mr. Miller and all of the civilian witnesses. While it is clear the Commonwealth is required to provide the relevant criminal records for the witnesses it intends to call at trial, Defendant is not entitled to receive the full, unredacted criminal records for those individuals. Resultantly, the Commonwealth must provide records demonstrating any *crimen falsi* convictions and charges currently pending for the witnesses it intends to call to testify at trial. If Defendant believes he did not receive all of the appropriate records, he may request the Court perform an *in camera* review of the criminal histories of the witnesses to ensure the Commonwealth has provided sufficient records for the defense to properly prepare for trial. Thus, Defendant's request for the criminal records for Defendant, Mr. Miller and all civilian witnesses is granted to the extent the Commonwealth must provide the records demonstrating any *crimen falsi* convictions and any charges currently pending or current sentences for which the witness may be seeking leniency in exchange for his or her testimony.

#### VIII. Bill of Particulars

Defendant filed a Motion for Bill of Particulars requesting the Commonwealth explain in writing its theory for the charge of criminal homicide. The Commonwealth objected to Defendant seeking a bill of particulars as the

request is untimely. “A request for a bill of particulars shall be served in writing by the defendant upon the attorney for the Commonwealth within 7 days following arraignment. The request shall promptly be filed and served as provided in Rule 576.” Pa.R.Crim.P. 572. While it is apparent the request for a bill of particulars filed by Defendant is untimely, the Court will still address whether Defendant’s request is appropriate.

A bill of particulars serves a very narrow purpose and it is not the vehicle to obtain discovery of the Commonwealth’s evidence. *Commonwealth v. Champney*, 832 A.2d 403, 412-413 (Pa. 2003). “A bill of particulars is intended to give notice to the accused of the offenses charged in the indictment so that he may prepare a defense, avoid a surprise, or intelligently raise pleas of double jeopardy and the statute of limitations.” *Id.* In *Champney*, the appellant requested the Commonwealth specify in a bill of particulars the appellant’s motive for the killing, whether the Commonwealth alleged that appellant was involved in a conspiracy to kill the victim, the names of any alleged co-conspirators, and any specific acts in furtherance of the conspiracy. The Supreme Court determined the trial court did not abuse its discretion in denying the request for bill of particulars as the request for the appellant’s motive was not the proper subject for a bill of particulars and it constituted a discovery request. *Id.*

In the case *sub judice*, Defendant requests a bill of particulars “requiring the Commonwealth to explain in writing the theory of their case regarding the specific charge of criminal homicide as charged in the criminal information at CC No. 201707686.” It is apparent from

*Champney* this information is not a proper basis for granting a request for a bill of particulars. It more or less is asking for the Commonwealth to outline its evidence and provide its rationale for charging Defendant with criminal homicide. This is very similar to the request for motive in *Champney*. The Commonwealth is not required to provide Defendant with its theory of the case nor can Defendant request the same in a bill of particulars. The request for the Commonwealth's evidence was more appropriately made in the Motion for Discovery. Upon receiving the evidence, Defendant is then able to prepare a defense to the evidence. Moreover, the charging documents provided to Defendant are sufficient to inform Defendant of the nature of the charges being asserted against him. Defendant already had a preliminary hearing in which the Commonwealth outlined its evidence and theory of the case in order to have the charges bound over to this Court. There seems to be no reason to require the Commonwealth to further provide a statement outlining its theory of the case.

#### IX. Petition for Writ of Habeas Corpus Concerning the Charge of Receiving Stolen Property

In his Petition for Writ of Habeas Corpus, Defendant contends the Commonwealth has failed to establish a prima facie case for the charge of Receiving Stolen Property.

Where a criminal defendant seeks to challenge the sufficiency of the evidence presented at his preliminary hearing, he may do so by filing a Writ of Habeas Corpus. *Commonwealth v. McBride*, 528 Pa. 153, 595 A.2d 589 (1995); *Commonwealth v. Carmody*, 799 A.2d 143 (Pa. Super. 2002). The purpose of a preliminary hearing is to

avoid the incarceration or trial of a defendant unless there is sufficient evidence to establish a crime was committed and the probability the defendant could be connected with the crime. *Commonwealth v. Fox*, 422 Pa. Super. 224, 234, 619 A.2d 327, 332 (1993), appeal denied, 535 Pa. 659, 634 A.2d 222 (1993) (quoting *Commonwealth v. Tyler*, 402 Pa. Super. 429, 433, 587 A.2d 326, 328 (1991), appeal denied, 533 Pa. 39, 617A.2d 1263(1992)).

In evaluating an accused's entitlement to pre-trial habeas corpus relief, a trial court must determine when there is sufficient evidence to make out a prima facie case that the defendant committed the crime with which he or she is charged. *Commonwealth v. Hock*, 556 Pa. 409, 728 A.2d 943 (1993). In a pre-trial habeas corpus proceeding, as in a preliminary hearing, the Commonwealth has the burden of establishing a prima facie case, offering some proof to establish each material element of the offense as charged. *Commonwealth v. Owen*, 397 Pa. Super. 507, 580 A.2d 412 [1990]. This does not mean that the prosecution must prove the accused guilty beyond a reasonable doubt, but rather, the prosecution must establish "sufficient probable cause" that the accused has committed the offense. *Commonwealth v. Prosdocimo*, 331 Pa. Super. 51, 479 A.2d 1073 (1994). The standard in determining whether a defendant is properly held for Court is: (a) that the record reveals a prima facie showing that a crime or crimes have been committed; and (b) that the defendant was in some way legally responsible. *Liciaga v. Court of Common Pleas of Lehigh County*, 523 Pa. 258, 566 A.2d 246 (1989).

The Commonwealth establishes a prima facie case



when it produces evidence that, if accepted as true, would warrant the trial court to allow the case to go to a jury. *Commonwealth v. Marti*, 779 A.2d 1177 (Pa. Super. 2001). The Commonwealth need not prove the elements of the crime beyond a reasonable doubt. *Id.* The prima facie case merely requires evidence of the existence of each element of the crime charged. *Id.* This is not the junction of the proceeding to make credibility and weight determinations. *Commonwealth v. Williams*, 911 A.2d 548, 551 (Pa. Super. 2006) (citing *Commonwealth v. Wojdak*, 502 Pa. 359, 466 A.2d 991, 997 (1983)). As a result of the Commonwealth bearing the minor burden of establishing a prima facie case, a witness' credibility is not an issue at a preliminary hearing. *Fox*, supra. The Court must "view the evidence in the light most favorable to the Commonwealth" and "consider the reasonable inferences based on that evidence which could support a guilty verdict." *Williams*, supra. Although a habeas corpus hearing is similar to a preliminary hearing, in a habeas corpus proceeding the Commonwealth has the opportunity to present additional evidence to establish that the defendant has committed the elements of the offense charged. *Commonwealth v. Karlson*, 449 Pa. Super. 378, 674 A.2d 249 (1996).

Hearsay evidence is admissible in a preliminary hearing to establish any element of an offense charged, including proof of ownership, non-permitted use of an item. Pa.R.Crim.P. 542. It has been well-established by Pennsylvania law that hearsay is competent evidence to establish a prima facie case for the crimes charged. *Commonwealth v. Ricker*, 120 A.3d 349 (Pa. Super. 2015); *Commonwealth v. McClelland*, 165 A.3d 19 (Pa. Super.

2017); *Commonwealth v. McLaurin*, 2017 WL 3634310 (Pa. Super. 2017).

Defendant is charged with Receiving Stolen Property, which is defined by 18 Pa.C.S.A. § 3925(a) as, “A person is guilty of theft if he intentionally receives, retains, or disposes of movable property of another knowing that it has been stolen, or believing that it has probably been stolen, unless the property is received, retained, or disposed with intent to restore it to the owner.” The Commonwealth must prove that the goods were stolen, the defendant received the goods, the defendant knew they were stolen or had reasonable cause to know they were stolen. *Commonwealth v. Gore*, 267 Pa. Super. 419, 424, 406 A.2d 1112, 1114 (1979) (citing *Commonwealth v. Davis*, 444 Pa. 11, 280 A.2d 119 (1971)). The Commonwealth is required to prove that the goods were actually stolen in order to achieve a conviction for receiving stolen property. *Commonwealth v. Stafford*, 424 Pa. Super. 591, 595, 623 A.2d 838, 840 (1993). It is permissible for the Commonwealth to prove the goods were actually stolen by utilizing only circumstantial evidence. *Id.*

At Defendant’s preliminary hearing, the Commonwealth presented the testimony of Detective Hallowich, who discovered the Glock 19 .9mm handgun seized at Defendant’s residence was reported as stolen. Even though Detective Hallowich does not have any firsthand knowledge concerning whether the Glock 19 handgun was stolen, the Commonwealth is permitted to rely on hearsay evidence he discovered during his investigation. The Court recognizes the Commonwealth failed to present the testimony of the rightful owner of the Glock

19 handgun; but, it is not required to do so until trial. In the event the Commonwealth fails to present competent evidence at trial as it relates to the charge of Receiving Stolen Property, Defendant will have the opportunity to request the Court enter a judgment of acquittal at the close of the Commonwealth's case. However, dismissing that charge at the current stage of the proceedings would be premature. Therefore, Defendant's Petition for Writ of Habeas Corpus is denied.

Based upon the foregoing, Defendant's Omnibus Pretrial Motion is granted to the extent the Commonwealth must provide the records demonstrating any *crimen falsi* convictions and any charges currently pending or current sentences for which the witness may be seeking leniency in exchange for his or her testimony. The remaining portions of the Omnibus Pretrial Motion are denied in their entireties.

#### ORDER OF COURT

NOW THIS 25th day of March, 2020, this case was before the Court on November 8, 2019, and January 6, 2020, for hearings on the Omnibus Pre-Trial Motion filed by the Defendant, both parties appeared, the Commonwealth of Pennsylvania, represented by counsel, Alicia S. Werner, Esquire, Deputy Attorney General, and Patrick J. Schulte, Esquire, Senior Deputy Attorney General, and the Defendant, Caden Michael Popovich, represented by counsel, Thomas N. Farrell, Esquire, James W. Manolis, Esquire, and Lisle T. Weaver, Esquire, and after hearings held and both parties were granted the opportunity to file a Brief in support of their respective position on the Motion,

and after consideration of the testimony and arguments made by counsel, the Court entered the following Order, and it is hereby ORDERED, ADJUDGED and DECREED as follows:

1. The Omnibus Pre-Trial Motion filed by the Defendant is GRANTED in part and DENIED in part.

2. The Omnibus Pre-Trial Motion is GRANTED to the extent the Commonwealth shall provide the Defendant criminal records which concern any crimen falsi convictions, regardless of the time frame in which the conviction occurred, and any pending charges or current sentences for the witnesses the Commonwealth intends to call to testify at trial.

3. All other remaining portions of the Omnibus Pre-Trial Motion are DENIED.

4. This case shall remain on the April, 2020, Criminal Jury Trial Term as per Order of Court dated March 9, 2020.

5. Due to the current closure of the Court generally to the public, the Court will consider a Motion to Continue the trial to a date certain as mutually agreeable to counsel along with a prior status conference to discuss any outstanding trial issues. It is the intention of the Court to conduct jury selection in a manner prior to trial to determine whether a jury can be fairly and impartially seated to render a fair verdict. This contemplated procedure may involve a short period of time between selection of the jury and commencement of trial in order to give counsel an opportunity to be fully prepared to try their respective case.

6. The Clerk of Courts shall serve a copy of this Order of Court upon counsel of record, Alicia S. Werner, Esquire, Deputy Attorney General, and Thomas N. Farrell, Esquire.

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## Commonwealth of Pennsylvania v. Maldonado Rosado

### *Juror Contact — Good Cause — Court Supervision*

After a criminal defendant attempted to contact jurors, the court entered an order prohibiting him from making such contact either directly or indirectly. Any request for a juror interview had to be based on good cause, and the court had to monitor any contact.

In December 2019, a jury found defendant guilty of numerous criminal offenses, including drug-related crimes. Sentencing had not yet occurred, because defendant had appealed one of the court's post-trial rulings. In March 2020, the district attorney advised the court that officials at the prison had discovered letters written by defendant which contained requests for friends to make contact with jurors. These letters included lists containing the names of the jurors. Defendant asked his friends to communicate with the jurors and see what type of conversation they had when they deliberated. He also requested that his friends provide jurors with additional documentation that defendant viewed as exculpatory.

The commonwealth filed a jury contact complaint, and the court conducted a hearing. Defendant testified at this hearing. His statements confirmed that he was attempting to contact jurors. Defendant further stated that he believed several jurors were pressured into rendering a guilty verdict.

Post-verdict communications with jurors were generally improper and forbidden by public policy. *Commonwealth ex rel Darcy v. Claudy*, 79 A.2d 785. Additionally, Lebanon County had promulgated a rule prohibiting any lawyer from having contact with a juror outside the courtroom. In the event of juror misconduct, contact with the juror was generally conducted only under the supervision of the court. A motion for leave to conduct juror interviews had to be supported by specific allegations of misconduct, and not based merely on speculative or conclusory concerns. *Foster v. State*, 132 So.3d 40.

At the hearing, defendant asserted that he could not investigate