

**SUPERIOR COURT  
OF THE  
STATE OF DELAWARE**

RICHARD R. COOCH  
RESIDENT JUDGE

NEW CASTLE COUNTY COURTHOUSE  
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***Re: State of Delaware v. Luis Sierra***  
**I.D. No. 1006013865**

Submitted: January 7, 2011  
Decided: April 5, 2011  
Revised: April 6, 2011

On Defendant Luis Sierra's Motion to Sever the Charge of Possession  
of a Deadly Weapon by Person Prohibited.

**GRANTED.**

On Defendant Luis Sierra's Motion to Sever Indictment from Co-Defendant  
Tywaan Johnson.

**DENIED.**

Dear Counsel:

## INTRODUCTION

In this capital murder case, Defendant Luis Sierra (“Defendant”) moves to have Count VIII of the indictment, Possession of a Deadly Weapon by a Person Prohibited, severed from his trial for murder and related offenses. Defendant also moves to have a separate trial from his co-defendant, Tywaan Johnson.

Upon review of the facts, the law, and the parties’ submissions, Defendant’s Motion to Sever the Charge of Possession of a Deadly Weapon by a Person Prohibited is **GRANTED**. Conversely, Defendant’s motion to sever the joinder of his indictment with co-defendant Tywaan Johnson is **DENIED**.

## FACTS AND PROCEDURAL HISTORY

On August 2, 2010, Defendant, together with co-defendant Tywaan Johnson, was indicted on two counts of Murder first Degree, two counts of Possession of a Firearm During the Commission of a Felony, Robbery First Degree, Conspiracy Second Degree, and Possession of a Firearm by a Person Prohibited.<sup>1</sup> These charges arose from an alleged drug purchase that devolved into a drug robbery; the victim, Anthony Bing, was shot and killed during this incident.<sup>2</sup>

Pursuant to Superior Court Criminal Rule 14, Defendant now moves this Court to sever Count VIII of the indictment, Possession of a Firearm by a Person Prohibited. Defendant alleges that he will be prejudiced by the joinder of Count VIII “because the jury would likely be persuaded to convict Defendant of all the other counts of the indictment due to his criminal history and evidence relating to that charge, rather than based on evidence that he actually committed the offenses charged in the balance of the indictment.”<sup>3</sup>

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<sup>1</sup> See Indictment by the Grand Jury.

<sup>2</sup> See *State v. Sierra*, Del. Super., I.D. No. 1006013865, Cooch, R. J. (Apr. 5, 2010) (Letter Op.) at 2-3. By separate letter opinion of today’s date, this Court denied Defendant’s motion to suppress a witness’s identification of Defendant in a photo array. *Id.*

<sup>3</sup> Def.’s Mot. to Sever of Dec. 10, 2010. Defendant also asserts that evidence of his prior convictions “puts [his] character at issue and such evidence of that prior conduct is otherwise inadmissible” and “the jury may be more easily persuaded to presume that

Also pursuant to Superior Court Criminal Rule 14, Defendant moves to sever his trial from that of his co-defendant, Tywaan Johnson.<sup>4</sup> Defendant asserts that there are “several contradictory statements at this point regarding the number of guns present as well as the individual or individuals whom potentially fired those weapons” and “it appears entirely likely that the remaining two defendants will be making antagonistic cross claims regarding whom was the shooter and therefore responsible for the murder.”<sup>5</sup> According to Defendant, if a joint trial is held, there is a “reasonable probability” that prejudice may result.<sup>6</sup> Defendant also asserts that, given that this is a capital case, each Defendant would be entitled to a separate penalty hearing should there be capital offense convictions.<sup>7</sup>

The State opposes both of Defendant’s motions to sever. With respect to Defendant’s motion to sever Count VIII of the indictment, the State “opposes the severance on a judicial economy basis and, instead, offers to ‘sanitize’ the indictment and strike any language that states why the defendant is a person prohibited from possessing a deadly weapon.”<sup>8</sup> In the alternative, the State asserts that a simultaneous bench trial should be held on Count VIII, provided that Defendant is amenable to waiving his right to a jury trial on that charge.<sup>9</sup> However, at the January 14 status conference, Defendant’s counsel advised the Court that Defendant will not waive his right to a jury trial on Count VIII, and Defendant will not stipulate to “sanitize” the indictment, as suggested by the State.<sup>10</sup>

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because the Defendant committed other crimes previously, that he probably committed the crimes charged.” *Id.*

<sup>4</sup> Def.’s Mot. for Severance of Trial of Dec. 10, 2010. A third co-defendant, Gregory Napier, reached a plea agreement with the State in which he agreed to testify against Defendant and Tywaan Johnson. *Id.* at 1.

<sup>5</sup> *Id.* at 2.

<sup>6</sup> *Id.* For example, Defendant asserts that he and his co-defendant’s right to testify “would be prejudiced” by a joint trial, or “one or both may feel unconstitutionally compelled to testify because they are tried together [as opposed] to separately.” *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> State’s Resp. of Jan. 10, 2011 at 1.

<sup>9</sup> *Id.* at 1-2.

<sup>10</sup> Thus, this Court need not reach the issue of whether “sanitiz[ing]” the convictions giving rise to the charge of Possession of a Deadly Weapon by a Person Prohibited is allowable under D.R.E. Rule 403. It has been said that a conviction is “sanitized” (at least in some states, for purposes of Rule 609) when a defendant’s “conviction for a similar or identical crime could be referred to as a felony conviction, and only the date of the conviction is disclosed to the jury, not the name, nature, or details of the felony.” Dannye R. Holley, *Judicial Anarchy: The Admission of Convictions to Impeach: State Supreme*

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*Courts' Interpretative Standards*, 2007 MICH. ST. L. REV. 307, 383 (2007) (citations omitted). Analysis of possible “sanitization” of the Possession of a Deadly Weapon by a Person Prohibited charge is aided by reference to the analysis of this issue by courts and commentators in the Rule 609 context. Thus, one commentator has noted that the practice of “sanitizing” convictions is “not contemplated by the text of [Federal Rule of Evidence] 609,” consequently, “sanitizing a conviction to omit its nature or statutory name (absent agreement of the parties) is more properly viewed as an application of Rule 403 [] and, as such, should be undertaken only after a trial court determination that the conviction is admissible under Rule 609.” Jeffrey Bellin, *Circumventing Congress: How the Federal Courts Opened the Door to Impeaching Criminal Defendants With Prior Convictions*, 42 U.C. DAVIS L. REV. 289, 339 n.174 (2008). Some jurisdictions endorse the practice of “sanitize[ing]” convictions when such convictions are the same, or similar to, the instant offense, whereas others require the trial judge to engage in a balancing analysis and sanitize any convictions that might give rise to undue prejudice. *Compare State v. Bolton*, 896 P.2d 830, 843 (Ariz. 1995) (“[A] trial court should sparingly admit evidence of prior convictions when the prior convictions are similar to the charged offense; or in appropriate cases, the trial court may reduce the risk of prejudice by admitting the fact of a prior conviction without disclosing the nature of the crime.”) and *State v. Hamilton*, 937 A.2d 965, 973-74 (N.J. 2008) (holding that trial courts should consider the “sanitization remedy” whenever the prior conviction evidence presents a risk of “undue prejudice” to the defendant; notably, that Court did not pronounce a categorical rule for sanitization, but instead referred the issue to the state’s Evidence Committee for a review of whether, and to what extent, sanitization of prior convictions should be expanded.). Although there is little Delaware case law addressing the practice of “sanitizing” prior convictions, it is not an uncommon practice in this Court. *See State v. Harris*, Del. Super., I.D. No. IN95-11-0494, Alford, J. (Aug. 14, 1996) (ORDER) (granting, *sua sponte*, but without discussion, a new trial to the defendant after the State used the defendant’s previous convictions on identical charges for impeachment purposes; this Court stated that it “would have allowed the State’s use of the fact that Defendant had several felony convictions but would have disallowed specific mention of [those convictions which were identical to the charges in the instant case].”).

In the specific context of a Possession of a Deadly Weapon by a Person Prohibited charge, this Court has acknowledged the practice of allowing the defendant to stipulate that the prior felony conviction be “sanitize[d].” *State v. Morrow*, 1994 WL 636994, \*1 (Del. Super. Ct. 1994) (“On occasion in this Court, defense counsel do stipulate that their clients have a prior conviction which prohibits them from possessing a deadly weapon. That stipulation is made part of the record but the exact nature of the crime or other status creating the prohibition is not presented to the jury. The obvious purpose is to eliminate and/or reduce the prejudice which flows from the jury’s knowledge of a prior criminal conviction. There are also cases in this Court where defense counsel, such as here, have not stipulated to “sanitize” the charge of possession of a deadly weapon by a person prohibited and this Court has granted their motions to sever.”). Although in *Morrow* this Court did not cite Rule 403 as the basis for such sanitization, it appears that Rule 403 would nonetheless be the applicable rule, given the observation that the “obvious purpose

With respect to Defendant's motion for severance from his co-defendant, the State asserts that that trying these two co-defendants together does not make their defenses antagonistic.<sup>11</sup> The State notes that Gregory Napier, a third co-defendant who has since entered into a plea agreement and will testify against Defendant and Tywaan Johnson, has identified Defendant as the shooter; moreover, the State notes that any "finger pointing" as to the identity of the shooter is of no consequence, because the State will be arguing accomplice liability, pursuant to 11 Del. C. § 271, thereby making each defendant liable for the actions of his co-defendant.<sup>12</sup> The State contends that it will likely put forth "the same evidence against both defendants," and, consequently, there is no reasonable probability of prejudice to Defendant.<sup>13</sup>

### **STANDARD OF REVIEW**

Superior Court Criminal Rule 8(a) provides that offenses may be jointly tried if the offenses "are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan." However, under Superior Court Criminal Rule 14,

[i]f it appears that a defendant or the state is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires. In ruling on a motion by a defendant for severance the court may order the attorney general to deliver to the court for inspection in camera any statements or confessions made by the defendants which the state intends to introduce in evidence at the trial.

The decision to grant or deny a motion for severance is "within the sound discretion of the trial court" and will not be overturned by the Supreme Court of Delaware unless there is a showing of prejudice.<sup>14</sup> To evaluate the potential prejudice to Defendant, the Court considers the following factors:

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[of sanitization] is to eliminate and/or reduce the prejudice which flows" from the defendant's prior conviction. *Id.*

<sup>11</sup> State's Memorandum Resp. of Jan. 7, 2011 at 1.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* at 2.

<sup>14</sup> *Wiest v. State*, 542 A.2d 1193, 1195 (Del. 1988) (citations omitted).

1) the jury may cumulate the evidence of the various crimes charged and find guilt when, if considered separately, it would not so find; 2) the jury may use the evidence of one of the crimes to infer a general criminal disposition of the defendant in order to find guilt of the other crime or crimes; and 3) the defendant may be subject to embarrassment or confusion in presenting different and separate defenses to different charges.<sup>15</sup>

In the context of a Possession of a Deadly Weapon by a Person Prohibited Charge, this Court has held that the “proof of the charge of Possession of a Deadly Weapon by a Person Prohibited will involve the presentation of Defendant’s prior criminal record, the jury may be unable to compartmentalize their judgment of guilt or innocence with regard to each of the separate counts in the indictment;” thus, the potential for such prejudice outweighs any competing considerations of judicial economy, and severance is appropriate.<sup>16</sup>

With respect to Defendant’s motion for severance from his co-defendant, the baseline presumption is that the State should jointly try co-defendants indicted for the same crime or crimes.<sup>17</sup> This is predicated on Superior Court Criminal Rule 8(b), which provides as follows:

Two or more defendants may be charged in the same indictment or information 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. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count.

Put another way, a severance should be granted “only if there is a serious risk that a joint trial would compromise a specific trial right of one of the

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<sup>15</sup> *Id.* (citations omitted).

<sup>16</sup> *See State v. Williams*, Del. Super., I.D. No. 0611019798, Stokes, J. (Aug. 29, 2007) (Letter Op.) at 1-2; *see also State v. Loper*, 1990 WL 91087 (Del. Super. Ct. 1990) (holding that, in a First Degree Murder case, proof of a Possession of a Deadly Weapon by a Person Prohibited offense “will necessarily reveal the existence of defendant’s prior criminal record” and falls “squarely within [the second type of prejudice articulated in *Wiest v. State*, *supra* note 10].”).

<sup>17</sup> *Fluodiotis v. State*, 726 A.2d 1196, 1210 (Del. 1999) (“Normally, judicial economy dictates that the State should jointly try defendants indicted for the same crime or crimes.”) (citation omitted).

defendants, or prevent the jury from making a reliable judgment about guilt or innocence.”<sup>18</sup>

Nonetheless, “if the defendants can show a reasonable and not hypothetical probability that substantial prejudice may result from a joint trial, the trial court may grant separate trials.”<sup>19</sup> To evaluate such prejudice, the Supreme Court of Delaware has articulated the following factors:

problems involving a co-defendant’s extra-judicial statements; an absence of substantial independent competent evidence of the movant’s guilt; antagonistic defenses as between the co-defendant and the movant; and difficulty in segregating the State’s evidence as between the co-defendant and the movant.<sup>20</sup>

Although mutually antagonistic defenses “can be determinative” in deciding a defendant’s motion for severance, the mere fact that there is “hostility between a defendant and his co-defendant or ‘mere inconsistencies in defenses or trial strategies,’ however, does not require severance *per se*.”<sup>21</sup>

## **DISCUSSION**

In this case, Defendant has refused to waive his right to a trial by jury on the Possession of a Deadly Weapon by a Person Prohibited, and he is not amenable to “sanitizing” the indictment to remove reference to the reasons for which he is prohibited from possessing a deadly weapon. Given the severity of the instant charges, this Court finds severance of Count VIII, Possession of a Deadly Weapon by a Person Prohibited, to be warranted in this case. Defendant is charged with, *inter alia*, capital Murder First Degree; in light of such a charge, the possibility that “the jury may be unable to compartmentalize their judgment of guilt or innocence with regard to each of the separate counts in the indictment” sufficiently outweighs any considerations of judicial economy.<sup>22</sup> Similarly, the joinder of Count VIII

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<sup>18</sup> *Manley v. State*, 709 A.2d 643, 653 (Del. 1998) (citations omitted).

<sup>19</sup> *Fluodiotis*, 726 A.2d at 1210 (citations omitted).

<sup>20</sup> *Manley*, 709 A.2d at 652 (Del. 1998) (citations omitted).

<sup>21</sup> *Id.* (citations omitted).

<sup>22</sup> *See State v. Williams*, Del. Super., I.D. No. 0611019798, Stokes, J. (Aug. 29, 2007) (Letter Op.) at 1-2; *see also State v. Loper*, 1990 WL 91087 (Del. Super. Ct. 1990) (holding that, in a First Degree Murder case, proof of a Possession of a Deadly Weapon by a Person Prohibited offense “will necessarily reveal the existence of defendant’s prior

with the remainder of the charges creates the possibility that “the jury may use the evidence of one of the crimes to infer a general criminal disposition of the defendant in order to find guilt of the other crime or crimes.”<sup>23</sup> Accordingly, the requirements of Rule 14 are satisfied, and Count VIII should be severed from the remainder of the charges.

Conversely, Defendant has failed to show “a reasonable and not hypothetical probability that substantial prejudice may result from a joint trial.”<sup>24</sup> Here, Defendant as his co-defendant are properly tried together under Rule 8(b), as they participated in the same “series of acts” which culminated in the victim’s murder. To avoid joinder under Rule 8(b), Defendant must show a “serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence.”<sup>25</sup>

Although Defendant asserts that there are “several contradictory statements” among co-defendants as to who shot the victim, and “antagonistic cross claims” may well result, this is not determinative in this case. As noted, the State is pursuing accomplice liability; as a result, each Defendant is equally responsible for the actions of his co-defendants.<sup>26</sup> Thus, just as in *Manley v. State*, where “only one defendant fired the fatal shots that killed [the victim]” and “[the defendant’s] legal culpability is the same whether he was convicted as a principal or as an accomplice in [the victim’s] murder,” Defendant has not established that a joint trial would result in his being “denied a specific trial right or tried by a jury which could not make a reliable judgment about his individual guilt or innocence.”<sup>27</sup> Although there may be hostilities between Defendants and inconsistencies between their respective defenses, the mere existence of this possibility does not establish “substantial injustice and unfair prejudice.”<sup>28</sup> Given that severance under Rule 14 is appropriate only when there is a “serious risk” of the foregoing prejudice to

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criminal record” and falls “squarely within [the second type of prejudice articulated in *Wiest v. State*, *supra* note 10].”).

<sup>23</sup> *Wiest v. State*, 542 A.2d 1193, 1195 (Del. 1988) (citations omitted).

<sup>24</sup> *Fluodiotis*, 726 A.2d at 1210 (citations omitted).

<sup>25</sup> *Manley*, 709 A.2d at 653 (Del. 1998) (citations omitted).

<sup>26</sup> 11 Del. C. 271 (“A person is guilty of an offense committed by another person when. . . [i]ntending to promote or facilitate the commission of the offense the person. . . [a]ids, counsels or agrees or attempts to aid the other person in planning or committing it.”).

<sup>27</sup> *Manley*, 709 A.2d at 653.

<sup>28</sup> *Id.*



the defendant, Defendant has not established a right to severance from his co-defendant.<sup>29</sup>

## CONCLUSION

For the reasons stated above, Defendant's motion for severance of Count VIII of the indictment, Possession of a Deadly Weapon by a Person Prohibited, is **GRANTED**, and Defendant's motion for severance from his co-defendant is **DENIED**.

**IT IS SO ORDERED.**

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Richard R. Cooch, R.J.

oc: Prothonotary  
cc: Michael C. Heyden, Esquire  
Anthony A. Figliola, Esquire  
Attorneys for Tywaan Johnson

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<sup>29</sup> *Id.*