Republic of Palau v. Tmetuchl, 1 ROP Intrm. 443 (1988)

REPUBLIC OF PALAU,
Plaintiff/Appellee,

v.

MELWERT TMETUCHL, LESLIE TEWID a/k/a LESLIE NISSANG, and ANGHENIO SABINO a/k/a ANGHENIO BEKEBEKMAD,
Defendants/Appellants.

CRIMINAL APPEAL NO. 2-86
Criminal Case No. 388-85

Supreme Court, Appellate Division
Republic of Palau

Revised opinion
Decided: March 16, 1988

Counsel for Appellee: Philip H. Isaac, AAG

Counsel for Tmetuchl: F. Randall Cunliffe

Counsel for Tewid: John S. Tarkong

Counsel for Sabino: James H. Grizzard

For all Appellants: David G. Richenthal, American Civil Liberties Union.

BEFORE: EDWARD C. KING,[1] Associate Justice; PAUL J. ABBATE,[2] Associate Justice, and FREDRICK J. O'BRIEN,[3] Associate Justice Pro Tem.

⊥444 O'BRIEN, Associate Justice Pro Tem:

After carefully and painstakingly reviewing the entire record, and reconsidering its earlier decision, the Court finds and concludes that there were certain errors in its opinion of July 14, 1987, so that opinion must be withdrawn. Having corrected those errors, however, the Court remains convinced that its original holding was correct. The evidence was insufficient to sustain the convictions.

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[1] The Honorable Edward C. King is the Chief Justice of the Supreme Court of the Federated States of Micronesia.

[2] The Honorable Paul J. Abbate is the Presiding Judge of the Superior Court of the Territory of Guam.

[3] The Honorable Fredrick J. O'Brien is the Presiding Judge of the National Court of the Republic of Palau, assigned for temporary service with the Supreme Court by the Chief Justice, pursuant to Article X, Section 12, of the ROP Constitution, and 4 PNC 201.

Republic of Palau v. Tmetuchl, 1 ROP Intrm. 443 (1988)

President Haruo I. Remeliik was assassinated outside his home at 12:30 a.m. on June 30, 1985. He was shot four times with a .30 cal. carbine. The weapon was never recovered. There were no eyewitnesses to the crime. No physical evidence directly linking any suspects to the crime was ever found. No suspects made any incriminating statements to the authorities. In mid-July, 1985, Melwert Tmetuchl, Anghenio Sabino, and Leslie Tewid were arrested and charged with the crime, in large part on the basis of state ments made by Mistyca Maidesil and by Namiko Ngiraikelau. In August, 1985, the Attorney General dismissed the charges against all the defendants when Maidesil failed a polygraph ("lie detector") examination and confessed that she had fabricated her story about the defendants' involvement in the crime. Despite Maidesil's having again recanted her story about the defendants, ⊥445 and despite her failing another polygraph examination, the Attorney General reinstated the charges against the defendants in December, 1985, and the trial was held in February and March, 1986. All the defendants were convicted of first degree murder and conspiracy and given lengthy prison sentences. The main basis for their appeals is the alleged insufficiency of the evidence.

An initial observation about this issue is that the Attorney General first believed that, once Maidesil's story of the defendants' involvement in the crime proved to be false, he did not have proof beyond a reasonable doubt of their guilt. Likewise, it is clear from the Trial Court's remarks at the sentencing hearing that, until it considered Maidesil's testimony, it did not find that there was proof beyond a reasonable doubt that the defendants were guilty:

> . . . this case is like a jigsaw puzzle . . . that puzzle commenced to be put together by the testimony of Namiko Ngiraikelau . . . the other pieces started falling into place . . . . And it was only then because of the inconsistencies of the witness Mistyca Maidesil that she was actually left to the last. And when all the other pieces of the puzzle fit in, why then her testimony did have some credence to some vital portions of it.

Thus, at critical junctures in the history of this case, four men charged with the responsibility of determining the truth of ⊥446 this matter (the Attorney General, the Presiding Judge, and the two special judges) concluded that, without Maidesil's test imony, there was insufficient evidence to support a conviction.

An appeal based on a claim that the evidence was insufficient to warrant a conviction requires an appellate court to review that evidence to ascertain whether the trial court's findings of fact were correct. The standard to be applied in deciding whether a trial court was correct in its findings of fact in a criminal case is found in *Republic of Palau v. Kikuo* , 1 ROP Intrm. 254 (App. Div. Aug. 1985):

> An Appellate Court will not reweigh the evidence adduced at trial but will determine only whether there was any reasonable evidence to support the [judgment]. *Id.* at 257 (emphasis added).

This standard is essentially the same as that found in the United States, and which has been

explained by the U.S. Supreme Court in the case of *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781 (1979) in the following language:

> The duty of the appellate court is to view the evidence in the light most favorable to the prosecution and then determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. 433 U.S. at 320, 99 S.Ct. at 2789.

A study of the trial transcript in the instant case reveals that the convictions herein are based primarily on the testimonies ⊥447 of Namiko Ngiraikelau and Mistyca Maidesil. The issue, then, is whether their testimonies constitute "reasonable evidence" within the meaning of *Kikuo, supra*, and *Jackson, supra*.

Mistyca Maidesil's Testimony

Mystica Maidesil's[4 sic] testimony does not constitute reasonable evidence because prior to the trial she had proved beyond all doubt that anything she might have to say regarding any possible connection the defendants may have had to the assassination was not worthy of belief. The history of her pretrial statements about the assassination follows.

⊥448 On June 30, 1985, "the day after the night of the President's shooting," Maidesil told Officers Elechuus and Ngirngetrang that Masanori Sugiyama, a convicted murderer, was the assassin. [M Tr. 8]. A possible motive for Sugiyama to have killed the President is that the latter had refused to prevent his extradition to Guam [M Tr. 16].

About five days later, when she was questioned by Officers Maidesil[5 sic] and Felix, she denied having any knowledge of the assassination [M Tr. 9-10].

Sometime before July 20, 1985, the police informed Maidesil that Kazuo Asanuma and Hokkons Baules had told them that she had knowledge of the assassination, whereupon she made

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[4] Maidesil's drug usage deserves comment. Drug usage does not make a witness incompetent to testify, but it is a factor which the fact-finder must take into account, especially as to such witness' ability accurately to perceive and to recall. Also, there is a certain dishonesty usually associated with drug users because of their habitual violation of the drug laws and their tendency to resort to dishonest means to secure drugs. The image of the stereotypical "junkie" who would sell his soul to get his next "fix" comes readily to mind.

According to all the testimony, Mistyca Maidesil was apparently not a heroin addict, but during the month prior to the assassination she used heroin twice a week and marijuana thrice weekly. Except for inquiry concerning her usage of drugs on the day preceeding the assassination [she said she had not used any drugs that day], the record is barren of information about what, if any, the effect of her drug usage was on her ability to perceive and to recall. So, Ms. Maidesil's drug usage was a factor affecting her credibility, *United States v. Butler*, 481 F.2d 531, 535 (D.C. Cir. 1973), but the extent to which it made her unworthy of belief is unclear.

[5] Ngirakesol Maidesil, brother of the witness, Mystica Maidesil.

a statement to the authorities [M Tr. 10-12]. When, where, and to whom this information was given, and the extent of the information which Maidesil furnished,[[6] sic] is not clear from the record.

On July 24 and 25, 1985, Maidesil was in Honolulu, where she was administered a polygraph ("lie detector") examination by FBI Agent Kenneth A. Vardell. Maidesil's story at that time was that

⊥449 as early as May, 1985, she had overheard Melwert Tmetuchl, Leslie Tewid, Anghenio Sabino, and Francisco Gibbons discussing plans to assassinate President Remeliik. She was present on June 28, 1985, when the defendants and Gibbons finalized their plans to shoot the President on the evening of June 29th. She had seen Tmetuchl get two handguns from his truck and give one to Gibbons, who was to be the primary assassin, with Tmetuchl as his backup. She also saw Tmetuchl throw a handgun into the lagoon on June 30th, after the shooting. The motives for the assassination were (1) the Tmetuchls were political opponents of President Remeliik, and (2) Gibbons was angry at the President over a recent court decision which adversely affected land in which Gibbons had a financial interest.[[7] sic]

But Maidesil failed the polygraph exam. When Agent Vardell confronted her with the results, she

> confessed that she had fabricated her entire account of having heard four men discuss plans to shoot President REMELIIK. She admitted that she had not seen the men with guns on June 28th, had not heard any assassination plans on that date, had not seen TMETUCHL throw any weapon into the lagoon, and had not heard them at any time discuss any plans to shoot the President. She admitted that her entire statement to the police was false, and had made up the story because she was angry with TMETUCHL and TEWID for having mistreated her. She acknowledged that she has no idea who actually shot President REMELIIK.[[8] sic]

On August 20, 1985, Maidesil made yet another statement about ⊥450 the assassination, this time to Investigator Stinnett, in which

> she again implicated the four men, claiming that she had heard the four discuss plans to shoot the President, and claiming that following the assassination, LESLIE TEWID had told her that FRANCISCO GIBBONS had shot the President and had told him the details which TEWID had related to her. She further claimed that TMETUCHL had given her a handgun to hide following the shooting, and that she had seen him throw an unknown object contained in a

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[6] Maidesil must have given the authorities what they considered substantial information because her statement "constituted the primary basis for subjects' arrests on July 20, 1985," according to Agent Vardell's Polygraph Examination Report, dated 8-26-85.

[7] Condensed from Polygraph Examination Report, dated 7/29/85.

[8] Quoted from Polygraph Examination Report, dated 7/29/85.

diaper into the water.[9 sic]

On August 22, 1985, Maidesil was sent to Honolulu for another polygraph examination, apparently because of her new statement. She fled from her hotel, however, leaving a note expressing a desire to have nothing further to do with the investigation. The FBI found her and she agreed to take the exam, but before the exam began, she

> admitted that she had lied again on almost all of her new statement and knew that she could not pass a polygraph examination regarding these things she had lied about. Specifically, she had lied about being told by TEWID that GIBBONS had shot the President and had lied about the details of the shooting which she claimed that TEWID had related to her. The only actual statement made to her by TEWID was a remark to her that GIBBONS had been drunk on every day following the assassination, and speculated that "maybe GIBBONS killed the President." She said that she actually knew nothing about any guns, was not aware of what kind of weapon was used to shoot the President, had not been given a handgun by ⊥451 TMETUCHL, and had not seen TMETUCHL throw any object into the water following the assassination. She also admitted that she had not heard the men discuss plans to shoot the President when she was with them on June 28, 1985, and June 29, 1985. She stated that she never heard any actual plans to shoot the President, but did hear TMETUCHL express anger at the President previously and had once remarked that they ought to kill the President. She admitted that no one had told her who had shot the President, that she had seen no weapons, and denied being involved in any way in the shooting. She indicated that she had made up all of the details in her statements because of pressures of continued police questioning and because she wanted to satisfy investigators so they would leave her alone.[10 sic]

She then "told the truth" about her knowledge of the case:

> She felt that the four men were "up to some thing on June 29th because they had switched vehicles and because TMETUCHL had not met her later that evening as he had promised. In the days after the assassination, she once heard TEWID say that he'd been seen by someone and had to roll up the window of the truck; she believed that he was referring to his waiting for GIBBONS during the assassination. She'd also heard SABINO say that he'd waited at the cemetery; she believed he was referring to his waiting for TMETUCHL during the assassination. She knew the men well. They never discussed anything in her presence because they knew she would tell somebody. These were the only reasons for her belief that the four men were involved in the assassination. She had made up all the other assassination. She had made up all the other information which she had given to the authorities.[11 sic]

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[9] Quoted from Polygraph Examination Report, dated 8-26-85.

[10] Quoted from Polygraph Examination Report, dated 8-26-85.

[11] Condensed from Polygraph Examination Report, dated 8-26-85.

⊥452 Agent Vardell then proceeded to administer the examination, but his questions were limited to exploring her possible involvement in the assassination. Maidesil's answers led him to conclude that she was being truthful when she denied having any involvement in the assassination.[12 sic]

On November 12, 1985, Maidesil testified before a Federal Grand Jury in Guam. That testimony is summarized as follows:

> [S]he had heard MELWERT TMETUCHL, ANGHENIO SABINO, LESLIE TEWID, and FRANCISCO GIBBONS discuss plans to kill President REMELIIK, and further that LESLIE TEWID had told her following the shooting that GIBBONS had shot REMELIIK, and he, TEWID, had provided transportation of GIBBONS to the scene of the shooting.[13 sic]

On November 22, 1985, Maidesil and Agent Vardell met in Portland, Oregon, for a third polygraph examination. Before the examination, Maidesil again admitted to Vardell that she had lied about certain details previously, but she insisted that she had told the truth when she testified before the Grand Jury in Guam. Vardell administered the examination and concluded that the results showed that Maidesil had again (1) lied about hearing ⊥453 Tmetuchl, Sabino, Tewid, and Gibbons discuss killing President Remeliik, (2) lied about Tewid telling her that Gibbons had shot the Pesident, and (3) lied about Tewid telling her that he had dropped off Gibbons near the President's house on the night of the assassination. He confronted Maidesil about the polygraph results, but she again insisted that she was telling the truth.[14 sic]

It must be borne in mind that polygraph examination results generally are not admissible as evidence in criminal trials, since the polygraph examination has not been shown to have a sufficiently high degree of reliability to warrant courts accepting it as a scientific method of distinguishing truth from falsity.

We are here concerned not with the polygraph examination results per se, but with the statements Maidesil made before, during, and after the three examinations administered to her. In other words, our focus is on what Maidesil said rather than what the examiner concluded from the test results. We note, however, that there is ample reason to credit the results of the polygraph examinations in this case. When it was revealed to Maidesil that she had failed the first polygraph examination, she "confessed that she had fabricated her entire account." She confirmed that she had lied on this exam when, on August 22, 1985, she ⊥454 repudiated her August 20th statement to Investigator Stinnett, which was essentially the same story she had given for the polygraph exam, declared that she knew she could not pass a polygraph examination, and "told the truth" that "she had made up all the other information which implicated the four men in her statements." This would tend to show that the test results were

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[12] Polygraph Examination Report, dated 8-26-85.

[13] Polygraph Examination Report, dated 11-29-85. The transcript of this testimony was never furnished to counsel or to the Court.

[14] Polygraph Examination Report, dated 11-29-85.

accurate.

We note first that Maidesil, in essence, told three different stories: (1) Masanori Sugiyama killed the President, (2) she knew nothing about the assassination, and (3) Tmetuchl, Sabino, Tewid, and Gibbons were responsible for the crime. Obviously, it is not possible that Maidesil was being truthful when she related all three stories because they are inconsistent with each other, although, logically, it is possible that she was being truthful in telling two of the three.

As to her first story, that Masanori Sugiyama killed President Remeliik, Maidesil had no personal knowledge about it; the information was hearsay as to her [M Tr. 8]. When she told it to the police, it is possible that she may have been truthful, in the sense that she was relaying hearsay information which she believed to be true. Although she said a few days later that she knew nothing about the assassination, she may have meant that she ⊥455 had merely hearsay knowledge, not personal or direct knowledge, of Sugiyama's deed. The polygraph examinations are of no assistance here because Maidesil was apparently not questioned about this in any of the three examinations.

As to her second story, that she knew nothing about the assassination, since she could have meant that she had no personal or direct knowledge of it, it is possible that she was being truthful when she made that statement. The polygraph examination results would seem to corroborate her lack of information.

Because she admitted on two occasions that her third story [that Tmetuchl, Sabino, Tewid, and Gibbons killed the President] was a complete fabrication, it is simply not possible that she was being truthful when told the third story. The Court notes the slight variations in that story which surfaced with each telling, but each of the several versions of the story held to the same basic plot. Additionally, the Court notes that Maidesil did not only repudiate her entire story, but denied specific elements of it, without which elements the story loses all meaning. Also, she gave reasons for having made it up in the first place. Under such circumstances, it is impossible that Maidesil could have been telling the truth at any of the times when she told that story.

The implications of the foregoing are that if Maidesil ⊥456 was being truthful when she told her first or second stories, or both, then there is no question that she lied each time she told her third story. That would be so for her testimony at trial, if she gave the third story as her testimony.

Turning then to her testimony at the trial of this case, we find that Maidesil did give the third story as her testimony. She testified about hearing the defendants and Gibbons talk about killing the President [M Tr. 14-19], and Tewid's telling her that he had dropped off Gibbons near the President's house on the night of the assassination [M Tr. 34-35] even though she had previously admitted lying about these matters. Then, despite her pretrial admission to Vardell that she knew nothing about any guns, she testified about going on a Rock Islands trip with Tmetuchl and Sabino in early June, when they had three guns with them, "a .410" [shotgun?],

"a .22" [rifle?], and another "long gun" [M Tr. 19-20]. Further, instead of admitting all of her false pretrial statements, she denied making any such statements except one: that she had seen Tmetuchl throw a gun into the water at Kemba on June 30th [M Tr. 13-14 and M Tr. 52-54]. Further, she denied admitting to Agent Vardell that she had made up her story implicating the defendants because she had been mistreated by Tmetuchl and Tewid [M Tr. 54-55]. This brief ⊥457 litany should suffice to show that Maidesil's previously demonstrated lack of credibility about the defendants involvement in the assassination was still in full force and effect at the time of trial, why her testimony was not reasonable evidence and why the Trial Court should have given it no credence at all.

Namiko Ngiraikelau's Testimony

We further hold that the testimony of Namiko Ngiraikelau was not "reasonable evidence" within the meaning of *Kikuo, supra*, and *Jackson, supra*, for the following reasons:

First, Ngiraikelau twice told the police that she had seen only one man walk past her house that fateful night, and that she was unable to identify that person. She told the Trial Court that she lied to the police about that because Akemi Delbirt, the owner of the house she lived in, told her not to "make any identity of any persons" (Tr. 329) and "not to tell about the two men" (Tr. 349). After moving out of Delbirt's house, she told the police that she had seen two men, Defendant Tmetuchl, and one she later identified in a photo array as Defendant Sabino.

Next, her identification of Defendant Sabino was highly questionable because: a) she had never seen him before that ⊥458 night,[15 sic] b) the photographic identification procedure used to enable Ngiraikelau to identify Sabino was highly suggestive,[16 sic] c) she described him as having a beard and mustache, whereas Defendant Sabino and his mother both testified that he

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[15] "The identification of strangers is proverbially untrustworthy." Felix Frankfurter, *The Case of Sacco and Vanzetti*, 30 (1927).

[16] The photo array herein appears to have been unduly suggestive, since only the photographs of Tmetuchl and Sabino were those of shirtless persons. As the U.S. Supreme Court said in *United States v. Wade*, 388 U.S. 218 (1967):

> A major factor contributing to the high incidence of miscarriage of justice from mistaken identification has been the degree of suggestion inherent in the manner in which the prosecution presents the suspect to witnesses for pretrial identification. *Id.* at 228.

Unduly suggestive identification procedures will result in the exclusion of the out-of-court identification and, sometimes, the in-court identification as well, under this test enunciated in *Simmons v. United States*, 390 U.S. 377 (1968):

> . . . convictions based on eyewitness identification at trial following a pretrial identification by photograph will be set aside on that ground only if the photographic identification process was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification. *Id.* at 384.

has never worn a beard or mustache, d) Defendant Sabino was not wearing a beard or mustache when Ms. Ngiraikelau identified him in the photo array, e) Sabino was not wearing a beard when Ngiraikelau made her in-court identification of him, f) Ms. Ngiraikelau had ⊥459 not seen Defendant Sabino even once (except for the photo array) between the night of the assassination and the trial -- a period of eight months, g) she was obviously hostile towards Sabino (Tr. 348) and there was no apparent reason for such an attitude, h) at the time of the sighting, she was a mere three feet from the suspect, who was shirtless, under moonlight and lighting from the house, yet she failed to see the tatoos on his back, and i) there was no corroboration for her identification of Sabino.

Further, her sighting of the two men was debatable in view of her testimony about being at Frida Ngiraibiochel's home having been contradicted by five defense witnesses, and her own testimony being curiously silent about having spoken to any one of them.

Then too, there was the question of when she was first told by Akemi Delbirt not to tell the police the truth about what she had seen that night. The witness clearly stated that "the first time she discussed this matter with Akemi Delbirt" was "about two weeks" after the assassination (Tr. 352). The importance of this question had to do with whether Ms. Ngiraikelau changed her story before or after the defendants had been arrested because, if she had changed her story after the arrests, it might well mean that her original statements to the police were true. ⊥460 Curiously, the prosecution offered no other witnesses or evidence to clarify this important point.

The prosecution apparently felt that it was important to prove that Mlib Tmetuchl's vehicle was (1) "the only tinted pickup truck, burgundy in color, four by four available here in Palau" (Tr. 330), and (2) that Mlib Tmetuchl's vehicle was seen in Ngerbodel, a short distance from the scene of the crime, within 15-30 minutes of the assassination. Ms. Ngiraikelau was the sole witness offered to establish these two points. Her testimony about the vehicle was self-contradictory and uncorroborated (Tr. 325-330).

Finally, there is the matter of Ms. Ngiraikelau's pretrial assertion to the defense attorneys that she knew nothing about the case. If she did make that statement (the prosecution conceded that she did, Tr. 752), she could have explained it in terms of a common everyday occurrence. Prospective prosecution witnesses often say something of the sort to avoid pretrial questioning by defense attorneys or investigators. Yet, it is clear that she lied in court when she denied having made it.

We live in an imperfect world. Almost any witnesses can have credibility problems due to a lack of corroboration, or a prior ⊥461 inconsistent statement, or being contradicted by another witness, etc. But when a witness has too many such problems, it is simply not reasonable to give that witness' testimony any credence whatsoever. Given the internal inconsistencies in Ngiraikelau's testimony, her prior inconsistent statements, the lack of corroboration of key points of her testimony, the contradiction of parts of her testimony by other witnesses, and her lying on the witness stand, this Court cannot characterize Ngiraikelau's testimony as "reasonable evidence," and must totally reject it.

Without the testimonies of Maidesil and Ngiraikelau, the rest of the evidence is patently insufficient to constitute even a prima facie case, let alone to find the defendants guilty beyond a reasonable doubt. Accordingly, their convictions cannot be permitted to stand and must be reversed.

Although, in view of our ruling on the sufficiency of the evidence, we are not required to address the other points raised on appeal, two other matters deserve comment. They concern the conduct of the prosecution and of the defense team.

How the prosecution could justify calling Mystica Maidesil as one of its witnesses and vouching for her veracity defies rational explanation except in terms which do not speak well of the aims of the prosecution. A prosecutor is an officer of the ⊥462 Court. His job has been defined by Justice Douglas in *Donnelly v. DeChristoforo*, 416 U.S. 637, 94 S.Ct. 1868 (1974):

> The function of the prosecutor . . . is not to tack as many skins of victims as possible to the wall. His function is to vindicate the rights of the people as expressed in the laws, and give those accused of crime a fair trial. *Id.* at 648-649.

Initially, it seemed that the prosecution intended to live up to its responsibilities. The Attorney General moved to dismiss all charges against the defendants because of Maidesil's recantations which resulted from her failure to pass a polygraph examination. Later, he reinstated the charges, supposedly because other evidence pointing to the defendants' guilt had been developed. Assuming that this were true, it fails to answer the question why the prosecution would call Maidesil as a witness at trial and then vouch for her veracity when the prosecution knew that, during the interim, she had failed a second and a third polygraph examination, and that she had most probably perjured herself in testifying before a grand jury in Guam (see Polygraph Report dated November 20, 1985). Beyond any doubt, Maidesil had proven that she was a totally unreliable witness. How then can it possibly be denied that the prosecution's motive in using Maidesil as a witness was to "tack the skins" of the defendants "to the wall" rather than to give them a fair trial?

⊥463 There was other conduct by the prosecution which was questionable, at best, for example, its handling of the defense demand for Agent Vardell. The prosecution easily brought FBI Agent Mike from Honolulu, and FBI Agent Sibert from Washington, D.C., to be prosecution witness, but conveyed to the Court a lack of information of Agent Vardell's whereabouts and an inability to bring him to Palau [Tr. 520-521], yet one telephone call to San Diego was all that was needed to resolve both problems. To add to the charade, the prosecution limply fell back on the purely legalistic argument that Vardell was beyond Palau's subpoena power and was, therefore, unavailable. The prosecution thus created the unavoidable impression that it was misleading the Court.

Suffice it to say that the foregoing and other questionable prosecution tactics did not lend to the proceedings below those indicia of an earnest search for the truth with which trials are supposed to be marked, nor did they do honor to the prosecutorial function.

As for the defense conduct, it amounted to "ineffective assistance of counsel." Those are harsh words to use, but they are justified by the defense failure to make any effort at all to keep Maidesil off the witness stand. Surely, it was not impossible to seek a pretrial hearing on a motion in limine to ⊥464 exclude Maidesil's testimony. Harsh words are also justified by the defense team's failure to move to suppress Ngiraikelau's pretrial and in-court identifications of Sabino on the grounds of undue suggestivity, since that identification was so potentially harmful to all the defendants. From what the transcript reveals, the first motion would be patently meritorious and the second has an unquestionable good faith basis for being made. There exist other indicia of inadequacy as well, two examples being Mr. Cunliffe's failure to examine Vardell's polygraph reports at the F.B.I. office in Guam (where he has his practice) long before the trial, and the failure of any defense attorney to attempt to obtain Vardell as a witness until the trial's was nearly over. It is also a mystery why the defense team failed even to inquire about any consideration the prosecution may have given to obtaining the testimony of Masanori Sugiyama, especially since that testimony was so potentially damaging to all the defendants, and since Sugiyama must have been a prime suspect in the case.

Any murder case is a very serious matter. A case dealing with the assassination of the leader of a country is an even more serious matter because of the resultant social and political implications. It is indeed regrettable that the trial of these defendants did not enable the people of Palau to discover, with certainty, who killed their first President. It is also

⊥465 does not allow "the State . . . to make repeated attempts to convict an individual for an alleged offense," since "[t]he constitutional pro hibition against'double jeopardy' was design ed to protect an individual from being subject ed to the hazzards of trial and possible con viction more than once for an alleged offense." *Id.* at 437 U.S. 11, 98 S.Ct. 2147 (quoting *Green v. United States*, 355 U.S." *Id.* at 437 U.S, 11, 98 S, Ct, 2147, quoting *Green v. United States* , 355 U.S, 184, 187, 78 S.Ct. 221, 223 (1957).

> . . . we hold today that the Double Jeopardy Clause precludes a second trial once the reviewing court has found the evidence legally insufficient . . . *Id.* at 437 U.S. 18, 98 S.Ct. 2150.

Having found, therefore, that the testimonies of Mistyca Maidesil and Namiko Ngiraikelau did not constitute reasonable evidence and, therefore, should not have been given credence by the Trial Court, and having further found that without those test imonies the remainder of the evidence is legally insufficient for a conviction on any of the charges brought against these defend ants, the Court concludes that its previous decision to remand the case for entry of judgment of acquittal was correct.

As stated in this Court's opinion of July 14, 1987, "This Court is left with no option but to reverse the conviction and to remand the case with instructions for the trial court to enter a verdict of acquittal on all counts." We again so instruct the ⊥466 Trial Court to do this as to all charges against all defendants. (The Trial Court prematurely entered such an order on July 16, 1987. That order was void ab initio inasmuch as it purported to deny the prosecution its right to

petition for a rehearing within 14 days. ROP R. App. Pro. 40(a)).

Reversed and remanded.

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CONCURRING AND DISSENTING OPINION, ASSOCIATE JUSTICE KING

I am in essential agreement with my colleagues as to most of what is said in the majority opinion.

Specifically, I agree, although for different reasons, that the trial court erred as a matter of law in giving credence to "vital portions" of the testimony of Mystica Maidesil, the only witness who testified that the defendants had planned to assassinate President Haruo I. Remeliik, and the only person who testified that any defendants at any time after the day of the assassination, had said anything strongly implying their guilt.

The record reveals that the trial court was led into error by false and unreliable testimony of Ms. Mystica Maidesil, which should have been excluded as incompetent. Ms. Maidesil's falsehoods, calculated to obscure from the trial court the pervasiveness and frequency of the contradictions and inconsistencies in her pretrial statements to investigators, were elicited and defended by the prosecution. This was prosecutorial misconduct in violation of the constitutional due process rights of the defendants to a fair trial and requires that the convictions be set aside.

However, I would not acquit the defendants at this juncture. It has not yet been established whether constitutional double jeopardy principles bar retrial of defendants in these circumstances, where the evidence admitted ⊥468 by the trial court was sufficient to support a conviction, but would likely have been insufficient without the evidence held on appeal to be incompetent. I would remand this case to the trial court for consideration of whether a new trial should be permitted, in the event the government does seek to reinstitute proceedings against the defendants.

I write at length for the case is of great historical importance to the Republic of Palau and the people of Palau are entitled to a full explanation of the reasoning of the members of this panel.

I. Standard of Review

This case presents the appellate court with an unusual challenge for we are asked to determine whether the trial court improperly relied upon unreliable testimony of the two principal witnesses.

The majority has concluded that the testimony of both witnesses was not"reasonable evidence" and must therefore be disregarded.

Republic of Palau v. Tmetuchl, 1 ROP Intrm. 443 (1988)

I agree that the testimony of Mistyca Maidesil must be stricken. Since that conclusion demands that the conviction of the defendant be set aside, I find it unnecessary to determine whether the trial court erred in relying upon the testimony of Namiko Ngiraikelau.

I do not believe the majority's "reasonable evidence" standard to be a proper one. Instead, I conclude that Ms. Maidesil's testimony was discredited as a matter of law by events leading up to the trial. These so eroded her ⊥469 credibility that no reasonable person could accept her testimony as reliable. This seems a small departure from the majority's approach but I consider the difference important for I fear that the standard proffered by the majority would hold out far too great a role for appellate courts in assessing the credibility of witnesses.

The primary task of an appellate court is to review questions of law, not fact. As a general proposition, the appellate court must accept as true any findings of the trial court that are supported by substantial evidence in the record. *Glasser v. United States* , 315 U.S. 60, 80, 62 S.Ct. 457, 469, 86 L.Ed. 680 (1941). When review of factual findings is necessary the appellate tribunal is obliged to review the evidence in the light most favorable to the trial court's factual determinations. *See Republic of Palau v. Kikuo*, 1 ROP. Intrm. 254, 257 (App. 1985).

These fundamental precepts of the judicial process are traceable in great part to the right to trial by jury. Yet, when a judge sits in the place of the jury, the findings of the trial judge are entitled to the same respect as that accorded to a jury. *Jackson v. United States* , 353 F.2d 862, 864 (D.C. Cir. 1965).

This broad deference in turn is grounded upon recognition that at the core of the task of any trier of fact, be it judge or jury, is the power and obligation to determine credibility of witnesses. The trier of fact at the trial court level may rely upon that testimony which it finds ⊥470 credible and may disregard testimony which does not appear so. To distinguish between these, the trier of fact must be a sensitive observer of tones, hesitations, inflections, mannerisms and general demeanor of actual witnesses. An appellate court has before it only bound volumes of papers setting forth words spoken at the trial. Appellate judges have no opportunity to observe the witnesses themselves or the manner of their testimony.

It is true, as the majority notes, that there are limited exceptions to this obligation of the appellate court to defer to the judgments of the trier of fact as to the credibility of witnesses. Yet it is crucial to bear in mind that any step by an appellate court to override a trial court determination as to the credibility of a witness is a profound departure from basic tenets of the appellate process.

The majority states that we are bound to accept as true only "reasonable evidence" relied upon by the trial court. I find this formulation troublesome and one not tied to longstanding judicial precedent. Reasonable is a term properly employed to characterize or measure the quality of a person's conduct, the prudence of an act, or the rationality of a logical conclusion. Use of this term to describe the quality of evidence is imprecise. Evidence does not reason or think and, strictly speaking, is not in itself reasonable or unreasonable.

Use of the word reasonable could also be mischievous in that it seems to imply a larger role for the appellate court ⊥471 than is proper. Courts routinely assess whether particular conduct is reasonable. Under the reasonableness standard, persons are expected to select, from possible options, a course of conduct which a cautious, prudent and reflective individual seeking to avoid unnecessary harm to people and property would select. Introduction of this word reasonable into the appellate review context may be taken to suggest that appellate courts have broad discretion to overrule a trial court which has accepted as true, evidence which the appellate judges find less believable or less persuasive than other evidence reflected in the trial record.

We need not slide toward standardless review simply to address the extraordinary circumstances of this case. I submit that the testimony of Mistyca Maidesil can and should be stricken under a much more carefully circumscribed standard: that no reasonable trier of fact could regard her testimony as reliable.

> There are cases which hold that "when a witness says in one breath that a thing is so, and in the next breath that it is not so, his testimony is 'too inconclusive and contradictory and uncertain to be the basis of a legal conclusion . . .'" [T]he justification appears to be based on the determination that the inconsistencies and contradictions of the witness' testimony are so glaring that "no fair minded man could balance it and find it true," and that, accordingly, no factual dispute remains over which reasonable men could differ.

United States v. Barber , 442 F.2d 517, 522 (3rd Cir. 1971) (*quoting Voas v. City of Baltimore* , 246 Md. 345, 228 A.2d 295, ⊥472 298 (1967)); *Eisenhower v. Baltimore Transit Co.* , 190 Md. 528, 59 A.2d 313, 318 (1948); and *Herbert v. Boston & M.M.R.* , 90 N.H. 324, 8 A.2d 744, 749 (1939). *See also United States v. Bamberger*, 456 F.2d 1119, 1125 (3rd Cir. 1972).

It is not what Ms. Maidesil said in court that makes her story unbelievable. In fact, if one heeds only the words uttered by her in court, as the trial court apparently did in this case, her testimony seems entirely reasonable and plausible. Ms. Maidesil's unreliability becomes apparent only when one carefully considers what she said in court against the background of what she did and said prior to the trial. When the inconsistencies and contradictions of Ms. Maidesil's prior statements are considered along with her testimony, no fair minded person could balance it all and conclude that any part of her testimony could be used as the basis for a legal conclusion.

Although the Vardell reports and other documents referred to in this opinion were part of the trial record, there is no indication that the trial court carefully reviewed the record concerning Ms. Maidesil's pretrial contradictions. Indeed, as is explained later in this opinion, Ms. Maidesil's testimony was presented in a manner calculated to mislead the trial court and make the triers of fact think her earlier contradictions were insignificant and understandable. The background revealing the inconsistencies and contradictions of Ms. Maidesil's various statements is ⊥473 set out and analyzed at length here to explain why I believe this is one of those extraordinary and rare instances when an appellate court is compelled to set aside findings of the trial court on grounds that the trial court findings are based on testimony which no

reasonable trier of fact could consider to be reliable.

II. The Maidesil Background and Testimony

This is the second case filed in the Palau Supreme Court accusing these same defendants of having assassinated President Haruo Remeliik on June 29, 1985. The first case, criminal action No. 265-85, was filed on June 22, 1985, naming Francisco Gibbons along with these three defendants.

A. The Stinnett Affidavit

The Information in case No. 265-85 was supported by an affidavit, dated July 20, 1985, of Trust Territory police officer William Stinnett. The affidavit sets out numerous statements said to have been made to Officer Stinnett by a then undisclosed informant referred to in the affidavit as CRI, apparently a "confidential reliable informant." CRI has subsequently been identified as Mistyca Maidesil.

The Stinnett affidavit relates that CRI said she had been present at a "series of meetings" among the three current defendants and Francisco Gibbons "between late May and late June" of 1985.

The affidavit describes the earlier discussions as "general," flowing from "the unhappiness of the meeting participants over a pending court case which concerned lands ⊥474 in the Republic."[17] The men are portrayed as agreeing that Governor Roman Tmetuchl would be a better president than Remeliik. [18] According to the affidavit, Ms. Maidesil said that these meetings eventually produced a "plan," whereby "Gibbons was to wait at the residence of the President, and was to kill him when he returned home."

The affidavit says that Ms. Maidesil advised Stinnett the plan was agreed upon, and the details finalized, during a meeting held on June 28, 1985, "between about 1900 and 2100 hours."

B. The Vardell Reports

On July 24 and 25, shortly after the Information was filed in case 265-85, Ms. Maidesil was interviewed and given a polygraph examination by United States Federal Bureau of Investigation agent Kenneth Vardell at FBI offices in Honolulu.

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[17] Ms. Maidesil seems to have abandoned the land case as an explanation given by the defendants for their frustration with President Remeliik. Her testimony at the trial, and apparently in any statements made by her on the topic after her July 1985 meetings with FBI agent Vardell, were to the effect that the men were upset that the President had caused Masanori Sugiyama to be transferred to Guam. M. Tr. 16. See also the December 6, 1985, affidavit of Lieutenant Elechuus, Para. 10.

[18] After July 1985, references to Governor Tmetuchl as a replacement preferred by the defendants disappeared from Ms. Maidesil's statements. Nothing to that effect was said at the trial.

1. First Vardell Report - Examiner Vardell's first report, dated July 29, 1985, reviewed what Ms. Maidesil, as a ⊥475 protected government witness, had been saying to officials.

> Witness claims that she overheard plans discussed among the four men to kill President REMELIIK as early as May 1985, and claimed that she was present with the four men on June 28, 1985, when they made final plans to shoot the President on the late evening of June 29th. Witness further claims that she saw TMETUCHL obtain two handguns, a revolver and an automatic, from his truck, keeping one and giving the other to GIBBONS, who was to be the primary assassin, with TMETUCHL acting as a back-up. Witness further claims that she saw TMETUCHL throw a handgun into the lagoon on Sunday, June 30th, after the shooting of President REMELIIK. The TMETUCHL family is a wealthy and powerful opponent of President REMELIIK, and, according to witness, GIBBONS was also angry with President REMELIIK over a recent court decision which adversely involved land in which GIBBONS has a financial interest.

However, the rest of this first Vardell report discredits Ms. Maidesil and her testimony. He concluded that the results of the examination concerning Ms. Maidesil's responses were "indicative of deception to all relevant questions."

The July 29 report goes on to say that, during the "post-test phase" of the examination, Ms. Maidesil:

> confessed that she had fabricated her entire account of having heard the four men discuss plans to shoot President REMELIIK. She admitted that she had not seen the men with guns on June 28th, had not heard any assassination plan on that date, had not seen TMETUCHL throw any weapon in the lagoon, and had not previously heard them at any time discuss ⊥476 [sic] any plans to shoot the President. She admitted that her entire statement to the police was false, and had made up the story because she was angry with TMETUCHL and TEWID for having mistreated her. She acknowledged that she has no idea who actually shot President REMELIIK.

Shortly thereafter, then attorney general Russell Weller filed an affidavit advising the court in case No. 265-85 that CRI had made "material changes" in her statements and that with those changes, "the remaining material is not sufficient to establish probable cause to believe that the defendants committed the crime with which they are charged." Based upon this admission by the government, the case was dismissed.

Very little, if anything, has occurred since that time either to restore the credibility of Ms. Maidesil or to strengthen the government's case against these three defendants.

2. The Second Vardell Report - A second polygraph examination report, dated

August 26, 1985, reflects that Ms. Maidesil subsequently recanted her recantation. On August 20, 1985, she made a second statement to investigator Stinnett. This second statement is summarized in examiner Vardell's second report, dated August 26, 1985, as follows:

> [S]he again implicated the four men, again claiming that she had heard the four discuss plans to shoot the President, and claiming that following the assassination, LESLIE ⊥477 [sic] TEWID had told her that FRANCISCO GIBBONS had shot the President and had told him details of the shooting, which TEWID had related to her. She further claimed that TMETUCHL had given her a handgun to hide following the shooting, and that she had also seen him throw an unknown object contained in a diaper into the water.

Based upon this new statement, Ms. Maidesil was again brought to Honolulu for another polygraph examination. However, prior to the examination, she disappeared from her hotel room, leaving a note stating in effect, according to the second Vardell report, that "she wanted no further involvement in the case."

She was subsequently located on the evening of August 22. The second Vardell report recounts that when she was brought to the FBI office, she:

> admitted that she had again lied on almost all of her new statement and knew that she could not pass a polygraph examination regarding these things she had lied about. Specifically, she had lied about being told by TEWID that GIBBONS had shot the President and had lied about the details of the shooting which she had claimed that TEWID had related to her. The only actual statement made to her by TEWID was a remark to her that GIBBONS had been drunk on every day following the assassination, and speculated that "maybe GIBBONS killed the President." She said that she actually knew nothing about any guns, was not aware of what kind of weapon was used to shoot the President, had not been given a handgun by TMETUCHL, and had not seen TMETUCHL throw any object into the water following the assassination. She also admitted that she had not heard the men discuss plans to shoot the President when she was with them on June 28th, 1985 and June 29, 1985. She stated that she never heard any actual plans to shoot the President, but did ⊥478 [sic] hear TMETUCHL express anger at the President previously and had once remarked that they ought to kill the President. She admitted that no one had told her who had shot the President, that she had seen no weapons, and denied being involved in any way in the shooting. She indicated that she had made up all the details in her statements because of pressures of continued police questioning and because she wanted to satisfy investigators so that they would leave her alone.

3. The Third Vardell Report - On November 21, 1985, then Palau Attorney General Weller was quoted in the Pacific Daily News as saying that investigators were making "good, solid, steady progress" toward charging the assassins of President Remeliik and that the investigation "should be completed January 1."

The apparent reason for Attorney General Weller's confidence on November 21 is indicated in a third polygraph examination report prepared by examiner Vardell. [19] That report, dated November 29, 1985, states that Mistyca Maidesil had testified on November 12, 1985, before a Federal grand jury in Guam that she had heard the same four men "discuss plans to kill President Remeliik, and further that ⊥479 [sic] Leslie Tewid had told her following the shooting that Gibbons had shot Remeliik and that he, Tewid, had provided transportation to Gibbons to the scene of the shooting."

This third Vardell report goes on to say that although Ms. Maidesil "admits having lied to certain details previously," she now said "she is basically telling the truth and is definitely being truthful in her new statement." Thus, for the first time in the three examinations, Ms. Maidesil steadfastly maintained to Vardell that her story was true even in the post-test phase of the examination.

Unfortunately, the results of the test did not match the newfound sense of conviction with which Ms. Maidesil adhered to her latest story. The report shows the "relevant questions" put to Ms. Maidesil during the third examination, and her responses:

SERIES I

> A. When you say that you heard those four men talk about killing President REMELIIK, are you lying about that? Response - No.
>
> B. When you say that MELWERT, LESLIE, ANGHENIO and CISCO talked about killing President REMELIIK, are you lying about that? Response - No.

SERIES II

> C. Are you now lying about what LESLIE TEWID told you about the shooting of President REMELIIK? Response-No.
>
> D. When you say that LESLIE TEWID told you that FRANCISCO GIBBONS shot President REMELIIK, are you lying about that? Response - No.

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[19] This report, attached as Exhibit C to appellants' brief, was not part of the trial record. Without consideration of this document the story told by the first and second Vardell reports as to the dealings between Vardell and Ms. Maidesil is incomplete and somewhat misleading. The report is also necessary to appreciate the nature of prosecutorial conduct in this case and to assess the prosecutorial implications that concerns as to Ms. Maidesil's veracity eventually dissipated. We have therefore accepted this document, and the November 21, 1985, clipping from the Pacific Daily News, as supplements to the record.

⊥480 [sic] E. When you say that LESLIE told you that he dropped off CISCO GIBBONS near the President's house on the night of the shooting, are you lying about that? Response - No.

SERIES III

F. When you say that LESLIE told you that FRANCISCO GIBBONS shot President REMELIIK, are you lying about that? Response - No.

G. Are you lying about hearing those four men talk about killing President REMELIIK? Response - No.

Based upon his examination of the polygraph record, examiner Vardell found "that the recorded responses are indicative of deception to all relevant questions." This report, then, undercut Ms. Maidesil's entire story as she was telling it at that time and as she told it during the trial.

Nevertheless, for reasons still unexplained, criminal case No. 388-85 was filed in the trial court against these defendants on December 6, one week after the third Vardell report. The Information was this time accompanied by an affidavit of Lieutenant John D. Elechuus. This affidavit placed heavy emphasis upon the representations of Mistyca Maidesil.

C. Analysis

1. The Polygraph Results - It is generally acknowledged that the apparent scientific nature of a polygraph examination lends to the results such an aura of irrefutable authenticity as to be dangerously misleading. ⊥481 [sic] *United States v. Alexander*, 526 F.2d 161, 168 (8th Cir. 1975).

A polygraph of course can not tap into the mind or soul to learn directly whether the person being examined is speaking truthfully, with a pure heart. Instead, the equipment works indirectly, measuring bodily responses which generally alter depending upon the stress and tension which a person feels. These responses tend to correlate with whether a person is telling the truth or lying.

Obviously, test results may vary depending upon the individual and the circumstances under which an examination is conducted. Few claim one hundred percent accuracy for this method of "lie detection" and some experts maintain that even properly administered polygraph examinations may produce results with little more than 65% accuracy. E. Cleary, McCormick on Evidence § 206 (3rd ed. 1984).

It is for these reasons that polygraph examination results normally are not accepted as evidence in court proceedings.[20] One may also speculate that the normal ⊥482 [sic] uncertainties

[20] The first two Vardell reports were accepted by the trial court pursuant to stipulation of

inherent in polygraph testing were compounded in the tests under consideration here, where examiner Vardell, an American, was putting questions in English to, and attempting to interpret the responses of, a citizen of Palau.

Even so, these reports are devastating to Ms. Maidesil's credibility. This is true in part because three examinations were given, each producing results consistent with the other. Reliability also is indicated by the fact that the tests did not show Ms. Maidesil to be lying in every response. The second examination confirmed the truth of her consistent denial that she was at the scene of the assassination and her denial that she knows who shot the President.

But the primary factor is that Ms. Maidesil's own actions tend to substantiate the accuracy of examiner Vardell's conclusions. In his first report, Mr. Vardell found deception as to every answer to a relevant question. Her reaction was to acknowledge that she had been lying and had fabricated the entire story.

It is significant also that Ms. Maidesil fled from her hotel room to avoid the second examination. This was done, she explained to Vardell, because she believed that lies in her new statement would prevent her from "passing" the examination. This was, in essence, an admission that the first test had produced accurate results. Her conduct demonstrated that she was sufficiently impressed with the ⊥483 [sic] capabilities of the polygraph to believe that it would be able to discern whether she would be telling the truth.

Moreover, as with the first examination, she quickly acknowledged the accuracy of the one finding of deception in the second examination. The question was whether she had additional information which she had been withholding concerning the assassination. When the examination showed her denial to be deceitful, she readily supplied information of a phone call made to a person other than any of the four men under investigation.

Thus, the reactions of Ms. Maidesil to the findings in examiner Vardell's first two reports are themselves powerful evidence of the accuracy of those findings.

Against this background it is impossible to understand how the prosecution, in good faith, could have disregarded the results of the third examination, which parallel the results of the first examination and are consistent with the admissions made by Ms. Maidesil in the first and second examinations. These results flatly contradict every uncorroborated statement made by Ms. Maidesil during the trial that implicated any of the defendants.

2. Inconsistent Stories - Equally impressive, and wholly to the side of the polygraph examination results themselves, is the series of inconsistent stories strewn about by Ms. Maidesil

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all parties, entered into to resolve a dispute as to whether the government could be required to produce examiner Vardell as a witness. As already noted, footnote 3 *supra*, the third has been accepted as a supplement to the trial record. The reports are considered here, not to assess the truth of anything Ms. Maidesil was saying at a given time, but to measure her reliability as a witness for the prosecution and the propriety of the prosecution's effort to present her testimony as true.

in response to police inquiries. Her first story was that Masanori Sugiyama might be the assailant. M. Tr. 8. Next, she said she knew nothing about ⊥484 [sic] the assassination. *Id.* at 9.

Then she created a kaleidoscopic series of montages with varying stories involving the three defendants and Francisco Gibbons.

a. Guns - Before the July 24 and 25 examination by Vardell, she was telling police that she had seen Melwert Tmetuchl throw a handgun into the lagoon on June 30 after the shooting of President Remeliik. On July 25, when faced with the results of her first polygraph examination, she said she had not seen Tmetuchl throw anything into the lagoon.

A few weeks later however, she produced a different version. In her August 20 statement to investigator Stinnett, she claimed that Tmetuchl had given her a handgun to hide following the shooting, and that she had also seen him throw an unknown object contained in a diaper into the water.

On August 22, anticipating the polygraph examination to be administered then, she said she had not been given a handgun by Tmetuchl, and had not seen him throw any object into the water following the assassination.

During the trial she produced yet another story concerning Tmetuchl and guns. This time she said nothing about having seen or possessed any guns. Her testimony was that on the Monday after the President was shot Tmetuchl told her that after he had learned of the shooting he told another person "to hide the guns." M. Tr. 35-36.

⊥485 [sic] b. Discussions with Tewid - Virtually every aspect of Ms. Maidesil's testimony underwent similar radical revisions, recantations and restorations. There is no indication in the record that Ms. Maidesil during July, 1985 mentioned anything said by any of the four men after the assassination to indicate their guilt. The second Vardell report however shows that in her August 20 statement, she said that "Leslie Tewid had told her that Francisco Gibbons had shot the President and had told him details of the shooting, which Tewid had related to her."

Two days later, anticipating a polygraph examination, Ms. Maidesil told examiner Vardell that she had "lied about being told by Tewid that Gibbons had shot the President and had lied about the details of that shooting, which she had claimed Tewid had related to her." Her August 22 statement to examiner Vardell was that "the only actual statement made to her by Tewid was a remark to her that Gibbons had been drunk on every day following the assassination, and speculated that 'maybe Gibbons killed the President.'"

On November 12, however, she provided yet another version of what Tewid had said to her. This time, in her testimony before the grand jury on Guam, she said that "Leslie Tewid had told her following the shooting that Gibbons had shot Remeliik and that he, Tewid, had provided transportation of Gibbons to the scene of the shooting."

Her trial testimony was similar. She testified ⊥486 [sic] that Tewid had said,

"Ever since the death or the killing of the President, Cisco [Gibbons] has been drinking." M. Tr. 35. The dialogue then continued as follows:

> Q At that time during that discussion, did Leslie Tewid say anything else to you concerning the events of the night the President was shot?
>
> A At that point, I asked him as to whether or not he knew who shot and killed the President and he told me. He said, "We are only trying to help our older brothers."
>
> "And that night, I drove Francisco Gibbons and dropped him off by that place and later on picked him up at Ngerbodel."

c. Plans - Similar inconsistencies and contradictions pervade Ms. Maidesil's trial assertions that she was present as the assassination was being agreed upon and planned. The first story was that she was present during a series of meetings, capped by a final session on June 28, when the four men made plans to kill President Remeliik. Investigator Stinnett's July 20, 1985 affidavit, filed with the court in support of the information in case 265-85, places great emphasis on Ms. Maidesil's statements, as CRI, concerning the June 28 meeting.

> 12. That CRI advised me that on June 28, 1985, there was another meeting between Defendants Tmetuchl, Gibbons, Tewid, and Sabino, which occurred between about 1900 and 2100 hours.
>
> 13. That CRI advised me that during the meeting mentioned in the previous paragraph, Defendants Tmetuchl, Gibbons, Tewid, and Sabino specifically agreed to kill the President on the night of June 29, 1985;
>
> 14. That CRI advised me that the date of June 29, 1985 was selected because the meeting ⊥487 [sic] participants knew that the body of police lieutenant Elwel would be coming out of the morgue on that day, and that most police officers would be attending the funeral;
>
> 15. CRI advised me that at the June 28 meeting, Tmetuchl instructed Tewid that he should borrow his sister's brown sedan, with tinted windows, for the next night;
>
> 16. That CRI advised me that at the June 28 meeting, Defendant Tmetuchl instructed Defendant Tewid to pick up Defendant Gibbons at his (Gibbon's) residence the following evening, using the borrowed brown sedan, and drop him off at the residence of the President not later than 2230 hours;
>
> 17. That CRI advised me that at the June 28 meeting, Defendant Tmetuchl instructed Defendant Tewid to return to the Kemba (Work Area in Malakal) after dropping off Defendant Gibbons, and there to switch cars, leaving the borrowed

brown Sedan and taking Mlib Tmetuchl's red 4 x 4 Toyota pick-up truck;

18. That CRI advised me that at the June 28 meeting, Defendant. Tmetuchl instructed Defendant Tewid that he should be in Ngerechemai Hamlet, below the residence of the President, not later than 0015, 30 June, to pick up Defendant Gibbons after the murder of Haruo I. Remeliik.

19. That CRI advised me that at the June 28 meeting, Defendant Tmetuchl instructed Defendant Gibbons that after he was dropped off at the President's house be Defendant Tewid, he should wait by the Mango tree for the President to return to his residence, at which time Defendant Gibbons should shoot the President, and should insure that he was dead;

20. That CRI advised me that at the 28 June meeting, Defendant Tmetuchl instructed Defendant Sabino that the two of them (Tmetuchl and Sabino) would drive Defendant Tmetuchl's rented red pick-up truck to the cemetery [sic] by the President's house, and that Defendant Sabino would stay with the truck while Defendant Tmetuchl went to assist Defendant Gibbons;

21. That CRI advised me that at the 28 June ⊥488 [sic] meeting, Defendant Tmetuchl instructed Defendants Gibbons, Tewid, and Sabino that after the killing, they should all go home and meet back at Kemba (Work Area in Malakal) on Sunday Afternoon, June 30, 1985;

The July 25 Vardell report also refers to contemporaneous representations made by Ms. Maidesil:

[S]he was present with the four men on June 28, 1985, when they made final plans to shoot the President on the late evening of June 29th. Witness further claims that she saw Tmetuchl obtain two handguns, a revolver and an automatic, from his truck, keeping one and giving the other to Gibbons, who was to be the primary assassin, with Tmetuchl acting as a back-up.

But on July 25, after examiner Vardell had found indications of deception to her responses on these points, Ms. Maidesil:

confessed that she had fabricated her entire account of having the men discuss plans to shoot President REMELIIK.... She admitted that she had not...previously heard them at any time discuss plans to shoot the President. She admitted that her entire statement to the police was false, and had made up the story because she was angry with Tmetuchl and Tewid for having mistreated her.

The August 26 Vardell report shows that on August 20 Ms. Maidesil again reversed herself, telling Stinnett, among other things, "that she had heard the four discuss plans to shoot the President."

However, during the pre-test phase of the August 22 examination, she changed her story again:

> She...admitted that she had not heard the men discuss plans to shoot the President when she was with them on June 28th, 1985 and June 29, 1985. She stated that she never heard any actual plans to shoot the President, but did hear Tmetuchl express anger at the President ⊥489 [sic] previously and had once remarked that they ought to kill the President.

On November 12, in her testimony to the grand jury, she apparently reverted to her August 20 position. The November 29 Vardell report says she testified "specifically" that she had heard the four men "discuss plans to kill President Remeliik."

Yet examiner Vardell concluded that her answers during the polygraph examination concerning these matters were "indicative of deception." The principle novelty here was that for the first time, when confronted with examiner Vardell's conclusions of deception, Ms. Maidesil held to her story and insisted that her testimony before the grand jury was true.

That newfound steadfastness is of little persuasive value however. By this time, Ms. Maidesil surely had been made aware of the laws concerning perjury and undoubtedly knew that if she were to admit that she had lied to the grand jury, this could expose her to criminal prosecution.[21]

⊥490 d. The Pattern of Change - A common direction is discernible in the alterations of Ms. Maidesil's claims from July, 1985 up to the trial. On all points, her earlier statements were far more promising in detail and potentially capable of verification than were the later ones.

For example, she originally said she saw Melwert Tmetuchl throw a handgun in the lagoon. If that were so, she would have known where he was standing and could have given police a reasonable idea of how far he threw it. Armed with this information, police officers presumably believed they would be able to find the gun. One can imagine that as their search continued, they returned to Ms. Maidesil seeking ever greater precision.

Her next story, that she did not actually see the gun but instead saw him throw an

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[21] No explanation appears as to why Ms. Maidesil was called to testify before the grand jury in Guam despite the fact that in her most recent interviews with Vardell she had disavowed knowledge of all matters that were the subject of her grand jury testimony. Moreover, the record is devoid of any indication of a legitimate law enforcement purpose which might have been served by that testimony. No representation has been made that the grand jury proceeding led to an indictment.

It is difficult to avoid the suspicion that the use of Ms. Maidesil in the grand jury proceedings was an artificial maneuver designed to "lock in" whatever story she might happen to tell at that time.

unknown object contained in a diaper, seems well calculated to ease the pressure for verification. Yet, the police undoubtedly remained almost equally eager to find this unknown object. They surely sought information about its size, shape, color and apparent weight, as well as the arc described by Tmetuchl's throw.

One who had no such information could be expected eventually to admit, as did Ms. Maidesil, that she had not seen Tmetuchl throw anything into the water.

Similar considerations apply to the original claims that Tmetuchl had given her a handgun to hide following the shooting. Police surely would have inquired as to the size, weight, description and color of the gun. ⊥491 [sic] They would also want to know precisely when and where she returned it to him, and where she kept it while it was in her possession. Attempts to fabricate such information could likely produce obvious inaccuracies or inconsistency with other information known to the police. A fabricator who wanted to appear cooperative would feel strong pressure to do what Ms. Maidesil did, that is, admit that this part of the story is untrue but furnish new items of less verifiable "information."

A similar pattern is apparent when one reviews Ms. Maidesil's representations concerning information she received from Tewid after the assassination. The August 26, 1985, Vardell report indicates that on August 20, at the same time that Ms. Maidesil was adjusting downward her representations about having seen Melwert Tmetuchl throw a handgun into the lagoon, she added the new information that "Leslie Tewid had told her that Francisco Gibbons had shot the President and had told him details of the shooting, which Tewid had related to her." This surely drew from the police numerous questions concerning the details related by Tewid. If the details she offered were insufficient or internally inconsistent, it would soon begin to appear either that she was refusing to cooperate with police officers, or that she actually had no such information. A person who had fabricated the discussion with Mr. Tewid would likely feel compelled to do as Ms. Maidesil did, that is, admit that there had been no such discussion.

⊥492 [sic] At that point, according to the second Vardell report, Ms. Maidesil adjusted her position as to post-assassination statements by Tewid saying that the only "actual statement" was that Gibbons had been drunk every day following the assassination and that "maybe Gibbons killed the President." This statement, much better calculated to avoid refutation than the earlier representation that Tewid had told her details of the killing, was said to have been made when only the two of them were present. This new position, to which she testified in the trial as well, afforded no opportunity for independent verification. The issue would simply be whether one believes Ms. Maidesil or believes Tewid.

The same pattern of movement toward more general, nonverifiable representations is apparent in Ms. Maidesil's claim about plans to kill the President.

She began by telling investigators not only that she had been involved in a series of meetings at which allusions were made to the desirability of having the President removed or killed, but she also emphasized a meeting said to have occurred on June 28 when the men made "final plans" to shoot the President on the 29th. The July 29, 1985, Vardell report shows that she

supplemented these statements with claims that she saw Tmetuchl obtain two handguns, a revolver and an automatic, from his truck, keeping one and giving the other to Gibbons.

These statements too were of the kind that would ⊥493 [sic] discussions in which President Remeliik was referred to as a bad President. These statements, she said, were coupled with suggestions that he should be replaced by a person better capable of leading Palau. M. Tr. 15-16.

Prosecutor Isaac was then allowed to lead her along, asking whether during those discussions any of the defendants had said anything about "removing or killing the President." M. Tr. 17. Her most specific testimony on this point is that Melwert Tmetuchl said "we will kill this President and have someone appoint someone or elect someone to replace him so that he may be able to lead Palau because if he continues to lead Palau, nothing will be done." M. Tr. 17, lines 18-21. However, even this testimony was extremely vague. In the context, it is impossible to determine whether Ms. Maidesil was representing that Mr. Tmetuchl made such a statement on one occasion or on all "those times when they were alleging that he was a bad President." *Id*. It is also unclear how the others responded to these remarks. According to Ms. Maidesil, "they only agreed." *Id.* In cross examination, she said that the agreement was indicated by their nodding of heads. M. Tr. 42-43.

Thus, Ms. Maidesil's story concerning prior discussions started with her saying that she had heard specific plans being made on June 28 and had seen handguns given to the primary assassin and back-up person. She ultimately retreated to relating hazily a few broad ⊥494 [sic] statements said to have been made at unspecified times during a two-month period. No specific conversation was related and the only communication indicated of three of the participants was that they nodded their heads.

D[sic]. Summary of Pretrial Conduct

By the time of trial, then, Ms. Maidesil had completely destroyed her own credibility. She had undergone three polygraph examinations. The results of each indicated deception in response to almost every relevant question put to her during the examination. The lone exceptions were the indications that she truthfully denied having been present at the assassination and truthfully denied knowing who shot the President.

Throughout the pretrial period, her stories underwent continuous and radical revision. On at least two occasions, she flatly admitted having fabricated the entire story. Finally, the pattern of story change was characteristic of one who is fabricating. Every adjustment Ms. Maidesil made in her story reflected a retreat from original detail which held out at least some vague potential for verification. In place of her earlier more detailed stories, she substituted increasingly vague and general statements which offered even less possibility of independent verification and instead would have to stand or fall entirely upon the credibility of Ms. Maidesil herself.

Many times over again, Ms. Maidesil had "said in one breath that a thing is so and in the

next breath that it is ⊥495 [sic] not so." These inconsistencies and contradictions were so glaring that by the time of the trial no fair minded person aware of this background could have offered or used her testimony as the basis of a legal conclusion. It was unconscionable to offer such testimony as a critical part of the prosecution's case in a murder trial and it was legal error for the trial court to accept and give consideration to the testimony.

III. Prosecutorial Misconduct

All of the information discussed above was known by the prosecution by the time trial began. Even allowing for the self-building momentum of an investigation and the understandable, often laudable, singlemindedness of investigators who are expected zealously to develop and prove hypotheses of guilt which might be overlooked by ordinary citizens, it is difficult to imagine that the prosecutor or any investigator who knew only what is revealed in the record could have had any belief whatever that Ms. Maidesil's testimony on any point could be trustworthy.

One would have hoped that the existing trial record would not have been the entire story. Ideally, the prosecution and investigators would have brought to the attention of the trial court additional information which could have counteracted the Vardell reports or somehow explained the actions of Ms. Maidesil in such a way as to have made possible reasonable belief in her veracity.

⊥496 [sic] However, no explanation was tendered. Quite the contrary. It is apparent that counsel adopted an affirmative strategy of attempting to mislead the triers of fact by obscuring the scope and nature of Ms. Maidesil's previous recantations.

The method used was to have Ms. Maidesil make a partial disclosure, restricting her admissions to just a few earlier misstatements, for all of which she offered explanations. Mr. Isaac began by questioning her concerning her early dealings with the police investigation. In response, Ms. Maidesil admitted that she originally told police that "Masanori" was the assassin, but explained that another had told her this. She acknowledged also that a few days later she told police she had no knowledge concerning the assassination, explaining to the trial court that this was because she was trying to "cover the identity" of her best friends. *Id.*, 9-10.

Ms. Maidesil went on to testify that, troubled by her conscience, she eventually felt compelled to tell the police that she had some knowledge of the assassination. Mr. Isaac then led her to make what purported to be a full disclosure as to "early discussions" with police officers in which she had made "some statements" which were not truthful. M. Tr. 13. Specifically, she acknowledged having falsely told police investigators around July 20 that Tmetuchl had thrown the gun "away into the water, ocean by the Kemba." M. Tr. 13, lines 20-21.

⊥497 [sic] She offered for this lie the rather confounding explanation, itself inexplicable, that she wanted to "protect Melwert." Mr. Isaac and Ms. Maidesil then continued with the following question and answer:

Q Do you recall any other false statements that you made to the police officers or investigators concerning events surrounding the shooting of the President?

A No.

Shockingly, Mr. Isaac accepted this answer as true. [22] This patently untruthful statement, coupled with Ms. Maidesil's previous testimony that she had wanted to protect the defendants but had finally revealed knowledge to the police concerning the defendants because the matter was bothering her conscience so much that she could not concentrate, was carefully designed to cast Ms. Maidesil in a heroic role. She was made to appear to the trial court as a person who liked the defendants, nevertheless was compelled as a matter of conscience to acknowledge their guilt, and who, undoubtedly because of the emotional trauma caused by this personal conflict, had originally misstated herself, but only as to one piece of information, and this ⊥498 [sic] for the purpose of protecting her friends.[23]

From that time on, Mr. Isaac unethically and improperly bent his efforts to the protection of Ms. Maidesil's untrue testimony. Throughout the attempts by defense counsel Cunliffe to question Ms. Maidesil concerning her earlier statements, Mr. Isaac interposed numerous objections and sought to convey the impression that Mr. Cunliffe was merely seeking repetitions of the admission made by Ms. Maidesil during direct examination. M. Tr. 51-54. Armed with this support, Ms. Maidesil doggedly denied making any admissions to agent Vardell except "about the gun." M. Tr. 52. She specifically denied ever having told Vardell that she had made

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[22] "[I]t is of no consequence that the falsehood bore upon the witness' credibility rather than directly upon defendant's guilt. A lie is a lie, no matter what its subject, and, if it is in any way relevant to the case, the district attorney has the responsibility and duty to correct what he knows to be false and elicit the truth." *Napue v. Illinois*, 360 U.S. 264, 270 (1959) (quoting *People of Savvides*, 1 N.Y. 2d 544, 136 N.E.2d 853, 854-44, 154 N.Y. S.2d 885, 887).

[23] Ms. Maidesil's motivations are an enigma. It can be said though that it is difficult to reconcile her actions with the image presented by this testimony. Plainly, even the prosecution and all investigators eventually became convinced that many of the details which she put forward to the police early on to implicate the defendants were untrue. Fabrications calculated to implicate others are usually expected of enemies, not friends of those so implicated.

Ms. Maidesil's conduct could more easily be interpreted as reflecting hostility to the defendants. One is reminded that she twice told agent Vardell that she had made up the stories because she was angry at Tewid and Tmetuchl for mistreating her.

Still another possibility is that she truly did believe, or suspect, that the defendants were guilty but, having no solid proof, fabricated information to whet the interest of the police in the hope that they would learn the truth.

Unfortunately, the cynical strategy of the prosecution and the ineffective response of defense counsel prevented the triers of fact from having an opportunity to understand her motives in order to determine whether anything she said might be believed.

up the story because Tewid and Tmetuchl had mistreated her. M. Tr. 54-55.

⊥499 [sic] Mr. Isaac also effectively opposed defense efforts to have agent Vardell brought to Palau to testify. After Ms. Maidesil had denied that she had ever recanted any parts of her story except "about the gun," the defense served upon the attorney general's office a witness summons requesting the presence of agent Vardell. In response, Mr. Isaac took the position that he had no control over Mr. Vardell and was not even sure of Vardell's whereabouts. T. 520, 523.

The Republic of Palau was and is a trust territory of the United States. There can be little doubt that the United States has fiduciary duties, and perhaps direct trusteeship agreement obligations to assist the Republic of Palau in its efforts to provide a fair trial for persons accused of assassinating the first President of the Republic of Palau.

In any event it is clear that the United States was providing assistance to the prosecution. Trust Territory officer Stinnett obviously had been made available to play a major role in the investigation and was present in Palau to testify on behalf of the prosecution. Patrick Demko of the United States Naval Intelligence Office was available to testify for the prosecution concerning the chain of custody of shell casings, slugs and other evidence as they were in the possession of various United States agencies including the United States Naval Intelligence Service, the United States Army Criminal Investigation Laboratory in Japan, and the United States Federal Bureau of Investigation in ⊥500 [sic] Washington, D.C. It is noteworthy that Mr. Demko was in Palau as a kind of standby witness, prepared to testify, although stipulations rendered his testimony unnecessary.

Robert W. Sibert, an agent from the United States Federal Bureau of Investigation Laboratory in Washington, D.C. also traveled to Palau to testify on behalf of the prosecution concerning tests conducted by that laboratory in connection with the investigation.

It is apparent that the resources of United States law enforcement agencies were being made available to the Republic of Palau and that officers of those agencies were available upon the request of the prosecution.

Mr. Isaac contended that he had received rather short notice of the desire of the defense to obtain the presence of agent Vardell. That is true, but the necessity for agent Vardell's presence only became apparent during the trial when Mistyca Maidesil denied the accuracy of descriptions of her earlier statements contained in the Vardell reports. In a similar situation, when trial testimony of defense witnesses required rebuttal, the prosecution swiftly produced FBI agent Stan Miiki from Honolulu to testify.

If any representations made in the course of the trial were inherently incredible, they were these suggestions that the prosecution was without ability to obtain the presence of agent Vardell. Plainly, Mr. Isaac's pleas of ignorance and impotence were an important part of the cynical strategy aimed at preventing the trial court from understanding the ⊥501 [sic] nature of the interplay between Ms. Maidesil and agent Vardell.

The trial court contributed to its own demise by acquiescing so readily in the prosecution's position that agent Vardell was beyond reach. T. 253-57, 520-29. Once the Vardell reports were admitted as evidence, the court had available to it ample notice that Ms. Maidesil's testimony as to the scope of her previous recantations was false and that her testimony on any point was unreliable. The court should then have invoked its supervisory powers either to strike the testimony or to make its consideration subject to the production of Vardell. *United States v. Banks*, 383 F. Supp. 389 (D.S.D. 1974). In saying this I do not overlook the fact that the Vardell reports were admitted as part of a compromise whereby the defense withdrew its demand for Vardell's testimony. Despite that agreement the trial court retained its own responsibility to uphold the administration of justice and should have exercised those powers sua sponte. *See United States v. Hart* , 344 F.Supp. 522 (E.D.N.Y. 1971). Failure to have done so strongly suggests that the trial court failed to give adequate consideration to the Vardell reports.

The prosecution also took advantage of Vardell's absence at closing argument, once again misleading the court, this time by suggesting that the reports somehow did not mean what they say. He referred to them as "a combination of information which [Vardell] may have gotten ⊥502 [sic] from others as well as his own recorded statements made to her by him." T. 749. He then added, "Mistyca Maidesil was talked to by a lot of people over a very long period of time, and this is reflective of what she was saying in those months of July and August and maybe into September and even later." *Id.*

These statements completed the circle of deceit. There is nothing in the Vardell reports establishing that anything in them concerning the recantations was "gotten from others." If Mr. Isaac believed the reports contained ambiguities requiring explanation or interpretation, it was incumbent upon him to produce agent Vardell to provide the explanation. Having failed to do so, then having opposed defense efforts to obtain the Vardell's presence, but having agreed to admission of the reports as a substitute for Vardell, it was blatantly improper for the prosecution to attack the reports of its own investigator by implying that the prosecution had special knowledge that the reports were not quite what they purported to be.

The untoward tactics of the prosecution were successful. Instead of recognizing Ms. Maidesil as utterly unreliable, the trial court was misled into perceiving her as an essentially credible witness compelled by conscience to testify and tell the truth but wishing to soften anything she might be required to say against the defendants, her "best friends."

These tactics almost surely changed the result of the ⊥503 [sic] trial. The evidence against the defendants was none too strong even with Ms. Maidesil's testimony. Since she was the only person to testify that the defendants had ever expressed any thought of killing the President, it is nearly inconceivable that the trial court would have found the remaining entirely circumstantial evidence sufficient grounds upon which to base a conviction.

The defendants rightly contend that these prosecutorial tactics constituted unlawful prosecutorial misconduct, depriving them of their right to a fair trial in violation of their rights of due process.

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The Constitution provides that, "The government shall take no action to deprive any person of life, liberty or property without due process of law." ROP Const. art. IV, § 6. The meaning of those words for proper application in this case is not self-evident. This Court's attention has not been directed to language in the documents of the constitutional convention clarifying the meaning of this clause nor have I found interpretations in previous decisions of this Court.

It therefore seems appropriate to look to decisions of other jurisdictions for guidance. The language of the due process clause is closely patterned upon that of the United States Constitution: "No person shall . . . be deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V. Decisions of United States courts under that clause are not binding upon this Court as to the ⊥504 [sic] meaning of similar language in this Constitution, but can and should be looked to for assistance.[24]

Decisions of United States courts uniformly establish that convictions which may have been influenced by prosecutorial presentations of false testimony must be set aside:

> The due process guarantee and the fair trial right of the accused are destroyed when a prosecutor obtains a conviction with the aid of evidence which he actually knows, or should know, to be false and allows it to go uncorrected. Deliberate deception of a court and jurors by the presentation of false evidence is reprehensible and incompatible with 'rudimentary demands of justice.' . . . It is immaterial whether the prosecutor consciously solicited the false evidence. It is also immaterial whether the false testimony directly concerns an essential element of the crime charged or it bears only on the credibility of a witness . . . . If there is any reasonable likelihood that the false testimony could have affected the jury's judgment, a new trial must be ordered . . . . The prosecutor's duty to correct the false testimony arises when the false evidence appears, or as soon as he becomes aware of inaccuracies.

United States v. Kelly, 543 F. Supp. 1303, 1310 (D. Ma. 1982).

These are long-standing principles, established under the United States Constitution's due process clause long before the drafters of the Palau Constitution borrowed the words.

> As long ago as *Mooney v. Holohan* , 294 U.S. ⊥505 [sic] 103, 112 (1935), this Court made clear that deliberate deception of a court and jurors by the presentation of known false evidence is incompatible with "rudimentary demands of justice." This was reaffirmed in *Pyle v. Kansas* , 317 U.S. 213 (1942). In *Napue v. Illinois* , 360 U.S. 264 (1959), we said, "[t]he same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears." *Id.*, at 269. Thereafter *Brady v. Maryland*, 373 U.S., at 87, held that

[24] The trial division has previously looked to United States decisions for assistance in interpreting the due process clause in civil litigation. *Governor of Kayangel v. Wilter*, 1 ROP Intrm. 206, 208 (1985) (Nakamura, C.J.).

> suppression of material evidence justifies a new trial "irrespective of the good faith or bad faith of the prosecution." See American Bar Association, Project on Standards for Criminal Justice, Prosecution Function and the Defense Function § 3.11(a). When the "reliability of a given witness may well be determinative of guilt or innocence," non-disclosure of evidence affecting credibility falls within this general rule. *Napue, supra*, at 269.

Giglio v. United States, 405 U.S. 150, 153, 92 S.Ct. 763, 765, 31 L Ed.2d 104 (1974).

A similar result was reached earlier, in *Napue v. United States* , 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959), when the United States Supreme Court unanimously reversed a conviction, saying:

> The principle that a State may not knowingly use false evidence, including false testimony, to obtain a tainted conviction, implicit in any concept of ordered liberty, does not cease to apply merely because the false testimony goes only to the credibility of the witness. The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is up such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend.

The drafters of the Palau Constitution and the citizens who ratified the Constitution surely anticipated ⊥506 [sic] that such "rudimentary demands of justice," "implicit in any concept of ordered liberty," would be upheld here. There is a reasonable likelihood that the convictions derived from prosecutorial misconduct. The misconduct therefore was of such a magnitude as to deprive the defendants of a fair trial and violate their constitutional right of due process. The convictions must be set aside.

IV. The Ngiraikelau Testimony

There are also numerous questionable aspects, including inconsistencies, contradictions, and strangeness of tone in the statements and testimony of Namiko Ngiraikelau. Certainly her claimed absolute identification of Anghenio Sabino, whom she said she had never seen before or since the night of the assassination, stretches credulity.

However, it would be difficult to determine whether any part or all of her testimony must or could be set aside by the appellate court on grounds that no reasonable trier of fact would consider the testimony to be reliable. In light of the other conclusions reached here I find it unnecessary to resolve this question.

V. The Remedy

The constitution of the Republic of Palau provides, at article IV, section 6, that, "No person shall be placed in double jeopardy for the same offense."

An obvious but important question is whether this provision would be violated if this case were to be remanded to the trial court and the government were to seek to try the defendants a second time on these charges.

⊥507 [sic] There is no easy answer to that question. The constitutional words themselves do not provide a clear answer as to whether a retrial should be considered a second, or double, jeopardy for the defendants, or just an extension of the first. No cases decided by this Court have addressed the issue. I am unaware of any guidance on the point in the records of the constitutional convention.

The fundamental rights article of the Constitution of the Republic of Palau contains many provisions drawn from the bill of rights of the United States Constitution. The double jeopardy clause is one of these.[25] In absence of more direct guidance in the law of Palau, it is appropriate that we look to interpretations of United States courts as to the meaning of the comparable clause in that Constitution for assistance in determining the scope of protections against double jeopardy provided by the Palau Constitution.

The general rule in the United States has long been that a defendant whose conviction is set aside upon appeal may be required to stand trial again for the same offense. *Ball v. United States*, 163 U.S. 622, 671, 16 S.Ct. 1192, 1195, 41 L.Ed. 300 (1896); *Sapir v. United States*, 348 U.S. 377, 75 S.Ct. 422, 99 L.Ed. 426 (1950).

That rule has been justified on reasonable and pragmatic ⊥508 [sic] grounds:

> It would be a high price indeed for society to pay were every accused granted immunity from punishment because of any defect sufficient to constitute severable error in the proceedings leading to conviction.

United States v. Tateo, 377 U.S. 463, 466, 84 S. Ct. 1587, 1589, 12 L.Ed.2d 448 (1964).

Until almost the time that the first Palau Constitutional Convention commenced on January 28, 1979, this general rule in the United States was applied to permit retrial even of a defendant whose conviction was overturned for failure of proof. *Bryan v. United States*, 338 U.S. 552, 70 S.Ct. 317, 94 L.Ed. 335 (1950).

However in 1978, the United States Supreme Court concluded that a distinction could be made between reversals for trial error and those for insufficiency of evidence:

> [R]eversal for trial error, as distinguished from evidentiary insufficiency, does not constitute a decision to the effect that the government has failed to prove its case. As such, it implies nothing with respect to the guilt or innocence of the defendant. Rather, it is a determination that a defendant has been convicted through a judicial process which is defective in some fundamental respect, *e.g.*, incorrect receipt or

[25] The United States Constitution counterpart is in the Fifth Amendment: "[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb."

> rejection of evidence, incorrect instructions, or prosecutorial misconduct. When this occurs, the accused has a strong interest in obtaining a fair readjudication of his guilt free from error, just as society maintains a valid concern for insuring that the guilty are punished.
>
> The same cannot be said when a defendant's conviction has been overturned due to a failure of proof at trial, in which case the prosecution cannot complain of prejudice, for it has been given one fair opportunity to offer whatever proof it could assemble.

⊥509 [sic] *Burks v. United States* , 437 U.S. 1, 16, 98 S.Ct. 2141, 2149-50 57 L.Ed.2d 1 (1978). The court went on to conclude, "Since we hold today that the Double Jeopardy Clause precludes a second trial once the reviewing court has found the evidence legally insufficient, the only 'just' remedy available for that court is the direction of a judgment of acquittal."

The *Burks* case however does not answer the precise question presented to us here. In the instant case, no member of this panel has specifically concluded that the evidence admitted and considered at the trial court level was insufficient to support the judgment of the trial court. My own view is that the trial evidence, had it been competent, would have been sufficient to support the convictions. Thus, we have here a case where the evidence actually admitted at trial was sufficient to sustain the convictions, but the legally competent evidence quite likely was insufficient.

In *Greene v. Massey*, 437 U.S. 19, 98 S.Ct. 2151, 57 L.Ed.2d 15 (1978), decided the same day as *Burks*, the United States Supreme Court faced facts more similar to those which confront us here. The *Greene* court found itself uncertain whether the Florida Supreme Court had set aside the trial court's conviction because all the evidence admitted at the trial level was insufficient to convict, or because, after some evidence had been ruled incompetent on appeal, the remaining evidence was insufficient to support convictions. The court said, "We express no opinion as to the double jeopardy implications of a retrial following such a holding," ⊥510 [sic] 437 U.S. at 26 n. 9, 98 S.Ct. at 2155 n. 9, and simply remanded the case to the lower court "for reconsideration in light of this opinion and *Burks*."

Soon thereafter the Maryland Court of Appeals concluded that the double jeopardy clause did not preclude retrial under facts similar to those here before us. Y. Kamisar, W. LaFave and J. Israel, Modern Criminal Procedure , 1420-21, citing *State v. Boone* , 383 A.2d 1361 (Md. 1978). In *Boone* the court said:

> The prosecution, . . . in proving its case is entitled to rely upon the correctness of the rulings of the court and proceed accordingly . . . . Were it otherwise, the State, to be secure, would have to consider every ruling by the court on the evidence to be erroneous and marshall and offer every bit of relevant and competent evidence. The practical consequences of this would seriously affect the orderly administration of justice.. . .

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There have subsequently been other decisions, some of which hold that retrial under the circumstances would be impermissible. For example, see *Commonwealth v. Funches* , 397 N.E.2d 1097 (Mass. 1979), cited in *Kamisar, supra* at 1421, Others agree with the *Boone* approach. *United States v. Harmon*, 632 F.2d 812, 814 (9th Cir. 1980).

The point is that this is a significant legal issue, unresolved under the United States Constitution for nearly 200 years, and still undecided at the time the pertinent language in the Palau Constitution was borrowed from the United States Constitution.

The issue has not been briefed by the parties before this Court and should not be lightly decided. Moreover, it is ⊥511 [sic] conceivable that we need not rule on this point, for the issue will be presented only if the government does elect to renew charges arising out of the assassination against these defendants, and if the trial court considers retrial to be consistent with the interests of justice. *See, e.g., United States v. Banks, supra*.

Courts should avoid unnecessarily addressing and deciding constitutional issues. I conclude that this case should be remanded to the trial court for appropriate action. If the government seeks to retry the defendants, the trial court may in the first instance require briefs, hear oral arguments and decide whether retrial is barred by the double jeopardy clause or other considerations. If the decision is that retrial is permitted, presumably this Court can arrange for expedited review of that decision. At that time however, the court will have before it the briefs of the parties and the trial court's decision, and will be far better positioned to address and decide this constitutional issue which is of great importance to the jurisprudence of the Republic of Palau.

VI. Conclusion

The testimony of Mistyca Maidesil was indisputably unreliable and should not have been taken into consideration by the trial court in reaching its judgment. The trial court was misled into accepting this incomplete evidence by prosecutorial misconduct. The defendants were deprived of a fair trial in violation of their rights of due process. The convictions almost certainly resulted from the prosecutorial ⊥512 [sic] misconduct and acceptance of this testimony, and therefore must be set aside.

I would remand this case to the trial court for appropriate action. If the government seeks to retry the defendants, the trial court could then consider whether retrial is barred by the double jeopardy clause and, if not, whether retrial would be consistent with the demands of justice.