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SCSL-04-14-T
(13139 - 13159)

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SPECIAL COURT FOR SIERRA LEONE

OFFICE OF THE PROSECUTOR

FREETOWN – SIERRA LEONE

Before: Hon. Justice Pierre Boutet, Presiding Judge
Hon. Justice Benjamin Mutanga Itoe
Hon. Justice Bankole Thompson

Registrar: Robin Vincent

Date filed: 27th June 2005

THE PROSECUTOR

Against

SAMUEL HINGA NORMAN

MOININA FOFANA

ALLIEU KONDEWA

(Case No. SCSL-2004-14-T)

REQUEST FOR LEAVE TO APPEAL DECISION ON PROSECUTION MOTION FOR A RULING ON THE ADMISSIBILITY OF EVIDENCE

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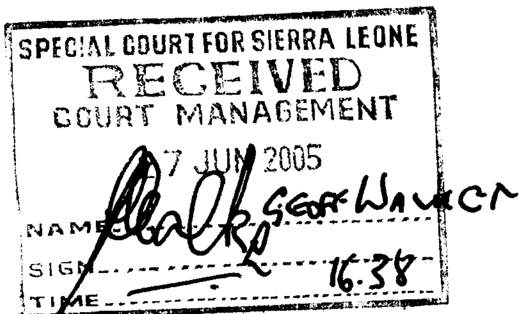

I. INTRODUCTION

1. Pursuant to Rule 73(B) of the Rules of Procedure and Evidence of the SCSL, the Prosecution hereby seeks leave to appeal the Trial Chamber's "Reasoned Majority Decision on Prosecution Motion for a Ruling on the Admissibility of Evidence", 24 May 2005 [1] (hereinafter the "Majority Decision on Admissibility of Evidence") and related oral rulings pertaining to witnesses TF2-187, TF2-135 and TF2-189.[2]
2. The Prosecution submits that the Trial Chamber's Majority Decision on Admissibility of Evidence and the related oral decisions can be considered jointly and severally.

II. PROCEDURAL BACKGROUND

3. On the 9th February 2004, the Prosecution filed a motion seeking leave to amend the Consolidated Indictment against the three accused persons so as to include additional charges of sexual violence. By a majority decision rendered on the 20th May 2004, the Trial Chamber denied the Prosecution's request. A request for leave to appeal the majority decision was denied by the Trial Chamber. The Prosecution filed an application requesting leave from the Appeals Chamber, which was also denied.
4. On the 15th February 2005, the Prosecution sought a ruling, by motion, as to the admissibility of evidence of sexual violence under counts 3 and 4 of the Consolidated Indictment. Those counts deal with "physical and mental harm" and "other inhumane acts", respectively.[3] On the 24th May 2005 the Trial Chamber delivered the Majority Decision on Admissibility of Evidence[4] denying the Prosecution's request to introduce sexual violence evidence under the existing counts.
5. The written Majority Decision on Admissibility of Evidence dismissed the Prosecution's application as the indictment contained no specific mention of sexual violence and such evidence could not be led under counts 3 and 4 of the Consolidated Indictment.

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[1] See, *Prosecutor v. Norman et al*, SCSL-2004 -14-T, "Reasoned Majority Decision on Prosecution Motion for a Ruling on the Admissibility of Evidence", 24 May 2005 [hereinafter, "**the Majority Decision on Admissibility of Evidence**"].
[2] See *Prosecutor v. Norman et al*, SCSL-2004 -14-T, Transcript, 1 June 2005, p.2, Transcript, 2 June 2005, p. 47, Transcript, 3 June 2005, p. 19.
[3] See, *Prosecutor v. Norman et al*, SCSL-2004-14-T, "Urgent Prosecution Motion for Ruling on the Admissibility of Evidence", 15 February 2005. Defence response and Prosecution reply were filed.
[4] Majority Decision on Admissibility of Evidence, *Supra* note 1.

6. The Prosecution submits that the Trial Chamber erred in law by refusing to allow the adduction of evidence of sexual violence or violence in a sexual context, under any circumstances, in the trial.

7. The Prosecution submits that as a result of the errors of law, exceptional circumstances exist for leave to be granted. As a result of the decision, the Prosecution has suffered irreparable prejudice.

III. ARGUMENTS

A. Exceptional Circumstances

8. The Trial Chamber committed errors of law in the Majority Decision on Admissibility of Evidence and the related oral decisions when it held that evidence relating to sexual violence was inadmissible[5]. The Majority Decision on Admissibility of Evidence did not address the evidentiary spectrum by which sexual violence evidence can be led.

9. The majority erred when it held that the proposed testimony was "forbidden evidentiary territory".[6] The key issue determined by the Trial Chamber was whether or not under Article 17(4), (a), (b), (c) the statutory due process rights of the accused persons were unfairly prejudiced by the adduction of sexual violence evidence. The decision could not support the legal proposition that all evidence of sexual violence was to be excluded from the trial.

10. The Prosecution, noting the need for brevity in submissions despite addressing a number of decisions, relies upon the Dissenting Opinion of Justice Pierre Boutet on Decision of Prosecution Motion for a Ruling on the Admissibility of Evidence. It is acknowledged that differences amongst judges of a Trial Chamber do not necessarily establish exceptional grounds, however the subject matter is of such importance, that clarity and consistency is paramount and should be resolved by the Appellate Chamber.

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[5] *Prosecutor v. Norman et al*, SCSL-2004 -14-T, Transcript, 1 June 2005, p.2, Transcript, 2 June 2005, p. 47, Transcript, 3 June 2005, p. 19

[6] *Prosecutor v. Norman et al*, SCSL-2004 -14-T, Transcript, 1 June 2005, p. 2.

11. Upon reviewing the fundamental differences between the majority and the dissenting opinion one can have regard to the following examples from the majority decision[7]:

    1. "nowhere in Counts 3 and 4 of the Consolidated Indictment as amended are there any specific factual allegations of sexual violence under the respective statements of "Inhumane Acts "as a crime against humanity..."

    2. "It cannot be validly posited that the proposed evidence can be properly adduced to support Counts 3 and 4 of the Consolidated Indictment without the underlying factual allegations having been specifically pleaded."

    3. "That the particulars in the Consolidated Indictment in respect of Count 3 and 4 cannot be validly interpreted to be of an inclusive nature and as not excluding the broad range of unlawful acts which can lead to serious physical and mental harm".

    4. "There is nothing in the records that seem to support the Prosecution's assertion that the evidentiary material under reference disclosed to the Defence "in some form" over 12 months ago and even if there were, there is nothing in the Consolidated Indictment, the principal accusatory instrument, to sustain such an assertion"

    The dissenting opinion contained, amongst other differences the following[8]:

    > "I am of the view that the Prosecution have provided the Accused with adequate notice that evidence about acts of sexual violence would be elicited at trial in support of Counts 3 and 4 of the Consolidated Indictment, through the means of the Supplementary Pre-Trial Brief, the Opening Statement, pre-trial disclosure of witness statements containing testimony on sexual violence, together with the further notice of intention through this Motion for clarification. I do not believe that the failure to explicitly list acts of sexual violence in the Consolidated Indictment would materially impair the ability of any of the Accused to effectively prepare his defence on such allegations. The Accused has been on notice since before the start of the trial that evidence of sexual violence would be elicited at trial as relevant and probative evidence to establish the allegations set forth in Counts 3 and 4 of the Consolidated Indictment."

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[7] Majority Decision on Admissibility, para. 19.
[8] Majority Decision on Admissibility, para. 29.

12. The differences between the majority decision and the dissenting opinion are irreconcilable.

Admissibility of Uncharged Acts

13. The Prosecution sought to adduce the following subject evidence to provide background evidence:

    a. TF2-187 alleged that she suffered an abortion after she was raped by the Third Accused. The evidence of sexual violence was intended to show the cause of, or the circumstances, surrounding the physical injury, namely the abortion.[9]

    b. In the case of TF2-135, the Prosecution sought to adduce evidence of a report, involving sexual abuse committed by Kamajors, which she directly made to the Second Accused. This evidence was intended to prove the individual criminal responsibility of the Second Accused under Article 6.3 of the Statute of the Special Court for Sierra Leone as to his knowledge of unlawful acts committed by subordinates and his response to the report.[10] It was not intended to be led to prove the unlawful sexual acts.

    c. Witness TF2-189 testified about events surrounding her captivity in Talia Yawbeko. She was asked as to whether she suffered any physical injury while in captivity. In the witness' statement she alleged that knife wounds were inflicted on her when she refused to have sex with her captor. The Prosecution evidence in question relates to the infliction of knife wounds under the charge of physical harm (Count 4).

14. The issue that arose during the testimony of the respective witnesses was whether acts of sexual violence could be adduced as evidence to provide the context of factual allegations[11]. The Majority Decision on Admissibility of Evidence does not provide a basis for excluding the subject evidence in support of factual allegations contained in the Consolidated Indictment. It should be noted that the Prosecution, in the light of the adverse decisions, did not call all witnesses who could testify to sexual violence.

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[9] *Prosecutor v. Norman et al*, SCSL-2004 -14-T, Transcript, 31 May 2005, p. 33 – 37.
[10] *Prosecutor v. Norman et al*, SCSL-2004 -14-T, Transcript, 2 June 2005, p. 31 – 34, 36 – 38.
[11] Majority Decision on Admissibility of Evidence, para. 16.

a) Uncharged crimes are admissible to prove facts in issue

15. The Prosecution submits that uncharged crimes are admissible where (1) the uncharged crime is directly probative of a fact in issue; and (2) the uncharged act is inextricably intertwined with the charged conduct such that proof of one incidentally involves proof of the other or explains the circumstances.

16. The Trial Chamber erred in law when they held that the evidence of TF2-135 was inadmissible. Uncharged crimes are admissible to prove material facts in an indictment. Under Rule 89(C), the Chamber may admit relevant evidence. Rule 89(B) empowers the Court to apply rules of evidence that will best favour a fair determination of the matter before it and are consonant with the spirit of the Statute and general principles of law.

17. The relevance of evidence is determined by reference to the issues which the court is called upon to decide. Uncharged crimes that are probative of material elements of charged crimes are relevant and therefore, admissible. This principle is supported by domestic[12] and international jurisdictions case law. It may be admitted to prove elements such as intent,[13] motive,[14] knowledge,[15] identity, plans, mode of operation[16] and position of authority.

18. In the ICTY *Strugar* case, the Tribunal held that a superior may be held liable under Article 7(3) of the Statute "if, inter alia, information was available to him which would

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[12] See for e.g., *US v. Bass*, 794 F. 2d 1305 where evidence of the accused's uncharged conduct was held admissible to prove material elements such as identity and the transportation of stolen property. This decision was based on Rule 404(b) of the US Federal Rules of Evidence which provides that "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Of note, Rule 403 provides that "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time or needless presentation of cumulative evidence."

[13] *Prosecutor v. Bagasora*, ICTR-98-41-T, "Decision on Admissibility of Proposed Testimony of Witness DBY", 18 September 2003, para. 9

[14] *Prosecutor v. Bagasora*, ICTR-98-41-T, "Decision on Admissibility of Proposed Testimony of Witness DBY", 18 September 2003, para. 9.

[15] *Prosecutor v. Bagilishema,* ICTR-95-I, Trial Judgement, 7 June 2001, para. 50.

[16] *Prosecutor v. Galic*, IT-98-29-PT, "Decision on Defence Motion for Indicating that the First and Second Schedule to the Indictment Dated 10 October 2001 Should be Considered as the Amended Indictment", 19 October 2001, para. 16. In this case it was held that uncharged conduct may be used to establish a consistent pattern of conduct.

put him on notice of offences committed by subordinates"[17] In the *Bagasora* case the ICTR held that uncharged crimes were admissible to prove possible motives for a crime.[18]

19. Evidence of sexual violence is admissible to prove facts in issue such as the knowledge of the accused persons under Article 6(3) of the Statute. The evidence is admissible because command responsibility is not only triggered by the specific acts for which an accused is charged[19] but by notice of criminal acts which would put a commander on reasonable notice that his subordinates were committing illegal acts. In the *Bagilishema,* Trial Judgement, the ICTR held that "*command responsibility for failure to punish may be triggered by a broadly based pattern of conduct by a superior, which in effect encourages the commission of atrocities by his or her subordinates.*"[20]

20. The evidence of TF2-135 was intended to establish knowledge of the accused under Article 6(3) of criminal acts committed by his subordinates and his response to it. The Court must determine whether the accused persons knew or had reason to know that their subordinates were committing the crimes alleged in the Consolidated Indictment and whether they took any steps to prevent the commission of these crimes. It did not matter that the alleged report related to an uncharged crime – in this case rape. It was admissible for the limited purpose of establishing knowledge.

b) <u>Uncharged acts are admissible if intertwined with charged acts</u>

21. The Trial Chamber erred in law in respect of the excluded portions of the testimony of TF2-187. The Court stated, "*We do not think it prudent to go in the direction of the*

[17] Prosecutor v. Strugar, IT-01-42-T, "Decision on the Defence Objection to the Prosecution's Opening Statement Concerning Admissibility of Evidence", 22 January 2004, p. 2, citing *Prosecutor v. Kupreskic*, IT-95-16-A, Appeals Judgement, para. 321.

[18] See, *Prosecutor v. Bagasora et al*, ICTR-98-41-T, " Decision on Admissibility of Proposed Testimony of Witness DBY", 18 September 2003, para. 10. *In Prosecutor v. Bagasora et al.*, ICTR-98-41-AR93 & ICTR-98-41-AR93.2, Decision on Prosecutor's Interlocutory Appeals Regarding Exclusion of Evidence, 19 December 2003, para. 14, the Trial Chamber held that evidence that may be inadmissible for a particular purpose may be admissible for other valid purposes. For examples of cases in which uncharged criminal conduct was admitted to prove elements of charged offences, see *Prosecutor v. Bagilishema et al*, ICTR-95-I, Trial Judgement, 7 June 2001, para. 63; *Prosecutor v. Galic*, IT-98-29-PT, "Decision on the Defence Motion for Indicating that the First and Second Schedule to the Indictment dated 10th October 2001 Should be Considered as the Amended Indictment", 19 October 2001, paras. 16 and 23.

[19] *Prosceutor v,.Bagasora* ICTR-98-41-T, Trial Judgement, para. 50.

[20] *Prosecutor v. Bagilishema,* ICTR-95-I, Trial Judgement, 7 June 2003, para. 50. In the footnote 55, it stated that [t]his position is evident not only from the case-law, but also from the aim of Article 6(3), which is not that the crimes of subordinates should be punished but that superiors should ensure that the crimes do not occur.

application of legal niceties requiring the Chamber to adopt some doctrine of judicial severability in admitting evidence."[21] A Trial Chamber should be capable of discerning which evidence directly relates to the counts on the indictment and which evidence can be categorised as uncharged acts. In *Bagasora*, it was held that "*where an event is not itself part of the crime charged, but without which 'the account would be incomplete or incomprehensible, then the fact that the whole account involves including evidence establishing the commission of an offence which the accused is not charged is not itself a ground for excluding evidence.*"[22]

22. The evidence of TF2-187 concerning the physical injury resulting from the alleged rape, that is, the abortion, fell within the Counts 3 and 4 of the Consolidated Indictment. The act of rape elucidates the context in which the witness suffered the abortion and forms an integral part of the immediate context of the crime.

23. As regards TF2-189, the witness should have been given the opportunity to answer the question so as to enable the Court to understand the nature of the evidence. The infliction of knife wounds falls under Counts 3 and 4. Such evidence must be admissible; a serious attack, which included an alleged rape, does not cease to be relevant and admissible because it was coincidental in time with a sexual assault.

c) Indictment must contain facts not evidence

24. The majority in the Trial Chamber erred in law when they excluded the evidence of the three witnesses on the grounds that acts of sexual violence were not pleaded in the Consolidated Indictment.[23] The majority failed to distinguish between material facts that should be pleaded in the indictment and the evidence to be adduced in proving those facts. In the *Sesay* decision this Trial Chamber held that an indictment must plead the charges and not the evidence by which those charges may be proved.[24] While the acts of sexual violence had to be specifically pleaded to be included in the charges, they did not

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[21] *Prosecutor v. Norman et al*, SCSL-2004 -14-T, Transcript, 1 June 2005, p. 2-3.
[22] *Prosecutor v. Bagasora*, ICTR-98-41-T, "Decision on Admissibility of Proposed Testimony of Witness DBY", 18 September 2003, para. 10.
[23] *Prosecutor v. Norman et al*, SCSL-2004 -14-T Transcript, 1 June 2005, p. 2; *Prosecutor v. Norman et al*, SCSL-2004 -14-T Transcript, 2 June 2005, p. 47
[24] *Prosecutor v Sesay*, SCSL-2003-05-PT, "Decision and Order on Defence Preliminary Motion for Defects in the Form of the Indictment", 13 October 2003, para. 7.

have to be so pleaded since they were being used as evidence to prove the charges in the indictment.

25. Uncharged crimes are admissible provided sufficient notice has been given to the Defence.[25] The statements of the three witnesses were disclosed to the defence.[26] Moreover, notice of the fact that the Prosecution intended to use the evidence was given in the Supplemental Pre-Trial Brief[27] and the opening statement.

d) Probative value of proposed evidence not outweighed by prejudicial value

26. The Prosecution submits that the excluded evidence does not unfairly prejudice the rights of the accused persons. In assessing prejudice, the Court must consider the interest of both the accused persons and the Prosecution.

27. The adduction of the proposed evidence does not violate the rights of the accused under Article 17 of the Statute of the Special Court for Sierra Leone. The accused persons were promptly informed of the charges against them in the Consolidated Indictment. The adduction of the subject evidence to prove the factual allegations does not subject the accused person to further criminal liability. It does, however, better inform the court as to the prevailing circumstances.

28. The Defence has had sufficient notice of the evidence by way of disclosure. Thus, use of sexual violence acts as evidence would not have led to any delay in the trial.

29. The prejudicial value of the evidence was not outweighed by its probative value. The subject evidence is not being led to impugn the character of the accused.

30. The Court must take into account not only the purpose for which evidence is being adduced but also the fact that evidence has less potential prejudicial impact when heard

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[25] *Prosecutor v. Galic*, IT-98-29-PT, "Decision on the Defence Motion for Indicating That the First And Second Schedule to the Indictment Dated 10 October 2001 Should be Considered as the Amended Indictment", 19 October 2001, para. 15 – 17.

[26] The redacted statements of TF2-135 were disclosed on 24 September 2003 and 11 October 2003. TF2-187's statements were disclosed on 25 September 2003 and 11 November 2003. The unredacted statements were disclosed on 30 May 2005; TF2-189's statements were disclosed 24 September 2003 and 11 October 2003. The unredacted statements were disclosed on 1 June 2006.

[27] Supplemental Pre-Trial Brief, para. 131, 220, 221, 222, 225, 260, 351 and 391

by professional judges. Judges are in a better position then a jury, for instance, to understand the purpose for which the evidence is tendered.[28]

B. Irreparable Prejudice

31. The Prosecution submits that it has suffered irreparable damage as a result of the exclusion of the evidence of the three witnesses.

32. It must be shown not only that the impugned decision may result in prejudice to the applicant but also that such a prejudice is irreparable in that it may not be remediable by appropriate means with the final disposition of the trial.[29]

33. The Prosecution has been precluded from adducing relevant evidence in support of the charges contained in the Consolidated Indictment, in particular, evidence proving the individual criminal responsibility of the accused persons. This harm cannot be remedied at the close of the trial.

34. There is a considerable difference between the justices of the Trial Chamber as to the disposition the Court should adopt when considering evidence of a sexual nature. His Honour Justice Benjamin Itoe, for example, stated, "I am of the opinion that the evidence which the Prosecution is seeking to adduce under the guise of proving Count 3 and 4 of the Indictment is indeed of a nature to cast a dark cloud on the image of innocence that the Accused enjoys under the law until the contrary is approved."[30] His Honour Justice Boutet, stated, "Evidence of acts of sexual violence is no different that any other act of violence for the purposes of constituting offences within Counts 3 and 4 of the Consolidated Indictment and not inherently prejudicial or inadmissible character evidence by virtue of their nature or characterisation as 'sexual'"[31].

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[28] *Prosecutor v. Bagasora*, ICTR-98-41-T, "Decision on Admissibility of Proposed Testimony of Witness DBY", 18 September 2003, para. 10.

[29] *Prosecutor v. Norman et al*, SCSL-2004 -14-T, "Decision on Joint Request for Leave to Appeal Against Decision on Prosecution's Motion for Judicial Notice", 19 October 2004, para.23.

[30] *Prosecutor v. Norman et al*, SCSL-2004-14-T, "Decision on the Urgent Prosecution Motion Filed on the 15th of February 2005 for a Ruling on the Admissibility of Evidence," 23 May 2005 (Separate Concurring Opinion of Hon. Justice Benjamin Mutanga Itoe), page 25, para .vii).

[31] *Prosecutor v. Norman et al*, SCSL-2004-14-T, "Decision on the Urgent Prosecution Motion Filed on the 15th of February 2005 for a Ruling on the Admissibility of Evidence," 23 May 2005 (Dissenting Opinion of Hon. Justice Pierre Boutet), page 11, para 31.

C. Issue of General Importance

35. The different approaches on matters of such importance require the involvement of the Appellate Chamber to resolve these issues. As His Honourable Justice Boutet noted, "The Current Motion does, however, raise an issue of importance as to whether evidence of sexual violence may be adduced at trial in support of existing Counts in the Consolidated Indictment against the Accused."[32]

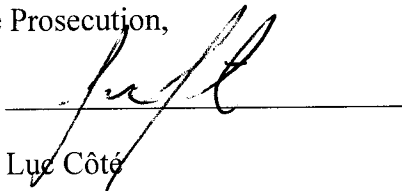
III. CONCLUSION

36. The Prosecution submits that the proposed testimony of the witnesses is both admissible and relevant. The subject evidence is admissible, inter alia, under section 89(C) of the Rules of Procedure and Evidence. The subject evidence is relevant as is could rationally affect (directly or indirectly) the assessment of the probability of the existence of a fact in issue in the proceedings.

37. The Trial Chamber could not have intended to exclude all evidence of unlawful sexual acts, regardless of the evidentiary value such evidence may possess. Therefore an error of law has occurred of such a nature, and in such circumstances, that leave to appeal should be granted in respect of the Majority Decision on Admissibility of Evidence and the related oral decisions.

Done in Freetown, this 27th day of June 2005.

For the Prosecution,



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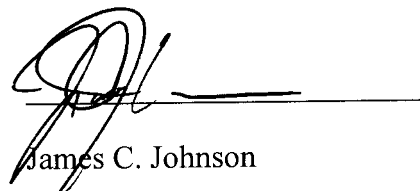
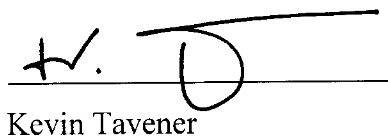


James C. Johnson



Kevin Tavener

[32] *Prosecutor v. Norman et al*, SCSL-2004-14-T, "Decision on the Urgent Prosecution Motion Filed on the 15th of February 2005 for a Ruling on the Admissibility of Evidence," 23 May 2005 (Dissenting Opinion of Hon. Justice Pierre Boutet), page 2, para 4.

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Annex of Authorities

1. *Prosecutor v. Sesay*, "Decision and Order on Defence Preliminary Motion for Defects in the Form of the Indictment", 13 October 2003.

2. *Prosecutor v. Strugar*, IT-01-42-T, "Decision on the Defence Objection to the Prosecution's Opening Statement Concerning Admissibility of Evidence", 22 January 2004. Available at http://www.un.org/icty/strugar/trialc1/decision-e/040122.htm.

3. *US v. Bass*, 794 F. 2d 1305.

4. *Prosecutor v. Bagasora*, "Decision on Admissibility of Proposed Testimony of Witness DBY", 18 September 2003. Available at http://www.ictr.org/ENGLISH/cases/Bagosora/decisions/180903.htm

5. Prosecutor v. Bagilishema, Trial Judgement, 7 June 2001. Available at http://www.ictr.org/ENGLISH/cases/Bagilishema/judgement/index.htm

6. *Prosecutor v. Bagasora*, ICTR-98-41-AR93 & ICTR-98-41-AR93.2, "Decision on Prosecutor's Interlocutory Appeals Regarding Exclusion of Evidence", 19 December 2003. Available at http://www.ictr.org/ENGLISH/cases/Bagosora/decisions/180903.htm

7. *Prosecutor v. Galic*, IT-98-29-T, "Decision on Defence Motion for Indicating That The First and Second Schedule to the Indictment Dated 10 October 2001 Should Be Considered An Amended Indictment", 19 October 2001. Available at http://www.un.org/icty/galic/trialc/decision-e/11019FI117058.htm

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agency may deviate from the guidelines if there is "good cause" for doing so. This reasoning would have some merit if the guidelines merely provided a presumptive release date from which the Parole Commission could deviate at its *complete* discretion and if courts had absolutely no authority to review the Commission's parole determinations. The system of "checks" on the Commission's discretion in making parole decisions discussed above, however, is inconsistent with the notion that the guidelines are not laws.

I conclude therefore that (1) the 1983 guidelines are laws, which when applied retroactively, as in this case, are (2) more onerous than the guidelines in effect when Yamamoto committed his crime. Under the circumstances, Yamamoto deserves immediate release from prison, because to hold him incarcerated for any additional time is to deny him his constitutional right to be free from an ex post facto application of the law.

UNITED STATES of America, Appellee,

v.

Michael Monroe BASS, Appellant.

UNITED STATES of America, Appellee,

v.

Charles Earl PRICE, Appellant.

Nos. 85–2034, 85–2035.

United States Court of Appeals,
Eighth Circuit.

Submitted March 12, 1986.

Decided July 1, 1986.

Defendants were convicted in the United States District Court for the Western District of Missouri, Russell G. Clark, J., of transporting stolen vehicle in interstate commerce, transporting stolen firearm in interstate commerce, and being felons in possession of firearms, and they appealed. The Court of Appeals, John R. Gibson, Circuit Judge, held that: (1) offenses of transporting stolen firearms in interstate commerce and of being felon in possession of firearm each require proof of additional fact which the other does not, so as to be separate offenses, and, thus, conviction on separate charges for each offense arising from possession and transportation of same weapons did not violate the double jeopardy clause; (2) defendant who was convicted of transporting stolen firearm in interstate commerce could not be sentenced under enhancement provision for transporting in commerce any firearm, having been convicted of a felony, but, rather, was required to be sentenced under penalty provision dealing with transportation of stolen firearms; but (3) testimony regarding defendants' escape from Arkansas corrections facility and theft of vehicle was relevant to establish identity and movement in interstate commerce, and, thus, district court did not abuse its discretion in admitting such evidence.

Affirmed in part and remanded in part.

1. Criminal Law ⚷195(1)

Double jeopardy clause bars multiple punishment for single offense in one proceeding only when legislature did not intend cumulative punishment. U.S.C.A. Const.Amend. 5.

2. Criminal Law ⚷196

When same act violates two distinct statutory provisions, whether legislature intended to create two separately punishable offenses or one is determined by whether each statute requires proof of additional fact which the other does not, in the absence of a clear indication of contrary legislative intent. U.S.C.A. Const.Amend. 5.

3. Criminal Law ⚷200(1)

Offenses of transporting stolen firearms in interstate commerce and of being felon in possession of firearm each require

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proof of additional fact which the other does not, so as to be separate offenses, and, thus, conviction on separate charges for each offense arising from possession and transportation of same weapons did not violate the double jeopardy clause. U.S.C.A. Const.Amend. 5; 18 U.S.C.A. § 922(i); 18 U.S.C.A.App. § 1202(a)(1).

4. Criminal Law ⟹29

Prosecutor's decision to charge defendant with being felon in possession of firearm rather than being convicted felon who ships or receives firearm in interstate commerce, which decision purportedly allowed prosecutor to also charge defendant with transporting stolen firearm in interstate commerce without violating double jeopardy, was not improper, absent any allegation of discriminatory prosecution. 18 U.S.C.A. §§ 922, 922(g-i); 18 U.S.C.A.App. § 1202(a).

5. Receiving Stolen Goods ⟹10

Defendant who was convicted of transporting stolen firearm in interstate commerce could not be sentenced under enhancement provision for transporting in commerce any firearm, having been convicted of a felony, but, rather, was required to be sentenced under penalty provision dealing with transportation of stolen firearms. 18 U.S.C.A. §§ 922, 922(i), 924(a); 18 U.S.C.A.App. § 1202(a), (a)(1); U.S.C.A. Const.Amend. 14.

6. Criminal Law ⟹1177, 1181.5(8)

The Court of Appeals would decline to apply concurrent sentence doctrine to defendant convicted of transporting stolen firearm in interstate commerce but sentenced under improper enhancement provision, even though defendant received concurrent sentence, and, thus, remand was required. 18 U.S.C.A. §§ 922, 922(i), 924(a); 18 U.S.C.A.App. § 1202(a), (a)(1); U.S.C.A. Const.Amend. 14.

7. Criminal Law ⟹369.2(2)

When other crimes evidence is integral part of immediate context of crime charged, it is not extrinsic evidence and is not governed by rule excluding evidence of other crimes; however, such fact does not remove all limits on admission of detailed wrongful acts testimony, and dictates of rule dealing with exclusion of otherwise relevant evidence must still be applied to ensure that probative value of evidence is not outweighed by its prejudicial value. Fed.Rules Evid.Rules 403, 404(b), 28 U.S.C.A.

8. Criminal Law ⟹661

Although government is generally not bound by defendant's offer to stipulate, balancing analysis to determine whether otherwise relevant evidence should be excluded on grounds of prejudice or confusion will incorporate some assessment of need for allegedly prejudicial information in light of valid stipulation. Fed.Rules Evid.Rule 403, 28 U.S.C.A.

9. Criminal Law ⟹369.2(6)

Testimony regarding defendants' escape from corrections facility and theft of vehicle was relevant to establish identity and movement in commerce, and probative value of such evidence outweighed prejudicial value so that district court did not abuse its discretion in admitting evidence, in prosecution for transporting stolen firearm in interstate commerce, transporting stolen vehicle in interstate commerce, and being felon in possession of firearms. Fed. Rules Evid.Rules 403, 404(b), 28 U.S.C.A.

10. Criminal Law ⟹369.2(6)

Testimony that defendants confronted witness with weapons in committing robbery was relevant to charges of transporting witness' stolen vehicle in interstate commerce, transporting stolen firearm in interstate commerce and of being felon in possession of firearm as being probative of knowledge that truck and weapons were stolen. Fed.Rules Evid.Rules 403, 404(b), 28 U.S.C.A.

11. Criminal Law ⟹369.2(6)

Testimony regarding witness' encounter with defendants in Missouri was probative of transportation of stolen vehicles and weapon in interstate commerce, and, thus, district court did not abuse its discretion in allowing such testimony, although detailed testimony regarding defendants' repeated

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threats on witness' life was graphic and might have been more detailed than necessary to establish points on which it was relevant. 18 U.S.C.A. § 924(a); Fed.Rules Evid.Rule 403, 28 U.S.C.A.

12. Criminal Law ⇐369.2(2)

Line between permissible other crimes evidence which is inextricable part of criminal transaction and unduly prejudicial evidence prescribed by rule is thin, and trial court must carefully consider value of evidence in full context of government's proof. Fed.Rules Evid.Rule 403, 28 U.S.C.A.

Donald R. Cooley, Springfield, Mo., for Michael Monroe Bass.

R. Steven Brown, Springfield, Mo. for Charles Earl Price.

Robin J. Aiken, Springfield, Mo., for appellee.

Before JOHN R. GIBSON and WOLLMAN, Circuit Judges, and HARPER,* Senior District Judge.

JOHN R. GIBSON, Circuit Judge.

Three principal issues are before us in these appeals. First, whether Michael Monroe Bass and Charles Earl Price may be convicted in the same proceeding both of transporting a stolen firearm in interstate commerce, in violation of Title IV of the Omnibus Crime Control Act, 18 U.S.C. §§ 922(i), 924 (1982) and 18 U.S.C. § 2 (1982), and of being a felon in possession of firearms, in violation of Title VII of the Omnibus Crime Control Act, 18 U.S.C. app. § 1202(a)(1) (1982) and 18 U.S.C. § 2. Second, whether the district court[1] erred in admitting evidence of other crimes committed during the criminal transaction giving rise to the offenses charged in this indictment. Third, whether the district court erred in sentencing Bass under section 1202(a) for a conviction under section 922(i) of the Act. We hold that the double jeopardy clause does not prohibit separate sentences on Counts II and III of appellants' indictment and that the district court did not err in denying appellant Price's motion to suppress the other crimes evidence. We conclude, however, that the district court erred in sentencing Bass under section 1202(a) of the Act for his conviction under section 922(i), and remand to the district court for sentencing on Count II under section 924(a) of the Act.

On April 4, 1985, Bass and Price escaped from the Tucker Prison Farm, Tucker, Arkansas, where they both were serving felony sentences. A 1977 Ford truck owned by the Arkansas Department of Correction was reported missing on the same day. Price and Bass were seen in the missing vehicle on that day; Price was driving the vehicle. The truck later was found abandoned.

Harold Reeder testified that on April 6, 1985, he made a security check of a house in Greer's Ferry, Arkansas, and was confronted by Bass and Price with rifles in their hands. Bass and Price tied him up and stole his 1979 International Scout truck. The owner of the house identified two .22 caliber rifles, a bow and arrow and a hunting knife later found in appellants' possession as stolen from his home.

Guy Pace testified that on April 6, 1985, at about 6:30 p.m., he saw the 1979 Scout in Taney County, Missouri. The truck was parked on the shoulder of a highway; Bass and Price were working onthe engine and Pace stopped to render assistance. According to Pace, as he inspected the engine, Bass and Price displayed the two stolen rifles and Bass threatened to kill him. He testified that Bass and Price took him into the woods and menaced him with the stolen weapons and the bow and arrow. Bass and Price then stole Pace's pick-up truck, taking the two stolen rifles with them, and left Pace with the Scout stolen from Reeder.

* The HONORABLE ROY W. HARPER, Senior United States District Judge for the Eastern and Western Districts of Missouri.

1. The Honorable Russell G. Clark, United States District Judge for the Western District of Missouri.

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Shortly thereafter, Mr. and Mrs. John King stopped to assist Pace. As Pace was getting into the Kings' car, Bass and Price returned in Pace's pick-up and stopped in front of the Kings' car. One of the appellants fired at the King vehicle, hitting the windshield. Pace testified that Price told him to get into the pick-up truck and again threatened his life. Bass took custody of the Kings and their two children. As Pace got into the pick-up with Price, he grabbed Price's rifle, a shoot-out occurred, and Pace, Bass and Price all were wounded.

A grand jury returned a three-count indictment against Bass and Price. Count I charged them with willfully and knowingly transporting a stolen vehicle, the Scout truck, in interstate commerce, in violation of 18 U.S.C. §§ 2, 2312. Count II charged them with knowingly transporting in interstate commerce firearms which they knew to be stolen, in violation of 18 U.S.C. §§ 2, 922(i), and 924(a). Count III charged them with possession of firearms which were in or affected commerce, having been convicted of felonies, in violation of 18 U.S.C. app. § 1202(a)(1) and 18 U.S.C. § 2. Both were convicted on all counts. Bass was sentenced to terms of three years on Count I and fifteen years on Counts II and III, to run concurrently. The sentences on Counts II and III were entered under 18 U.S.C. app. § 1202(a), which authorizes an enhanced sentence of fifteen years without possibility of parole for persons having three previous robbery convictions. Price was sentenced to terms of five years on Counts I and II and two years on Count III, all to run consecutively.

I.

Both Bass and Price argue that their conviction on charges of transporting stolen firearms in interstate commerce, in violation of section 922(i), and of being felons in possession of firearms, in violation of section 1202(a)(1), constitutes multiple punishment for a single offense and, therefore, violates the double jeopardy clause of the fifth amendment. The appellants maintain that the two statutes describe the same offense because the same acts violate both statutes: the same guns were involved in both counts, and the interstate commerce requirement of both offenses is satisfied by their movement from the State of Arkansas into the State of Missouri.

[1, 2] The fifth amendment proscribes being "twice put in jeopardy of life or limb" for the same offense. U.S. Const. Amend. V. The Supreme Court has interpreted this provision to proscribe both multiple trials and multiple punishments for the same offense. *North Carolina v. Pearce,* 395 U.S. 711, 717, 89 S.Ct. 2072, 2076, 23 L.Ed.2d 656 (1969). In *Missouri v. Hunter,* 459 U.S. 359, 103 S.Ct. 673, 74 L.Ed.2d 535 (1983), the Court made clear, however, that the double jeopardy clause bars multiple punishment for a single offense in one proceeding only when the legislature did not intend cumulative punishment. *Id.* at 366, 103 S.Ct. at 678 ("[w]ith respect to cumulative sentences imposed in a single trial, the Double Jeopardy Clause does not more than prevent the sentencing court from prescribing greater punishment than the legislature intended"). When the same act violates two distinct statutory provisions, whether the legislature intended to create two separately punishable offenses or one is determined by the test set forth in *Blockburger v. United States,* 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932). The *Blockburger* inquiry is whether each statute requires proof of an additional fact which the other does not. *Blockburger,* 284 U.S. at 304, 52 S.Ct. at 182. The Supreme Court has held that *Blockburger* states a rule of statutory construction, not a constitutional requirement. *Missouri v. Hunter,* 459 U.S. 359, 368, 103 S.Ct. 673, 679, 74 L.Ed.2d 535 (1983). Therefore, the *Blockburger* rule is not controlling where there is clear indication of a contrary legislative intent. *Hunter,* 459 U.S. at 368, 103 S.Ct. at 679; *Albernaz v. United States,* 450 U.S. 333, 340, 101 S.Ct. 1137, 1142, 67 L.Ed.2d 275 (1981). Thus, in the case before us, appellants' convictions in a single proceeding under sections 922(i) and 1202(a)(1) of the Omnibus Crime Control

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Act violate the double jeopardy clause only if Congress intended that these statutes describe a single offense and there is no evidence that Congress intended to impose cumulative punishment for violation of these provisions.

[3] Applying the *Blockburger* test to the present case, it is evident that sections 1202(a)(1) and 922(i) of the Omnibus Crime Control Act describe separate offenses. To establish a violation of section 1202(a)(1), the government must prove that a person who has previously been convicted of a felony in a federal or state proceeding received, possessed, or transported a firearm which had been in or affected commerce. To establish a violation of section 922(i), the government must prove that a person (whether or not a convicted felon) transported or shipped in interstate commerce a stolen firearm or ammunition. Proof of a section 1202(a)(1) offense does not necessarily establish a section 922(i) offense, since the latter requires proof that the weapon was stolen. Likewise, proof of a section 922(i) violation does not necessarily prove a violation of 1202(a)(1), since the latter requires proof that the perpetrator was a convicted felon.

The appellants stress the Court's decision in *Ball v. United States,* 470 U.S. 856, 105 S.Ct. 1668, 84 L.Ed.2d 740 (1985), to support the argument that sections 1202(a)(1) and 922(i) create only one offense. In *Ball,* the defendant was convicted of receiving a firearm in violation of 18 U.S.C. § 922(h)(1), and possessing that firearm in violation of 18 U.S.C. app. § 1202(a)(1). Applying the *Blockburger* test, the Court found "proof of illegal receipt of a firearm *necessarily* includes proof of illegal possession of that weapon." *Id.* 105 S.Ct. at 1672 (emphasis in original). Given this unavoidable overlap in the statutes, the Court concluded that Congress did not intend these provisions to proscribe separate offenses. Finding nothing in the legislative history to rebut this determination, the Court concluded that when a single act establishes the receipt and the possession of a firearm, the double jeopardy clause bars defendant's conviction under both sections 922(h)(1) and 1202(a)(1) of the Omnibus Crime Control Act.[2] *Id.* at 1674.

We find *Ball* clearly distinguishable. The holding in *Ball* is specific to the sections of the Omnibus Crime Control Act in issue in that case. As discussed above, the *Blockburger* test yields a different result when applied to sections 922(i) and 1202(a)(1) of the Act. Proof of a section 922(i) violation does not *necessarily* constitute proof of a section 1202(a) violation. Therefore, conviction on separate charges in a multicount indictment charging violation of these sections of the Act does not violate the double jeopardy clause.[3]

Our decision is supported by the legislative history of Title VII of the Omnibus Crime Control Act. The legislative history shows that Congress intended Title VII of the Act to complement Title IV of the Act. *See United States v. Batchelder,* 442 U.S. 114, 120, 99 S.Ct. 2198, 2202, 60 L.Ed.2d 755 (1979); *Scarborough v. United States,* 431 U.S. 563, 573, 97 S.Ct. 1963, 1968, 52 L.Ed.2d 582 (1977). The Court, in *Scarborough v. United States,* found that the essence of Congress' intent under section 1202(a), and the intent stressed in the legislative history, was to punish the possession of weapons by people "who have no business possessing [them]." *Id.* at 577, 97 S.Ct. at 1970 (*quoting* 114 Cong. Rec. 13869 (1968)). The focus on separately

2. The court made clear, however, that a defendant may properly be charged and tried in a multi-count indictment under both sections of the statute. *Ball v. United States,* 105 S.Ct. at 1674.

3. Appellants also argue that *United States v. Girst,* 636 F.2d 316 (D.C.Cir.), *vacated* 645 F.2d 1014 (1979), *disapproved of Ball v. United States,* 470 U.S. 856, 105 S.Ct. 1668, 84 L.Ed.2d 740 (1985), supports the argument that no distinction is made between possession and transportation for purpose of double jeopardy analysis. However, the Supreme Court's opinions in *Ball v. United States,* 105 S.Ct. at 1671 n. 7, and *United States v. Batchelder,* 442 U.S. 114, 99 S.Ct. 2198, 60 L.Ed.2d 755 (1979), clearly undermine the *Girst* court's analysis on which appellants rely.

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punishing possession is made clear in the following statement by Senator Long in introducing the amendment:

> Of all the gun bills that have been suggested, debated, discussed and considered, none except this Title VII attempts to bar possession of a firearm from persons whose prior behaviors have established their violent tendencies * *.
>
> * * * Under Title VII, every citizen could possess a gun until commission of his first felony. Upon his conviction, however, Title VII would deny every assassin, murderer, thief and burglar of [sic] the right to possess a firearm in the future * * *.

Scarborough, 431 U.S. at 573, 97 S.Ct. at 1968 (quoting 114 Cong. Rec. 13868, 14773 (statement of Senator Long)).

Section 1202(a)(1), therefore, describes categories of persons for whom it is an offense to possess any weapon which has been in or affected commerce. Section 922 does not separately punish possession of a weapon by a convicted felon, and 922(i) punishes only the transportation of a stolen weapon. Thus, despite the broad areas of overlap between Titles IV and VII of the Act, this is one area in which section 1202(a)(1) clearly complements section 922. We thus conclude that Congress intended to separately punish possession of a weapon by a felon, that this purpose is distinct from that underlying section 922(i), and that a conviction in one proceeding under both sections does not violate the double jeopardy clause.

[4] Bass, additionally, challenges the prosecutor's decision to proceed under section 922(i), rather than under 922(g) or 922(h),[4] arguing that the government, by carefully selecting the provision under which to proceed, was able to seek two separate convictions where only one would otherwise be appropriate. In *United States v. Batchelder*, 442 U.S. 114, 99 S.Ct. 2198, 60 L.Ed.2d 755 (1979), the Supreme Court stated "[W]hen an Act violates more than one criminal statute, the government may prosecute under either so long as it does not discriminate against any class of defendants." *Id.* at 123–24, 99 S.Ct. at 2203–04. In *Ball* the Supreme Court clarified that *Batchelder* reaffirms the government's discretion to charge under one statute rather than another *or* to proceed under several where an act violates more than one criminal statute. *Ball*, 105 S.Ct. at 1617 n. 7. Bass does not allege discriminatory prosecution, and the record is devoid of any such inference. This contention is, therefore, without merit.[5]

II.

[5] As a separate basis for relief, Bass argues that his conviction on Count II is

4. These subsections of the Act punish the convicted felon who ships or receives a firearm in interstate commerce regardless of whether the firearm was stolen.

5. We likewise find without merit Bass' challenge to the constitutionality of the § 1202(a) enhance penalty provision.

Bass argues that the enhanced punishment provision in § 1202(a) violates the equal protection clause and constitutes cruel and unusual punishment. He contends that it singles out persons with three prior robbery convictions for additional punishment without a rational basis. For emphasis, he points out that his co-defendant Price has a more extensive criminal record than he does but was not subject to enhanced punishment for his conviction under § 1202(a)(1) because he did not have three prior robbery convictions.

The equal protection clause does not require identical treatment of all persons, but only that there be a rational basis for the statutory distinctions made. *Marshall v. United States*, 414 U.S. 417, 422, 94 S.Ct. 700, 704, 38 L.Ed.2d 618 (1974). In adopting the enhancement provision of § 1202(a), Congress sought to address the proliferation of burglaries and robberies, and, specifically, to punish the career robber or burglar who it thought committed the vast proportion of these crimes. *See* H.R. No. 98–1073, 98th Cong., 2d Sess. 3 (1984) (statement of Senator Specter in introducing the enhancement provision).

Since there is a rational basis for the statutory distinction made, the recidivist enhanced punishment provision of § 1202(a) does not violate the equal protection clause. We likewise have considered Bass' assertion that the enhanced punishment provision constitutes cruel and unusual punishment and find it to be without merit.

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invalid because the district court erroneously entered sentence on that count under 18 U.S.C. app. § 1202(a), rather than under 18 U.S.C. § 924(a), the provision under which Count II was charged and tried. As discussed above, Count II of Bass' indictment charged him with transporting a stolen firearm in interstate commerce, knowing it to be stolen, in violation of 18 U.S.C. § 922(i). 18 U.S.C. § 924(a) contains the penalty provision for violation of section 922 and imposes a maximum penalty of imprisonment for five years and a $5,000 fine for violation of section 922. Section 1202(a)(1) states the charge which is the basis of Count III—transporting in commerce any firearm, having been convicted of a felony. The maximum enhanced penalty under this section is imprisonment for fifteen years and a fine of $25,000. The district court sentenced Bass on Count II under this enhancement provision. The record is devoid of any reason why the district court, even after the prosecuting attorney brought the discrepancy to his attention, chose to sentence Bass under section 1202(a)(1) rather than section 924(a).

In *United States v. Batchelder*, 442 U.S. 114, 119, 99 S.Ct. 2198, 2201, 60 L.Ed.2d 755 (1979), the Supreme Court held that "[S]ection 924(a) alone delimits the appropriate punishment for violations of [section] 922(h)." The Court stressed that Congress intended that Title IV, which contains sections 922 and 924, and Title VII, which contains section 1202, of the Omnibus Crime Control Act be applied independently, and that the penalty provision of each title is specific to violations of that respective title. *Id.* at 122, 99 S.Ct. at 2203.

[6] The government argues that we need not address this issue on the strength of the concurrent sentence doctrine. Under this doctrine, where a defendant receives concurrent sentences on plural counts of an indictment, and where the conviction on one count is valid, a reviewing court need not pass on the validity of the defendant's conviction on another count if a ruling in defendant's favor would not reduce the time the defendant is required to serve or otherwise prevent some prejudice to the defendant. *United States v. Smith*, 601 F.2d 972, 973–74 (8th Cir.), *cert. denied*, 444 U.S. 879, 100 S.Ct. 166, 62 L.Ed.2d 108 (1979); *Sanders v. United States*, 541 F.2d 190, 193 (8th Cir.1976), *cert. denied*, 429 U.S. 1066, 97 S.Ct. 796, 50 L.Ed.2d 784 (1977). Courts have long expressed doubt of the propriety of applying the concurrent sentence doctrine in cases on direct appeal. *See Benton v. Maryland*, 395 U.S. 784, 793 n. 11, 89 S.Ct. 2056, 2062 n. 11, 23 L.Ed.2d 707 (1969) (expressly reserving the question whether a total abolition of the concurrent sentence doctrine may be appropriate in cases heard on direct appeal); *see also Sanders*, 541 F.2d at 194; *United States v. Neff*, 525 F.2d 361, 363 (8th Cir.1975) (Lay, J., concurring). Without resolving this question for general applicability, we decline to apply the concurrent sentence doctrine in this instance. We therefore remand the case to the district court with instructions to enter sentence on Count II under 18 U.S.C. § 924(a) and to correct the record appropriately.

III.

We now address Price's contention that the district court erroneously denied his motion to exclude from the trial evidence of the escape from prison, the theft of the prison's truck, the robbery at Greer's Ferry, and the acts culminating in the shooting incident. Price essentially contends that the prosecutor entered cumulative and irrelevant evidence concerning offenses not charged in the indictment, and that this evidence was unduly prejudicial under Federal Rule of Evidence 403, thus denying him his constitutional right to a fair and impartial trial. The government contends that the evidence was admissible under rule 404(b) to prove the appellants' identity, knowledge, and the interstate transportation of the weapons and vehicle involved. The government also argues that the evidence was admissible because it was an integral part of the immediate context of the crimes charged. In denying Price's

motion in limine, the district court found that the challenged evidence was admissible because it was probative of identity and because the occurrences all constituted an integral part of the overall criminal conduct giving rise to the indictment.

[7] We have held that where evidence of other crimes is "so blended or connected, with the one[s] on trial as that proof of one incidentally involves the other[s]; or explains the circumstances; or tends logically to prove any element of the crime charged," *United States v. Derring*, 592 F.2d 1003, 1007 (8th Cir.1979), it is admissible as an integral part of the immediate context of the crime charged. *Id.; see also United States v. Turpin*, 707 F.2d 332, 336 (8th Cir.1983). When the other crimes evidence is so integrated, it is not extrinsic and therefore is not governed by Rule 404(b). *United States v. DeLuna*, 763 F.2d 897, 913 (8th Cir.), *cert. denied*, — U.S. —, 106 S.Ct. 382, 88 L.Ed.2d 336 (1985); *accord United States v. Williford*, 764 F.2d 1493, 1498–99 (11th Cir.1985); *United States v. Torres*, 685 F.2d 921, 924 (5th Cir.1982). We hasten to add, however, that taking such evidence out of the scope of 404(b) analysis does not remove all limits on the admission of detailed wrongful acts testimony. The dictates of rule 403 must still be applied to ensure that the probative value of this evidence is not outweighed by its prejudicial value. *See generally* J. Weinstein & M. Berger *Evidence*, ¶ 404(10) at 404–80 (1985).

[8–11] All the evidence which Price challenges was an integral part of an extended criminal transaction, extending over several days, which gave rise to the offenses charged. Looking to rule 403, we conclude that the evidence clearly is probative of material elements of the charged offenses. The testimony regarding Bass and Price's escape from the Arkansas Corrections Facility and the theft of the Arkansas Department of Corrections vehicle was relevant to establish identity[6] and the appellants' movement in interstate commerce, an element of all three counts of Price's indictment. Likewise, Reeder's testimony regarding the fact that the defendants confronted him with weapons in the Greer's Ferry robbery is clearly relevant to Count I of the complaint—which charges theft of Reeder's truck—and to Counts II and III of the complaint—which charge knowingly transporting stolen weapons in interstate commerce. The evidence is probative of Price's knowledge that the truck was stolen, as well as evidence that the weapons were stolen and that the defendant knew that they were stolen.[7] Finally, Pace's testimony regarding his encounters with Bass and Price in Missouri was probative of the transportation of the stolen vehicle and weapons in interstate commerce.

[12] The task of balancing the probative value of this evidence against its prejudicial value is primarily for the trial court, and we normally defer to its judgment. *United States v. Boykin*, 679 F.2d 1240, 1244 (8th Cir.1982); *United States v. Derring*, 592 F.2d at 1007 n. 6; *United States v. Peltier*, 585 F.2d at 32. The evidence was relevant to important elements of the

6. Price contends that the government refused his offer to stipulate to identity and that, had the offer been accepted, the other crimes evidence would then have been unnecessary. We have held that, as a general rule, the government is not bound by the defendant's offer to stipulate. *See United States v. Booker*, 706 F.2d 860, 862 (8th Cir.), *cert. denied*, 464 U.S. 917, 104 S.Ct. 283, 78 L.Ed.2d 261 (1983); *United States v. Peltier*, 585 F.2d 314, 324 (8th Cir.1978), *cert. denied*, 440 U.S. 945, 99 S.Ct. 1422, 59 L.Ed.2d 634 (1979); *compare United States v. Pedroza*, 750 F.2d 187, 201 (2d Cir.1984) (district court has discretion to allow evidence of other crimes despite defendant's offer to stipulate so that government may provide a complete explanation of crime charged) *and United States v. Mohel*, 604 F.2d 748, 754 (2d Cir.1979) (once an unequivocal and sufficient stipulation is made on an element of an offense, other crimes evidence may not be admitted to prove that point). However, a proper rule 403 balancing analysis will incorporate some assessment of the need for the allegedly prejudicial information in light of a valid stipulation. We need not resolve that question in this case, however, given that the challenged evidence is probative of issues other than identity.

7. In fact, to the extent that the testimony concerns the actual theft of the truck, it is probative of the crime charged, not solely uncharged crimes, and therefore is not other crimes evidence. *DeLuna*, 763 F.2d at 913.

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offenses charged, and was closely intertwined with the entire criminal transaction upon which Price and Bass jointly embarked. We are somewhat troubled by the admission of Pace's detailed testimony regarding Bass and Price's repeated threats on his life and by Reeder's testimony that he was tied up during the Greer's Ferry robbery. The testimony was graphic and may have been more detailed than necessary to establish the points on which it was relevant. The line between permissible evidence which is an inextricable part of a criminal transaction and unduly prejudicial evidence proscribed by 403 is thin. The trial court must carefully consider the value of the evidence in the full context of the government's proof. With due regard to the purpose of rule 403 to protect the defendant from unfair prejudice, we do not believe that, in this case, the probative value of the evidence was substantially outweighed by its prejudicial value. Concluding that there was no abuse of discretion in admitting this evidence, we affirm the district court's judgment.

Accordingly, we affirm Price's conviction in all respects. We affirm Bass' conviction on Counts I and III, but remand Count II to the district court for entry of sentence under section 924(a).

UNITED STATES of America, Appellant.

v.

1,378.65 ACRES OF LAND, MORE OR LESS, SITUATE IN VERNON COUNTY, STATE OF MISSOURI, and Laurance Phister, et al., Appellees.

No. 85-2021.

United States Court of Appeals, Eighth Circuit.

Argued April 16, 1986.

Decided July 1, 1986.

Rehearing and Rehearing En Banc Denied July 31, 1986.

Defendants in condemnation action applied for attorney fees under Equal Access to Justice Act. The United States District Court for the Western District of Missouri, John W. Oliver, Senior District Judge, 614 F.Supp. 594, granted award of attorney fees, and United States appealed. The Court of Appeals, Rosenn, Circuit Judge, sitting by designation, held that Government's position was substantially justified, and, thus, Government was relieved from liability for attorney fees.

Reversed.

1. United States ⟹147

Following 1985 amendments to Equal Access to Justice Act, in order to show that its position was "substantially justified" and thus be relieved from liability for fees of a prevailing opponent, Government must show not merely that its position was marginally reasonable, but that its position was clearly reasonable, well founded in law and fact, and solid though not necessarily correct. 28 U.S.C.A. § 2412(d)(1)(A).

See publication Words and Phrases for other judicial constructions and definitions.

2. United States ⟹147

District court's consideration of record in other federal condemnation actions involving other appraisers in reaching its decision whether Government's position in condemnation action was "substantially justified" within attorney fee provision of Equal Access to Justice Act was error; in light of 1985 amendments to the Act, district court had no alternative but to confine itself to record before three-member commission appointed to determine question of just compensation. Fed.Rules Civ.Proc. Rule 71A(h), 28 U.S.C.A.; 28 U.S.C.A. § 2412(d)(1)(A, B).

3. United States ⟹147

Government's position in condemnation action was "substantially justified" within meaning of attorney fee provision of Equal