

**IN THE COURT OF COMMON PLEAS OF NORTHAMPTON COUNTY
COMMONWEALTH OF PENNSYLVANIA
CRIMINAL DIVISION**

**COMMONWEALTH OF
PENNSYLVANIA**

v.

JOHN MCGLINCHEY, III,

Defendant.

No: C-48-CR-0721-2011

OPINION OF THE COURT

This matter is before the Court on Defendant John McGlinchey, III's Omnibus Pre-trial Motion, whereby he seeks to: (1) quash the aggravating circumstances raised in the Commonwealth's Notice of Aggravating Circumstances; (2) suppress his statements to City of Easton Police Officers; (3) prevent the Commonwealth from introducing certain photographs at trial; (4) compel the Commonwealth to produce discovery; (5) compel the Commonwealth to produce *Brady* material; and (6) change venue and/or venire.

The Commonwealth responded to McGlinchey's motion and both parties filed memoranda of law, supporting their respective legal arguments. The parties appeared for a hearing on May 27, 2011. McGlinchey's Omnibus Pre-trial Motion is now ready for disposition.

I. Factual and Procedural Posture

On January 6, 2011, Detective Joseph Alonzo, of the City of Easton Police Department, filed a Police Criminal Complaint before Magisterial District Judge Daniel G. Corpora. Therein, in a sworn Affidavit of Probable Cause, Detective Alonzo stated that:

1. I, Det. Joseph Alonzo, am a sworn police officer for the City of Easton. I am currently assigned as a detective in the department's Criminal Investigations Division. On December 24th [sic], 2010 I was assigned to investigate a shooting.

2. On December 24th [sic], 2010 at approximately 2346 hours the Easton Police Department responded to 200 Vista Dr. for a report of a male that had been shot. Upon arrival officers learned that the victim was a 17 year old [sic] juvenile male and that he appeared to have been shot in the head.¹ Officers entered the home and located a second female victim, Kimiko Moon, who also was shot in the head, in a second floor bedroom. Both victims were transported to St Luke's Hospital for medical treatment.

3. Officers located a witness, Christopher Moon, and he was interviewed by this affiant on December 25th [sic], 2010. The witness stated that he observed a white male enter his home, 200 Vista Dr., and point what appeared to be a handgun at the 17 year old [sic] male. The witness heard and saw the gun go off and observed the juvenile male fall.

4. Moon then heard the suspect run upstairs to the second floor after which Moon fled the residence.

5. Moon recognized the suspect as a white male who associated with Kimiko Moon. Moon knew that the suspect's first name was "John" and had a business card that "John" had provided to him in the past. That business card was turned over to police and contained the name John McGlinchey, who will be now known as the defendant.

¹ The juvenile male referenced in Detective Alonzo's report was later identified as Marquis Moon.

6. A photo of the defendant was obtained and placed into a photo array to be shown to Christopher Moon. On December 25th [sic], 2010 Christopher Moon was shown the photo array and he identified the defendant as the same person who entered his home and shot the victims.

7. On January 4th [sic], 2011 the Easton Police Department was advised by St Luke's Hospital that Kimiko Moon had been pronounced dead.

8. On January 6th [sic], 2011 the Lehigh Coroner's Office ruled the manner of death a homicide from the two gun shot [sic] wounds she sustained the night of this incident.

7. Based on the above information, I respectfully request that an arrest warrant be issued for the defendant so that he may appear in court to answer the above stated charges.

See Affidavit of Probable Cause at 1-2, *Commonwealth v. McGlinchey*, C-48-CR-711-2011 (C.P.Northampton, Jan. 6, 2011).² Upon consideration of Detective Alonzo's Criminal Complaint, Magisterial District Judge Corpora issued a warrant for McGlinchey's arrest. See Warrant of Arrest at 1-2, *Commonwealth v. McGlinchey*, C-48-CR-711-2011 (C.P.Northampton, Jan. 6, 2011).³

² The Affidavit of Probable Cause was filed of record before Magisterial District Judge Corpora. See Criminal Docket at 3, *Commonwealth v. McGlinchey*, C-48-CR-721-2011 (C.P.Northampton) (as printed on Jun. 21, 2011). In the record, the Affidavit of Probable Cause is attached to the back of the Notice of Formal Arraignment / Pretrial Conference. See Formal Arraignment / Pretrial Conference Notice, *Commonwealth v. McGlinchey*, C-48-CR-721-2011 (C.P.Northampton, Feb. 20, 2011).

³ In the record, the Warrant of Arrest is also attached to the back of the Notice of Formal Arraignment / Pretrial Conference Notice, behind the Affidavit of Probable Cause. See Formal Arraignment / Pretrial Conference Notice.

McGlinchey was subsequently arrested and charged with Criminal Homicide,⁴ Criminal Attempt to Commit Criminal Homicide,⁵ and two counts of Aggravated Assault.⁶ On February 25, 2011, McGlinchey appeared before Magisterial District Judge Corpora for a Preliminary Hearing. At the conclusion of the Preliminary Hearing, Magisterial District Judge Corpora bound over all charges for trial. See Preliminary Hearing, *Commonwealth v. McGlinchey*, C-48-CR-721-2011 (C.P.Northampton, June 29, 2011) [hereafter "N.T. Preliminary Hearing"].

On March 14, 2011, pursuant the rules of Criminal Procedure, the Commonwealth filed a Notice of Aggravating Circumstances, evincing its intent to pursue the Death Penalty. See Commonwealth's Notice of Aggravating Circumstances Pursuant to Pennsylvania Rule of Criminal Procedure #802 [sic], *Commonwealth v. McGlinchey*, C-48-CR-721-2011 (C.P.Northampton, Mar. 14, 2011) [hereafter "Notice of Aggravating Circumstances"]. Therein, to support its pursuit of the Death Penalty, the Commonwealth set forth three aggravating circumstances: (1) Kimiko Moon "was a prosecution witness to a murder or other felony committed by John McGlinchey III and was killed for the purpose of preventing her testimony against John McGlinchey III in any grand jury or criminal proceeding involving such offenses;" (2) "John McGlinchey III committed a killing while

⁴ 18 Pa.C.S. § 2501.

⁵ 18 Pa.C.S. §§ 901, 2501.

⁶ 18 Pa.C.S. § 2702(a)(2).

in the perpetration of a felony;" and (3) "[i]n the commission of the offense, John McGlinchey III knowingly created a grave risk of death to another person in addition to" Kimiko Moon.⁷ *Id.*

On March 24, 2011, we presided over McGlinchey's Formal Arraignment. See Transcript of Proceedings, *Commonwealth v. McGlinchey*, C-48-CR-721-2011 (C.P.Northampton, May 9, 2011). Thereafter, pursuant to the Order of Court filed on April 8, 2011,⁸ McGlinchey filed a timely Omnibus Pre-trial Motion.⁹ See Omnibus Pretrial Motion, *Commonwealth v. McGlinchey*, C-48-CR-721-2011 (C.P.Northampton, May 6, 2011). On May 27, 2011, the parties appeared for a hearing upon that motion and Assistant District Attorney John Obrecht introduced into evidence the transcript of McGlinchey's February 25, 2011 Preliminary Hearing. See Transcript of Proceedings at 60-61, *Commonwealth v. McGlinchey*, C-48-CR-721-2011 (C.P.Northampton, June 29, 2011) [hereafter "N.T. Pre-trial Hearing"].

⁷ The Commonwealth's aggravating circumstances were filed pursuant to 42 Pa.C.S. § 9711(d)(5)-(7), respectively.

⁸ See Order of Court, *Commonwealth v. McGlinchey*, C-48-CR-721-2011 (C.P.Northampton, Apr. 8, 2011) [hereafter "Scheduling Order"].

⁹ On April 8, 2011, pursuant to Pa.R.Crim.P. 570, this Court held a pre-trial conference with counsel for the Commonwealth and counsel for McGlinchey, on the record, to discuss all "matters which [might] aid in the disposition of the proceeding." See Pa.R.Crim.P. 570(A)(6). Thereafter, we issued the above-mentioned Scheduling Order, which, *inter alia*, set deadlines for the filing of, response to, and argument upon McGlinchey's Omnibus Pre-trial Motion. See Order of Court at ¶ 4, *Commonwealth v. McGlinchey*, C-48-CR-721-2011 (C.P.Northampton, Apr. 8, 2011); see also Pa.R.Crim.P. 570(C) ("The court shall place on the record the . . . rulings made by the court as to any of the matters considered in the pretrial conference. Such order shall control the subsequent proceedings unless modified at trial to prevent injustice."). Such motion, though not filed within thirty days of his Formal Arraignment, see Pa.R.Crim.P. 579, was timely filed pursuant to our Scheduling Order.

II. Defendant's Omnibus Pre-trial Motion

As noted above, McGlinchey, through the instant Omnibus Pre-trial Motion, seeks to: (1) quash the aggravating circumstances raised in the Commonwealth's Notice of Aggravating Circumstances; (2) suppress his statements to City of Easton Police Officers; (3) prevent the Commonwealth from introducing certain photographs at trial; (4) compel the Commonwealth to produce discovery; (5) compel the Commonwealth to produce *Brady* material; and (6) change venue and/or venire. See Omnibus Pretrial Motion at ¶¶ 6-28. The Commonwealth responded to McGlinchey's motion and both parties filed memoranda of law, supporting their respective legal arguments. We now address each motion.

A. Motion to Quash Aggravating Factors

First, McGlinchey argues that the Commonwealth cannot produce evidence to support any of the aggravating factors espoused in the Commonwealth's Notice of Aggravating Circumstances and, therefore, argues that this Court should quash those aggravating factors.¹⁰ See Omnibus Pretrial Motion, *Commonwealth v. McGlinchey*, C-48-CR-721-2011 (C.P.Northampton, May 6, 2011). Specifically, he argues:

¹⁰ In his Omnibus Pre-trial Motion, McGlinchey argued that "there is *insufficient evidence* to support the existence of the . . . aggravating factors." Omnibus Pretrial Motion at ¶ 27 (emphasis added). By comparison, in his Memorandum of Law in support of the Omnibus Pre-trial Motion, McGlinchey argued that "there is *no evidence* to support any of the aggravating circumstances[.]" Memorandum of Law at 8, *Commonwealth v. McGlinchey*, C-48-CR-721-2011 (C.P.Northampton, May 6, 2011) (emphasis added).

A. According to the testimony adduced at the preliminary hearing, the victim, Kimiko Moon, was not a witness to the shooting of Marquis;

B. That the victim, Kimiko Moon was not present in the room where Marquis Moon was shot and has no knowledge concerning the circumstances under which Marquis Moon was shot;

C. That the Defendant was not perpetrating any other felony when he allegedly assaulted and shot Kimiko Moon;

D. That [by] the shooting of Kimiko Moon, the Defendant did not create any risk to any other person;

E. That when the Defendant allegedly assaulted the victim, Kimiko Moon, no other person was present in the room and no other person was at risk of injury.

Omnibus Pretrial Motion at ¶ 27.

As noted above, at the May 27, 2011 hearing upon McGlinchey's Omnibus Pre-trial Motion, Assistant District Attorney Obrecht introduced into evidence the transcript of McGlinchey's February 25, 2011 Preliminary Hearing. At the Preliminary Hearing, Marquis Moon and Christopher Moon testified about their recollection of events from the evening of December 24, 2010, and City of Easton Police Officer Eric Campbell, City of Easton Detective Joseph Alonzo, and Senior Investigator Deputy Coroner Daniel Buglio testified about the events of the early morning of December 25, 2010 and their subsequent investigation.

Marquis Moon and Christopher Moon both testified that on December 24, 2010, at approximately 11:00 p.m., Marquis Moon, Marquis's father, Christopher Moon, and Marquis's six year-old brother, Malachi, were

downstairs in a residence located at 200 Vista Drive in Easton, Pennsylvania. See N.T. Preliminary Hearing at 19-20, 21, 25, 28, 58, 60. Marquis was in the living room, the room nearest the front door of the residence and stairs to the second floor, which were directly in front of the front door. See *id.* at 25, 28, 61. Christopher and Malachi were sitting at the kitchen table. *Id.* at 61. Marquis's aunt, Kimiko Moon, was upstairs in the same residence. *Id.* at 22, 25, 46.

Marquis recalled that he was decorating a Christmas tree and listening to music when "a person came into the home, he waived [sic] at me, and I looked at him. . . . [He] just walked in the house and walked up the stairs." *Id.* at 26, 27; see also *id.* at 30. Marquis and Christopher noted that this person was a Caucasian male and that he wore "a jean jacket type thing," which was blue and white with a blue hood, "and some blue jeans." See *id.* at 30, 65. Christopher recognized him as an associate of Kimiko, whom he had seen prior to December 24, 2010. *Id.* at 66. At the Preliminary Hearing, both Marquis and Christopher identified that person as Defendant John McGlinchey, III. *Id.* at 30-31, 66.

After McGlinchey entered their residence, Marquis continued to decorate the Christmas tree until he heard someone walking back down the stairs. *Id.* at 31-32. He then looked toward the stairs to the second floor and saw Defendant approaching him, brandishing a firearm. *Id.* at 32, 35. Marquis testified that McGlinchey shot him, causing Marquis to fall to the

floor. *Id.* at 36-37. While on the floor, Marquis heard another gunshot and realized that he had been “shot in the back.” *Id.* at 38.

On direct examination, Marquis testified that:

A. After this, about five, ten seconds later I started getting up. And when I got up, I looked towards the stairs as to run out. And I could see his legs going up the stairs. I can see the bottom of his feet, like walking up the stairs.

Q. His, meaning Mr. McGlinchey’s feet?

A. Yes.

Id. at 40. On cross-examination, he clarified that:

Q. . . . after how long, did you -- five seconds you started to get up, or ten seconds?

A. Yes.

Q. And then you saw feet going up the stairs?

A. Yes.

Q. You couldn’t see the person going up the stairs?

A. Nope.

Q. Just the feet?

A. I seen like about lower than the knee.

Q. Feet and calf?

A. Yes. Feet and jeans. I mean, shoes and jeans.

Id. at 51-52.

Christopher testified similarly, noting that, after hearing gunshots, he picked up Malachi and hid in the first floor bathroom. *See id.* at 68-69.

Q. And so you took Malachi in the bathroom?

A. Ah-ha.

Q. Then what?

A. I heard two steps on the front staircase, and I took it upon myself to just grab my son, my six-year-old [sic], and get him out of the house.

Q. I heard you say something about you heard steps on the staircase?

A. Two steps.

Q. Can you elaborate on that?

A. The staircase goes in the -- the staircase is above the bathroom, it goes over the bathroom. So if you're in the bathroom, the staircase would be over your head.

Q. So where did you hear these steps?

A. On the stairs.

Q. Above you, are you saying?

A. Like if I'm facing -- if I'm in the bathroom and I'm facing the toilet, I heard steps like behind the wall of the toilet in front of you.

So the first two stairs, like right in front of me.

Q. So you heard --

A. Behind the wall.

Q. You were in the bathroom with Malachi?

A. Ah-ha.

Q. You heard two steps?

A. Ah-ha.

Q. Where were the steps coming from?

A. Going up the stairs.

Q. Going up the stairs?

A. Yeah.

Q. Now, over the period of time that you lived there, have you heard that type of sound before as people go up and down?

A. Yes.

Q. So you're sure that that is what it was?

A. Yes.

Id. at 69-71.

Marquis and Christopher both fled the residence and ran across the street, where neighbors treated Marquis's wounds and alerted the police. *Id.* at 42, 71.

City of Easton Police Officer Eric Campbell and Senior Investigator Deputy Coroner Daniel Buglio also testified at the Preliminary Hearing. Officer Campbell was one of the first officers to respond to the phone call from Marquis's neighbors and to enter the residence located at 200 Vista Drive. *See id.* at 85-86. Officer Campbell testified that, during the officers' initial investigation of the residence, they discovered a woman, later identified as Kimiko Moon, lying in bed in one of the upstairs bedrooms. *Id.* at 85, 89, 93, 95. He noted at that time, and later testified, that Kimiko had head wounds that appeared to be bullet wounds, and blood and brain matter

on the left side of her head. *Id.* at 89, 90. After Kimiko was pronounced dead on January 4, 2011, Deputy Coroner Buglio determined that her death was a homicide, caused by the gunshot wounds observed by Officer Campbell. *See id.* at 5, 7, 12, 13-14, 15.

Finally, City of Easton Detective Joseph Alonzo, the lead investigator in this case, testified at the Preliminary Hearing. In pertinent part, Detective Alonzo testified that the police recovered four bullets: one from the living room wall, one from the body of Marquis Moon, and two from the head of Kimiko Moon. *See id.* at 98. These bullets were sent to the Pennsylvania State Police Crime Laboratory in Bethlehem, Pennsylvania, where they were compared for ballistics. *Id.* at 99. Detective Alonzo testified that the Pennsylvania State Police Crime Laboratory determined that all four bullets were discharged from the same firearm. *Id.* at 101.

A defendant may file a pre-trial challenge to the Commonwealth's decision to pursue the Death Penalty. *See Commonwealth v. Walter*, 966 A.2d 560, 564-65 (Pa. 2009); *Commonwealth v. Buck*, 709 A.2d 892, 896-97 (Pa. 1998). The Supreme Court of Pennsylvania has held that:

It is well-established that the Commonwealth has no pre-trial burden of proving an aggravating factor. However, the trial court must be able to ensure that the Commonwealth is not seeking the death penalty for an improper reason. The nature of the court's inquiry is focused solely upon whether the case is properly designated as capital, not whether each aggravating factor alleged is supported by evidence. We note that, pursuant to 42 Pa. C.S. § 9711(c)(1)(i), the trial court is required to instruct the jury to consider only aggravating circumstances for which there is *some evidence*. Thus, if the Commonwealth files

a notice of aggravating circumstances which includes at least one aggravating factor that is supported by any evidence, the case is properly framed as a capital case.

Buck, 709 A.2d at 896 (emphasis in original). Furthermore:

A defendant who claims that there is no evidence supporting the notice of aggravating circumstances bears the burden of proving that contention. *If the defendant fails to meet this burden and evidence exists to create a factual dispute regarding whether the aggravating factor(s) exist, the defendant's motion should be summarily denied as no abuse of discretion by the prosecutor is apparent. . . .* If no evidence is presented in support of any aggravating circumstance, the trial court may rule that the case shall proceed non-capital. This ruling shall be without prejudice to the Commonwealth to file an amended Rule 352 notice if it subsequently becomes aware of evidence in support of an aggravating factor.¹¹

Id. at 896-97 (some emphasis added, some emphasis in original, footnote omitted).

Upon consideration of the testimony adduced at McGlinchey's Preliminary Hearing, we have determined that this case is properly framed as a capital case because at least one of the Commonwealth's aggravating circumstances is supported by some evidence of record. *See Buck*, 709 A.2d at 896. Specifically, through the testimony offered at McGlinchey's Preliminary Hearing, the Commonwealth has demonstrated that it has at least some evidence to support its theory that Kimiko Moon "was a prosecution witness to a murder or other felony committed by John McGlinchey III and was killed for the purpose of preventing her testimony

¹¹ Pa.R.Crim.P. 503 was amended and renumbered as Pa.R.Crim.P. 803 effective April 1, 2000. *See* Pa.R.Crim.P. 803, note.

against John McGlinchey III in any grand jury or criminal proceeding involving such offenses.” See Notice of Aggravating Circumstances at 1. We have so concluded because a jury could find that Kimiko Moon was in the same residence as Marquis Moon when Marquis was shot by McGlinchey, see N.T. Preliminary Hearing at 19-22, 25, 28, 46, 58, 60; that McGlinchey entered the Moons’ residence, see *id.* at 30-31, 69; that Kimiko could thus have seen or heard the shooting(s), see *id.*; that she would thus have acted as a witness against McGlinchey; and that, after shooting Marquis Moon, McGlinchey proceeded upstairs and shot and killed Kimiko Moon to prevent her from testifying against him in a *future* criminal proceeding. See *id.* at 40, 51-52, 69-71, 89-90, 101.

We note, however, that the Commonwealth has not introduced any evidence to suggest that Kimiko Moon would testify against McGlinchey in a grand jury or criminal prosecution that was *pending* on December 24, 2010. As such, to survive a *post-trial* motion to disqualify the aggravating circumstance discussed above, *i.e.*, McGlinchey killed Kimiko Moon to prevent her from testifying against him in a *future* criminal proceeding, the Commonwealth must prove beyond a reasonable doubt that McGlinchey killed Kimiko Moon and, further, demonstrate by *direct evidence* that he killed her with the intention to eliminate a witness to the shooting of Marquis Moon. See *Commonwealth v. Appel*, 539 A.2d 780, 784 n.2 (Pa. 1988). Circumstantial evidence of such intent will not suffice. *Id.* In *Appel*, the

Supreme Court of Pennsylvania explained that:

We maintain the position that the existence of this aggravating circumstance cannot be established circumstantially unless the victim was in fact a witness in a pending grand jury or criminal prosecution. However, the killing of a potential Commonwealth witness before either of these bodies results in [a] frontal assault upon the criminal justice system. To ignore this erosion in the process where it can be established by direct, rather than the less reliable circumstantial evidence, would unduly restrict the obvious legislative intent. Therefore, we will permit a finding of the existence of this particular aggravating circumstance where the killing results from the intention to eliminate a potential witness, if such facts can be established by *direct* evidence.

Appel, 539 A.2d at 784 n.2 (Pa. 1988) (citations omitted, emphasis in original).

At this stage, however, we must deny McGlinchey's motion to disqualify the aggravating circumstances because this aggravating circumstance, as detailed at length, above, is supported by at least some evidence of record. *See Buck*, 709 A.2d at 896. The standard for resolving such a pre-trial motion to disqualify aggravating factors differs from the standard applied when resolving a post-trial but pre-sentencing motion to disqualify the same. *Compare Buck*, 709 A.2d at 896 (when resolving defendant's pre-trial motion to disqualify aggravating factors, trial court must determine whether such aggravating factors are supported by at least some evidence) *with Appel*, 539 A.2d at 784 n.2 (Pa. 1988) (when resolving defendant's post-trial motion to disqualify aggravating circumstances, trial court must review sufficiency of the evidence supporting such aggravating factors).

Accordingly, McGlinchey's motion to quash the Commonwealth's aggravating circumstances is denied.¹² See *Buck*, 709 A.2d at 896.

B. Motion to Suppress Statements

McGlinchey argues that this Court should suppress statements that he made to City of Easton Police Officers on December 25, 2010 because he made these statements while in custody and, allegedly, without knowingly, intelligently, and voluntarily waiving his right to counsel and/or his right to avoid self-incrimination. See Omnibus Pretrial Motion at ¶¶ 8-9. He alleges that, during police interrogation, he requested counsel but was nonetheless questioned without counsel. *Id.* at ¶ 9(c)-(d). He also argues that, during such interrogation, "he was extremely fatigued and suffering from the effects of involuntary drug intoxication." *Id.* at ¶ 9(a).

The Commonwealth acknowledges that McGlinchey was interrogated by and made statements to Detective Alonzo on December 25, 2010. See Commonwealth's Brief in Opposition to Defendant's Omnibus Pretrial Motion at 2, *Commonwealth v. McGlinchey*, C-48-CR-721-2011 (C.P.Northampton, May 20, 2011). However, the Commonwealth opposes McGlinchey's suppression motion because it disputes his allegation that he did not knowingly, intelligently, and voluntarily waive his right to counsel and/or his

¹² Because we found that some evidence supported one of the Commonwealth's aggravating factors, we have not examined the remaining aggravating factors. See *Buck*, 709 A.2d at 896 ("[I]f the Commonwealth files a notice of aggravating circumstances which includes at least one aggravating factor that is supported by any evidence, the case is properly framed as a capital case.").

right to avoid self-incrimination. *See id.* (arguing that Defendant was advised of and waived his *Miranda* rights). Specifically, the Commonwealth denies that McGlinchey was either fatigued or intoxicated during the period of his interrogation, and further denies that Detective Alonzo interrogated McGlinchey after he requested counsel. *See Commonwealth's Answer to Defendant's Omnibus Pretrial Motion at ¶¶ 9(a), (c)-(d), Commonwealth v. McGlinchey, C-48-CR-721-2011 (C.P.Northampton, May 20, 2011).*

On May 27, 2011, at the hearing upon McGlinchey's Omnibus Pre-trial Motion, the Commonwealth offered the testimony of Detective Alonzo to address the issues raised by McGlinchey's suppression motion. *See N.T. Pre-trial Hearing at 23-59.* Detective Alonzo's testimony was transcribed pursuant to Pa.R.Crim.P. 581(G) and McGlinchey's suppression motion is now ready for disposition.

1. Findings of Fact

Detective Alonzo was the only witness to testify at the May 27, 2011 hearing. *See id.* at 23. As the lead investigator in this matter, he oversaw all aspects of the investigation of the shootings of Kimiko Moon and Marquis Moon and identified McGlinchey as the main suspect for those crimes. *Id.* at 23-24, 48.

In the early morning hours of December 25, 2010, Detective Alonzo learned that the Pennsylvania State Police had taken McGlinchey into

custody and detained him at the Pennsylvania State Police barracks in Dublin, Pennsylvania. *Id.* at 25. Upon receipt of this information, Detective Alonzo traveled to the Pennsylvania State Police barracks with City of Easton Investigator Salvatore Crisafulli, to interview Defendant. *Id.* They arrived at the barracks at approximately 10:30 a.m. and met with Defendant in an interview room at approximately 11:30 a.m. *Id.* at 26.

When Detective Alonzo and Investigator Crisafulli met McGlinchey, he was not shackled or dressed as an inmate. Although the Pennsylvania State Police had detained him in a cell at the barracks, McGlinchey was not handcuffed, shackled, or otherwise physically restrained while he spoke with Detective Alonzo. *Id.* at 26-27, 46. McGlinchey sat in a wooden chair and was free to stand up, stretch, or walk around the room, which was enclosed and approximately 450 square feet in size. *See id.* at 46-47, 52. Furthermore, he wore casual clothes, consisting of blue jeans, a t-shirt, a hooded jacket, and sneakers. *Id.* at 26.

Detective Alonzo informed McGlinchey that two victims had been shot and hospitalized during the evening hours of December 24, 2010. *Id.* at 27, 33-34, 52. Detective Alonzo also advised McGlinchey that he was a suspect in those shootings, that he was under arrest, and that he had been charged with two counts of Criminal Attempt to Commit Homicide and two counts of

Aggravated Assault.¹³ *Id.* at 27-28, 52. At the May 27, 2011 hearing upon McGlinchey's suppression motion, Detective Alonzo testified credibly that McGlinchey "was calm, lucid . . . coherent and understood what was going on." *Id.* at 27.

Next, Detective Alonzo produced a copy of the City of Easton Police Department's "Rights and Waiver" form, upon which he had written the date, time, and location of the interview, the incident number, and the name of the person interviewed, *i.e.*, John McGlinchey III.¹⁴ *Id.* at 28-30. This form is divided into two sections. The first section sets forth the defendant's *Miranda* rights.¹⁵ See Rights and Waiver Form. As provided to the Court, the first section of this form states:

My name is Det. Joseph Alonzo of the Easton Police Department. I wish to advise you that you have an absolute right to remain silent; that anything you say can and will be used against you in a court of law; that you have a right to talk to an attorney before and have an attorney present with you during your questioning; that if you cannot afford an attorney, one will be appointed to represent you without charge before any questioning, if you so desire. If you do decide to answer any questions you may stop anytime you wish.

¹³ When Detective Alonzo met with Defendant, Kimiko Moon was still alive. Accordingly, the City of Easton Police Department had not yet charged McGlinchey with Criminal Homicide. See *id.* at 28.

¹⁴ This form was introduced as Commonwealth's Exhibit 1. See Commonwealth's Exhibit 1, *Commonwealth v. McGlinchey*, C-48-CR-721-2011 (C.P.Northampton, June 29, 2011) [hereafter "Rights and Waiver Form"].

¹⁵ *Miranda v. Arizona*, 384 U.S. 436 (1966).

Id. A signature line appears at the end of the first section, just above the phrase "I understand my Rights." *Id.* The second section of the form provides a waiver of the rights described above. It states:

I fully understand the statement advising me of my rights and I am willing to answer questions. I do not want an attorney and I understand that I may refuse to answer anytime during questioning. No promises have been made to me nor have any threats been made against me.

Id. A signature line also appears at the end of the second section, just above the phrase "I waive my Rights." *Id.*

Detective Alonzo read the first section of the Rights and Waiver Form to McGlinchey, presenting the Form in such a manner that McGlinchey could also read it. N.T. Pre-trial Hearing at 28-29. Detective Alonzo also instructed McGlinchey to interrupt if he had any questions. *Id.* at 29. When Detective Alonzo finished reading the first section of the Rights and Waiver Form to McGlinchey, he watched as McGlinchey signed on the line above the phrase "I understand my Rights." *Id.* at 30-31, 32, 33. He did not ask Detective Alonzo any questions about the rights as explained in the Rights and Waiver Form.¹⁶ Detective Alonzo also witnessed McGlinchey sign the line at the end of the second section of the Rights and Waiver Form, above

¹⁶ After Detective Alonzo read McGlinchey his rights, McGlinchey asked Detective Alonzo "if the victims were okay." N.T. Pre-trial Hearing at 33 ("After I explained the rights to him he asked if the victims were okay. . . . Yes, after I read his rights, yes, if they were okay.").

the phrase "I waive my Rights."¹⁷ *Id.* at 32-33.

Detective Alonzo initially interrogated McGlinchey for approximately thirty minutes. *Id.* at 40. At the hearing upon McGlinchey's Omnibus Pre-trial Motion, Detective Alonzo described that interrogation as follows:

Q. . . . can you tell the Court what was asked and what was answered?

A. I asked Mr. McGlinchey to explain what happened the night before on the 24th and he, in turn, explained that he was only familiar with the female as Jazz, which I knew was a nickname for Kimiko Moon, and that he met her earlier in the day and they kind of spent time on and off throughout the day.

Their original plan was I believe that they -- he picked her up at her home. He did not recall the exact address of her residence but he just -- he described it in detail where she lived, that it was in the city of Easton, which is the -- it was in the Highland section of Easton, which is off 611.

Q. So you understood him to be referring to the victim in this case, Kimiko Moon?

A. Yes, but he knew her as Jazz.

Q. Continue on. What was asked, what was stated?

A. He explained that earlier in the day, I believe, he met up with her at the house, they responded to a convenience store somewhere within the city, he could not remember where, and that he had paid her \$20 for a blowjob.

Q. And -- in a parking lot in a convenience store?

A. Yes, some type of store along those lines. He could not remember exactly the name of the store or where it was.

¹⁷ During Detective Alonzo's direct examination, McGlinchey interrupted, stating "It's a lie. It's not my signature at the bottom -- [.]" *Id.* at 29. We have disregarded these statements. McGlinchey's outburst was simply that -- an outburst -- and was not offered as sworn testimony. As such, his statements are not evidence and we may not consider them.

Q. What did he tell you happened next?

A. After their sex act was completed he went into this store to buy Kimiko some type of alcoholic drink. He was not sure of what type of drink it was, just that it was blue in color.

Q. And what happened then?

A. Eventually they -- Mr. McGlinchey stated that Kimiko Moon wanted to get high and that she used heroin. And he was asked by Kimiko to take her up to the Brickhouse Tavern so she could buy heroin.

Q. Where is the Brickhouse Tavern?

A. It's the 1400 block of Butler Street in the city of Easton.

Q. What did he tell you happened next?

A. When they arrived at the Brickhouse Tavern, Kimiko went inside and was inside for some time. Mr. McGlinchey was waiting in the car for her. As he sat and waited, time passed and she didn't come out so he went inside the Brickhouse to look for her. He saw she was sitting at the bar, and he sat in the front of the bar towards the entrance and ordered a Red Bull, which was a nonalcoholic drink, and he was provided that in a can. And he opened the can and he sat there and drank that waiting for Kimiko.

Q. What did he tell you happened next?

A. He stated that she was speaking with a male and eventually another female and I believe Kimiko eventually came over to him at one point, but after that he told me he did not remember what happened. He had blacked out somehow.

Q. And continue on with what you asked him and what he told you.

A. I asked him to -- if he remembers anything from that night after being at the Brickhouse. The only thing he stated he remembers is getting home to his home in Bucks County at approximately 11:30 in the evening and realizing that

his wallet or money from his wallet was stolen. He eventually changed that because he had his wallet with him, that somebody had lifted his wallet, stolen \$500, placed his wallet back in his pocket and also stole cell phones from him.

Q. All right. And did there come a time when he says he got home?

A. Yes. He said he was home approximately 2330 hours, or 11:30 at night, of the 24th.

Q. And this would have been around the time when this offense allegedly occurred?

A. Yes.

Q. What did he say happened next?

A. He stated his mother had seen him and he went to bed. He eventually tried calling, I believe the cell phone companies, and he also originally stated he had credit cards stolen from his wallet, but then he realized he had his wallet. He tried calling the cell phone companies on two different occasions trying to have those services canceled.

Q. Now this is not you saying it happened, this is --

A. No, this is Mr. McGlinchey stating this.

Q. What did he say after that?

A. Next thing he remembers is waking up to the State Police being at his home, I believe.

Q. Did he specify what time that was?

A. No, it was in the very early morning hours.

Id. at 35-39. On cross-examination, Detective Alonzo testified further that:

Q. Now during your interview of the defendant he described his activities the day previous and ending up at Brickhouse Tavern?

A. Yes, on the 24th.

Q. And that he told you he was drinking Red Bull and he described that he blacked out while still at the Brickhouse Tavern?

A. Yes.

Q. The next thing he remembered was being at home?

A. Being at home.

Q. And did he tell you on more than one occasion that he must have been drugged?

A. That's what he stated, yes. He didn't know how, but he assumed he was drugged by some type of date rape drug.

Q. Did he tell you anybody bought him a drink at the Brickhouse Tavern?

A. No. He said he bought the Red Bull himself.

Q. After that, anything else to drink?

A. No.

Q. Did he know how long he's there total?

A. Just the approximate time he arrived.

Q. Didn't even remember leaving?

A. No.

Q. And he told you once again on more than one occasion he must have been drugged, he blacked out and it must have been a date rape?

A. That's what he was telling me, yes.

Id. at 55-56. Detective Alonzo reviewed McGlinchey's recollection of events with McGlinchey for an additional thirty minutes. *See id.* at 39-40, 42.

During this second thirty-minute period, McGlinchey, in response to a question posed by Investigator Crisafulli, stated that he had not discharged a firearm in many years. *Id.* at 43.

At the hearing upon McGlinchey's suppression motion, Detective Alonzo was also questioned about the conditions surrounding the interrogation. He stated that, during the hour-long interrogation, McGlinchey did not request any respite, refreshment, or any other form of break from questioning. *See id.* at 40. Further, he was asked:

Q. And were there any requests made to you or Investigator [Salvatore] Crisafulli about personal comforts?

A. No.

Q. Was there any request of any sort about being tired or fatigued or anything of that nature?

A. No, there was not.

Q. Now what, if anything, did you observe about [McGlinchey's] demeanor? Forget what he said for the moment. How did he behave in terms of conversing back and forth with you?

A. It was a normal conversation. I don't believe we raised our voices at any point. He sat straight up. He would move around in his chair but it wasn't as if he was under the influence of any type of narcotics or alcohol. He appeared lucid, coherent, and knew exactly what was going on.

Q. And regardless of whether or not you agree or disagree with what he said, how was he responding to your inquiries?

A. He responded to each question that was asked of him.

Q. Did you see any deficiency in any fashion in terms of his behavior or fatigue level or being sick?

A. No, nothing along those lines.

Q. Did you observe anything about him that may lead you to the conclusion that he was under the influence of anything that would have diminished his ability to communicate?

A. No

Id. at 40-41.

After approximately one hour of interrogation, McGlinchey stated that he wished to speak with an attorney. *Id.* at 41, 43, 44. Accordingly, Detective Alonzo and Investigator Crisafulli immediately ended the interrogation. *Id.* at 44. Thereafter, no further attempts were made to elicit statements from McGlinchey. *Id.* at 59.

2. Analysis

When deciding a motion to suppress an accused's alleged statements, we must determine "whether the Commonwealth has established by a preponderance of the evidence that the statements of the accused were voluntary and the waiver of his constitutional rights was knowing and intelligent." *See Commonwealth v. Edwards*, 555 A.2d 818, 826 (Pa. 1989).

The determination of whether a defendant has validly waived his *Miranda* rights, *i.e.*, the right to counsel and the right to remain silent,

depends upon a two-prong analysis: (1) whether the waiver was voluntary, in the sense that defendant's choice was not the end result of government pressure, and (2) whether the waiver was knowing and intelligent, in the sense that it was made with full

comprehension of both the nature of the right being abandoned and the consequence of that choice.

Commonwealth v. Mitchell, 902 A.2d 430, 451 (Pa. 2006). When determining whether a defendant voluntarily, knowingly, and intelligently waived his rights, the touchstone inquiry is whether such waiver was “the product of a free and deliberate choice rather than intimidation, coercion, or deception[.]” *Commonwealth v. Paxton*, 821 A.2d 594, 598 (Pa. Super. 2003) (citation omitted).

With respect to the first prong of the test expressed in *Mitchell, supra*, *i.e.*, whether a defendant’s waiver of rights was voluntary, this Court must examine the totality of the circumstances. *See Commonwealth v. Housman*, 986 A.2d 822, 840 (Pa. 2009); *Commonwealth v. Perez*, 845 A.2d 779, 787 (Pa. 2004); *Commonwealth v. Chacko*, 459 A.2d 311, 317 (Pa. 1983). “[F]actors to consider include the interrogation’s duration and means, the defendant’s physical and mental state, the detention conditions, police attitude during the interrogation, and any other factors indicating whether coercion was used.” *Housman*, 986 A.2d at 840; *cf. Commonwealth v. Kichline*, 361 A.2d 282, 290 (Pa. 1976) (factors to consider include any “conditions which may serve to drain one’s power of resistance to suggestion or to undermine one’s self-determination”).

Accordingly, Pennsylvania suppression courts routinely examine and consider evidence of a defendant’s fatigue, anxiety, and/or illness during an interrogation. *See, e.g., Kichline*, 361 A.2d 282. Such courts also examine

evidence of recent intoxication. *See id.*; *Commonwealth v. Ventura*, 975 A.2d 1128, 1137 (Pa. Super. 2009) (“The fact that an accused has been drinking does not automatically invalidate his subsequent incriminating statements. The test is whether he had sufficient mental capacity at the time of giving his statement to know what he was saying and to have voluntarily intended to say it.”). Suppression courts should also consider any evidence that the police made promises or offers to the defendant or otherwise induced the defendant to speak. *See Commonwealth v. DiStefano*, 782 A.2d 574, 581-82 (Pa. Super. 2001).

With respect to the second prong of the test expressed in *Mitchell*, *supra*, *i.e.*, whether the defendant knowingly and intelligently waived his rights, this Court must look again to the totality of the circumstances. *Housman*, 986 A.2d at 840; *Perez*, 845 A.2d at 787; *Kichline*, 361 A.2d at 290. “[T]he record must show not only that adequate warnings were given but also that the defendant understood the import of those warnings.” *Kichline*, 361 A.2d at 290. Although recent intoxication may affect a defendant’s ability to knowingly and intelligently waive his rights, such intoxication “does not automatically invalidate his subsequent incriminating statements.” *Ventura*, 975 A.2d at 1137 (citation omitted). Instead “when evidence of impairment is present, it is for the suppression court to decide whether the Commonwealth has established by a preponderance of the evidence that the suspect nonetheless had sufficient cognitive awareness to

understand the *Miranda* warnings and to choose to waive his rights.” *Id.* (quoting *Commonwealth v. Britcher*, 563 A.2d 502, 507 (Pa. Super. 1989)).

In *DiStefano, supra*, the Superior Court of Pennsylvania applied these factors and determined, based on the police officers’ actions and the impact of those actions upon the defendant, that suppression of the defendant’s statements was warranted. Scranton Police Officers arrested DiStefano upon suspicion that he murdered his ex-girlfriend. *DiStefano*, 782 A.2d at 578. Those police officers interrogated DiStefano for eleven hours, beginning at 7:00 p.m. and ending at 6:00 a.m., the next morning. *Id.* DiStefano was granted only three brief breaks, did not sleep, and was not informed of his *Miranda* rights. *See id.*

During the interrogation, [DiStefano] was asked to provide a speculative theory of the circumstances of the homicide. He surmised that the victim was visited by a former lover at her place of employment who became enraged and killed her when she rejected his romantic advances. When asked what concerns the hypothetical third person killer might have, [DiStefano] replied that the killer would be worried about being treated fairly and about receiving psychological help. The interrogating officer, Trooper Joseph Pacifico, answered these concerns with assurances that the hypothetical killer would be treated fairly under the law and would receive mental health services. [DiStefano] asked the trooper to put the assurances in writing. The trooper asked [DiStefano] “What should I write?” The following note was prepared at the [DiStefano’s] direction, [DiStefano] dictating and the trooper writing:

We understand you're not a murderer—that it was a crime of passion—that you have a lot of pain, grief and remorse inside. That we intend to give you the necessary treatment to relieve your pain, grief and remorse.

TPR Joseph G. Pacifico [signature]

* * *

Detective Carlson joined Trooper Pacifico in the interrogation room at approximately 1:00 a.m. and the interrogation subsequently became accusatory and confrontational as they told [DiStefano] that they believed "the guy in his [hypothetical] scenario was him." At approximately 3:00 a.m. [DiStefano] asked if he could leave and return to continue the questioning the next day and was told "no" and that "you know, listen you're here now, you know. Why don't we just talk about this, get this all wrapped up. Something to that effect." The questioning continued and the interrogation report reveals that approximately one hour later:

Det. CARLSON and I asked DISTEFANO what he was worried about or afraid of that he couldn't tell us the truth. DISTEFANO said he wanted to finish his semester at college and wanted to get his teaching certificate. He said if he was arrested he wouldn't be able to finish his school semester. He also said that if he were convicted of a crime like this he would never get his teaching certificate. We discussed his concerns about school and told him he would eventually be able to finish his schooling and get his teaching certificate.

Id. at 578-79. At approximately 4:00 a.m., DiStefano "agreed to tell the truth" and issued a written statement of confession. *Id.* at 579.

Soon thereafter, DiStefano was formally placed under arrest and given his *Miranda* rights. *Id.* Before trial, he filed a suppression motion, seeking to preclude the introduction of his oral and written statements. *Id.* The suppression court denied his motion and, following conviction, DiStefano appealed. *Id.* The Superior Court, applying the factors discussed above, determined that the suppression court should have suppressed DiStefano's statements. The court reasoned:

The record shows that the police implied that [DiStefano] would get help for his psychological needs by court order only after he was arrested. The clear implication was that [DiStefano] would not be formally arrested until he "told the truth" and admitted that he was the person in the hypothetical scenario. When [DiStefano] said that he was concerned he would never be able to finish his degree and get his teaching certificate if he was arrested and convicted of the subject crime, the police falsely assured him that such was not the case. These assurances were made during an eleven hour overnight interview without the benefit of *Miranda* warnings to a person whose car keys had been taken and who was told he could not go when he asked to leave. Under a totality of the circumstances we conclude that the confession was not voluntarily given. We find that the interrogation was clearly manipulative and resulted in a confession which was not made freely or by unconstrained decision.

Id. at 581-82.

In *Ventura, supra*, the defendant sought to suppress statements made during questioning by various police officers, asserting that "such statements were obtained in violation of the state and federal constitutions because he was too intoxicated to knowingly, voluntarily, and intelligently waive his rights[.]" See *Ventura*, 975 A.2d at 1133, 1137-39. The trial court held a suppression hearing and, thereafter, denied Ventura's motion. Ventura appealed to the Superior Court, which affirmed the trial court's decision. In affirming the trial court's decision, the Superior Court determined that Ventura voluntarily waived his rights, as demonstrated by police officers' testimony regarding their interactions with and observations of Ventura.

Officer Foster testified that he did not observe indications that Ventura was inebriated when he first arrived on the scene. Although he smelled the odor of alcohol on Ventura and "it was apparent that [Ventura] had been drinking," Officer Foster

testified that he did not witness Ventura slur his speech, stagger or stumble while walking, or make “any kind of swaying or motions which would lead [him] to believe that he was intoxicated.” Officer Rhodes testified that he recalled “smelling the odor of alcohol in the rear of the cruiser [while] transporting [Ventura] to the station, but nothing that would [. . .] characterize him as being intoxicated.” Detective Ralston interviewed Ventura at the police station and testified that Ventura was not intoxicated[.]

Id. at 1138. Detective Ralston concluded that Ventura was not intoxicated because Ventura was willing to cooperate with the police, able to provide answers to questions, did not slur his speech, and expressed concern about the possibility of self-incrimination. *Id.* The Superior Court also tacitly determined that Ventura knowingly and intelligently waived his rights because “most tellingly, [Ventura] demonstrated that he was capable of making decisions when he chose not to answer certain questions because he feared incrimination.” *Id.* at 1139.

Similarly, the Superior Court recently affirmed the decision of this Court, as entered and explained by the Honorable F.P. Kimberly McFadden, P.J., to deny a defendant’s suppression motion because he knowingly and intelligently waived his rights. *See Commonwealth v. Pautienus*, No. 4370-2008, 2008 WL 8041091 (C.P.Northampton, Aug. 15, 2008), *affirmed*, 4 A.3d 668 (Pa. Super. 2010). There, as explained by this Court:

although Detective Grifo testified that Defendant appeared lethargic and smelled of alcohol, a portable breath test showed a .01 blood alcohol content. Defendant affirmatively answered all questions asked in the *Miranda* waiver and agreed to be interviewed. . . . *Defendant demonstrated that he understood his rights during questioning because after only*

approximately 25 minutes of questioning, Defendant ended the interview by asking for an attorney. The foregoing demonstrates that Defendant knowingly and voluntarily waived his *Miranda* rights prior to any statement to the police. Consequently, Defendant's statements were not obtained in violation of his Constitutional rights.

Id. (citations omitted and emphasis added).

Upon consideration of the foregoing, we have concluded that the evidence adduced at the suppression hearing demonstrates that McGlinchey voluntarily, knowingly, and intelligently waived his rights to have counsel present during questioning and to remain silent. Such evidence indicates that McGlinchey was comfortable and alert during his interrogation by Detective Alonzo and Investigator Crisafulli, and not subjected to "factors indicating [that] coercion was used" or "conditions which may serve to drain one's power of resistance to suggestion or to undermine one's self-determination." *See Housman*, 986 A.2d at 840; *Kichline*, 361 A.2d at 290. McGlinchey was interviewed for only one hour, beginning at 11:30 a.m. N.T. Pre-trial Hearing at 26, 39-40, 42. During that interview, he wore casual clothes and sat, unshackled, on a chair in a moderately large interview room. *Id.* at 26-27, 46. He was free to move about the room and he did not request any respite, refreshment, or any form of break during the interview. *Id.* at 40. Further, Detective Alonzo testified credibly that McGlinchey appeared "calm, lucid . . . coherent and understood what was going on" throughout the interview. *Id.* at 27.

Furthermore, unlike the *DiStefano* case, *supra*, the evidence in this case did not reveal any element of coercion or deception on the part of the police officers involved. As noted above, McGlinchey's interrogation began at 11:30 a.m. and lasted for only approximately one hour. *Id.* at 26, 39-40, 42. He did not request and was not denied breaks or refreshments. *Id.* at 40. Most importantly, unlike the police officers in *DiStefano*, the City of Easton Police Officers did not offer or promise McGlinchey anything in exchange for his statements.

Finally, the evidence from the suppression hearing demonstrates that McGlinchey knowingly and intelligently waived his *Miranda* rights. At the beginning of the interrogation, Detective Alonzo produced a copy of the Rights and Waiver Form and read it to McGlinchey, holding it in such a way that McGlinchey could read along. *Id.* at 28-30. As noted earlier, McGlinchey was "calm, lucid . . . coherent and understood what was going on." *Id.* at 27. Although prompted to do so, McGlinchey did not ask any questions about his rights. *See id.* at 29. Instead, he signed the Rights and Waiver Form on the lines above the phrases "I understand my Rights" and "I waive my Rights." *Id.* at 30-31, 32-33. Finally, after only one hour of testimony, McGlinchey exercised his rights by requesting counsel and ending the interview. In sum, the totality of the circumstances in this case, which are very similar to the circumstances discussed in *Pautienus*, *supra*, indicate

that McGlinchey knowingly and intelligently waived his rights.¹⁸ See *Pautienus*, 2008 WL 8041091.

Accordingly, we deny McGlinchey's motion to suppress the statements that he made to Detective Alonzo and Investigator Crisafulli.

C. Motion to Suppress Photographs

In his third motion, McGlinchey seeks to suppress "photographs depicting the body of the deceased, Kimiko Moon, which were taken during the investigation and autopsy and are in possession of the Commonwealth and will be used at trial." Omnibus Pretrial Motion at ¶ 14. Although McGlinchey does not specifically identify those photographs, he alleges that "[s]uch photographs are highly prejudicial and inflammatory and are of little or no probative value, and any prejudice clearly outweighs any probative value." *Id.* at ¶ 15.

The Supreme Court of Pennsylvania has established that:

A photograph of a murder victim in a homicide trial is not *per se* inflammatory and the admissibility of these photographs is within the sound discretion of the trial court. A photograph is admissible after application of a two-part test. The court must first determine if the photograph is inflammatory and then, if it is, the court must apply a balancing test to determine whether the photograph is of such essential evidentiary value that its need clearly outweighs the likelihood of inflaming the minds and passions of the jury.

¹⁸ On or about July 8, 2011, McGlinchey filed a Notice of Mental Infirmity or Insanity Defense. We note that McGlinchey did not, however, produce any evidence of mental infirmity, insanity, or mental health issues at the suppression hearing. However, we also note that mental illness does not automatically validate a defendant's waiver of his constitutional rights. See, e.g., *Mitchell*, 902 A.2d at 452.

Commonwealth v. Eichinger, 915 A.2d 1122, 1142 (Pa. 2007) (citations omitted).

At the hearing upon McGlinchey's motion, counsel for McGlinchey and the Commonwealth agreed that McGlinchey's motion to suppress the aforementioned photographs was premature for two reasons. First, as recognized by both parties, the Commonwealth has not yet identified the photographs that it will use at trial. See N.T. Pre-trial Hearing at 5, 12-13. Second, as established by our Scheduling Order:

On or before October 15, 2011, the Commonwealth and defense counsel shall meet and review all visual reproductions or representations that may be used as evidence at trial, including, but not limited to, photographs, videotapes, and DVDs of the crime scene and autopsy. Such evidence shall be made available for the Court's review upon its request. If either the Commonwealth or defense counsel objects to the use of any such reproduction or representation, it shall raise the issue by filing a motion of record, accompanied by a memorandum of law citing authority supporting its position, on or before October 22, 2011[.]

Scheduling Order at ¶ 20.

Accordingly, we deny McGlinchey's motion but do so without prejudice, such that he may re-file a motion to suppress specific photographs on or before October 22, 2011.

D. Motions to Compel Production of Discovery and *Brady* Material

In his fourth and fifth motions, McGlinchey seeks to compel production of Discovery and *Brady* materials. Omnibus Pretrial Motion at ¶¶ 11-12, 17-18.

In *Brady*, the United States Supreme Court held that “the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.” *Id.* at 87, 83 S.Ct. 1194. The duty to disclose may encompass impeachment evidence as well as directly exculpatory evidence, and the prosecution’s duty under *Brady* extends to exculpatory evidence in the files of police agencies of the same government prosecuting the case. *Commonwealth v. Lambert*, 584 Pa. 461, 470, 884 A.2d 848, 854 (2005). Evidence is material if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the trial would have been different. *Id.*; see also *Commonwealth v. Collins*, 585 Pa. 45, 68, 888 A.2d 564, 577-78 (2005) (in order to establish a *Brady* violation, a defendant “must establish that there has been a suppression by the prosecution of either exculpatory or impeachment evidence that was favorable to the accused, and that the omission of such evidence prejudiced the defendant”). However, “[t]he mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial does not establish materiality in the constitutional sense.” *Commonwealth v. Chambers*, 570 Pa. 3, 29, 807 A.2d 872, 887 (2002) (citation omitted).

Commonwealth v. Smith, 985 A.2d 886, 900 (Pa. 2009).

At the hearing upon McGlinchey’s motions, both parties recognized that: (1) the Commonwealth has a continuing obligation to produce Discovery; (2) the Commonwealth has a continuing obligation to produce *Brady* material; (3) the Commonwealth has not produced certain Discovery, including, *inter alia*, certain laboratory tests that the Commonwealth has not

yet received; (4) the Commonwealth has continually met its ongoing obligations; and (5) Defense Counsel has no reason to believe, at this juncture, that the Commonwealth will not continue to meet its obligations. N.T. Pre-trial Hearing at 6-7, 11.

As such, because no dispute as to either Discovery or *Brady* materials currently exists, we deny McGlinchey's motions. However, as above, we do so without prejudice, such that he may re-file a motion to compel Discovery or a motion to compel production of *Brady* material if the need arises.

E. Motion to Change Venue and/or Venire

Finally, McGlinchey has filed a motion seeking to change either the venue or venire.

Pursuant to the Pennsylvania Rules of Criminal Procedure, the trial court shall enter an Order changing venue or venire if it determines, after a hearing, that "a fair and impartial trial cannot . . . otherwise be had in the county where the case is currently pending." Pa.R.Crim.P. 584(A).

"Ordinarily, a defendant is not entitled to a change of venue unless he or she can show that pretrial publicity resulted in actual prejudice that prevented the impaneling of an impartial jury. The mere existence of pre-trial publicity does not warrant a presumption of prejudice." *Commonwealth v. Karenbauer*, 715 A.2d 1086, 1092 (Pa. 1998) (citations omitted).

At the May 27, 2011 hearing upon his motions, one of McGlinchey's attorneys, Dwight Danser, Esquire, asked this Court to hold McGlinchey's motions to change venue and venire in abeyance. Attorney Danser stated that "it's too early to [rule upon the motions] because we don't know what kind of publicity this case will generate in the future as we approach a trial date. . . . So far I don't think there's been sufficient publicity to warrant a change of venue." N.T. Pre-trial Hearing at 4; *see also* N.T. Pre-trial Hearing at 5 (same, with respect to motion to change venire).

Because McGlinchey has acknowledged that there has not been sufficient pre-trial publicity to warrant either a change of venue or a change of venire, we deny his motion. However, we deny his motion without prejudice, such that he may re-file it if sufficient publicity arises before trial.

WHEREFORE, we enter the following:

**IN THE COURT OF COMMON PLEAS OF NORTHAMPTON COUNTY
COMMONWEALTH OF PENNSYLVANIA
CRIMINAL DIVISION**

**COMMONWEALTH OF
PENNSYLVANIA**

v.

JOHN MCGLINCHEY, III,

Defendant.

No: C-48-CR-0721-2011

ORDER OF COURT

AND NOW, this 21st day of July, 2011, upon consideration of Defendant John McGlinchey III's Omnibus Pretrial Motion, the Commonwealth's response thereto, and the evidence adduced at a May 27, 2011 hearing thereon, and for the reasons set forth more fully in the attached Opinion of the Court, it is hereby **ORDERED** that:

1. Defendant's pre-trial motion to quash the Commonwealth's aggravating circumstances is **DENIED**;
2. Defendant's motion to suppress statements made to City of Easton Police Officers is **DENIED**;
3. Defendant's motion to suppress photographs of the victim, Kimiko Moon, is **DENIED**, without prejudice;

4. Defendant's motion to compel production of Discovery and *Brady* material is **DENIED**, without prejudice; and
5. Defendant's motion to change venue and/or venire is **DENIED**, without prejudice.

BY THE COURT:

MICHAEL J. KOURY, JR., J.