In The Supreme Court of Bermuda
CRIMINAL JURISDICTION

GUIDANCE NOTES
FORMS 4 AND 5
(DEFENCE AND PROSECUTION TRIAL TIMETABLE)

GENERAL

1. FORM 4 and FORM 5 are the trial timetable statements. The intention is for these two forms to assist in preventing trial delays / adjournments occasioned by Counsel seeking to:
   (i) consider the late disclosure of unused material or additional evidence;
   (ii) liaise with one another in respect of pre-trial applications and objections;
   (iii) exchange skeleton arguments and/or case law for legal arguments;
   (iv) edit transcripts and video / audio footage by agreement;
   (v) edit photo albums by agreement;
   (vi) consider witnesses whose evidence may be read in;
   (vii) view exhibits in Court; and/or
   (viii) obtain electronic equipment or other aids for the presentation of evidence

2. Adjournments or delays for any of these reasons are most often avoidable where both sides have applied adequate thought and attention to these issues prior to trial.

COVER LETTER TO REGISTRAR

3. FORM 4 is to be filed together with FORM 3 under a cover letter to the Registrar. See FORM 3 cover letter requirements above.

JOINT HEARING BUNDLES

4. 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.

5. 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.

6. 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 FOR FILING AND SERVICE

7. FORM 4 is the Trial Timetable Notice and it must be filed and served by the Defence simultaneously with FORM 3. Therefore, like FORM 3, FORM 4 must be filed and served within 28 days from the date on which the Prosecution files and serves FORM 1.

(Questions 1-4**)**

NOTICE OF PRE-TRIAL APPLICATIONS

8. The Defence is also required under section 5(2)(d) to give an indication on any point of law (including admissibility of evidence or an abuse of process) which is intended to be taken. Further, any case law which is intended to be used for that purpose should be stated. Compliance with section 5(2)(d) is achieved through FORM 4 which must be filed and served at the same time as FORM 3.

9. Notice of a pre-trial application must include notice of any of one or more the following intended applications, *inter alia*:

   (i) **applications for further particulars of indictment** (see section 490 CC) (requests for further particulars of indictment often arise in multi-defendant

cases where the issue of joint enterprise comes into play under sections 27 and 28 CC: *R Cox, Hewey and Washington SC*; and *Bean and Simons v The Queen [2014] Bda LR 30*; *Eberly v R 1999 Criminal Appeal No. 11 Pitcher v R 1999 Criminal Appeal No. 7; Stacy Robinson v The Queen [2015] Bda LR 119; R v Searle* [1971] Crim LR 592; *Sidney O'Neil Gibbons And Ronald O'Neal Beach v The Queen [2009] Bda LR 41; Sousa, Tucker and Simons v The Queen [2010] Bda LR 76*

(ii) **applications in relation to the Prosecutor's opening speech at trial** Defence Counsel should give early consideration to any areas of evidence which are objectionable and which ought not to be included in the opening speech from its perspective. Counsel for both sides should attempt to resolve any such points arising well in advance of the start of the trial. Where an agreement has not been obtained, concerns by Defence Counsel should be included in this part of the pre-trial application questions.

(iii) **severance applications** (see section 515 CC)

(iv) **applications for order requiring prosecutor to elect between charges** on indictment (see section 480 (2)(a) CC)

(v) applications relating to **alternative counts on indictments or lesser included offences** (see sections 492-497CC)

(vi) **application for site visits** (see section 531 CC)

(vii) **adjournment applications** (see sections 489A CC and 501 CC and Practice Direction issued 18 May 2004 by former Chief Justice, Richard Ground)

(viii) **applications for reporting restrictions** (see section 476K CC)

(ix) **abuse of process applications** (see *The Queen v N.M. [2015] CA (Bda) 13 Crim; The Queen v Durrant and Gardner CA (Bda) LR 85*; *Aaron O'Connor v The Queen [2015] CA (Bda) 30 Crim*) and *The Queen v Rabain 2001 Criminal Jur. No. 12 [2001] SC (Bda) LR 21 and 2001 Crim App No. 5 [2001] CA (Bda) LR 10)*

(x) **bias applications / conflicts of interest points** (see *Frederick Matthews v Amy Trott et al [2015] Bda LR 40* *F v F [2015] Bda LR 66 paras 44-51)*; *Pintori [2007] EWCA Crim 1700*; *Terrence Smith [2007] Bda LR 80*; *R v Julian Washington [2016] CA (Bda) 10* and *Porter v Magill [2001] UKHL.69 para 103*: "*The question is whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased.*"

(xi) **constitutional motions** (see *Kristopher Gibbons v The Queen and the Attorney General [2015] CA (Bda) 5 Crim)*

(xii) **jurisdictional points** *R v Anthony Seymour [2004] CA (Bda) LR 62* and *[2007] UKPC 59*

(xiii) **application for an order appointing commissioner to take the evidence of a witness** (PART XXVIA Sections 543A-543D CC)

(Questions 5-10**)**

ADMISSIBILITY OBJECTIONS

10. Section 93 of PACE grants the Court the power to exclude any evidence on which the Prosecution propose to rely if it appears to the Court, having regard to all circumstances, including the circumstances in which the evidence was obtained, that the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the Court ought not to admit it.

11. The Supreme Court and Court of Appeal has considered the issue of **admissibility of gang evidence** in the following cases: *Brangman v R [2011] Bda LR 64*; *Myers v R [2012] Bda LR 74*; *Cox v R [2012] Bda LR 72*; *Muhammad v R [2014] Bda LR 27; Blakeney and Grant v R [2014] Bda LR 32* and *Warner v R [2012] Bda LR 73*.

12. The Privy Council then went on to review and uphold the Court of Appeal's decisions on **admissibility of gang evidence** in *Meyers v R, Brangman v R and Cox v R [2015] UKPC 40*. Thereafter, with the benefit of the *Meyers* and *Cox* judgments, the Court of Appeal went on to consider and approve the admission of gang evidence in *Julian Washington v The Queen [2016] CA Crim (Bda) 10* and *Devon Hewey and Jay Dill v. The Queen [2016] CA Crim (Bda) 9*.

13. The Court of Appeal disapproved the **admission of GSR particle evidence** and **collateral fact evidence** on the grounds of **propensity** in *Wolda Gardner v The Queen [2016] CA Crim (Bda) 10*.

14. See sections 90(2) and 93 of PACE and *R v Darronte Dill [2010] (SC Bda) LR 4* and *McQueen v Raynor (Police Constable) [2007] Bda LR 63* on **admissibility of confession statements by the Accused**. For pre-PACE decisions where the Judges' Rules 1964 were engaged, see *The Queen v Paco Fubler [2000] (SC Bda) LR 35*; *The Queen v Albert Allen [2004] (SC Bda) LR 38; Tucker v R, Dill v R [2005] Bda LR 9;* and *R v Ronald Mapp [2004] (SC Bda) LR 61.*

15. See *Sousa v R, Tucker v R, Simons v R [2010] (CA Bda) LR 76* on the **admissibility of evidence of out of court statements** in a multi defendant trial.

16. In *John Malcolm White v The Queen [2003] (SC Bda) Unreported*; *Smith v Osborne (Police Sergeant [1987] Bda LR 28* and *Neville Junior Simons v The Queen [1988] Bda LR 6* the **admissibility of similar fact evidence** was considered. (See also leading UK case law *Boardman v DPP (1970) 60 Cr App R 165* and *R v Chauhan (1981) 73 Cr App R 232*).

17. Section 81 of PACE on the **admissibility of expert reports** renders an export report admissible whether or not the person making it attends Court to give oral evidence so long as leave has been given by the Court.

(Questions 11-14**)**

PROOF BY FORMAL ADMISSIONS

18. Proof by formal admission is made under section 30 of the Evidence Act 1905:

"*(1)…any fact of which oral evidence may be given in any criminal proceedings may be admitted for the purpose of those proceedings by or on behalf of the prosecutor or the accused person, and the admission by any party of any such fact under this section shall as against that party be conclusive in those proceedings of the fact admitted.*

(2) Any admission under this section-
(a) may be made before or at the proceedings;
(b) if made otherwise than in open court, shall be in writing;

(c) if made in writing by an individual, shall purport to be signed by the person making it and, if so made by a body corporate, shall purport to be signed by a director or manager, or the secretary or clerk; or some other similar officer of the body corporate;

(d) if made on behalf of an accused person who is an individual, shall be made by his counsel;

(e) if made at any stage before the trial by an accused person who is an individual and who is represented at his trial by counsel, must be approved by his counsel (whether at the time it was made or subsequently) before or at the proceedings in question.

(3) An admission under this section for the purpose of the proceedings relating to any matter shall be treated as an admission for the purpose of any subsequent criminal proceedings relating to that matter (including an appeal or retrial).

(4) An admission under this section may, with leave of the court, be withdrawn in the proceedings for the purpose of which it was made or any subsequent criminal proceedings relating to the same matter."

19. Questions 11-14 in FORM 4 are intended to prompt Counsel to identify, as part of the pre-trial court management process, any non-contentious evidence which can be placed before the Court by way of formal admission. Counsel should take all reasonable steps to avoid leaving consideration of formal admissions to the mid-trial stage.

(Questions 15-19**)**

READ-INS/TENDER OF WITNESS STATEMENTS:

20. Section 29(1) of the Evidence Act makes proofs by written statement just as admissible as oral evidence in respect of any person where the following conditions are satisfied under 29(2):

(a) the statement purports to be signed by the person who made it;

(b) the statement contains a declaration by that person to the effect that it is true to the best of his knowledge and belief and that he made the statement knowing that, if it were tendered in evidence, he would be liable to prosecution if he willfully stated in it anything which he knew to be false or did not believe to be true;

(c) before the hearing at which the statement is tendered in evidence, a copy of the statement is served, by or on behalf of the party proposing to tender it, on each of the other parties to the proceedings; and

(d) none of the other parties or their counsel, within seven days from the service of the copy of the statement, serves a notice on the party so proposing objecting to the statement being tendered in evidence under this section:

Provided that the conditions mentioned in paragraph (c) and (d) shall not apply if the parties agree before or during the hearing that the statement shall be so tendered.

21. Section 29(3)(d) provides that where a statement tendered in evidence refers to any other document as an exhibit, the copy served on any other party to the proceedings shall be accompanied by a copy of that document or by such information as may be necessary in order to enable the party on whom it was served to inspect that document or a copy thereof.

22. Also see section 29(4)(b): …*the court may, of its own motion or on the application of any party to the proceedings, require that person to attend before the court to give evidence*.

23. Part VIII of PACE covers documentary evidence in criminal proceedings. Section 75(1) allows for the admission of first-hand hearsay evidence: *a statement made by a person in a document shall be admissible in criminal proceedings as evidence of any fact of which direct oral evidence by him would be admissible if-*
(a) the requirements of one of the paragraphs of subsection (2) are satisfied; or
(b) the requirements of subsection (3) are satisfied

The subsection (2) requirements mentioned in section 75(1)(a) are:
(a) that the person who made the statement is dead or by reason of his bodily or mental condition unfit to attend as a witness;
(b) that-
(i) the person who made the statement is outside of Bermuda; and
(ii) it is not reasonably practicable to secure his attendance; or
(c) that all reasonable steps have been taken to find the person who made the statement, but that he cannot be found.

The subsection (3) requirements mentioned in section 75(1)(b) are:

(a) that the statement was made to a police officer or some other person charged with the duty of investigating offences or charging offenders; and
(b) that the person who made it does not give oral evidence through fear or because he is kept out of the way.

24. Section 77 of PACE gives the Supreme Court the authority to direct the exclusion of a statement that is otherwise admissible under the above provisions if it is of the opinion that in the interests of justice it ought not to be admitted. (See section 77(2) for a list of the considerations to which the Court must have regard in deciding whether to exclude such a statement.)

25. Section 78 uniquely applies to statements in documents that appear to have been prepared for purposes of criminal proceedings or investigations:
Where a statement which is admissible in criminal proceedings by virtue of section 75 or 76 appears to the court to have been prepared…for the purposes-
(a) pending of contemplated criminal proceedings; or
(b) of a criminal investigation,
the statement shall not be given in evidence in any criminal proceedings without the leave of the court, and the court shall not give leave unless it is of the opinion that the statement ought to be admitted in the interests of justice; and in considering whether its admission would be in the interests of justice, it shall be the duty of the court to have regard-
(i) to the contents of the statement;
(ii) to any risk, having regard in particular to whether it is likely to be possible to controvert the statement if the person making it does not attend to give oral evidence in the proceedings, that its admission or exclusion will result in unfairness to the accused or, if there is more than one, to any one of them; and
(iii) to any other circumstances that appear to the court to be relevant.

26. For examples of cases where the Court relied on sections 75 and 78 of PACE see: *Lorenzo Lottimore and Craig Hatherley v The Queen [2013] CA Crim (Bda) 1 Criminal Appeals Nos 12 of 2012 & 1 of 2013 (paras 39-40)*; and *Devon Hewey and Jay Dill v The Queen [2016] CA (Bda) 9 Crim*.

27. Section 79 refers to proofs of statements contained in documents:
Where a statement contained in a document is admissible as evidence in criminal proceedings, it may be proved-
(a) by the production of that document; or

(b) (whether or not that document is still in existence) by the production of a copy of that document, or of the material part of it,

Authenticated in such manner as the court may approve; and it is immaterial for the purposes of this section how many removes there are between a copy and the original.

28. Also see section 34 CJPA which contemplates circumstances when depositions may be read in as evidence on order of the Court

29. Counsel should fully consider the applicability of the above provisions and collaborate with the other side on whether any statements are likely to be tendered or whether the Court needs to be addressed in this regard as part of pre-trial case management.

(Questions 20-25**)**

TENDER OF WITNESS FOR CROSS-EXAMINATION:

Witnesses on Back of Indictment

30. In the UK, the significance of the term '*witnesses whose names are on the back of the Indictment*' is explained as follows:

"*Having opened his case, prosecuting counsel calls his witnesses and reads out any written statements admissible under exceptions to the rule against hearsay. As a matter of practice, he should call, or read the statements of, all witnesses whose statements have been served, or, to use the traditional phrase 'witnesses whose names are on the back of the indictment'.*

(This terminology derives from the former UK practice of listing the Prosecution witness names on the back of the Indictment)

Although counsel has a discretion not to call a witness on the back of the indictment, he must exercise his discretion in a proper manner and not for what Lord Thankerton in Adel Muhammed El Dabbah v A-G for Palestine [1944] AC 156 described as 'some oblique motive' (e.g., unfairly so as to surprise or prejudice the defence)." (See Blackstone's Criminal Practice 2010 edn D14.6)

31. For the purpose of determining the Bermuda version of the '*witnesses whose names are on the back of the Indictment*' the Court will look to those witnesses who gave statements which were served on the Defence in compliance with section 3 DCR.

(Questions 26-37**)**

EDITING EVIDENCE

32. Counsel ought to engage in discussions with one another as early as possible on whether there is a mutual need or a unilateral request for the editing of evidence. This may include, but is not limited to:

(i) evidence in video/audio format;
(ii) transcripts of evidence; and
(iii) photographs

33. Trials ought not to be interrupted or delayed due to late discussions between Counsel on editing.

(Questions 38-50**)**

ESTIMATING DURATION OF EVIDENCE

34. Counsel are duty-bound to assist the Court under the various stated CPR provisions. As such the Defence is expected to advise the Court as prudently as they are able on the likely duration of their witnesses in chief. The Court should also be made aware of the precise duration of any video or audio footage which is intended to be put in evidence.

35. Questions 47-50 call for notice of a requested site visit for the same reason. (See section 531 CC on the Court's authority to direct the jury to view any place or thing which the Court thinks desirable.)

(Questions 51-52**)**

COURT SECURITY

36. Both Counsel for the Prosecution and for the Defence have ultimate responsibilities to the Court as officers of the Court themselves. As such, any issues or concerns which may effectively compromise the security of the Court should be made known to the Court promptly.

SIGNATURES

37. Unlike FORM 3, FORM 4 does not require the signature of the Accused personally in circumstances where the Accused is represented by Counsel.

FORM 4 must be separately completed in respect of each Accused person

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FORM 5 (PROSECUTION TRIAL TIMETABLE)

COVER LETTER TO THE REGISTRAR

38. FORM 5 must be filed under a cover letter to the Registrar stating the following:

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

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

(iii) where a hearing date is requested, specification of hearing dates mutually available to the Defence and the Prosecutor covering a 60 day period from the filing date; and

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

JOINT HEARING BUNDLES

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

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

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

(Questions 1-4**)**

PRE-TRIAL APPLICATIONS

42. While section 3 of the DCR does not expressly confer an obligation on the Crown to give notice of any prosecution pre-trial applications, all other principles and rules of law do (including the CPR).

43. Compliance with notice requirements is achieved through FORM 5 which must be filed and served within 14 days from the day on which the Prosecution was been served with FORM 4.

44. The pre-trial application question here is aimed to include notice of any range of applications including, *inter alia*:

(i) **applications to amend the indictment** (section 489 of the CC)

(ii) **applications for the clearance of the Court while a child is giving evidence** (see section 542 of the CC)

(iii) **applications for the clearance of the Court** during taking of other evidence in particular cases (section 543 of the CC)

(iv) **applications for Complainant to testify outside the Courtroom** (section 542A of the CC)

(v) **applications for an order appointing commissioner to take the evidence of a witness** (PART XXVIA Sections 543A-543D of the CC);

(xiv) **applications for site visits** (see section 531 of the CC)

(xv) **applications for an order for a statement to be read in as evidence** (section 34 of the CJPA, section 29 of the Evidence Act and sections 75,78-79 of PACE) ; and

(xvi) **applications for admission of similar fact evidence** (*John Malcolm White v The Queen [2003] (SC Bda) Unreported*; *Smith v Osborne (Police Sergeant [1987] Bda LR 28* and *Neville Junior Simons v The Queen [1988] Bda LR 6*; *Boardman v DPP (1970) 60 Cr App R 165* and *R v Chauhan (1981) 73 Cr App R 232*).

(Questions 11-16**)**

NOTICES OF ADDITIONAL EVIDENCE

45. Notices of Additional Evidence relate only to evidence which the Crown intend to rely on. Section 3 of the DCR states the Prosecutions duty to disclose its case. Section 29 of the CJPA provides an ultimate 70 day deadline from the *sent* date for service of used and unused evidence.

46. Accordingly, any Notices of Additional Evidence for filing after the said section 29 deadline should only be done after leave of the Court is issued under section 30 of the CJPA (applications for extension of time).

47. While a literal interpretation of the wording of section 30 unintentionally suggests a need for the Crown to obtain leave in order to *disclose* evidence beyond the section 29 deadline, in practice the application for leave of the Court is actually for the allowance of the admission of the evidence in question. Whether the not the Crown obtain leave under section 30, **the duty to disclose that evidence to the Defence is absolute**.

(Questions 17-20**)**

CONTINUING DUTY TO DISCLOSE RELEVANT UNUSED EVIDENCE

48. The requirement for the Crown to obtain leave under section 30 for an extension of time is not to be confused with the Crown's continuing duty to disclose unused material. (See section 6 and 7 of the DCR).

49. The Prosecutor should also refer to section 9 DCR for reference to the potential consequences of failure to disclose relevant unused material. (Notably section 9 refers to the Prosecutor's failure to '*disclose relevant unused material as required by sections 5* (sic) *and 7'*. The reference to section 5 appears to be a draftsman's slip as the Prosecutor's duty to disclose unused material arises under section 4.)

50. Ultimately, the Court may stay proceedings where the prosecutor's failure to disclose relevant unused material amounts to the accused being denied a fair trial.

51. The Crown is duty bound to disclose all relevant evidence whether it proposes to rely on that evidence or not.

(Questions 21-22**)**

ORDER OF WITNESSES/ SCHEDULE OF EXHIBITS

52. The Prosecution is expected to prepare and produce a list outlining the order of Crown witnesses and a schedule of Crown exhibits as part of the case management process.

53. Where changes are made in this regard, the Prosecution will be expected to make the Court and the Defence aware of those changes without unwarranted or unreasonable delay.

(Questions 23-31**)**

TRIAL TIME ESTIMATES

54. The Prosecution is required to assist the Court on the likely duration of the Crown's case. This may include the need for an indication of the number of Crown witnesses

who will be giving *viva voce* evidence and the likely duration of their evidence in chief. This would also include notifying the Court of the duration of any video or audio evidence to be played in Court.

55. Further, the Crown is expected to give the earliest notice practicable of a request for the jury to attend any particular place for viewing under section 531 CC.

(Questions 32-37**)**

CROWN WITNESS READ-INS

56. It is the Prosecutor's responsibility to prepare and serve a list of the Crown witnesses proposed to be read into evidence. Once this list is served, the ball is in the corner of the Defence.

57. See paragraphs 173-182 above for the provisions of law on reading in statements.

COURT SECURITY

58. See paragraph 189 above.

SIGNATURES

59. The signature boxes at the end of FORM 5 are subject to the same requirements as those for FORM 1 (see paragraphs 69-70 above).

FORM 5 must be separately completed in respect of each Accused person