

**SUPERIOR COURT  
OF THE  
STATE OF DELAWARE**

RICHARD R. COOCH  
RESIDENT JUDGE

NEW CASTLE COUNTY COURTHOUSE  
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Wilmington, Delaware 19801-3733  
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***Re: State of Delaware v. Tywaan Johnson***  
**I.D. No. 1007020056**

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

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

**DENIED AS MOOT.**

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

**DENIED.**

Dear Counsel:

## INTRODUCTION

In this capital murder case, Defendant Tywaan Johnson (“Defendant”) moves to have a separate trial from his co-defendant, Luis Sierra. A counterpart motion for separate trial was filed by co-defendant Sierra; Sierra’s motion was denied by separate letter opinion of today’s date.

Defendant has also moved 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. However, at the status conference held on January 14, Defendant’s counsel advised the Court that Defendant has agreed to waive his right to a trial by jury on this count. Thus, after a proper colloquy, to be held at a later time, the Court will try Defendant on the charge of Possession of a Deadly Weapon by a Person Prohibited simultaneously with the trial by jury on all remaining counts. As a result, the jury will be unaware of the existence of this charge. Accordingly, Defendant’s motion to sever the charge of Possession of a Deadly Weapon by a Person Prohibited is moot.

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 **DENIED AS MOOT**. Defendant’s motion to sever the joinder of his indictment with co-defendant Luis Sierra is **DENIED**.

## FACTS AND PROCEDURAL HISTORY

On August 2, 2010, Defendant, together with co-defendant Luis Sierra, 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>

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

<sup>2</sup> For further factual background, 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.*

Pursuant to Superior Court Criminal Rule 14, Defendant moves to sever his trial from that of his co-defendant, Luis Sierra.<sup>3</sup> Defendant asserts that there are “[i]t is anticipated that the defendants will be making claims that the other defendant(s) was the shooter and therefore responsible for the murder” and “[h]aving a joint trial will cause Defendant severe injustice, harm and will deprive him of a fair trial.”<sup>4</sup>

The State opposes Defendant’s motion to sever, asserting that that neither Defendant nor co-defendant Luis Sierra offered any extra-judicial statements that would be problematic at trial; according to the State, trying these two co-defendants together does not make their defenses antagonistic.<sup>5</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 co-defendant Luis Sierra as the shooter.<sup>6</sup> The State also 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>7</sup> Finally, 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>8</sup>

### **STANDARD OF REVIEW**

There is a presumption that the State should jointly try co-defendants indicted for the same crime or crimes.<sup>9</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

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<sup>3</sup> Def.’s Mot. for Severance of Trial of Oct. 25, 2010.

<sup>4</sup> *Id.* at 1-2.

<sup>5</sup> State’s Memorandum Resp. of Jan. 7, 2011 at 1.

<sup>6</sup> *Id.*

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

<sup>8</sup> *Id.* at 2.

<sup>9</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).

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 defendants, or prevent the jury from making a reliable judgment about guilt or innocence.”<sup>10</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>11</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>12</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>13</sup>

## **DISCUSSION**

In this case, Defendant has failed to show “a reasonable and not hypothetical probability that substantial prejudice may result from a joint trial.”<sup>14</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>15</sup>

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<sup>10</sup> *Manley v. State*, 709 A.2d 643, 653 (Del. 1998) (citations omitted).

<sup>11</sup> *Fluodiotis*, 726 A.2d at 1210 (citations omitted).

<sup>12</sup> *Manley*, 709 A.2d at 652 (Del. 1998) (citations omitted).

<sup>13</sup> *Id.* (citations omitted).

<sup>14</sup> *Fluodiotis*, 726 A.2d at 1210 (citations omitted).

<sup>15</sup> *Manley*, 709 A.2d at 653 (Del. 1998) (citations omitted).

Although Defendant asserts that “the defendants will be making claims that the other defendant(s) was the shooter and therefore responsible for the murder,”<sup>16</sup> this possibility of antagonistic defenses 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>17</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>18</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>19</sup> Given that severance under Rule 14 is appropriate only when there is a “serious risk” of the foregoing prejudice to the defendant, Defendant has not established a right to severance from his co-defendant.<sup>20</sup>

## CONCLUSION

For the reasons stated above, Defendant’s motion for severance of the charge of Possession of a Deadly Weapon by a Person Prohibited, is **DENIED AS MOOT**, 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: Peter W. Veith, Esquire  
Brian J. Chapman, Esquire  
Attorneys for Luis Sierra

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<sup>16</sup> Def.’s Mot. to Sever of Oct. 25, 2010.

<sup>17</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>18</sup> *Manley*, 709 A.2d at 653.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*