



SPECIALIST PROSECUTOR'S OFFICE
ZYRA E PROKURORIT TË SPECIALIZUAR
SPECIJALIZOVANO TUŽILAŠTVO

In: KSC-BC-2020-06
Specialist Prosecutor v. Hashim Thaçi, Kadri Veseli, Rexhep Selimi and Jakup Krasniqi

Before: Trial Panel II
Judge Charles L. Smith, III, Presiding Judge
Judge Christoph Barthe
Judge Guénaël Mettraux
Judge Fergal Gaynor, Reserve Judge

Registrar: Dr Fidelma Donlon

Filing Participant: Acting Specialist Prosecutor

Date: 12 April 2023

Language: English

Classification: Public

Public Redacted Version of 'Prosecution request to add five items relating to expert witness to the Exhibit List with confidential Annexes 1-5', KSC-BC-2020-06/F01405, dated 29 March 2023

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I. INTRODUCTION

1. Consistent with the Panel's instruction to finalise expert reports before commencement of the Prosecution's case¹ and pursuant to Article 40 of the Law,² and Rules 102(1)(b), 112, 118(2), 149 of the Rules,³ the Specialist Prosecutor's Office ('SPO') requests leave to amend the Exhibit List⁴ to include the following, interconnected documents relating to expert witness W04875 (collectively, 'Requested Amendments'):

- a. an updated DNA forensic expert report ('W04875 Supplement')⁵ prepared by W04875 on 6 March 2023 to supplement his original 2021 Expert Report⁶ and to provide expert opinion on updated DNA analysis concerning [REDACTED], a named murder victim in the Indictment⁷ ('Updated DNA Report' and 'Murder Victim', respectively);
- b. the letter containing the instructions the SPO provided to W04875 before the production of the W04875 Supplement ('Instructions');⁸
- c. the Updated DNA Report,⁹ containing a newly calculated likelihood ratio of the DNA identification of the Murder Victim;

¹ Order on the Conduct of Proceedings, KSC-BC-2020-06/F01226/A01, 25 January 2023 ('Conduct of Proceedings Order'), para.122 ('The SPO is therefore instructed to ensure before their case commences that the report of any expert it intends to call is finalised and ready to be tendered in evidence').

² Law No.05/L-053 on Specialist Chambers and Specialist Prosecutor's Office, 3 August 2015 ('Law').

³ Rules of Procedure and Evidence Before the Kosovo Specialist Chambers, KSC-BD-03/Rev3/2020, 2 June 2020 ('Rules'). All references to 'Rule' or 'Rules' herein refer to the Rules, unless otherwise specified.

⁴ Annex 1 to 'Prosecution submission of amended exhibit list with strictly confidential and *ex parte* Annex 1 and confidential Annex 2', KSC-BC-2020-06/F01376/A01, 16 March 2023, Strictly Confidential and *Ex Parte* ('Exhibit List').

⁵ Annex 1, 111160-111162.

⁶ 103373-103387 ('2021 Expert Report').

⁷ Amended Indictment, KSC-BC-2020-06/F00999/A01, 30 September 2022 ('Indictment'), para. [REDACTED], Schedule B, p. [REDACTED].

⁸ Annex 2, 111165-111169.

⁹ Annex 3, 110668-110674.

- d. an official note concerning an email exchange with W04875, providing additional information on his expert evidence in relation to the Updated DNA Report ('W04875 Clarification');¹⁰ and
- e. an official note of a 15 March 2023 meeting recording information relevant to the Updated DNA Report, the W04875 Supplement, and 2021 Expert Report ('15 March 2023 Meeting Note').¹¹

2. The SPO intends to tender the Requested Amendments and/or use them during the examination of W04875. This request – which, at this stage, solely concerns amendment of the Exhibit List and not admission¹² – is timely, limited in scope, and concerns relevant material, which is probative of the charges.¹³

II. SUBMISSIONS

4. In this complex multi-Accused case, involving a considerable amount of evidence, amendments to the Exhibit List should be treated with flexibility, provided that – as is the case here – there is adequate protection of the Accused's rights.¹⁴ Considering the stage of the proceedings, scope of the case, and the limited nature and scope of the Requested Amendments,¹⁵ there is minimal impact on Defence preparations. Therefore, the Requested Amendments strike an appropriate balance between the rights of the Accused and the duty of the SPO to present available evidence to prove its case.¹⁶

¹⁰ Annex 4, 111175-111175.

¹¹ Annex 5, 111337-111338.

¹² See Decision on Prosecution Request to Amend the Exhibit List and Related Matters, KSC-BC-2020-06/F01352, 8 March 2023 ('8 March 2023 Decision'), para.31 (an evaluation of proposed amendments to the Exhibit List does not call for an assessment of admissibility, but a *prima facie* evaluation only).

¹³ See 8 March 2023 Decision, KSC-BC-2020-06/F01352, paras 29, 31, 33; Decision on Thaçi's Appeal against "Decision on Specialist Prosecutor's Request to Amend its Exhibit List and to Authorise Related Protective Measures", KSC-BC-2020-06/IA019/F00006, 12 July 2022 ('Appeal Decision'), para.21.

¹⁴ See 8 March 2023 Decision, KSC-BC-2020-06/F01352, paras 29, 31; Appeal Decision, KSC-BC-2020-06/IA019/F00006, para.21.

¹⁵ Compare Conduct of Proceedings Order, KSC-BC-2020-06/F01226/A01, para.82 (where new material is of significant nature, an opposing Party may seek appropriate relief for preparations).

¹⁶ Appeal Decision, KSC-BC-2020-06/IA019/F00006, para.21.

A. THE REQUEST IS TIMELY

5. This request arises out of developments in the [REDACTED]¹⁷ [REDACTED].

6. In October 2022,¹⁸ in [REDACTED], the SPO was in contact with the expert¹⁹ who produced the original 2009 DNA Identification.²⁰ W04875 provided his expert opinion on, *inter alia*, the 2009 DNA Identification in his 2021 Expert Report.²¹ During contacts with the 2009 DNA Identification expert, the SPO learned that statistical methods were now available that were better than those used for the 2009 DNA Identification. On 20 January 2023, the SPO received a preliminary version of the Updated DNA Report, which re-calculated the likelihood of biological kinship using the 'new' methods. On 24 January 2023, the SPO discussed this version with W04875. Following these discussions, the SPO requested amendments²² and on 27 January 2023, the SPO received the Updated DNA Report.²³ On 15 February 2023, the SPO instructed W04875 to provide his expert opinion on a number of issues relating to the methodology and findings of the Updated DNA Report.²⁴ On 6 March 2023, the SPO received the W04875 Supplement²⁵ and W04875 Clarification.²⁶ The SPO thereafter obtained the information contained in the 15 March 2023 Meeting Note.²⁷

¹⁷ [REDACTED].

¹⁸ For relevant background pertaining to the Updated DNA Report and W04875 Supplement, *see* 110668-110674, pp.110668-110669.

¹⁹ The SPO does not intend to call this expert to testify in this case.

²⁰ SITF00012453-SITF00012464 ('2009 DNA Identification'), which is already on the Exhibit List. *See* Exhibit List, Item 6702. This expert is also the author of the Updated DNA Report. *See* Annex 5, 111337-111338, para.5.

²¹ 103373-103387, pp.103382-103383. The 2021 Expert Report also concerns other charged murder victims in this case.

²² The SPO requested for the report to be amended to include the 'prior probability' standard used in calculation of the new likelihood ratio and data on the DNA profiles used for the identification. *See* 110668-110674, p.110669, para.5.

²³ The Updated DNA Report is dated 27 January 2023 and was received by the SPO on the same day, *see* Annex 3, p.110670; Annex 2, p.111165.

²⁴ Annex 2, p.111165-111169.

²⁵ Annex 1, p.11162. *See also* Annex 4, para.1.

²⁶ Annex 4, 111175-111175 (the official note pertaining to this 6 March 2023 communication was registered on 9 March 2023).

²⁷ Annex 5, 111337-111338, para.1 (the official note pertaining to the relevant 15 March 2023 meeting was registered on 17 March 2023).

7. The Requested Amendments – which are interconnected and being sought promptly following receipt, processing, and assessment – are therefore timely.²⁸ This request (i) is being made before the trial commences and well in advance of W04875's testimony (who is not anticipated to be among the first 40 witnesses²⁹); and (ii) ensures that W04875's expert report is finalised and ready to be tendered in evidence.³⁰

B. GOOD CAUSE EXISTS FOR THE REQUESTED AMENDMENTS

8. The Requested Amendments are *prima facie* relevant and of sufficient importance to justify their addition to the Exhibit list.³¹

9. In the W04875 Supplement, the witness addresses the methodology used and findings presented in the Updated DNA Report, which is an updated version of the original 2009 DNA Identification on the remains of the Murder Victim. The Update DNA Report applies a different and more precise method for the calculation of the likelihood ratio of biological kinship.

10. W04875 provides his views in respect of applicable professional standards and on the statistical results presented in the Updated DNA Report.³² W04875 also addresses certain issues he had previously remarked on with regard to the 2009 DNA Identification,³³ and notes that the Updated DNA Report includes the 'prior probability' used in the calculations, and DNA profile information, which was not contained in the 2009 DNA Identification.³⁴ The W04875 Clarification, Instructions,³⁵

²⁸ Conduct of Proceedings Order, KSC-BC-2020-06/F01226/A01, para.82; 8 March 2023 Decision, KSC-BC-2020-06/F01352, para.30.

²⁹ See KSC-BC-2020-06/F01117/A01.

³⁰ Conduct of Proceedings Order, KSC-BC-2020-06/F01226/A01, para.122.

³¹ See 8 March 2023 Decision, KSC-BC-2020-06/F01352, para.31.

³² Annex 1, p.111162. W04875 also clarifies technical terms. See *e.g.* Annex 1, pp.111160-111161, where he explains the software used for the calculations and the meaning of the term 'Y-STR haplotype'.

³³ In his 2021 Expert Report, W04875 had stated that the 2009 DNA Identification did not provide the DNA profiles and prior probability used in the calculations, which prevented independent verification of the results. See 103373-103387, p.103383.

³⁴ Annex 1, p.111161.

³⁵ Conduct of Proceedings Order, KSC-BC-2020-06/F01226/A01, para.122 (ordering the Party calling an expert witness to file, with the expert report, a concise summary of the instructions provided to the expert). As the Instructions are already concise and limited in scope, the SPO proposes to add the Instructions in full.

and 15 March 2023 Meeting Note³⁶ are necessary to a full and proper assessment of the W04875 Supplement and Updated DNA Report.³⁷ The SPO intends to rely upon the Requested Amendments, including during the examination of W04875.

11. As W04875 is proposed to provide evidence as an expert witness in this case,³⁸ and the SPO intends to tender the Requested Amendments and/or use them with the witness in court, good cause exists for their addition, which will better enable the Parties, Victims' Counsel, and Panel to understand and assess the DNA evidence relating to the Murder Victim.

C. THERE IS LIMITED, IF ANY, PREJUDICE TO THE DEFENCE

12. The Requested Amendments provide the Accused sufficient notice and do not unduly prejudice the Defence's ability to prepare for trial.³⁹

13. As noted above, W04875 is not among the first 40 witnesses to testify.⁴⁰ This request is filed well in advance of his testimony and before the start of trial. Further, the proposed documents relate to a known aspect of the SPO's case, including an expert witness on the Witness List,⁴¹ exhibits already on the Exhibit List, and a known detention site and Murder Victim.⁴²

14. The relevant part of the 2021 Expert Report was re-disclosed to the Defence in unredacted form on 30 January 2023, when the Defence also received the 2009 DNA

³⁶ See Annex 5, para.7 (stating that, at the time of the original 2009 DNA Identification, a less sophisticated system was used to calculate the likelihood ratio of kinship). See also Annex 5, paras 8-9 (indicating that, with the new method used for the calculations contained in the Updated DNA Report, the 'haplotype' analysis was performed, which allowed the conclusion that 'the Y chromosome found in the bone sample [of the victim] corresponds to the Y chromosome from the father's sample').

³⁷ In addition to the Updated DNA Report itself, the document at Annex 4 also includes an SPO Official Note summarising the relevant background and contacts with, *inter alia*, W04875. This Official Note is submitted for the sake of completeness.

³⁸ Witness List, KSC-BC-2020-06/F01078/A03, p.566.

³⁹ See 8 March 2023 Decision, KSC-BC-2020-06/F01352, para.31.

⁴⁰ See KSC-BC-2020-06/F01117/A01. See also 8 March 2023 Decision, KSC-BC-2020-06/F01352, para.33 (where the Trial Panel considered this factor in relation to the impact of requested amendments on the Accused's preparation for trial).

⁴¹ Annex 4 to 'Prosecution submission of amended witness and exhibit lists', KSC-BC-2020-06/F01078/A03, 2 November 2022, Strictly Confidential and *Ex Parte* ('Witness List').

⁴² See, *similarly*, Appeal Decision, KSC-BC-2020-06/IA019/F00006, paras 21-22.

Identification.⁴³ The Defence will have sufficient time to review the Requested Amendments (which in total amount to 18 pages) and prepare, including before W04875 testifies.⁴⁴ Accordingly, the Requested Amendments will have minimal, if any, impact on the Defence's ability to prepare for trial and W04875's examination.

III. CLASSIFICATION

15. This filing and its annexes are confidential in accordance with Rule 82(4) and to give effect to existing protective measures. A public redacted version will be filed.

IV. RELIEF REQUESTED

16. For the foregoing reasons, the SPO requests authorisation to add the Requested Amendments to the Exhibit List.

Word Count: 1947



Alex Whiting

Acting Specialist Prosecutor

Wednesday, 12 April 2023

At The Hague, the Netherlands.

⁴³ Disclosure 657. Such information was previously redacted/withheld with the Pre-Trial Judge's authorisation to give effect to existing protective measures. *See* Twelfth Decision on Specialist Prosecutor's Request for Protective Measures, KSC-BC-2020-06/F00571, 17 November 2021, Strictly Confidential and *Ex Parte*, paras 23-28, 55(d).

⁴⁴ The Trial Panel has considered the limited volume of items in favour of authorising their addition to the Exhibit List. *See* 8 March 2023 Decision, KSC-BC-2020-06/F01352, para.33.