SCSL-04-16-T

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SPECIAL COURT FOR SIERRA LEONE
OFFICE OF THE PROSECUTOR
FREETOWN – SIERRA LEONE

TRIAL CHAMBER II

Before: Hon. Justice Richard Lussick, Presiding
Hon. Justice Teresa Doherty
Hon. Justice Julia Sebutinde

Registrar: Mr. Lovemore G. Munlo SC

Date filed: 27 July 2006

THE PROSECUTOR

Against

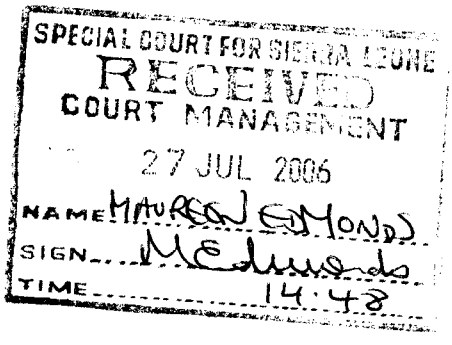
ALEX TAMBA BRIMA
BRIMA BAZZY KAMARA
SANTIGIE BORBOR KANU

Case No. SCSL – 2004 – 16 – T

PUBLIC--URGENT

PROSECUTION MOTION FOR AN ORDER RESTRICTING CONTACTS BETWEEN THE ACCUSED AND DEFENCE WITNESSES AND REQUIRING DISCLOSURE OF SUCH CONTACTS

Office of the Prosecutor
Mr. Christopher Staker
Mr. Karim Agha



Defence Counsel for Brima
Mr. Kojo Graham
Ms. Glenna Thompson

Defence Counsel for Kamara
Mr. Andrew Daniels
Mr. Pa Momo Fofanah

Defence Counsel for Kanu
Mr. Geert-Jan Alexander Knoops
Ms. Carry J. Knoops
Ms. A.E. Manly-Spain

I. INTRODUCTION

1. The Prosecution hereby moves the Trial Chamber for an order restricting contacts between the Accused and Defence witnesses, by prohibiting such contacts without the prior authorisation of the Trial Chamber. The Prosecution also seeks an order requiring the Registry to provide the Trial Chamber and the parties with the details of any such contacts that have taken place to date.
2. It should be emphasised that this motion does not seek to limit contacts between Defence witnesses and Defence counsel. In any contacts with Defence witnesses, Defence counsel of course remain subject to the provisions of the Code of Professional Conduct for Counsel with the Right of Audience before the Special Court for Sierra Leone, as well as to their general professional ethical obligations, including Article 10(D) of the Code, which provides that: "Counsel shall not communicate or meet with a witness during his testimony once the witness has made the solemn declaration under Rule 90 (B) of the Rules, except with leave of a Judge or a Chamber".
3. The Prosecution requests that this motion be dealt with by the Trial Chamber as a matter of urgency. The Prosecution would request that the Trial Chamber order expedited filings in relation to this motion, such that any Defence response would be filed by 3 August 2006, and any Prosecution reply by 4 August 2006.

II. BACKGROUND

4. At the status conference held on the afternoon of the 25 July 2006, counsel for the First Accused indicated that certain Defence witnesses were unwilling to testify until they had spoken to the Accused.[1] He indicated further that the Registry has certain policy guidelines regulating visits between an Accused and witnesses,[2] and indicated that the

[1] Transcript, 25 July 2006, p. 6 (lines 16-19): "(MR. GRAHAM) I said earlier that our key witnesses in Freetown who we are ready to -- we hoped were ready to testify suddenly have requested that they meet with accused persons before they come into Court to come and testify."

[2] *Ibid.*, p. 6 (lines 21-28): "MR GRAHAM: Your Honours, I must inform you that, of course, the Registrar has policy guidelines which regulates the visits of protected witnesses and accused persons. It allows only one visit at a time. They're visiting hours are also restricted from 2.00 to 4.30. I'm sure these are some of the operational constraints in terms of how many can see them for them to have enough time to be able to discuss and talk about what they need to do for them --"

Defence was trying to arrange meetings between Defence witnesses and the Accused.[3] He additionally indicated that the purpose of the meeting between Defence witnesses and the Accused would be to "discuss, if I'm right, their stories, or the account, or their testimony that they are coming to give here in the Court".[4]

5. At the time, counsel for the Prosecution noted that the Prosecution:

> wasn't comfortable with this idea of the group of Freetown witnesses sort of meeting together as some kind of group and agreeing in a group fashion to perhaps meet the accused, because we wouldn't like to think that they're being addressed as to what kind of evidence they should give, especially as the number of the witnesses 32 to 49 are, in fact, former SLA or serving SLA soldiers.[5]

6. Counsel for the First Accused stated the following morning that "The idea behind visiting the accused persons is, one, to explain their fate, their predicament, and, two, a summons of confidence posting. It was not to get their stories to coincide."[6]

III. ARGUMENT

7. In England, it is a "well-known principle that discussions between witnesses should not take place, and that the statements and proofs of one witness should not be disclosed to any other witness".[7] The reason for this has been explained as follows:

> The witness should give his or her own evidence, so far as practicable uninfluenced by what anyone else has said, whether in formal discussions or informal conversations. The rule reduces, indeed hopefully avoids any possibility, that one witness may tailor his evidence in the light of what anyone else said, and equally, ***avoids any unfounded perception that he may have done so.***[8]

8. For this reason, English courts have held that witness training for criminal trials is prohibited.

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[3] Transcript, 25 July 2006, p. 4 (lines 23-27): "(MR. GRAHAM) Except with Freetown the issue has been the witnesses also wanting to meet with the accused persons. We've got the policy guidelines from the Registrar, and we've made some headway in terms of trying to arrange for some of these witnesses to meet some of the accused persons this past week."

[4] *Ibid.*, p. 8 (lines 17-19).

[5] *Ibid.*, p. 13 (lines 4-10) (MR. AGHA).

[6] Transcript, 25 July 2006, p. 3 (lines 4-6) (MS. THOMPSON).

[7] See *R v. Momodou* [2005] EWCA Crim 177, para. 61 (citing other cases); approved in *R v. Salisbury* [2005] EWCA Crim 3107, para. 61.

[8] *Momodou*, para. 61 (emphasis added).

> These risks are inherent in witness training. Even if the training takes place one-to-one with someone completely remote from the facts of the case itself, the witness may come, even unconsciously, to appreciate which aspects of his evidence are perhaps not quite consistent with what others are saying, or indeed not quite what is required of him. An honest witness may alter the emphasis of his evidence to accommodate what he thinks may be a different, more accurate, or simply better remembered perception of events. A dishonest witness will very rapidly calculate how his testimony may be "improved". These dangers are present in one-to-one witness training. Where however the witness is jointly trained with other witnesses to the same events, the dangers dramatically increase. ***Recollections change. Memories are contaminated. Witnesses may bring their respective accounts into what they believe to be better alignment with others. They may be encouraged to do so, consciously or unconsciously. They may collude deliberately. They may be inadvertently contaminated. Whether deliberately or inadvertently, the evidence may no longer be their own.*** Although none of this is inevitable, the risk that training or coaching may adversely affect the accuracy of the evidence of the individual witness is constant. So we repeat, witness training for criminal trials is prohibited".[9]

9. While it has been held that this principle does not preclude pre-trial arrangements "to familiarise witness with the layout of the court, the likely sequence of events when the witness is giving evidence, and a balanced appraisal of the different responsibilities of the various participants", caution must also be exercised in the implementation of any such arrangements.[10]

10. Where pre-trial discussions between witnesses do take place, the evidence does not necessarily have to be excluded, but if it is not excluded, appropriate inferences can be drawn by the finder of fact.

> It follows, in our judgment, that the fact that there has been a pre-trial discussion of evidence between potential witnesses cannot be said to render the evidence of such witnesses at the trial so unsafe that it ought always to be excluded. Each case has to be dealt with on its own facts. In some cases it may emerge in the course of cross-examination at the trial of the witnesses concerned that such discussions may well have led to fabrication of the evidence in the sense which we have described. In such a case the court might properly take the view that it would be unsafe to leave any of the

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[9] *Momodou*, para. 61.
[10] *Momodou*, paras. 62 and following.

> evidence of the witnesses concerned to the jury. There may however be other cases where the nature of such pre-trial discussions is such that it would be quite sufficient to draw to the jury's attention in the course of summing up the implications which such conduct might have for the reliability of the evidence of the witnesses concerned. In each case it must be a matter for the trial judge.[11]

> ... it is a matter for the judge to deal with in his own way according to the particular circumstances that apply at the time. His task is to bring to the notice of the jury what the learned judge in this case properly described as the "down side" of what had undoubtedly taken place. In other words, the jury should have very clearly put before them the fact that because the conference had taken place and the interchange of recollections of evidence which is to be inferred from what occurred, they should bear in mind that the evidence for that reason is all the more suspect.[12]

11. Other legal systems recognize the same problem. In the United States of America, Rule 615 of the Federal Rules of Evidence provides:

> At the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion. ...[13]

12. It has been observed, in relation to this rule, that:

> While Rule 615 provides solely for the exclusion of witnesses from the courtroom, the court may take further measures of separation designed to prevent communication between witnesses, such as ordering them to remain physically apart, ordering them not to discuss the case with one another, ordering an attorney not to convey the substance of one witness' testimony to another witness, and ordering witnesses not to read a transcript of the trial testimony of another witness.[14]

13. It has been added that:

> If a witness violates an order of exclusion or separation, the appropriate remedy is committed to the sound discretion of the court. The court may declare a mistrial, refuse to permit a witness

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[11] *R v. Skinner* (1994) 99 Cr App R 212, at 217, quoting *R v. Arif*, The Times, June 22, 1993.
[12] *Skinner*, p. 218.
[13] Text obtained from http://www.law.cornell.edu/rules/fre/rules.htm.
[14] Michael H. Graham, Commentary of Rule 615 of the Federal Rules of Evidence, 2 Handbook of Fed. Evid. § 615:1 (6th ed.) (footnotes omitted).

> to testify, permit cross-examination concerning the violation, or instruct the jury to weigh the credibility of the witness in light of the witness' presence in court or discussions with another witness. The court may also hold the witness in contempt. However the thrust of judicial opinion absent compelling circumstances is against the simple remedy of disqualifying the witness. Unfortunately once it is decided to permit the witness to testify, the remaining alternatives are not without their drawbacks:
>
> > A contempt citation punishes the witness and may perhaps deter future misconduct but "does nothing to extinguish any false testimony which the witness may have fabricated by listening to other witnesses." The comment, while useful, may have unwarranted repercussions where the witness remained in the courtroom but his testimony was unaffected. A derogatory comment on his credibility may actually distort the truth.
>
> The best remedy is to avoid the problem as much as possible by the court impressing upon both the witness and counsel in the first place the importance of obeying the court's ruling excluding and separating the witness.[15]

14. The Prosecution submits that the same dangers and considerations that apply in relation to contacts between witnesses apply also in relation to contacts between an accused and Defence witnesses. If an accused discusses a case with a Defence witness, there is the danger that, consciously or unconsciously, the Defence witness may be inadvertently contaminated, and that whether deliberately or inadvertently, the evidence may no longer be their own.[16]
15. In any event, the First Accused was a witness in this case, and contacts between the First Accused and a Defence witness would therefore amount to contact between Defence witnesses.
16. Where an Accused meets with a person who has been identified as a Defence witness, it is logical to assume that they might discuss the contents of the witness's proposed testimony. Notwithstanding the explanation given by counsel for the First Accused referred to in paragraph 6 above, the comments of counsel for the First Accused referred to in paragraph 4 above must strengthen this assumption.
17. Although the quotes from the cases cited above are taken from the context of legal systems that have jury trials, they are equally applicable to the legal system of the Special

[15] *Ibid.*, footnotes omitted.
[16] See text to footnote 8 above.

Court. If a Trial Chamber is aware that witnesses have discussed their evidence with each other in advance, the Trial Chamber is faced with similar choices as a judge who is instructing a jury. Either the Trial Chamber may decide that the pre-trial discussions have rendered the evidence so unreliable that it should not be taken into account at all, or the Trial Chamber could weigh the credibility of the evidence in the light of the discussions between the witnesses.

18. The Prosecution submits that in the legal system of the Special Court, the Trial Chamber has the power, under Rule 54, or in the exercise of its inherent power, to prohibit contacts, communications or visits between an Accused and Defence witnesses.

19. It is the overriding duty of the Trial Chamber to ascertain the truth. Consistently with this principle, for the reasons given in the quote in paragraph 13 above, it is submitted that it is preferable for the Trial Chamber to take steps to ***prevent*** the contamination of evidence, than to take steps to deal with the consequences of possible contamination after the event.

20. The Prosecution submits that there are particular concerns in the present case arising from the fact that the First Accused has raised a defence of alibi.[17] In the circumstances, it is submitted that steps should be taken to avoid a situation in which there could be a perception that the Accused and the Defence witness have had the opportunity to tailor their alibi evidence.

IV. CONCLUSION

21. Accordingly, the Prosecution seeks an order prohibiting contacts between all three Accused and any Defence witnesses without the prior authorisation of the Trial Chamber, and in particular, all contacts between the First Accused and the alibi witnesses to be disclosed by the Defence for the First Accused pursuant to the Trial Chamber's order of 26 July 2006.[18] This order would not prevent contacts between Defence counsel and Defence witnesses, which should be sufficient to enable the Defence to prepare effectively for the trial.

22. The requested order would not, however, remedy the situation in relation to any Defence witness who has already visited the Accused. The Prosecution therefore seeks a further

[17] See the Trial Chamber's "Decision on Prosecution Motion for Relief in Respect of Violations of Rule 67", of 26 July 2006, SCSL-04-16-T-521.
[18] See footnote 17 above.

order requiring the Registrar to inform the Trial Chamber and the parties of the details of any Defence witnesses who have visited the Accused in this case. The disclosure of such details will enable the parties to cross-examine witnesses on, and to make submissions on, the effect that such visits may have on the evidence of the witnesses concerned. This would assist the Trial Chamber in the ascertainment of the truth.

Done in Freetown,
27 July 2006
For the Prosecution,

Christopher Staker
Acting Prosecutor

Karim Agha
Senior Trial Attorney

Index of Authorities

1. AFRC Trial Transcript, 25 July 2006.
2. *R v. Momodou* [2005] EWCA Crim 177.
3. *R v. Salisbury* [2005] EWCA Crim 3107.
4. *R v. Skinner* (1994) 99 Cr App R 212, at 217, quoting *R v. Arif*, The Times, June 22, 1993.
5. US Federal Rules of Evidence, found at http://www.law.cornell.edu/rules/fre/rules.htm.
6. Michael H. Graham, Commentary of Rule 615 of the Federal Rules of Evidence, 2 Handbook of Fed. Evid. § 615:1 (6th ed.)
7. *Prosecutor v. Brima et al., Decision On Prosecution Motion For Relief In Respect Of Violations Of Rule 67*, SCSL-04-16-T-521, Trial Chamber II, 26 July 2006.

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Prosecution Authorities

2. *R v. Momodou* [2005] EWCA Crim 177.

Westlaw.

[2005] 1 W.L.R. 3442 Page 1
2005 WL 62320 (CA (Crim Div)), (2005) 169 J.P. 186, [2005] 2 All E.R. 571, [2005] 2 Cr. App. R. 6, (2005) 169 J.P.N. 276, (2005) 149 S.J.L.B. 178, [2005] 1 W.L.R. 3442, [2005] Crim. L.R. 588, 2-09-2005 Times 62,320, 2-11-2005 Independent 62,320, [2005] EWCA Crim 177
(Cite as: [2005] 1 W.L.R. 3442)

*3442 Regina v. Momodou and Another (Practice Note)
[2005] EWCA Crim 177

Court of Appeal

CA (Crim Div)

Judge LJ, Dobbs J and Sir Michael Wright

2004 Dec 7, 8; 2005 Feb 2

Crime--Evidence--Witness--Training or coaching of witnesses in criminal proceedings prohibited--Guidance on pre--trial familiarisation with court procedure

Training or coaching for witnesses in criminal proceedings, whether for prosecution or defence is not permitted. The witness should give his or her own evidence, so far as practicable uninfluenced by what anyone else has said, whether in formal or informal discussions, in order to avoid any possibility that the witness may tailor his evidence in the light of what anyone else has said and to avoid any unfounded perception that he may have done so.

This principle does not preclude pre-trial arrangements to familiarise witnesses with the layout of the court, the likely sequence of events when the witness is giving evidence, and a balanced appraisal of the different responsibilities of the various participants. Nor does the principle prohibit training of expert and similar witnesses in, for example, the technique of giving comprehensive evidence of a specialist kind to a jury. The critical feature of training of this kind is that it should not be arranged in the context of any forthcoming trial and can therefore have no impact whatever on it.

In the context of an anticipated criminal trial, if arrangements are made for witness familiarisation by outside agencies rather than the Witness Service then in advance of any proposal for familiarisation the Crown Prosecution Service should be informed in writing and invited to comment. If the defence engages in the process it would be wise to seek counsel's advice. It is a matter of professional duty on counsel and solicitors to ensure that the trial judge is informed of any familiarisation process organised by the defence using outside agencies.

This familiarisation process should normally be supervised or conducted by a solicitor or barrister and preferably by an organisation accredited for the purpose by the Bar Council and Law Society. None of those involved should have any personal knowledge of the matters in issue. Records of those present should be maintained and the programme should be retained, together with all the written material used during the familiarisation sessions. Such material should not bear any similarity to the issues in the criminal proceedings to be attended by the witnesses. Any discussion of the instant criminal proceedings must be stopped and advice given as to why it is impermissible, with a note made if and when any such warning is given. All documents used in the process should be retained. If relevant to prosecution witnesses they should be handed to the Crown Prosecution Service and in relation to defence witnesses they should be produced to the court. It should be a matter of professional obligation for barristers and solicitors involved in the process to see that this guidance is followed (post, paras 61-65).

The following cases are referred to in the judgment of the court:

R v **Arif** The Times, 22 June 1993, CA

R v Richardson [1971] 2 QB 484; [1971] 2 WLR 889; [1971] 2 All ER 773; 55 Cr App R 244, CA

R v Shaw [2002] EWCA Crim 3004, CA

R v **Skinner** (1993) 99 Cr App R 212, CA

*3443 No additional cases were cited or referred to in the skeleton arguments.

APPEALS against conviction

On 13 and 14 August 2003 in the Crown Court at Harrow, before Judge Sanders and a jury, the defendants, Henry Momodou and Beher Limani, were both convicted of violent disorder. Momodou was acquitted of arson, being reckless as to whether

life was endangered. On 15 August 2003 each was sentenced to four years' imprisonment. They appealed against conviction on the grounds, inter alia, that the proceedings should have been stayed as an abuse of process on the basis that prosecution witnesses had been coached.

The facts are stated in the judgment of the court.

Joel Bennathan (assigned by the Registrar of Criminal Appeals) for Momodou.

Jollyon Robertson and *Scott Ivill* (assigned by the Registrar of Criminal Appeals) for Limani.

Nigel Rumfitt QC and *Susannah Johnson* for the Crown.

Cur. adv. vult.

2 February 2005. JUDGE LJ

handed down the judgment of the court.

1 On 13 and 14 August 2003, after a trial lasting almost four months in the Harrow Crown Court, before Judge Sanders and a jury, Henry Momodou and Beher Limani were respectively convicted of violent disorder. The same jury acquitted Momodou of count 2, arson, being reckless as to whether life was endangered. On 15 August each was sentenced to four years' imprisonment. They now appeal against both conviction and sentence with leave of the single judge.

2 There were a number of co-defendants. Kastrioti, Kalu, Gaba and Hrubes were acquitted of violent disorder on the judge's direction. Jacobs, Abdul and Tuka were acquitted by the jury of the same offence. A not guilty verdict was entered by the judge in relation to an offence of arson alleged against Gabo. Another defendant, Mosstaffa, was acquitted on the direction of the judge of both violent disorder and arson. He pleaded guilty to an offence of affray and was sentenced to three months' imprisonment. Before the jury was sworn, Aliane pleaded guilty to violent disorder. A not guilty verdict was entered in relation to arson. He was sentenced to 18 months' imprisonment.

3 The appeal raises important issues about pre-trial coaching or training of witnesses and about the exercise by a trial judge of his powers when the court has received communications from one or more jurors critical of the conduct of other jurors. Although different grounds were advanced by both defendants, it was agreed that if any ground gave rise to doubts about the safety of the conviction of either defendant, then the conviction should be quashed, irrespective of whether the specific ground had been identified in his notice of appeal.

4 The prosecution arose from a well-publicised, major and notorious disturbance at the Yarl's Wood Immigration Detention Centre ("Yarl's Wood"), in Bedfordshire on the night of 14/15 February 2002, some three months after the centre was opened.

5 The centre, which was run for the most part by staff of Group 4 known as detention custody officers was divided into four wings, Alpha, Bravo, Charlie and Delta. Females and families were detained in Charlie wing and single males in Delta wing. Association between the wings was permitted.

6 The trigger for events which led to the violence was a problem involving a female detainee known as Eunice. In the morning of 14 February she was involved in some trouble in the Charlie wing office. Not long afterwards, she was found in an unauthorised part of the Delta wing, and when asked to move, she refused. A number of detainees had heard her side of the earlier incident, and demanded to know why she had been refused medical treatment. They were told that she had been seen, and medication ordered. Although there was a degree of unpleasantness, the crowd ***3444** dispersed, and the atmosphere calmed. Eunice was told that she would not be allowed to visit Delta wing that evening and a message was duly posted in the shift office in Charlie wing where she was detained.

7 At about 7.30 that evening a number of female detainees gathered outside the shift office on Charlie wing, anticipating a visit to the part of the Delta wing where male and female detainees were able to associate. Eunice was one of the women. In view of the earlier decision, when she sought to go into Delta wing, she was told that she would not be allowed to do so. She began to shout that she wanted to see a supervisor, and that she wanted to go to church in Delta wing. She walked towards the locked security door. Other female detainees followed. Some of them began to shout at detention custody officers who were present. The security gate was closed. When the

security gate was opened, some of the detainees were ushered back into Charlie wing, but Eunice refused to move. She remained with her back against the locked security door, uttering threats. She began to throw her arms about and push at the detention custody officers, kicking at one of them. An order that she should be restrained was given. When a detention custody officer attempted to carry out the order, Eunice either bit or tried to bite him. In the end however she was restrained and brought to the floor.

8 This scene was observed through the window of the locked door by male detainees on Delta wing who were on the other side of the door. They began to bang on it. Some detainees armed themselves with improvised weapons, using chairs and table legs. The window was smashed. Missiles were then thrown through the resulting gap. Although, in the end, none of the detainees in Delta wing broke through the door to achieve the "rescue" of Eunice, the incident escalated very rapidly.

9 We need not describe the way in which an apparently minor matter of organisation and discipline at the centre erupted into mayhem and destruction during which some of the detainees gained control of the centre by the sheer force of their numbers and by violent intimidation of staff. Others escaped. The details of individual ordeals need no narration. It is however important to emphasise the vast scale of the disorder.

10 The outbreak of violence lasted for several hours before the police and prison service were able to regain control of the scene. For those who witnessed it, including a number of detainees, the incident was extremely alarming. For those present and directly involved, and under threat of serious injury or even death, it must have been a terrifying ordeal. Violence and the threat of violence was widespread. The building was set on fire, and half of it was effectively razed to the ground. The resulting damage ran into many million pounds. It required the most wide-ranging forensic deconstruction of a site ever undertaken in Europe, involving the examination of literally tons of material, to establish that there were no fatalities.

11 The prosecution case against Momodou, well-known in the centre, physically striking, and easily identifiable, was that he played a prominent part in the incident. He was directly involved in smashing the window in the locked security door, and, after Aliane had damaged a security camera on the ceiling, he pulled it away from the ceiling. He used a metal bar to force open a telephone cash box. He was also alleged to have started a fire. When he was subsequently interviewed, Momodou denied that he was present at the scene, untruthfully asserting that he was at prayers and then had gone straight to his room. Limani was said to be the first person seen on CCTV, waving and encouraging detainees towards the scene of the trouble involving Eunice. He was also present outside the office when it was besieged, and then again when a number of detainees made their way into Charlie wing, where he was seen to run about the corridor, screaming and shouting. He attacked the door in the manager's office, and ransacked it. Finally, he was alleged to have been one of the detainees who broke through the Delta wing gates, and after assisting the escape of others, escaped himself.

12 The Crown's case that the defendants were involved in the violent disorder was well supported. We shall first summarise the evidence given by detention custody ***3445** officers. One, Ram, saw the incident involving Eunice in the lobby. He heard people trying to smash the door into the secure lobby, and when the window was broken, it just missed striking him. The only detainee he saw was Momodou, whom he knew as Henry, with his face at the glass. He could see a number of other detainees behind Henry, without being able to identify them because the background was dark, and the lights were smashed. A second detention custody officer, Gibb, saw Momodou, whom he recognised, punching at the window with his fist. He saw his arm move, and when the glass broke he saw Momodou's face. He identified a number of other detainees, but apart from a good deal of shouting and banging, he could not see what they were doing. The third detention custody officer, Collins, was involved in the efforts to restrain Eunice. When she shouted that she was going to be killed, a number of detainees were extremely aggravated. He knew Momodou, who was holding a piece of metal about 8-12" long, and heard him shout aggressively, "Open the door then". He did not do so. The window was then broken by a piece of metal which he believed Momodou had been holding. He was struck and his elbow was cut by the glass from the broken window. A fourth detention custody officer, Fox, saw a number of detainees, including Momodou, who again, he knew, behind the window to the secure lobby. Momodou was punching "hell"

out of the window in the door, which cracked. A solid object came through it which caught Collins. Another detention custody officer, Attwood, thought that the window had been broken by a chair leg. The detainees behind the door included Momodou, whom he heard shouting words to the effect, "Fucking get off her, leave her alone, get off my mum". Detention custody officer Traynor heard noise coming from the Delta secure lobby. He recognised Momodou as one of those behind the door. In his evidence he attributed the smashing of the window to another of the defendants, but the judge reminded the jury that this description was contradicted by almost every other witness. A number of detention custody officers identified the defendant as one of those present behind the security door, but did not attribute any particular offensive activity to him. Detention custody officer Nandha, stationed in the control room, viewing the disturbance through the CCTV system, saw Momodou smashing CCTV cameras in the lobby with some kind of wooden implement. The CCTV system itself did not survive the fire.

13 The final detention custody officer who gave evidence of events at the scene was Wakefield. He went to the lobby area and saw the smashed window in the door. There were four detainees in a line, one of them "Big Henry", the nickname or description of the defendant Momodou. Momodou and another detainee then left his sight. He heard the sound of furniture breaking in the television room, and other areas, after which Momodou and his companion returned with table legs which were used to attack the door. The lights went out. The walls vibrated. No one got through the door, but a camera, and metal table legs, were thrown through the door, and a fire extinguisher was discharged. He later went outside the building to the Delta gates when approximately 60-70 detainees rocked the gates until they burst open. He described a scene of great violence, and a breakaway group of detainees who ran towards the perimeter fence. He was 99% sure that he saw Limani climbing out, a piece of towel used as a face mask falling away while Limani was helping someone else over the fence.

14 Limani was also seen earlier via the CCTV cameras by Nandha, stationed in the control room. He saw Limani near the prayer room, waving those behind him towards the core of the trouble. He reported tables being broken and their legs removed, and then used to hit cameras. A detention custody officer present in the gym, O'Donnell, heard loud banging saw a group of ten detainees trying to come through the gym door. He recognised Limani as one of them. Detention custody officer Burns was at the family area, trying to assist. She described how she was confronted by one male detainee, demanding her keys, and another who ripped her radio from her shoulder and then broke it. She was threatened and abused. She saw some 50 men running about, the only one of whom she could identify was Limani. She spoke to him directly, addressing him by name, seeking his help to avoid fire ***3446** danger to families trapped in the block. Detention custody officer Curtis underwent a particularly unpleasant ordeal. He was one of those besieged in the wing office. At one stage a hole appeared in the wall. A lighter came through it on a couple of occasions. A fire extinguisher was sprayed into the office. The mob chanted, "Burn Group 4, burn ". He saw some light coming through the hallway and recognised Limani as one of the mob.

15 Two detainees gave relevant evidence. Chidawanyika saw detainees running about, smashing windows and furniture. He saw Momodou in the telephone room, using an iron bar to try and open the telephones. He identified Limani as one of those who kicked at the manager's door. Having helped some detention custody officers make their escape from the building, on his return, Chidawanyika walked past the telephone room, where he saw Momodou trying to extract, using a metal bar, coins. Another detainee, Lawal, heard the noise made by Eunice at the start of the incident and saw her being restrained. He alleged that she was being beaten up. He saw a crowd, which included Momodou, at the door, trying to force open the door. Momodou helped to smash the glass in the window using a piece of metal. He saw Aliane smash a camera with a fire extinguisher. Momodou then helped to dislodge it. He was later to describe Momodou setting fire to the building.

16 When he was interviewed on 10 April, Momodou denied any involvement in the incident. He was in the chapel when the lights went out, and he then went to his room and stayed there for about ten minutes. Although he later saw a number of others doing damage, he had no personal involvement whatever. When he was interviewed later, on 8 July, he denied having anything to do with the fire. Limani was interviewed on 13 March and 20 May. He claimed that he was watching television when he heard that a woman detainee had been beaten up. He

had no involvement in the incident. When the fire first started he went outside, but he denied threatening any member of staff or that he had helped any detainees to escape.

17 Neither defendant gave evidence at trial.

[In para 18-26 the court considered and rejected submissions that the judge should have stayed the trial as an abuse of process owing to the absence of defence witnesses. Complaint was also made about the informal identification of the defendants by photograph but the court concluded that neither defendant's conviction was undermined by the circulation of those photographs.]

Witnesses called by the prosecution at trial

27 Three separate areas for the arrangements for prosecution witnesses need attention. We cannot avoid a lengthy narrative of the essential facts. The background is the immediate aftermath of the incident. For reasons which will immediately become obvious, we deliberately refrain from describing it as a "riot". Two problems, with no direct bearing on the question of the guilt of any defendants needed urgent attention. It was suspected that one or more individuals had died during the incident. However until the major scientific investigation was concluded, and it was affirmatively established that no-one had died, Group 4, as the company responsible for Yarl's Wood, was suspected of corporate manslaughter. Group 4 was simultaneously considering and eventually started civil proceedings against the Bedfordshire Police Authority, seeking compensation under the Riot (Damages) Act 1886 (49 & 50 Vict c 38). In short, quite independently of the criminal process involving individual defendants, and the potential involvement of Group 4's employees as witnesses to the incident, it was directly involved, both as a potential defendant to criminal proceedings and as a claimant in civil proceedings.

28 When the incident was eventually brought under control, an immediate process of group counselling was organised by Group 4. The Independent Counselling and Advisory Service ("ICAS") was immediately retained. The organisation provides therapeutic services for those involved in traumatic incidents. Staff were seen in group sessions known as a "trauma debrief". These sessions lasted in total between two and three hours, with each session facilitated by two clinicians, each one of whom was either a chartered psychologist, or a counsellor registered with *3447 the British Association of Counselling and Psychotherapy. The initial trauma de-brief sessions were not counselling sessions as such, but took the form of structured discussion about feelings and reactions after the incident, with the clinicians managing the content of the discussion with the aim of assessing the therapeutic needs of those attending. These sessions were organised in groups and took place between 19 and 20 February. The groups were made up of those who had apparently been together on the night of the disturbance. No notes were made of the discussions, and the sessions took place before any members of staff had made witness statements to the police. The precise arrangements were not fully clarified until the very end of the trial.

29 With counsel's assistance we have been able to identify the witnesses relevant to these appeals who participated in the trauma de-briefings. Gibb, Ram, Collins, Fox, Wakefield and Nandha, as well as Attwood and Traynor, attended ICAS sessions. So did O'Donnell and Burns. Gibb, Fox and Attwood attended together in the same group. Collins and Wakefield attended in another group.

30 The witnesses gave various descriptions of these events. Ram said that he did not discuss the incident with his colleagues, but he had received 1 1/2 hours' counselling some three or four days after the incident. There were six present in his group, talking about their experiences. He thought Sylvia Burns was one of them. After the incident Gibb was asked to identify any one of the detainees who was involved in the incident. He made a list of them before he had access to any records or photographs. He then attended two sessions of group counselling with ICAS. There were seven to eight detention custody officers in his group, and they discussed their experiences and the effect on them. Collins described what appears to have been the ICAS debriefing which, he said, took place about a month after the incident. The detention custody officers present talked about what had happened after the incident, but this was a general conversation, and names were not swapped. Attwood described a single one hour counselling session immediately after the incident, followed by a further session some six weeks later. He was told not to discuss the case or the incident, but simply their personal feelings and how the incident had affected them. Traynor did not recollect

attending for ICAS counselling. He was the shift manager, and was concerned with the welfare of other detention custody officers. Nandha described attending a couple of ICAS group meetings. He did not discuss what had happened on the night. The meeting was mainly about feelings. O'Donnell described counselling after the incident.

31 The second area of complaint is and was regarded by the judge and the prosecution, as well as the defendants at trial, as much more significant. As a direct result of the proceedings proposed to be taken by Group 4, in April 2002, a firm of solicitors, highly regarded in commercial and civil litigation, Norton Rose, was instructed to act on its behalf. Shortly afterwards, in late April, arrangements were made for a notice to be delivered to all Group 4 employees who may have been witnesses to the incident from the manager of Yarl's Wood.

32 Taking the form of advice to staff, the notice began by asserting that despite repeated assurances that staff who made statements to the police would be provided with a copy, as a result of the civil dispute between the police and Group 4, Bedfordshire Police was refusing to provide such copies. They were lowering the line between investigation of the incident, and gathering evidence to support the police's own civil claim against Group 4. Staff were asked to bear in mind the advice Group 4 had received from their solicitors. They were reminded that they were "under no obligation to be interviewed" and that any interview notes and statements could be used in any criminal or civil proceedings or public inquiries. If willing to be interviewed by the police, they were entitled to "have a solicitor present at the interview" who would be provided at Group 4's expense. Staff were then advised to ask to be provided with a copy of any statement they might give to the police, and in the event of a refusal, should not sign the statement. If they were invited to sign a statement, they should make sure they had "a proper opportunity to review it *3448 carefully", and to ask to take it away for "review" and discussion with their "manager and/or with a solicitor".

33 They were further told to ask the police to specify the criminal offence which was being investigated at the outset of the interview, and only to answer questions related to its stated purpose. They were to answer factual questions, but not make statements of opinion or say "what you think other people may have done or thought". It was pointed out that they might be asked to sign any police notes relating to their interview, but indicated that they did not have to sign them, and "advised" that they should not. "If you do decide to sign the notes insist on a copy. Do not sign until you have had a chance to review the notes carefully ... you may wish to discuss the notes with a manager or solicitor first." Staff were under no obligation to provide their pocket books, and if asked, they were required to consult with the manager before handing it over.

34 We have not seen the letter sent by Norton Rose dated 25 April 2002 to the Bedfordshire Police. It is however obvious from the response dated 2 May 2002, that it reflected the contents of a notice to staff, and that the Bedfordshire CID were in possession of a copy.

35 Apart from denying that the police decision not to provide witnesses with copies of their statement arose from the "civil dispute" with Group 4, this letter pointed out that it was "normal practice in criminal investigations" not to provide witnesses with copies of their statements until shortly before they attended court as a witness, "to prevent, or at least minimise the risk of defence allegations of collusion and/or contamination of evidence". Concern was expressed about a potential conflict of interest between the corporate position of Group 4 itself, and that of its employees, as witnesses. The solicitors were asked to advise Group 4 that their employees were under civic responsibilities to assist the police with their investigation. The advice in the notice, if followed by potential witnesses, "could lead to witnesses having their oral testimony undermined at any criminal prosecution by defence suggestions that their evidence has been influenced by third parties (including third parties who have a supervisory responsibility towards them and/or with whom they have a conflict of interest)". The relevance of any evidence which a witness might be able to give could only be fully appreciated by the police when the investigation was concluded, and it was standard practice for statements to be obtained from witnesses which included inadmissible opinion or hearsay evidence, but which would provide a relevant line for further investigation by the police. It was considered "obstructive" for staff to be encouraged to withhold copies of their notebooks, which might contain "highly probative evidence", and would be liable to disclosure in the event of a prosecution. It would therefore seem "to make much

more sense for them to be handed over to the police now".

36 The letter concluded that the notice to staff was "distinctly hostile to the police investigation, and strikingly at odds with Group 4's public assertions that they are doing everything they can to co-operate with the police". The need for these matters to be approached cautiously was demonstrated by the fact that some Group 4 staff had already viewed photographs of detainees which might compromise any identifications given at trial, another process "potentially damaging to the prospects of a successful prosecution, and notwithstanding police requests ... that this very practice should be avoided".

37 That is the background, and this exchange of correspondence is self-explanatory. The police were extremely concerned, not merely at the tone of the notice sent by the manager to his staff, but also at the potential damage to a successful prosecution if the evidence of detention custody officer witnesses from Group 4 were contaminated, or approached as if it were.

38 It was agreed at trial that it would have been wholly improper for witnesses to discuss their notes and statements with their manager or with the company's solicitors, and further that the assertion that witnesses were entitled, as a matter of law, to be provided with their written statements was unfounded. A formal ***3449** complaint was made against Norton Rose to the Law Society. We do not know and, for present purposes, do not need to know the outcome.

39 Group 4 subsequently arranged witness training for its employees. Much of what actually happened is still not entirely clear, and we were invited to deal with the problem on the available material. We have not heard evidence or representations on behalf of Bond Solon or Group 4, but the inference that Group 4 was concerned to protect its intended civil proceedings is inescapable.

40 As soon as these arrangements were discovered, advice was sought from counsel for the Crown, Mr Nigel Rumfitt. His advice was unequivocal. In the context of a criminal trial the proposed training was wrong, and might constitute a contempt of court both by Group 4 and by Bond Solon, the company chosen for training purposes. The programme of training was to be stopped immediately. By then however 16 potential witnesses for the prosecution had received training. Their names were provided to the defence and in due course to the jury.

41 The copy of a case study prepared by Bond Solon for training purposes was exhibited at trial. We have studied it. According to the text, witnesses were invited to read the case study and imagine they were involved in the events described in it. It continues:

> "You were on duty on 12 September 2001 in your normal role. You have been called as a witness for the prosecution in the trial of some detainees charged with various offences arising from the events on 12 September 2001."
> *"The background*
> "Butlins detention centre for asylum seekers opened in January 2001. The centre is designed to hold up to 200 asylum seekers at a time, including women and children. There is a 15 ft high fence topped by a barbed wire around the centre, CCTV cameras, regular patrols by security officers, and detainees unable to move around the site except under guard. The centre is run by Group 4. Detainees have alleged that the security staff are rude, racist and intimidating, and that they have been threatened with transfer to a prison if they complained. They have also complained of poor conditions and treatment. On 12 September 2001, a disturbance started apparently triggered by a programme on TV about the events in the United States of America on 11 September. A fire started and the fire brigade was called. In the confusion some detainees escaped but were later apprehended in a local Macdonald's. Several detainees are accused of violent disorder and escaping."

42 The study was specifically directed to Group 4 employees in their capacity as witnesses for the prosecution. The defendants to the "study" prosecution were detainees for whom the witnesses

were responsible. Ignoring the reference to the terrorist attack in the United States on 11 September 2001, the similarities between this "case study" and events at Yarl's Wood on 14/15 February 2002 is obvious. Even if the discussion and training began by focussing on the case study, the focus would inevitably move to evidence to be given by witnesses for the prosecution in what was then the shortly forthcoming trial. This case study would have been an entirely inappropriate basis for any form of witness coaching or training in the present case. The trial proceeded on the basis that it had indeed been used for Bond Solon training purposes.

43 The evidence on this issue, and the consequent approach to it, may have been incomplete. On 3 April, shortly before the trial began, Group 4 responded to the concerns about witness training, asserting that the training programme did not involve any witness coaching. The original case study sent to Group 4 by Bond Solon could indeed have become "confused" with the incident at Yarl's Wood, and instructions were therefore given that the case study should not be used. The letter then provided a detailed account of the way in which Bond Solon had become involved in the training programme, asserting that the police liaison officer was well-aware of the proposal. The content of the course was explained. There were one-day sessions, in groups of eight witnesses in a course "designed to give [the] witness an ***3450** experience very similar to going to court". In the morning the theory, practice and procedure of giving evidence was explained. This included the roles played by various participants in the proceedings, the layout of the court, the technique of cross-examination and how to handle questions which were not understood. The afternoon session included practice cross-examination of these witnesses "on real life experiences which were not connected with the riot". The letter repeated, "as stated above, the case study to which you refer in your letter was not used as it was deemed inappropriate". There was a strong denial of coaching or rehearsal of evidence: the course was simply intended to familiarise witnesses with the process and procedures "so that giving evidence is not so intimidating".

44 No record of the training programme, or the training of individual witnesses was available at trial, and the identity of the person responsible for the training was unknown. It was agreed at trial that Wakefield and Burns were "believed to have received Bond Solon training". It looks as though Robinson, a detention custody officer, who described Momodou's presence behind the security door without attributing any specific offensive behaviour to him, also received training. There is some uncertainty about Wakefield's position. The admission that he was "believed" to have received it was not a positive assertion that he had. In re-examination he denied that he had attended such training. On the other hand we were told that a letter from the Crown Prosecution Service had informed the defence that he had. We have not seen the letter. This is not satisfactory, but if there was any unfairness in the way in which the issue was approached at trial, Wakefield suffered the consequences, because his evidence was approached as if he must have been lying when he denied that he had received training. Indeed, on the issue of training by Bond Solon, the entire process redounded, as the Crown feared it would, against the prosecution.

45 It was an agreed fact between the prosecution and the defence at trial that the training offered by Bond Solon was "wholly inappropriate and improper". The judge took a particularly robust view of what had happened and unusually directed that he should there and then be expressly associated with that agreed fact. In the case of one defendant against whom the evidence largely consisted of witnesses who had been so trained, he withdrew the case from the jury. In relation to the present defendants, and other defendants, his directions to the jury were uncompromising. In a broad-ranging, stinging, criticism, he ended this part of his directions to the jury: "There is no place for witness training in our country, we do not do it. It is unlawful."

46 We must now move to a third area relating to prosecution witnesses where, according to the submissions before us, there was a danger of contamination. In November 2002, 22 detention custody officer employees of Group 4 received "cognitive therapy" from two psychologists, both called Dr McGurk. Some of them were seen in groups, others individually. The purpose was to provide information about the likely symptoms and disorders which would be associated with the aftermath of their involvement in the incident on 14/15 February.

47 In a letter dated 22 December 2002, headed "Yarl's Wood debriefing", Dr Barry McGurk suggested that the counselling efforts which took place in the immediate aftermath (that is the ICAS

treatment) was less than satisfactory. Employees were continuing to suffer from what was described as "crooked thinking", and were in need of "a proper de-briefing" to help the therapeutic process and help them move on with their lives. The letter asserted that police instructions that people should not talk about the incident had already been disregarded. The Group 4 supervisor, David Watson, had been asked to speak about his role in the incident to the employees. The police instruction appeared to be "silly", because the individuals would inevitably discuss their experiences with their colleagues in informal settings. As there were so many "incorrect and varying ideas" about what had actually happened, these employees would be "vulnerable to aggressive questioning" at trial. As to the argument that the arrangements for a "debriefing" would lead to a submission that the witnesses had colluded, the alternative argument was that a de-briefing would only "provide an accurate picture of what was happening to other people " without changing any individual's view of what had happened to him or her.

48 ***3451** There was an immediate response on behalf of the prosecution, expressing "great" concern. It pointed out that discussions between witnesses before a criminal trial could give rise to a number of difficulties. These were identified. The response included a series of questions, and sought assurances that full records of "everything to do with the therapy" would be kept and made available in good time for the trial. The letter ended by repeating the writer's extreme concern, in particular at the arrangements for a "group debriefing exercise which actually covers the chronological sequence of events ". An extract was also sent to Group 4 of the then recently issued booklet relating to the "provision of therapy for child witnesses prior to a criminal trial", pointing out that for this purpose there was no difference in principle between child and adult witnesses. The text read:

> "Prior to the criminal trial group therapy where the specific recounting of abuse takes place is best avoided. The particular danger of this kind of group therapy is that the witness may adopt the experiences of others taking part in the therapy. Structured group therapy approaches which help in a neutral way to improve the child's self-esteem are less likely to cause difficulties. As a general principle, group therapy should not be offered to the child witness prior to the trial."

49 However Group 4 then indicated that it would postpone the original proposal for a large group de-brief, but nevertheless asserting that as a matter of company policy, for many years, Group 4 had made these de-briefings available to staff who had together been involved in any traumatic incident.

50 In the meantime, on 29 January, Group 4 wrote to the chief Crown Prosecutor notifying him that the services of Dr McGurk had been retained, and that he had already held two sessions of cognitive therapy with small groups of Group 4 staff. They were said to have "benefited significantly" from the process. The letter recorded the recommendation that this debriefing exercise should be extended beyond the existing patients to all members of staff who were on duty at the time, who might be "repressing symptoms of psychological disorders " arising from their presence at Yarl's Wood during the riot. In the interests of the health of its employees, Group 4 had accepted the medical advice, and proposed to allow Dr McGurk to organise a "group debriefing".

51 A further letter from the chief Crown Prosecutor, which appears to have crossed in the post, again emphasised the dangers and difficulties of group therapy. No records of the form of de-briefing are available, but the information about precisely who had attended when, and who had attended with him was disclosed and in due course presented to the jury. Group meetings took place, the first on 4 November 2002, the last on 21 February 2003.

52 Ram, Curtis, Burns and apparently Wakefield attended for therapy at the McGurks', Curtis on several occasions. It is now perhaps convenient to record Curtis' evidence that he had not spoken to anyone about the incident because, hardly surprisingly given his experience, he had suffered depression and post-traumatic disorder syndrome, and that he had received treatment. Ram attended with Curtis, on 4 November 2002, with three others who gave no evidence against the defendants. Burns attended once, with others, again, none of whom gave any significant evidence against either defendant. From the agreed facts, we cannot find any specific material that Wakefield was seen simultaneously with any other relevant witness. The form of treatment received by the witnesses, except for

Curtis, whose general evidence has been narrated, was not closely examined, not least because the relevant information emerged late in the trial.

Abuse of process

53 None of the complaints with which we are immediately concerned were directed at investigating police officers, or those responsible for the preparation and conduct of the prosecution. They did nothing which justifies criticism. To the ***3452** contrary, as the narrative demonstrates, they did their utmost to see that the process was not undermined or subverted by the actions of Group 4 or their solicitors.

54 The steady development of the abuse of process jurisdiction suggests that, notwithstanding that the prosecution or prosecuting authority may be blameless, as a matter of principle, the judge is vested with jurisdiction to order that proceedings should be stayed. The activities of third parties may constitute an abuse of process making a fair trial impossible, and if so, in an extreme case, this discretion is available to be exercised. That said, it has been pointed out time and again that difficulties, even great difficulties, created for the defence are almost always capable of being addressed by the trial process itself. This is usually achieved by evidence or agreed facts which properly inform the jury of the difficulties faced by the defendant. Then, with the benefit of the judge's directions as well as counsel's submissions before its retirement, the jury is well able to appreciate the impact of these difficulties on the proper preparation and conduct of the defence, and to take them fully into account before deciding whether the evidence demonstrates that the prosecution case has been proved. Juries have a strongly developed sense of fairness. Experience shows that they lean over backwards to see that the prosecution does not benefit from and that the defendant is not prejudiced by any unfairness, whatever its source. These considerations should properly inform the exercise by the trial judge of the salutary, but rarely exercised, power to halt a prosecution as an abuse.

55 Our first and immediate concern is whether there are any grounds for interfering with the judge's decision that the case against the defendants and their co-defendants should proceed. On the information before him when the application was made, the conduct of Group 4 in relation to detention custody officer witnesses, and the potential difficulties created by it, was capable of full explanation before and analysis by the jury. We can find no misdirection by the judge, and none was identified to us, which would justify interfering with his decision that the case should proceed. In the result, his decision meant that all areas of complaint were fully ventilated and put into their proper evidential context before the jury. In our judgment the decision was correct.

56 We have however further examined whether the information about witness treatment or training which, with the assistance of the prosecution, became available by the end of the trial, should lead us to doubt the safety of the conviction. Again, no criticism can be directed at the way the judge summed up these issues. To the contrary he was at the greatest pains to give lengthy, unequivocal and robust support to every aspect of the conduct of Group 4 which was rightly criticised before the jury by the prosecution and the defendants. We have no reason to doubt that the jury would have been fully alert to those directions and the judicial concern which led to their expression.

Witness care

ICAS

57 The ICAS arrangements were not improperly motivated. As employers, Group 4 provided this facility for members of their staff who wished to have it, or thought they needed it. Two potential dangers were identified. First, discussions between those who had been grouped together during specific parts of the incident might influence individual recollections, and second, there would be no means of checking whether this had happened.

58 We understand the submission, but we are unimpressed with it as a matter of complaint. It was not unreasonable for employers to do everything they could to alleviate the pressures and stresses endured by those members of their staff who were involved in or witnessed this incident. In its immediate aftermath, we can well understand why little, if any, thought was given to the position of potential witnesses who might become involved in any subsequent prosecutions of any detainees. At that time there was no process to be abused. Litigation, civil or criminal, would have been far from the mind of any of these potential witnesses. Many of them had endured a

*3453 ghastly experience. Provided that no attempt was made to conceal what had happened from the jury (and none was), it was not abused. Each relevant witness for the prosecution was cross-examined about his or her involvement in the ICAS arrangements, and the jury was properly informed of the relevant facts.

McGurk

59 The later cognitive therapy is more troublesome because, by then, the employees who needed such treatment included witnesses in the forthcoming prosecution. The potential conflict between necessary pre-trial treatment for a witness or victim of crime and the possible contamination of that evidence by constant out-of-court reiteration or aspects of treatment which consciously or unconsciously involved the prodding of memory is well-recognised. Without treatment, some victims and witnesses may suffer serious continuing psychological ill-health. On the other hand, treatment which involves discussion and analysis of the incident which is the subject of the prosecution may affect the clarity and accuracy of the witnesses' memory. The dilemma is most frequently observed in cases where the victim has endured serious, sometimes prolonged, sexual crimes. Early treatment would help the victim to come to terms with what she (as it usually is) has suffered. The treatment process however does sometimes lead to a reduced possibility of conviction. In some cases therefore the conundrum resolves itself into a decision about priorities. The correspondence encapsulates this dilemma. Where, as here, the court was not involved in the decision about priorities, the critical requirement is that the court should be properly informed of any witness who has received pre-trial treatment of any kind. That enables its possible impact on the evidence to be investigated at trial, as appropriate. The trial then proceeds on the basis of the known facts, which can be properly assessed.

60 In the present case, by the time the jury retired, it was fully informed of precisely which prosecution witnesses had attended for the McGurk cognitive therapy, and when it happened, and the identity of others who received treatment at the same time. With the judge's directions, and in the context of very modest levels of therapy which actually took place, and the very limited possibility of cross-contamination of evidence which related to the participation of either defendant in the violent disorder, a proper evaluation of their evidence could be made.

Witness training (coaching)

Bond Solon

61 There is a dramatic distinction between witness training or coaching, and witness familiarisation. Training or coaching for witnesses in criminal proceedings (whether for prosecution or defence) is not permitted. This is the logical consequence of the well-known principle that discussions between witnesses should not take place, and that the statements and proofs of one witness should not be disclosed to any other witness: see R v Richardson [1971] 2 QB 484, R v **Arif** The Times, 22 June 1993, R v **Skinner** (1993) 99 Cr App R 212 and R v Shaw [2002] EWCA Crim 3004. The witness should give his or her own evidence, so far as practicable uninfluenced by what anyone else has said, whether in formal discussions or informal conversations. The rule reduces, indeed hopefully avoids, any possibility that one witness may tailor his evidence in the light of what anyone else said, and equally, avoids any unfounded perception that he may have done so. These risks are inherent in witness training. Even if the training takes place one-to-one with someone completely remote from the facts of the case itself, the witness may come, even unconsciously, to appreciate which aspects of his evidence are perhaps not quite consistent with what others are saying, or indeed not quite what is required of him. An honest witness may alter the emphasis of his evidence to accommodate what he thinks may be a different, more accurate, or simply better remembered perception of events. A dishonest witness will very rapidly calculate how his testimony may be "improved". These dangers are present in one-to-one witness training. Where however the witness is jointly trained with other *3454 witnesses to the same events, the dangers dramatically increase. Recollections change. Memories are contaminated. Witnesses may bring their respective accounts into what they believe to be better alignment with others. They may be encouraged to do so, consciously or unconsciously. They may collude deliberately. They may be inadvertently contaminated. Whether deliberately or inadvertently, the evidence may no longer be their own. Although none of this is inevitable, the risk that training or coaching may adversely affect the accuracy of the evidence of the individual witness is constant. So we repeat, witness

training for criminal trials is prohibited.

62 This principle does not preclude pre-trial arrangements to familiarise witnesses with the layout of the court, the likely sequence of events when the witness is giving evidence, and a balanced appraisal of the different responsibilities of the various participants. Indeed such arrangements, usually in the form of a pre-trial visit to the court, are generally to be welcomed. Witnesses should not be disadvantaged by ignorance of the process, nor when they come to give evidence, taken by surprise at the way it works. None of this however involves discussions about proposed or intended evidence. Sensible preparation for the experience of giving evidence, which assists the witness to give of his or her best at the forthcoming trial is permissible. Such experience can also be provided by out of court familiarisation techniques. The process may improve the manner in which the witness gives evidence by, for example, reducing the nervous tension arising from inexperience of the process. Nevertheless the evidence remains the witness's own uncontaminated evidence. Equally, the principle does not prohibit training of expert and similar witnesses in, for example, the technique of giving comprehensive evidence of a specialist kind to a jury, both during evidence-in-chief and in cross-examination, and, another example, developing the ability to resist the inevitable pressure of going further in evidence than matters covered by the witnesses' specific expertise. The critical feature of training of this kind is that it should not be arranged in the context of nor related to any forthcoming trial, and it can therefore have no impact whatever on it.

63 In the context of an anticipated criminal trial, if arrangements are made for witness familiarisation by outside agencies, not, for example, that routinely performed by or through the Witness Service, the following broad guidance should be followed. In relation to prosecution witnesses, the Crown Prosecution Service should be informed in advance of any proposal for familiarisation. If appropriate after obtaining police input, the Crown Prosecution Service should be invited to comment in advance on the proposals. If relevant information comes to the police, the police should inform the Crown Prosecution Service. The proposals for the intended familiarisation programme should be reduced into writing, rather than left to informal conversations. If, having examined them, the Crown Prosecution Service suggests that the programme may be breaching the permitted limits, it should be amended. If the defence engages in the process, it would in our judgment be extremely wise for counsel's advice to be sought, again in advance, and again with written information about the nature and extent of the training. In any event, it is in our judgment a matter of professional duty on counsel and solicitors to ensure that the trial judge is informed of any familiarisation process organised by the defence using outside agencies, and it will follow that the Crown Prosecution Service will be made aware of what has happened.

64 This familiarisation process should normally be supervised or conducted by a solicitor or barrister, or someone who is responsible to a solicitor or barrister with experience of the criminal justice process, and preferably by an organisation accredited for the purpose by the Bar Council and Law Society. None of those involved should have any personal knowledge of the matters in issue. Records should be maintained of all those present and the identity of those responsible for the familiarisation process, whenever it takes place. The programme should be retained, together with all the written material (or appropriate copies) used during the familiarisation sessions. None of the material should bear any similarity whatever to the issues in the criminal proceedings to be attended by the witnesses, and nothing in it should play on or trigger the witness's recollection of events. As already indicated, ***3455** the document quoted in para 41, if used, would have been utterly flawed. If discussion of the instant criminal proceedings begins, as it almost inevitably will, it must be stopped. And advice given about precisely why it is impermissible, with a warning against the danger of evidence contamination and the risk that the course of justice may be perverted. Note should be made if and when any such warning is given.

65 All documents used in the process should be retained, and if relevant to prosecution witnesses, handed to the Crown Prosecution Service as a matter of course, and in relation to defence witnesses, produced to the court. None should be destroyed. It should be a matter of professional obligation for barristers and solicitors involved in these processes, or indeed the trial itself, to see that this guidance is followed.

66 On the facts apparently established, alternatively on the factual assumptions made at trial,

so far as these defendants were concerned this guidance was not complied with in relation to two witnesses, Wakefield and Burns. As already indicated, their names were among those provided to the defence as having attended for training.

67 We have closely examined the relevant material. We have already noted the facts agreed by the Crown at trial and the judge's directions. The fact of and the arrangements for the training programme organised by Group 4 with Bond Solon reflected adversely not on the defence but on the Crown. Legitimate and powerful forensic criticism of the facts was made by the defence: the Crown conceded its justification: the judge unequivocally endorsed it. In Wakefield's case, his contemporaneous notes of the incident were made on the following day. If his evidence drifted away from those notes, there was ample scope for cross-examination. In Burns' case, her evidence was not wholly critical of Limani. In any event, the way in which the "training" issue was left to the jury meant that it was damaging to the creditworthiness of every witnesses who received it. In the result, looking at the evidence overall, the arrangements for training for Burns and Wakefield do not undermine the safety of the conviction.

[In paras 68-97 the court considered a further ground of appeal by both defendants relating to an allegation of impropriety by one juror in respect of two other jurors. The court held that the judge could not be criticised for the way in which he handled the issue. In paras 98-117 Momodou's allegation that he was incompetently represented was considered and rejected. In paras 118-120 the court refused Limani's application for leave to argue that the evidence of a witness, Rippingale, should not have been admitted. In paras 121-125 appeals against sentence were considered and dismissed.]

126 These appeals against conviction and sentence are accordingly dismissed.

Appeals dismissed.

Representation

Solicitors: Crown Prosecution Service, Bedfordshire.

Reported by Mrs Clare Barsby, Barrister

END OF DOCUMENT

Prosecution Authorities

3. *R v. Salisbury* [2005] EWCA Crim 3107.

Westlaw.

2005 WL 3498952
2005 WL 3498952 (CA (Crim Div)), [2005] EWCA Crim 3107
(Publication page references are not available for this document.)

R v. Salisbury
Case No: 2004/04118/D4
[2005] EWCA Crim 3107

Court of Appeal (Criminal Division)

CA (Crim Div)

Before : The Lord Chief Justice of England and Wales Mrs Justice Rafferty and Mr Justice MacKay

Date: 30th November 2005

On Appeal from Chester Crown Court Mr Justice Pitchford

T 20037200

Representation

P V Birkett QC & E Edhem for the Appellant.

R Spencer QC & A Thomas for the Respondent.

Judgment

Lord Phillips :

1 On 18 June 2004 in the Crown Court at Chester before Mr Justice Pitchford and a jury this Appellant was convicted of two counts of attempted murder and found not guilty on two other counts which charged her with the same offence.

2 On Count 1 she was acquitted of attempting to murder James Byrne on 18 May 1999. On Count 2 she was acquitted of attempting to murder Reuben Thompson on 14 March 2002. On Count 3 she was convicted by a 10 to 2 majority of attempting to murder Frances May Taylor on 21 March 2002. On Count 4 she was convicted unanimously of attempting to murder Frank Owen on 31 March 2002. On Count 2 the case against her was that she caused the patient to be nursed lying flat on his back, which would have led to congestion in the heart and lungs. In the other counts the allegation was that she administered diamorphine with intent to kill.

3 The Appellant was a nursing sister of nearly 30 years standing and worked at Leighton Hospital, Crewe on a gastroenterology/general medical ward. She had the care of a number of terminally ill elderly patients. The case against her was that she had deliberately attempted to hasten the end of the natural life of some of them. In Counts 1, 3 and 4 the allegation was that she had used diamorphine inappropriately and to that end. She did not dispute that she had administered diamorphine to May Taylor and Frank Owen shortly before their respective deaths. Her case was that this was done lawfully and in the best interests of each patient. Diamorphine is a painkilling drug which may be used to provide dying patients with relief from pain and stress, though it carries the unwanted consequence of depressing the functions of the heart and lung. It has therefore to be prescribed by a qualified doctor. He or she makes the decision to prescribe it on the basis of or in conjunction with the reports and observations of the patient by the nurses who had care of the patient.

4 There were three grounds in the Appellant's perfected grounds of appeal:
(a) That the Judge wrongly rejected a submission of no case to answer on Count 3.
(b) That the prejudice of using Count 3 to lend support to Count 4 on the issue of intent "cannot be ruled out as rendering the verdict on both counts unsafe".
(c) Irrespective of (a) and (b) there was a lurking doubt as to the safety of the verdicts.

5 The appellant was granted leave by the Full Court. The first ground now includes the assertion that the submission of no case on Count 4 should also have been allowed. Ground 2 alleges in the alternative that if one count only should have been removed from the jury on the basis of no case to answer, the verdict on the other is unsafe having regard to the direction the jury was given that an adverse finding on one count could support the Crown case on the other. Ground 3 remains, and includes issues related to the training of witnesses for the Crown and disclosure of the fact of their training.

No case to answer

6 The jurisdiction of the Court is familiar. In R v Galbraith (1981) 73 Cr. App. R. 124 this Court expressed it as follows:

"... where there is some evidence but it is of a tenuous character, for example, because of inherent weakness or because it is inconsistent with other evidence

(a) Where the Judge concludes that the Crown evidence, taken at its highest, is such that a jury properly directed could not properly convict on it, it is his duty, on a submission being made, to stop the case.

(b) Where however the Crown evidence is such that its strength or weakness depends on the view to be taken of a witness's reliability, or other matters which are generally speaking within the province of the jury and where on one possible view of the facts there *is* evidence on which the jury could properly come to the conclusion that the defendant is guilty, then the Judge should allow the matter to be tried by the jury".

7 Helpful and detailed schedules have been put before this Court in which the points for and against the Crown case have been summarised under headings entitled "plums" and "duff". These words echo the case of R v Shippey [1988] CLR 767 in which Turner J held that the requirement to take the Crown evidence at its highest did not mean "picking out all the plums and leaving the duff behind". This much- cited case has been put in its context by this Court in the recent decision of Pryer [2004] EWCA (Crim) 1163 in which Hooper LJ deprecated what he called resort to the "plums and duff principle". He pointed out that Shippey itself was a case which depended almost entirely on the evidence of a single complainant whose evidence suffered from internal contradictions and inconsistencies. He treated it as "no more than another case on the facts" and not a case which laid down any principle of law. To be fair to Mr Birkett QC, who presented this appeal, he made no explicit reference to it at all.

8 The key issue for the jury to consider was whether the Crown had proved that the Appellant had the necessary intent to kill any of these patients. As the Judge was to direct the jury, in a very clear summing up which has not been and could not be criticised,:--

"If you are sure ... that a deliberate attempt was made to bring forward or to hasten the end of a natural life, the offence of attempted murder was committed. You must be sure both of an attempt and an intention to kill .... You may convict Mrs Salisbury of attempted murder if, but only if, you are sure her real or primary intention was not to provide relief from pain or distress but to hasten death. If you were to conclude that her real or primary purpose may have been to relieve her patient from pain then you could not convict her of attempted murder even if she knew that the effects of what she did might include the hastening of death."

Count 3 -- May Taylor

9 This elderly lady was admitted to Leighton Hospital at around midnight on 17 March 2002 in an unconscious state having suffered her second stroke. Her prognosis was poor. She was 88 years old and her family agreed that she was not to be resuscitated in the event of a cardio-respiratory event. She died on 23 March, just under six days later. Two days before she died the Appellant had set up a device known as a Graseby pump to administer diamorphine.

10 There were two fundamental bases of the Crown case on this Count. The first was that the Appellant had engineered the prescription of diamorphine by a doctor, which was an essential precondition for its use, by means of providing him with information to the effect that the patient was in pain, which was false to her knowledge. The second basis was that she caused the administration of diamorphine two days later when she knew it was not clinically indicated, and in the face of objections from nursing colleagues. The thrust of the no case submission was that there was insufficient evidence on both these issues, alternatively that such evidence as there was was so discredited or tenuous as to require the Judge to direct the jury to acquit.

11 As to the first basis of the case against the Appellant, this was said to provide, if proved, strong evidence of intent. It required an examination of the nurses' observations of the patient between admission on 17 March and a ward round by Dr.McKay at 0930 on the 19 March, when he wrote the prescription for diamorphine via the Graseby pump. During this period the patient was unconscious and turned by nurses about every 2 hours. The expert evidence called by the Crown was to the effect that with a stroke victim such as Mrs Taylor pain on moving the head or agitation on being turned could be a sign of cerebral irritation. Professor Forrest added that if such a patient showed these signs on one occasion she would be expected to do so on later occasions.

12 Mrs Taylor was seen on admission by Nurse Collinson in the assessment unit, who tested her for pain and found none. Mrs Taylor's daughter-in-law visited her the next day and on all following days and her lay view was that she was in no pain. She was admitted to Ward 4 that evening where Nurse Brundrit, on duty overnight, did not note any pain

and said if she had thought she needed assistance for it she would have made a note.

13 On the morning of the 19 March the Appellant came on duty and gave the patient a bed bath with the assistance of Nurse Dale, a senior support nurse. This procedure involved the handling and moving of the patient for something up to half an hour and would have been an occasion on which, had she been experiencing the painful effects of her stroke, Mrs Taylor might have been expected to show some sign of pain or discomfort. Dale's evidence was that she "didn't make any sound and didn't seem in any distress at all". At 0930 the Consultant Dr McKay made his ward round, attended by the Appellant. His House Officer made the notes for him, and wrote "Agitated when turning. Keep comfortable". Dr. McKay said this would have been based on information coming from the nursing staff, and the Appellant agreed that it would have come from her, though she had made no note of her own to that effect. Dr McKay proceeded to prescribe diamorphine through a Graseby, and said he would not have done this unless he had heard a report of pain or discomfort. Mr Birkett realistically conceded that there was evidence that the Appellant's assertion was influential at the very least in the doctor's decision to write the prescription. Equally, he argues, there were other factors in the doctor's mind, including the apparent nature of the stroke and its likely sequelae.

14 In the event the Appellant did not take any steps to set up the device immediately, as might have been expected if she thought the patient was in pain. As it was she asked Nurse Gillam, who worked the following shift, to do it for her, saying she had not had time to do it herself. Gillam did not do so, as she saw no signs of discomfort during her shift. At 2115 on 19 March she made a note of her decision, saying it was "... due to no obvious signs of pain or discomfort". She told Nurse Darby, the nurse who took over from her; she for her part also formed the view that the patient appeared to be comfortable and did not therefore set up the pump.

15 The following day, March 20, Nurse Pearson was on the early shift and gave the patient a full bed bath, recording that she seemed comfortable and pain free though frail and poorly. She too did not set up the Graseby. The Appellant was on duty for that shift and took no steps herself to set it up. On the late shift Nurse Gillam again noted that Mrs Taylor's condition remained the same and Nurse Hassall countersigned the note to that effect. Hassall said that if they had observed pain when turning her at 1800 she would have noted it. Nurse Darby on the night shift made a note "Appears to be comfortable".

16 By the morning of the 21 March, therefore, the position reached was that on nine occasions nurses had positively noted an absence of pain, and the only member of the nursing staff to have claimed to have observed any problem to the contrary was the Appellant in her oral report on 19 March to the doctor. Furthermore, having obtained the prescription on the basis of that report, she did not act on it herself for the next 48 hours, and other nurses positively rejected the notion of setting up the pump.

17 On the early shift on the 21 March the Appellant asked Nurse Acton, a bank nurse, to set up the Graseby. She and Nurse Martin went and withdrew the diamorphine from the drugs cupboard to set the Graseby up. They returned to the room where the patient was and discussed with Nurse Dale whether it was right to proceed given Mrs Taylor's apparent comfortable state. Dale had by now bed-bathed her twice without seeing signs of pain. The three nurses, all sceptical of the need for this strong drug, then tested the patient by turning her to see if this evoked any painful response; it did not. Martin, the senior of the three, was not prepared to set it up and went to tell Sister Pountney as much. The Appellant was there and intervened saying words to the effect of "I'll do it then". Pountney described her as "quite adamant that the patient did need it" and said she supported the Appellant as being the senior nurse on duty, whereas she herself had no experience of nursing this patient. She recalled the Appellant as explaining her action by saying "Why prevent the inevitable?" but "not in a malicious type of way". The Crown portrayed this answer, which was not challenged in cross examination by the Appellant's counsel, but was denied later by the Appellant herself as not being something she did say or would have said, as capable of being very incriminating evidence against her, evincing at the least a callous indifference towards the life of the patient.

18 The Appellant went to the side room, where by now Acton was alone with the patient, and asked her if she was happy with what was proposed, meaning the setting up of the pump. Acton agreed, saying in evidence that the doctors would not have prescribed it and a senior sister would not have asked her to do it if it had not been the case that the patient was suffering from some pain. She had not read the previous notes. The Appellant said "She's not going anywhere". When the line was inserted in her upper

thigh Mrs Taylor flinched and the Appellant indicated that this showed she was in some pain. The nursing expert witness Bowey said that a flinch would not justify diamorphine. The only other event of significance on the 21 March was that in the morning Dr London carried out a ward round, saw the patient and made no note of her being in any distress.

19 When she gave evidence the Appellant claimed that the need for the diamorphine to be set up was triggered by the fact that the patient required re-catheterisation. The Crown's nursing expert said this was not a painful procedure for a woman and claimed that it would not require analgesia of any sort, let alone diamorphine. At all events the Graseby was set up at 1135 on 21 March and was re-primed at 2300 on 22 March. Mrs Taylor died at 0115 on the 23 March. After setting up the pump the Appellant had played no further part in the care of Mrs Taylor.

20 Based on this evidence the points made by the appellant are these, with the answers of the Crown to them.

21 First it is stressed that the prescription for diamorphine was made by an experienced Consultant who had the patient in front of him and must have exercised his professional judgment. But Dr Mackay was asked whether he would have done so had there not been a report to him of discomfort, and said he would not. There was no question but that such a report came from the Appellant. No doctor in this case ever saw discomfort for himself. Mr Birkett's concession recorded above at paragraph 13 above comes close to disposing of this point.

22 The absence of a note by the Appellant recording her finding of agitation is not sinister, and may be explained by the fact, as emerged in evidence, that busy nurses do not always have time to make such entries. In fairness the Judge directed the jury not to attach too much weight to this failure. The Crown, however, relied on the positive evidence of notes made by the witnesses to the effect that there was no pain, as well as their recollections of this particular patient which were to the same effect. The jury might also be impressed by the lay evidence of the daughter-in-law who knew the patient well.

23 None of the other nurses who were in charge of the patient saw fit to remove the Graseby as being unnecessary. Of these Darby gave positive reasons for her failure to do so even after she had noticed the laboured breathing of the patient at the last.

24 Other nurses, it is said, did not take steps to prevent the hastening of the end Mrs Taylor's life, if that is what it was. But the narrative above shows that some did; on both the 19th and 21st. Martin maintained her refusal to put the Graseby up and only the junior nurse Acton was prevailed upon, believing that Dr London on his recent ward round must have sanctioned it.

25 The remark about not preventing the inevitable was said in terms by Pountney, who heard it said, not to have been "malicious", merely as underlining her certainty that the drug was needed. But Pountney had no day to day responsibility for the patient, had to rely on the ward sister, and "the inevitable" can only have meant death. It was for the jury to construe this remark in context. Pountney had also used this word in the context of remarks made by the Appellant about Frank Owen, and this may have helped them put a sensible construction on it.

26 The drug was prescribed in a low dose (15mg.); if the Appellant had an intent to kill she would surely have exaggerated her report of pain so as to procure a higher prescription. But Dr McKay did describe even this low dose as having the potential to shorten life by "a day or two". Diamorphine is a powerful and dangerous drug, and if she had the intent alleged the Appellant might have anticipated that her false report of agitation only as opposed to worse pain might only have been met with a prescription for a less powerful analgesic.

27 The delay in setting up the Graseby is inconsistent with an intent to kill, as is the failure to "boost" the supply of the drug. It was the case that the Appellant in practice encountered opposition from other nurses, which she may not have anticipated, say the Crown.

28 Observation of pain in an unconscious patient is a subjective assessment and very difficult. Pain is not necessarily continuous. But the majority of those who noted the absence of pain were nurses of long experience, and all were making a point of looking out for it. The stroke expert Hendre said that if this stroke had been such as to cause pain it would have been continuous and very uncomfortable. He would have expected agitation if displayed to be repeated on subsequent occasions, though the condition can fluctuate quite markedly. Though Dr McKay said that a right parietal stroke was the most serious and painful type, the expert said that pain resulted in a relatively small percentage of cases.

29 In argument before us Mr Birkett summed the matter up in this way: that the medical evidence supported the proposition that pain was likely to have been manifested as the patient moved from the acute to the rehabilitation stage; this would have coincided with the Appellant's claim of agitation observed on the morning of the 19 March; haemorrhagic stroke does cause cerebral irritation which would be evident especially if the neck was flexed and the head moved. This he says totally supports the "real possibility" that this patient was agitated on turning. These signs are subtle and may require an experienced eye to detect.

30 In a case such as this it is necessary to stand back, as the Judge did, and form a view as to the overall picture at the end of the Crown case. The impression the Judge said he had formed was that the defence submissions had raised questions of fact for the jury to decide, but the Crown had established a case to answer. We agree with this assessment. It was not necessary at the close of the Crown case for the Judge to consider whether the evidence so far disclosed was such that there was only one inference the jury could properly draw from it. Whether there is only one inference is for the jury and not the judge to decide -- see Jamieson [2003] EWCA Crim 3755 at paras.46-49. In our judgment there was sufficient evidence from which such an inference could have been drawn, it could not be described as either tenuous, discredited or at all weak, and the judge was right to rule as he did.

Count 4

31 The issue for the jury was summarised by Pitchford J as:

"Did the Defendant when she administered either or both diamorphine injections to Frank Owen on 31st March 2002 attempt to hasten his death with intent to hasten his death?"

32 Frank Owen, born in 1909, had been admitted to the appellant's ward on 3 January 2002, and had suffered a stroke. He developed infections whilst on the ward, and had difficulties with eating and drinking, but had been relatively pain-free. In the first two and a half months of his stay, he only occasionally required co-codamol (an over-the-counter analgesic) and from mid-March consistently refused it. The Crown's case was that the appellant became increasingly frustrated with his presence on the ward, pressing unrealistically for his discharge to a nursing home, despite his requiring intravenous feeding.

33 During the night of 23/24 March he became dehydrated and Dr Shakshir directed that fluids be recommenced. When Nurse McNally explained this on hand-over next morning the Appellant said "He's 91 for God's sake, he's not going to make it anyway"

34 On the night of 28/29 March, he was given two injections of diamorphine, the "As Required" prescription written up by Dr Akinsoji permitting nursing staff to administer the drug when the patient showed obvious pain. Mr Owen was not seen again by a doctor after the prescription was given. The nursing notes for that night recorded that he had been in pain when being moved, and a small sacral sore was observed.

35 The Akinsoji prescription did not in itself justify the Appellant's administering diamorphine 2 days later. Rather, the issue for the jury was whether such a need existed in the morning of 31 March. The Crown relied upon evidence from the nurses who attended him over the last 3 days of his life.

36 By the evening of 29 March, the notes record Mr Owen as "settled and comfortable" and during the night of 29/30 March as "settled and pain free".

37 On the morning of 30 March he was noted as seeming "comfortable and pain free on movement". For the next shift Nurse Colclough confirmed that he had been pain-free.

38 The night nurse Nurse Thompson on 30/31 March wrote "no changes to report overnight".

39 On Easter Sunday, 31 March 2002 after a period of sickness the Appellant came on duty for an early shift to find him still on the ward occupying a side room.

40 To Nurse Thompson she said "What's he still doing here?" and to Nurse Graham "I can't believe he's still here" the suggestion being that she was surprised and annoyed. At the handover, when Nurse Thompson told the Appellant that Mr Owen had been pain-free overnight and had not required analgesia the Appellant replied "I'll make sure he gets something this morning".

41 Mr Owen was conscious when at about 8.00am he was given a bed bath by Student Nurse Wendy Graham and HCA Nicky Harding, a procedure which involves turning the patient several times and is a well recognised opportunity to identify pain. Neither

saw any sign of pain or discomfort. During it the Appellant came in and told them "Lie him down flat and with any luck his lungs will fill with fluid and he will die", adding "He's going stiff already". They did not obey. In evidence the Appellant denied saying those words.

42 Wendy Graham had been so shocked that, unaware that Mr Owen had died, the same day she wrote an account of the events, thus:

"Today I witnessed something I hope I will never encounter again. It involves a lovely man whom I have looked after since the beginning of my placement. Today Sister Salisbury was in charge. Just as myself and Nicky were to commence bed bathing the gentleman, Sister Salisbury came into the room and said: 'Why is this man still being nursed sat up? When you have finished bed bathing him, lie him down flat. With any luck his lungs will fill with fluid and he'll die'. Nicky and I looked at each other in disgust and disbelief at what we had heard. We said nothing at that time. We made the gentleman comfy and placed two pillows under his head. We did not lie him flat. My emotions at the moment are mixed. Why somebody of Sister Salisbury's status could even contemplate speaking like that. I have seen the gentleman lying there since it happened this morning. I know he was for TLC, and up to that point had received excellent care. I couldn't stop thinking the last thing to go is a person's hearing. Did he hear her? Please say he didn't".

43 Harold Owen was with his father from late morning onwards and his father did not seem to him to be in any pain.

44 At 0850 the appellant accompanied by Nurse Brundritt gave Mr Owen an injection of 2.5mg diamorphine. The Crown's case was that since there was no clinical need for it and in the light of her comments, it was given for the purpose of hastening his death. She made what was alleged to be a false entry in the nursing notes timed at 0850 to explain the injection, writing "Full wash given, patient in pain on moving".

45 After his death, it was discovered that the intravenous drip had not been changed that morning and that it had inexplicably been switched off. The inference suggested was that the Appellant had abandoned the fluids knowing that she had set death in train with the injection.

46 The second injection of 2.5 mg diamorphine at 1250 was preceded by a further comment by the Appellant to Nurse Brundritt: "You know that Lizzie won't give him any", a reference to Nurse Crabtree, who was coming on duty in the afternoon. The evidence was that Mr Owen had not been in any distress or discomfort prior to this injection. There was no sign of any pain, discomfort or agitation when the Appellant and Nurse Brundritt went to give the second injection and by now Nurse Brundritt was troubled, telling the jury "I wasn't happy about it. I just didn't think that it was needed." but did not feel able to challenge the authority of the Appellant whom she described as unapproachable and intimidating. Mr Owen died at 3.15 pm

47 Apart from the Appellant, the only witness to suggest that there might have been some discomfort was Nurse Brundritt, She said that Mr Owen had seemed "in quite an agitated state" when they entered the room for the first 0850 injection, so that she did not challenge its propriety. A few minutes earlier Mr Owen had been conscious when the Appellant had suggested he be laid flat in the hope that he would die, so that when she returned soon afterwards with a hypodermic syringe his agitation was unsurprising. By that stage, however, the Appellant had already decided to give the injection, unaware of the state in which she would find him.

48 A few days later Sister Pountney had a conversation with the Appellant about whether Mr Owen had died comfortably. The Appellant said "Yes. Thanks to me. When the night staff went off duty he deteriorated but they hadn't given him anything. So I gave him something. I saw who was on a late duty and knew he would get nothing else, so I gave him another dose and that did the trick. He died at 3 o'clock." Sister Pountney was to stress the absence of "malicious intent". The Appellant told the jury:

"I wouldn't have said the words quite like that. I wouldn't have said: 'It did the trick'. I would have said: 'He died pain-free and with dignity'."

49 The sequence of events on 31 March coupled with the Appellant's comments at the time and subsequently, provided compelling evidence from which the jury could infer that her real purpose and intent that day was to end Frank Owen's life.

50 Grounds of Appeal now advance the proposition that the judge should have withdrawn from the jury Count 4 as lacking the sole inference that the appellant's intention was to hasten death and that she succeeded, in the same way as has been urged as to Count 3. As we have made plain in respect of Count

3 and for the same reasons we reject that argument.

51 A number of witnesses spoke of the adverse effects of diamorphine, particularly in frail patients whose breathing is already compromised.

52 Professor Forrest, an expert, confirmed that a 2.5 mg dose of diamorphine would, on the balance of probabilities, have hastened Mr Owen's death. The Appellant herself knew the effect which diamorphine would have if administered inappropriately.

53 If the Appellant did use the words recalled by Sister Pountney -- including the reference to seeing who was on a late duty and knowing that no diamorphine would be given -- it was important evidence of the Appellant's true wish to hasten Frank Owen's death. The conviction on Count 4, like the conviction on Count 3, could only be unsafe if there were no sufficient evidence to justify the inference of an intent to hasten death. The circumstantial evidence was powerful. The contemporaneous written note of Student Nurse Wendy Graham was compelling. The comments made by the Appellant to nursing colleagues before, at the time, and after the event were evidence upon which the jury was entitled to rely as proving the Appellant's state of mind at the time the diamorphine was administered. It was entitled to reject the Appellant's own account and to prefer the mutually corroborative accounts of the various witnesses.

54 The judge was correct to reject the submission at the conclusion of the case for the Crown, the jury was entitled to return a verdict of guilty and the conviction is not unsafe.

The Training Course

55 That certain witnesses were to attend and subsequently attended a training course on the giving of evidence was not until Day 1 of the trial disclosed to the defence. In hindsight, as the judge clearly concluded in his ruling, such limited information as the Crown possessed should have been disclosed.

56 The defence applied to have the evidence of all witnesses who attended the training course ruled inadmissible under PACE s. 78, alternatively for the proceedings to be stayed on the grounds of abuse of process.

57 The Court heard on the voir dire oral evidence from inter alia Sally Hatfield (counsel specialising in medical law and clinical negligence, who conducted the course), and Detective Sergeant Alan Segrott (Officer in the Case).

58 The judge gave a lengthy and fully reasoned ruling entirely in accordance with the principles subsequently confirmed by the Court of Appeal in R v. Momodu and Limani [2005] 2 Cr.App.R. 6. and in the unreported case of Ultraframe v Fielding (2003) EWCA Crim 3755.

59 The sole point upon which Mr Birkett QC sought to rely was the non-disclosure. It is thus unnecessary to consider in detail the content of the course. In brief, it was as the judge concluded an exercise more accurately entitled "witness familiarisation". It became clear during the limited cross-examination of witnesses who had attended the course that nothing untoward had taken place and that a warning in the most forceful and appropriate terms was sounded about the impropriety of discussing evidence. There was no question of any witness having a copy of his or her witness statement to study or pass around before the trial. Stringent arrangements were made for witnesses to read their statements a day or two before they came to court, in controlled conditions.

60 There is no challenge to the learned Judge's ruling on the issue following the voir dire. A model of clarity and balance, it included the following comments:

"24. In my view, the attendance of Crown witnesses upon a witness training course, whatever its title, was without question a matter for disclosure to the defence well before the trial. ... I agree that the defence would have been entitled to raise their anxiety before me at one of the pre-trial hearings held in February and March 2004. It is unfortunate that such limited disclosure as could be made was not made at a much earlier stage in these proceedings. I am quite satisfied, however, that no-one on the Crown side sought to take advantage of the defendant. ...

25. If, however the defence had been in a position to raise that anxiety, my power to intervene would have been limited. I could only have expressed a strong view whether the course content was suitable. I could not have prevented the witnesses' employers providing such training to their employees. At trial my task would have been, as it now is, to judge whether the evidence of those witnesses should be excluded under section 78.

26. The question I now have to resolve in considering both of Mr Birkett's submissions is whether an unfair advantage has been obtained by the Crown or an unfair prejudice suffered by the

defendant. In my view, it manifestly has not. As soon as the Crown were alive to the ramifications, full disclosure was made and the matter aired in the voir dire. It transpires that the course was designed to avoid the risk of an accusation of witness coaching.

27. There is, in my view, a difference of substance between the process of familiarisation with the task of giving evidence coherently and the orchestration of evidence to be given. The second is objectionable and the first is not.

28. The course was delivered by a member of the Bar I judge to have been well aware of the implications. She took pains to ensure that any witnesses who attended her courses knew of the possible consequences of collusion and she forbade it. No attempt was made to indulge in application of the facts of this case, or anything remotely resembling them. True it is that witnesses would have undergone a process of familiarisation with the pitfalls of giving evidence and were instructed how best to prepare for the ordeal. This, it seems to me, was an exercise any witness would be entitled to enjoy were it available. What was taking place was no more than preparation for the exercise of giving evidence. No-one engaged in special pleading with a view to gaining any expertise beyond the application of sound common sense.

29. I do not accept that this training, if that is the correct description, was capable of converting a lying but incompetent witness into a lying but impressive witness. Having considered the course content in some detail it seems to me the witnesses can have gained only a rudimentary understanding of what was to come and received no coaching in how to lend a specious quality to their evidence. What they would have received was knowledge of the process involved. It was lack of knowledge and understanding which created demand for support in the first place. Acquisition of knowledge and understanding has probably prepared them better for the experience of giving evidence. They will be better able to give a sequential and coherent account. None of this gives them an *unfair* advantage over any other witness. Although ease of manner or confidence in the witness box, if it exists, may be a matter for consideration by a jury, it does not seem to me that the ultimate judgment whether the witness is credible or reliable will depend upon such considerations. In so far as they may, Mr Birkett now has available all the material he needs to warn the jury against complacency. In my judgment, the process of the trial itself will deal satisfactorily with any disadvantage to which the defendant has been put."

61 In R v Momodou and Limani (supra) Judge LJ held as follows:

"48. There is a dramatic distinction between witness training or coaching, and witness familiarisation. Training or coaching for witnesses in criminal proceedings (whether for Crown or defence) is not permitted. This is the logical consequence of well-known principle that discussions between witnesses should not take place, and that the statements and proofs of one witness should not be disclosed to any other witness. (See Richardson [1971] CAR 244; ***Arif***, unreported, 22nd June 1993; **Skinner** [1994] 99 CAR 212; and Shaw [2002] EWCA Crim 3004.) The witness should give his or her own evidence, so far as practicable uninfluenced by what anyone else has said, whether in formal discussions or informal conversations. The rule reduces, indeed hopefully avoids any possibility, that one witness may tailor his evidence in the light of what anyone else said, and equally, avoids any unfounded perception that he may have done so. These risks are inherent in witness training. Even if the training takes place one-to-one with someone completely remote from the facts of the case itself, the witness may come, even unconsciously, to appreciate which aspects of his evidence are perhaps not quite consistent with what others are saying, or indeed not quite what is required of him. An honest witness may alter the emphasis of his evidence to accommodate what he thinks may be a different, more accurate, or simply better remembered perception of events. A dishonest witness will very rapidly calculate how his testimony may be "improved". These dangers are present in one-to-one witness training. Where however the witness is jointly trained with other witnesses to the same events, the dangers dramatically increase. Recollections change. Memories are contaminated. Witnesses may bring their respective accounts into what they believe to be better alignment with others. They may be encouraged to do so, consciously or unconsciously. They may collude deliberately. They may be inadvertently contaminated. Whether deliberately or inadvertently, the evidence may no longer be their own. Although none of this is inevitable, the risk that training or coaching may adversely affect the accuracy of the evidence of the individual witness is constant. So we repeat, witness training for criminal trials is prohibited.

49. This principle does not preclude pre-trial arrangements to familiarise witness with the layout of the court, the likely sequence of events when the witness is giving evidence, and a balanced appraisal of the different responsibilities of the various participants. Indeed such arrangements, usually in the form of a pre-trial visit to the court, are generally to

be welcomed. Witnesses should not be disadvantaged by ignorance of the process, nor when they come to give evidence, taken by surprise at the way it works. None of this however involves discussions about proposed or intended evidence. Sensible preparation for the experience of giving evidence, which assists the witness to give of his or her best at the forthcoming trial is permissible. Such experience can also be provided by out of court familiarisation techniques. The process may improve the manner in which the witness gives evidence by, for example, reducing the nervous tension arising from inexperience of the process. Nevertheless the evidence remains the witness's own uncontaminated evidence. ... The critical feature of training of this kind is that it should not be arranged in the context of nor related to any forthcoming trial, and it can therefore have no impact whatever on it."

62 We have considered whether, having regard to this guidance, the witness training that took place in the present case was open to objection. We have concluded that it was not. There is in our judgment no force in the complaint that non-disclosure contributes to the convictions upon these two counts being unsafe.

63 For the reasons that we have given, this appeal is dismissed.

END OF DOCUMENT

Prosecution Authorities

4. *R v. Skinner* (1994) 99 Cr App R 212, at 217, quoting *R v. Arif*, The Times, June 22, 1993.

Westlaw.

[1994] 99 Cr. App. R. 212 Page 1
1993 WL 964106 (CA (Crim Div)), (1994) 158 J.P. 931, (1994) 99 Cr. App. R. 212, (1994) 158 J.P.N. 701, (1993) 137 S.J.L.B. 277, [1994] Crim. L.R. 676, (1994) 158 L.G. Rev. 701
(Cite as: (1994) 99 Cr. App. R. 212)

*212 R. v. Gary **Skinner**

Court of Appeal

CA (Crim Div)

(Lord Justice Farquharson, Mr Justice Alliott and Mr Justice Pill):

November 5, 8, 1993

Trial--Practice--Discussion by Police Witnesses Before Giving Evidence-- Whether Improper.

As a general rule, discussions between witnesses, particularly just before going into court to give evidence, should never take place. Nor should statements or proofs of evidence be read to witnesses in each other's presence.

*213 Dictum of Sachs L.J. in Richardson (1971) 55 Cr.App.R. 244, 251, [1971] 2 Q.B. 484, 490 considered. **Arif,** The Times, June 22, 1993, distinguished .

Appeal against conviction.

On July 10, 1992, in the Crown Court at Snaresbrook (Judge Marr-Johnson) the appellant was convicted by a majority of 11 to one of possessing a Class A prohibited drug ("ecstasy" tablets) with intent (count 3) and was sentenced to four years' imprisonment. His co-defendant Baker pleaded guilty on July 6, 1992, to possessing a Class B prohibited drug (amphetamine sulphate) (count 1) and on count 2 to a similar offence as the appellant. On August 25, 1992, he was sentenced to two years' imprisonment on count 1 and to six years' imprisonment concurrent on count 2. Also, a confiscation order in the sum of £ 16,400 was made to be paid within six months, in default nine months' imprisonment consecutive to the six years. Further, he was ordered to pay £375 towards the prosecution costs. Baker applied for leave to appeal against sentence. The Court allowed the application, which does not call for report, and varied his term of imprisonment to five years in all.

The facts appear in the judgment.

The appeal was argued on November 5 and 8, 1993.

J. Mitchell (assigned by the Registrar of Criminal Appeals) for the appellant.

Richard Travers for the Crown.

FARQUHARSON L.J.:

Gary **Skinner** appeared at the Snaresbrook Crown Court on July 6, 1992. He appeared there with the applicant in the next application, a man called Baker. Baker himself pleaded guilty to two counts of possessing drugs with intent to supply. The first was possession of a Class B drug, amphetamine; the second was the possession of a Class A drug with intent, in fact, the drug Ecstasy. In respect of those pleas Baker was, in due time, sentenced to terms of two years and six years' imprisonment concurrently. There was a confiscation order made in relation to the sum of £16,400 to be paid within six months and an order that he serve nine months consecutive in default of that payment. He was also ordered to pay costs.

Turning now to the present appellant. He was convicted, after a trial that took no less than five days, by the jury on an 11 to one majority. The offence of which he was convicted was possessing a Class A drug, once again Ecstasy tablets, with intent to supply. He was duly sentenced to a term of four years' imprisonment. Although there is no appeal against sentence, he now appeals against conviction of the charge that I have read out.

The circumstances of the case were that on December 6, 1991, four plain clothes police officers were lying in wait in two unmarked police vehicles in the Hampstead Road near Camden Town. They were on drugs patrol and were awaiting the arrival of a white Volkswagen pick-up van. When the vehicle came into view both police cars followed it. As the Volkswagen van pulled over the road and stopped on the opposite side, the two police vehicles pulled up, one in front and the other one behind.

The police officers, having alighted from their cars, walked up to the van where four men had emerged. At the time of their attempt to make arrests there was some disorder. Baker made a run for it and was

chased by one of the police officers. He was caught a little way along the road. Another man called Clive Fleming also ran. He was followed by another police officer and was allegedly seen to have thrown something into the side of the road as he ran away. Robinson, a youth who was the fourth party in the car being followed, made an attempt to run away and was stopped. Both Baker and Robinson were found to have drugs on their person.

The amount involved so far as Baker was concerned, coupled with the drugs that were found at his home subsequently, involved a value in excess of £ 11,000.

*214 At the time they left the vehicle, **Skinner** had made his way towards a telephone box and had begun to urinate. He was followed by two police officers, particularly by the officer who was subsequently in charge of the case, D.C. Simpson. That officer observed that the appellant was urinating, but as he approached he saw that the appellant had dropped a small black container onto the ground. That, when it was recovered subsequently, was shown to have 95 Ecstasy tablets inside it to a value of some £20 for each tablet.

The thrust of the prosecution case was that these four, all in possession of drugs to a different degree, were making their way to a night-club in Camden where it was submitted they proposed to sell the drugs.

The appellant denied throughout that he had been responsible for throwing the canister containing the 95 tablets on to the ground, and when challenged about it affected not to know anything about the tablets at all.

At the trial he did not give evidence. It was essentially part of his case that if the container was found there, the allegation that he himself had dropped it was untrue. So there was a head-on conflict between him and certainly D.C. Simpson.

The conviction of the appellant has been challenged by his counsel, Mr Mitchell, on a number of grounds, and I take them in turn. The first relates to the conduct of the officer in charge of the investigation, D.C. Simpson. It seems that there was some inefficiency in the administration of the case by Simpson because on the first day of the trial the exhibits did not even arrive at court.

However, during the course of the trial a more important matter emerged. The jury asked a question relating to whether there were any fingerprints found on the canister which it was alleged that the appellant had dropped. On giving evidence about it, D.C. Simpson said that he had not submitted the canister to the laboratory for fingerprint testing because he was of the view that there would be no purpose in it, in the sense that no prints would be found.

Overnight, it appeared, when the exhibits were sought, the canister had been submitted to the forensic science laboratory for fingerprint testing, so when the exhibits were brought back the following day it was necessary for D.C. Simpson to give evidence to that effect. When challenged as to what he said before, the Detective Constable said that he had been totally unaware that anybody had arranged for the canister to be submitted in the way that it obviously had. He had not arranged it and if anyone else had done so they did it without his authority.

The general thrust of cross-examination regarding this matter was that Simpson was behaving dishonestly, and that he was concealing the fact that the exhibits had been submitted to the forensic science laboratory to the prejudice of the appellant. In fact it has emerged that the analysis by the laboratory failed to identify any fingerprints on the canister. The most important criticism made by Mr Mitchell, in regard to this part of the case, is in relation to what the learned judge said about it in the course of his summing-up. That appears at p. 42 of the transcript of the summing-up, where he said:

"There is no evidence from which you could possibly infer that an examination of the case might have tended to show that the Defendant's fingerprints definitely were not, and could not, be on the canister. You have heard no evidence of that sort whatsoever. The truth of the matter is that the evidence really does not go any further than what Mr Simpson told you about it in his evidence."

Mr Mitchell says, and we accept with justice, that that puts the matter the wrong way around. The findings of the forensic science laboratory should not have been expressed as saying "does not show that the defendant's fingerprints were not upon *215 the canister". What should have been said is that "the appellant's fingerprints were not found to be on the canister"; in other words a positive statement in his favour, rather than in the double negative way in which it had been expressed by the learned judge. To that extent, so far as this part of the case is concerned,

we consider the criticisms made by Mr Mitchell to be justified.

On the other hand, having considered the matter, we are not of the view that the way in which the learned judge expressed the matter was so fundamentally wrong as to affect the justice of the conviction in the case.

The next matter which was raised by counsel concerned the question of what assets the appellant had at the relevant time. There was in existence, at the time of the trial, a statement from a D.C. Bullimore. He was the officer who had been instructed to investigate the assets of the appellant under the Drug Trafficking Offences Act 1986. At the time of the trial it appears the defence had not been shown Bullimore's statement and indeed, prosecuting counsel, Mr Travers, was not even aware of its existence. In fact the statement of Bullimore revealed that the appellant had no assets.

Two points, perhaps, can be made about this. First, it must have been clear to counsel, one would suppose, that such an inquiry had taken place, because inquiries always take place in an investigation of this nature when a drugs prosecution is undertaken for the reasons that are set out in the Act itself. In any case, in the course of this trial the jury had been informed that the appellant was on income support, so that must have indicated to them the limitations of his resources.

Counsel, however, still criticises the Crown in the sense that during the course of his final speech on these facts, prosecution counsel used this expression: "We do not know about **Skinner's** assets. How does this help you?" Well of course, in fairness to Mr Travers, he did not know the contents of Bullimore's statement at the relevant time; nonetheless, Mr Mitchell contends that that was prejudicial to his client. Had he been better informed, no doubt Mr Travers would have expressed himself differently. Once again, given that the jury knew that the appellant was on income support, we are of the opinion that it could not conceivably have influenced the verdict.

The most important issue raised in the course of the appeal, and one indeed which we adjourned from last Friday because we needed further help on any case law that could be found, related to an incident that occurred in the evidence of D.C. Belsham (one of the four arresting officers). When he was cross-examined, he agreed that before coming into Court, and on arriving at the Crown Court building, he and other officers had gone into a room at Court and discussed the case. He drew a distinction between discussing the case and discussing the evidence and he purported to say that it was common practice in these circumstances and at such a time for officers to talk together about the case.

Counsel was outraged at this evidence and challenged the officer very severely. Indeed, the general thrust of Mr Mitchell's criticism is that the officers, so far from only discussing the case, were dishonestly discussing the evidence between themselves for the benefit of the prosecution.

During the course of the cross-examination, and towards the end of it, while one of the police officers was under questioning in relation to this matter, the learned judge intervened. At p. 5 of the transcript appears this observation:

"There is rather a fine line there, is there not? I am bound to say that I do not quite see why officers should not discuss the sequence of events. But you mean that if there is a suggestion that they then attempt to tailor the evidence which they otherwise would have given that would be wrong, but they are two separate things, are they not?"

***216** There, the learned judge was attempting to draw the distinction between the two types of discussion, that is to say (1) one confined to the sequence of events and (2) where witnesses discuss their evidence together. It is a distinction, perhaps, which would be rather hard to apply in practice because the conversation on one basis would very quickly shade into the conversation on the other. The difficulty is that where conversations of that nature take place between witnesses it is almost inevitable, and certainly they would be suspected of it, that they discuss not only the case itself but the evidence which they are about to give.

The question then arises as to the propriety of such conduct. It has certainly been permissible, since Lord Goddard's time, for officers to confer together in the making up of their notebooks immediately after the events or interviews in which they have both been participating, as an aid to memory. That is shown by one of the cases that has been referred to this morning, namely the case of Bass (1953) 37 Cr.App.R. 51, [1953] 1 Q.B. 680. Furthermore, it has been the practice, certainly since the case of Richardson (1971) 55 Cr.App.R. 244, [1971] 2 Q.B.

484, that before coming into court witnesses can be shown their original statements, so that they can refresh their memory immediately before giving evidence. There has been no authority which directly bears upon the question of whether witnesses may discuss the matter together in the way it occurred in the present case. In some circumstances, of course, it is inevitable that discussions between witnesses will take place as where, for example, all the witnesses come from the same family. But it is a very different situation, in our judgment, when one is dealing with the evidence of police officers. Indeed, the rules should apply so far as they can be enforced in all circumstances.

This Court is clearly of the opinion that Mr Mitchell is correct when he says that it is wrong for a discussion of that kind to take place immediately before the witnesses, or any of them, go into court to give their evidence. The difficulties are manifest, and he has shown through a review of such cases as do assist us, such as Richardson and Bass, that the general thrust of the court's findings are that such conversations should never take place.

He has helpfully drawn together a number of principles which he is able to discern from the authorities, and some of them would be obvious to any practitioner. He emphasises that any rehearsal of the evidence of witnesses or the coaching of witnesses are practices to be strongly discouraged. He is assisted in that by dicta from the case of Richardson which I have already cited, where the learned judge giving the judgment of the Court, Sachs L.J., said at p. 251 and p. 490B:

"Obviously it would be wrong if several witnesses were handed statements in circumstances which enabled one to compare with another what each had said."

Whilst that is not directly the situation here, obviously the sense of what the Lord Justice is saying would apply in the present case. In other words, as a general rule, any discussions as to what evidence is going to be given by them should never take place between two or more witnesses.

Counsel goes on to say that statements or proofs should not be read to witnesses in each other's presence. That must obviously follow because it would amount to a discussion between the pair of them as to what evidence is going to be given; one would be enlightened by the evidence that is to be given by the other.

As a practice, therefore, the Court disapproves of such conferences taking place. It is to be hoped that they will not do so in the future. It is particularly important in the case of police officers because, as is well known, they are the only ones who give evidence fortified by the use of notes made at the time. In such a case, as indeed is the case here, witnesses can be attacked for giving evidence on grounds that they are giving not a true account of what occurred, but something which has been affected by the discussions they have had with somebody else.

***217** A further case was put before us which has not been fully reported but of which we have been given a transcript, named Dogan **Arif,** The Times, June 22, 1993. This shows that there may be exceptional circumstances where such conversations take place before the trial is heard; but that was an instance where what might be described as a "case conference" was called, in which various witnesses took part. Where it is necessary to discuss the evidence to ensure what course the prosecution should take in the presentation of its evidence at the trial, there may be occasions when such discussions can legitimately take place. Indeed, that is recognised in the case of **Arif.** But that, as Mr Mitchell points out, is a different situation from the one that applies here. It is one thing to have such a conference to plan the presentation of the case well ahead of the hearing, but a quite different thing where witnesses are drawn together immediately before the trial at the court house, and take part in the kind of discussions we have been referring to here. However, one cannot make an absolute rule, and that I think emerges from the judgment of Nolan L.J. in the case of **Arif.** He says this at p. 10 of the transcript:

"It follows, in our judgment, that the fact that there has been a pre-trial discussion of evidence between potential witnesses cannot be said to render the evidence of such witnesses at the trial so unsafe that it ought always to be excluded. Each case has to be dealt with on its own facts. In some cases it may emerge in the course of cross-examination at the trial of the witnesses concerned that such discussions may well have led to fabrication of the evidence in the sense which we have described. In such a case the court might properly take the view that it would be unsafe to leave any of the evidence of the witnesses concerned to the jury. There may however be other cases where the nature of such pre-trial discussions is such that it would be quite sufficient to draw to the jury's attention in the course of summing up the

implications which such conduct might have for the reliability of the evidence of the witnesses concerned. In each case it must be a matter for the trial judge."

Mr Mitchell complains that the learned judge dealt with this in the wrong way and did not put the matter before the jury in the way that could have, to some extent, cured the defect in the presentation of the case, and put the matter properly in perspective for the jury's consideration. I have already referred to the point where the learned judge interrupted counsel's cross-examination of one of the police witnesses, but I turn now to see what he did say to the jury in this context. That appears at p. 42 of the transcript, lower down on the page. It is an important passage which has been referred to on a number of occasions during the course of argument. The learned judge said this:

"Then it was also said that the police officers conferred together--as one or more of them told you--before they came into court to give evidence. For what it is worth, I have to say that I do not see anything wrong with their doing that but, of course, it does enable the Defence to make this comment; that if they have put their heads together that is an excellent opportunity for them to each find out what the other is saying. The Defence may fairly comment that if the opportunity is abused it gives the officer an opportunity to tailor his evidence to say something which he would not otherwise say. If the officers had made up their minds to lie about it, it gives them an opportunity to get their lies straight, as it were, so they are telling the same story. So that, if you like, is the down side from a practice of this sort."

He then goes on to put the Crown contentions.

Mr Mitchell has analysed this particular direction very thoroughly. He says that the ***218** learned judge, even putting it in this way at all, did not put it fairly because he made his observations conditional, that is to say that he was not accepting there had been any impropriety. It is perfectly plain from the outset that the learned judge had made it clear, as indeed was obvious to all the jury, that the officers had discussed the evidence in that way. He did say, "I have to say that I do not see anything wrong with their doing that", and Mr Mitchell again rightly criticises the learned judge's observations for the reasons that I have attempted to give. A further criticism is that the learned judge did not forcibly enough put before the jury the fact that such conduct was to be disapproved of and deplored. In those circumstances, argues Mr Mitchell, the conviction ought to be quashed on that ground alone, quite apart from the others which he has advanced.

We do not see the argument in that way. As appears from the case that I have just cited, namely **Arif,** it is a matter for the judge to deal with in his own way according to the particular circumstances that apply at the time. His task is to bring to the notice of the jury what the learned judge in this case properly described as the "down side" of what had undoubtedly taken place. In other words, the jury should have very clearly put before them the fact that because the conference had taken place and the interchange of recollections of evidence which is to be inferred from what occurred, they should bear in mind that the evidence for that reason is all the more suspect. To use his own words, "if the officers had made up their minds to lie about it, it gives them an opportunity to get their lies straight". So long as the jury have in mind that that is a consequence that would arise from this kind of conduct, it seems to us that it is sufficient. We do not, however, in the same breath, approve of the way in which he approached the matter for the reasons I have already explained. It is not correct to say there was nothing wrong with conferences of the kind that I have been describing.

There are certain other criticisms of the summing-up. Mr Mitchell, I hope, will forgive me if I do not go through them all. At one stage, the learned judge did inform the jury that the drugs allegedly thrown away by Fleming had been the subject of a search on the part of police dogs and that nothing had been found. In fact, says Mr Mitchell, no such evidence of a search was ever given and the judge was wrong to refer to it. He said that the fact that there had been a search which was unsuccessful was prejudicial to his client's case. For my part, I have not entirely understood the way in which Mr Mitchell was putting it, but certainly in the later part of the same point he criticised D.C. Simpson for a statement that he made during the course of the interview of the appellant after his arrest. Simpson said in the interview that the appellant and Baker had both been seen to throw away canisters. In fact, the truth of the matter was that Baker was never seen to throw away a canister. When he was caught in the way I have already described, he was searched and the drugs were found upon him. The fact that D.C. Simpson had made that misleading comment was not the subject of any reference by the learned judge in the course of his summing-up.

Another, and perhaps more subsequential complaint, was made with regard to the evidence which counsel

had agreed between themselves should be edited out. It relates, of course, to the fact that the police cars were waiting for the arrival of the white van in the Hampstead Road on the evening of the arrest of the three accused. It was the subject of agreement between counsel that nothing would be said to the effect that the police were waiting for this particular van or were acting on information.

The learned judge in dealing with that part of the case says this at p. 18 of the transcript:

"It must be quite apparent now that the police were anxious to track down a source of drugs which was coming to Camden Palace, which we are told is a night-club of some sort.... I am afraid I certainly do not know anything about ***219** the Camden Palace but it seems to be a nightspot of some sort in north London. In the time honoured phrase beloved by the police, 'acting on information received'--that is to say, they had some unspecified information from somewhere--they were in effect lying in wait in unmarked parked cars, in the general area of Hampstead Road in North London."

Furthermore, a little further down in the course of the summing-up, he refers to the vehicle which they were waiting for coming into the view of the officers who were sitting in the two cars. Then he goes on to describe how, when the white Volkswagen van came into their sight, they followed it in the way I have already outlined.

This kind of evidence should never be placed before a jury. To say the police were acting as a result of information received is simply to refer to inadmissible and prejudicial hearsay evidence. Whilst the criticism made by Mr Mitchell once again is one that is right, one cannot suppose that the jury were in fact so out of touch and ill-informed as not to realise precisely what is happening when two police cars wait in one position and immediately follow a car that comes upon the scene.

For that reason also we are of the view that this is not a serious matter in the sense that it does not affect our feelings that the conviction is just.

If we are wrong in each of the points in which we have said that Mr Mitchell's criticisms are justified in saying that there is no lurking doubt in our minds about the justice of the conviction, we would, in any event, have applied the proviso. However, for the reasons I have attempted to explain, we have not found it necessary to do so. For these reasons this appeal will be dismissed.

Representation

Solicitors: Solicitor, Customs & Excise.

Appeal dismissed.

END OF DOCUMENT

Prosecution Authorities

5. US Federal Rules of Evidence, found at http://www.law.cornell.edu/rules/fre/rules.htm.

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Federal Rules of Evidence

Contents & Context

These rules govern the introduction of evidence in proceedings, both civil and criminal, in Federal courts. While they do not apply to suits in state courts, the rules of many states have been closely modeled on these provisions.

Federal Rules of Evidence (2004)

(incorporating the revisions that took effect Dec. 1, 2003)

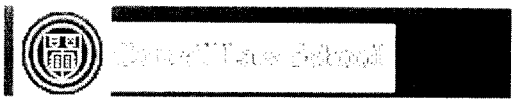
ARTICLE I. GENERAL PROVISIONS

18659

Rule **615**. Exclusion of Witnesses

At the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion. This rule does not authorize exclusion of (1) a party who is a natural person, or (2) an officer or employee of a party which is not a natural person designated as its representative by its attorney, or (3) a person whose presence is shown by a party to be essential to the presentation of the party's cause, or (4) a person authorized by statute to be present.

18660



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Federal Rules of Evidence

NOTES TO RULE 615

HISTORY:

(Jan. 2, 1975, P.L. 93-595, § 1, 88 Stat. 1937; Mar. 2, 1987, eff. Oct. 1, 1987.) (Amended Nov. 1, 1988; Amended Nov. 18, 1988, P.L. 100-690, Title VII, Subtitle B, § 7075(a), 102 Stat. 4405; Amended Apr 24, 1998, eff. Dec. 1, 1998)

AMENDMENTS:

1988. Act Nov. 18, 1988 inserted "a" before "party which is not a natural person".

1998. Dec. 1, 1998 insert "or (4) a person authorized by statute to be present." at the end of the last sentence.

Notes of Advisory Committee on Rules.

The efficacy of excluding or sequestering witnesses has long been recognized as a means of discouraging and exposing fabrication, inaccuracy, and collusion. 6 Wigmore §§ 1837-1838. The authority of the judge is admitted, the only question being whether the matter is committed to his discretion or one of right. The rule takes the latter position. No time is specified for making the request.

Several categories of persons are excepted. (1) Exclusion of persons who are parties would raise serious problems of confrontation and due process. Under accepted practice they are not subject to exclusion. 6 Wigmore § 1841. (2) As the equivalent of the right of a natural-person party to be present, a party which is not a natural person is entitled to have a representative present. Most of the cases have involved allowing a police officer who has been in charge of an investigation to remain in court despite the fact that he will be a witness. United States v. Infanzon, 235 F.2d 318 (2d Cir. 1956); Portomene v. United States, 221 F.2d 582 (5th Cir. 1955); Powell v. United States, 208 F.2d 618 (6th Cir. 1953); Jones v. United States, 252 F.Supp. 781 (W.D.Okl. 1966). Designation of the representative by the attorney rather than by the client may at first glance appear to be an inversion of the attorney-client relationship, but it may be assumed that the attorney will follow the wishes of the client, and the solution is simple and workable. See California Evidence Code § 777. (3) The category contemplates such persons as an agent who handled the transaction being litigated or an expert needed to advise counsel in the management of the litigation. See 6 Wigmore § 1841, n. 4.

Notes of Committee on the Judiciary, Senate Report No. 93-1277.

Many district courts permit government counsel to have an investigative agent at counsel table throughout the trial although the agent is or may be a witness. The practice is permitted as an exception to the rule of exclusion and compares with the situation defense counsel finds himself in--he always has the client with him to consult during the trial. The investigative agent's presence may be extremely important to government counsel, especially when the case is complex or involves some specialized subject matter. The agent, too, having lived with the case for a long time, may be able to assist in meeting trial surprises where the best-prepared counsel would otherwise have difficulty. Yet, it would not seem the Government could often meet the burden under rule 615 of showing that the agent's presence is essential. Furthermore, it could be dangerous to use the agent as a witness as early in the case as possible, so that he might then help counsel as a nonwitness, since the agent's testimony could be needed in rebuttal. Using another, nonwitness agent from the same investigative agency would not generally meet

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government counsel's needs.

This problem is solved if it is clear that investigative agents are within the group specified under the second exception made in the rule, for "an officer or employee of a party which is not a natural person designated as its representative by its attorney." It is our understanding that this was the intention of the House committee. It is certainly this committee's construction of the rule.

Notes of Advisory Committee on 1987 amendments to Rules.

The amendment is technical. No substantive change is intended.

Notes of Advisory Committee on 1988 amendments to Rules.

The amendment is technical. No substantive change is intended.

Notes of Advisory Committee on 1998 amendments to Rules.

The amendment is in response to: (1) the Victim's Rights and Restitution Act of 1990, 42 U.S.C. § 10606, which guarantees, within certain limits, the right of a crime victim to attend the trial; and (2) the Victim Rights Clarification Act of 1997 (18 U.S.C. § 3510).

Prosecution Authorities

6. Michael H. Graham, Commentary of Rule 615 of the Federal Rules of Evidence, 2 Handbook of Fed. Evid. § 615:1 (6th ed.)

Handbook of Federal Evidence
Current through the 2006 Update
Michael H. Graham[FNa0]

Article VI. Witnesses
Rule 615. Exclusion of Witnesses
Commentary

615:1 Exclusion and separation of witnesses

Primary Authority

Fed. R. Evid. 615

If a witness hears the testimony of others before he himself takes the stand, he will find it much easier to deliberately tailor his own story to that of other witnesses. Witnesses may also be influenced subconsciously. In either event, the cross-examiner will find it more difficult to expose fabrication, collusion, inconsistencies, or inaccuracies with respect to witnesses who have heard others testify.[FN1] Separation prevents improper influence during the trial by prohibiting witness to witness communication both inside and outside the courtroom.[FN2]

At common law the court in its discretion could exclude witnesses in the interests of the ascertainment of truth.[FN3] Rather than adopting a discretionary approach, Rule 615 treats the exclusion of witnesses as a matter of right--"At the request of a party, the court *shall* order witnesses excluded."[FN4] The court is also empowered to order exclusion on its own motion. A request to exclude witnesses is often referred to as "invoking the rule on witnesses." No time period is specified in which to make the request. [FN5] Several standards have been applied in determining whether a failure of the court to order exclusion of a witness requires a reversal of the judgment.[FN6]

Under Rule 615 not all witnesses may be excluded and separated. The rule does not authorize exclusion of (1) a party who is a natural person,[FN7] or (2) an officer or employee of a party which is not a natural person designated as its representative by its attorney which includes an investigative agent of the government,[FN8] or (3) a person whose presence is shown by the party to be essential to the presentation of the cause,[FN9] or (4) a person authorized by statute to be present.[FN10]

An example of a witness whose presence may be essential is an expert witness. It is certainly essential to give counsel the benefit of his expert's assistance while an expert for the other party is testifying. Similarly assistance may be needed in connection with other technical matters as to which counsel lacks sufficient familiarity to try the case effectively on his own. A strong argument can be made for also permitting the presence of an expert witness who intends to give his opinion at trial based in part on evidence presented at trial, Rule 703.[FN11]

Exclusion and separation does not extend to rebuttal witnesses[FN12] or witnesses called to impeach credibility.[FN13]

While Rule 615 provides solely for the exclusion of witnesses from the courtroom, the court may take further measures of separation designed to prevent communication between witnesses,[FN14] such as ordering them to remain physically apart, ordering them not to discuss the case with one another,[FN15] ordering an attorney not to convey the substance of one witness' testimony to another witness[FN16], and ordering witnesses not to read a transcript of the trial testimony of another witness.[FN17]

If a witness violates an order of exclusion or separation,[FN18] the appropriate remedy is committed to the sound discretion of the court.[FN19] The court may declare a mistrial,[FN20] refuse to permit a witness to testify,[FN21] permit cross-examination concerning the violation,[FN22] or instruct the jury to weigh the credibility of the witness in light of the witness' presence in court or discussions with another witness.[FN23] The court may also hold the witness in contempt.[FN24] However the thrust of judicial opinion absent compelling circumstances is against the simple remedy of disqualifying the witness.[FN25] Unfortunately once it is decided to permit the witness to testify, the remaining alternatives are not without their drawbacks:

> A contempt citation punishes the witness and may perhaps deter future misconduct but "does nothing to extinguish any false testimony which the witness may have fabricated by listening to other witnesses." The comment, while useful, may have unwarranted repercussions where the witness remained in the courtroom but his testimony was unaffected. A derogatory comment on his credibility may actually distort the truth.[FN26]

The best remedy is to avoid the problem as much as possible by the court impressing upon both the witness and counsel in the first place the importance of obeying the court's ruling excluding and separating the witness.[FN27]

ADVOCACY NOTES

Co-defendant plea agreement during trial. Edmonds v. State, 138 Md.App. 438, 771 A.2d 1094, 1103 (2001) ("We hold that a trial court is not required, either by Rule 5-615, its purpose, its policies, or its 'spirit,' to exclude a former co-defendant's testimony in these circumstances. Nevertheless, we agree with the trial court that when a co-defendant negotiates a separate plea agreement after having heard much of the prosecution's case-in-chief, there is reason for concern about influenced, tailored, or manufactured testimony. There simply is no denying that a co-defendant who 'turns State's witness' during trial may have been 'taught' by testimony that he would not have heard if the plea agreement had been reached before trial, and then may craft his testimony to bolster the State's case in order to secure a plea agreement, at the expense of the remaining defendant. Here, the trial court recognized this possibility, and took mitigating steps to address it. Even though it correctly concluded that the sequestration rule did not apply, the court gave appellant nearly all of the same remedies he might have obtained under Rule 5-615. We hold that the trial court acted properly in doing so. A trial court faced with a mid-trial plea of one co-defendant must determine on a case by case basis whether to afford the remaining defendant any of the remedies available under Rule 5-615. Cf. Redditt, 337 Md. at 629, 655 A.2d 390 ('whether there is to be a sanction and, if so, what sanction to impose, are decisions left to the sound discretion of the trial judge').").

Conference between attorney and testifying witness; granting recess. See generally People v. Lamont Branch, 83 N.Y.2d 663, 612 N.Y.S.2d 365, 634 N.E.2d 966, 967-69 (1994):

> There can be no question that once a witness takes the stand the truth-seeking function of a trial will most often be best served by requiring that the witness undergo direct questioning and cross-examination without interruption for counseling (see, Perry v. Leeke, 488 U.S. 272, 282, 109 S.Ct. 594, 600, 102 L.Ed.2d 624; see also, People v. Enrique, 80 N.Y.2d 869, 587 N.Y.S.2d 598, 600 N.E.2d 229, affg. on opn. below, 165 A.D.2d 13, 17, 566 N.Y.S.2d 201, 203; People v. Narayan, 58 N.Y.2d 904, 460 N.Y.S.2d 503, 447 N.E.2d 51). Indeed, a trial court may reject a request by a defendant to speak with his or her attorney during testimony despite the defendant's conceded right to counsel (see, Perry v. Leeke, supra, 488 U.S. at 284, 109 S.Ct. at 601). Nonetheless, in rejecting the contention that trial courts must allow attorney-client conferences to testifying witnesses, the Supreme Court and our Court have been careful to note that trial courts may allow such conferences as a matter of discretion (see, id., at 284, 109 S.Ct. at 601; see also, People v. Enrique, 80 N.Y.2d 869, 587 N.Y.S.2d 598, 600 N.E.2d 229, affg. on opn. below, 165 A.D.2d 13, 22, 566 N.Y.S.2d 201, 206, supra). Though the Perry line of cases dealt with midtestimony conferences

involving defendants, we see no reason why the rules articulated in those cases should not apply generally to other witnesses, including the prosecution witness here (see, Perry v. Leeke, supra, 488 U.S. at 282, 109 S.Ct. at 600).

Thus, the decision to grant a recess and to allow a conference between a lawyer and a testifying witness falls within the broad discretion allowed a trial court in its management of a trial. This Court, as a court of law, may reverse such decisions only for legal error, i.e., "the case presented shows no room for the exercise of * * * reasonable discretion" (Matter of Coombs v. Edwards, 280 N.Y. 361, 364, 21 N.E.2d 353). We are not free to substitute our judgment for that of the trial court when conflicting facts and inferences reasonably support a decision for or against a certain result (see, Cox v. Lykes Bros., 237 N.Y. 376, 382, 143 N.E. 226; Matter of Droege, 197 N.Y. 44, 53, 90 N.E. 340).

The Trial Judge in this case was confronted with the possibility that a witness was testifying falsely at the trial, thereby jeopardizing a criminal prosecution and exposing himself to perjury charges. Significantly, it was alleged that the witness was lying, not because of anything the prosecutor had done or failed to do, but because of a hallway confrontation that would not have occurred had court security personnel followed instructions. Faced with the need to make sure the court's truth-seeking function was not impaired-- either by witness intimidation or by improper witness coaching by the prosecution--the court chose a sound middle path that allowed the People a chance to rehabilitate their case to some extent, yet fully protected both defendant's right to cross-examination and the jury's authority to make informed determinations as to facts and credibility. The court required that the witness be told that he was under no obligation to speak to the prosecutor, it informed the jury that the witness had been removed so that the prosecutor could confer with him and it barred the People from introducing any details about why Edwards changed his story other than the equivocal testimony that he was frightened. The two directly contradictory statements made under oath by Edwards remained on the record for the jury's consideration, both as a matter of credibility and as a matter of fact. Further, the court allowed the defense the opportunity to cross-examine the witness about the conference and about the change in testimony. The defense was also allowed, in summation, to urge the jury to consider whether improper coaching might have caused the change in testimony.

In light of these safeguards undertaken to preserve both the truth-seeking function of trial and defendant's rights, we conclude that the trial court did not abuse its discretion. The dissent correctly points out that the trial court had at its disposal other means of dealing with this problem, including an in camera conference with the witness or simply leaving the People to impeach Edwards pursuant to CPL 60.35. Perhaps other Judges would have handled the matter differently, but that is not the standard of review on this appeal. The question is whether the Judge erred as a matter of law. In our view, the solution chosen here fell well within the broad scope of discretion allowed to a trial court.

Our decision today is consistent with decisions in other jurisdictions preserving the trial court's authority to allow midtestimony conferences between the prosecution and a witness when appropriate safeguards are in place. In United States v. Malik, 800 F.2d 143, a witness changed his testimony after a prosecutor routinely conferred with the witness during recesses without the court's authorization. The Seventh Circuit concluded there was no error. The court found it significant that "the jury [was] advised of the conversation and heard the witness make the correction subject to cross-examination by defense counsel" (800 F.2d, at 149). In United States v. De Jongh, 937 F.2d 1, the First Circuit found no error where the prosecutor and a witness met privately between her direct testimony and cross-examination. The court noted that "the defense, the court, and the jury were fully informed of the meeting and its circumstances in ample time to assess their effect, if any, on [the witness's] credibility" (937 F.2d, at 3). Similarly, in State v. Delarosa-Flores, 59 Wash.App. 514, 799 P.2d 736, review denied 116 Wash.2d 1010, 805 P.2d 814, a 67-year-old rape victim was allowed to confer privately with a prosecutor after she became anxious and gave an answer on direct examination that contradicted her pretrial statements. In finding no abuse of discretion, the Wash-

ington appellate court pointed out that if improper coaching did take place during the recess, the appropriate remedy was "[s]killful cross-examination" (59 Wash.App., at 517, 799 P.2d, at 738). Finally, in Frierson v. State, 543 N.E.2d 669, an Indiana appellate court found it proper for a trial court to allow a conference during direct testimony after a sexual assault victim became upset on the stand. As in Delarosa-Flores, the court held that the opportunity to cross-examine protected defendant's rights fully.

Though a trial court's discretion is not boundless, these decisions, like Perry v. Leeke and People v. Enrique (supra), underscore the wisdom of leaving trial courts with broad discretion to determine when a conference is called for and when it is not. A midtestimony conference may be a strategic maneuver designed to frustrate the other side's case, or it may be an important step toward making sure a flustered witness does not inadvertently misstate the facts. The trial court is in the best position to distinguish between the two. Its ruling necessarily turns on judgments we, as an appellate court, cannot easily make from a cold record: the apparent condition of the witness, the possible motivation of the attorney, the likelihood of undue delay, and the probability that cross-examination will be an adequate remedy. To unduly limit a trial court's discretionary power in matters concerning trial management increases the likelihood that rigid rules will replace common sense and that the truth-seeking function of a trial will be impaired not advanced.

Criminal defense witness may not be precluded from testifying. State v. Sequin, 73 Haw. 331, 832 P.2d 269, 273 (1992) ("We have said that where the rule has been invoked and clearly violated, the appropriate sanction is discretionary with the court. State v. Moriwaki, 71 Haw. 347, 353, 791 P.2d 392, 395 (1990). The court's discretion is limited in a criminal case if the rule has been violated by a defense witness. Because of sixth amendment concerns and the dictates of article I, § 14 of the Constitution of the State of Hawaii, we have held it to be error for a trial court to refuse to permit a defense witness to testify as a penalty for violating the rule. State v. Leong, 51 Haw. 581, 583-86, 465 P.2d 560, 562-63 (1970).").

Jury voir dire. Anderson v. State, 774 N.E.2d 906, 909-10 (Ind.App.2002) ("We acknowledge that Indiana Trial Rule 615 requires a trial court to grant a motion for separation of witnesses. We also believe that the case of Bell v. State, 495 N.E.2d 526, 527 (Ind.1986), although it predates the adoption of Rule 615, is instructive as to what a separation order is intended to protect against: witnesses hearing the testimony of other witnesses, or discussing their testimony, and tailoring their testimony accordingly. The Bell court discussed the general differences between trial testimony and jury voir dire and held it would not infer prejudice to the defendant from witnesses sitting through voir dire against the defendant's wishes. Id. The court did note, however, that the 'appellant's concern is not without some basis,' which suggests the possibility that a defendant could be prejudiced in such a situation if the claim of prejudice can be substantiated. Id.").

Multiple police officers. Stafford v. State, 736 N.E.2d 326, 330 (Ind.App.2000):

We believe Evid. R. 615 permits the designation of only one person as a representative of the State. The Rule provides that "an officer or employee of a party that is not a natural person designated as its representative" may not be excluded from the courtroom. This is in the singular--there is no indication that more than one officer, employee or representative is allowed when a separation of witnesses motion has been granted. And see Heeter, 661 N.E.2d at 615 (noting the "tradition of permitting a *police officer* to remain in the courtroom at counsel's table" (emphasis supplied)).

The language of the rule does not preclude, however, the designation of a second individual as an "essential" witness. In Bell v. State, 610 N.E.2d 229, 233 (Ind.1993), a case tried prior to the effective date of the rule, the trial court granted the State's request that two witnesses remain in the courtroom during the trial. Our supreme court af-

firmed on the ground Bell was not prejudiced by the presence of the two witnesses, but suggested the trial court may properly allow one witness as a representative of the State (now the second exception to Rule 615) and another witness to assist counsel (now the third exception to Rule 615 for "essential" witnesses). It stated "each party has a right to have *one* person in the courtroom to assist counsel. *Further*, a police officer may remain in the courtroom even though he is also a witness." Id. (citation omitted) (emphasis supplied).

We thus hold that it is not error under Evid. R. 615 to permit one witness to remain in the courtroom under the second exception as a party's designated representative and to permit one witness to remain under the third exception when a party can show that witness is "essential to the presentation of the party's cause." In light of our supreme court's statements that the State may have *one* person in the courtroom to assist counsel and may "further" have *a police officer* in the courtroom even though the officer is a witness, we must decline to adopt the State's proffered interpretation of the rule, which interpretation would potentially permit every witness to remain in the courtroom throughout a trial despite a separation of witnesses order.

Opening statement. State v. Harris, 839 S.W.2d 54, 68 (Tenn.1992) ("Placing witnesses under the rule or exempting them is within the sound discretion of the trial court. State v. Taylor, 645 S.W.2d 759 (Tenn.Crim.App.1982). The question of whether the rule must be applied upon request before opening statements was unsettled in Tennessee at the time of this trial. See 10 Raybin, Tennessee Practice, § 26.21 (1985). Rule 615, Tennessee Rules of Evidence (effective date January 1, 1990), requires that upon request, sequestration of witnesses shall be effective before opening statements.").

Rebuttal witness. State v. Hill, 590 N.W.2d 187, 189 (N.D.1999) ("At least one state appellate court has held sequestration does not apply to rebuttal witnesses. Martin v. State, 596 P.2d 899, 901 (Okl.Crim.App.1979). The sequestration rule, however, has clearly been applied to rebuttal witnesses by the federal courts. See, e.g., United States v. Ell, 718 F.2d 291, 292 (9th Cir.1983). Some state courts, as well, have applied the sequestration rule to rebuttal witnesses. See, e.g., State v. Swillie, 218 Neb. 551, 357 N.W.2d 212, 215 (1984). N.D.R.Ev. 615 does not expressly exclude application to rebuttal witnesses. We agree with the majority of courts which have applied the rule to rebuttal witnesses, giving the trial courts discretion whether to allow testimony by a rebuttal witness who has heard evidence in violation of a sequestration order. See, e.g., United States v. Hargrove, 929 F.2d at 320- 321 (it is not an abuse of discretion to allow testimony by a witness, who has heard prior testimony in violation of a sequestration order, which is offered to rebut, not conform with, the prior testimony)."); State v. Omechinski, 196 W.Va. 41, 468 S.E.2d 173, 177 n.6 (1996) ("We reject any notion that this rule should not be applied to rebuttal witnesses when those witnesses already have given testimony in the case-in-chief. The argument that exclusion is not required because the jury will have the opportunity to weigh the credibility of the rebuttal testimony in light of testimony previously given by the witness has force, but we believe on balance it is unsound. The purpose of the rule is to prevent witnesses from 'tailoring' their testimony to that of earlier witnesses and to aid in detecting testimony that is less than candid. Geders v. United States, 425 U.S. at 87, 96 S.Ct. at 1335, 47 L.Ed.2d at 598-99. These concerns are just as valid for a rebuttal witness who already has testified in the case-in-chief as they are for a primary witness. A witness may wish to tailor rebuttal testimony to conform to that of other witnesses as well as to cover up inconsistencies in earlier testimony that have been revealed by other witnesses. See 6 J. Wigmore, Evidence § 1840 at 470 (Chadbourn rev.1976) (the time for sequestration 'continues for each witness after he [or she] has left the stand, ... because it is frequently necessary to recall a witness in consequence of a later witness' testimony.' (Footnote omitted)).").

Recess discussion between criminal defendant and his attorney. Amos v. State, 618 So.2d 157, 161 (Fla.1993) ("In Thompson, the court denied Thompson consultation with his attorney during a thirty-minute recess requested by the prosecution. While we held in Bova that the error was harmless because of the overwhelming evidence of guilt, in Thompson, we held: 'Had the attorney-client consultation been allowed, defense counsel could have advised, calmed, and reassured

Thompson without violating the ethical rule against coaching witnesses.' Thompson, 507 So.2d at 1075. We found that we could not say that there was no reasonable possibility that the error did not affect the jury verdict. In this case, it was clear error for the court to prohibit Amos from speaking to his counsel during the recess period, and the prosecution precipitated the error by incorrectly advising the court on what the law is on this issue."); People v. Abrams, 260 Ill.App.3d 566, 197 Ill.Dec. 853, 631 N.E.2d 1312, 1317-18 (1 Dist.1994):

> The first issue presented for review concerns whether defendant was denied the benefit of counsel over the lunch recess which interrupted the trial when the State had only one more witness to call before it was to rest, after which defendant was to present his evidence. In Geders v. United States (1976), 425 U.S. 80, 96 S.Ct. 1330, 47 L.Ed.2d 592, the United States Supreme Court held that where, prior to an overnight recess, a trial court instructs a defendant and/or his counsel not to discuss anything about the case during the overnight break, the court had unconstitutionally deprived that defendant of the vital "guiding hand of counsel" (Geders, 425 U.S. at 89, 96 S.Ct. at 1335, 47 L.Ed.2d at 599 quoting Powell v. Alabama (1932), 287 U.S. 45, 68- 69, 53 S.Ct. 55, 63-64, 77 L.Ed. 158), which mandated a reversal of the defendant's conviction. In Geders, the recess came in the middle of the defendant's testimony after he had completed his direct testimony, but before the Government had commenced its cross-examination of him. The Court concluded that this was a critical time in the proceeding because it would be during the night that counsel and his client would confer to map strategy, obtain potentially valuable information from the defendant not disclosed during his testimony or merely to "discuss with counsel the significance of the day's events." Geders, 425 U.S. at 88, 96 S.Ct. at 1335, 47 L.Ed.2d at 599.
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> The rule of Geders has been expanded to strike orders which prohibit attorney/client consultations over the lunch recess (United States v. Conway (5th Cir.1980), 632 F.2d 641), or even during a 21-minute break in the conduct of a trial. (United States v. Allen (4th Cir.1976), 542 F.2d 630.) In Mudd v. United States (D.C.Cir.1986), 798 F.2d 1509, 1511, Judge Mikva, writing for the majority, opined that the lesson of the progeny of Geders was that "a trial court may not place a blanket prohibition on all attorney/client contact, no matter how brief the trial recess." This view of Geders was slightly modified by the Supreme Court in Perry v. Leeke (1989), 488 U.S. 272, 109 S.Ct. 594, 102 L.Ed.2d 624, where the court held that the sixth and fourteenth amendment guarantees of the right to counsel are not offended where the trial court proscribes consultations between the defendant and his attorney during a 15-minute recess which comes in the midst of the defendant's direct testimony. Leeke emphasized that its rule applied only when the trial court was compelled to interrupt the direct testimony of the defendant; therefore, in a context other than that present in Leeke, the conclusion of Mudd regarding the unconstitutionality of broad prohibitions on attorney/client conferences during recesses is not invalidated by that decision.

Requiring defendant to testify first. State v. Kido, 102 Hawai'i 369, 76 P.3d 612, 617-20 (App.2003) ("In Brooks v. Tennessee, 406 U.S. 605, 92 S.Ct. 1891, 32 L.Ed.2d 358 (1972), the United States Supreme Court confronted a Tennessee statute which provided that, in criminal cases, 'the defendant desiring to testify shall do so before any other testimony for the defense is heard by the court trying the case.' Id. at 606, 92 S.Ct. 1891, * * * Accordingly, the Supreme Court held that the Tennessee statute 'violates an accused's constitutional right to remain silent insofar as it requires him to testify first for the defense or not at all.' Id. at 612, 92 S.Ct. 1891. * * * Notably, some federal and state appellate courts, presented with averments of Brooks error, have declined to find constitutional error, (1) where the trial court required that the defendant testify before only some of his witnesses, (2) where the defendant's decision whether to testify congealed before the trial court's action, and/or (3) where the defendant himself created the exigency for taking his testimony first. In so holding, some of those courts have noted the distinction between the statutory directive in Brooks and the trial court directive before them, though none have explained why the distinction makes a constitutional difference. However, those cases are factually distinguishable from ours because the choice foisted upon Kido was effectively the same choice the Tennessee statute forced upon Brooks. See Brooks,

406 U.S. at 610-12, 92 S.Ct. 1891; United States v. Rantz, 862 F.2d 808, 811-12 (10th Cir.1988) (finding Brooks error because the defendant was required to testify 'before any other defense testimony'), cert. denied 489 U.S. 1089, 109 S.Ct. 1554, 103 L.Ed.2d 857 (1989); Cruz-Padillo v. State, 262 Ga. 629, 422 S.E.2d 849, 851 (1992) (citing Brooks and holding that 'the trial court violated [the defendant's] federal and state constitutional rights to remain silent and to due process by requiring him to testify before any of the other defense witnesses or not at all'). In addition, the record contains no indication that Kido had already decided to testify in any event. Or that Kido himself created an exigency that pushed him to the head of the witness list. The delay and inconvenience that would have been occasioned by waiting to bring Garcia to the courtroom--from elsewhere in the courthouse--would have been trifling indeed.").

Review on appeal. Hill v. State, 337 Ark. 219, 988 S.W.2d 487, 491 (1999) ("Conspicuously absent from appellant's brief is any discussion of Rule 616's applicability to the facts of this case. Nor has appellant demonstrated that any prejudice resulted from the trial court not excluding the witnesses. In fact, appellant never called the witnesses to take the stand. Prejudice is not presumed, and the court will not reverse absent a showing of prejudice. Clark, supra, 323 Ark. at 216-217, 913 S.W.2d 297."); State v. Lowe, 61 Conn.App. 291, 763 A.2d 680, 683 (2001) ("The defendant first claims that the court violated the sequestration order when it allowed Gill to testify as to chain of custody because Gill had heard all previous testimony while seated at the prosecution table, thereby depriving the defendant of a fair trial. We disagree. For the defendant to prevail on his claim, he must show that (1) the court violated a sequestration order and (2) he was prejudiced by the violation. See State v. Robinson, 230 Conn. 591, 599, 646 A.2d 118 (1994). 'A violation of a sequestration order does not automatically require a new trial .... The controlling consideration is whether the defendant has been prejudiced by the violation .... If the prejudice resulting from the violation is likely to have affected the jury's verdict, a new trial must be ordered.' (Citations omitted.) Id.; State v. Brown, 187 Conn. 602, 611, 447 A.2d 734 (1982). 'The burden is on the defendant to show prejudice in the trial court's failure to observe its sequestration order .... ' State v. Stovall, 199 Conn. 62, 69, 505 A.2d 708 (1986); see State v. Robinson, supra, at 599, 646 A.2d 118. Thus, the defendant bears the burden of demonstrating that 'it is more probable than not that the erroneous action of the court affected the result.' (Internal quotation marks omitted.) State v. Nguyen, 52 Conn.App. 85, 93, 726 A.2d 119 (1999), aff'd, 253 Conn. 639, 756 A.2d 833 (2000).").

Separation order does not alone include sequestration. State v. Jackson, 697 A.2d 1328, 1330 (Me.1997) ("Jackson contends the court erred by denying his motion to exclude Dyment's testimony. We disagree. The limited consequence of a sequestration order, pursuant to M.R.Evid. 615, is that witnesses are excluded from the courtroom until they have finished testifying. State v. Bennett, 416 A.2d 720, 726-27 (Me.1980). 'The primary function of sequestration is to prevent one witness from hearing the testimony of another so as to be able to conform his own testimony to that given by the other, especially that given in response to cross-examination.' State v. Cloutier, 302 A.2d 84, 90 (Me.1973). A sequestration order 'is not a general prohibition against witnesses talking about the case.' Bennett, 416 A.2d at 727. In the absence of any request for more stringent restrictions to be imposed by the court, the sequestration order in the instant case did no more than exclude witnesses from the courtroom until they were finished testifying. Thus the conversation that Dyment described between herself and Blouin was not a violation of the order.").

Support person allowed near witness while testifying. State v. Harrison, 24 P.3d 936, 940 (Utah 2001) ("It is established law in Utah that a witness of tender years may be accompanied by an adult to ease the emotional turmoil of testifying in court. See State v. Keeley, 8 Utah 2d 70, 71-72, 328 P.2d 724, 725 (1958). This practice is one legitimately within the trial court's inherent powers. Neither party has identified, nor do we find express authority for or limitation of, this practice either in statute or in court rule."); Gadberry v. State, 46 Ark.App. 121, 877 S.W.2d 941, 945, 946 (1994) ("Several other jurisdictions have allowed similar seating arrangements in cases involving minor victims who testify about sexual abuse. See Boatright v. State, 192 Ga.App. 112, 385 S.E.2d 298 (1989) (defendant's rights not violated when foster parent of child victims allowed to stand behind children during their testimony); Stanger v. State, 545 N.E.2d 1105 (Ind.App. 1 Dist.1989) (presence

of silent supportive adult seated behind child witnesses was not inherently prejudicial and did not violate due process rights); State v. Rogers, 213 Mont. 302, 692 P.2d 2 (1984) (no prejudice shown where child witness permitted to testify while sitting on the prosecuting attorney's lap); State v. Johnson, 38 Ohio App.3d 152, 528 N.E.2d 567 (1986), cert. denied 498 U.S. 826, 111 S.Ct. 81, 112 L.Ed.2d 54 (1990) (trial judge did not err in permitting eight-year-old victim to testify while sitting on aunt's lap); State v. Dompier, 94 Or.App. 258, 764 P.2d 979 (1988) (trial court entitled to permit child victim to testify while sitting on foster mother's lap); Commonwealth v. Pankraz, 382 Pa.Super. 116, 554 A.2d 974 (1989) (trial court did not abuse its discretion by permitting child witness to sit in grandmother's lap while testifying--no prejudice shown); Mosby v. State, 703 S.W.2d 714 (Tex.App. 13 Dist.1985) (a guardian ad litem who was seated behind child witness during child's testimony did not affect jury's assessment of the witnesses' credibility); State v. Hoyt, 806 P.2d 204 (Utah App.1991) (witness of tender years may be accompanied to witness stand by an adult to ease the inherent emotional turmoil of testifying); State v. Jones, 178 W.Va. 519, 362 S.E.2d 330 (1987) (no prejudice shown in allowing seven-year-old victim to testify while sitting on foster mother's lap).").

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[FN1] Perry v. Leeke, 488 U.S. 272, 280-283, 109 S.Ct. 594, 600-601, 102 L.Ed.2d 624 (1989) ("The reason for the rule is one that applies to all witnesses--not just defendants. It is a common practice for a judge to instruct a witness not to discuss his or her testimony with third parties until the trial is completed. Such nondiscussion orders are a corollary of the broader rule that witnesses may be sequestered to lessen the danger that their testimony will be influenced by hearing what other witnesses have to say, and to increase the likelihood that they will confine themselves to truthful statements based on their own recollections. The defendant's constitutional right to confront the witnesses against him immunizes him from such physical sequestration. Nevertheless, when he assumes the role of a witness, the rules that generally apply to other witnesses--rules that serve the truth-seeking function of the trial--are generally applicable to him as well. Accordingly, it is entirely appropriate for a trial judge to decide, after listening to the direct examination of any witness, whether the defendant or a nondefendant, that cross-examination is more likely to elicit truthful responses if it goes forward without allowing the witness an opportunity to consult with third parties, including his or her lawyer."); Geders v. United States, 425 U.S. 80, 87, 96 S.Ct. 1330, 1335, 47 L.Ed.2d 592 (1976) ("The aim of imposing 'the rule on witnesses,' as the practice of sequestering witnesses is sometimes called, is twofold. It exercises a restraint on witnesses 'tailoring' their testimony to that of earlier witnesses; and it aids in detecting testimony that is less than candid.").

See generally Opus 3 Ltd. v. Heritage Park, Inc., 91 F.3d 625, 628 (4th Cir.1996) ("Upon a party's request for witness sequestration, Federal Rule of Evidence 615 requires the court to exclude witnesses so that one witness cannot hear the testimony of another. The rule is designed to discourage and expose fabrication, inaccuracy, and collusion. Fed.R.Evid. 615 advisory committee's note; see also United States v. Leggett, 326 F.2d 613, 613 (4th Cir.) (noting that witness sequestration 'prevent[s] the possibility of one witness shaping his testimony to match that given by other witnesses at the trial'), cert. denied 377 U.S. 955, 84 S.Ct. 1633, 12 L.Ed.2d 499 (1964). The merit of such a rule has been recognized since at least biblical times. The Apocrypha, vv. 36-64, relates how Daniel vindicated Susanna of adultery by sequestering the two elders who had accused her and asking each of them under which tree her alleged adulterous act took place. When they gave different answers, they were convicted of falsely testifying. See 6 John H. Wigmore, Wigmore on Evidence § 1837, at 455-56 (James H. Chadbourn ed., 1976). It is now well recognized that sequestering witnesses 'is (next to cross-examination) one of the greatest engines that the skill of man has ever invented for the detection of liars in a court of justice.' Id. § 1838, at 463."); United States v. Jackson, 60 F.3d 128, 133 (2d Cir.1995), cert. denied 516 U.S. 980, 116 S.Ct. 487, 133 L.Ed.2d 414 (1995) ("Rule 615 codified a well-established common law tradition of sequestering witnesses 'as a means of discouraging and exposing fabrication, inaccuracy, and collusion.' Fed.R.Evid. 615, Advisory Committee Notes; see also Government of the Virgin Islands v. Edinborough, 625 F.2d 472, 475, 476 (3d Cir.1980); Frideres v. Schiltz, 150 F.R.D. 153, 158 (S.D.Iowa 1993)

(noting that '[s]equestering witnesses to assist in ascertaining truth is at least as old as the Bible'). The Supreme Court observed that this practice, which goes back to 'our inheritance of the common Germanic law,' serves two purposes: it 'exercises a restraint on witnesses "tailoring" their testimony to that of earlier witnesses; and it aids in detecting testimony that is less than candid.' Geders v. United States, 425 U.S. 80, 87, 96 S.Ct. 1330, 1335, 47 L.Ed.2d 592 (1976).").

[FN2] United States v. Romano, 736 F.2d 1432 (11th Cir.1984), opinion vacated on unrelated grounds 755 F.2d 1401 (11th Cir.1985).

[FN3] Kaufman v. United States, 163 F.2d 404 (6th Cir.1947), cert. denied 333 U.S. 857, 68 S.Ct. 726, 92 L.Ed. 1137 (1948), rehearing denied 333 U.S. 878, 68 S.Ct. 896, 92 L.Ed. 1154 (1948); United States v. Postma, 242 F.2d 488 (2d Cir.1957), cert. denied 354 U.S. 922, 77 S.Ct. 1380, 1 L.Ed.2d 1436 (1957), and 354 U.S. 922, 77 S.Ct. 1381, 1 L.Ed.2d 1436 (1957); Williamson v. United States, 310 F.2d 192 (9th Cir.1962); Taylor v. United States, 388 F.2d 786 (9th Cir.1967).

[FN4] United States v. Warren, 550 F.2d 219 (5th Cir.1977), cert. denied 434 U.S. 1016, 98 S.Ct. 735, 54 L.Ed.2d 762 (1978) (Rule 615 is mandatory in nature). Rule 615 adopts the position long advocated by 6 Wigmore, Evidence § 1839 at 467 (Chadbourn rev. 1976).

No error ordinarily occurs if an order under Rule 615 is not entered. See United States v. Williams, 136 F.3d 1166, 1169 (7th Cir.1998) ("It is not at all uncommon for trial attorneys to treat sequestration orders under Rule 615 in a nonchalant manner, but a cavalier approach is not advisable. Although sequestration requests are routinely made in cases where they are unnecessary, in cases where they are necessary, or at least advisable, attorneys should specifically note the rule and ask the trial judge to formally invoke it. Without taking these minimal steps, it will be the rare case indeed where we could conclude that a 'sequestration order' has been violated.").

As to agreements between counsel to exclude witnesses not brought to the attention of the trial court, see United States v. Arias-Santana, 964 F.2d 1262, 1266 (1st Cir.1992) ("Appellant chose to bypass the prospect of a *court-ordered* witness sequestration under Rule 615, however, then tardily sought retroactive relief from an alleged violation of a private understanding which he was unable to establish. In these circumstances, a defendant relies on undocumented understandings at his peril, and the district court quite reasonably decided not to interrupt the trial to engage in an extended *voir dire* where it was likely that the alleged scope of the sequestration agreement was unprovable. See Rossetti, 768 F.2d at 16 (witness discussions not improper where 'neither the prosecution nor the defense requested the court to instruct any witness not to discuss his testimony with another potential witness during the trial.'); see also United States v. De Jongh, 937 F.2d 1, 3 (1st Cir.1991) (absent formal request for witness sequestration order, trial court properly refused to strike testimony of witness who consulted with prosecutor prior to defendant's cross-examination of witness). We find no plain error.").

[FN5] See United States v. Brown, 547 F.2d 36 (3d Cir.1976), cert. denied 431 U.S. 905, 97 S.Ct. 1698, 52 L.Ed.2d 389 (1977) (request to exclude prior to opening is discretionary; no failure to exclude after opening as request not renewed.). Compare 6 Wigmore, Evidence § 1840 at 470 (Chadbourn rev. 1976) ("[T]he time for sequestration begins with the delivery of testimony upon the stand and ends with the close of testimony. It is therefore not appropriate during the reading of the pleadings or the opening address of counsel; * * *. It continues for each witness after he has left the stand, because it is frequently necessary to recall a witness in consequence of a later witness' testimony. It need not be demanded at the very opening of the testimony, at any time later, when the supposed exigency arises, the order may be requested."), with 3 Weinstein's Evidence ¶615[02] at 615-19 (1987) ("The practice is to exercise discretion to exclude prospective witnesses during openings and any arguments or proffers of proof where a witness' testimony may be summarized. The rule should be applied at hearings, as to suppress, and on other occasions when witnesses may be heard, as on sentencing.").

Failure to make a request prior to the commencement of testimony may result in Rule 615 not being invoked. See Blackmon v. Johnson, 145 F.3d 205, 211 (5th Cir.1998), cert. denied 526 U.S. 1021, 119 S.Ct. 1258, 143 L.Ed.2d 355 (1999) ("Blackmon also contends that the district court erred in not sequestering the witnesses during the evidentiary hearing and that the testimony of Robert Goodwin and Paul Ross should be stricken. Blackmon invoked the sequestration rule during the second day of testimony after witnesses entered the courtroom. The court did not order the witnesses sequestered because the rule had not bee invoked at the beginning of the proceedings and a witness for Blackmon had been present in the courtroom during the preceding day's testimony. * * * We have held that the district court's decision on the sequestration of witnesses is reviewed for abuse of discretion and a party must demonstrate 'sufficient prejudice' to warrant relief. Even if we were to agree that the trial court erred in not sequestering the witnesses, Blackmon is unable to demonstrate sufficient prejudice from the testimony of Goodwin and Ross.").

Rule 615 applies to pretrial suppression hearings, United States v. Warren, 578 F.2d 1058 (5th Cir.1978), rehearing denied 586 F.2d 608 (5th Cir.1978), rehearing 589 F.2d 254 (5th Cir.1979); United States v. Brewer, 947 F.2d 404 (9th Cir.1991). Compare United States v. West, 607 F.2d 300 (9th Cir.1979) (exclusion of witnesses at a preliminary evidentiary hearing rests in the discretion of the court; the mandatory exclusion of Rule 615 commences with the presentation of evidence at trial).

Rule 615 does not apply at the taking of a deposition. Fed.R.Civ.Proc. 30(c).

As to whether the request is timely if made after the requesting parties' witnesses have all testified was raised but not decided in William L. Comer Family Equity Pure Trust v. C.I.R., 958 F.2d 136, 140 (6th Cir.1992) ("Nothing in the rule specifies a time for making the request. The government relies on a Seventh Circuit decision which held that where one party makes no motion to exclude witnesses until after all their witnesses have testified, it is not an abuse of discretion to deny the sequestration motion. Mueller v. Cities Serv. Oil Co., 339 F.2d 303 (7th Cir.1964). This decision, however, was made prior to the adoption of Rule 615 and thus does not establish a clear precedent.").

Exclusion extends through closing arguments at trial, United States v. Juarez, 573 F.2d 267 (5th Cir.1978), cert. denied 439 U.S. 915, 99 S.Ct. 289, 58 L.Ed.2d 262 (1978). Compare 6 Wigmore, Evidence, § 1840 at 470 (Chadbourn rev. 1976) (ends with close of testimony).

[FN6] See generally United States v. Jackson, 60 F.3d 128, 136-37 (2d Cir.1995), cert. denied 516 U.S. 980, 116 S.Ct. 487, 133 L.Ed.2d 414 (1995):
This Circuit has not yet articulated the appropriate test for determining whether a Rule 615 violation amounts to reversible error. Recently, we have suggested in dicta that the harmless error standard applies. See Rivera, 971 F.2d at 890 ("[E]ven when a proper request has been made and a trial court has erred [under Rule 615], courts have ruled that not even Rule 52(a) harmless error, much less Rule 52(b) plain error, occurred."). Sister circuits exploring this issue agree that the appellate court must consider whether the party moving for sequestration was prejudiced by the error. See, e.g., United States v. Ramirez, 963 F.2d 693, 704 (5th Cir.), cert. denied506 U.S. 944, 113 S.Ct. 388, 121 L.Ed.2d 296 (1992); Pulley, 922 F.2d at 1286; United States v. Brewer, 947 F.2d 404, 411 (9th Cir.1991); Farnham, 791 F.2d at 335; Prichard, 781 F.2d at 183; Edinborough, 625 F.2d at 474. The circuits differ, however, as to who has the burden on the issue of prejudice. The majority of courts to consider this question requires the movant to show that the failure to sequester resulted in prejudice. See, e.g., United States v. Sykes, 977 F.2d 1242, 1245 (8th Cir.1992); Prichard, 781 F.2d at 179; Edinborough, 625 F.2d at 474.
A few courts reject this approach, however, and apply the harmless error test, placing the burden on the government to prove that failure to sequester was harmless, i.e., that it did not prejudice the movant. See, e.g., Pulley, 922 F.2d at 1286; Farnham, 791 F.2d at 335. But see United States v. Greschner, 802 F.2d 373, 376 (10th Cir.1986) (applying harmless error analysis, yet

putting burden on defendant to establish burden was prejudicial), cert. denied 480 U.S. 908, 107 S.Ct. 1353, 94 L.Ed.2d 523 (1987). These courts reason that a violation of Rule 615 should be presumed to result in prejudice, thereby requiring reversal unless the presumption is rebutted. See Brewer, 947 F.2d at 411 ("'[W]hen a court fails to comply with Rule 615, prejudice is presumed and reversal is required unless it is manifestly clear from the record that the error was harmless or unless the prosecution proves harmless error by a preponderance of the evidence.'") (quoting United States v. Ell, 718 F.2d 291, 293-94 (9th Cir.1983)). According to this rationale, any other approach places an unreasonable, even impossible, burden on the defendant. For example, the Fourth Circuit interprets

the mandatory, unambiguous language of the rule to reflect the drafters' recognition that any defendant [claiming there was a Rule 615 violation] would find it almost impossible to sustain the burden of proving the negative inference that the second agent's testimony would have been different had he been sequestered. A strict prejudice requirement of this sort would be not only unduly harsh but also self-defeating, in that it would swallow a rule carefully designed to aid the truth-seeking process and preserve the durability and acceptability of verdicts. Rule 615 thus reflects an a priori judgment in favor of sequestration. Farnham, 791 F.2d at 335.

We believe the correct view is that the burden to demonstrate lack of prejudice, or harmless error, properly falls on the party that had opposed sequestration. First, we agree that placing the burden of persuasion on the movant virtually demands the impossible; only with 20/20 hindsight could a party demonstrate what would have been said had a witness been sequestered. Moreover, placing the harmless error burden on the party that had opposed sequestration is consistent with Rule 615's express presumption in favor of sequestration. Thus, we hold that where case agents have been exempted in violation of Rule 615, a new trial is in order "unless it is manifestly clear from the record that the error was harmless or unless the prosecution proves harmless error by a preponderance of the evidence." Brewer, 947 F.2d at 411 (quoting Ell, 718 F.2d at 293-94).

Applying this analysis, we conclude that the case before us "is the exceptional case because the facts are such that any presumption of prejudice is rebutted." Farnham, 791 F.2d at 336. Even without the testimony of the three agents, the evidence presented in favor of the conviction was overwhelming).

[FN7] Varlack v. SWC Caribbean, Inc., 550 F.2d 171 (3d Cir.1977) (exclusion of party held reversible error).

The fact that the criminal defendant has the ability to hear prior testimony and tailor his testimony accordingly is a proper subject of comment during closing argument. Portuondo v. Agard, 529 U.S. 61, 72, 120 S.Ct. 1119, 1127, 146 L.Ed.2d 47 (2000) ("In sum, we see no reason to depart from the practice of treating testifying defendants the same as other witnesses. A witness' ability to hear prior testimony and to tailor his account accordingly, and the threat that ability presents to the integrity of the trial, are no different when it is the defendant doing the listening. Allowing comment upon the fact that a defendant's presence in the courtroom provides him a unique opportunity to tailor his testimony is appropriate--and indeed, given the inability to sequester the defendant, sometimes essential--to the central function of the trial, which is to discover the truth.").

The possibility that numerous parties, each similarly situated as to an event or controversy, may present an appropriate case for exclusion in spite of Rule 615(1) was raised in N.L.R.B. v. Stark, 525 F.2d 422 (2d Cir.1975), cert. denied 424 U.S. 967, 96 S.Ct. 1463, 47 L.Ed.2d 734 (1976), but not decided because of nature of applicability of rules of evidence to particular proceedings.

[FN8] United States v. Gonzalez, 918 F.2d 1129, 1138 (3d Cir.1990), cert. denied 498 U.S. 1107, 111 S.Ct. 1015, 112 L.Ed.2d 1097 (1991) ("The district court applied the second exception in disallowing Caba's motion. The witness whom Caba wished to sequester was the United States' designated representative. Many circuits recognize a 'case agent' exception to the typical rule of sequestration, basing the exception on Rule 615. See United States v. Machor, 879 F.2d 945, 953 (1st Cir.1989), cert. denied 493 U.S. 1081, 110 S.Ct. 1138, 107 L.Ed.2d 1043 (1990); see also United States v. Robles-Pantoja, 887 F.2d 1250, 1256-57 (5th Cir.1989); United States v. Adamo, 882 F.2d 1218, 1235 (7th Cir.1989); United States v. Par-

odi, 703 F.2d 768, 773 (4th Cir.1983); United States v. Butera, 677 F.2d 1376, 1381 (11th Cir.1982), cert. denied 459 U.S. 1108, 103 S.Ct. 735, 74 L.Ed.2d 958 (1983); United States v. Perry, 643 F.2d 38, 53 (2d Cir.), cert. denied 454 U.S. 835, 102 S.Ct. 138, 70 L.Ed.2d 115 (1981). These cases hold that the government case agent responsible for a particular investigation should be permitted to remain in the courtroom, even though the agent will often testify later on behalf of the government. Such an exception is envisioned by Rule 615(2), and it is further supported by legislative history."); Hampton v. Kroger Co., 618 F.2d 498 (8th Cir.1980) (one representative of each Kroger store implicated in suit was properly permitted to remain in courtroom even though each was called to testify); United States v. Jones, 687 F.2d 1265, 1268 (8th Cir.1982) ("Defendant contends that subdivision (2) includes only federal officers and does not encompass local police officers. Although the issue has not been squarely decided, there is nothing in the cases or legislative history of the rule that suggests state or local officers should be treated differently than federal officers."); United States v. Boyer, 574 F.2d 951 (8th Cir.1978), cert. denied 439 U.S. 967, 99 S.Ct. 457, 58 L.Ed.2d 426 (1978) (FBI agent fits under second exception); United States v. Auten, 570 F.2d 1284 (5th Cir.1978) (government investigator); United States v. Meyer, 403 F.2d 52 (9th Cir.1968) (FBI agent permitted to sit at counsel table although a witness); In re United States, 584 F.2d 666, 667 (5th Cir.1978):

Although Rule 615 does not expressly provide that a government investigative agent can also be a designated representative for the purpose of exception (2), the legislative history of the Rule indicates that the exception was designed to include agents such as Doredant. In the Senate Report accompanying Rule 615, the Senate Committee on the Judiciary expressed concern that a District Judge, in applying Rule 615, might feel compelled to exclude all government agents who were to testify in the trial, including the agent responsible for the preparation of the case. S.Rep. No. 93-1277, 93rd Cong., 2nd Sess. (1974), U.S.Code Cong. & Admin.News 1974, pp. 7051, 7073, *reprinted in* Historical Note, 28 U.S.C.A., Rule 615. The Committee recognized that the participation of this agent in the trial might be of critical importance to the government's case. The Committee stated that the second exception was designed to allow the agent to remain in the courtroom. This was their language:

"This problem is solved if it is clear that investigative agents are within the group specified under the second exception made in the rule, for 'an officer or employee of a party which is not a natural person designated as its representative by its attorney.' It is our understanding that this was the intention of the House committee. It is certainly this committee's construction of the rule."

The notes of the Advisory Committee in the proposed Rules of Evidence also reflect a belief that police officers and other agents in charge of the investigation are embraced within the scope of exception (2). Notes of Advisory Committee on proposed rules reprinted in 28 U.S.C.A., Rule 615.

* * * [T]he District Court erred in excluding Doredant from the courtroom.

Compare United States v. Woody, 588 F.2d 1212 (8th Cir.1978), cert. denied 440 U.S. 928, 99 S.Ct. 1263, 59 L.Ed.2d 484 (1979) (it is a matter of discretion whether to exclude government agent as it was prior to Rule 615). See also United States v. Causey, 609 F.2d 777, 778 (5th Cir.1980) (from the language of Rule 615(2) "it would reasonably be argued that the rule does not grant counsel for a party the right to designate more than one representative of the party to be present during the proceedings. * * * We need not decide this matter, however, because appellants have not shown how Baylor's presence prejudiced their case."). See generally United States v. Machor, 879 F.2d 945, 953 (1st Cir.1989), cert. denied 493 U.S. 1081, 110 S.Ct. 1138, 107 L.Ed.2d 1043 (1990) ("Defendants maintain, however, that even after the promulgation of the new Federal Rules of Evidence, the court retained discretion to exclude a person who falls within the 615(2) exception. The courts are divided on this issue. Some cases support defendants' view that the trial court has discretion to exclude the government case agent. United States v. Thomas, 835 F.2d 219, 223 (9th Cir.1987), cert. denied 486 U.S. 1010, 108 S.Ct. 1741, 100 L.Ed.2d 204 (1988); United States v. Woody, 588 F.2d 1212, 1213 (8th Cir.1978), cert. denied 440 U.S. 928, 99 S.Ct. 1263, 59 L.Ed.2d 484 (1979). The majority view, however, is that Fed.R.Evid. 615(2) has severely curtailed the discretion of the trial court to sequester the government's case agent. See 3 Weinstein's Evidence, § 615[02], n. 8 and cases therein cited. The practical and policy concerns inherent in the promulgation of the rule support this view. * * * Thus, we reject defendants' argu-

ment.").

Rule 615(2) has been held to permit only a single representative investigative officer to be present, at least when the testimony of the government agents is other than routine, such as for example, identifying exhibits, and is critical. United States v. Farnham, 791 F.2d 331, 334 (4th Cir.1986) (presence of second officer was reversible error; defendant not required to show prejudice: "Here, the district judge refused Farnham's timely request to permit only one of the two case agents to remain in the courtroom, thus allowing the second agent to hear the testimony of the first agent. The presence of Agent Martin during the testimony and cross-examination of Agent Phillips assumes particular relevance in light of the fact that the allegedly false declaration charged in Count Three of the indictment concerned Farnham's denial before the grand jury that he had made certain statements to the agents. Thus, Farnham's conviction on Count Three turned exclusively on the relative credibility of the defendant on the one hand and Agents Phillips and Martin on the other."); United States v. Pulley, 922 F.2d 1283, 1285-86 (6th Cir.1991), cert. denied 502 U.S. 815, 112 S.Ct. 67, 116 L.Ed.2d 42 (1991) ("The district judge concluded that subpart (2) gives a trial court discretion to let the government be represented by two agent-witnesses. United States v. Alvarado, 647 F.2d 537 (5th Cir.1981), which was cited by the district judge, appears to support this view. United States v. Farnham, 791 F.2d 331 (4th Cir.1986), on the other hand, rejects it. So does United States v. Kosko, 870 F.2d 162 (4th Cir.), cert. denied 491 U.S. 909, 109 S.Ct. 3197, 105 L.Ed.2d 704 (1989), which reaffirms Farnham. We agree with the conclusion announced by the United States Court of Appeals for the Fourth Circuit in Farnham and Kosko. 'Relying on the mandatory language of Rule 615 and the singular phrasing of the exception embodied in 615(2),' the Farnham court said, 'we hold that the district court erred in refusing to sequester [the second agent], if not during the entire trial, at least during the testimony of his colleague.' Farnham, 791 F.2d at 335.").

Contra Breneman v. Kennecott Corp., 799 F.2d 470 (9th Cir.1986) (there is wide discretion in the trial court to allow multiple representatives); United States v. Payan, 992 F.2d 1387 (5th Cir.1993) (trial court has discretion to permit two government witnesses to remain). Accord United States v. Green, 293 F.3d 886, 892 (5th Cir. 2002), cert. denied 537 U.S. 965, 123 S.Ct. 400, 154 L.Ed.2d 323 (2002) ("The district court allowed three investigators to sit at counsel table throughout the trial. All three officers testified as fact witnesses concerning the search of the home of Henry Green's parents in January 1996. The officers represented the FBI, the Louisiana State Police, and the Allen Parish Sheriff's Office. Federal Rule of Evidence 615 gives the court discretion to exempt more than one case agent from sequestration if their presence is essential to the presentation of the case. United States v. Alvarado, 647 F.2d 537, 540 (5th Cir.1981). The trial court overruled the defendants' objections to the presence of the investigators. The court determined that the investigators' presence was essential to the presentation of the case. The case was complex. The investigation was lengthy, broad geographically, and involved numerous witnesses. The conspiracy was from 1990 to 1998, and occurred throughout Houston, Texas, Oakdale, Louisiana, and surrounding areas. Each investigator represented a different law enforcement entity during the investigation. None of the agencies took part in all aspects of the investigation, and each performed independent investigations. Due to the complexities of the case and the defendants' failure to show how the investigators' presence prejudiced their testimony or that their testimony had a significant impact on the conviction, the district court did not abuse its discretion.").

Resort to Rule 615(3) has been suggested. United States v. Rivera, 971 F.2d 876, 890 (2d Cir.1992) ("If a request to exclude Helbock, or to allow only one of the detectives to be present in the courtroom, had been made, the government could have attempted to exempt Helbock from exclusion under Rule 615(3) as 'a person whose presence is shown by a party to be essential to the presentation of the party's cause.' See Pulley, 922 F.2d at 1286 (government may seek to exempt two agent-witnesses under different provisions of Rule 615); United States v. Alvarado, 647 F.2d 537, 540 (5th Cir.1981) (same). Rivera contends that the government failed to meet its 'burden' on this issue. Because no pertinent request was ever made, however, no showing by the government was necessary."); United States v. Jackson, 60 F.3d 128, 134-35 (2d Cir.1995) ("In asserting that the district court erred, the appellants rely on the reasoning of other circuits that the government may only ex-

empt one agent for each subprovision of Rule 615. See United States v. Pulley, 922 F.2d 1283, 1286 (6th Cir.) (allowing exemption of only one agent under 615(2) and one agent under 615(3)), cert. denied 502 U.S. 815, 112 S.Ct. 67, 116 L.Ed.2d 42 (1991), United States v. Farnham, 791 F.2d 331, 335 (4th Cir.1986). This circuit has not yet addressed whether more than one agent may be exempted pursuant to each subprovision of Rule 615. We have only noted in dicta that two agents could appropriately be exempted from the Rule, one under the second subprovision and the other under the third. United States v. Rivera, 971 F.2d 876, 889-90 (2d Cir.1992). * * * While we would expect it to be the rare case when a district judge exempts more than one witness under a particular subprovision of Rule 615, we hold that a district court judge has discretion to do so. The advisory notes to Rule 615 do state that the Rule treats the matter of sequestration as 'one of right,' as opposed to being 'committed to the [trial judge's] discretion.' Although we interpret this, consistent with the Rule's use of the word 'shall,' to require the sequestration of witnesses upon a party's request, we read the caselaw to provide the judge with discretion in determining whether the witness in question falls within one of the Rule 615 exemptions. See United States v. Payan, 992 F.2d 1387, 1394 (5th Cir.1993) (The trial judge has discretion to determine how many witnesses may be excused from sequestration.); Rivera, 971 F.2d at 889 ('It is within a trial court's discretion to exempt the government's chief investigative agent from sequestration .... '). Because the Rule does not expressly limit to one the number of exemptions per provision, we conclude that this discretion extends to deciding whether, in a particular case, more than one witness should be exempt under a particular subprovision.").

The person designated must already be an officer or employee of a party; the person may not be made an officer or employee for the purpose of satisfying Rule 615(2). Opus 3 Ltd. v. Heritage Park, Inc., 91 F.3d 625, 630 (4th Cir.1996) ("While Heritage Park had to concede under its theory of the case that Mack was not a corporate officer or employee, it falls back on the letter that Heritage Park's president sent to Mack before trial designating him 'to act on behalf of Heritage Park, Inc. at the trial.' Heritage Park argues that, by virtue of the letter, Mack became an employee of the company for Rule 615 purposes and therefore was entitled to be present at trial as Heritage Park's corporate representative. We cannot agree that a corporation's mere designation of a person to act on its behalf at trial converts the person into its employee. Moreover, to allow a corporate party to 'employ' a person solely as its trial representative would render Rule 615 meaningless. A corporate party could avoid the rule in every case by designating its key witness or 'employing' that witness as its trial representative. We decline to recognize the efficacy of such a practice.").

Rule 615(2) is *not* restricted solely to persons who are empowered to bind the entity through their testimony; "representative" on the face of the rule includes employees. Queen v. Washington Metropolitan Area Transit Authority, 842 F.2d 476 (D.C.Cir.1988).

[FN9] See, e.g., Government of Virgin Islands v. Edinborough, 625 F.2d 472 (3d Cir.1980) (mother of young rape victim allowed to remain in court while child testified).

With respect to support persons, see, e.g., Fla.S. § 90.616(2)(d): "In a criminal case, the victim of the crime, the victim's next of kin, the parent or guardian of a minor child victim, or a lawful representative of such person, unless, upon motion, the court determines such person's presence to be prejudicial."

The party asserting that the witness is "essential" bears the burden of proof. Opus 3 Ltd. v. Heritage Park, Inc., 91 F.3d 625, 628 (4th Cir.1996) ("Because of its important role in reaching the truth, Rule 615 carries a presumption favoring sequestration. See United States v. Farnham, 791 F.2d 331, 335 (4th Cir.1986). Accordingly, we construe the rule's exemptions 'narrowly in favor of the party requesting sequestration.' Id. For the same reason, the party seeking to avoid sequestration of a witness bears the burden of proving that a Rule 615 exemption applies. See United States v. Jackson, 60 F.3d 128, 135 (2d Cir.), cert. denied 516 U.S. 980, 116 S.Ct. 487, 133 L.Ed.2d 414 (1995), and cert. denied 516 U.S. 1130, 1165, 116 S.Ct. 951,

1057, 133 L.Ed.2d 875, 134 L.Ed.2d 201 (1996); Government of the Virgin Islands v. Edinborough, 625 F.2d 472, 476 (3d Cir.1980)."). Government of Virgin Islands v. Edinborough, 625 F.2d 472, 476 (3d Cir.1980) ("To recapitulate, under Rule 615 the prior practice has been changed and sequestration should be granted upon request. A party who believes that the presence of the witness is 'essential' must bear the burden of supporting that allegation and showing why the policy of the Rule in favor of automatic sequestration is inapplicable in that situation. The party desiring sequestration must then be given an opportunity to show why sequestration is needed. Finally, the trial court should explicate the factors considered if sequestration is denied.").

With respect to expert witnesses, see note 11 infra.

With respect to determining whether a witness, or more than one witness, see note 8 supra, is essential to the presentation of the cause, see generally Bruneau v. South Kortright Central School, 962 F.Supp. 301, 304-05 (N.D.N.Y.1997):
"Rule 615 codified a well-established common law tradition of sequestering witnesses 'as a means of discouraging and exposing fabrication, inaccuracy, and collusion.' " United States v. Jackson, 60 F.3d 128, 133 (2d. Cir.1995) (quoting Fed.R.Evid. 615 advisory committee's note; citing Government of the Virgin Islands v. Edinborough, 625 F.2d 472, 475-76 (3d Cir.1980); Frideres v. Schiltz, 150 F.R.D. 153, 158 (S.D.Iowa 1993)). Sequestration "serves two purposes: it 'exercises a restraint on witnesses "tailoring" their testimony to that of earlier witnesses; and it aids in detecting testimony that is less than candid.' "Id. (quoting Geders v. United States, 425 U.S. 80, 87, 96 S.Ct. 1330, 1335, 47 L.Ed.2d 592 (1976)).
Although there is a clear inclination toward sequestration, a judge has "discretion in determining whether the witness in question falls within one of the Rule 615 exemptions." Id. (citing United States v. Payan, 992 F.2d 1387, 1394 (5th Cir.1993)). While the language in Rule 615 seems to suggest that only one individual can be exempt from sequestration in each category, the Second Circuit has held that a district judge has the discretion to exempt more than one witness under one category. "Because the Rule does not expressly limit to one the number of exemptions per provision, we conclude that this discretion extends to deciding whether, in a particular case, more than one witness should be exempt under a particular subdivision." Id. at 135. The Second Circuit has set out six criteria to consider in making a sequestration exemption:
1) how critical the testimony in question is, that is, whether it will involve controverted and material facts; 2) whether the information is ordinarily subject to tailoring, ... such that cross-examination or other evidence could bring to light any deficiencies; 3) to what extent the testimony of the witness in question is likely to encompass the same issues as that of other witnesses ... 4) the order in which the witnesses will testify, 5) any potential for bias that might motivate the witness to tailor his testimony ... and 6) if the court is considering exempting the witness from sequestration under Rule 615(3), whether the witness' presence is 'essential' rather than simply desirable.
Id. at 135 (citing United States v. Prichard, 781 F.2d 179, 183 (10th Cir.1986); United States v. Womack, 654 F.2d 1034, 1040-41 (5th Cir.1981), cert. denied 454 U.S. 1156, 102 S.Ct. 1029, 71 L.Ed.2d 314 (1982); United States v. Pulley, 922 F.2d 1283, 1286-87 (6th Cir.1991); United States v. Agnes, 753 F.2d 293, 307 (3d Cir.1985)). The Second Circuit further held that "the burden to demonstrate lack of prejudice, or harmless error, properly falls on the party that had opposed sequestration." Id. at 136.
Parker, Race, and Thompson were properly exempted under Rule 615. Parker and Race fall under Rule 615(3) and Thompson is exempt under Rule 615(2). Since Parker was the plaintiff's teacher, it was essential for preparation of the School's defense to have him easily accessible to counsel. Parker was the only legally responsible adult directly aware of what occurred in his classroom during the time in question. Race, as assistant superintendent, had essential knowledge of the School's Title IX policy, had direct contact with the plaintiff's guardian regarding the allegations presented in this case, and knew what actions had been taken to remedy any problems that existed. Finally, Thompson, as the School's current superintendent, has essential knowledge of the development of Title IX policy and must be viewed as the school's "designated representative" under 615(2). It should also be noted that Thompson never testified.

In conclusion, the plaintiff's claim that the presence of Race, Parker, and Thompson created an atmosphere of coercion and resulted in false testimony and that it was error to permit their presence is without merit.

As to the factors to be applied, see Bruneau ex. rel. Schofield v. South Kortright Central School District, 163 F.3d 749, 762 (2d Cir.1998), cert. denied 526 U.S. 1145, 119 S.Ct. 2020, 143 L.Ed.2d 1032 (1999):
Six factors serve as guides to inform a district court's exercise of its discretion: (1) how critical is the sought-to-be-excluded witness's testimony; (2) whether that testimony is ordinarily subject to tailoring; (3) whether the testimony is likely to cover the same issues as other witnesses; (4) in what order will the witnesses be called; (5) whether any potential for bias exists that could incline a person to tailor his testimony; and (6) whether the witness's presence is essential or simply desirable. See Jackson, 60 F.3d at 135.
Plaintiff has not shown that the district court abused its discretion by exempting Race and Parker from a Rule 615 sequestration order. The court reasoned that Race, as the School's assistant superintendent, was the official most knowledgeable of the School's Title IX policy, and she also knew what actions the School had taken to remedy its alleged violation. The court also found that Parker, as Bruneau's sixth grade teacher, was the only legally responsible school official present in the classroom with the opportunity to observe directly the alleged discriminatory occurrences. We find no error in the conclusion that both witnesses were essential to the presentation of the School's case and therefore needed to be accessible in the courtroom throughout the trial.
Moreover, we believe Race's and Parker's testimony was not subject to tailoring. Their testimony had been previously recorded during extensive examinations before trial. Thus, any alteration at trial of the testimony given in deposition would be subject to challenge on cross-examination. The order in which the witnesses were called was not an important consideration in this case because Race and Parker were present during the pre-trial depositions of plaintiff and other of her witnesses, and therefore had already heard most of the courtroom testimony.

With respect to review an appeal, see Opus 3 Ltd. v. Heritage Park, Inc., 91 F.3d 625, 628-29 (4th Cir.1996) ("Our review of a district court's application of Rule 615 depends on the nature of the district court's ruling. We review de novo the district court's order refusing sequestration or sequestering a person whom it finds exempt under section (1) or (2), and we review for clear error factual findings about who is a party, officer, or employee. But a ruling under section (3) resembles a trial court's evidentiary rulings, which fall within the courts' broad discretion over the conduct of trials. Accordingly, we apply an abuse of discretion standard to a district court's judgment about whether section (3) exempts a person as essential to a party's presentation of its cause. See Jackson, 60 F.3d at 134-35; Polythane Sys., Inc. v. Marina Ventures Int'l., Ltd., 993 F.2d 1201, 1209 (5th Cir.1993), cert. denied 510 U.S. 1116, 114 S.Ct. 1064, 127 L.Ed.2d 383 (1994).").

Witnesses other than the criminal defendant, Brooks v. Tennessee, 406 U.S. 605, 92 S.Ct. 1891, 32 L.Ed.2d 358 (1972), who are allowed to remain may, in the court's discretion, be required to testify first or early. See United States v. Parodi, 703 F.2d 768 (4th Cir.1983). See generally United States v. Martin, 920 F.2d 393, 397 (6th Cir.1990) ("The comments to the rules have made clear from the beginning that case agents are intended to be included within this exception. Although we can conceive of a situation in which it would be within the discretion of the trial judge to require a non-sequestered witness to testify first, it is difficult to conceive of a situation in which the *failure* to do so would be reversible error. The case agent is the prosecutor's information source and even if the agent were excluded, the prosecutor would still have to reveal to him what other witnesses had said and done in order to map out strategy. This would defeat the whole purpose of sequestration. Also, the case agent is frequently not the most important or knowledgeable government witness and to require him to testify first may well make no sense at all.").

[FN10] The Advisory Committee's Note, supra, indicates that Rule 615 was amended to add exclusion (4) in light of the right of victims who are also witnesses to be present in court to the extent so provided by the Victim's Rights and Restitution Act

of 1990, 42 U.S.C. § 10606, and the Victim Rights Clarification Act of 1997, 18 U.S.C. § 3510.

42 U.S.C. § 10606(b)(4) provides that a crime victim has "[t]he right to be present at all public court proceedings related to the offense, unless the court determines that testimony by the victim would be materially affected if the victim heard other testimony at trial."

18 U.S.C. § 3510 provides as follows:

> **(a)Non-capital cases.**--Notwithstanding any statute, rule, or other provision of law, a United States district court shall not order any victim of an offense excluded from the trial of a defendant accused of that offense because such victim may, during the sentencing hearing, make a statement or present any information in relation to the sentence.
> **(b)Capital cases.**--Notwithstanding any statute, rule, or other provision of law, a United States district court shall not order any victim of an offense excluded from the trial of a defendant accused of that offense because such victim may, during the sentencing hearing, testify as to the effect of the offense on the victim and the victim's family or as to any other factor for which notice is required under section 3593(a).
> **(c)Definition.**--As used in this section, the term "victim" includes all defined as victims in section 503(e)(2) of the Victims' Rights and Restitution Act of 1990.

Rule 615 and the foregoing two statutes together would now clearly result in United States v. McVeigh, 106 F.3d 325 (10th Cir.1997) (Rule 615 invoked against victim-impact witnesses) being decided differently.

[FN11] Opus 3 Ltd. v. Heritage Park, Inc., 91 F.3d 625, 629 (4th Cir.1996) ("Because Rule 615 is designed to preclude fact witnesses from shaping their testimony based on other witnesses' testimony, it does not mandate the sequestration of expert witnesses who are to give *only* expert opinions at trial. Indeed, an expert who is not expected to testify to facts, but only assumes facts for purposes of rendering opinions, might just as well hear all of the trial testimony so as to be able to base his opinion on more accurate factual assumptions. Nevertheless, we decline to adopt a *per se* rule exempting expert witnesses, even those who are expected only to render opinions, from sequestration. The rule does not provide such an exemption and section (3) vests in trial judges broad discretion to determine whether a witness is essential. See Morvant v. Construction Aggregates Corp., 570 F.2d 626, 630 (6th Cir.), cert. dismissed, 439 U.S. 801, 99 S.Ct. 44, 58 L.Ed.2d 94 (1978)."); Malek v. Federal Insurance Co., 994 F.2d 49, 54 (2d Cir.1993) ("Under the circumstances revealed in this case, we find that the district court erred in sequestering Friedell. Our review of the record reveals that Redsicker's testimony differed from his reports: Redsicker testified that the fire was an 'intense fire' but did not make that specific finding anywhere in his report. Since this was an important finding bearing on the question of arson and was not made in Redsicker's reports, Friedell's presence in the courtroom was important to the presentation of the Maleks' case, and a ten-minutes recess was not an adequate substitute for his presence."); United States v. Mohney, 949 F.2d 1397, 1404 (6th Cir.1991), cert. denied 504 U.S. 910, 112 S.Ct. 1940, 118 L.Ed.2d 546 (1992) ("Mohney moved to sequester Peterson under this rule so that Peterson, in testifying regarding the individual returns, would not 'parrot' Bednarczyk's calculations and testimony. Because Peterson's testimony was based on Bednarczyk's calculations, the court denied the sequestration request so that if cross-examination should bring out any facts not considered by Bednarczyk in making his calculations, Peterson would be present to ensure the accuracy and completeness of his own testimony."); United States v. Lussier, 929 F.2d 25, 30 (1st Cir.1991) ("Whether one denominates Soares as a 'fact' or 'expert' witness, it is clear that his testimony was based on, summarized, and was consistent with the evidence presented at trial, and that there would have been 'little, if any reason' to sequester him. Morvant v. Construction Aggregates Corp., 570 F.2d 626, 629-30 (6th Cir.1978) (little if any reason to sequester a witness who is to testify in an expert capacity only and not to the facts of the case). Lussier was not prejudiced by the decision to allow Soares to remain in court, which consequently was not an abuse of the district court's discretion. See United States v. Jewett, 520 F.2d 581, 584 (1st Cir.1975)."); United

States v. Conners, 894 F.2d 987, 991 (8th Cir.1990) ("Federal Rule of Evidence 615(3) expressly excludes 'a person whose presence is shown by a party to be essential to the presentation of the party's cause' from the general rule that witnesses will be sequestered upon request of a party. The government relies, in part, upon this exception in asserting that the court properly permitted Horlitz to remain during the trial. It argues that Horlitz was called as an expert in the area of bank examination and that his presence during the trial was essential to his ability to effectively testify regarding the exhibits before the jury. For this reason, we believe that the court did not abuse its discretion by permitting Horlitz to remain in the courtroom."); Mayo v. Tri-Bell Industries, Inc., 787 F.2d 1007, 1013 (5th Cir.1986) ("As experts they would be testifying solely as to their opinion based on the facts or data in the case, and, accordingly, were properly exempted from the exclusion of witness order.").

Compare Miller v. Universal City Studios, Inc., 650 F.2d 1365, 1373-74 (5th Cir.1981) ("Defendants argue that rule 615 must be read to impliedly exclude from sequestration expert witnesses, who usually do not testify regarding the facts of the case but only express their opinion based on those facts, in order to prevent the rule from conflicting with rule 703, which permits an expert to base his opinion on facts or date perceived by him at trial. Defendants rely primarily on Morvant v. Construction Aggregates Corp., 570 F.2d 626 (6th Cir.1978), cert. dismissed 439 U.S. 801, 99 S.Ct. 44, 58 L.Ed.2d 94 (1978), in which the court stated it could 'perceive little, if any, reason for sequestering a witness who is to testify in an expert capacity only and not to the facts of the case.' Id. at 629. The Morvant court further held, however, that rule 703 does not furnish an automatic basis for exempting an expert from sequestration under rule 615. Id. at 630. We agree. Whether or not it would be reasonable for a trial court to exempt an expert witness from a sequestration order, there is no required exemption implied under rule 615. Exemption would be questionable in a case such as this, however, where defendants' expert was to testify about the two works upon which Gene Miller was giving his own similarity analysis.").

See generally United States v. Seschillie, 310 F.3d 1208, 1213-14 (9th Cir.2002), cert. denied 538 U.S. 953, 123 S.Ct. 1644, 155 L.Ed.2d 500 (2003):

Seschillie argues that Gieszl's presence was "essential to the presentation of [his] cause" and that Gieszl therefore fell within the third exception to Rule 615. We review the district court's ruling regarding the applicability of Rule 615(3) for an abuse of discretion. See Alexander Shokai v. Internal Revenue Service, 34 F.3d 1480, 1486 (9th Cir.1994) (reviewing for abuse of discretion a decision under Tax Court Rule 415, which mirrors Rule 615, a district court's decision that an expert was not essential); Opus 3 Ltd. v. Heritage Park, Inc., 91 F.3d 625, 629 (4th Cir.1996) (reviewing for abuse of discretion decision that expert witness did not meet criteria of Rule 615(3)); Polythane Sys., Inc. v. Marina Ventures Int'l, Ltd., 993 F.2d 1201, 1209 (5th Cir.1993) (same); Malek v. Fed. Ins. Co., 994 F.2d 49, 54 (2d Cir.1993) (same); cf. Breneman v. Kennecott Corp., 799 F.2d 470, 473 (9th Cir.1986) (reviewing for abuse of discretion a district court's decision that party could designate multiple representatives according to Rule 615(2)).

In many circumstances, a potential expert witness will be an "essential party" within the meaning of Rule 615(3). The Advisory Committee Notes to Rule 615(3) contemplate as much, stating that the exception includes "an expert needed to advise counsel in the management of litigation." See also Alexander Shokai, 34 F.3d at 1486 (applying a parallel statute but concluding that petitioners had not demonstrated that his expert was "necessary for the presentation of the case."); see generally Opus 3, 91 F.3d at 629; Malek, 994 F.2d at 54; Polythane, 993 F.2d at 1209; United States v. Mohney, 949 F.2d 1397, 1404 (6th Cir.1992), cert. denied 504 U.S. 910, 112 S.Ct. 1940, 118 L.Ed.2d 546 91992); Morvant v. Construction Aggregates Corp., 570 F.2d 626, 629-630 (6th Cir.1978).

We decline to conclude, however, that an expert witness will *always* meet the criteria of Rule 615(3). The reason is simple: "[H]ad the framers intended it, they would have said so, or added a fourth exception." Morvant, 570 F.2d at 629-630. Instead, the framers indicated that the "essential nature" of a witnesses' presence must "be shown by [the] party." Fed. Rule of Evid. 615(3). In addition, although an expert witness does not normally testify to facts, thereby nullifying the need for sequestration, there are circumstances in which an expert may also give factual testimony. Morvant, 570 F.2d at 630. For example, a

crime expert might investigate a crime scene and later testify to both factual observations and expert conclusions. The burden, therefore, remains on the party requesting the Rule 615(3) exception to make "a fair showing" that "the expert witness is in fact required for the management of the case." Morvant, 570 F.2d at 630; accord Opus, 91 F.3d at 629.

Applying this standard, we conclude that the district court abused its discretion in excluding Gieszl from the courtroom. Seschillie did make the required "fair showing" that Gieszl's presence was "essential." Morvant, 570 F.2d at 629-630. When the district court excluded Gieszl, it had not yet precluded Gieszl from applying his opinions concerning accidental discharge of a gun to the facts of this case. Therefore, at the time of the exclusion, the district court should have considered Seschillie's explanation that Gieszl needed to hear the testimony of victims Bernita, Rosie, and Webster in order properly to provide opinion evidence. Nor were there any countervailing reasons to sequester Gieszl. Unlike an expert excluded because he is both an expert witness and a fact witness, see Opus, 91 F.3d at 629, Gieszl was not a fact witness. These circumstances favor allowing Gieszl to observe trial: "[A]n expert who is not expected to testify to facts, but only assumes facts for purposes of rendering opinions, might just as well hear all of the trial testimony so as to be able to base his opinion on more accurate factual assumptions." Id. Indeed, even the government agreed that Gieszl's presence during trial would be appropriate.

The district court dismissed this argument, noting that Gieszl could read the trial transcripts. Trial transcripts are an imperfect substitute for live testimony. The imperfection was patent in this case because some of the witness testimony was demonstrative rather than verbal.

Further, the district court excluded Gieszl primarily because it felt that his presence would send a false message to the jury by creating the impression that the expert has "some added substance." Rule 615, however, authorizes exclusion "so that [witnesses] cannot hear the testimony of other witnesses," not for other reasons. Also, the exception contained in Rule 615(3) is for persons "essential to the presentation of the parties' cause." If a person meets that criterion, exclusion is "not authorize[d]." Rule 615. Excluding Gieszl because of the impression his presence might make on the jury, even though he met the Rule 615(3) exclusion criterion, was an abuse of discretion. See United States v. Working, 287 F.3d 801, 807 (9th Cir.2002) (a district court abuses its discretion when its ruling is guided by erroneous legal conclusions); United States v. Morales, 108 F.3d 1031, 1035 (9th Cir.1997) (same). We must next consider whether this error prejudiced Seschillie.

As to support persons being essential, see note 9 supra.

[FN12] United States v. Bramlet, 820 F.2d 851, 855 (7th Cir.1987), cert. denied 484 U.S. 861, 108 S.Ct. 175, 98 L.Ed.2d 129 (1987):

More significantly, however, application of the court's general exclusionary order to the government's rebuttal witnesses was unnecessary. The rationale for excluding adverse witnesses is premised on the concern that once having heard the testimony of others, a witness may inappropriately tailor his or her own testimony to the prior evidence. Geders v. United States, 425 U.S. 80, 87, 96 S.Ct. 1330, 1334, 47 L.Ed.2d 592 (1976); United States v. Ell, 718 F.2d 291, 293 (9th Cir.1983). This concern is justified, for instance, where "fact" or "occurrence" witnesses are called to testify. Under such circumstances, a fact finder's appreciation for and determination of relevant facts and occurrences must remain unsullied by the potential for subtle, yet significantly distorted modification of a witness testimony.

By contrast, the very function of a rebuttal witness is directed toward challenging the prior testimony of opposing witnesses, thereby enhancing the fact finder's ultimate determination of an objective "truth." While not all rebuttal witnesses need be appraised of prior testimony--impeachment witnesses called to demonstrate bias, for example, a rebuttal witness presented to refute the medical findings of an opposing expert can contribute most completely to a jury's truth finding capacity only by fully understanding and addressing all of the relevant prior evidence. Cf. United States v. Burgess, 691 F.2d 1146, 1157 (4th Cir.1982) (holding that government psychiatrists should be allowed to hear testimony of opposing expert witnesses in order to completely familiarize themselves with each other's findings). Whether such evidence is summarized in the form of a hypothetical question or exposed by prior review, rebuttal examination cannot be properly conducted without revealing, in some

measure, the testimony which is subject to refutation. Moreover, trial by ambush and confoundment of rebuttal witnesses hardly advances the purported goals of reliability and trustworthiness. Id. (it is unreasonable to place experts under short time constraints for familiarizing themselves with each other's findings and therefore, reasonable to permit all of them to appear in court).
In addition, though not relevant here, practical considerations militate against excluding rebuttal witnesses. It is often difficult to know in advance, who may be called to rebut evidence which has not yet been presented. Thus, any number of interested persons attending a trial might be called as rebuttal witnesses, making their prior exclusion impossible.

Compare United States v. Wylie, 919 F.2d 969, 976 (5th Cir.1990) treating the matter as within the trial court's discretion: "The facts of Ortega-Chavez are similar to those here. Both cases involve disputes concerning 'government rebuttal witnesses, who were present in the courtroom during previous testimony' and 'were allowed to testify despite a sequestration order made pursuant to Fed.R.Evid. 615.' Ortega-Chavez, 682 F.2d at 1089. In Ortega-Chavez, we found no abuse of discretion or prejudice. Id. at 1090. We stated that the rebuttal witnesses' testimony merely confirmed that of the other witnesses and that the government should not be faulted for calling the witnesses on rebuttal instead of during its case in chief, as it had no reason to perceive that such testimony would be necessary until it heard the testimony of another witness. Id."

[FN13] United States v. Shurn, 849 F.2d 1090, 1094 (8th Cir.1988) ("When the search warrant for 6027 Suburban Street was executed Jeanne Navies was found in the home running down the steps. She was later arrested as a material witness prior to appellant's trial and placed in the U.S. Marshal's Witness Security Program after she agreed to testify for the government. Thus, while Ms. Navies testified, law enforcement officers, including Detective Wheeler, remained in the courtroom despite the court's sequestration order. Some of Ms. Navies' testimony, to the surprise of the government, was different than her prior statements. Thus, Detective Wheeler was called as a rebuttal witness to impeach Ms. Navies. Prior to Ms. Navies' change of heart, the government did not intend to call Detective Wheeler as a witness. * * * Furthermore, the purpose of a sequestration order is not applicable to the present facts. The practice of excluding witnesses serves to prevent them from tailoring their testimony to that which has already been presented, and helps to detect testimony that is less than candid. United States v. Perry, 815 F.2d 1100, 1105 (7th Cir.1987) (citing Geders v. United States, 425 U.S. 80, 87, 96 S.Ct. 1330, 1334-35, 47 L.Ed.2d 592 (1976)). The testimony, in the present case, was not cumulative but simple impeaching.").

[FN14] United States v. Womack, 654 F.2d 1034, 1040 n. 8 (5th Cir.1981), cert. denied 454 U.S. 1156, 102 S.Ct. 1029, 71 L.Ed.2d 314 (U.S.Ala.1982) ("The Government submits that there has been no violation of Rule 615 because that rule does not require that witnesses be instructed not to discuss the case; rather, it merely requires that witnesses be excluded from the courtroom. See United States v. Smith, 578 F.2d 1227 (8th Cir.1978) (new trial granted on other grounds), on appeal after new trial, 600 F.2d 149 (8th Cir.1979), which held that the determination whether or not to instruct sequestered witnesses concerning communications with other witnesses after they have testified is within the trial court's sound discretion. 578 F.2d at 1235. We do not decide the issue whether the trial court's failure to instruct the sequestered witnesses not to discuss the case, where the parties did not request that such restrictive conditions be placed on the sequestration order, is a violation of Rule 615. For the purposes of this opinion, we have assumed that the Rule was violated.").

United States v. Buchanan, 787 F.2d 477, 485 (10th Cir.1986) reached the conclusion that Rule 615, while not explicitly stating, includes within it a prohibition against witness to witness communication out of court--witnesses should be clearly instructed that they "are not to discuss the case or what their testimony has been or would be or what occurs in the courtroom with anyone other than counsel for either side." Jerry Parks Equipment Co. v. Southeast Equipment Co., Inc., 817 F.2d 340 (5th Cir.1987), appeal after remand 871 F.2d 119 (5th Cir.1989) proceeds upon the same assumption. Compare United States v. Maliszewski, 161 F.3d 992, 1012 (6th Cir.1998), cert. denied 525 U.S. 1183, 119 S.Ct. 1126, 143 L.Ed.2d 120 (1999) ("The district court rejected defense counsel's motion for a mistrial, holding that there was no violation of the sequestration

order: 'There has been no order entered preventing counsel or the case agent from consulting with witnesses during their testimony, nor even any order preventing counsel from consulting the witness during cross examination.' Further, the court concluded, 'there is no showing that [the AUSA or the agent] consulted with this witness Galvan for the purpose of coordinating his testimony with the testimony of any previous witness.' "); United States v. Sepulveda, 15 F.3d 1161, 1175-77 (1st Cir.1993) ("The rule more or less codifies common-law sequestration powers, but it is at once less discretionary and less stringent than its forebears. On one hand, the rule cabins the judge's discretion by affording all parties a *right* to close the courtroom to prospective witnesses. On the other hand, while the common law supported sequestration beyond the courtroom, see 6 John Wigmore, Evidence § 1840, at 471 n. 7 (1976) (stating that, at common law, the sequestration process involves three parts: preventing prospective witnesses from consulting each other; preventing witnesses from hearing other witnesses testify; and preventing prospective witnesses from consulting witnesses who have already testified), Rule 615 contemplates a smaller reserve; by its terms, courts must 'order witnesses excluded' only from the courtroom proper, see Perry v. Leeke, 488 U.S. 272, 281 & n. 4, 109 S.Ct. 594, 600 & n. 4, 102 L.Ed.2d 624 (1989); United States v. Arruda, 715 F.2d 671, 684 (1st Cir.1983). In sum, the rule demarcates a compact procedural heartland, but leaves appreciable room for judicial innovation beyond the perimeters of that which the rule explicitly requires. See United States v. De Jongh, 937 F.2d 1, 3 (1st Cir.1991) (stating that district courts possess 'considerable discretion' to fashion orders pertaining to sequestration.). * * * On these facts, the district court's denial of relief must be upheld. The court's basic sequestration order, which ploughed a straight furrow in line with Rule 615 itself, did not extend beyond the courtroom. There has been no intimation that the witnesses transgressed this order. Moreover, because the district court did not promulgate a non-discussion order applicable to any witness until the conclusion of that witness's testimony, Perez, Milne, and Coriaty were under no obligation, prior to that moment, to refrain from discussing their recollections with each other. Finally, there is no evidence that any of the three ever chatted about the case with another witness after having been admonished to the contrary--or at any earlier time, for that matter."); United States v. Arias-Santana, 964 F.2d 1262, 1266 (1st Cir.1992) ("In addition to ordering their exclusion from the courtroom, the trial court has broad discretion to direct witnesses not to discuss their testimony outside the courtroom. See Geders v. United States, 425 U.S. 80, 87, 96 S.Ct. 1330, 1335, 47 L.Ed.2d 592 (1976).").

Whether or not invocation of Rule 615 in the terms of the rule alone without specific reference to "separation" includes "separation" has come into play with respect to a witness held in contempt for reading trial transcription, with the majority in United States v. McMahon, 104 F.3d 638 (4th Cir.1997) affirming the district court's criminal contempt order. But see id. at 648 (Michael, C.J., dissenting):

I recognize that on the "question of whether a trial court abused its discretion in permitting [or failing to permit] a witness who arguably violated a sequestration order to testify," ante at 643 n. 3, some cases have held that a Rule 615 sequestration order does cover more than courtroom exclusion, even if the order only mentions exclusion. See e.g., United States v. Greschner, 802 F.2d 373, 375 (10th Cir.1986) (holding that Rule 615 prohibits discussion of the case between witnesses), cert. denied 480 U.S. 908, 107 S.Ct. 1353, 94 L.Ed.2d 523 (1987); Miller v. Universal City Studios, Inc., 650 F.2d 1365, 1373 (5th Cir.1981) (holding that Rule 615 prohibits the reading of trial transcripts). However, as the majority recognizes, such cases "concern [a] very different question" from that of finding criminal contempt. In this "very different" context, courts have still struggled over the extent to which conduct other than courtroom attendance is barred by a simple sequestration order barring witnesses from the courtroom. See Sepulveda, 15 F.3d at 1176 (holding that rule 615 only requires that witnesses be excluded from the courtroom proper); United States v. Scharstein, 531 F.Supp. 460, 463 (E.D.Ky.1982) (holding that a Rule 615 order need not prohibit witnesses from discussing the case with one another). Moreover, even the Tenth Circuit, which construes the invocation of Rule 615 to prohibit discussion between witnesses, also requires that the trial court specify this prohibition in its order. See United States v. Buchanan, 787 F.2d 477, 484-85 (10th Cir.1986) (holding that the trial court erred in failing to state "clearly" in its sequestration order that witnesses are not to discuss the case), rev'd on other grounds after remand, 891 F.2d 1436 (10th Cir.1989), cert. denied 494 U.S. 1088, 110 S.Ct. 1829, 108 L.Ed.2d 958

(1990); United States v. Johnston, 578 F.2d 1352, 1355 (10th Cir.1978) (admonishing trial courts to instruct sequestered witnesses that they are not to discuss their testimony with other witnesses), cert. denied 439 U.S. 931, 99 S.Ct. 321, 58 L.Ed.2d 325 (1978).

This confusion about how far the scope of a bald Rule 615 order extends for the sanction of excluding testimony underscores the necessity of a specific order when criminal contempt is charged. In this case, the district court's written order stayed within the narrow text of Rule 615. The order states only that "the Government's motion to sequester the Defendant's witnesses will be granted, and the Defendant's witnesses will be excluded from the courtroom." In enforcing the order against McMahon in open court at the beginning of the trial, the court said simply, "He will have to leave the courtroom." There is no mention of any prohibited activity other than entering the courtroom. In fact, even the majority recognizes that the order was "stunningly simple: prospective witnesses were barred from the courtroom." Ante at 643.

There is not sufficient evidence to establish that the order was clear enough to prohibit the reading of daily transcript or receiving reports from an observer. The text of the written order does not support an expansion to prohibit these activities. The court's oral command to McMahon, "He will have to leave the courtroom," actually emphasizes that only courtroom exclusion was required. The court did nothing to communicate the existence of a broader scope to the order. To find specificity the court could only go to McMahon's state of mind--McMahon had to know what the order meant because "he [was] no dummy" and the scope of the order was "obvious." However, as I point out in part I, McMahon's belief of guilt is not sufficient to prove the order's clarity (the specificity element) beyond a reasonable doubt.

Obviously, failure on the part of the trial court to explicitly take "further measures" may lead to confusion. See United States v. Magana, 127 F.3d 1, 5- 6 (1st Cir.1997):

Apart from this "heartland" of courtroom sequestration mandated by Rule 615, the court retains discretion to add other restrictions or not, as it judges appropriate. Sepulveda, 15 F.3d at 1176 ("Outside of the heartland, the district court may make whatever provisions it deems necessary to manage trials in the interests of justice."). The regulation of witness conduct outside the courtroom is thus left to the district judge's discretion. Id. The court may, for example, order that witnesses not converse with each other about the case. See Arias-Santana, 964 F.2d at 1266. Further, the court has the discretion to prohibit counsel from conferring with a witness during the witness's testimony, including during any recesses in the trial. See Geders, 425 U.S. at 87-88, 96 S.Ct. at 1334-35.

In this case the court granted Magana's oral motion for sequestration of witnesses without elaborating the terms of the order. It appears that the court assumed counsel's familiarity with a long-standing custom in the district that precluded counsel from conferring with a witness until the witness had been excused from the stand. As it happened, the prosecutor had only recently relocated to the district and was not familiar with the local practice. Indeed, the judge noted that this was the prosecutor's first trial before him. Nevertheless, it was not unreasonable for the court to presume that an Assistant United States Attorney would be familiar not only with the written rules of local practice, but also with those unwritten rules that had, by repeated application over time, become established as a "custom" of practice in the court. It is plain that the district court regarded the prohibition against conferring with a testifying witness as such an established custom, and we have no reason to question that assessment.

[FN15] United States v. Johnston, 578 F.2d 1352, 1355 (10th Cir.1978), cert. denied 439 U.S. 931, 99 S.Ct. 321, 58 L.Ed.2d 325 (1978) ("[A] circumvention of the rule does occur where witnesses indirectly defeat its purpose by discussing testimony they have given and events in the courtroom with other witnesses who are to testify. * * * This should be avoided by instructions to counsel and the witnesses when the rule's invocation is announced, making it clear that witnesses are not only excluded from the courtroom but also that they are not to relate to other witnesses what their testimony has been and what occurred in the courtroom."). See also United States ex rel. Clark v. Fike, 538 F.2d 750 (7th Cir.1976), cert. denied 429 U.S. 1064, 97 S.Ct. 791, 50 L.Ed.2d 781 (1977) suggesting that a separation order may issue as to the conduct of witnesses prior

to trial.

With respect to the criminal defendant's right to discuss his testimony with counsel, Geders v. United States, 425 U.S. 80, 96 S.Ct. 1330, 47 L.Ed.2d 592 (1976), held that prohibiting the defendant from consulting his attorney during an overnight recess denied to the accused the effective assistance of counsel. Whether counsel may be prohibited from discussing the case with the defendant "during a brief routine recess during the trial day" was expressly reserved. Id. at 89 n. 2. This question was addressed in Perry v. Leeke, 488 U.S. 272, 109 S.Ct. 594, 102 L.Ed.2d 624 (1989), where the Supreme Court held that barring the criminal defendant from consulting with his counsel during a fifteen minute break between direct and cross-examination did not violate the Sixth Amendment. As to assessing the adequacy of the physical circumstances surrounding counsel's consultation with the accused, see Abrams v. Barnett, 100 F.3d 485 (7th Cir.1996), cert. granted, judgment vacated on other grounds 521 U.S. 1114, 117 S.Ct. 2503, 138 L.Ed.2d 1008 (1997).

During an overnight or other substantiatial recess, it is improper to bar counsel from discussing with the defendant the substance of the defendant's testimony. United States v. Santos, 201 F.3d 953 (7th Cir.2000).

As to witnesses who are not also criminal defendants, it is common for the court to instruct a witness not to discuss the case with anyone including the attorney who called the witness while the court is in recess. This practice is particularly prevalant when the recess occurs during cross-examination. See Geders v. United States, 425 U.S. at 87-88, 96 S.Ct. at 1335 ("The trial judge here sequestered all witnesses for both prosecution and defense and before each recess instructed the testifying witness not to discuss his testimony with anyone. Applied to nonparty witnesses who were present to give evidence, the orders were within sound judicial discretion and are not challenged here.").

The court in Geders, id. at 89-91 provides an interesting discussion concerning the "coaching" of witnesses at trial and its cure or prevention:
There are other ways to deal with the problem of possible improper influence on testimony or "coaching" of a witness short of putting a barrier between client and counsel for so long a period as 17 hours. The opposing counsel in the adversary system is not without weapons to cope with "coached" witnesses. A prosecutor may cross-examine a defendant as to the extent of any "coaching" during a recess, subject, of course, to the control of the court. Skillful cross-examination could develop a record which the prosecutor in closing argument might well exploit by raising questions as to the defendant's credibility, if it developed that defense counsel had in fact coached the witness as to how to respond on the remaining direct examination and on cross-examination. In addition the trial judge, if he doubts that defense counsel will observe the ethical limits on guiding witnesses, may direct that the examination of the witness continue without interruption until completed. If the judge considers the risk high he may arrange the sequence of testimony so that direct-and cross-examination of a witness will be completed without interruption. That this would not be feasible in some cases due to the length of direct- and cross-examination does not alter the availability, in most cases, of a solution that does not cut off communication for so long a period as presented by this record. Inconvenience to the parties, witnesses, counsel, and court personnel may occasionally result if a luncheon or other recess is postponed or if a court continues in session several hours beyond the normal adjournment hour. In this day of crowded dockets, courts must frequently sit through and beyond normal recess; convenience occasionally must yield to concern for the integrity of the trial itself.

See also Perry v. Leeke, 488 U.S. 272, 282-285, 109 S.Ct. 594, 601-602, 102 L.Ed.2d 624 (1989) ("In other words, the truth-seeking function of the trial can be impeded in ways other than unethical 'coaching'. Cross-examination often depends for its effectiveness on the ability of counsel to punch holes in a witness' testimony at just the right time, in just the right way. Permitting a witness, including a criminal defendant, to consult with counsel after direct examination but before cross-examination, grants the witness an opportunity to regroup and regain a poise and sense of strategy that the unaided witness

would not possess. This is true even if we assume no deceit on the part of the witness; it is simply an empirical predicate of our system of adversary rather than inquisitorial justice that cross-examination of a witness who is uncounseled between direct examination and cross-examination is more likely to lead to discovery of the truth than is cross-examination of a witness who is given time to pause and consult with his attorney. * * * Thus, just as a trial judge has the unquestioned power to refuse to declare a recess at the close of direct testimony--or at any other point in the examination of a witness--we think the judge must also have the power to maintain the status quo during a brief recess in which there is a virtual certainty that any conversation between the witness and the lawyer would relate to the ongoing testimony. As we have said, we do not believe the defendant has a constitutional right to discuss that testimony while it is in process.").

With respect to a civil litigant's right to discuss his testimony with counsel, see Potashnick v. Port City Constr. Co., 609 F.2d 1101, 1119 (5th Cir.1980), rehearing denied 613 F.2d 314 (5th Cir.1980), cert. denied 449 U.S. 820, 101 S.Ct. 78, 66 L.Ed.2d 22 (1980):
Judge Hand's rule in the instant case similarly prohibited "any further conversations" with a witness once his testimony commenced, and the application of the rule barred the president and sole shareholder of defendant Port City from talking to his attorney for a period of seven days, including several overnight recesses. Judge Hand's denial of any attorney-client communication for such an extended period of time resulted in a significant deprivation of the effective assistance of counsel and thus impinged upon Port City's constitutional right to retain counsel.

In the absence of a court order, an attorney is free to confer with her witness. See United States v. Calderin-Rodriguez, 244 F.3d 977, 984-85 (8th Cir.2001) ('The appellants contend that the district court erred in refusing to strike the testimony of witness Charles Lahiff because Lahiff discussed his testimony with the prosecutor and another witness during the evening recess midway through his direct testimony. * * * Appellants object more vociferously to the meeting between the prosecutor and Lahiff than to that between Lahiff and Kemp, but the meeting between Lahiff and the prosecutor violated neither Federal Rule of Evidence 615 nor the sequestration order in this case. Rule 615 provides simply: 'At the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses ....' This rule does not by its terms forbid an attorney from conferring with witnesses during trial. Cf. United States v. Kindle, 925 F.2d 272, 276 (8th Cir. 1991) (Rule 615 does not require court to forbid contact between DEA case agent and witness during trial). Nor is it inherently unethical for a lawyer to speak to a witness once the witness has begun to testify. See United States v. DeJongh, 937 F.2d 1, 3 (1st Cir.1991); 29 Charles Alan Wright and Victor James Gold, Federal Practice and Procedure § 6243, at 64 (1997) ('During the course of a trial, an attorney customarily consults out-of-court with his client and other witnesses.'). Assuredly, the district court, in exercise of its discretion in regulating the conduct of the trial, may impose restrictions on an attorney's contact with witnesses during trial, not only to prevent unethical coaching, but also simply to preserve the status quo during breaks in testimony. See, e.g., Perry v. Leeke, 488 U.S. 272, 281-84, 109 S.Ct. 594, 102 L.Ed.2d 624 (1989) ('It is a common practice for a judge to instruct a witness not to discuss his or her testimony with third parties until the trial is completed.'). In this case, however, the district court's order explicitly assumed that the attorneys would talk to witnesses."); United States v. De Jongh, 937 F.2d 1, 3 (1st Cir.1991) ("We discern no error. To be sure, the district court possesses considerable discretion to make prophylactic orders designed to curb possible trial abuses, 'includ[ing] broad power to sequester witnesses before, during, and after their testimony.' Geders v. United States, 425 U.S. 80, 87, 96 S.Ct. 1330, 1335, 47 L.Ed.2d 592 (1976); see also Fed.R.Evid. 615. But here, the defendant had not requested that witnesses be sequestered or that any special prophylaxis be employed. Similarly, the court, on its own initiative, had entered no protective orders. We are aware of no rule or ethical principle suggesting, in the absence of a court order, that a prosecutor should refrain from conferring with a government witness before the start of cross-examination. As appellant's counsel admits, a prosecutor--or any other lawyer, for that matter--would be foolhardy to call an important witness without attempting, first, to debrief the witness; and we see no greater or different risk of taint in an interview at the end of the direct. There was no sufficient reason to strike Vlyt's testimony. See, e.g., United

States v. Rossetti, 768 F.2d 12, 16 (1st Cir.1985) (where no sequestration order was in place, there was no error in district court's refusal to strike testimony of key government witness who met privately with government investigator during trial in respect to apparent inconsistencies between the witness' anticipated testimony and testimony already given by other witnesses).").

A criminal defendant has a Sixth Amendment right to communicate with his attorney at counsel table while court is in session provided such communication is not done in a disruptive manner. Moore v. Purkett, 275 F.3d 685, 688-89 (8th Cir.2001):

As a part of the right to effective assistance of counsel, the Sixth Amendment guarantees a defendant the right to confer with counsel in the courtroom about the broad array of unfurling matters, often requiring immediate responses, that are relevant to the defendant's stake in his defense and the outcome of this trial. Geders v. United States, 425 U.S. 80, 88, 96 S.Ct. 1330, 47 L.Ed.2d 592 (1976); United States v. Miguel, 111 F.3d 666, 672 (9th Cir.1997). Except when the defendant is testifying, or during brief recesses in that testimony, the defendant enjoys an absolute "right to unrestricted access to his lawyer for advice on a variety of trial-related matters." Perry v. Leeke, 488 U.S. 272, 284, 109 S.Ct. 594, 102 L.Ed.2d 624 (1989). The defendant's ability to communicate with counsel in court remains "one of the defendant's primary advantages of being present at the trial." Illinois v. Allen, 397 U.S. 337, 344, 90 S.Ct. 1057, 25 L.Ed.2d 353 (1970). A defendant may lose his Sixth Amendment right if, after being warned by the judge of the consequences, the defendant repeats disruptive behavior. Id. at 343, 90 S.Ct. 1057. Nevertheless, "courts must indulge every reasonable presumption against the loss of constitutional rights." Id.

In our view, the state trial court ran afoul of these principles in prohibiting Moore from talking quietly with his attorney in the courtroom during the trial. Because of Moore's uncontroverted limited writing skills, the trial court's ban on Moore speaking quietly with his attorney effectively prevented Moore from communicating with his attorney at all while court was in session. The record does not show that Moore's conversations with his attorney would disrupt court proceedings, or that the trial court ever warned Moore about being disruptive or gave him an opportunity to correct disruptive behavior before banning him from talking altogether. Instead, the record shows the trial court simply thought defendants had little reason to talk with their attorneys in the courtroom, and maintained a general practice of not allowing it.

[FN16] Whether counsel may be prohibited from conveying to a witness the substance of another witnesses testimony was answered affirmatively in United States v. Rhynes, 196 F.3d 207 (4th Cir.1999) over an impassioned partial dissent and in spite of the fact that the trial court's Rule 615 order did not "explicitly" bar such conduct by an attorney:

When the court granted the defense's motion for sequestration, the district court stated:

THE COURT: Well, I do grant the usual sequestration rule and that is that the witnesses shall not discuss one with the other their testimony and particularly that would apply to those witnesses who have completed testimony not to discuss testimony with prospective witnesses, and I direct the Marshal's Service, as much as can be done, to keep those witnesses separate and apart from the witnesses who have not yet given testimony who might be in the custody of the marshal.

J.A. at 273 to 74. The district court exempted the Government's case agent and summary witness, and defendants' investigator, "[s]o long as [he] observe[d] Rule 615 and [did] not talk to the witnesses about testimony that has just concluded or testimony that has concluded." J.A. at 275. The district court required the defense to make a representation that the investigator would not talk to the witnesses.

M. Rhynes contends that neither Rule 615 nor the court's order indicates that his counsel could not conduct the interview of Alexander as to Davis' allegations. He further cites a leading treatise for the proposition that "[if] exclusion is ordered, the witnesses should be instructed not to discuss the case among themselves or with anyone except counsel for either side." 2 Charles A. Wright, Federal Practice & Procedure § 415 (2d ed.1982). M. Rhynes also argues that "[i]f defense counsel, actively fulfilling his constitutional function, is to be prohibited from such an interview with his own key witness, there must be a specific directive by the trial court to prohibit what would otherwise be a normal and expected Sixth Amendment obliga-

tion." Brief for Appellants at 36. See Geders v. United States, 425 U.S. 80, 87, 96 S.Ct. 1330, 47 L.Ed.2d 592 (1976) (forbidding a sequestration order that prohibited a defendant-witness from conferring with his counsel). M. Rhynes contends that if the court wanted defense counsel to not speak to witnesses about prior witness testimony, it could have made this known as it did with defense's investigator.

These arguments fail to persuade us to overturn the district court's decision. An appellate court is obliged to allow district courts discretion to preserve the integrity of a trial. Substantial deference is due a district court's evidentiary rulings and reversal may occur only where there has been an abuse of discretion. General Elec. Co. v. Joiner, 522 U.S. 136, 141, 118 S.Ct. 512, 139 L.Ed.2d 508 (1997). This deference is especially appropriate where, as here, the district court's actions are designed to protect the truthfulness of testimony. As the Supreme Court has stated, "If truth and fairness are not to be sacrificed, the judge must exert substantial control over the proceedings." Geders, 425 U.S. at 87, 96 S.Ct. 1330.

The judicial system as a whole has a global interest in protecting the truth-finding process. Conduct such as witness coaching and perjury threatens to destroy the integrity of this process. The risk of this type of conduct inhered in the circumstances of this case. This was a multi-defendant conspiracy with the potential for a variety of conflicting stories from the respective defendants. We cannot say that the district judge was unreasonably on heightened alert to the risks of tailoring. Nor can we say that his actions to combat these risks were unreasonable.

The sequestration order was drawn to ensure that there was no witness coaching, collusion among witnesses, or tailoring of testimony. While cross-examination plays an important role in preventing these ills, it may not be the complete answer. In fact, the very availability of a sequestration order under Fed.R.Evid. 615 reflects the judgment of the drafters that cross-examination may not be wholly sufficient to safeguard the truth-finding function in all circumstances.

Further, Rule 615 is not the limit of a district court's supervisory authority over the conduct of a trial. See United States v. Sepulveda, 15 F.3d 1161, 1176 (1st Cir.1993). The court may take additional measures to prevent the tailoring and fabrication of witness testimony, such as prohibiting witnesses from discussing the case with one another, from discussing the case with any attorney, and from reading transcripts of the trial testimony of other witnesses. See Michael Graham, Federal Practice and Procedure, Federal Rules of Evidence § 6611, at 216 to 18 (interim ed. 1992).

Although the dissent challenges the district court's interpretation of its order, district courts are best able to interpret their own orders. See Vaughns v. Board of Educ. of Prince George's County, 758 F.2d 983, 989 (4th Cir.1985). We have noted that district courts are entitled to "inherent deference" when they construe the same. Anderson v. Stephens, 875 F.2d 76, 80 n. 8 (4th Cir.1989). Indeed, reversal of a district court's interpretation of its own order may occur only when "the record clearly shows an abuse of discretion." Texas N.W. Ry. Co. v. Diamond Shamrock Ref. & Mktg. Co. (In re Chicago, Rock Island & Pacific R.R. Co.), 865 F.2d 807, 810 (7th Cir.1988) (internal quotation marks omitted).

Here the district court's interpretation of its order was a reasonable one. The purpose of a sequestration order "is, of course, to prevent the possibility of one witness shaping his testimony to match that given by other witnesses at the trial." United States v. Leggett, 326 F.2d 613, 613 (4th Cir.1964). Given the danger of tailoring, allowing an attorney to inform a witness of other witnesses' testimony poses the exact same risk as allowing witnesses to speak with one another. If the attorney is permitted to convey the same information that a witness was not allowed to obtain from another source, then the sequestration order may be effectively nullified. The district court was thus within its discretion to interpret its order in a manner that prevented the defense from undermining the very purpose of that order. Even were we to think, as the dissent does, that the district court's interpretation resulted in an "overbroad" sequestration order, that would still not suffice to undermine the district court's reasonable attempt to ensure the integrity of the proceedings before it.

The dissent complains that neither Rule 615 nor the district court's order barred any attorney from speaking with any witness. But as stated above, the district court properly exercised its discretion to interpret its order in light of the order's manifest intent. The fact that the text of the order may not have expressly mentioned attorney-witness communications does not alter this conclusion. In fact, other circuits have recognized that a sequestration order may cover more than courtroom exclusion even if the order mentions only exclusion. See, e.g., United States v. Greschner, 802 F.2d 373, 375 (10th Cir.1986) (Rule 615 also

prohibits discussion of case between witnesses); Miller v. Universal City Studios, Inc., 650 F.2d 1365, 1373 (5th Cir.1981) (Rule 615 prohibits the reading of trial transcripts). These cases recognize that trial judges are entitled to be on alert to the myriad ways in which individuals may attempt to circumvent sequestration orders.

Moreover, the district judge did not find a violation of the order simply because defense counsel spoke generally about the case with a witness who was yet to testify. Rather, the district judge sanctioned the defense because the attorney had conveyed precisely that information which the sequestration order was designed to withhold from prospective witnesses--namely, the testimony of prior witnesses in the case.

It would undoubtedly benefit every defense witness to know what a prosecution witness had or had not said on the stand. This is especially so where, as here, a prosecution witness has linked the defense witness to the defendant's own alleged illegal activities. A defense witness equipped with this specific knowledge has an opportunity to tailor his testimony to respond more convincingly to such allegations.

Rhynes was reversed en banc accompanied by impassioned dissents supporting the original panel decision. The majority in Rhynes, 218 F.3d 310, 317 (4th Cir.2000) opined:

The Government has conceded that neither the plain language of the district court's order, nor the provisions of Rule 615, prohibit any conduct by lawyers, and we note that "in all but the most extraordinary circumstance," the inquiry should end here. Estate of Cowart v. Nicklos Drilling Co., 505 U.S. 469, 475, 112 S.Ct. 2589, 120 L.Ed.2d 379 (1992). Nonetheless, the Government asserts that the "purpose and spirit" of the sequestration order were compromised by Mr. Scofield's discussion with Alexander. Specifically, the Government contends that the "truth-seeking" process would be hindered if lawyers were permitted to reveal testimony in the manner exercised by Mr. Scofield. This is basically an argument that Rule 615, the extending language, or the policies underlying sequestration implicitly proscribed Mr. Scofield's conduct; we reject the argument for several reasons.

We have properly recognized the purpose and spirit underlying witness sequestration: it is "designed to discourage and expose fabrication, inaccuracy, and collusion." Opus 3 Ltd. v. Heritage Park, Inc., 91 F.3d 625, 628 (4th Cir.1996). Put differently, sequestration helps to smoke out lying witnesses: "It is now well recognized that sequestering witnesses 'is (next to cross-examination) one of the greatest engines that the skill of man has ever invented for the detection of liars in a court of justice.' " Id. (citing 6 Wigmore on Evidence § 1838, at 463).

To the extent that the Government asserts that Mr. Scofield frustrated the purpose and spirit of sequestration, we disagree. The Government asserts that Mr. Scofield's actions undermined the truthfulness of Alexander's testimony, which, in the Government's view, is surely an act that runs afoul of the sequestration order. On the contrary, lawyers are not like witnesses, and there are critical differences between them that are dispositive in this case. Unlike witnesses, lawyers are officers of the court, and, as such, they owe the court a duty of candor, Model Rules of Professional Conduct Rule 3.3 (1995) ("Model Rules"). Of paramount importance here, that duty both forbids an attorney from knowingly presenting perjured testimony and permits the attorney to refuse to offer evidence he or she reasonably believes is false. Id. Rule 3.3(a)(4), (c). Similarly, an attorney may not "counsel or assist a witness to testify falsely." Id. Rule 3.4(b). And, if an attorney believes that a non-client witness is lying on the witness stand about a material issue, he is obliged to "promptly reveal the fraud to the court." Id. Rule 3.3, cmt. 4. The Supreme Court has emphasized the importance of attorneys' duty of candor: "Any violation of these strictures would constitute a most serious breach of the attorney's duty to the court, to be treated accordingly." Geders v. United States, 425 U.S. 80, 90 n. 3, 96 S.Ct. 1330, 47 L.Ed.2d 592 (1976) (citing to parallel provisions of Model Code of Professional Responsibility). Consequently, lawyers' ethical obligations to the court distinguish them from trial witnesses.

Moreover, the purpose and spirit underlying sequestration are not absolute; indeed, we have aptly recognized that even the "powerful policies behind sequestration" must bend to the dictates of the Constitution. Opus 3 Ltd., 91 F.3d at 628. Thus, to the extent that they are implicated in this case, the policies and spirit of sequestration must yield to the constitutional and ethical duties Mr. Scofield sought to effectuate here. That is, in the context of a criminal trial like this one, a defense attorney's

duty to his client assumes constitutional stature: "In all criminal prosecutions, the accused shall ... have the Assistance of Counsel for his defence." U.S. Const. amend. VI. To all clients, an attorney owes competence. Model Rules Rule 1.1. To fulfill this basic duty, the attorney must prepare carefully for the task at hand: "Competent representation requires ... thoroughness and preparation reasonably necessary for the representation." Id. Rule 1.1(a).

Thorough preparation demands that an attorney interview and prepare witnesses before they testify. No competent lawyer would call a witness without appropriate and thorough pre-trial interviews and discussion. In fact, more than one lawyer has been punished, found ineffective, or even disbarred for incompetent representation that included failure to prepare or interview witnesses. United States v. Tucker, 716 F.2d 576 (9th Cir.1983) (defense counsel ineffective for failing to interview witnesses); McQueen v. Swenson, 498 F.2d 207 (8th Cir.1974) (same); In re Warmington, 212 Wis.2d 657, 668, 568 N.W.2d 641 (1997) (lawyer disbarred for, among other things, "failing to supervise the preparation of an expert witness"); In re Wolfram, 174 Ariz. 49, 847 P.2d 94, 96 (1993) (failure to interview witnesses cited among reasons for suspending attorney).

In this context, Mr. Scofield's actions were necessary in the exercise of his duties, both constitutional and ethical, as a lawyer. First, when the Government called Davis as a witness and began asking him questions about Alexander, Mr. Scofield made clear that he was unaware that Alexander had been implicated as a co-conspirator. See supra at 313-14. Although Davis's subsequent testimony did not implicate Alexander in any specific drug deal, the import of Davis's allegation was clear: Alexander was serving as an intermediary between drug buyers and Rhynes. Faced with an allegation that his prime supporting witness, Alexander, had been assisting, or participating in, a drug conspiracy with Rhynes, Mr. Scofield had ethical (and possibly constitutional) duties to investigate these allegations with Alexander before he put Alexander on the stand. Mr. Scofield was thus compelled to ascertain, if possible: (1) whether Davis's allegations were untrue (or, if true, whether Alexander intended to invoke his Fifth Amendment rights); (2) whether Alexander's denials were credible; and (3) why Davis would make potentially false allegations against Alexander. Put simply, Mr. Scofield needed to fully assess his decision to call Alexander as a witness, and, to fulfill his obligations to his client, Scofield was compelled to discuss Davis's testimony with Alexander. See Chandler v. Jones, 813 F.2d 773 (6th Cir.1987) (finding counsel's performance deficient for (1) failing to prepare witness for trial; (2) improperly using leading questions; and (3) calling witness who was expected to invoke the Fifth Amendment).

In response, the Government claims that Mr. Scofield did not violate the sequestration order by merely speaking with Alexander; instead, it was Mr. Scofield's informing Alexander of Davis's testimony that violated the order. Based on this view, the Government asserts that counsel had ample room to interview and prepare witnesses without running afoul of the sequestration order. But this conclusion begs the question, "How was counsel to discern the limits of the sequestration order?" Those limits--as declared after the fact by the district court--did not appear on the face of the order, in Rule 615, in controlling precedent, or even in persuasive authorities. In fact, adoption of the Government's position would make it virtually impossible for counsel to know whether they have "ample room" to perform essential tasks without violating an order. This argument thus fails to persuade us.

Further, sequestration is not the only technique utilized to ensure the pursuit of truth at trial. Indeed, if an attorney has inappropriately "coached" a witness, thorough cross-examination of that witness violates no privilege and is entirely appropriate and sufficient to address the issue. In Geders, Chief Justice Burger, for a unanimous Court, endorsed cross-examination as the swift antidote for witness coaching:

The opposing counsel in the adversary system is not without weapons to cope with "coached" witnesses. A prosecutor may cross-examine a defendant as to the extent of any "coaching" .... Skillful cross-examination could develop a record which the prosecutor in closing argument might well exploit by raising questions as to the defendant's credibility, if it developed that defense counsel had in fact coached the witness as to how to respond ....

Geders, 425 U.S. at 89-90, 96 S.Ct. 1330.

In short, the Government's position requires the implication that by discussing prior trial testimony with Corwin Alexander, Mr. Scofield necessarily coached Alexander or made it likely that Alexander would commit perjury. To the contrary, we must trust and rely on lawyers' abilities to discharge their ethical obligations, including their duty of candor to the court,

without being policed by overbroad sequestration orders. Furthermore, we are confident that, if an attorney is lax in his duty of candor, that laxness will normally be exposed--even exploited--by skillful cross-examination.

[FN17] Hill v. Porter Memorial Hospital, 90 F.3d 220, 223 (7th Cir.1996) ("Upon realizing that before testifying Drs. Rosen and Geremia had read the trial transcript of Dr. Kelly's testimony, Mrs. Hill's counsel moved that their testimony be stricken, arguing that Drs. Rosen and Geremia 'tailored' their expert opinions based on Dr. Kelly's testimony. In the alternative, Mrs. Hill's counsel requested that the jury be instructed concerning the credibility of an expert witness who had reviewed another witness' trial testimony."); Miller v. Universal City Studios, Inc., 650 F.2d 1365, 1373 (5th Cir.1981):
The purpose of the sequestration rule is to prevent the shaping of testimony by one witness to match that of another, and to discourage fabrication and collusion. Taylor v. United States, 388 F.2d 786 (9th Cir.1967); United States v. Leggett, 326 F.2d 613 (4th Cir.1964), cert. denied 377 U.S. 955, 84 S.Ct. 1633, 12 L.Ed.2d 499 (1964). The opportunity to shape testimony is as great with a witness who reads trial testimony as with one who hears the testimony in open court. The harm may be even more pronounced with a witness who reads trial transcript than with one who hears the testimony in open court, because the former need not rely on his memory of the testimony but can thoroughly review and study the transcript in formulating his own testimony. The court properly held that providing a witness daily copy constitutes a violation of rule 615.
Defense counsel's statement during oral argument that it is a common practice in the Miami area to allow witnesses to read daily copy despite the existence of a sequestration order gives us some cause for concern. There is nothing in the record to substantiate counsel's statement, however, and we cannot speculate that most attorneys in Miami either do not realize that reading daily copy violates the sequestration rule or have adopted a practice that violates the rule. The district judge commented at trial that in the five years he had been on the bench he had never heard of allowing witnesses to read daily copy.

Pretrial testimony of another witness, such as a deposition or grand jury transcript, may be reviewed without violating Rule 615, United States v. Chitty, 15 F.3d 159 (11th Cir.1994) (grand jury testimony), as may be pretrial material of the witness herself or other material.

[FN18] No violation occurs where the party had no reason to believe that the person could possibly be called as a witness prior to an unexpected event occurring at trial. See United States v. Green, 305 F.3d 422, 429 (6th Cir.2002) ("From our review of the record, we find no violation of the sequestration order. As the government points out, it did not know of the existence of the letter prior to Marvin Warner's cross-examination. Thus, the government could not have known to have Rogers [Warner's attorney] absent during Marvin Warner's testimony. Under these circumstances, the district court did not abuse its discretion in permitting Rogers to testify or in denying Green's motion for a mistrial because of Rogers' testimony.").

[FN19] Holder v. United States, 150 U.S. 91, 14 S.Ct. 10, 37 L.Ed. 1010 (1893); United States v. Rossetti, 768 F.2d 12 (1st Cir.1985); United States v. Eastwood, 489 F.2d 818 (5th Cir.1973); United States v. Whiteside, 404 F.Supp. 261 (D.Del.1975).

If Rule 615 has been violated by a witness who testifies prior to discovery of the breach, the judgment will be reversed only if prejudice is shown. United States v. Warren, 578 F.2d 1058 (5th Cir.1978), rehearing denied 586 F.2d 608 (5th Cir.1978), rehearing 589 F.2d 254 (5th Cir.1979). Where the witness is permitted to remain in court, it should naturally follow that he may also testify. Yet in United States v. Nelson, 603 F.2d 42 (8th Cir.1979) and again in United States v. Williams, 604 F.2d 1102 (8th Cir.1979), the court stated that whether a government agent who remains in court can testify rests in the discretion of the court and if the defendant was unfairly prejudiced by his testimony error will have been created. This case was incorrectly decided. Once a witness is found to fall within an exception to Rule 615, this status carries with it a *right* to testify.

[FN20] United States v. Miller, 499 F.2d 736 (10th Cir.1974) (unless harm shown, new trial will not be ordered); United States v. Pollack, 640 F.2d 1152 (10th Cir.1981) (mistrial declared).

In the most egregious cases the trial court may even dismiss the claim for relief or criminal charge. See Pickel v. United States, 746 F.2d 176, 182 (3d Cir.1984) ("We also assume that Fed.R.Civ.Proc. 41(b), which allows the court to dismiss claims for violation of any court order, might support a dismissal in a most egregious situation.").

Sequestering of a witness who should not have been sequestered does not require reversal in the absence of a showing of prejudice. Marathon Pipe Line v. Drilling Rig Rowan/Odessa, 699 F.2d 240 (5th Cir.1983), cert. denied 464 U.S. 820, 104 S.Ct. 82, 78 L.Ed.2d 92 (1983).

[FN21] Miller v. Universal City Studios, Inc., 650 F.2d 1365, 1373 (5th Cir.1981) ("On appeal defendants challenge both the finding of a violation of the rule and the exclusion of their expert witness as a sanction for the violation. Since the sanction applied here would be reasonable for a violation of rule 615, we address only whether the district court correctly held that a violation occurred."). Accord United States v. Wilson, 103 F.3d 1402 (8th Cir.1997); Rowan v. Owens, 752 F.2d 1186 (7th Cir.1984), cert. denied 476 U.S. 1140, 106 S.Ct. 2245, 90 L.Ed.2d 691 (1986).

If the witness has already testified, the testimony may be struck from the record and the jury instructed to disregard. See United States v. Magana, 127 F.3d 1, 6 (1st Cir.1997) ("He permitted counsel to examine the witness about her conversation with the prosecutor and gave the defendants the choice to do that either in the presence of the jury or on voir dire. After the voir dire, he carefully evaluated the possibility of prejudice to the defendants before determining to strike the testimony, and even after making the tentative decision, he took steps to assure that counsel had considered fully what impact striking the testimony might have on the state of the evidence.").

[FN22] United States v. Posada-Rios, 158 F.3d 832, 872 (5th Cir.1998), cert. denied 526 U.S. 1031, 119 S.Ct. 1280, 143 L.Ed.2d 373 (1999) ("Because the defendants were allowed a full opportunity to cross-examine Hall, and because the testimony that was elicited from Hall did not indicate that his testimony was influenced by his conversations with Cortes, the district court did not err in refusing to strike the testimony of Hall and Cortes or to allow further questioning of Hall and Cortes outside of the presence of the jury."); United States v. Hobbs, 31 F.3d 918, 921 (9th Cir.1994) ("As the government correctly notes, the Supreme Court has recognized three sanctions for the violation of a sequestration order: (1) holding the offending witness in contempt; (2) permitting cross-examination concerning the violation; and (3) precluding the witness from testifying. E.g., Holder v. United States, 150 U.S. 91, 92, 14 S.Ct. 10, 11, 37 L.Ed. 1010 (1893).").

[FN23] Holder v. United States, 150 U.S. 91, 14 S.Ct. 10, 37 L.Ed. 1010 (1893); Hill v. Porter Memorial Hospital, 90 F.3d 220 (7th Cir.1996); United States v. Binetti, 547 F.2d 265 (5th Cir.1977) reversed on other grounds 552 F.2d 1141 (5th Cir.1977).

[FN24] United States v. McMahon, 104 F.3d 638 (4th Cir.1997); United States v. Smith, 578 F.2d 1227 (8th Cir.1978), appeal after remand 600 F.2d 149 (8th Cir.1979); Shoemaker v. K-Mart, Inc., 294 F.Supp. 260 (E.D.Tenn.1968).

[FN25] Holder v. United States, 150 U.S. 91, 92, 14 S.Ct. 10, 10, 37 L.Ed. 1010 (1893) ("If a witness disobeys the order of withdrawal, while he may be proceeded against for contempt, and his testimony is open to comment to the jury by reason of his conduct, he is not thereby disqualified, and the weight of authority is that he cannot be excluded on that ground merely, although the right to exclude under particular circumstances may be supported as within the sound discretion of the trial court."); United States v. Cropp, 127 F.3d 354, 363 (4th Cir.1997), cert. denied 522 U.S. 1098, 118 S.Ct. 898, 139 L.Ed.2d 883 (1998) ("The Supreme Court has long recognized that a trial court may employ one of three remedies when a sequestra-

tion order has been violated: sanction of the witness; instructions to the jury that they may consider the violation toward the issue of credibility; or exclusion of the witness' testimony. See, e.g., Holder v. United States, 150 U.S. 91, 14 S.Ct. 10, 37 L.Ed. 1010 (1893). The remedy of exclusion is so severe that it is generally employed only when there has been a showing that a party or a party's counsel caused the violation. See Braswell v. Wainwright, 463 F.2d 1148, 1152-53 (5th Cir.1972); United States v. Hobbs, 31 F.3d 918, 922 (9th Cir.1994). Because exclusion of a defense witness impinges upon the right to present a defense, we are quite hesitant to endorse the use of such an extreme remedy."); United States v. English, 92 F.3d 909, 913 (9th Cir.1996) ("The district court did not abuse its discretion by deciding not to disqualify Mr. Lawther from testifying. One factor given considerable weight in determining what sanction, if any, is appropriate for the violation of a sequestration order is whether the side calling the witness deliberately violated the court's order. See, e.g., Hobbs, 31 F.3d at 922-23 ('no evidence before the district court that defense counsel had acquiesced in the witnesses' violation'); United States v. Gibson, 675 F.2d 825, 836 (6th Cir.) (whether party seeking the testimony knew of sequestration violation is an important factor in determination of appropriate sanctions), cert. denied 459 U.S. 972, 103 S.Ct. 305, 74 L.Ed.2d 285 (1982). Although the government in this instance may have known Mr. Lawther was in the courtroom during some of the trial, there is no indication that the prosecution intended to violate the court's order. Rather, the prosecution had not expected to call Mr. Lawther to the stand at all, but changed its mind after hearing English testify. Moreover, English does not indicate how, if at all, he was prejudiced by the introduction of Mr. Lawther's testimony. See, e.g., United States v. Brewer, 947 F.2d 404, 410- 11 (9th Cir.1991) (applying harmless error analysis to review of failure to exclude witnesses from courtroom)."); United States v. Hobbs, 31 F.3d 918, 921-22 (9th Cir.1994) ("Although the Court has indicated that the disqualification of a witness is a sanction that is to be used sparingly, it has not spelled out what 'particular circumstances' support such a sanction. Our circuit has interpreted Holder as holding that it is usually an abuse of discretion to disqualify such a witness 'unless the defendant or his counsel have somehow cooperated in the violation of the order.' United States v. Torbert, 496 F.2d 154, 158 (9th Cir.), cert. denied 419 U.S. 857, 95 S.Ct. 105, 42 L.Ed.2d 91 (1974); United States v. Oropeza, 564 F.2d 316, 326 (9th Cir.1977) ('A witness is not disqualified merely because he remains in the courtroom after a sequestration order.'), cert. denied 434 U.S. 1080, 98 S.Ct. 1276, 55 L.Ed.2d 788 (1978); Taylor v. United States, 388 F.2d 786, 788 (9th Cir.1967); see also United States v. Gibson, 675 F.2d 825, 836 (6th Cir.1982) (' "[P]articular circumstances" sufficient to justify exclusion of a witness are indications that the witness has remained in court with the "consent, connivance, procurement or knowledge" of the party seeking testimony.'), cert. denied 459 U.S. 972, 103 S.Ct. 305, 74 L.Ed.2d 285 (1982); Braswell v. Wainwright, 463 F.2d 1148, 1152-53 (5th Cir.1972); United States v. Schaefer, 299 F.2d 625, 631 (7th Cir.), cert. denied 370 U.S. 917, 82 S.Ct. 1553, 8 L.Ed.2d 497 (1962). * * * Because of this constitutionally based right of the defendant to present evidence in his favor, disqualification of defense witnesses is too harsh a penalty to impose in the absence of misbehavior by the defendant or his counsel. Braswell, 463 F.2d at 1157; Taylor, 388 F.2d at 788 (' "[S]pecial circumstances" justifying ... [a] refusal should ... tend to make the litigant a party to and justly subject to sanction for the witness's disobedience.'); see also Torbert, 496 F.2d at 158 (disqualification appropriate where a discrepancy develops between testimony of defendant and of codefendant and defendant then deliberately violates sequestration order by reciting his version of the facts to a potential witness). When determining whether the disqualification of a defense witness constitutes an abuse of discretion, some courts have also considered whether the excluded witness's testimony would have been cumulative to the testimony or evidence presented by other witnesses. See Avila-Macias, 577 F.2d at 1389; see also United States v. Perry, 815 F.2d 1100, 1105-06 (7th Cir.1987). * * * In this case, the court's order excluding the defense witnesses from testifying was erroneous because there was no evidence before the court at the time it made its ruling either that Hobbs or his counsel had knowledge of or had consented to the witnesses' presence in the courtroom or that the witnesses were aware of the sequestration order. The witnesses entered the courtroom after the proceedings had begun and while defense counsel was cross-examining Agent Hudock. At this time defense counsel had her back to the spectators and was unaware of the witnesses' presence. As a general matter, we easily can imagine a situation where a prospective witness becomes confused and enters the courtroom late, when counsel is busy and may be unaware that a witness has entered the room. See Weinstein & Berger, 3 Weinstein's Evidence, ¶615[03], at 615-29.

In this case counsel notified the court of the witnesses' presence as soon as she became aware of it.").

[FN26] 3 Weinstein's Evidence ¶615[03] at 615-26 (1987).

[FN27] In order to justify reversal for violation of the sequestration rule, the aggrieved party must show sufficient prejudice. United States v. Warren, 578 F.2d 1058 (5th Cir.1978), modified on other grounds, 612 F.2d 887 (5th Cir.1980), cert. denied 446 U.S. 956, 100 S.Ct. 2928, 64 L.Ed.2d 815 (1980) (insufficient prejudice shown where trial court failed to exclude government witness from courtroom during suppression hearing); United States v. Eastwood, 489 F.2d 818 (5th Cir.1973) (trial court's failure to declare mistrial where witnesses who had violated sequestration orders nevertheless testified did not justify reversal on appeal absent showing of prejudice sufficient to constitute abuse of discretion); United States v. Womack, 654 F.2d 1034 (5th Cir.1981), cert. denied 454 U.S. 1156, 102 S.Ct. 1029, 71 L.Ed.2d 314 (1982) (the determination whether to declare a mistrial or to order a new trial for violation of Rule 615 is a matter within the trial court's sound discretion.).

See also United States v. Diaz, 248 F.3d 1065, 1104 (11th Cir.2001) ("We find that the violation of the sequestration order resulted in no prejudice. Echevarria argues that the district court erred by allowing Nelson Martin to be recalled to the stand more than two weeks after his initial testimony to clarify what he meant by his testimony that he was physically taken by 'armed' men. Just prior to Martin's being called to the stand, the government spoke with Martin and asked him what the kidnappers had held in their hands. Martin responded 'guns'. Counsel for Echevarria then moved to exclude the testimony of Martin. (R.430, at 3133). The court determined that the violation of the order was not in bad faith, particularly since Nelson was recalled for only a specific purpose--to clarify the meaning of 'armed'. Following the direct examination of Martin regarding the meaning of 'armed', defense counsel were able to cross examine Martin. During cross examination, defense counsel brought out the fact that, although the pistols existed two weeks ago when Martin originally testified, he never explicitly referenced them. Accordingly, we find no prejudice.").

FEDEVID § 615:1
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