In The Supreme Court of Bermuda
CRIMINAL JURISDICTION

GUIDANCE NOTES
FORM 3
(DEFENCE DISCLOSURE STATEMENT)

GENERAL

1. FORM 3 is the Defence Disclosure Statement which must be filed and served in accordance with section 5 DCR. FORM 3 is principally divided into two parts:

   (i) Questions 1-51 inquire into the Defence's position on the Prosecution's level of compliance with its disclosure duties under sections 3 and 4 DCR (as reported by the Prosecution in FORM 1); and

   (ii) Questions 52-71 relate to the Defence case and the Defence's general duties to assist the Court in its case management duties (see rule 3.3 of the Criminal Procedure Rules 2013 (CPR)) and section 5 DCR.

COVER LETTER TO THE REGISTRAR

2. FORM 3 must be filed under a cover letter to the Registrar confirming:

   (i) the enclosure of both FORM 3 and FORM 4[1];

   (ii) compliance (or non-compliance) with the required timeframe for filing; (where there is non-compliance, an explanation should be included in the cover letter);

   (iii) whether a hearing is requested or whether a written application is being submitted for consideration by a Judge;

[1] FORM 3 and FORM 4 are to be filed together under the same filing cover letter

(iv) where an oral hearing is requested, specification of hearing dates mutually available to the Defence and the Prosecutor covering a 30 day period from the filing date; and

(i) whether a joint hearing bundle is enclosed or will subsequently be filed in accordance with the rules of this Practice Direction.

JOINT HEARING BUNDLES

3. Where the Defence intends to make a written or oral application, a copy of any skeleton argument and related case law which the Defence intends to place before the Court shall be served (not filed) on the Prosecution.

4. The Prosecution will then have 14 days thereafter within which to serve the Defence with a copy of any skeleton argument and /or case law in reply or in objection to the application.

5. Within 7 days of receipt of the Prosecution's reply (or in the case where there is no reply from the Prosecution: no less than 7 days but no more than 14 days after serving the Prosecution with the Defence skeleton argument and / or case law), the Defence shall file all of the exchanged materials as a joint hearing bundle for the Court.

TIMELINE TO FILE AND SERVE:

6. FORM 3 is the Defence Statement which must be filed and served within 28 days of the Defence having been served with FORM 1 by the Prosecution.

7. The Defence disclosure obligations under section 5 DCR are statutorily triggered upon the Prosecution's compliance with sections 3(1) and 4(1) DCR.

Section 5(1) DCR:
"5(1) Provided the prosecutor has-

a. complied with his obligations under section 3(1); and

b. complied with his obligations under section 4(1),

an accused person, shall be obligated to serve a defence statement on the prosecutor and the court within 28 days after the prosecutor complies with its duty to disclose under section 3."

8. The kick-start to the 28 day countdown is contingent on the Prosecution having complied with its duty to disclose its case and any relevant unused material in its possession under sections 3(1) and 4(1) DCR, respectively.

9. However, under section 5 the computation of the 28 day timeline oddly starts from service of a section 3(1) notice alone. This has provoked some confusion.

10. For the avoidance of doubt, the 28 day timeframe for filing and serving FORM 3 starts once the Prosecution has verified the discharge of its 3(1) and 4(1) obligations through the filing and service of FORM 1.

11. Plainly put, **the Defence has 28 days within which to file and serve FORM 3 (and FORM 4) once the Prosecution has filed and served FORM 1.**

12. While the DCR does not specify a provision under which the Defence may apply to the Court for an extension of time to file its section 5 notice (ie FORM 3), leave of the Court should be sought nonetheless where the Defence require additional time to file and serve FORM 3.

13. Counsel should refer to sections 10 and 11 DCR as a reminder of the Courts' statutory powers which apply where the Defence fails/refuses to comply with its disclosure obligations under the DCR.

(Questions 1-38**)**

DEFENCE CHECKLIST FOR DISCLOSURE OF CROWN'S CASE:

14. Questions 1 – 38 relate to used material and give the Defence the opportunity to confirm the parts of the Crown's case which have been disclosed. The Defence is also required to report any undisclosed parts of the Crown's case, to the extent that it is known.

15. Disclosure of the Crown's case must be distinguished from disclosure of unused material (which is addressed by Questions 39-51). The distinction between used and unused material is set out in section 2 DCR. See paragraph 46 above.

16. The categories of used material under which the questions are arranged are as follows:
    (i) police and civilian witness statements;
    (ii) expert evidence;
    (iii) exhibits and aid memoires; and
    (iv) statements made by the Accused

    (Questions 39-51**)**

DEFENCE CHECKLIST FOR DISCLOSURE OF UNUSED MATERIAL:

17. This part of FORM 3 focuses on what the Defence has to say about service or non-service of relevant unused material in the possession of the Crown. Again, section 2 DCR is the starting point for reference to the meaning of relevant unused material. (See paragraph 46 above).

    (Questions 52-56**)**

NOTICE OF NATURE OF DEFENCE CASE

18. The answers to be provided in this portion of FORM 3 are intended to bring the Defence in compliance with section 5(2)(a) DCR.

19. The Defence must outline the nature of the Accused's defence including any particular defences on which the Accused intends to rely. Questions 52-54 in FORM 3 call for the Defence to fulfil its section 5(2)(a) DCR obligations. However, where there is contention, it is ultimately a matter for the Court to decide whether or not the Defence may be exempted from responding to any questions set out in FORM 3. The filing and serving of FORM 3 is mandatory, whether or not the Defence challenges its obligation to answer any particular question therein.

20. Examples of defences for specification in FORM 3 include, *inter alia*:

    (i) Statutory defence of **intoxication** under sections 42-43 CC;

    (ii) Statutory defence of **necessity/duress** under section 39 CC (Extraordinary emergencies). (See *Billy Odoch v The Queen [2016] SC (Bda) 61 App* where the Learned Chief Justice, Ian Kawaley, cited *Daniels-v-R [2006] Bda LR 78*: "*in*

this case the accused in interview claimed that he had purchased a firearm to prevent it being sold to a young boy and intended to hand it in to the Police. Leading counsel at trial applied to vacate the plea on the grounds that he had not appreciated the Bermudian equivalent of the common law defence of duress. As trial judge, I refused leave. The Court of Appeal held that I ought to have permitted the plea to be vacated.);

(iii) Statutory defence of **mistake of fact** under section 38 CC. (However, see *Kristopher Gibbons v The Queen and the Attorney General [2015] CA (Bda) 5 Crim* where the appellant filed a notice of motion under sections 1 and 6 of Schedule 2 to the Bermuda Constitution Order 1968 before the trial judge submitting that the effect of section 190(4)(aa) as read with sections 323 CC and/or 325 CC unfairly created an absolute liability offence where a defendant over 21 years had reasonable cause to believe and genuinely believed the victim to be 16 or older.);

(iv) Statutory defence of **provocation** (see sections 254-255 and 295 CC); and

(v) Statutory defence of **self defence** (see sections 257-259 CC) (see section 253 CC for defence of a dwelling house; sections 260-264 for defence of property). Section 269 outlines use of excessive force.

21. Section 5(2)(b)-(c) DCR requires the Defence to indicate (with reasons) factual portions asserted in the prosecution case which are disputed. Question 55 appears for this reason.

22. Question 56 appears as an alert to the Court and to the Crown on any defences which put in issue the Accused's lack of mental competency or a defective state of mind.

23. Examples of defences which put in issue the Accused's lack of mental competency or a defective state of mind:

(i) Statutory defence of **insanity** under section 41 CC (Also see section 546 CC on an acquittal on ground of insanity and the common law M'Naghten Rules HL (1843));

(ii) Statutory defence of **diminished responsibility** under section 297A CC; and

(iii) Common law defence of **automatism** (a rare defence which is more likely to arise in strict liability cases where the *actus reus* is denied on account of dissociation or hypo/hyperglycemia or sleepwalking) See *Bratty v A.G. for Northern Ireland (1963) A.C. 386* and *R v Quick/Paddison [1973] 3 WLR 26;* (In *R v Quick* (ante) an analysis of the distinction between insanity and automatism was broadly compared to the difference between 'disease of mind' and 'defect of reason'.)

24. Notably, section 33 and 38 applications under the Mental Health Act 1968 only arise post-conviction and refer to the Court's powers to authorize the admission to and detention in a hospital.

(Questions 57-58**)**:

NOTICE OF ALIBI DEFENCE

25. Section 30 of the Evidence Act 1905 (Notice of alibi) was repealed by section 17 DCR.

26. Questions 57-58 on alibi evidence arise out of the obligations imposed by section 5(3) DCR which provides as follows:

"*A defence statement that discloses an alibi defence shall give particulars of the alibi defence, including-*
the name, address and date of birth of any witness the accused person intends to call to give evidence in support of the alibi, or as many of those details as are known to the accused person when the statement is given;
any information in the accused person's possession which might be of material assistance in identifying or finding any such witness in whose case any of the details mentioned in paragraph (a) are not known to the accused person when the statement is given."

27. An alibi defence envisages the commission of an offence which necessarily involves the Accused being present at a particular place and at a particular time. (See *R v. Hassan, 54 Cr. App. R. 56, CA*.)

28. Evidence which merely indicates the Accused was not present at the scene of the crime, with no positive assertion (or suggestion) as to where he/she was, is not alibi

evidence for the purpose of section 5(3) of the DCR. (Also see Archbold 2009 edition para 4-317). Further, alibi evidence is irrelevant where the Crown's case does not depend on the Accused being present at the crime scene. For example, where the Crown alleges that a Defendant ordered an unlawful killing as opposed to having committed the act itself, alibi evidence is of no use.

(See *R v Wolda Gardner (Court of Appeal) No. 12 of 2014 paragraph 44* and *Devon Hewey and Jay Dill v The Queen [2016] CA (Bda) 9 Crim*; and *R v Lesley* [1996] 1 CR APP R 39 and *Blakeney and Grant v The Queen [2014] Bda LR 32*).

(Questions 59-65**)**:

NOTICE OF DEFENCE EXPERT REPORTS

29. The Defence is required to disclose any expert reports which are intended to form part of the Defence case. Ultimately, the Court must be made aware of any pending expert evidence from the Defence.

30. This is consistent with:
    (i) the overriding objective in rule 1.1 CPR;
    (ii) the parties' obligations to assist the Court in its case management duties under rule 3.3 CPR; and
    (iii) the intention underlying section 5 DCR for the Defence to disclose its case.

(Question 66**)**:

RIGHTS OF THE ACCUSED (DECISION TO GIVE EVIDENCE)

31. Question 66 is an important reminder to Defence Counsel to refer to *Practice Direction (Supreme Court of Bermuda) No. 7 of 2008* which, in summary, requires Counsel to make a written record of the facts surrounding an Accused's decision not to give evidence in his own defence:

Practice Direction No. 7 of 2008:
"*Counsel are reminded that where it is decided that the defendant will not give evidence, this should be recorded in writing, along with a brief summary of the reasons for that decision. Wherever possible, the record should be endorsed by the defendant. This statement of principle is taken from the judgment of the Privy Council in Ebanks v* R *[2006] UKPC 16, at [18].*

Indeed, defending counsel should as a matter of course make and preserve a written record of all the instructions he receives, including a witness statement: Ibid. [17], quoting and applying Bethel v The State (1998) 55 WIR 394, at 398.

These principles are of universal application and are not limited to capital cases or to England & Wales: Ebanks v R (supra) at [17].

The practice has recently been reinforced by several cases in Bermuda Court of Appeal, and should now be well understood by the profession. In view of that, in future Counsel who fail to comply may be subject to disciplinary proceedings."

32. An Accused person should also be clear on his/her right to call witnesses in his own defence. Those witnesses may include expert witnesses. (See *R v Wolda Gardner (Court of Appeal) No. 12 of 2014*).

(Question 67**)**:

ACCUSED AND WITNESSES SUBJECT TO CROSS-EXAMINATION

33. Question 67 applies to the rule that any Defence witness who gives evidence in Court is liable to be cross-examined by the Prosecutor. In multi-defendant trials, the Accused should also be made aware of the Co-Accused's right to cross-examine under section 529 CC:

"*Where during a joint trial one of the accused persons gives evidence, and by such evidence to incriminates one of the Co-accused persons, then that co-accused person shall be entitled to cross-examine him, and such cross-examination shall take place before cross-examination by Counsel for the Prosecution.*"

34. Further, on the subject of cross-examination, the Accused should be made to understand that the Prosecutor is likely to assert fabrication if any disputed fact stated by the Accused in evidence was not previously put by Defence Counsel during cross examination of the Crown witnesses (See *R v Kiana Trott-Edwards CA (Bda) Nos. 14 and 20 of 2015*);

(Question 68**)**:

ADVISING ACCUSED ON RULES ON CHARACTER EVIDENCE

35. Question 68 is intended to ensure the Accused understands the basic framework of the law on character evidence. Prior to trial, an Accused should be made aware of his right to decide whether to adduce character evidence as part of his defence.

36. The Accused should also be clear that the Prosecutor is likely to seek the Court's leave for the Accused to be cross-examined on any previous convictions where the Accused speaks to his/her own good character or impugns (attacks) the character of a Crown witness.

37. Counsel should refer to the principles laid down in *Makin v The Attorney General for New South Wales [1894] AC 57*. (Also see *Jamar Dill v The Queen [2013] CA (Bda) 7 Crim*).

(Questions 69-70**)**:

CLIENT INSTRUCTIONS / SHARING DISCLOSURE WITH ACCUSED

38. Questions 69 and 70 are aimed to eliminate (or at least reduce) complaints on appeal that Defence Counsel failed to take full instructions or make the Accused aware of all the evidence served. (See *R v Wolda Gardner (Court of Appeal) No. 12 of 2014*).

39. The signature requirements at the end of FORM 3 are a further safeguard in this respect. (See paragraphs 152-153 below).

(Question 71**):**

JURY SELECTION AND ACCUSED'S RIGHT TO CHALLENGE

40. Question 70 is included to ensure that the Accused is aware of the jury selection process and specifically of the right to challenge 3 jurors selected.

41. Notwithstanding, it is the Court's duty to inform the Accused in open court of his/her right to challenge up to three jurors before the jury is sworn. (See sections

517 and 519-520 CC and the Jurors Act 1971) (Also see *R v Julian Washington (Court of Appeal) No. 8 of 2014* on the subject of jury eligibility.)

SIGNATURES:

42. The signature portion at the end of FORM 3 requires the signature of the Accused, personally. This is in line with section sections 5(5) and 5(6) DCR.

43. Where the Accused is represented, Defence Counsel is also required to sign FORM 3.

FORM 3 must be separately completed in respect of each Accused person