Ngiraked v. ROP, 5 ROP Intrm. 159 (1996)
JOHN O. NGIRAKED and EMERITA KERRADEL,
Appellants,

v.

REPUBLIC OF PALAU,
Appellee.

CRIMINAL APPEAL NO. 3-93
Criminal Case No. 114-92

Supreme Court, Appellate Division
Republic of Palau

Opinion
Decided: January 8, 1996

Counsel for Appellant John O. Ngiraked: Kevin N. Kirk

Counsel for Appellant Emerita Kerradel: Oldiais Ngiraikelau
⊥160
Counsel for Appellee: John F. De Pue and Jerry Massie
U.S. Department of Justice
Jon Hinck, Acting Attorney General

BEFORE: ARTHUR NGIRAKLSONG, Chief Justice; JEFFREY L. BEATTIE, Associate Justice; LARRY W. MILLER, Associate Justice.

NGIRAKLSONG, Chief Justice:

Before the Court are the appeals of John O. Ngiraked ("Ngiraked") and Emerita Kerradel ("Kerradel") (collectively "appellants") from their convictions for first degree murder arising from the assassination of Palau's first President, Haruo I. Remeliik. The matter has been fully briefed by all the parties and oral argument was heard on December 11, 1995. Because the appellants have identified no errors by the Trial Division that warrant reversal, the Court affirms the convictions.

I. FACTS

In the early morning of June 30, 1985, President Remeliik was shot and killed near his home in Ngerchemai hamlet, Koror. In 1985, police arrested and charged three individuals for the murder. They were convicted at trial, but the convictions were reversed on appeal. *See Tmetuchl v. ROP, 1 ROP* Intrm. 443 (1988).

Over the next several years, no further arrests were made in connection with the

assassination. In January of 1992, Patrick Remarii ("Remarii"), who was in jail on charges in another matter, asked to speak with police investigators and stated that he wanted to provide information concerning the murder of President Remeliik. On January 16, 1992, Remarii was interviewed by investigators from the Special Prosecutor's Office. The investigators made a magnetic recording of the interview using a micro cassette tape-recorder. The same investigators conducted a second interview with Remarii on January 23, 1992, which was also recorded. In the two tape-recorded interviews, according to those present, Remarii confessed to the killing of President Remeliik and implicated appellants. A third interview was also conducted, but not recorded.

Subsequently, charges of first degree murder were brought against Remarii and the appellants. Remarii entered into a plea agreement with the prosecution whereby he agreed to enter guilty ⊥161 pleas to a charge of aggravated assault in another action and to the charge of second degree murder in the killing of President Remeliik. Remarii also agreed to cooperate with the prosecution in their investigation of the assassination and by providing a statement under oath in open court. On March 20, 1992, after the court took Remarii's guilty pleas, Remarii provided his statement on the record as per the plea agreement.

A preliminary hearing was held on April 21, 1992. During the hearing, the trial court and appellants learned for the first time of the taped interviews with Remarii. The interim special prosecutor informed the trial court that no transcript of the tapes had been prepared and that the tapes may have been reused, wiping out the interviews with Remarii. The interim special prosecutor represented that notes were taken of the first interview, however. The prosecution later confirmed that the tapes had been erased. Appellants subsequently moved to suppress or strike the testimony of Remarii or to dismiss the action, based on the erasure of the tapes by the prosecution. The trial court denied the motions.

Kerradel also moved for funds to hire a firearms and ballistics expert, and a polygraph examiner. The trial court denied her request for funds. In the midst of trial, Kerradel moved for a mistrial or to relieve her counsel from continuing to represent her due to contact between a partner to her counsel and a Special Judge. The trial court denied that motion as well.

On April 29, 1993, after trial before Associate Justice Sutton and two Special Judges [1]

[1] The use of Special Judges in murder trials is provided for in 4 P.N.C. § 309(b) which provides:

> When a murder case is assigned for trial, the justice of the Supreme Court assigned to preside shall assign two of the special judges to sit with him in the trial thereof. The special judges shall participate with the presiding judge in deciding, by majority vote, all questions of fact and sentence, but the presiding judge alone shall decide all questions of law involved in the trial and determination of the case.

See Chisato v. ROP, 2 ROP Intrm. 227, 232 (1991); *Santos v. ROP*, 1 ROP Intrm. 274, 275-76 (1985).

(collectively "fact finders"), appellants ⊥162 were convicted of violating Title 17, Sections 102 and 1701 of the Palau National Code by willfully, deliberately and with malice aforethought and premeditation aiding and abetting Remarii in the murder of President Remeliik. Subsequently, appellants were sentenced to life imprisonment in Koror jail.

Although the government points to other physical and testimonial corroborating evidence in the record, it concedes that its case was presented principally through the testimony of Remarii. The following is a recounting of the events surrounding the assassination of President Remeliik, based primarily on the trial testimony of Remarii.

In June of 1985, Heinrick Ngowakl ("Heinrick") gave Remarii an M-l carbine, two magazines and some 40 rounds of ammunition. A week later, Remarii was asked by one of Heinrick's sons to meet with Heinrick and Ngiraked at Heinrick's residence in Ngeremlengui. Also present in the house was Kerradel, who would later marry Ngiraked. At the meeting, Ngiraked blamed President Remeliik for financial misfortunes he and his family had encountered. Ngiraked asked Remarii to kill President Remeliik in return for $10,000. Ngiraked pledged that the amount would be $1,000,000 if Ngiraked became President. Ngiraked promised Remarii that if he killed the President, Ngiraked would see to it that Remarii would never have to work again. After Ngiraked made this offer, according to Remarii, Kerradel told Remarii: “Patrick you can do this. [W]hen you do this you can take the roads from Ngerias coming to Ngerkesoaol, and I will hide you at our house. At the room of our house, and nobody will find you.” She continued: "Pat when you do this, you will . . . stop going fishing, no more hunting, and going to the market such as selling betel nuts and selling them at the market areas."

A few days later, Sulial Heinrick ("Sulial") and Oscar Heinrick (“Oscar”), both sons of Heinrick, went to Koror with Remarii by boat. Heinrick met them and drove Remarii to a location near President Remeliik's residence to get an idea of the logistics of the killing and escape. They then went to Ngiraked's residence to meet with Ngiraked and discuss the timing of the murder.

⊥163 On June 28, 1985, Remarii was asked by one of Heinrick's children to meet at Heinrick's residence. Heinrick told Remarii to get ready to go to Koror that day. Remarii loaded the magazines for the weapon, put the gun in a plastic garbage bag and made a mask for himself. Sulial, Heinrick and Remarii then traveled to Koror by boat. Ngiraked picked them up and instructed Remarii to be sure that the President was dead. Ngiraked gave Sulial a hunting knife and told him to use it if he needed to. Ngiraked then drove Sulial and Remarii to the President's residence, but because the President had already returned home, Ngiraked decided to wait another day to commit the murder. Ngiraked instructed Remarii to hide the weapon, and drove Sulial and Remarii back to the boat.

The next day, Remarii, Heinrick, Sulial and Oscar took Heinrick's boat to Koror again. It was about 7:00 in the evening when they arrived. Heinrick procured a pickup truck and drove Remarii and Sulial to a store, then to retrieve the stashed weapon and finally, at about 7:30 p.m., to a location near President Remeliik's residence. Sulial and Remarii hid and waited for the President to arrive.

According to Remarii, after he and Sulial had been hiding for several hours, President Remeliik drove his car into the driveway, parked and got out of the car. Remarii stood, released the safety on the firearm, took aim at the President's head and pulled the trigger. The weapon, however, misfired. The President, apparently hearing the ejected round, looked up and saw Remarii. President Remeliik shouted and tried to run. Remarii leaped the hood of the President's car and intercepted him. The President grabbed the barrel of the weapon and the two struggled for control. Remarii successfully pushed the President over the embankment of a small hill. The President tumbled down. Remarii proceeded to shoot the President a total of four times. The final shot, taken at point-blank range, pierced the President's head.

After the murder, Remarii and Sulial returned to the dock where Heinrick and Oscar were waiting. The four then fled Koror. During the trip, Remarii recounted for Heinrick the details of the murder so that Ngiraked could be briefed. When they had returned to Heinrick's residence, Remarii burned the clothing and shoes he had worn during the attack. He gave the weapon and remaining ammunition to Heinrick.

⊥164 Days after the murder, Remarii and Heinrick visited Ngiraked in Koror. Ngiraked gave $200 to Remarii and promised him that his financial problems were in the past. Ngiraked provided Remarii with financial and in-kind assistance over the succeeding years. Ngiraked gave Remarii lumber to repair his house, two boats and boat engines, a motorcycle, a pickup truck, housing and various amounts of money to Remarii and his family. Kerradel also gave money to Remarii and his family.

Eventually, the relationship between Remarii and Ngiraked began to sour. Remarii moved his family out of their house because he believed that Ngiraked's brother was carrying on an affair with Remarii's wife. Remarii felt slighted by Ngiraked when Ngiraked traveled to Guam for a month and left Remarii with only $200. Indeed, Remarii was so outraged that, in an intoxicated state, he fired several bullets into Ngiraked's residence while Ngiraked was still in Guam. When Remarii accused Ngiraked of failing to keep his promise to pay Remarii $10,000 for murdering the President, Ngiraked admitted that the debt existed and that it could be as high as $1,000,000. Ngiraked vowed to pay him the amount owed. Remarii later threatened to kill Ngiraked if the money was not paid. Ngiraked told Remarii to be patient and promised to pay for Remarii's child-care expenses.

In mid-December of 1991, Remarii was arrested and detained for assault. When Ngiraked failed to post bail as he had promised, and his relationship with Ngiraked and Kerradel had otherwise deteriorated, Remarii asked to speak to police investigators. As discussed above, Remarii implicated appellants in the murder, and appellants were eventually convicted. Ngiraked and Kerradel now appeal.[2]

---

[2] Sulial Heinrick was charged, but acquitted after trial based on the finding that his participation in the murder was the result of duress. Oscar Heinrick was also charged, but the charge against him was dismissed by the prosecution in exchange for his testimony at trial. Heinrick Ngowakl died before charges could be brought against him.

II. DISCUSSION

Ngiraked's appeal is based on the destruction of the tapes containing the prosecution's initial interviews with Remarii. Kerradel raises the same issue and contends additionally that her ⊥165 conviction should be reversed because (1) the evidence was insufficient to support the conviction, (2) the trial court erred by not declaring a mistrial or allowing Kerradel's counsel to withdraw when it became known that there was a potential conflict between a member of counsel's law firm and a Special Judge, and (3) the trial court erred in declining to provide the funds necessary to procure the services of certain expert witnesses.

A. Destruction of Interview Tapes by the Prosecution

Appellants contend that the trial court committed reversible error by allowing Remarii to testify at trial. It is undisputed that the tapes of the January 16 and 23, 1992, interviews of Remarii by the prosecution were destroyed by the prosecution before appellants could review them. The Trial Division declined to exclude the testimony or declare a mistrial, but did impose a sanction on the prosecution by issuing an instruction to the fact finders that they could infer from the destruction that the tapes contained information unfavorable to the prosecution. [3] Appellants contend that the destruction of the tapes was in violation of Rule of Criminal Procedure 26.2 ("Rule 26.2") and deprived them of their constitutional rights to a "full opportunity to examine all witnesses" and to due process. Const. art. IV, §§ 6 & 7. Appellants argue that subpart (e) of Rule 26.2 and the Constitution required the exclusion of Remarii's testimony or a mistrial, and that the instruction to the fact finders did not remedy the violations.

⊥166 1. Rule 26.2

Rule 26.2 provides in relevant part as follows:

> 26.2 PRODUCTION OF STATEMENTS OF WITNESSES.
>
> (a) *Motion for Production* . After a witness other than the defendant has testified on direct examination, the court, on motion of a party who did not call the witness, shall order the attorney or trial assistant for the government or the defendant and his attorney or trial assistant, as the case may be, to produce, for the examination and use of the moving party, any statement of the witness that is in their possession and that relates to the subject matter concerning which the witness has testified.
>
> * * * *
>
> (e) Sanction for Failure to Produce Statement. If the other party elects not to

[3] Specifically, the trial judge instructed the fact finders that "the destruction of th[e] tapes by the government and the fact that because of the government's act the contents of the tapes are not available to the defendants permits you to draw the inference that the tapes contained information which is unfavorable to the government in the prosecution of this case. You are not compelled to draw such inference however upon consideration of all the evidence before you at the close of this matter you may freely do so if that is your conclusion."

> comply with an order to deliver a statement to the moving party, the court shall order that the testimony of the witness be stricken from the record and that the trial proceed, or, if it is the attorney or trial assistant for the government who elects not to comply, shall declare a mistrial if required by the interest of justice.

There is no dispute that the tape-recorded interviews are "statements" as that term is used in Rule 26.2.[4] Nor is there a dispute that, had the government not destroyed the tapes, the defendants would have been entitled to examine them under this Rule. The dispute centers around whether, given that the tapes were destroyed, the trial court was required by the Rule to exclude the testimony of Remarii at trial.

⊥167 a. Standard of Review

The trial court has discretion in ruling on discovery matters and the admissibility of evidence; this is so even where the production of statements and the challenge to the admissibility of evidence is based on Rule 26.2. *See Campbell v. United States* , 83 S.Ct. 1356, 1360-61 (1963); *United States v. Simtob* , 901 F.2d 799, 808-09 (9th Cir. 1990). Accordingly, this Court will not reverse the trial court's decision to admit into evidence Remarii's testimony unless the trial court abused its discretion.

b. Culpability and Prejudice

The parties agree that the tape-recorded statements were destroyed by the government and thus, as a result of government conduct, were not produced. Appellants argue that this constitutes a violation of Rule 26.2 and urge that under subpart (e) of the Rule, the trial court was left with no discretion but either to strike the testimony or to declare a mistrial.

Although the trial court agreed that the prosecution had violated Rule 26.2, it concluded that it had discretion to impose sanctions less harsh than striking the testimony or declaring a mistrial. Relying on the reasoning provided in a long line of United States cases interpreting the Jencks Act, 18 U.S.C. § 3500 and United States Federal Rule of Criminal Procedure 26.2, [5] the trial court concluded that it had discretion to design a remedy to satisfy the particular demands of the case and was not limited by subpart (e). In fashioning an appropriate sanction, the trial court looked to two factors: (1) the culpability of the government in destroying the statement and (2) the injury to the defense.

As to the first factor, the trial court concluded that the erasure of the tapes was not attributable to a bad faith motive. As to the second factor, the trial court found that the appellants had been prejudiced by the loss of potentially useful impeachment evidence against Remarii.

---

[4] A "statement" under Rule 26.2 includes "a substantially verbatim recital of an oral statement made by the witness that is recorded contemporaneously with the making of the oral statement and that is contained in a stenographic, mechanical, electrical, or other recording or a transcription thereof." Rule of Crim. P. 26.2(f).

[5] The language used in the Jencks Act and U.S. Rule 26.2 is identical to Rule 26.2 in all material respects.

The trial court concluded, however, that given the myriad of other material that could be used to expose inconsistencies in Remarii's testimony, the amount of prejudice was not so high as to warrant exclusion of Remarii's testimony. Rather, to sanction the prosecution and remedy the violation, the ⊥168 trial court instructed the fact finders that they may draw an inference that material unfavorable to the prosecution was contained in the tape-recorded statements. *See supra* note 3.

The Court has reviewed the record and the arguments of appellants, and cannot characterize as clearly erroneous the trial court's findings that the destruction of the tapes was not the result of bad faith by the prosecution[6] and that appellants suffered prejudice only to the extent that they may have been deprived of largely cumulative impeachment material. The finding that the prosecution did not act in bad faith was amply supported by the record. Importantly, notes of the first interview taken by one of the police investigators were not destroyed. This suggests that there was no intent to conceal information imparted by Remarii in the interviews. Also, the prosecution generated numerous other statements that were ultimately used by the defense in efforts to impeach Remarii. This was conduct wholly inconsistent with conduct one would expect if the prosecution destroyed the tapes as part of a strategy to keep material out of the hands of the defense and reduce the risk of impeachment.

⊥169 Likewise, there was ample support for the trial court's finding that the defendants were not substantially prejudiced by the absence of the tapes. Again, although the tapes of the two interviews were unavailable, the written notes of the first interview taken by one of the police investigators were produced. Defendants had available the notes at trial to attempt to show inconsistencies between Remarii's trial testimony and statements he made in the first interview. Moreover, appellants had at their disposal an arsenal of other materials to use in cross-examining Remarii, including the statement given by Remarii under oath after pleading guilty, statements made by Remarii at the preliminary hearing, witnesses who spoke with Remarii about the murder, witnesses familiar with Remarii's reputation for truthfulness, and agreement between Remarii and the prosecution.

---

[6] In concluding that the actions by the interim special prosecutor in destroying the tapes was not the result of a strategy to prevent appellants from access to the statements, the trial court considered the affidavit of Bill R. Mann. Mann acted as the supervisor of the interim special prosecutor when the interim special prosecutor worked in the Office of the Attorney General, Federated States of Micronesia, prior to coming to Palau. Through his affidavit, Mann testified regarding the limited experience the interim special prosecutor had in criminal matters and of his performance problems. Although the trial court initially refused to consider the affidavit, it later reversed its ruling and held that it could consider the affidavit under Rule of Evidence 104(b).

This Court agrees with appellants that Rule of Evidence 104(b) does not apply here. Nonetheless, the Court concludes that any error was harmless. In a previous order, issued before the Mann affidavit had been submitted, the trial court had made the same finding that the prosecution did not destroy the tapes in bad faith. Only in reaffirming its original finding in a second order did the trial court consider the Mann affidavit. There is no basis on which to conclude that the trial court would have found differently in the second order had it not considered the Mann affidavit.

c. Appropriate Remedy

Remaining is the issue whether, given its factual findings, the trial court abused its discretion in admitting the testimony of Remarii at trial. The vast majority of United States courts interpreting the Jencks Act and Federal Rule of Criminal Procedure 26.2 hold that the trial court has discretion to decide which sanctions, if any, should be imposed on the prosecution for its violation of a Rule 26.2 order to produce witness statements. [7] Because the fashioning of an appropriate remedy "depends on numerous and subtle considerations difficult to detect or appraise from a cold record, the trial court's discretion should be upheld in the absence of a clear showing of prejudicial abuse of discretion. * * * When the documents . . . are sought only to impeach the credibility of adverse witnesses, and not to prove the ⊥170 facts stated therein, the same conclusion is even more compelling." *Jencks v. United States* , 77 S.Ct. 1007, 1016-17 (1957) (Burton, J., concurring) (internal citations and quotations omitted).

As did the trial court, the United States federal courts hold almost universally that, in crafting the most appropriate sanction, the trial court should consider the totality of the circumstances, including the culpability of the prosecution and the harm to the defendant. *See, e.g., United States v. Taylor* , 13 F.3d 986, 990 (6th Cir. 1994); *United States v. Lam Kwong-Wah* , 924 F.2d 298, 310 (D.C. Cir. 1991), *cert. denied* , 113 S.Ct. 287 (1992); *United States v. Maldonado-Rivera*, 922 F.2d 934, 954-55 (2d Cir. 1990), *cert. denied* , 111 S.Ct. 2811 (1991); *United States v. Moeckly*, 769 F.2d 453, 464 (8th Cir. 1985), *cert. denied*, 106 S.Ct. 1196 (1986); *United States v. Echeverry* , 759 F.2d 1451, 1456 (9th Cir. 1985); *United States v. Wables* , 731 F.2d 440, 447 (7th Cir. 1984); *United States v. Soto* , 711 F.2d 1558, 1563 n.10 (11th Cir. 1983); *United States v. Principe* , 499 F.2d 1135, 1139 (1st Cir. 1974). The Court finds persuasive the rationale underlying these decisions.

The trial court's decision here to issue a cautionary instruction to the fact finders, as opposed to striking the testimony or declaring a mistrial, was made only after careful analysis of the government's motive in destroying the tape-recorded statements and the prejudicial impact of the lost statements on the defendants' ability to present their defenses. This was a proper exercise of the discretion given trial court judges. *See, e.g., United States v. Peters* , 587 F.2d 1267, 1276 (D.C. Cir. 1978); *United States v. Quiovers*, 539 F.2d 744, 747 (D.C. Cir. 1976).

2. Full Opportunity to Examine All Witnesses and Due Process

---

[7] Ngiraked urges the Court not to rely on cases from other jurisdictions to interpret Rule 26.2. The Court is certainly not bound by the decisions of foreign courts when interpreting the procedural rules governing the courts of Palau. As this Court has stated before, however, where the courts of Palau face an issue of first impression, it is wholly proper, and indeed prudent, to tap the analytical resources that are available in the bodies of law developed elsewhere. *See Kazuo v. ROP*, 1 ROP Intrm. 154, 172 n.43 (1984). Such authority is particularly valuable where, as here, the Palau rule is identical to, and derived directly from, a foreign jurisdiction's statute or rule that has been the subject of extensive analysis and interpretation. *See Blailes v. ROP*, 5 ROP Intrm. 36, 39 (1994).

Appellants also contend that the destruction of the tapes deprived them of their constitutional right to a "full opportunity to examine" Remarii. Const. art. IV, § 7. The Court rejects this contention. To determine whether a criminal defendant's right to a "full opportunity to examine all witnesses" is denied when a witness' statement is not produced, the Court again finds guidance in cases from the United States. The Court notes at the outset that the United States Constitution gives a criminal defendant the right "to be confronted with the witnesses against him" without expressly granting a "full opportunity to examine" the witnesses. U.S. Const. amend. VI. The cases construing the United States ⊥171 Constitution's confrontation clause, however, hold that the primary and essential interest protected by the amendment is the right to cross-examine witnesses. *See, e.g., Davis v. Alaska*, 94 S.Ct. 1105, 1110 (1974). Without determining whether the Palau constitutional provision may be more expansive than the U.S. confrontation clause in other circumstances, the Court views the two provisions as sufficiently similar to make it worthwhile to look to U.S. authority when considering appellants' contention that the non-production of witness statements violates a defendant's right to a "full opportunity to examine witnesses."

Appellants have not called our attention to any authority holding that a criminal defendant's constitutional right to cross examine a witness is violated when all prior statements of the witness are not provided to the defendant, nor has the Court found any. The authority for compelling the production of *Jencks* type of witness statements is the *Jencks* decision, Rule 26.2 and, in the United States, the Jencks Act.

It is clear that Rule 26.2 and the Jencks Act, both of which were derived from *Jencks v. United States*, 77 S.Ct. 1007 (1957), do not implicate constitutional rights under the United States Constitution. Neither do they articulate evidentiary rules demanded by the Constitution.[8]

> [T]he Jencks decision and the Jencks Act were not cast in constitutional terms. *Palermo v. United States*, [79 S.Ct. 1217, 1229 (1959)]. They state rules of evidence governing trials before federal tribunals; and we have never extended their principles to state criminal trials.

United States v. Augenblick, 89 S.Ct. 528, 533 (1969); *see Lincoln v. Sunn*, 807 F.2d 805, 816 (9th Cir. 1987) (Jencks decision and Jencks Act "state evidentiary rules governing federal trials, and do not invoke constitutional considerations."), *cert. denied*, 111 S.Ct. 277 (1990). The failure to produce a witness statement does ⊥172 not violate a criminal defendant's right to a full opportunity to examine witnesses.

Appellants also contend that the failure to produce the Remarii interview tapes violated their constitutional right to due process. Const. art. IV, § 6. In support of that contention, they cite *Brady v. Maryland*, 83 S.Ct. 1194 (1963), and its progeny. In *Brady*, the United States Supreme Court held that the suppression of exculpatory evidence by the prosecution in the face

---

[8] *See also United States v Bagley*, 105 S.Ct. 3375, 3381 (1985) (failure to disclose information to defense that might have been helpful in conducting cross-examination is not restriction on cross-examination and amounts to constitutional violation only if it is material and deprives defendant of fair trial in violation of due process).

of a defendant's request violates the due process clause of the United States Constitution where the evidence is "material" to guilt or punishment. *Brady*, 83 S.Ct. at 1196-97. In *United States v. Bagley*, 105 S.Ct. 3375 (1985), the U.S. Supreme Court held that the evidence is "material" only "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." *Bagley*, 105 S.Ct. at 3383; *see Strickland v. Washington*, 104 S.Ct. 2052, 2068 (1984); *United States v. Agurs*, 96 S.Ct. 2392, 2401 (1976).

Although we have not before had occasion to consider whether the *Brady* rule applies to the due process clause of the Palau Constitution, we now conclude that it does. The instant case, however, involves no alleged suppression of exculpatory evidence. It involves suppression of impeachment evidence.[9] In view of the other impeachment evidence available for use in cross examining Remarii and casting doubt on his credibility, the Court concludes that the missing interview tapes were not "material." Accordingly, there was no due process violation in failing to produce the tapes.

⊥173 B. Sufficiency of the Evidence against Kerradel

Appellant Kerradel contends that the evidence of her involvement was insufficient to support a conviction for first degree murder under Title 17, sections 102 and 1701 of the Palau National Code. The Court rejects this contention.

1. Standard of Review

This Court's review of the sufficiency of the evidence is extremely circumscribed, limited to the question whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Liep v. ROP*, 5 ROP Intrm. 5, 9 (1994); *Worswick v. ROP*, 3 ROP Intrm. 269, 274 (1993). This Court will pay deference to the fact finders' opportunity to hear witnesses and observe their demeanor. *Sisior v. ROP*, 4 ROP Intrm. 152, 156 (1994).

2. Aiding and Abetting and the Evidence against Kerradel

A person commits the offense of murder in the first degree if the person unlawfully takes the life of another with malice aforethought by poison, lying in wait, torture, or any other kind of wilful, deliberate, malicious, and premeditated killing. 17 P.N.C. § 1701. Kerradel concedes, as she must, that a person may be convicted for first degree murder on evidence showing that the person aided and abetted the commission of the offense. 17 P.N.C. § 102.

---

[9] Impeachment evidence falls within the *Brady* rule if it meets the materiality test. "[T]he 'reasonable probability' test hardly goes so far as to require disclosure of all possible impeachment evidence, even as to principal witnesses. In particular, since witnesses are not likely to acknowledge serious flaws in their credibility in the information they give to the prosecutor, any impeachment material they furnish to the prosecution only rarely would have the great bearing on credibility needed to meet the *Bagley* standard." W. LAFAVE & J. ISRAEL, CRIMINAL PROCEDURE § 20.7(d) at 893 (2d ed. 1992).

This Court recently observed that "[t]o be guilty of aiding and abetting, the defendant must participate in a criminal offense as something he wishes to bring about and must seek by some act to make it succeed." *Blailes v. ROP* , 5 ROP Intrm. 36, 39 (1994); *see also United States v. Davis*, 61 F.3d 291, 297 (5th Cir. 1995). The test for aiding and abetting comprises two prongs: association and participation. To prove association, the prosecution must establish that the defendant shared the criminal intent of a principal in acting to bring about the criminal offense. *Blailes*, 5 ROP Intrm. at 36. To prove participation, the prosecution must establish that the defendant engaged in some affirmative conduct designed to advance the success of the venture. *See United States v. Perez* , 922 F.2d 782, 786 (11th Cir. 1991), *cert. denied*, 111 S. ⊥174 Ct. 2840 (1991); *United States v. Beck*, 615 F.2d 441, 449 (7th Cir. 1980).

3. The Evidence

There is evidence in the record, provided primarily through the testimony of Remarii, that during the first meeting with Remarii, Heinrick and Ngiraked, Kerradel encouraged Remarii to accept Ngiraked's offer of payment in return for killing President Remeliik. [10] There is also evidence that she proposed an escape route, promised to conceal Remarii in her house after the murder and acted as a conduit for payments from Ngiraked to Remarii after the murder.

Kerradel contends in her brief that this evidence is insufficient to establish, beyond a reasonable doubt, that she aided and abetted in the criminal venture to assassinate President Remeliik. Specifically, Kerradel argues that the testimony of Remarii is inherently unreliable, and that in any event, the evidence was insufficient to establish the participation prong of the aiding-and-abetting test. The Court rejects Kerradel's contentions.

a. Credibility

As to the first ground, contesting the credibility of Remarii, the record is clear that the fact finders had the opportunity to judge the credibility of the witnesses. The fact finders had before them the trial and pretrial testimony of Remarii, Kerradel's impeachment witnesses, and other impeachment and credibility evidence. Further, in presenting argument to the fact finders, Kerradel had the opportunity to highlight inconsistencies and other reasons to doubt the veracity of Remarii's testimony. Finally, the instructions to the fact finders extensively covered their duties with regard to witness credibility. [11] The fact finders were thus ⊥175 presented with the

[10] Oscar also testified against Kerradel but testified only that he saw her at the meeting.

[11] Each fact finder was instructed that, in assessing the credibility of the witnesses, he may consider "anything that reasonably helps you to assess the testimony" including the witnesses' (1) appearance, (2) attitude, (3) behavior on the stand,(4) age, (5) intelligence, (6) experience, (7) opportunity and ability to see or hear the things about which the witness testified, (8) memory, (9) motive to tell or not to tell the truth, (10) interest in the outcome of the case, (11) bias, (12) reputation for truthfulness or untruthfulness, (13) prior criminal convictions, (14) prior inconsistent statements, (15) prior conduct, and (16) internal consistency. The role of prior inconsistent statements was reiterated in another instruction. Each fact finder was also instructed to examine "with great care" the testimony of any witness who had agreed to testify in return for

challenge to the credibility of Remarii and the instructions that govern such challenges, but ultimately declined to discount his testimony. After having reviewed the transcript as a whole, including the portions identified by Kerradel in particular, and viewing the evidence in the light most favorable to the prosecution, this Court cannot conclude that Remarii's testimony so lacked credibility that no rational finder of fact could have believed it.

---

leniency by the government. In another instruction, each fact finder was directed to consider with "caution and great care" Remarii's testimony in particular because of the treatment he received from the government. Kerradel does not contend that these instructions were improper or inadequate.

b. Participation

Kerradel also argues that the prosecution failed to prove the "participation" prong of the test for aiding and abetting. She asserts first that her words alone cannot, as a matter of law, be enough to constitute aiding and abetting. Kerradel contends second that, as a matter of law, a defendant cannot "aid or abet" the commission of a crime unless that defendant's participation was necessary for the completion of the crime. Kerradel argues that the prosecution failed to show that without her participation, the assassination would not have been completed. The Court rejects both of these contentions.

As to the first, where words are said knowingly with the intention that they aid, abet, counsel, command, induce or procure the commission of a crime, and are designed to increase the probability that the offense will be committed, the speaker may be deemed a principal under 17 P.N.C. section 102. *See, e. g., United* ⊥*176* *States v. Barnett* , 667 F.2d 835, 842-43 (9th Cir. 1982) (words instructing others on how to manufacture illegal substance can constitute aiding and abetting); *United States v. Buttorff* , 572 F.2d 619, 624 (8th Cir.) (speeches instructing and encouraging tax evasion constitute aiding and abetting tax evasion), *cert. denied*, 98 S.Ct. 3095 (1978); 21 AM. JUR. 2D *Criminal Law* § 170 (1981) ("[a]dvice or encouragement given by words . . . may make one a principal in a felony.").

As to the second, nothing in Title 17, section 102 of the P.N.C. limits its application to defendants whose participation in the commission of a crime is a proximate "but-for" cause of the crime, and no case law cited by Kerradel or located by the Court stands for such a proposition.[12] To the contrary, the only authority directly on point rejects such a rule:

> The assistance given . . . need not contribute to the criminal result in the sense that but for it the result would not have ensued. It is quite sufficient if it facilitated a result that would have transpired without it . . . . [W]here one counsels murder he is guilty as an accessory before the fact, though it appears to be probable that murder would have been done without his counsel.

State ex rel. Attorney General v. Talley , 102 Ala. 25, 15 So. 722 (1894) (emphasis added), cited in W. LAFAVE & A. SCOTT, CRIMINAL LAW § 6.7(a) at 578 & n.45 (2d ed. 1986).

To be punished as a principal under section 102, a defendant must have acted knowingly and intentionally[13] in aiding, abetting, ⊥177 counseling, commanding, inducing or procuring the

---

[12] The instructions issued to the fact finders on the elements of aiding and abetting liability did not articulate a but-for causation requirement. Kerradel never requested such an instruction nor did Kerradel take issue with, or appeal based on, the instruction given.

[13] Other than Kerradel's challenge to Remarii's credibility, there is no contention that the fact finders erred in concluding that Kerradel intended through her statements to induce Remarii to kill the President. This case does not require any difficult line-drawing between active encouragement or instigation of a crime and mere passive approval. *See State v. Ulvinen*, 313 N.W.2d 425, 428 (Minn. 1981) (evidence of mother's remark that "it would be the best for the kids" or “it will be the best” "at best support[ed] a finding that [she] passively acquiesced in her

commission of an offense. A rule that the participation prong of the aiding and abetting test could be satisfied only where the evidence showed that the defendant's actions were essential for the completion of the crime would lead to peculiar results. For example, a defendant who kept watch for police while his cohorts robbed a bank would be deemed an aider or abetter only if there arose the need to sound a warning. *See Missouri v. Turner* , 48 A.L.R.2d 1008, 1014 (Mo. 1954); 21 AM. JUR. 2D Criminal Law § 170 (1981) ("a person may be a principal who watches at a proper distance to prevent surprise while others commit the unlawful act."). The Court holds that, to establish the participation prong here, the prosecution needed to prove only that Kerradel advised or encouraged the commission of the crime and that it "influenced the perpetration of the crime." *United States v. Ritter*, 989 F.2d 318, 322 (9th Cir. 1993); *Barnett*, 667 F.2d at 841.

Here, the fact finders heard evidence that during the June 1985 meeting in which the murder of the president was discussed, Kerradel encouraged Remarii to kill the President, repeated Ngiraked's assurances of financial support, proposed an escape route and offered to hide Remarii after the murder.[14] Furthermore, the fact finders heard evidence that Remarii committed the murder shortly after that meeting. [15] Based on this evidence viewed in the ⊥178 light most favorable to the prosecution, a reasonable fact finder could infer that Kerradel's statements were designed to increase the probability that the crime would be committed and in fact did so.[16]

C. Conflict Between Kerradel's Counsel and Special Judge

Approximately eight weeks into the prosecution's case, Kerradel's counsel informed the trial court that his partner in the practice of law had, in the course of representing a client, filed a third-party civil complaint for money damages against one of the Special Judges. The day after so informing the trial court, Kerradel's counsel stated that his law firm had withdrawn from the civil case against the Special Judge. Appellants moved for a mistrial or for the disqualification

---

son's plan to kill his wife"), cited in W. LAFAVE & A. SCOTT, CRIMINAL LAW § 6.7(a) at 578-79 n.45 (2d ed. 1986).

[14] The fact finders also heard evidence that after the murder, Kerradel made payments on behalf of Ngiraked to Remarii. This evidence would not alone make Kerradel an aider and abetter under section 102. It is, however, corroborative of other evidence that she encouraged Remarii to commit the murder.

[15] Although there was some time lag between the encouragement given by Kerradel and the murder, there is no rule of law that such time lag breaks the connection between Kerradel and the crime. *See, e.g., Barnett*, 667 F.2d at 841 ("[t]he fact that the aider and abettor's counsel and encouragement is not acted upon for long periods of time does not break the actual connection between the commission of the crime and the advice to commit it."). Of course, the fact finders were free to take the time lag into account.

[16] Kerradel points to testimony in which Remarii omitted to mention her when asked who had encouraged him to commit the murder. Later, however, when Remarii was asked who "induced you, or enticed you into killing the President," Remarii named Kerradel as well as Ngiraked. Trial Transcript, volume X at 76. The fact finders were free to take into account these varying answers in determining which answer was accurate and whether Kerradel's participation was enough to constitute aiding and abetting. In any event, a reasonable fact finder could have found a connection between Kerradel's statements and the murder based on the evidence without relying on Remarii's testimony that the statements had in fact influenced him.

of Kerradel's counsel claiming that their right to due process was violated. The trial court denied the motions, holding that, based on a voir dire examination of the Special Judge, the government had met its burden to establish that the Special Judge carried no bias against the defendants.

Kerradel contends that the trial court erred and reversal of the convictions is appropriate. She relies for this contention on decisions emphasizing the serious nature of improper juror influence. *See, e.g., Mattox v. United States* , 13 S.Ct. 50, 53 ⊥179 (1892). It is clear, however, that "due process does not require a new trial every time a juror has been placed in a potentially compromising situation." *Smith v. Phillips* , 102 S.Ct. 940, 946 (1982). Before devising any remedy, the trial court must first determine the scope of the prejudice.

Here, the trial court took care to make such a determination. Both parties were given the opportunity to examine the Special Judge under oath about the matter. The Special Judge testified unequivocally that the event did not affect his ability to render an impartial verdict. The trial court's conclusion that appellants suffered no prejudice was not clearly erroneous given the testimony and the fact that the law firm withdrew promptly from its participation in the civil action. There was no error in denying appellants' motions.

D. Denial of Funds to Kerradel to Employ Experts

Kerradel requested that the trial court provide her with funds to retain a ballistics and firearms expert, and a polygraph expert. She appeals from the denial of the motions by the trial court.

The trial court has discretion in ruling on an indigent criminal defendant's motion for appointment of an expert, and reversal of the trial court's ruling is appropriate only when the discretion is abused. *See United States v. Dischner* , 974 F.2d 1502, 1521 (9th Cir. 1992), *cert. denied*, 113 S.Ct. 1290 (1993); *United States v. Casal*, 915 F.2d 1225, 1230 (8th Cir. 1990), *cert. denied*, 111 S.Ct. 1400 (1991); *United States v. Cruz* , 783 F.2d 1470, 1473-74 (9th Cir.), *cert. denied*, 106 S.Ct. 2901 (1986). In exercising its discretion, a trial court should evaluate the value of the requested expert testimony to the defense and, conversely, the effectiveness of the defense if deprived of the requested expert. *See, e.g., Ake v. Oklahoma*, 105 S.Ct. 1087 (1985); *Moore v. Kemp*, 809 F.2d 702, 711 (11th Cir.), *cert. denied*, 107 S.Ct. 2192 (1987).

The burden of showing that an expert should be appointed is with the defendant. *See Caldwell v. Mississippi* , 105 S.Ct. 2633 (1985). To meet the burden, the defense must provide more than speculation that the expert may be of some assistance. The defense must show a reasonable probability that the expert would provide admissible, noncumulative expert testimony that is helpful to the defense and will assist the fact finders. *See Moore*, 809 F.2d at 710-11.

⊥180 To establish a need for the ballistics and firearms expert, Kerradel argued to the trial court that the expert would be useful in impeaching Remarii. According to Kerradel, the expert would have testified that the number of rounds fired at the crime scene differed from the number of rounds Remarii claims to have fired. Kerradel did not establish, however, why an expert was necessary to count the number of discharged shells or why expert testimony would be of more

assistance to the fact finders than non-expert testimony on this point. The trial court did not abuse its discretion in denying Kerradel a ballistics and firearms expert.

To establish the need for a polygraph expert, Kerradel argued to the trial court that the expert would bolster her credibility as a witness. The trial court held that polygraph evidence would not be admitted and, therefore, there was no need to appoint an expert for that purpose. Kerradel contends that the trial court erred in concluding that the evidence would not be admitted and that the expert should have been appointed.

Factual questions as to the admissibility of evidence, including expert opinion, are left to the sound discretion of the trial court. *See United States v. Blaylock*, 20 F.3d 1458, 1462 (9th Cir. 1994). Here, the trial court declined to grant the funds based on the general rule that polygraph examinations are not admissible. *See Tmetuchl v. ROP* , 1 ROP Intrm. 443, 453 (1988). It was well within the trial court's discretion to deny funds for the retaining of an expert where, as here, the likelihood that the expert's testimony would be admissible was small.

None of the assigned errors warrants reversal. Accordingly, we AFFIRM.