

1 and three counts of Disturbing the Peace. In Criminal Case No. 16-0170, the Commonwealth
2 charged Defendant with Second Degree Murder, Assault with a Dangerous Weapon, and
3 Aggravated Assault and Battery.

4 On September 26, 2016, the Commonwealth filed a motion to consolidate Criminal Case
5 Nos. 15-0081 and 16-0170. The Commonwealth argues that both cases are logically related and
6 have overlapping evidence. The overlapping evidence includes physical blood evidence, potential
7 witness testimony and Defendant's own statements.

8 On September 29, 2016, Defendant filed an opposition to the Commonwealth's Motion to
9 Consolidate. Therein, Defendant contests the existence of a causal link between charges in Criminal
10 Case Nos. 15-0081 and 16-0170. Additionally, Defendant argues that consolidation would cause
11 prejudice and potentially confuse the jury.

12 III. LEGAL STANDARD

13 "The court may order two or more informations to be tried together if the offenses . . . could
14 have been joined in a single information." NMI R. Civ. P. 13. Moreover, Rule 8 of the
15 Commonwealth Rules of Criminal Procedure ("Rule 8") states, in part:

16 Two or more offenses may be charged in the same information . . . if the offenses
17 charged . . . are of the same or similar character or are based on the same act or
18 transaction or on two or more acts or transactions connected together or
constituting parts of a common scheme or plan.

19 NMIR. Crim. P. 8(a).

20 Because the Commonwealth Rules of Criminal Procedure are patterned after the Federal
21 Rules of Criminal Procedure, interpretations of the federal rules are instructive. *Commonwealth v.*
22 *Ramangmau*, 4 N.M.I. 227, 233 n.3 (1995). Generally, courts have construed Rule 8's federal
23 counterpart "broadly in favor of initial joinder." *United States v. Ford*, 632 F.2d 1354, 1373 (9th
24 Cir. 1980) (citing *United States v. Satterfield*, 548 F.2d 1341, 1344 (9th Cir. 1980)). For joinder to
25 be proper, "[a]t least one of Rule 8(a)'s three conditions must be satisfied for proper joinder, and
'those conditions, although phrased in general terms, are not infinitely elastic.'" *United States v.*

1 *Jawara*, 474 F.3d 565, 573-74 (9th Cir. 2007) (citing *United States v. Randazzo*, 80 F.3d 623, 627
2 (1st Cir.1996)); *see also United States v. Cardwell*, 433 F.3d 378, 385 (4th Cir. 2005).

3 IV. DISCUSSION

4 The Commonwealth moves to consolidate the above-mentioned cases arguing that they are
5 logically related and have overlapping evidence. Defendant opposes the motion, arguing that the
6 cases are unrelated and consolidation would cause unfair prejudice. In deciding the
7 Commonwealth's Motion, the Court questioned the existence of: (1) a common scheme or plan; (2)
8 the same or similar character of the cases; and, (3) prejudice.

9 **A. There is an insufficient showing that Criminal Case Nos. 15-0081 and 16-0170 are** 10 **connected through a common scheme or plan.**

11 Courts generally permit joinder under this prong where the counts "grow out of related
12 transactions." *Jawara*, 474 F.3d at 574. "Transaction" has a flexible meaning and "may
13 comprehend a series of many occurrences, depending not so much upon the immediateness of their
14 connection as upon their logical relationship." *United States v. Friedman*, 445 F.2d 1076, 1083 (9th
15 Cir. 1971). In determining whether existence of a common scheme or plan warrants joinder of
16 offenses, courts ask whether the commission of one of the offenses either depended upon or
17 necessarily led to the commission of the other; or whether proof of the one act either constituted or
18 depended upon proof of the other. *Jawara*, 474 F.3d at 574 (citing *United States v. Halper*, 590
19 F.2d 422, 429 (2d Cir.1978)).

20 Generally, courts have found that a common plan or scheme exists where "cases involve a
21 concrete connection between the offenses that goes beyond mere thematic similarity." *Jawara*, 474
22 F.3d at 574. For example, in *United States v. Kinslow*, 860 F.2d 963, 965-966 (9th Cir. 1988), the
23 Court concluded that the charges of kidnapping, interstate transportation of a minor, unlawful
24 transportation of firearms, and interstate transportation of stolen property were properly joined
25 because "all took place within the same 24 hour period and they all made up part of [defendant's]

1 common plan to get to California . . . with [a] family as his hostages.” In *United States v.*
2 *Whitworth*, 856 F.2d 1268, 1277 (9th Cir. 1988), the Court concluded that charges of espionage and
3 tax evasion were part of a common plan or scheme, even though they occurred at different times,
4 because the tax evasion flowed directly from the espionage activity and the tax evasion resulted
5 from the need to conceal the illegal proceeds of that activity.

6 This matter is distinguishable from *Kinslow* or *Whitworth*. Here, there is no showing that the
7 charges of Second Degree Murder, Assault with a Dangerous Weapon or Aggravated Assault and
8 Battery against Ana Maria Pialur Limes led to Disturbing the Peace against multiple victims and
9 Illegal Possession of a Controlled Substance, or vice versa. Instead, the Commonwealth’s
10 discussion of relatedness focused on temporal proximity and overlapping evidence—which is more
11 appropriate for the “same or similar character” prong of Rule 8(a). Accordingly, the Court finds
12 there is an insufficient showing that the charges in Criminal Case Nos. 15-0081 and 16-0170 are
13 connected through a common plan or scheme.

14
15 **B. Criminal Case Nos. 15-0081 and 16-0170 are of the same or similar character,
therefore joinder is appropriate.**

16 “The ‘same or similar character’ prong of Rule 8(a) is the most amorphous and
17 controversial of the three grounds for joinder.” *Jawara*, 474 F.3d at 575. In order to assess whether
18 joinder of the offenses meets the “same or similar character” prong, the Court in *Jawara* considered
19 factors such as, “the elements of the statutory offenses, the temporal proximity of the acts, the
20 likelihood and extent of evidentiary overlap, the physical location of the acts, the modus operandi
21 of the crimes, and the identity of the victims.” *Id.* at 578. The weight of each factor depends on the
22 context and allegations in the case, however, the similar character of the joined offenses should be
23 “readily apparent or reasonably inferred.” *Id.* “Courts should not have to engage in inferential
24 gymnastics or resort to implausible levels of abstraction to divine similarity.” *Id.*

25 ///

1 Of the above-mentioned factors, the temporal proximity of the acts and the likelihood and
2 extent of evidentiary overlap are the most relevant factors showing the same or similar character of
3 the cases in this matter.

4 The Information in Criminal Case No. 16-0170 charges Defendant with Second Degree
5 Murder, Assault with a Dangerous Weapon, and Aggravated Assault and Battery that allegedly
6 occurred on or between April 18, 2015 and April 19, 2015. The Information in Criminal Case No.
7 15-0081 charges Defendant with Illegal Possession of a Controlled Substance and three counts of
8 Disturbing the Peace that allegedly occurred on or around April 19, 2015. The Commonwealth
9 intends to prove that Defendant committed the alleged murder on the same night, before he was
10 arrested for Illegal Possession of a Controlled Substance and Disturbing the Peace. The
11 Commonwealth's Motion alleges that after committing said murder, Defendant walked around San
12 Jose Village and created a disturbance. Further, due to that disturbance, police officers responded to
13 complaints, observed Defendant holding a zip lock bag containing methamphetamine, and arrested
14 Defendant. The significantly short span between these events weighs in favor of consolidation.

15 The First Circuit Court of Appeals found that evidentiary overlap justified consolidation of
16 separate indictments charging theft of motor vehicle and assault with intent to murder where the
17 testimony of the assault victim linked the defendant to the stolen vehicle, despite the fact that the
18 crimes were unrelated. *See Jervis v. Hall*, 622 F.2d 19, 22 (1st Cir. 1980). Similarly here, the
19 Commonwealth states that overlapping evidence exists between Criminal Case No. 15-0081 and
20 16-0170. Such evidence includes: Defendant's statements, potential testimony of the officers,
21 potential testimony of other witnesses, Defendant's disposition or state of mind on the night in
22 question, and physical blood evidence found on Defendant's clothing when he was initially arrested
23 for possession. Additionally, during the scheduled hearing, the Commonwealth stated that it is their
24 intention to introduce the above-mentioned evidence in both cases and argued that it could not be

25

1 separated because evidence that proves one case supports or is linked to evidence in the other case.
2 This overlapping evidence also weighs in favor of consolidation.

3 Based on above, joinder of Criminal Case No. 15-0081 and 16-0170 would be appropriate
4 under the “same or similar character” prong of Rule 8(a).

5 **C. The Court is not persuaded that Defendant will suffer actual prejudice.**

6 Joinder is improper “only if [it] results in actual prejudice because it ‘had substantial and
7 injurious effect or influence in determining the jury’s verdict.’” *United States v. Terry*, 911 F.2d
8 272, 277 (9th Cir. 1990) (quoting *United States v. Lane*, 474 U.S. 438, 449, 106 S. Ct. 725, 732, 88
9 L. Ed. 2d 814 (1986)).

10 The principal dangers which may prejudice a defendant by joinder arise in that: (1) the
11 defendant may become embarrassed or confounded in presenting separate defenses, (2) the jury
12 may use evidence in one crime to infer a criminal disposition of the defendant; (3) the jury may
13 cumulate evidence of various crimes charged and find guilt when, if considered separately, it would
14 not so find. *Drew v. United States*, 331 F.2d 85, 88 (D.C. Cir. 1964). “A less tangible but perhaps
15 equally persuasive, element of prejudice may reside in a latent feeling of hostility engendered by
16 the charging of several crimes as distinct from only one.” *Id.* Thus, “the court must weigh prejudice
17 to the defendant cause by joinder against the obviously important considerations of economy and
18 expedition in judicial administration.” *Id.* However, “where the evidence of each of the crimes
19 charged would have been admissible in separate trials . . . any claim of substantial prejudice is
20 without merit.” *Holmes v. Gray*, 526 F.2d 622, 625 (7th Cir. 1975).

21 Here, the defense argues that consolidation is improper because it would prejudice
22 Defendant in multiple ways. Specifically, the defense argues that: (1) jurors may be unable to
23 separate Defendant’s alleged drug use from alleged violent crimes; (2) jurors would hear evidence
24 on four separate counts for which they are not the finder of fact; and, (3) the evidence presented
25 could affect the juror’s ability to judge Defendant impartially. Additionally, the defense argues that


1 Defendant is entitled to an expeditious resolution and consolidation could encourage the Office of
2 the Attorney General to hold criminal defendants for extended periods of time.

3 The Court is not persuaded by Defendant's arguments for the following reasons. First,
4 Defendant does not set forth any arguments as to the inadmissibility of evidence in both cases. As
5 discussed above, claims of substantial prejudice have no merit when evidence of each crime is
6 admissible in separate trials. Second, the Court does not share Defendant's lack of faith in the jury,
7 Office of the Attorney General, or judicial administration. Moreover, Defendant's arguments do
8 not account for the curative value of limiting instructions, the numerous trials that combine both
9 jury and bench counts, and the fact that Defendant's argument for expeditious resolution supports
10 consolidation. Third, judicial economy weighs in favor of joinder. Accordingly, the Court finds
11 there is no showing of actual prejudice on Defendant by joinder.

12 **V. CONCLUSION**

13 Based on the foregoing, the Commonwealth's Motion to Consolidate is hereby **GRANTED**.
14 A status conference for Criminal Case Nos. 15-0081 and 16-0170 is scheduled for February 14,
15 2017 at 9:00 a.m. in Courtroom 217A. All parties are ordered to appear.

16
17 **SO ORDERED** this 11th day of January, 2017.

18
19
20 
21 **TERESA K. KIM-TENORIO**
Associate Judge

22
23
24
25