1002)

SCSL-03-01-T
(29329-29377)

29329

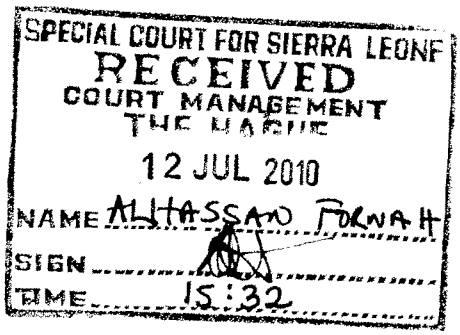
SPECIAL COURT FOR SIERRA LEONE
OFFICE OF THE PROSECUTOR

TRIAL CHAMBER II

Before: Justice Julia Sebutinde, Presiding
Justice Richard Lussick
Justice Teresa Doherty
Justice El Hadji Malick Sow, Alternate Judge

Registrar: Ms. Binta Mansaray

Date filed: 12 July 2010



THE PROSECUTOR **Against** **Charles Ghankay Taylor**

Case No. SCSL-03-01-T

PUBLIC WITH ANNEXES A-C
PROSECUTION RESPONSE TO DEFENCE MOTION TO EXCLUDE CUSTODIAL STATEMENTS OF ISSA SESAY

Office of the Prosecutor:
Ms. Brenda J. Hollis
Mr. Nicholas Koumjian
Ms. Sigall Horovitz

Counsel for the Accused:
Mr. Courtenay Griffiths, Q.C.
Mr. Terry Munyard
Mr. Morris Anyah
Mr. Silas Chekera
Mr. James Supuwood

I. INTRODUCTION

1. The Prosecution opposes as unfounded the 1 July 2010 Defence "Motion to Exclude Custodial Statements of Issa Sesay" ("**Motion**"), by which it requests the Trial Chamber to exclude 11 interview statements ("**Statements**") made by Issa Hassan Sesay ("**Sesay**") between 10 March and 15 April 2003 in connection with Special Court Case No. SCSL-04-15 ("**RUF case**"), where he was an accused. The Prosecution also opposes as unfounded the alternative relief requested, that if the Chamber allows the use of the Statements, the Trial Chamber also admit into evidence transcripts and exhibits from the *voir dire* proceedings held in the RUF case.

2. There is no legal basis to exclude the use of Sesay's Statements in the current case. The Motion erroneously asks the Chamber to adopt legal findings adjudicated in another case and apply them to manifestly distinct issues in the present case. The issue presently before this Chamber is the impeachment of a witness with a prior inconsistent statement, whereas the decision in the RUF case involved the use of an accused's prior self-incriminatory statements to impeach his testimony in his own trial. The Prosecution in the present case seeks to put to the witness his own words concerning Taylor's relationship with the AFRC/RUF, information this surviving senior RUF commander is uniquely situated to provide.

3. In the present circumstances, all of Sesay's Statements are admissible to the extent they are contrary to his direct examination. However, in the interest of expediting the proceedings, the Prosecution only seeks to use Sesay's first interview, dated 10 March 2003, which comprises 50 pages[1] and contains no confessions ("**Interview of 10 March 2003**").

4. In light of the Prosecution's intent to only use Sesay's Interview of 10 March 2003, the records of the *voir dire* in the RUF case are largely irrelevant and unhelpful in resolving the issues before this Trial Chamber.

Background

5. On 29 May 2009, the Defence filed Version I of its Witness List, including a summary for Witness DCT-172,[2] whose identity was disclosed by the Defence on 10 May 2010.[3] On 17

---

[1] The 11 interviews at issue in the Defence Motion total 1086 pages.

[2] *Prosecutor v Taylor*, SCSL-01-T-784, 'Public with Annexes A, B, C and Confidential Ex Parte Annex D, Defence Rule 73*ter* filing of Witness Summaries with a Summary of the Anticipated Testimony of the Accused, Charles Ghankay Taylor', 29 May 2009.

May 2010, the Prosecution disclosed Sesay's Statements.[4] On 5 July 2010, Sesay appeared voluntarily as a witness for Taylor's Defence.

6. Sesay was tried by Trial Chamber I of the Special Court.[5] An indictment and an arrest warrant against Sesay were signed on 7 March 2003. Sesay was arrested on 10 March 2003 and interviewed by the Prosecution 11 times between 10 March and 15 April 2003. The Interview of 10 March 2003 started with the relevant rights advisements and waivers. Sesay confirmed that he was "willing a hundred percent" to cooperate.[6] The portion of the Interview of 10 March 2003 containing the rights advisements and waivers is attached hereto as **Annex C**.

7. In the RUF case, Sesay testified on his own behalf and the Prosecution sought to use his Statements to impeach his trial testimony. The Sesay Defence objected to the Statements' admissibility on the grounds that they were not voluntary. Trial Chamber I held a *voir dire* hearing and found that the Statements resulted from "fear of prejudice and the hope of advantage", and held that the Prosecution in that case did not prove *beyond a reasonable doubt* that the Statements were made voluntarily.[7] Trial Chamber I found that the Statements resulted from "improper inducements" made by investigators to Accused Sesay, that could have led him to mistakenly believe that he was not charged in that case or that his indictment could be dropped, and he was persuaded under this misapprehension to give "self-incriminating" statements in violation of his rights to silence and against self-incrimination.[8]

8. Trial Chamber I further stated that it did "not find that the conduct of the Investigators involved trickery rising to the level that 'shocks the conscience of the community.'"[9] It found that the Prosecution had fulfilled its obligations under Rules 42 and 63, that Sesay's waiver of the right to counsel was voluntary,[10] and that Sesay's characteristics, the manner

---

[3] Letter from Courtenay Griffiths, Q.C. to Brenda Hollis, "Re: Disclosure by Witnesses' DCT Number and Names of Defence Witnesses", 10 May 2010. (Attached as **Annex A**.)
[4] Letter from Brenda J. Hollis to Courtenay Griffiths re. DCT-172, 17 May 2010. (Attached as **Annex B**.)
[5] *Prosecutor v Sesay, Kallon and Gbao*, Case No. SCSL-04-15-T.
[6] Interview of 10 March 2003, p. 16.
[7] *Prosecutor v Sesay et al.*, SCSL-04-15-T-1188, 'Written Reasons – Decision on the Admissibility of Certain Prior Statements of the Accused Give to the Prosecution' ("**Sesay Admissibility Decision**"), 30 June 2008, para. 52. Also see para. 66.
[8] Sesay Admissibility Decision, para. 60.
[9] *Ibid.*, para. 52.
[10] *Ibid.*, para. 65.

of his questioning, and his medical conditions did not render the interviews oppressive.[11] Trial Chamber I also found that "the interview did not take place under coercive or oppressive circumstances".[12]

II. APPLICABLE LAW

9. Rule 89 (C) of the Rules of Procedure and Evidence ("**Rules**") allows the Chamber to admit any relevant evidence. According to the Special Court's jurisprudence:

> Rule 89 (C) ensures that the administration of justice will not be brought into disrepute by artificial or technical rules, often devised for jury trial, which prevent judges from having access to information which is relevant. Judges sitting alone can be trusted to give second hand evidence appropriate weight, in the context of the evidence as a whole and according to well-understood forensic standards.[13]

10. Pursuant to Rule 95 of the Rules, the Chamber must exclude evidence "if its admission would bring the administration of justice into serious disrepute".

III. ARGUMENTS

The use of the Interview of 10 March 2003 during the cross-examination of witness Sesay is legally permissible and appropriate

11. The Defence has made no showing which justifies prohibiting the Prosecution from using this statement in the cross examination of witness Sesay. The principle of *stare decisis* is irrelevant as the legal issues in dispute in the present circumstances are patently distinct from those faced by Trial Chamber I in Sesay's own trial. A Trial Chamber is not bound by a decision of another Trial Chamber on a point of law,[14] and where, as here, the issues are manifestly distinct, the other Trial Chamber's decision is of no assistance.

12. No provision in the Rules allows a Trial Chamber to simply "follow the lead" of other Trial Chambers in order to make findings without hearing evidence. The RUF judgment found that Sesay was not a credible witness,[15] but certainly it is for this Trial Chamber to make its

---

[11] *Ibid.*, paras. 56, 58, 59.
[12] *Ibid.*, para. 60.
[13] *Prosecutor v Taylor*, SCSL-03-01-T-721, 'Decision on Prosecution Notice of Appeal and Submissions Concerning the Decision Regarding the Tender of Documents', 6 February 2009, para. 36 (citing *Prosecutor v Norman et al.*, SCSL-04-14-AR65, 'Fofana – Appeal Against Decision Refusing Bail', 11 March 2005, para. 26).
[14] *Prosecutor v. Aleksovski*, IT-95-14/1, Judgement (Appeals Chamber), 24 March 2000, para. 114 ("decisions of Trial Chambers, which are bodies with coordinate jurisdiction, have no binding force on each other, although a Trial Chamber is free to follow the decision of another Trial Chamber if it finds that decision persuasive").
[15] *Prosecutor v Sesay et al.*, SCSL-04-15-T-1234, Judgement, 2 March 2009, para. 608.

own determination of Sesay's credibility and not simply "follow the lead" of Trial Chamber I on this issue.

13. The decision in the RUF case to exclude the Statements was based on the legal finding that they were a product of a violation of his rights as an accused, and is inapplicable to the current situation where Sesay is appearing as a witness. A witness does not have the same right against self-incrimination as an accused. Rule 90 (E) allows the Chamber to compel a witness to answer a question even if the answer might tend to incriminate him, subject to safeguards in relation to the use of such evidence.[16] In any event, the Interview of 10 March 2003 contains no admissions of guilt by Sesay, and cannot be used against Sesay whose appeal is final.

14. The ICTY Trial Chamber in *Halilović* stressed that "[t]he jurisprudence of the Tribunal shows that there is a fundamental difference between an accused, who might testify if he so chooses, and a witness. The Statute and the Rules provide for safeguards for suspects and accused, which are not enjoyed by witnesses."[17] The ICTY Appeals Chamber in *Kvocka* held that "neither the Statute nor the Rules nor the Tribunals' own practice 'treat a witness in the same way as an accused testifying under oath' and that 'an accused enjoys specific protection with regard to respect for the rights of the defence'".[18] Thus, any exclusionary rules which governed the use of Sesay's Statements when he was an accused in the RUF case are inapplicable in the current circumstances, where Sesay appears voluntarily as a witness.

15. In *Blagojević*, the ICTY Trial Chamber specifically clarified that the rights in Rules 42, 43 and 63 protect suspects/accused and not third parties.[19] Blagojević had complained that

---

[16] It is also noted that under Rule 90(E) of the Rules: "Testimony compelled in this way shall not be used as evidence in a subsequent prosecution against the witness for any offence other than false testimony under solemn declaration". In addition, according to Rule 77(A): "The Special Court, in the exercise of its inherent power, may punish for contempt any person who knowingly and willfully interferes with its administration of justice, including any person who: (i) being a witness before a Chamber, subject to Rule 90(E) refuses or fails to answer a question".

[17] *Prosecutor v Halilović*, IT-01-48-T, 'Decision on Motion for Exclusion of Statement of Accused', 8 July 2005, para. 20. In this decision, the Trial Chamber excluded a prior statement made by Halilović to the Office of the Prosecutor at a time when he was a witness and not an accused or a suspect. The Trial Chamber stated that this evidence could not be used in subsequent proceedings against Halilović because it was unrecorded, and challenging the content of the statement would require the accused to waive his right to remain silent.

[18] *Prosecutor v Kvocka et al.*, IT-98-30-30/1-A, Judgement (Appeal), 28 February 2005, para. 125.

[19] *Prosecution v Blagojević & Jokić*, IT-02-60-T, 'Decision on Vidoje Blagojević's Expedited Motion to Compel the Prosecution to Disclose its Notes From Plea Discussions with the Accused Nikolić and Request for an Expedited Open Session Hearing', 13 June 2003. The rights under Rules 43 and 63 are discussed in page 5 of the decision, and the rights under Rule 42 are addressed in footnotes 22 and 23.

plea discussions between the Prosecution and Momir Nikolić, an accused in another ICTY case, were not recorded as required by the Rules in relation to suspects.[20] In rejecting Blagojević's complaints, the Chamber considered that "the protections set forth in Rules 43 and 63 (B) are provided for the suspects and accused being questioned, not third persons" and found that: "in relation to the plea discussions between the Prosecution and Momir Nikolić ... Blagojević is not an interested party who could raise the complaint of non-performance of any obligations set out under the respective Rules.[21]

Rule 95 does not bar the use of the Interview of 10 March 2003 to cross examine witness Sesay

16. A determination of whether Rule 95 would bar the admissibility of Sesay's Interview of 10 March 2003 in the present case must be made on the basis of the present circumstances, where Sesay appears voluntarily as a witness. The efforts to secure Sesay's cooperation for the interview on 10 March 2003 were not made in coercive, oppressive or shocking circumstances. Accordingly, there is no reason to exclude the interview from the current proceedings under Rule 95. Furthermore, during this interview, Sesay makes no admissions of guilt and no improper inducements were offered. Most of the events cited by Trial Chamber I in its decision to exclude Sesay's Statements from his own trial occurred after his Interview of 10 March 2003.[22] As can be seen in Annex A, the only Prosecution suggestion made to Sesay on 10 March 2003 was that his cooperation could be a mitigating factor in sentencing,[23] in accordance with Rule 101(B)(ii).[24]

---

[20] *Ibid.* At the time of these discussions, Nikolić and Blagojević were co-accused on the same indictment. Nikolić later pleaded guilty and agreed to testify against Blagojević in return for Prosecution promises to dismiss Genocide and other charges and to recommend a reduced sentence. See *Prosecutor v. Dragan Nikolić*, IT-94-2, Trial Transcript, 4 September 2003.

[21] *Ibid.*, page 5.

[22] These factors cited by Trial Chamber I in paragraph 45 of the Sesay Admissibility Decision include: that Sesay was blindfolded and taken from his cell by armed men on 11 March 2003; that he was told he would be called as a witness for the Prosecution if he co-operated with the investigators (suggestions which according to Sesay's own testimony in the *voir dire* hearing were made after 10 March 2003; see RUF case, Transcript, 19 June 2007, p. 49 et seq); and that the Prosecution would protect and care for Sesay's family (suggestions which according to Sesay's own testimony were made on 12 March 2003; see RUF case, Transcript, 19 June 2007, pp. 50, 56).

[23] Interview of 10 March 2003, pp. 14-15: "Whatever cooperation you are offering to the Office of the Prosecutor will be taken into full consideration ... Then it will be passed on, at the appropriate time, to the Judge to be taken into consideration with -- for their intention to use this collaboration, or to take into consideration this collaboration. Whenever -- you know, if found guilty of any offence, whenever sentencing occurs, it will be the position of the Prosecutor to request the Judge to take into consideration, you know, whatever the sentence could be. I want to make sure, that it is quite clear, that there is no promise made to you here in regards to a negotiation of sentencing, place of sentencing or whatever. It will be up to the Judge to take this into consideration."

[24] Rule 101(B)(ii) provides that a Trial Chamber "**shall** take into account" substantial cooperation with the Prosecutor. (*Emphasis added.*)

17. Sesay was informed of his status as an Accused before being questioned on 10 March 2003. At the start of the Interview of 10 March 2003, the investigator read Sesay his rights as an accused under Article 17 of the Statute, and the arrest warrant, which referred to him as an accused and informed him that an indictment had been signed against him.[25] Pursuant to Rule 63, Sesay was informed of the rights of a suspect under Rule 43 and was *correctly* told that he was also a suspect.[26] It is noteworthy that the word "accused" appears 23 times in the Interview of 10 March 2003. Because under Rule 2, a person ceases to be a suspect once indicted, by definition, Accused persons are a sub-set of suspects. In order for Sesay to understand that the rights of a suspect in Rule 43 applied to him, it was appropriate and legally correct to inform Sesay that he was a suspect. Even if Sesay gave the interview believing that he was a witness, this would not constitute a reason to exclude the interview in the current proceeding, where in fact, he is a witness.

18. Complex criminal investigations can seldom unravel multi-layered and opaque organizations without information from those involved in the criminal activities. It is desirable for the fact-finder to hear from persons inside a criminal enterprise who would have the best knowledge of events. It is widely accepted in international and national criminal courts that the Prosecution, with the court's approval, can offer promises not to prosecute, or other incentives to cooperate. In the AFRC judgement, this Trial Chamber rejected arguments that a witness's evidence should be dismissed because he had sought and received an assurance that he would not be prosecuted.[27]

19. Rule 101(B)(ii) obligates the Trial Chamber at the time of sentencing to consider the substantial cooperation of the Accused person with the Prosecution. This is the only mitigating factor explicitly referred to in the Rules. It is not improper for the Prosecution to inform accused persons that their cooperation will be brought to the attention of the judges at the time of sentencing. This is commonly done when plea agreements are negotiated in

---

[25] Interview of 10 March 2003, p. 4.

[26] Rule 2 defines a suspect as "A person concerning whom the Prosecutor possesses reliable information which tends to show that he may have committed a crime over which the Special Court has jurisdiction in accordance with Article 1 of the Statute".

[27] *Prosecutor v. Brima et al.*, SCSL-04-16-T-613, Judgement, 20 June 2007, paras. 357-359: "The Defence argues that the witness was not credible because he derived benefits from testifying ... The witness revealed that he sought and received an assurance from the Office of the Prosecutor that he would not be prosecuted for any crimes he had committed ... The Trial Chamber finds that his evidence throughout was consistent and any discrepancies minor. In addition, the witness presented a truthful demeanor. Thus, the Trial Chamber finds that he was a credible and reliable witness."

international courts.[28] It is further accepted that persons receiving such benefits can be called as Prosecution witnesses.[29]

20. The jurisprudence cited in the Motion is unhelpful to resolve the issues before the Trial Chamber. *A and Others v. Secretary of State for the home Department (No 2,)*[30] concerned the admission of a statement into evidence without the witness testifying where the statement was obtained through torture. In the Canadian case *R. v. Oickle*[31], the court held the statement at issue admissible. The *dicta* of the court cited by the Defence concerned both a circumstance not present in this case, the admission in the Prosecution case of confessions of an accused procured in violation of the accused's rights, and a prohibition against inducements of the kind allowed in the international courts.

Witness Sesay's Interview of 10 March 2003 is highly relevant

21. Sesay's Interview of 10 March 2003 contains evidence that goes to the principal issue in dispute in this case: the relationship between Charles Taylor and the RUF, and contradicts the witness's testimony before this Chamber on this issue. The interview therefore meets the admissibility test of Rule 89(C) and its admission would advance the Trial Chamber's duty under Rule 90(F)(I) to "[m]ake the interrogation *(of witnesses)* and presentation *(of evidence)* effective for the ascertainment of the truth."

22. It is well established in the jurisprudence of the Special Court that the reliability of evidence is not a consideration at the time of determining admissibility:

> At the admissibility stage, the only test is that of relevance ... Evidence is admissible once it is shown to be relevant; the question of its reliability is determined thereafter, and is not a condition for its admission ... It is at a later stage – when the evidence is being considered by the Trial Chamber in order to reach its judgement – that it becomes incumbent upon the Trial Chamber to inquire as to matters such as the reliability and probity of the relevant evidence.[32]

---

[28] At the ICTY, plea agreements between the Prosecution and the accused were accepted by the Trial Chamber and the admissions considered as mitigating circumstances in sentencing in the following cases: Milan Babić, Predrag Banović, Miroslav Bralo, Ranko Češić, Miroslav Deronjić, Damir Došen, Miodrag Jokić, Dragan Kolundžija, Darko Mrđa, Dragan Nikolić, Momir Nikolić, Dragan Obrenović, Biljana Plavšić, Ivica Rajić, Duško Sikirica, Milan Simić, Stevan Todorović, and Dragan Zelenović. At the ICTR, plea agreements between the Prosecution and the accused were accepted by the Chamber and considered as a mitigating circumstance in the cases of: Kambanda, Serushago, Ruggiu, Serugendo, Rugambarara, Bagaragaza, Nzabirinda, Bisengimana, and Rutaganira.

[29] For example, at the ICTY: Accused Obrenović testified for the Prosecution in the *Blagojević* and *Krstić* cases, as part of his plea agreement; Miroslav Deronjić testified as a Prosecution witness in the *Milosević* and *Krajišnik* cases as part of his plea bargain; Momir Nikolić testified as a Prosecution witness in the *Blagojević* Trial. At the ICTR: Kambanda testified for the Prosecution against *Bizimungu* and *Nzirorera*; Serushago testified for the Prosecution against *Nzirorera* and *Bagosora*; and Ruggiu testified for the Prosecution against *Nzirorera* and *Bagosora*.

[30] Motion, para. 19.

[31] Motion, paras. 24, 28.

[32] *Ibid.*, para. 37.

23. The Defence argument that the interview is unreliable because Sesay lied to secure a Prosecution inducement goes to weight of the evidence does not require the Chamber to make a separate finding on the admissibility of the prior inconsistent statement.[33]

Use of the Interview of 10 March 2003 is in the Interests of Justice

24. It is in the interests of justice to allow the use of the Interview of 10 March 2003 in cross-examination and for the Trial Chamber to assess its significance in light of all witness Sesay's testimony and all other evidence. As this Chamber has previously held, excluding highly relevant evidence could itself bring the judicial process into disrepute:

> We hold that the hearsay evidence given by the Witness is relevant evidence and is therefore admissible evidence under Rule 89(C). We find that the Defence has not made out a case for the exclusion of that evidence, let alone for the exclusion of the Witness's evidence in its entirety. Nor has anything been put before us which would justify the conclusion that the admission of the evidence would bring the administration of justice into serious disrepute pursuant to Rule 95. On the contrary, the evidence in our view is so clearly relevant that the judicial process would be brought into disrepute by excluding it.[34]

25. The Defence argument that a statement of a testifying accused cannot be used against a co-accused implicated in the statement is not supported by jurisprudence.[35] Furthermore, in the practice of international courts, prior inconsistent statements of an Accused can be used by his co-Accused.[36] National jurisprudence allows the admission of a statement made by a witness in the proceedings against his accomplice even when the statement was induced, as long as any inducements are disclosed.[37] In any event, Sesay is not accused in this case.

Voir Dire Transcripts from RUF Case Largely Irrelevant

26. The Prosecution opposes the Motion's request to admit into evidence the records of the *voir dire* in the RUF case. Judicial notice under Rule 94 is the legal mechanism available to a

---

[33] See: *People v. Ball*, 821 P.2d 905 (Court of Appeals of Colorado, 1991), p. 908: "There is no requirement that, before permitting counsel to cross-examine a witness about any prior statement, the trial court first determine that the prior statement was 'voluntary.'" See also: *People v. Adams* 283 Ill. App. 3d 520 (Appellate Court of Illinois, 1996), p. 525 approving the trial judge's decision to decline to hold a hearing on the voluntariness of a Witness' prior statement, which was introduced for impeachment alone. The Appellate Court found that such a hearing was not necessary because defence counsel could raise the issue of voluntariness in cross-examination.

[34] *Prosecutor v. Brima et al*, Case No.SCSL-04-16-PT-280, 'Decision on Joint Defence Motion to Exclude all Evidence from Witness TF1-277 Pursuant to Rule 89(c) and/or Rule 95', 24 May 2005, para. 24.

[35] Motion, para. 31.

[36] For example, the ICTR Appeals Chamber allowed the Kanyabashi Defence to cross-examine his co-Accused Ntahobali using statements which Ntahobali had previously made to Prosecution investigators. See *Prosecutor v. Nyiramasuhuko et al.*, Case No. ICTR-97-21-AR73, 'Decision on Appeal of Accused Arsene Shalom Ntahobali against the Decision on Kanyabashi's Oral Motion to Cross-Examine Ntahobali using Ntahobali's Statements to Prosecution Investigators in July 1997', 27 October 2006. It is noted that the statements were admitted only for the purpose of impeachment (para. 3).

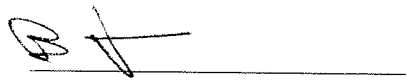
[37] *Giglio v. United States*, 405 U.S. 150 (1972).

Chamber through which it can apply findings from another case. In order to qualify for judicial notice, an adjudicated fact from another proceeding "must not contain legal conclusions nor may it constitute a legal finding."[38] Trial Chamber I's legal conclusions and findings thus cannot qualify for judicial notice. The facts set out in the record of the *voir dire* are in large part unhelpful in this case. The *voir dire* in the RUF case focused on events through the last interview on 15 April 2003 and beyond, and very little testimony concerned the period between Sesay's arrest at about noon on 10 March 2003 and the completion of his first interview, approximately four hours later. Further, Sesay is available to give his own evidence on the circumstances of his interview before the Trial Chamber, under oath and subject to cross examination.

IV. CONCLUSION

27. For the above reasons, the Prosecution requests the Chamber to dismiss the Motion in its entirety and allow the Prosecution to use the Interview of 10 March 2003 during its cross-examination of Witness Sesay, and to reject the Defence request to admit in the present proceedings the *voir dire* transcripts from the RUF case.

Filed in The Hague,
12 July 2010,
For the Prosecution,



Brenda J. Hollis,
The Prosecutor

[38] *Prosecutor v Taylor*, SCSL-01-T-765, 'Decision on Defence Application for Judicial Notice of Adjudicated Facts from the AFRC Trial Judgement pursuant to Rule 94(B)', 23 March 2009, para. 26.

INDEX OF AUTHORITIES

SCSL

Prosecutor v. Taylor

Prosecutor v Taylor, SCSL-01-T-784, Public with Annexes A, B, C and Confidential *Ex Parte* Annex D, Defence Rule 73*ter* filing of Witness Summaries with a Summary of the Anticipated Testimony of the Accused, Charles Ghankay Taylor, 29 May 2009.

Prosecutor v Taylor, SCSL-01-T-765, 'Decision on Defence Application for Judicial Notice of Adjudicated Facts from the AFRC Trial Judgement pursuant to Rule 94(B)', 23 March 2009.

Prosecutor v Taylor, SCSL-03-01-T-721, Decision on Prosecution Notice of Appeal and Submissions Concerning the Decision Regarding the Tender of Documents, 6 February 2009.

Prosecutor v. Brima et al.

Prosecutor v. Brima et al., SCSL-04-16-T-613, Judgement, 20 June 2007.

Prosecutor v. Brima et al., Case No.SCSL-04-16-PT-280, Decision on Joint Defence Motion to Exclude all Evidence from Witness TF1-277 Pursuant to Rule 89(c) and/or Rule 95, 24 May 2005.

Prosecutor v. Sesay et al.

Prosecutor v Sesay et al., SCSL-04-15-T-1234, Judgement, 2 March 2009.

Prosecutor v Sesay et al., SCSL-04-15-T-1188, Written Reasons – Decision on the Admissibility of Certain Prior Statements of the Accused Give to the Prosecution, 30 June 2008.

ICTY

Prosecutor v Halilović, IT-01-48-T, Decision on Motion for Exclusion of Statement of Accused, 8 July 2005.

http://www.icty.org/x/cases/halilovic/tdec/en/050708.htm

Prosecutor v Kvocka et al., IT-98-30-30/1-A, Judgement (Appeal), 28 February 2005.

http://www.icty.org/x/cases/kvocka/acjug/en/kvo-aj050228e.pdf

Prosecutor v. Dragan Nikolić, IT-94-2, Trial Transcript, 4 September 2003.

http://www.icty.org/x/cases/dragan_nikolic/trans/en/030904IT.htm

Prosecution v Blagojević & Jokić, IT-02-60-T, Decision on Vidoje Blagojević's Expedited Motion to Compel the Prosecution to Disclose its Notes From Plea Discussions with the Accused Nikolić and Request for an Expedited Open Session Hearing, 13 June 2003.

http://www.icty.org/x/cases/blagojevic_jokic/tdec/en/030613.htm

Prosecutor v. Aleksovski, IT-95-14/1, Judgement (Appeals Chamber), 24 March 2000.

http://www.icty.org/x/cases/aleksovski/acjug/en/ale-asj000324e.pdf

ICTR

Prosecutor v. Nyiramasuhuko et al., Case No. ICTR-97-21-AR73, Decision on Appeal of Accused Arsene Shalom Ntahobali against the Decision on Kanyabashi's Oral Motion to Cross-Examine Ntahobali using Ntahobali's Statements to Prosecution Investigators in July 1997, 27 October 2006.

http://liveunictr.altmansolutions.com/Portals/0/Case/English/Nyira/decisions/271006.pdf

NATIONAL JURISPRUDENCE

United States

Giglio v. United States, 405 U.S. 150 (1972).

People v. Ball, 821 P.2d 905 (Court of Appeals of Colorado, 1991).

People v. Adams, 283 Ill. App. 3d 520 (Appellate Court of Illinois, 1996).

29341

ANNEX A

SPECIAL COURT FOR SIERRA LEONE
OFFICE FOR THE DEFENCE OF CHARLES TAYLOR
Correspondence Address, C/o the SCSL Office at the STL P.O. Box 19536 2500CM
The Hague, The Netherlands
Telephone +31705159742 Facsimile: +31703222711
E-mail cgxqc@btinternet.com; moilanens@un.org

10 May 2010

By Hand Delivery and Electronic Mail

Ms. Brenda Hollis
Principal Trial Attorney
Office of the Prosecutor
Special Court for Sierra Leone
The Hague Sub-Office

Dear Brenda,

Re: Disclosure by Witnesses' DCT Number and Names of Defence Witnesses

In compliance with the Trial Chamber's Decision dated 27 May 2007, SCSL-03-01-T-782 "Decision on Urgent Defence Application for Protective Measures for Witnesses and for Non-Public Materials," and the Trial Chamber's oral Order of 5 February 2010[1], the Defence hereby provides the disclosure of the names of Defence Protected Witnesses, twenty-one (21) days before the witness is expected to be called by the Defence.

DCT-#	Witness' Name	Witness' Aliases
DCT-023	[redacted]	
DCT-172	Issa Hassan Sesay	
DCT-190	[redacted]	[redacted]
DCT-192		
DCT-220		
DCT-279		

The witnesses are not listed by "order of call" and, as was noted by the Court when its order was pronounced, this list is subject to change, in the sense that some of the witnesses might ultimately not be called by the Defence.

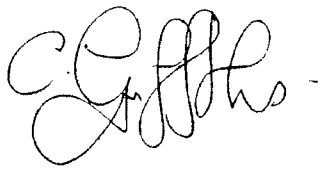
The Defence requests the Prosecution to disclose any material, within its possession, which is relevant to the named witnesses including, but not limited to, witness statements and/or disbursement records. The Defence notes the Prosecution's continuous obligation under Rule 68 of the Rules and Procedure and Evidence to

[1] See, Trial Transcript, 5 February 2010, pages 34865-34866.

disclose any exculpatory material in relation to all Defence witnesses whose identity has been disclosed to the Prosecution.

Specifically, the Defence requests the unredacted statements and material within the Prosecution's possession from DCT-023, whom the Defence have reason to believe is the same as TF1-382.

Yours sincerely,



Courtenay Griffiths, Q.C.
Lead Counsel for Charles G. Taylor

Cc: The Justices of Trial Chamber II.
Mr. Simon Meisenberg, Senior Legal Officer, Trial Chamber II

29344

ANNEX B

29345

SPECIAL COURT FOR SIERRA LEONE

OFFICE OF THE PROSECUTOR

128 JOMO KENYATTA ROAD • NEW ENGLAND • FREETOWN • SIERRA LEONE

PHONE: +1 212 963 9915 Extension: 178 7100 or +39 0831 257100

FAX: EXTENSION: 178 7366 OR +39 0831 257366 OR +232 22 297366

CONFIDENTIAL

By hand
Mr. Courtenay Griffiths
c/o Defence Office
The Special Court for Sierra Leone
Binckhorstlaan 400
2516 BL
Den Haag

17 May 2010

Dear Mr. Griffiths,

***Prosecutor v Charles TAYLOR*, SCSL-03-01-T – DCT-172**

Please find enclosed in Annex 1, witness material related to Defence witness DCT-172. The material is disclosed to you in hard copy only.

Should you withdraw from representation of the Accused in the Taylor Case prior to the conclusion of proceedings, please remit all materials disclosed to you to the Office of the Principal Defender. We also request that at the conclusion of proceedings in this case, all non-public material disclosed to the Defence by the Prosecution be remitted to the Registry.

Kindly inspect the contents of the disclosure package and sign and return the receipt to the Charles Taylor Prosecution team at your earliest convenience.

Yours faithfully,

Brenda J. Hollis
The Prosecutor

29346

ANNEX C

Monday, 10 March 2003

INTERVIEW OF ISSA HASSAN SESAY, a.k.a. ISSA SESAY

--- Upon commencing at 3:03 p.m.

Present: Gilbert Morissette, Deputy Chief of Investigation; Joseph Saffa, Investigator; Stacey Donison, Court Reporter.

GILBERT MORISSETTE: Okay, we're ready to begin. My name is Gilbert Morissette. I'm with the Special Court, for the Office of the Prosecutor, in Freetown, Sierra Leone. It is three minutes after three on the 10th of March, 2002 [sic]. Present in the room is also Joseph Saffa, who is also an investigator with the Office of the Prosecutor, and Mr. Issa Sesay.

Q. To begin with, Mr. Sesay, I want to show you a copy of the arrest warrant which has been issued by the Special Court for Sierra Leone, which was signed by Judge Bankole Thompson, the Presiding Judge of the Trial Chamber --

A. Yes.

Q. -- ordering your arrest and detention in regards to crimes committed during the mandate, or over the mandate for the Special Court.

A. Yes.

Q. You'll have a chance to read that later if you want to.

A. Yes, sir.

Q. Also I will show you, which we will read to you, as a matter of fact I will read the whole thing to you, in regards to the rights of accused under Article 17 of the Statute, and Rules 42 and 43 of the Rules

of Procedure and Evidence of the Special Court for Sierra Leone. Do you understand me so far?

A. Yes, sir. Yes, sir.

Q. Article 17 of the Statute in regards to the right of the accused says:

"1. All accused shall be equal before the Special Court.

2. The accused shall be entitled to a fair and public hearing, subject to measures ordered by the Special Court for the protection of victims and witnesses.

3. The accused shall be presumed innocent until proven guilty according to the provision of the present Statute.

4. In the determination of any charge against the accused pursuant to the present Statute, he or she shall be entitled to the following minimum guarantees, in full equality:

a. To be informed promptly and in detail in a language which he or she understands of the nature and cause of the charge against him or her;"

which is in the warrant which I will read to you later, okay?

A. Yes.

Q. "To have adequate" -- sorry, we'll just take a little break here.

"b. To have adequate time and facility for the preparation of his or her defence and to

communicate with counsel of his or her own choosing;

c. To be tried without undue delay;

d. To be tried in his or her presence, and to defend himself or herself in person or through legal assistance of his or her own choosing; to be informed, if he or she does not have legal assistance, of this right; and to have legal assistance assigned to him or her, in any case where the interest of justice so require, and without payment by him or her in any such case if he or she does not have sufficient means to pay for it;

e. To examine, or have examined, the witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her;

f. To have the free assistance of an interpreter if he or she cannot understand or speak the language used in the Special Court;

g. Not to be compelled to testify against himself or herself or to confess guilt."

So these are the rights of the accused, okay?

A. Yes, sir.

Q. Under Rules 42 and 43 of the Rules of Procedure and Evidence of the Special Court for Sierra Leone, there are also rights of suspect during investigation. Basically the rights of the suspect is when you're being interviewed by -- like we are doing now.

A. Yes, sir.

Q. I will read those rights before we start the interview with you, okay?

A. Yes, sir.

Q. But first let's go over the arrest warrant. Okay. The arrest warrant, a decision for the arrest warrant, and the issue was dated in London on the 7th day of March, 2003. As I said earlier, it's signed by Judge Bankole Thompson, Presiding Judge of the Trial Chamber, and it reads as follows:

> "The Special Court for Sierra Leone (the "Special Court"), sitting as Judge Thompson, designated by the President of the Special Court according to Rule 28 of the Rules of Procedure and Evidence,"

which are called later "the Rules"

> "Considering that the Indictment against Issa Hassan Sesay also known as Issa Sesay, a citizen of Sierra Leone, born 27 June 1970 at Freetown, Western Area, Republic of Sierra Leone, who is accused of Crimes against Humanity, violations of Article 3 common to the Geneva Conventions and of Additional Protocol II, and other Serious Violations of International Humanitarian

Law, ("the Accused"); was reviewed and approved by the Special Court on 7 March 2003;

Considering that an Order for the Non-Disclosure was ordered on 7 March 2003;

Hereby orders the Registrar of the Special Court

(A) to address this Warrant of Arrest, Decision Approving the Indictment, the Approved Indictment of the Accused and a Statement of the Rights of the Accused to the national authorities of Sierra Leone in accordance with Rules 55."

So this is what happened this morning. These documents, all these documents are in the hands of the Sierra Leone police, and as soon as the official turnover takes place, you will be getting a copy of all this, okay?

A. Yes, sir.

Q. "(C) to cause to be served on the Accused, at the time of his arrest, or as soon as is practicable immediately following his arrest, in English or have read to him in a language he understands, a certified copy of the Warrant of Arrest,"

which is what I'm doing now,

"a certified copy of the Indictment,"

which, as I said, will be served to you as soon as the turnover is done,

"a statement of the rights of the Accused,"

which I read earlier to you --

A. Yes, sir.

Q. "and to caution the Accused that any statement made by him shall be recorded and may be used as evidence against him in coordination with the National Authorities of the State concerned;"

which is what -- the third form I will read to you after we finish this part.

"(D) to remand the Accused, into the custody of the Special Court Detention Facility or such other Detention Facility as determined by the President in accordance with Rule 57."

Okay?

"Hereby orders the relevant authorities of the government of Sierra Leone

(A) promptly notify the Registrar of the Court of the arrest of the accused for the purpose of effectuating his transfer to the custody of the Court, and to surrender the Accused to the Court without delay;

(B) to transfer the Accused to the custody of the Special Court without delay, or to such other place as the President may decide. The

transfer shall be arranged between with the relevant national authorities of the Government of Sierra Leone and the Registrar of the Special Court;

(C) to assist and facilitate the Office of the Prosecutor of the Special Court, at any location, in the search for and seizure of all evidence related to the crimes alleged to have been committed by the Accused;

(D) to identify and locate assets owned by the Accused located within the territory of any State and adopt provisional measures to free such assets without prejudice to the rights of third parties;

(E) not to disclose to the public, including the media or any public record, the existence of the Indictment and this Warrant of Arrest, or any part thereof or information pertaining to the Indictment and this Warrant for Arrest until further order of the Court or at the direction of the Prosecutor;

(F) if the relevant national authorities of the Government of Sierra Leone are unable to immediately execute the present Warrant of Arrest and Order for Transfer, as requested,

the Government of Sierra Leone is requested to indicate the reason for its inability to affect thereto.

A Member of the Office of the Prosecutor may be present from the time of arrest."

[Mobile phone interruption]

GILBERT MORISSETTE: We'll take a short break because of the telephone.

--- Recess taken at 3:15 p.m.

--- On resuming at 3:16 p.m.

GILBERT MORISSETTE: We'll start again there. It's just been a short break because of a call.

Q. As I said:

"A Member of the Office of the Prosecutor may be present from the time of arrest. Done in London, this 7th day of March 2003."

Okay?

A. Yes, sir.

Q. So this is the order of arrest -- warrant of arrest and order for transfer, so that's the authority on which you were arrested this morning.

A. Yes.

Q. Now, having read these rights to you, the right of the accused and the right of a suspect during an investigation, which I will do now, the reason you are here this afternoon is for us to discuss your

implication or involvement during the events related here.

A. Yes, sir.

Q. Now, before we go any further, I have to read to you what we call the right advisement for a suspect or accused, okay?

A. Yes, sir.

Q. Again, we'll read this, it says:

> "In accordance with Rule 42 of the International Criminal Tribunal for Rwanda Rules of Evidence and Procedure applicable to Special Court for Sierra Leone..."

What I want to explain to you here is that the Special Court for Sierra Leone follows the same Rules of Evidence and Procedure as the Rwanda tribunal. That's how the court was formed.

> "...you are hereby advised that you are a suspected of being a participant involved in International War Crimes and/or Crimes Against Humanity and as such you are advised of the following".

So being a suspect, which is the reason why there was an arrest warrant issued for you, and that's why you are considered as a suspect, okay?

A. Yes, sir.

Q. Now, the rights that I'll read to you -- so far you understand what I'm saying?

A. Yes, sir. Yes, sir. I'm getting you, sir.

Q. Okay. You have:

"The right to be assisted by counsel of your choice or to have legal assistance assigned to you without payment if you do not have sufficient means to pay for it;"

Okay? Basically it's what -- the rights of the accused I read to you earlier here, it's a repetition of what we're doing now. But the reason we're doing this is this will become part of the suspect statement if there is such a thing that we -- if we do take a suspect statement.

"The right to have the free assistance of an interpreter if you cannot understand or speak the language to be used for questioning."

Understand?

A. Yes.

Q. And:

"The right to remain silent, and to be cautioned that any statement you make shall be recorded and may be used in evidence."

Do you understand these rights?

A. Yes, sir.

Q. Okay. I will ask you to put your initial here or circle where it says yes, if you want to make a circle around the yes, saying that you understand?

A. You're talking now about this paragraph?

Q. Yes, exactly, those three that I've read there.

A. Yes.

Q. Just make a circle around the yes, and put your initial here.

[The interviewee complies]

A. Why?

Q. Your initial or name, signature.

A. Initials?

Q. Yeah, whatever you normally sign, okay?

A. I sign my initials.

Q. So this is the right for assistance by counsel, you're saying you understand, the right of free assistance, interpreter, and the right to remain silent.

A. Yes, sir.

Q. Good. Now we continue as saying:

"Are you willing to waive the right to counsel and proceed with the interview and preparation of a witness statement; yes or no?"

In other words, are you willing to discuss with us your involvement? Are you willing to tell us what happened and what you know of these events?

A. Yes, sir.

Q. Yes?

A. Yes, sir.

Q. And again, put your initial.

[The interviewee complies]

Q. Thank you. Now we continue again with the rights advisement:

"In accordance with Rule 43 of the International Criminal Tribunal for Rwanda Rules of Evidence and

Procedure applicable to Special Court for Sierra Leone you are hereby advised that the questioning of a suspect shall be audio-recorded or video-recorded, in accordance with the following procedure."

So for the purpose of today's procedure, what we are doing is we are audio-recording.

A. Yes.

Q. Okay?

A. Yes, sir.

Q. "That you will be informed in a language you speak and understand that the questioning is being audio-recorded or video-recorded;".

So again, I repeat, we are audio-recording. Do you understand so far?

A. Yes, sir.

Q. "In the event of a break in the course of the questioning, the fact and the time of the break shall be recorded before audio-recording or video-recording ends, and the time of the resumption of the questioning shall also be recorded;";.

Do you understand?

A. Yes, sir.

Q. "At the conclusion of the questioning you shall be offered the opportunity to clarify anything you have said, and to add anything you wish, and the time of

conclusion shall be recorded;" .

Do you understand?

A. Yes.

Q. "The content of the recording shall then be transcribed as soon as practicable after the conclusion of questioning and a copy of the transcript supplied to you, together with a copy of the recording or, if multiple recording apparatus was used, one of the original recorded tapes;".

In this case it's only one tape at a time, so there will be a copy supplied to you later. And:

"After a copy has been made, if necessary,"

which will be the case here,

"of the recorded tape for purpose of transcription, the original recorded tape or one of the original recorded tapes shall be sealed in your presence under the signature of yourself and the Prosecutor/designee.

I understand these requirements and agree to have my interview recorded."

Do you agree with this?

A. Yes, sir.

Q. Again, if you want to sign -- circle the yes and put your initial.

[The interviewee complies]

Q. Okay. Mr. Sesay --

29360

Giglio v. United States, 405 U.S. 150 (1972).

9 L.Ed.2d 770. Where the material facts bearing upon the relatively narrow issue of waiving counsel are undisputed, except inferentially, and show that waiver was made "knowingly and intelligently," I believe that this test has been met.[3]

There is little likelihood that a new hearing now, eight years after the 1964 conviction, will be conducive to dependable factfinding[4] or will enlarge upon the evidence already considered. This case already has received the attention of four courts. Remanding it may further the repetitive judicial re-examination which has become so commonplace. The current flood of petitions for post-conviction relief already threatens—because of sheer volume—to submerge meritorious claims and even to produce a judicial insensitivity to habeas corpus petitioners.[5]

405 U.S. 150, 31 L.Ed.2d 104

John GIGLIO, Petitioner,

v.

UNITED STATES.

No. 70-29.

Argued Oct. 12, 1971.

Decided Feb. 24, 1972.

While appeal from a judgment of conviction was pending in the Court of Appeals, defense counsel filed a motion for new trial on basis of newly discovered evidence. The District Court denied the motion. On certiorari to the Court of Appeals, the Supreme Court, Mr. Chief Justice Burger, held that if assistant United States attorney, who first dealt with key Government witness, promised witness that he would not be prosecuted if he cooperated with the Government, such a promise was attributable to the Government, regardless of whether attorney had authority to make it, and nondisclosure of promise, which was not communicated to assistant United States attorney who tried the case, would constitute a violation of due process requiring a new trial.

Reversed and remanded.

Mr. Justice Powell and Mr. Justice Rehnquist took no part in consideration or decision of case.

1. Criminal Law ⇐700

Deliberate deception of a court and jurors by presentation of known false evidence is incompatible with rudimentary demands of justice.

2. Criminal Law ⇐919(1)

When reliability of a given witness may well be determinative of guilt or innocence, nondisclosure of evidence affecting credibility falls within rule that suppression of material evidence justifies a new trial irrespective of good faith or bad faith of the prosecution.

3. Criminal Law ⇐919(1), 959

A new trial is not automatically required whenever the combing of the prosecutor's files after the trial has disclosed evidence possibly useful to the defense but not likely to have changed the verdict; a finding of materiality of the evidence is required; a new trial is required if the false testimony could in any reasonable likelihood have affected the judgment of the jury.

3. In Townsend v. Sain, 372 U.S. 293, 319, 83 S.Ct. 745, 760, 9 L.Ed.2d 770 (1963), the Court recognized that it must rely largely on district judges, who have the "paramount responsibility in this area," to implement the prescribed standards.

4. Petitioner demonstrated in the state court proceeding the infirmity of his memory by initially denying that he had ever been in court prior to the forgery charge, when in fact he had been convicted previously of receiving stolen goods and had served a sentence for that crime.

5. See Bator, Finality in Criminal Law and Federal Habeas Corpus for State Prisoners, 76 Harv.L.Rev. 441, 451 (1963).

29362

4. **Attorney General** ⇐7
Constitutional Law ⇐268(8)

If assistant United States attorney, who first dealt with key Government witness, promised witness that he would not be prosecuted if he cooperated with the Government, such a promise was attributable to the Government, regardless of whether attorney had authority to make it, and nondisclosure of promise, which was not communicated to assistant United States attorney who tried the case, would constitute a violation of due process.

5. **Witnesses** ⇐367(1)

Where Government's case depended almost entirely on testimony of a witness who was named as a coconspirator but was not indicted, and without it there could have been no indictment and no evidence to carry case to jury, such witness' credibility was important issue in case and evidence of any understanding or agreement as to future prosecution would be relevant to such witness' credibility and jury was entitled to know of it.

Syllabus *

Petitioner filed a motion for a new trial on the basis of newly discovered evidence contending that the Government failed to disclose an alleged promise of leniency made to its key witness in return for his testimony. At a hearing on this motion, the Assistant United States Attorney who presented the case to the grand jury admitted that he promised the witness that he would not be prosecuted if he testified before the grand jury and at trial. The Assistant who tried the case was unaware of the promise. *Held:* Neither the Assistant's lack of authority nor his failure to inform his superiors and associates is controlling, and the prosecution's duty to present all material evidence to the jury was not fulfilled and constitutes a violation of due process requiring a new trial. Pp. 765–766.

Reversed and remanded.

James M. LaRossa, New York City, for petitioner.

Harry R. Sachse, New Orleans, La., for respondent.

Mr. Chief Justice BURGER delivered the opinion of the Court.

Petitioner was convicted of passing forged money orders and sentenced to five years' imprisonment. While appeal was pending in the Court of Appeals, defense counsel discovered new evidence indicating that the Government had 1151
failed to disclose an alleged promise made to its key witness that he would not be prosecuted if he testified for the Government. We granted certiorari to determine whether the evidence not disclosed was such as to require a new trial under the due process criteria of Napue v. Illinois, 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959), and Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed. 2d 215 (1963).

The controversy in this case centers around the testimony of Robert Taliento, petitioner's alleged coconspirator in the offense and the only witness linking petitioner with the crime. The Government's evidence at trial showed that in June 1966 officials at the Manufacturers Hanover Trust Co. discovered that Taliento, as teller at the bank, had cashed several forged money orders. Upon questioning by FBI agents, he confessed supplying petitioner with one of the bank's customer signature cards used by Giglio to forge $2,300 in money orders; Taliento then processed these money orders through the regular channels of the bank. Taliento related this story to the grand jury and petitioner was indicted; thereafter, he was named as a coconspirator with petitioner but was not indicted.

Trial commenced two years after indictment. Taliento testified, identifying petitioner as the instigator of the

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See United States v. Detroit Timber & Lumber Co., 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L. Ed. 499.

scheme. Defense counsel vigorously cross-examined, seeking to discredit his testimony by revealing possible agreements or arrangements for prosecutorial leniency:

"[Counsel.] Did anybody tell you at any time that if you implicated somebody else in this case that you yourself would not be prosecuted?

"[Taliento.] Nobody told me I wouldn't be prosecuted.

"Q. They told you you might not be prosecuted?

"A. I believe I still could be prosecuted.

. . . . . .

[152] "Q. Were you ever arrested in this case or charged with anything in connection with these money orders that you testified to?

"A. Not at that particular time.

"Q. To this date, have you been charged with any crime?

"A. Not that I know of, unless they are still going to prosecute."

In summation, the Government attorney stated, "[Taliento] received no promises that he would not be indicted."

The issue now before the Court arose on petitioner's motion for new trial based on newly discovered evidence. An affidavit filed by the Government as part of its opposition to a new trial confirms petitioner's claim that a promise was made to Taliento by one assistant, DiPaola,[1] that if he testified before the grand jury and at trial he would not be prosecuted.[2] DiPaola presented the Government's case to the grand jury but did not try the case in the District Court, and Golden, the assistant who took over the case for trial, filed an affidavit stating that DiPaola assured him before the trial that no promises of immunity had been made to Taliento.[3] The United [153] States Attorney, Hoey, filed an affidavit stating that he had personally consulted with Taliento and his attorney shortly before trial to emphasize that Taliento would definitely be prosecuted if he did not testify and that if he did testify he would be obliged to rely on the "good judgment and conscience of the Government" as to whether he would be prosecuted.[4]

The District Court did not undertake to resolve the apparent conflict between the two Assistant United States Attorneys, DiPaola and Golden, but proceeded on the theory that even if a promise had been made by DiPaola it was not authorized and its disclosure to the jury would not have affected its verdict. We need not concern ourselves with the differing versions of the events as described by the two assistants in their affidavits. The heart of the matter is that one Assistant United States Attorney—the first one who dealt with Taliento—now states that he promised Taliento that he would not be prosecuted if he cooperated with the Government.

1. During oral argument in this Court it was stated that DiPaola was on the staff of the United States Attorney when he made the affidavit in 1969 and remained on that staff until recently.

2. DiPaola's affidavit reads, in part, as follows:
"It was agreed that if ROBERT EDWARD TALIENTO would testify before the Grand Jury as a witness for the Government, . . . he would not be . . . indicted. . . . It was further agreed and understood that he, ROBERT EDWARD TALIENTO, would sign a Waiver of Immunity from prosecution before the Grand Jury, and that if he eventually testified as a witness for the Government at the trial of the defendant, JOHN GIGLIO, he would not be prosecuted."

3. Golden's affidavit reads, in part, as follows:
"Mr. DiPaola . . . advised that Mr. Taliento had not been granted immunity but that he had not indicted him because Robert Taliento was very young at the time of the alleged occurrence and obviously had been overreached by the defendant Giglio."

4. The Hoey affidavit, standing alone, contains at least an implication that the Government would reward the cooperation of the witness, and hence tends to confirm rather than refute the existence of some understanding for leniency.

[1-3] As long ago as Mooney v. Holohan, 294 U.S. 103, 112, 55 S.Ct. 340, 342, 79 L.Ed. 791 (1935), this Court made clear that deliberate deception of a court and jurors by the presentation of known false evidence is incompatible with "rudimentary demands of justice." This was reaffirmed in Pyle v. Kansas, 317 U.S. 213, 63 S.Ct. 177, 87 L.Ed. 214 (1942). In Napue v. Illinois, 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959), we said, "[t]he same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears." *Id.*, at 269, 79 S.Ct., at 1177. Thereafter Brady v. Maryland, 373 U.S., at 87, 83 S.Ct., at 1197, held that suppression of material evidence justifies a new trial "irrespective of the good faith or bad faith of the prosecution." See
154 American Bar Association, Project on Standards for Criminal Justice, Prosecution Function and the Defense Function § 3.11(a). When the "reliability of a given witness may well be determinative of guilt or innocence," nondisclosure of evidence affecting credibility falls within this general rule. *Napue, supra*, at 269, 79 S.Ct., at 1177. We do not, however, automatically require a new trial whenever "a combing of the prosecutors' files after the trial has disclosed evidence possibly useful to the defense but not likely to have changed the verdict . . . . " United States v. Keogh, 391 F.2d 138, 148 (CA2 1968). A finding of materiality of the evidence is required under *Brady, supra*, at 87, 83 S. Ct., at 1196, 10 L.Ed.2d 215. A new trial is required if "the false testimony could . . . in any reasonable likelihood have affected the judgment of the jury . . . " *Napue, supra*, at 271, 79 S.Ct., at 1178.

[4] In the circumstances shown by this record, neither DiPaola's authority nor his failure to inform his superiors or his associates is controlling. Moreover, whether the nondisclosure was a result of negligence or design, it is the responsibility of the prosecutor. The prosecutor's office is an entity and as such it is the spokesman for the Government. A promise made by one attorney must be attributed, for these purposes, to the Government. See Restatement (Second) of Agency § 272. See also American Bar Association, Project on Standards for Criminal Justice, Discovery and Procedure Before Trial § 2.1(d). To the extent this places a burden on the large prosecution offices, procedures and regulations can be established to carry that burden and to insure communication of all relevant information on each case to every lawyer who deals with it.

[5] Here the Government's case depended almost entirely on Taliento's testimony; without it there could have been no indictment and no evidence to carry the case to the jury. Taliento's credibility as a witness was therefore an im- 155
portant issue in the case, and evidence of any understanding or agreement as to a future prosecution would be relevant to his credibility and the jury was entitled to know of it.

For these reasons, the due process requirements enunciated in *Napue* and the other cases cited earlier require a new trial, and the judgment of conviction is therefore reversed and the case is remanded for further proceedings consistent with this opinion.

Reversed and remanded.

Mr. Justice POWELL and Mr. Justice REHNQUIST took no part in the consideration or decision of this case.

29365

People v. Ball, 821 P.2d 905 (Court of Appeals of Colorado, 1991).

29366

plaints by the Board "shall be expeditiously ... conducted so that no physician is subjected to unfair and unjust charges." *See also* § 24–4–105(10), C.R.S. (1988 Repl.Vol. 10A) ("[every] agency shall proceed with reasonable dispatch to conclude any matter presented to it....").

In his answer to the original complaint filed by the Board, Norton alleged as an affirmative defense that the complaint against him must be barred because it had not been expeditiously conducted as required by § 12–36–118(4)(d).

One month after the Board filed an amended complaint against him, while retaining the allegation of undue delay in violation of § 12–36–118(4)(d), Norton moved to amend his answer to add other affirmative defenses. The ALJ allowed the amended answer, except for the affirmative defenses of age discrimination, which is not an issue here, and laches. Norton now contends that the ALJ's denial of his motion to add the defense of laches deprived him of a "legitimate defense and due process" and was, therefore, an abuse of the ALJ's discretion. We do not agree.

[12] Laches is an affirmative defense requiring a showing of lack of diligence by plaintiff and prejudice to defendant. *Roberts v. Morton*, 549 F.2d 158 (10th Cir. 1976), *cert. denied sub nom. Roberts v. Andrus*, 434 U.S. 834, 98 S.Ct. 121, 54 L.Ed.2d 95 (1977). "The basis of laches in equity is unreasonable delay and lack of diligence extending for so long a time or under such circumstances that it would be inequitable to grant relief." *O'Byrne v. Scofield*, 120 Colo. 572, 212 P.2d 867 (1949).

The record here indicates that, despite its ruling on the laches defense, the ALJ consistently allowed consideration of Norton's evidence on the issue of undue delay by the Board. And, the record indicates that the ALJ did so in light of Norton's repeated reminders that he had raised the allegation that the complaint was time-barred at the inception of the case.

Moreover, the record further reveals that both the ALJ and Norton considered the equitable defense of laches as the equivalent of the statutory defense of undue delay: For example, the ALJ said: "To what extent [§ 12–36–118(4)(d)] might differ from laches, I don't know." And, Norton stated: "Although [the ALJ ruled] that we could not specifically assert the defense of laches.... We said it in the original answer [referring to § 12–36–118(4)(d)]. We just didn't use the word 'laches.'"

Thus, despite Norton's allegation that he was prevented from presenting evidence to show "that the Board unreasonably delayed enforcement of the [charges] which resulted in prejudice to him," the record is to the contrary. And, the ALJ considered this evidence and specifically addressed the delay issue in his order, finding that "[all] that has been shown is the passage of time, which in and of itself, does not establish unreasonable delay ... [Norton] has demonstrated no reason why the delays in bringing this case to hearing have been prejudicial or violative of fundamental fairness."

Thus, no prejudice resulted to Norton, and accordingly, we find no abuse of discretion.

The order is affirmed.

PIERCE and MARQUEZ, JJ., concur.

The PEOPLE of the State of Colorado, Plaintiff–Appellee,

v.

Raymond Lloyd BALL, Defendant–Appellant.

No. 88CA1711.

Colorado Court of Appeals, Div. III.

Sept. 26, 1991.

Rehearing Denied Nov. 7, 1991.

Defendant was convicted in the District Court, Mesa County, David A. Bott-

ger, J., of conspiracy to commit second-degree burglary of controlled substance, third-degree criminal trespass, conspiracy to commit tampering with physical evidence, and tampering with physical evidence, and he appealed. The Court of Appeals, Criswell, J., held that: (1) prosecutorial misconduct during first trial did not require imposition of double jeopardy bar to retrial, absent showing that misconduct was designed to provoke mistrial; (2) use of coconspirator's testimony from first trial could be used to impeach coconspirator at second trial even though grant of new trial was based in part on finding that prosecutor improperly attempted to influence coconspirator at first trial; and (3) requiring that half of sentence be served concurrently with and half be served consecutively to sentence which defendant was already serving as result of prior conviction would have resulted in interruption in sentence.

Affirmed in part; vacated and remanded in part.

1. **Double Jeopardy ⇐96**

Defendant's motion for mistrial generally operates as waiver of constitutional protection against retrial under double jeopardy clause. U.S.C.A. Const.Amend. 5.

2. **Double Jeopardy ⇐97**

Defendant's motion for mistrial does not waive constitutional protection against retrial under double jeopardy clause if prosecutorial misconduct is designed to provoke mistrial; record must show that prosecutorial misconduct resulted from improper motivation, bad faith, or overreaching in attempt to trigger mistrial. U.S.C.A. Const.Amend. 5.

3. **Double Jeopardy ⇐97**

Defendant's posttrial motion for new trial waived constitutional protection against retrial under double jeopardy clause absent any showing that prosecutorial misconduct which triggered mistrial was designed to provoke mistrial; prosecutor's informal comments to witness were spontaneous result of prosecutor's good-faith belief that witness was not being completely candid in testimony. U.S.C.A. Const.Amend. 5.

4. **Arrest ⇐63.5(5)**

Police officers had reason to believe that defendant was connected with attempted burglary so as to justify investigatory stop in light of absence of frost on windshield of vehicles near burglary and discovery of CB radio in possession of burglary suspect.

5. **Arrest ⇐63.5(9)**

Contradictory responses defendant gave to police questioning, combined with need to obtain further report on another suspect, justified prolonging detention of defendant, after valid investigatory stop, for limited time.

6. **Witnesses ⇐379(8, 11)**

Grant of new trial which was based in part on finding that prosecutor improperly attempted to influence witness at first trial did not render witness' testimony at first trial involuntary or untrustworthy for impeachment purposes. Rules of Evid., Rule 613.

7. **Witnesses ⇐388(6)**

Prosecutor could impeach witness whose testimony was read at trial with prior inconsistent statements that witness had made to police detective without confronting witness with previous statements and offering opportunity to explain apparent inconsistencies in light of specific exception to foundation requirement in rule, where witness, who had testified at first trial concerning defendant's comings and goings from motel on night of burglary, was unavailable at second trial. Rules of Evid., Rules 613, 804(b)(1), 806.

8. **Criminal Law ⇐1171.6**

Trial court's error in allowing prosecutor to engage in improper closing argument was harmless where court's instruction to jury emphasized that defendant was not charged with offense to which prosecutor made reference and made it clear that jurors were not to consider that argument as implying that defendant had actually committed crime.

9. Criminal Law ⇐722½

Once jury has acquitted defendant of particular charge, there cannot be good argument that he actually committed crime.

10. Criminal Law ⇐1217

Prisoner who commences service of sentence is entitled to serve that sentence in uninterrupted manner.

11. Criminal Law ⇐1217

Trial court lacked authority to impose sentence of 11 years with half of sentence to be served concurrently with and another half served consecutive to sentence defendant was currently serving; sentence imposed by court would have defendant serve first half of sentence, complete serving remainder of prior sentence, and then recommence serving last half of sentence.

Duane Woodard, Atty. Gen., Charles B. Howe, Chief Deputy Atty. Gen., Richard H. Forman, Sol. Gen., John J. Krause, Asst. Atty. Gen., Denver, for plaintiff-appellee.

David F. Vela, Colorado State Public Defender, Sally S. Townshend, Deputy State Public Defender, Denver, for defendant-appellant.

Opinion by Judge CRISWELL.

Defendant, Raymond Lloyd Ball, appeals the judgment of conviction of conspiracy to commit second degree burglary of a controlled substance, third degree criminal trespass, conspiracy to commit tampering with physical evidence, and tampering with physical evidence, as well as the sentence imposed upon him. We affirm the conviction, but vacate the sentence imposed and remand for re-sentencing.

Defendant's convictions resulted from a second trial of the charges asserted against him. While he was convicted of the same charges in a first trial, those convictions were later set aside by the trial court because of prosecutorial misconduct.

I.

Defendant first argues that the prosecutorial misconduct during his first trial required imposition of the double jeopardy bar to retrial. We disagree.

During the first trial, the People called an alleged co-conspirator as one of its witnesses. At a recess in the testimony, however, the prosecutor engaged in a heated exchange with this witness. The trial court found that statements made by the prosecutor constituted a threat to this witness to have the witness' previously bargained plea set aside. While the trial court denied defendant's contemporaneous motion for a mistrial, it granted defendant's post-trial motion for a new trial, based on this and other incidents.

[1] A defendant's motion for a mistrial generally operates as a waiver of his constitutional protection against retrial under the double jeopardy clause. *United States v. Dinitz*, 424 U.S. 600, 96 S.Ct. 1075, 47 L.Ed.2d 267 (1976); *People v. Baca*, 193 Colo. 9, 562 P.2d 411 (1977).

[2] However, if the prosecutorial misconduct is designed to provoke a mistrial, defendant's motion will not, under such circumstances, result in a waiver. *People v. Espinoza*, 666 P.2d 555 (Colo.1983). In order for double jeopardy to attach in such cases, the record must support a finding that the prosecutorial misconduct resulted from "improper motivation, bad faith, or overreaching in an attempt to trigger a mistrial." *People v. Espinoza, supra. See People v. Baca, supra.*

[3] Here, there was no finding by the court that the conduct engaged in by the prosecutor was designed to provoke a mistrial, nor was there any evidence that the prosecutor was motivated by a desire to inject error into the proceedings. Rather, the prosecutor's informal comments to the witness were the spontaneous results of the prosecutor's good faith belief that the witness was not being completely candid in his testimony. Hence, there was no basis to conclude that the prosecutor's misconduct required dismissal of the charges. *See People v. Espinoza, supra.*

II.

[4] Defendant next argues that the trial court erred in denying his motion to suppress evidence obtained during the investigatory stop of his vehicle. Again, we disagree.

The trial court found that the discovery of a CB radio in the possession of one of the burglary suspects justified the belief by the arresting officers that there was another person involved. In addition, unlike others parked in the vicinity, two vehicles near the burglary had no frost on their windshield, indicating they had not been there long. One of these vehicles was connected to a suspect apprehended at the scene, and the other one belonged to defendant.

These circumstances constituted sufficient information from which a police officer could form a reasonable belief that defendant was connected with the attempted burglary so as to justify an investigatory stop of him. *See Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968); *Stone v. People*, 174 Colo. 504, 485 P.2d 495 (1971).

[5] After defendant was stopped, the contradictory responses he gave to police questioning, combined with the need to obtain a further report on a co-suspect, justified prolonging the detention of defendant for 24 minutes. Thus, the stop was reasonably related to the limited purpose of ascertaining the prior actions and possible involvement of defendant. *See People v. Hazelhurst*, 662 P.2d 1081 (Colo.1983).

III.

[6] We also disagree with defendant that the use of the co-conspirator's testimony from defendant's first trial constituted plain error.

The same witness whom the trial court found had been the subject of threatening statements by the prosecutor in the first trial also testified at defendant's subsequent re-trial. On cross-examination, defense counsel questioned this witness concerning the attempted prosecutorial harassment, and both counsel questioned the witness concerning any pressure upon him from the district attorney's office to give favorable testimony for the People.

Defendant argues that, since the grant of a new trial was based, in part, upon the trial court's finding that the prosecutor improperly attempted to influence this witness in the first trial, his testimony at the first trial was not "voluntary" and, thus, should be barred as untrustworthy.

Under CRE 613, a witness may be impeached with his prior inconsistent statements. There is no requirement that, before permitting counsel to cross-examine a witness about any prior statement, the trial court first determine that the prior statement was "voluntary."

Here, a proper foundation for the questioning was established by asking the witness if he remembered making the statements before confronting him with them. *See Transamerica Insurance Co. v. Pueblo Gas & Fuel Co.*, 33 Colo.App. 92, 519 P.2d 1201 (1973). The witness testified at some length concerning the circumstances under which his former testimony was given. Thus, he had ample opportunity to explain or deny the validity of his previous statements. We conclude, therefore, that the trial court properly permitted the use of the witness' former testimony for impeachment purposes.

IV.

[7] Defendant next contends that the trial court erred by allowing the prosecutor to impeach a witness whose testimony was read at trial with prior inconsistent statements that the witness had made to a police detective. Because the witness did not testify at trial, defendant argues, the requirement that he be confronted with his previous statement and offered an opportunity to explain the apparent inconsistency was not met. We disagree.

At defendant's first trial, one witness testified concerning defendant's comings and goings from a motel on the night of the burglary. At defendant's second trial, this witness was unavailable. Hence, pursuant to CRE 804(b)(1), the People, over

defendant's objection, had a transcript of his testimony from the first trial read into the record. Later in the trial, the People also had admitted, over defendant's objection, the testimony of a police detective, who testified as to inconsistent statements made by this witness.

Defendant argues that the evidence of the prior inconsistent statements was improperly offered for impeachment purposes because the witness could not first be confronted with those prior statements as required by CRE 613. However, CRE 806 creates a specific exception to this foundation requirement of CRE 613. That rule states:

> "When a hearsay statement ... has been admitted in evidence, the credibility of the declarant may be attacked, and if attacked may be supported, by any evidence which would be admissible for those purposes if declarant had testified as a witness. Evidence of a statement or conduct by the declarant at any time, inconsistent with his hearsay statement, *is not subject to any requirement that he may have been afforded an opportunity to deny or explain.*" (emphasis supplied)

See King v. People, 785 P.2d 596 (Colo. 1990) (fn. 5); *People v. Freeman*, 739 P.2d 856 (Colo.App.1987).

The prior testimony of this witness was admitted pursuant to CRE 801(d)(1); it constituted "hearsay" under CRE 801(c), but such testimony was admissible under an exception to the general rule excluding hearsay. Since the court had admitted such a hearsay statement, CRE 806 specifically authorized prior statements of the declarant to be offered.

V.

[8] We also conclude that, while the trial court erred in allowing the prosecutor to engage in an improper closing argument, the error was not prejudicial.

In defendant's first trial, he was acquitted of the charge of second degree burglary. Hence, that charge was not a subject for consideration at his second trial. Nevertheless, during the rebuttal portion of the prosecutor's final argument, the following colloquy took place:

> Prosecutor: "Now, Ray Ball is not charged with the crime of second degree burglary. There's a good argument that he actually committed that crime."
>
> Defense Counsel: "I'm going to object to this. There's no argument that he was acquitted of that."
>
> Prosecutor: "I didn't say that he had actually committed this crime. I believe I said that there's a good argument that he actually committed this crime."
>
> Defense Counsel: "Your Honor, here he was arguing that Ray Ball committed burglary."
>
> Prosecutor: "There is a good argument."

After a sidebar conference, the argument continued:

> Prosecutor: "Like I said, there is a good argument that he actually committed the crime of second degree burglary of a controlled substance."
>
> Defense Counsel: "I'm going to object. This is totally improper."
>
> The Court: "All right. I'm afraid I'm going to allow him to go forward."

The court then advised the jury as follows:

> "The jury is advised that the charges [are] as set out in [the instructions] and that the reference to burglary is set out for definitional purposes. You should interpret the district attorney's argument in that manner. Defendant is not charged with burglary of a controlled substance."

The defendant argues that, by his comments, the prosecutor impermissibly conveyed the impression that he personally believed that the defendant was guilty of the crime charged. While we do not view these comments in that light, we agree that the comments were improper.

[9] Once a jury has *acquitted* a defendant of a particular charge, there simply *cannot* be made a "good argument that he actually committed that crime," as the prosecutor averred. Further, since defendant was not charged with the crime to

29371

which the prosecutor referred, whether he had committed that crime was irrelevant to the issues before the jury in this prosecution.

Hence, we conclude that the trial court erred in overruling defendant's objections to these comments and in not chastising the prosecutor for making these remarks.

However, the court's instruction to the jury emphasized that defendant was not charged with the offense to which the prosecutor referred, and it made clear that the jurors were not to consider that argument as implying that defendant had actually committed the crime of second degree burglary.

We must presume that the jurors heeded this instruction. *People v. Smith*, 620 P.2d 232 (Colo.1980). Under these circumstances, therefore, we conclude that the trial court's error in allowing such argument was not prejudicial.

VI.

Finally, we agree with the defendant that the trial court erred in imposing a "split" sentence upon him.

[10] A prisoner who commences the service of a sentence is entitled to serve that sentence in an uninterrupted manner. *People v. Battle*, 742 P.2d 952 (Colo.App. 1987). *See Watson v. Enslow*, 183 Colo. 435, 517 P.2d 1346 (1974).

[11] Here, at the time of sentencing, defendant was serving a 32-year sentence as the result of a prior conviction. For his conviction of conspiracy to commit second degree burglary, the court imposed a sentence of 11 years. However, it directed that one-half of that 11-year sentence be served concurrently with, and the second half be served consecutive to, the 32-year sentence that he was then serving.

The result of the imposition of such a sentence will be that defendant will commence the service of this 11-year sentence, will serve five and one-half years of that sentence, and that sentence will then be interrupted while he completes serving the remainder of his present 32-year sentence. When he completes serving that 32-year sentence, he will then re-commence serving the last half of the 11-year sentence that the court imposed in this case.

Because of this interruption in the service of the sentence imposed, we conclude that the trial court lacked authority to require a portion of the sentence to be served concurrently and a portion to be served consecutively. *See People v. Battle, supra.* Consequently, defendant must be resentenced for his conviction of conspiracy to commit second degree burglary.

Defendant's conviction of conspiracy to commit second degree burglary of a controlled substance, third degree criminal trespass, conspiracy to tamper with evidence, and tampering with evidence is affirmed; defendant's sentence for conspiracy to commit second degree burglary of a controlled substance is vacated, and the cause is remanded to the trial court for resentencing on that conviction.

TURSI and PLANK, JJ., concur.

RALSTON PURINA-KEYSTONE, Petitioner,

v.

John LOWRY and the Industrial Claim Appeals Office of the State of Colorado, Respondents.

No. 90CA2106.

Colorado Court of Appeals, Div. C.

Oct. 24, 1991.

Self-insured employer petitioned for review of an order of the Industrial Claim Appeals Office awarding total temporary disability benefits to a claimant and assessing a penalty for failure to admit or deny liability in a timely manner. The Court of

29372

People v. Adams, 283 Ill. App. 3d 520 (Appellate Court of Illinois, 1996).

file a late post-judgment motion, and to appeal from an adverse ruling on any post-judgment motion filed. *Swanson*, 276 Ill. App.3d at 133, 212 Ill.Dec. at 826, 657 N.E.2d at 1171. We believe that this procedure impermissibly skips the mandatory second and third steps of the post-conviction process. On remand, defendant can proceed to step two: counsel should be appointed to represent defendant and counsel should be afforded an opportunity to amend the post-conviction petition. After the State has been given an opportunity to respond, the trial court may conduct an evidentiary hearing (step three of the process). At the hearing, the parties may present evidence regarding why no direct appeal was taken. If the evidence establishes that defendant was denied a desired appeal through no fault of his own, then the trial court shall grant defendant any appropriate post-conviction relief, including permission to file a late notice of appeal.

[9, 10] We note that the trial court urged this court to grant a late appeal. This court is without authority to do so. Under certain circumstances, this court may grant leave to file a late appeal, but only if a motion is filed with this court within six months of the expiration of the time for filing the notice of appeal. See 134 Ill.2d R. 606(c). Where a defendant has timely invoked his appellate rights, only to have his appeal dismissed through no fault of his own, this court has the power to later reinstate the appeal. *Moore*, 133 Ill.2d at 339–40, 140 Ill.Dec. at 389, 549 N.E.2d at 1261. More than six months have passed since the expiration of the time for filing a notice of appeal, and defendant never invoked his appellate rights. Post-conviction relief is now defendant's only avenue to appeal.

Reversed and remanded.

GARMAN and KNECHT, JJ., concur.

283 Ill.App.3d 520
218 Ill.Dec. 805

The PEOPLE of the State of Illinois, Plaintiff–Appellee,

v.

Donnie ADAMS, Defendant–Appellant.

No. 1–93–0694.

Appellate Court of Illinois,
First District, Fourth Division.

Sept. 5, 1996.

Defendant was convicted in the Circuit Court of Cook County, Mary Maxwell Thomas, J., of first-degree murder, and he appealed. The Appellate Court, Sheila M. O'Brien, J., held that: (1) defendant lacked standing to claim that trial court erred in refusing to allow witness to assert privilege against self-incrimination at trial; (2) witness' prior inconsistent statement was not admitted as substantive evidence, as required for hearing to determine whether statements were voluntarily given; and (3) incomplete impeachment of witness was not reversible error.

Affirmed.

1. Witnesses ⇐306

Defendant lacked standing to claim any error based on trial court's refusal to allow witness to assert his Fifth Amendment right against self-incrimination at trial. U.S.C.A. Const.Amend. 5.

2. Witnesses ⇐306

Constitutional privilege against self-incrimination is personal privilege belonging only to person testifying. U.S.C.A. Const. Amend. 5.

3. Witnesses ⇐390

Defendant's prior inconsistent statements were admitted for impeachment purposes only, so that trial court was not required to find that statements were voluntarily given before allowing them to be admitted. 725 ILCS 5/115–10.1.

4. Criminal Law ⇐1170.5(1)

Incomplete impeachment of witness was not reversible error, where two other wit-

nesses testified that defendant shot murder victim; outcome of trial would not have been different if cross-examination had not occurred.

5. Criminal Law ⇐1170.5(1)

Incomplete impeachment of witness is reversible error only when unfounded insinuation is substantial, repeated and definitely prejudicial.

People's Law Office, Chicago (Micky Forbes, Jeffrey H. Haas, of counsel), for appellant.

State's Attorney of Cook County, Chicago (Kenneth T. McCurry, Owen D. Kalt, of counsel), for appellee.

Justice SHEILA M. O'BRIEN delivered the opinion of the court:

Following a jury trial, defendant, Donnie Adams, was found guilty of the first-degree murder of Tony Johnson and sentenced to 40 years in prison. On appeal, defendant argues: (1) the trial court erred by refusing to allow witness Marvin Winters to invoke his fifth amendment right against self-incrimination; (2) the trial court erred by refusing to hold a hearing to determine whether Winters' prior inconsistent statements were voluntarily given; (3) the trial court erred by admitting Winters' prior inconsistent statements as substantive evidence; (4) defendant was denied a fair trial when the State failed to complete impeachment of him; and (5) the "cumulative impact" of the above-stated errors denied him a fair trial. We affirm.

Marvin Winters testified before the grand jury on January 14, 1992, that he saw defendant shoot Tony Johnson. On September 14, 1992, Winters' counsel informed the trial judge that Winters' grand jury testimony was false. Further, Winters wished to invoke his fifth amendment right against self-incrimination during defendant's upcoming trial, because he feared if he testified truthfully that he did not see defendant shoot Johnson, the State would bring perjury charges against him. The State contended Winters could not invoke the fifth amendment right against self-incrimination at defendant's trial, because his testimony would not implicate him in the crime for which defendant was being prosecuted. The trial judge also expressed concern about setting a precedent whereby "anyone who testified before the grand jury who later had second thoughts" could assert the fifth amendment at trial. Accordingly, the trial judge ruled that Winters could not invoke the fifth amendment.

At trial, Felicia Spivey testified that at about 1:40 p.m. on January 10, 1992, she and Tony Johnson were walking in the 1300 block of North Laramie. She saw defendant come out of a gangway and start to quickly walk toward them. Spivey noticed that defendant "had a look on his face like he hated [Johnson]" and she told Johnson to look at the "strange person" coming toward them.

Spivey testified defendant pulled his hat down to his eyebrows, walked close to Johnson, and said "Remember me?" Johnson did not respond, and then defendant pulled a gun out of his pants and fired four or five shots at Johnson.

Spivey testified Johnson fell on top of her, and they rolled off the sidewalk onto the street. Spivey was then taken to Mt. Sinai Hospital. On January 13, Spivey viewed a lineup and identified defendant.

The State called Marvin Winters, who reiterated his request to plead the fifth amendment. Outside the presence of the jury, the trial judge informed Winters that she had already determined he had no fifth amendment privilege in this case, and she directed him to answer the questions posed to him at trial. Defense counsel informed the judge that if the State attempted to impeach Winters with his prior statements, the defense would like a sidebar hearing to determine whether those statements were voluntary. The judge ruled such a hearing would not be proper because the circumstances surrounding Winters' prior statements could come out on cross-examination.

Winters then testified before the jury that he was on the 1300 block of North Laramie at the time Johnson was shot, but he denied seeing defendant there. The State impeached Winters with his statement to Assis-

tant State's Attorney Noonan on July 13, 1992, and his testimony before the grand jury on January 14, 1992, in which Winters admitted to seeing defendant shoot Johnson at about 1:50 p.m. on January 10, 1992.

On cross-examination, Winters stated that on January 12, 1992, a group of armed men beat him and told him to tell the police that defendant was the person who shot Johnson. Defense counsel asked Winters whether he had seen who shot Johnson, and Winters replied he had "seen the person from behind, * * * [and] assumed it was [defendant]." Defense counsel then asked Winters, "That wasn't [defendant] out there shooting, was it?" Winters replied that from his "view," he knew defendant was the shooter.

After the State rested, defendant took the stand and testified he was at Laramie and Crystal at about noon on January 10, 1992, and he saw Johnson crossing the street. However, defendant denied shooting Johnson. On cross-examination, defendant testified he went home at 1 p.m. on January 10 and stayed there until 3 p.m. He then went to the home of his uncle, MC Winters' and stayed there until 4:30. Defendant denied calling Marvin Winters on January 10 and stating he was going to say he was with MC at the time of the shooting. Defendant also denied asking MC to be an alibi witness for him.

The jury found defendant guilty of first-degree murder, and the trial court sentenced him to 40 years in prison. Defendant filed this timely appeal.

[1] First, defendant argues the trial court erred when it refused to allow Marvin Winters to invoke his fifth amendment right against self-incrimination based on his belief that, if he testified at trial, the State would bring perjury charges against him. Defendant contends he was prejudiced thereby, because if the trial court had allowed Winters to assert the fifth amendment, the jury would not have heard Winters' prior statements that he saw defendant shoot Johnson.

[2] The State responds that defendant does not have standing to raise this issue. We agree. It is well established that the constitutional privilege against self-incrimination is a *personal* privilege belonging only to the person testifying (see *People v. Homes*, 274 Ill.App.3d 612, 619, 211 Ill.Dec. 200, 654 N.E.2d 662 (1995); *Couch v. United States*, 409 U.S. 322, 93 S.Ct. 611, 34 L.Ed.2d 548 (1973); *People v. Shockey*, 67 Ill.App.2d 133, 139, 213 N.E.2d 573 (1966)), even where that person's testimony also incriminates defendant. *United States ex rel. Falconer v. Pate*, 319 F.Supp. 206 (N.D.Ill.1970), *aff'd*, 478 F.2d 1405 (7th Cir.1973); *United States v. Bruton*, 416 F.2d 310 (8th Cir.1969). The personal nature of the fifth amendment privilege precludes defendant from claiming any error based on the trial court's refusal to allow Winters to assert the privilege at trial.

Defendant contends, though, he has standing pursuant to *In re Grand Jury Proceedings*, 814 F.2d 61 (1st Cir.1987). We disagree. There, the United States Court of Appeals for the First Circuit held that defendant had standing to challenge (a) whether a letter sent to recipients of a grand jury subpoena *duces tecum* violated provisions of Federal Rule of Criminal Procedure 6(e)(2), which govern the limits of grand jury secrecy; and (b) whether the purpose of the grand jury investigation was to improperly collect evidence for use in another case in which defendant had already been indicted. The court distinguished between the standing requirements of cases of that nature, in which the allegations of grand jury abuse gave defendant standing, and those involving claims of fifth amendment privilege, which are inherently personal and may not be asserted vicariously. *In re Grand Jury Proceedings*, 814 F.2d at 67. The present case involves a claim of fifth amendment privilege, not grand jury abuse, and, therefore, *In re Grand Jury Proceedings* is not applicable.

[3] Second, defendant argues the trial court erred when it allowed Winters' prior inconsistent statements to be substantively admitted under section 115–10.1 of the Code of Criminal Procedure of 1963 (725 ILCS 5/115–10.1 (West 1992)) without first holding a hearing to determine whether those statements were voluntarily given. In support, defendant cites *People v. Johnson*, 255 Ill. App.3d 547, 559, 193 Ill.Dec. 522, 626 N.E.2d 1073 (1993), which held that before a prior

inconsistent statement is admissible as substantive evidence, the trial court must find there is a sufficient evidentiary basis from which a jury could find that the declarant's prior statements were knowing and voluntary. The State does not dispute that Winters' prior inconsistent statements were substantively admitted, but it argues the trial court committed no error in refusing to hold a hearing to determine whether those statements were voluntarily given.

The record before us, however, indicates Winters' prior inconsistent statements were admitted for impeachment purposes only, not as substantive evidence. We base this conclusion on the following factors: (a) when the State questioned Winters about his prior inconsistent statements, it did not ask that the statements be admitted as substantive evidence; (b) during closing argument, when defense counsel quoted Winters' prior inconsistent statement, the State objected on the grounds that the prior statement "wasn't admitted into evidence * * *. It was used for impeachment purposes"; and (c) without objection, the trial court gave the following version of Illinois Pattern Jury Instructions, Criminal, No. 3.11 (2d ed. 1981):

> "The believability of a witness may be challenged by evidence that on some former occasion he made a statement that was not consistent with his testimony in this case.
>
> Evidence of this kind may be considered by you only for the purpose of deciding the weight to be given the testimony you heard from the witness in this courtroom."

Having determined Winters' prior inconsistent statements were admitted for impeachment purposes only, we need not address defendant's argument that before admitting a prior inconsistent statement as substantive evidence, the trial court *must* find the statement was knowing and voluntary.

Defendant contends, though, that even if the statements were admitted for impeachment purposes only, there is no case law holding that the trial court *could not* hold a hearing to determine whether those statements were voluntarily given. Therefore, defendant argues the trial court erred when it determined as a matter of law that it lacked the discretion to hold such a hearing.

However, we find no indication in the record that the trial judge denied defendant's request for a hearing on the voluntariness of Winters' prior statements because she believed she lacked the discretion to hold such a hearing. When denying defendant's request for a hearing, the trial court stated, "He's not the defendant. As far as whether they are voluntary, he's a witness. As to having a hearing, I don't think that's proper. That's where if you had that information, that can come out in cross examination. That's the whole purpose of cross-examination, to challenge the veracity of the witness."

Thus, the trial court denied the hearing because it felt defense counsel could raise at trial the issue of the voluntariness of Winters' prior statements. We find no abuse of discretion by the trial court.

Third, defendant argues the trial court erred when it admitted Winters' prior inconsistent statements as substantive evidence. As discussed above, those statements were admitted for impeachment purposes only.

[4] Fourth, defendant argues the State cross-examined him concerning statements he allegedly made about using his uncle MC as an alibi, but failed to present appropriate rebuttal testimony after he denied making those statements. Defendant contends it was error for the State to ask him questions presuming facts not in evidence as a precursor to impeachment, unless the State had evidence to substantiate the inquiry. In support, defendant cites *People v. Nuccio*, 43 Ill.2d 375, 253 N.E.2d 353 (1969). There, the trial court found Nuccio, a police officer, guilty of murdering a 19–year–old man near Franksville. The supreme court reversed and remanded for a new trial after quoting at length nine pages of "cross-examination by which the State repeatedly insinuated, generally without any supporting testimony, that defendant and his witnesses had engaged in a pattern of reprehensible conduct in their relationships to the youths who frequented Franksville." *Nuccio*, 43 Ill.2d at 381, 253 N.E.2d 353. The supreme court held

29377

"Where * * * the guilt of the accused is not manifest, but is dependent upon the degree of credibility accorded by the trier of fact to his testimony and that of the witnesses who testify on his behalf, and there appear in the record substantial numbers of unsupported insinuations which, if considered, could have seriously impeached the credibility of the defendant and his witnesses, * * * it is our opinion that justice and fundamental fairness demand that the defendant be afforded a new trial free from such prejudicial misconduct." *Nuccio*, 43 Ill.2d at 396, 253 N.E.2d 353.

[5] Cases subsequent to *Nuccio* have also held that the incomplete impeachment of a witness is reversible error only when the unfounded insinuation is substantial, repeated, and definitely prejudicial. *People v. Amos*, 204 Ill.App.3d 75, 82, 149 Ill.Dec. 411, 561 N.E.2d 1107 (1990).

The complained-of cross-examination here is as follows:

"Q. Did you call Marvin Winters on the afternoon of January 10, 1992, and tell him I got an alibi. I'm going to say I was with my uncle MC. Did you make that conversation to Marvin Winters?

A. No.

Q. You never did?

A. No.

Q. Did you call Marvin Winters on the night of January 10th?

A. No.

Q. Did you call Marvin Winters and ask him if Tony was dead?

A. No.

Q. And you didn't call him and tell him you're going to use your uncle as an alibi either; right?

A. No.

* * * * * *

Q. Did you ever ask MC if he would be an alibi witness for you?

A. No.

Q. You didn't?

A. No."

Such cross-examination does not approach the nine pages quoted at length in *Nuccio*, which were found to be "substantial." See *Nuccio*, 43 Ill.2d at 384–92, 253 N.E.2d 353. Further, given the testimony of Felicia Spivey identifying defendant, and the testimony of Marvin Winters, in which he first denied seeing defendant at the time Johnson was shot, but later admitted he knew defendant was the shooter, we cannot say the outcome of the trial would have been different had the cross-examination not occurred. Accordingly, we find no reversible error.

Finally, defendant argues the "cumulative impact" of the trial errors denied him a fair trial. We disagree. Defendant is rearguing the same alleged errors that we have already found do not necessitate a new trial.

For the foregoing reasons, we affirm the trial court. As part of our judgment, we grant the State's request and assess defendant $150 as costs for this appeal.

Affirmed.

CAHILL and THEIS, JJ., concur.

283 Ill.App.3d 541
218 Ill.Dec. 809

Ronald BECK, Individually and as Representative of a Class of Similarly Situated Persons, Plaintiff–Appellant,

v.

BUDGET RENT–A–CAR, a Foreign Corporation, Sears, Roebuck & Co., a Foreign Corporation, and Philadelphia Insurance Co., a Foreign Corporation, Defendants–Appellees.

No. 1–95–3849.

Appellate Court of Illinois,
First District, Fourth Division.

Sept. 5, 1996.

Plaintiff filed class action on behalf of persons who rented vehicles and paid for