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Superior Court of Justice

BETWEEN:

HER MAJESTY THE QUEEN

- and -

NICOLE YVONNE KISH

Accused

TRIAL PROCEEDINGS

PRE-TRIAL MOTION FOR RE-ELECTION

MONDAY, JANUARY 17, 2011

SUPERIOR COURT OF JUSTICE

B E T W E E N:

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HER MAJESTY THE QUEEN

- and -

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NICOLE YVONNE KISH

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--- Before THE HONOURABLE MR. JUSTICE NORDHEIMER, with a jury, at the Metropolitan Toronto Court House; commencing on **Monday, January 17, 2011.**

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MOTION FOR RE-ELECTION

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A P P E A R A N C E S:

W. THOMPSON, Esq. & E. MIDDELKAMP, Ms.	for the Crown
J. SCARFE, Esq. & V. SIMPSON, Ms.	for the Accused

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MONDAY, JANUARY 17, 2011

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R v KISH

THE COURT: Mr. Thompson.

MR. THOMPSON: Yes.

10 THE COURT: I have inherited another matter that needs to be spoken to very briefly before we deal with the Kish matter, so as soon as everyone can be brought up on the Project Kryptic, we will deal with that, and be ready to go.

15 MR. THOMPSON: All right, Your Honour. With respect to Kish, I did try to make an effort to contact you this morning. What is being requested, Your Honour, is that we can speak to you in chambers very briefly.

20 THE COURT: All right. Do you want to do that while we bring up the other people?

MR. THOMPSON: We could. It may take upwards maybe of about a half an hour, but --

25 THE COURT: Oh.

MR. THOMPSON: I am just --

THE COURT: Let me get rid of --

MR. THOMPSON: Fair enough. Thank you for your indulgence.

30 THE COURT: -- necessarily put it that way, but get rid of these other people, and we'll deal with it.

MR. SCARFE: Thank you, Your Honour.

THE COURT: Counsel on the Kish matter in chambers.

--- COURT RECESSED AT 10:16 a.m.

--- UPON RESUMING AT 10:40 a.m.

MS. MIDDELKAMP: Good Morning, Your Honour, Ms. Middelkamp, initial E. I believe co-counsel have stepped outside to see --

THE COURT: All Right. We will wait a moment.

MS. MIDDELKAMP: If I can just step out, I will ask them to come back in.

Your Honour, I can advise you as well Mr. Scarfe has gone to have Ms. Kish brought into the courtroom as well.

THE COURT: Yes.

MR. SCARFE: Good morning, Your Honour. For the record my name is John Scarfe, with me is Vanora Simpson. As we discussed in chambers, I think everybody is agreeing, Ms. Kish, who is present in court, be allowed to sit with us

at counsel table, so I've asked her to do so.

THE COURT: That's fine.

MR. SCARFE: Behind her is my articling student, Ms. Santerre, S-A-N-T-E-R-R-E, and today is obviously the first day of the Kish matter.

A publication ban was made at the preliminary hearing and it would be my request, and I don't think it's opposed, that the publication ban continue at least until we've completed arguing the pre-trial application.

THE COURT: I think that's automatic under the provisions of the *Criminal Code*, but in any event, it's clear that the pre-trial matters are not to be published until at least we get the selection of the jury.

MR. SCARFE: Uhmm, just before Christmas in cooperation with my friends, the Crown's office, we tried to set up, subject to change, a basic outline of witnesses on the trial proper, and so I provided my friend essentially with two lists. The first was, I am assuming these people are being called by the Crown, and if so, could you please make these other people, the second list available in the event that the defence seeks to call them, rather than us having to commence relationship with these people that subpoenaed them ourselves. So, it's my understanding that Detective Sergeant Giroux, present in court, worked very hard over the last few weeks and has managed to locate almost

everybody, and so, what I think would be the next appropriate step, subject to my friends, would be to sort of do a roll call, as we discussed in chambers, and see who is here, and what kind of issues there are about having them come back when it comes their time. So --

THE COURT: All right.

MR. SCARFE: -- subject to Your Honour.

MR. THOMPSON: Your Honour, just so it's clear. The Officer Giroux, what he did, he contacted a number of witness of the list that were composable by the Crown and, indeed, the defence. On the list, the officer, knowing that we weren't going to start on the 17th, although the subpoena says 17th, he sent a letter as well indicating to the witnesses that they would be called on certain dates. Both defence and the Crown are content with that, and we don't see there are going to be any difficulty with that. However there are some witnesses here today that were, for defence, and my friend wants them bound over, so I would ask that these particular witnesses be bound over, as opposed to doing a roll call, have them come forward and have them bound over.

THE COURT: Anyone who has been subpoenaed as a witness in this case, please step forward.

MR. THOMPSON: And just so it's clear, Your Honour, I know we discussed this in chambers, but both my

5 friend and I, subsequent to this, we are content that the officer contact them as to when they are to come down. The officer is prepared to take that on, and I think it will work out better is, and my friend concurs with that as well.

THE COURT: Gentlemen, as you know, you have

10 been subpoenaed as possible witnesses in this case, a trial is going to take a number of weeks and it's not yet clear when and if you will be necessary as witnesses. There are two ways we can address this issue. One is that I can require you to come back day by day by day until you are

15 needed. The other alternative is if you give me your undertaking to appear when you are so advised by Detective Sergeant Giroux or anyone delegated by him for that purpose, then you can leave and go off and attend to your normal lives

20 and simply return on the date that you are so advised by the Detective. Any of you not prepared to give me that undertaking in terms of your appearance at the Detective's advice or are we all in agreement to do it that way?

25 UNIDENTIFIED PERSON: Yes.

THE COURT: All right. So, if you will provide a telephone number, a contact information, Detective Sergeant Giroux, he will call you in advance of when you need to attend, and then you don't need to come back to court

30 until he so advises you. All right?

MR. THOMPSON: Perhaps they could just

identify themselves on the record.

THE COURT: Sir, your name.

MR. CSICS: My name is Terrel Csics.

THE COURT: And you, sir?

MR. HITCHCOCK: Jasper Hitchcock.

MR. AMERO: Harold Amero.

MR. PATSIOPOULOS: William Patsiopoulos.

THE COURT: All right. I assume they are all known to the Detective, in any event. Is -- all right. So if you go to the Detective now, and make sure he has your contact information, then you will be free to go and until you are advised to return. Thank you.

MR. THOMPSON: Thank you, Your Honour.

MR. SCARFE: For the record, for the individuals showed up, there were more people on the list. My friend could just clarify whether I should be concerned or --

THE COURT: It's possible that some people have been delayed in attending, perhaps counsel can coordinate that with the Detective Sergeant, and if there are other people to be addressed, we can do it when we reconvene this afternoon.

MR. SCARFE: Thank you, sir.

THE COURT: You had some material you were going to give me, Mr. Scarfe.

Submissions
(Thompson)

MR. SCARFE: Oh, thank you. And I apologize, I gave it to my friends earlier this morning. This is a supplemental material, ah, which has been prepared in response to my friend's response, and, ah, in the interests of the environment and other things, all of the material referred to in the supplementary argument, statement of facts are contained on two CD's which are paper clipped within there and I am certainly happy to provide paper copies to everybody, if required. I assumed it appropriate.

THE COURT: That's fine. Is there anything else that you need to address before we start formally at 2:15?

MR. SCARFE: Nothing.

MR. THOMPSON: Uhmm, nothing, Your Honour. I would indicate that in terms of the lost evidence, I know my friend has gone to some efforts to get a video of the location where the two cameras are juxtaposed. However, we do have one in which there is measurements done, the officer's gone down there. And I'm not -- we have a sort of a script, let me just have the court's indulgence, I hate to be rude.

Sorry, Your Honour, I apologize. I just, I just didn't want that necessarily to be something that we are opposing that in terms of my friends efforts of making a video and the transcript with it, but if it's not filed with

the materials, that's fine. Thank you. Sorry.

THE COURT: All right then, 2:15.

--- COURT RECESSED AT 10:53 a.m.

--- UPON RESUMING AT 2:16 p.m.

MR. THOMPSON: Good afternoon, Your Honour. Deal with the Kish matter, please.

THE COURT: Good afternoon.

MR. SCARFE: Good afternoon, Your Honour. If I might, I'd like to begin submissions and sort of a review of the facts on the first motion we discussed earlier, which is the application for a re-election.

THE COURT: If you could begin by having Ms. Kish arraigned?

MR. SCARFE: Sure.

THE COURT: Mr. Registrar.

THE REGISTRAR OF THE COURT: Thank you, Your Honour.

Nicole Kish, you stand charged that you, on or about the 9th day of August in the year 2007 at the City of Toronto, in the

Toronto region, did kill Ross Hammond, and did thereby commit second degree murder, contrary to s.231(7) of the *Criminal Code*.

Nicole Kish, upon the reading of this indictment, how do you plead, guilty or not guilty.

THE ACCUSED: Not guilty, sir.

THE REGISTRAR OF THE COURT: Please be seated.

THE COURT: Mr. Scarfe.

MR. SCARFE: I hope I am not forgetting any other housekeeping matters. I found two additional articles to supplement my materials, and perhaps I'll hand them up now, because I'll simply forget.

MR. THOMPSON: I am in receipt of these just now, Your Honour. I have them.

MR. SCARFE: I am going to assume you are well familiar with my materials, unless you tell me otherwise, Your Honour.

THE COURT: I am.

MR. SCARFE: And so I guess what I'll do is I'll start with a basic summary of the facts as they apply to this case.

The facts as to what happened on Queen Street that night are set out in sufficient detail in my

application, and I am sure Your Honour has some recollection of the original hearing of the bail variation that came to you later on.

What's important with respect to this application is that at the outset of the preliminary inquiry, there was a discussion about whether the, procedurally the election is read to the accused, even though the judge would have automatically entered an election of judge and jury. But, in any event, Ms. Kish has been making it clear from the beginning of the preliminary inquiry that this is her desire, she wishes to have a trial with a judge sitting alone, and thereby, thereby waiving her constitutional right to a jury trial. And the reason I open with that is that there are a number of cases where this relief has been denied simply on the basis of judge shopping. And it's important that it be clear on the record that there was no judge shopping in this case. The intention was made at the beginning of the preliminary hearing, and I think my friends and I can agree that when I made the request that's in the materials to the Deputy Attorney General's office, to Mr. Thompson, that we had not been assigned a trial judge at that point, and, in fact, the first day we became aware that Your Honour would be the trial judge was the day you had the trial coordinator call both counsel and indicate that you had been the judge on the bail hearing, does anybody have any objection. That was

the first news for us.

So that very first issue that has to be put out of the way, was there judge shopping, and the answer is no, there was no judge shopping.

The request, the next step is that on October of 2010 we made the formal request, which I understand is the current protocol in these situations, to the Attorney General's office. We set out three concerns. One of which has sort of been nullified. And I'll just deal with that very quickly. There is a witness named Faith Watts, she was one of the original four accused in the aggravated assault case. She is transient, to some extent, and we've had periods of time where we have been touch with her, and periods when we haven't. Out of an abundance of caution, at the end of the preliminary hearing, and with a great deal of patience and understanding from Justice Horkins, College Park, we were able to arrange a video link testimony using the Regus Business Centre, which has like a thousand offices around the room, and so court was essentially convened down at 20 Dundas, and the Eaton Centre office tower there, and Ms. Faith Watts arrived in San Francisco to another Regus Business Centre, and she was able to give some testimony that, that will become the subject of much debate in this case. But in a sense, put the knife in her own hands. And as a result of that testimony, we continued in our efforts to

make sure we could produce her for trial. My esteemed friend here, Mr. Thompson, considered carefully his position with respect to that, and the effect it would have on the trial. And in anticipation of having problems getting Ms. Watts either here live or on the video, all but consented to the last resort the 715 application that would have eventually ensued if she had disappeared into the street again. And as a result, that third concern that was expressed with respect to, or to the Attorney General was, ah, nullified.

So that leaves us with the two major concerns as expressed in that request, which was the negative pre-trial publicity and and the particularities of eyewitness identification. And those two combined, as we did our best to set out in the letter in your materials, are the real remaining reasons, and but, as is often the case here, the Attorney General responded with declining the request for consent to re-election pursuant to Section 473 of the -- and provided a number of reasons. And I have summarized those in my application at paragraph 13, and bear a momentary piece of attention:

> Re-elections in homicide cases are to be the exception to the rule. *R v. Khan*.

We accept that.

> Historically homicides have always been tried by a judge and jury.

Submissions on motion to re-elect
(Scarfe)

Well, we accept that, too. Part of the reason, I suppose, is because the Crown often doesn't give their consent. So it's a bit of a circular on that. Then we get into:

> Issues related to pre-trial publicity can be addressed by an adequate challenge for cause. Eyewitness's identification evidence can be the subject of any necessary instructions and Toronto juries are well able to handle this type of case without impartiality.

And if I had to paraphrase each of those three things, I would do it as don't worry, it'll be okay, and, in essence, that's kind of boilerplate. I think that we've failed to see here is a real consideration about pre-trial publicity in this case, and in this day and age, and the real consideration about the particular eyewitness identification in this case. And as a result, the application goes on to allege that the answer lacks consideration, it's a boilerplate answer, and the Ministry of Attorney General, in their response, has failed to provide anything really case specific. And as such, it's my submission to you that this is just an another example of, we always say no. It doesn't matter if it's an eyewitness case, doesn't matter about the publicity, juries are well able to handle it. And that may be great for the Crown, but clearly, they have a defendant

coming before the court here with very different views, and her right to a jury trial, uhmm, the benefit sort of set out in that discussion in the caselaw isn't really a benefit unless you can waive it. Otherwise, you are, as the case is put, imprisoned in your rights. Under the guise of constitution.

Now I'll deal briefly before I go into the various categories, we requested some statistics as to how often the Crown consents, how often they have been asked and how often they consent. We got some numbers back, there aren't that many cases, it spanned 2008, 2009, 2010. I wrote to my friend I said, kind of speculative about these numbers based on what I've learned elsewhere. My friend's declining to explain further. So, the statistics really aren't before you. And I indicated in chambers today, I am declining to my opportunity to subpoena the Attorney General himself and deal with the three days of lawyers who quashed the subpoena. My friend understands the application. The request for statistics if he wants to provide evidence, that's his right. As far as we know, we don't know how often they consent and how often they are asked. You know, my friends provided me with some very basic numbers, but they cry out for further information. So I am just going to leave it at that.

Departing from my materials, I am going to say to Your Honour that there are three distinguishing

Submissions on motion to re-elect
(Scarfe)

factors in this case that have not really arisen in the prior jurisprudence that's before you, of which Your Honour has written yours in *J.S-R*. The first is sort of a, the world's change and the essence of it is that the permanence of the internet, we all know that media reports on things, and I will take an aspect of my friend's application as well, there really hasn't been a lot of media since 2007, 2008, and in the 65 odd pages of media articles that appear in your materials. I would simply have to agree. Last article that I see is a year after Mr. Hammond's death, and it's sort of an in depth interview with the wife of the deceased, and that sort of appears to be the last time it is discussed until between the middle of Christmas and New Years, and Mr. Pazzano of The Sun wrote about upcoming trials in 2011 and included a photograph of my client. I just passed up the internet version of that.

A lot of these cases have been decided on the basis that well, there hasn't been that much publicity for a while, and therefore, I guess intense prejudice in the minds of prospective jurors is probably faded. But that's all different in the age of instant access to the internet. We all know now a lot of people carry smart phones, ipads, laptops, whether they bring them to court or not, the temptation is to satisfy ones curiosity, finding out everything they can about the case. And this goes back to

first book in the Bible. You have got Adam and Eve, you guys can hang out here and do anything you want, it's paradise, just don't eat the apple from that tree. And, of course, human nature, as we learned over and over again throughout thousands of years, is that curiosity tends to trump good sound instructions. And it's my submission that notwithstanding extensive instructions that Your Honour might give to a jury that someone in that group of 12 is going to violate those instructions, they are going to go home, they are going to research about it, they are going to come back, and they are going to tell their fellow jurors on a break what they learned. And I can't prove that to you, but it's pretty basic human nature, and to support that is the article I have just handed up to you, which was an article by Justice Sweeney of the Maryland District Court, commenting his own experience with respect to a case involving the Baltimore mayor, citing from other cases and proposing a pretty elaborate set of instructions to jurors to try and counter balance this availability of information. The article sort of goes both ways and raises a real question about whether juror misconduct is really a big issue in these case, and the extent to which it can be curbed, and it sort of dovetails a little bit with the section in McGregor, which Your Honour considered and cited in J.S-R., talks about telephone survey, but also Dr. Nidmar, in the evidence he gave. And I included

5 *R v. Koh* just for the -- K-O-H, Madam Repoter -- just for the principles of the fact that you can take judicial notice, prior findings of credibility is the most common case is *Parks*, big survey about racism in Toronto, and judges don't require every defendant to come forward and do their own, the
10 new survey. So to speak. And I know Your Honour had some issues with lack of a telephone survey in J.S-R., and I have attempted to deal with that, in my materials. Reviewing the telephone survey that was before Madam Justice Charron in McGregor, led me to believe that there were some pretty
15 general questions, it all had to do, McGregor was the case where a lady in Ottawa was named Patricia Allen was killed in 1991 by a crossbow, and it brought out public debate about how easy it is to get your hand on a crossbow, and public
20 debate in the wakes of the Lépine shooting in Montreal, what's the justice system doing to protect women from violence.

We have a similar situation here where you
25 have got the presses basically dub this the pan handler murder, and subsequent to Ms. Kish being arrested and released, there was a lot of debate in the media with respect to what do we do about pan handlers, nobody likes being asked for money on the streets. Some warnings about don't, you can
30 call the police, the *Safe Streets Act* means the police will come and enforce by law, et cetera, et cetera, et cetera.

Submissions on motion to re-elect
(Scarfe)

5 And so, in a sense, we are similar to McGregor in that we've, a case that just by the virtue of the facts has ignited a bit of a public debate about sort of a separate issue from the merits of whether Ms. Kish is guilty or not, it's more to do with nobody likes a pan handler, nobody likes to be harassed 10 by a pan handler, specially if it's an aggressive pan handler, and we have some concerns about a jury in that situation.

What we've tried to do is include a number of articles and internet postings which set out certainly the 15 media, as it was, back in August, September, October 2007, but also the recent trend towards blogging and feeds. And the kind of things where people are now participating in the media from their computers at home. Where an article is 20 published in the media, and at the bottom, whether it be the Toronto Star, or whatever, that invites, there is a place to put comments. And then if you go back and find that article a month later, there is often 20 or 50 or a hundred comments 25 from people that then form part of what is permanently on the internet. And so while all this stuff is pretty old, it's all still there, and Your Honour cannot make an order to the entire worldwide web to take it all down. So, what's gonna 30 happen, in my submission, and my research indicates this is the first sort of case that's been raised here, but what's different about this case is that although the media is old,

we now are in a day and age in early 2011 where, old or not, it's still there. So, if we bring in 300 prospective jurors and just ask them what it is they remember about this case, you know, at first most of them will likely say, I don't remember this case. And if you asked a few prodding questions, you know, the one about the pan handler on Queen Street, eventually they are going to go oh, yeah I remember, that was about three years ago. But it's once you have weeded through those 300 people and you have 12 people sitting in the box, for two or three months that go home every night, that come back and forth working their smart phones, Facebook and texting with their friends, reading newspapers, and that kind of thing on line, and but most important, conducting searches, Google and other search engines, and that's why my clerk did a fairly comprehensive internet search back in December of past year 2010 in an effort to try and find out if the juror decides to violate the instructions and go looking, what are they going to find. And according to him, indicated in the materials, and I was remiss not getting an affidavit from him, but, get it if the record needs, somewhere in the area of 9,000 hits when you put in the deceased's name, combined with the word, murder. And we've given you a little bit of a printout where you can see what are the first 5, 10, 15 articles that come up in those hits. And I'll get to the content as part of my second

distinction. But in essence, and as it's put in both of those articles, put up, *Juror Misconduct in the 20th Century,* and one I just handed from you Justice Sweeney in Maryland, is the gone are the days where a juror who decides he is not going to follow the instructions and do his own research, has to go to the trouble of going to the reference library, sitting down in the newspaper section, going through the micro fiches and looking at all the articles, that's a fair bit of effort involved in that. Or if he wanted to see the scene right, he'd actually have to go there. Whereas in this day and age, and it's what makes this application different in one respect, is that you don't have to go to the library any more. In fact, if you sneak your laptop into the jury room with your little Rogers stick, or even just use your iphone during deliberations with the jurors, all right, you can, a question comes up, it's just too easy to go looking for the information. And where we go looking for the information is not filtered by this court as to what's appropriate for a jury to hear and what's not, it's what reporters decided to write on a particular day, followed by what readers decided to write in response, including if you sift through the materials like, I know that girl, and she shouldn't have done what she did. She is obviously very sick, to other people being a lot more, or maybe don't know her, but, bringing out facts or alleging things that don't

actually form part of the evidence.

So, it's this permanence of the internet is the first distinction that I wanted to argue before Your Honour in respect to this application.

The second distinction, and it falls within the first, is that in none of the cases before the court that I have read has there been this issue of jurors having access to clearly prejudicial and clearly inadmissible evidence. You will recall from the bail variation and from the materials, and if you start in that long stack of materials at page 54, you will find eight separate articles, which talk about the fact that Ms. Kish, after being released by, on bail, second degree murder charges, was subsequently re-arrested and charged with an aggravated assault that was alleged to have taken place two to three months before the death of Mr. Hammond, and what brings us before the court. And the allegations related to an older lady who we eventually figured out had some mental health issues, and that kind of thing, and, ah, these allegations were that the older lady was walking in the area of Queen and Spadina, she bent down to pet a dog that was with some quote "homeless kids", and that one of these homeless females got angry about that and essentially beat her up. On Queen Street. Uhmm, and it was only after being released on bail, and they sort of dug up this four or five-month old cold case and showed a

photo line-up to Ms. Gardiner, the older lady who had been beat up. So five months after, four, five months after she is seeing a photo line-up, and this is right after Ms. Kish has been in the news, sort of the face on the poster child for squeegee kids who get bail. And so, there is about an eight or nine-minute, thank God they videoed it, but there is an eight or nine-minute photo line-up procedure that was conducted in a police station with Ms. Gardiner and some of the officers, and didn't follow procedure, and they got it down to two photos in front of her, and sort of saying, well, I don't know, I am leaning towards number 8, which prompted a scathing judgment at the bail hearing from Justice Vaillancourt, about quality of the photo line-ups, why these charges were ever laid in the first place, et cetera, et cetera. But, nonetheless, if you start at page 54, it's the essence of the article is she's done it again. Now she's out on bail again. And nothing positive about, you know, there being some doubts as to the Crown allegation. Months later, day two of the preliminary hearing on those charges, the Crown stood up and did the right thing and stayed the charges. Unfortunately, we can't find any sort of corrective media that went on and wrote an article about what a travesty of justice it had been and she was innocent from the beginning.

So my second distinction in this case is if

those jurors, even one of them, decides to violate Your Honour's instructions, and go home and finds any one of these eight or nine articles, it's going to be very tempting for that jury to come back in and say, do you guys know what this girl, she beat up an old lady three months before this. And that's going to stay, and I can't think of anything more prejudicial, uhmm, to Ms. Kish's fair trial rights, than having evidence that pretty sure my friends wouldn't try to lead, and Your Honour would certainly exclude, keep away from the jury, but it's all out there. And none of the jurisprudence that Crowns provided or that I have been able to provide you, has that really been a sticking point from any of the cases. Certainly there have been high profile cases that have proceeded before juries or also high profile cases where the judge has interfered and said no no no, we're doing this judge alone as per *McGregor*, and as per *G.C.* which I understand, as a decision of Justice Molloy, which is under appeal, and I don't believe that's back yet, so, no instruction from the Court of Appeal. But now we have two issues that aren't raised in any of that jurisprudence; the permanence of the internet, and in this particular case the presence of easily accessible and clearly prejudicial evidence out there. And just to underscore the point, it's important to remember that if Your Honour instructs jurors not to do their own research and then these 12 people sort of

form a bond because they are sitting around a lot together, and they are spending day after day after day together, and lunch together and stuff, if one of those jurors goes, finds out or come back and tells everybody about it, it's unlikely, certainly it's quite possible that nobody's going to rat everybody else out and come and tell the Court Constable to come and tell you that there has been juror misconduct, and that prejudicial evidence has been discussed when we were waiting for court one morning. And so, I think it's an important distinction in this case, and one that on the basic weighing of the facts could be a legitimate reason for Your Honour to order a judge alone trial in this case, without trying to overrule anybody's prior jurisprudence, anything like that.

The factum goes on to discuss eyewitness identification, and there have been some cases in the jurisprudence where eyewitness identification has been the major issue and courts have had to consider, in light of that, whether or not to override the Crown's discretion and order that the trial proceed judge alone. That's all fine. Certainly, there is frailties, but in this particular case, there are basically three witnesses that are worthy of some note. Of the Crown's perhaps one of their two star witnesses is a paramedic named Jonathan Paget, P-A-G-E-T. I won't insult Madam Reporter by spelling Jonathan, unless she needs

me to. And as you'll hear when this trial proceeds, he is sitting on the streetcar with his friend, ex-girlfriend Molly Stopford, and that his attention is drawn to the side window of the streetcar where he begins to see certain events take place. And he, it's all laid out in the materials that he eventually comes to the conclusion that although he can't, that the girl who runs into the fight with the knife is the same girl who is seen later on the other side of the street, screaming and complaining that she's been stabbed. So we have tried to probe at the preliminary hearing why is it that, you know, that this girl, knife girl, and cut girl, are the same girl. Was it the hair? Was it the eyes? And went through the whole thing. And any clothing, just was unable to point to any particular identifying characteristic. Then when I suggested to him, you know, maybe you are kind of assuming that because you sort of always hear that a person runs into a knife or the fight, they come out with an injury, and he said yeah, you always hear that. So doesn't the logic kind of work in reverse, you see a girl complaining, just seen a girl with a knife, and now you see a girl complaining of the injury, isn't it possible that your mind is sort of playing, no, I just know. And so we have one of those classic cases, remember we read in ID cases and all the studies about the identification witness who can't substantiate why he knows, he's sure. It's dangerous evidence, he is a paramedic,

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although you think, not law enforcement, but at the end of being in stressful situations often has to prepare a report, so one might accord more reliability to this, but as Justice Horkins said in his decision, you know, this line of cases where all the witness says is that's the man, and can't say why, and clearly, those are some of the most dangerous eyewitness identification type witnesses, because they seem so morally sure that that's the person. But we know from studies that these people can be mistaken. Two hundred plus wrongful convictions overturned because of this and that. And so, it's my submission that when you are faced with that kind of a danger, the wrongful conviction based on somebody who is sure of, but can't say why, that you can try to deal with that instruction in instructions and that's fine, that's often the way it's dealt with, but there would be a benefit to evaluating that kind of evidence through the lens of judicial experience. Because it's pretty obvious the trial judges tend to have, specially experienced trial judges, have a better understanding of the frailties of identification evidence and more tools for assessing. Now that's the first witness.

The second witness is a, well the second two witnesses are witnesses that were called at the preliminary inquiry, but who just before they were called, either in the days leading up to it, or the very morning that they came to

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court, and prior to giving their recollection, were shown a videotape, and which would, will become known as the City TV video. And as Your Honour well knows, there are City TV Nissan Pathfinders driving all over the city at all hours of the night, and some of these guys have police scanners there, and they tend, they often show up before the ambulance does. And in this case, a gentleman named Bert Dandy, who is a long time employee of City TV, ah, just happened to be in the neighbourhood when stuff came over the scanner, and said there is a fight on Queen Street, and he managed to get there before the ambulance, get out of his truck, get on scene, start filming. And you will recall that Mr. Hammond, after he was stabbed, was able to grab a cab and go about 150 feet, 200 feet down the street, so now two locations. And essentially what the video shows Mr. Hammond lying on the ground, suffering from his wounds, being tended to by civilians and police officers, and eventually an ambulance pulls up, and then about a minute later, the four pan handlers come walking down the street, my client having been stabbed through the arm, making a lot of noise, not understanding that the ambulance isn't there for her, and, ah, there is a whole portion of the video that shows these four suspects, sort to speak, near the back of the ambulance, talking to the police, screaming for help, that kind of thing, and wearing obviously the same clothes they had been

wearing two minutes earlier or five minutes earlier when the fight went down, up the street. Now, George Dranichak, who was the best friend of the deceased, and Yanee Newman (phon), who was an individual who had just gotten on the streetcar at that point in time, both testified at the preliminary hearing. When they were originally interviewed, they were shown photo line- ups, and my friend will correct me if I'm wrong, but neither of them were able to pick anybody out of a photo line-up. But then just before the preliminary hearing, they are both shown the City TV video, which obviously depicts the people that they may have seen that night and as, so I spent a lot of time trying to sift through the recollection you had before you watched the City TV video, and now, they both said things like, you know, Mr. Dranichak said yeah, it really helped to clear up some questions for me. Now I'm sure that this girl was this, and this girl was that. Whereas Mr. Newman went even further and tried to sort out the different periods of recollection, and say can you tell me what you remember before you saw the City TV video, and he frankly indicated, and it's reproduced in the application, I can't. I'm totally, having watched the City TV video I am not able to go back in my mind before that and tell you what I do recall and don't recall and that kind of thing.

So those two witness, I put them in a group,

but they, but what Your Honour is going to have to do if we have a jury is not only are you going to have to instruct them on the frailties of identification evidence, and all that stuff, and Justice Watts's manual of criminal evidence under eyewitness identification, about big mistakes being made in the past, and honest people being wrong, now you have got to instruct them on tainted identification. So you have two witnesses, who say X and Y, and they saw this and that, who clearly concede that their recollection before being shown a piece of evidence like that is different from their recollection after they have seen it, and obviously a lengthy cross-examination on that, you have got to somehow convey to this jury, after laying out the basics for how you assess eyewitness identification, now, you have got to convey to them, there is this other wrinkle, two of these witnesses say that or appear to have been tainted by the action of the Crown and the police in preparing these people to testify at the preliminary hearing. Everybody knew it was an ID case, I don't mean to cast dispersions or be leading, but the long and the short of it is it was inappropriate, and as soon as I found out it was being done, I put a big speech on the record at the preliminary inquiry, and I think they stopped doing at that point. But, showing the video before the person comes into court. Clearly, if the Crown has a good reason to show the video, you have the person come into court, give their

testimony and their recollection, and show it later or something. But you don't get, you don't mess around with the quality of the ID by either shoring it up or confusing it with a video, much like the one here. And in a sense, that is also a product of this new day and age, 20 years ago you didn't have these guys showing up before the police and the ambulance, filming everything, and that becoming such an important part of the evidentiary record. In the case. So clearly, the jury is going to have to see the video as part of this, but you start showing it to witnesses, you further complicate the task of assessing the quality and credibility of a person's identification.

So in a sense, and I can take you through the cases but I'm sure you know them better than I, and I have already done that to some extent. The essence of my application, in addition to what you have before you in writing is that the world's changed. The permanence of availability of the internet has led to a series of mistrials, ah, juror misconduct hearings and that kind of thing, and these are articles that are just coming out in the last year or two, that go, and there is plenty more of them on the internet, and it's sparked a huge debate whether in a high profile murder case you can still get an impartial jury after all that's been heard by them. Or even afterwards. And it kind of echoes what Dr. Nidmar said in McGregor back

in 1992, and that's down at the bottom of page 3 or couple of paragraphs, and it's side barred, but Dr. Nidmar, who was a Professor of Social Science, and law, Duke University in South Carolina, there is in my case book.

MR. THOMPSON: No, I know. Which tab.

MR. SCARFE: Tab C.

MR. THOMPSON: Thanks. Thank you.

MR. SCARFE: Page 3. He was called by the defence as part of this application to have a judge alone, and he talked, he is, most of his work was done in the U.S. where they have a much more extensive process of screening jurors, but about six lines down, he says:

> There are certain particular difficulties in cases of massive pre-trial publicity where emotions run high and where there is a perception of an apparent societal consensus as to the desired result.

And I don't know how to put it better than that. When I look at this case. You're back to the pan handling thing. Everybody, nobody likes a pan handler, nobody likes to be harassed or bothered by pan handlers as they walk down the street. When you hear about an aggressive pan handler, we all look at the situation is where we've been made uncomfortable by pan handlers, and it's formed part of our subconscious, and we are more likely to take sides against

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the pan handler than specially if it's an allegation that arises out of pan handling. And that's where we'll get the apparent societal consensus as to the desired results. Then it goes on to talk about how it's more difficult in Canada because you can't really do an in depth probe into each juror and get, you know, we tend to ask one maybe two, three questions at the most. It goes on to make the comment:

> Further in such cases the group decision process often serves to polarize the jurors initial beliefs and opinions.

So in a sense, you get this almost lynch mob mentality, where one of the jurors really hates pan handlers, talks about his or her experience over and over and over again on the breaks and at lunch, and by the end of it, everybody hates pan handlers. So, I rely very heavily on the McGregor case, as they did in J.S-R. I have no telephone, sir, as they did not have in J.S-R. But, again, the focus is not so much, we had, we heard a bunch of stuff in 2007, and they must remember it, focuses this argument is yes, there was a whole bunch of stuff published, it's never been taken down, and these 12 people are just going to be too tempted to go and find out more. Because there is going to be lots of material out there. As they are sifting through it, I don't think, the third or fourth article where they find out about her being charged with aggravated assault for beating up some

other old lady. And I can't undo that kind of damage. Probably won't even find out about it. So ...

THE COURT: I take it it's still your intention to challenge for cause on the basis of publicity if it is a jury trial.

MR. SCARFE: If this is a jury trial, then yes. I haven't really drafted my application, I guess, part of it would be based on the reasons that Your Honour would give, if you dismiss this application, but clearly, there are some issues that warrant a challenge for cause beyond the colour of someone's skin. Given the pre-trial publicity, the negative publicity. So just briefly, my book of authorities basically is principled, if the first tab is *Khan*, which is, ah, what was cited in the response from the Attorney General, and, ah, is indicated at the beginning of part three, we take no issue with that. We agree with everything that's said in *Khan*, uhmm, but remind the court that not every case demands a jury trial, it's just not to be interfered with lightly. And to also indicate that the comment there that kind of no longer applies, yeah, paragraph 15, Tab A:

> As Henderson provides a full answer to this ground of appeal, we find it unnecessary to finally determine the test that should be applied when an accused seeks to dispense with the mandatory

> requirement of a trial by jury. That said, we are inclined to view that, absent consent from the Crown in order to avoid the requirement of a trial by jury, an accused must show on balance. ...

and here's the important part.

> ...that the time-honoured statutory and common law procedures designed to preserve and protect the right of every accused to a fair trial by an impartial tribunal are sufficient. And the particular circumstances of his or her case.

The decision wasn't written that long ago, 2007, but it talks about these time-honoured statutory and common law procedures. And my respectful submission to this court is that the time-honoured isn't cutting it in this new age any more. We now have a new problem, as outlined by the articles, with respect to the permanence of information on the internet, and that wasn't a problem before, and so we need something more than the time-honoured statutory and common law procedures to deal with the reality of 2011.

Tab B is the case of *L.E.* it's also cited in my friend's materials. Just a couple of comments about that. Ratio, as I understand it, and it's indicated at paragraph 17 of the - Ms. Kish's factum is that the Crown does not have an

unfettered right to withhold consent. But in the end, in that case, the application was denied, and a big part of the reason why the application was denied was because they, the court had already ordered a change of venue. They had moved the case from Prescott all the way to North Bay, and then the accused got there and decided that in addition to the change of venue, he wanted a judge alone trial as well, and it just didn't seem to follow. So, but the principle there is the same.

Tab 3 is McGregor, which I've already talked about, at length. And that's the case that goes on to talk about the constitutional right to a jury trial being a benefit to the accused, and then asking the question, what good is a benefit if you can't waive it.

Now Tab 4 is an interesting decision because it applies to a youth, as do many of these, and that engages in different statutory scheming, apparently under Section 67 of the *Youth Criminal Justice Act*, even in a manslaughter, the Crown can invoke a mandatory jury trial. And this came down to a combination, combo case, because on the one hand, yup, there was plenty of pre-trial negative pre-trial publicity arising from the Boxing Day shootings, but in that case the accused being a youth had a particular right to participate and understand the case to meet, when the

Attorney General just said no, we don't, we're not saying why, uhmm, that was one major factor, as long as the pre-trial publicity that persuaded Justice Molloy to grant the application in favour of the defence. But again, it's a combination case that arises out of a variety of schemes.

Tab 5 is Your Honour's case of J.S-R. And I think I've already spoken about that. Happy to answer any questions that you may have.

Then my case book sort of digresses into a number of cases on identification and I won't trouble with you, with that, because we are all familiar with those cases. It's trite law to say that there's been a re-evolution of case of mistaken identity at this haunt the criminal law.

Finally the last one I would refer to is the *Law Society of Alberta versus Krieger*. It's basically summed up in my factum, essentially, prosecutorial discretion as I understand the reasoning for the court in this case, extends to things like whether to proceed, whether to proceed summarily or by indictment, whether to stay the charges. But doesn't really go into tactical considerations such as judge and jury and judge alone. So there is a distinction between the traditional route of prosecutorial discretion, and prosecutorial discretion that I guess I put in the second category, would be the tactical. And in my respectful submission, what *Krieger* is saying is that this

isn't really an area of the traditional prosecutorial discretion. Because it's more of a tactical consideration. And so that brings me I guess to my final point of caselaw. A number of these cases talk with some dismay about why the Crown would want a jury trial and can they articulate some really good reasons? And if they can't, can we assume from that, or at least circumstantially infer that maybe the reason is arbitrary, and what we're looking for is a more favorable trier of fact. And I - no aspersion what soever to these two particular assistant Crown Attorneys, they, as far as I understand it, are muddled up in a bigger debate that extends to 720 Bay, and is really an issue of Crown policy. Uhmm, but, the same token, there are, it's found in my factum again, numerous benefits to proceeding by judge alone, which are benefits equally attributable both the Crown and to the defence. Now, there is the obvious, just take a moment, yes, paragraph 53 of my factum.

> Nicole Kish respectfully submits that acting fairly in this case would require a trial by judge alone. A trial proceeding in this manner would;
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> (1) neutralize the affect of the adverse pre-trial publicity.

I think the Crown being a quasi Minister of Justice who is not here to win but just to ensure fair trial, ought to

5 recognize that, you know, there is some pretty dangerous stuff in that pre-trial publicity and that's a benefit to them too, because if they have to do this all over again after an appeal, whatever, ah, that's no good for the Crown.

(2) Minimize the potential for improper
10 use of not just eyewitness testimony, the tainted eyewitness testimony.

And I think that's in everybody's interest, unless, of course, you are Crown and you are more concerned about
15 winning, but neither of these esteemed Crowns, I am sure, are taking that view. And then 3 and 4, of course, have a more general application, we guarantee that verdict is obtained. I have never seen a murder trial with a hung judge. And so, but there are lots that end in a hung jury and so certainly
20 society's interest in doing this in an efficient and economical way, and reaching some sense of finality, is in a sense guaranteed by a judge alone. And, of course, it is generally accepted that judge alone trials are shorter than
25 jury trials. Because things that have to be explained to a jury, and things that have to be a jury has to be educated as to can it be done much more quickly with a judge who has sort of been through it all before.

So when you look at the response letter from
30 720 Bay and you try and analyze what it is they are saying, it's like, it's always worked, just keep going, don't worry,

we can correct everything with instructions and I'll deal with it in reply if my friends can. I have failed to hear anybody articulate any advantage to having a trial by judge and jury. An advantage the administration of justice, to the accused right to a fair trial. Anything. So, when you make that request, and you get a bunch of boilerplate, don't worry, we can fix it instructions, and then there is no paragraph that says and by the way, you better have a trial with a jury because, and then the public demands it or it's better for everybody, or, there is some benefit to the lawyers, the administration of justice, the accused, anybody, then I would have more of an uphill battle, but here, unless my friend is going to astound me with a brilliant submission, there is no net benefit forcing this accused to have a trial with a judge and jury when she doesn't want one. Just doesn't seem to be any basis for that, except to say to the rest of the world out there, you can't make that choice, and we are not going to set a precedent where the tail's wagging the dog and the accused can just dictate this and that. No benefit whatsoever. So, in my respectful submission, an accused comes and says look, I am really worried about the pre-trial publicity, I am really worried about this identification evidence, and the best the Crown can say is, but don't worry, we'll fix it with an instruction. I haven't really exercised the discretion in a judicial way. And

absent some other consideration beyond don't worry, how can we assume anything but the Attorney General takes the view, he has got a greater likelihood of achieving a conviction, and obtaining a favorable result than to refuse consent.

So, I haven't really gone into a lot of detail with respect to my friend's book of authorities for the factum that he's filed. A lot of it seems to be fairly principled. Uhmm, *R v. Ng* is worthy some of note. I think my friend will rely heavily on that. Two points about *R v. Ing*. One is it was a judge shopping case. Too late to bring this application. Trial judge already been announced, it wasn't like he had been yelling for it a year earlier. And the court goes on to say:

> There must be evidence of misconduct on behalf of the Crown if a trial judge is to interfere with prosecutorial discretion.

And I would just remind you again about that distinction in *Krieger*. You can't just put everything that the Crown decides into this big pot called prosecutorial discretion, or certain things like whether perceive, whether to lay a charge, whether to stay a charge, those things are right in that pot. But as far as tactical considerations in achieving a more favorable result that's different, and that's all set out in *Krieger*.

L.(E.) I have spoken to, and so, I can just

check with my learned friend.

Subject to any questions, those are my submissions.

THE COURT: Thank you. Mr. Thompson.

MR. THOMPSON: Thank you, Your Honour.

Your Honour, I, the application or my response to the application, obviously I am going to be relying on the format of that. I think it's fairly self evidentiary in terms of how it's laid out. Notwithstanding that, I am going to change the order around a little bit in order to make what I would suggest are more concise direct comments with respect to my friend's application.

So, from the outset, Crown's position is that the only issue this court should address or assess in terms of the Crown's refusing to consent is whether the decision of the Crown was improper motive, or abuse of process. It has been submitted by the applicant as pointed to some evidence that would establish this and there is no evidence before the court that he has put before properly before the court to indicate that there has been any improper motive, nor has there been any abuse of process at this point.

However, dealing with my friend's application, I do think it's important that I deal with number, the two things he brought up in particular, that being publicity, and the other being complexity of the actual

case as he perceives it, with respect to the identification evidence.

So, on publicity, alone, I can refer Your Honour to number 4 of my response, and once again, it's Tab E of my friend's application, in which he's outlined all the articles he did. And rightfully so. He's indicated that all these articles basically deal with 2007. There is one there from 2008. Similarly, with respect to the search they did where there was some 9,000 hits, if Your Honour, in my factum, incurred my response factum would indicate that some of those involved paparazzi, et cetera, so I don't know that just because there is 9,000 hits what the contents of those hits are? But in any event, that's my friend's position. With respect to that publicity, that that would somehow affect the ability to choose an impartial juror.

In support of that then, I have used Your Honour's case in J.S-R., in paragraphs 9 and 15, which is found in Tab 1 of my materials, and if I may, and I am just going to read some of these sections out. In terms of the former evidence perhaps I can just start down a little bit halfway through the paragraph.

> The lack of later evidence in this case is more significant. However given the assertion of the appellant's factum that the anger generated by this case towards

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> people affiliated with gangs and guns and not just the actual perpetrators is palpable. I do not have any basis to evaluate the degree that this assertion, this asserted anger has likely permeated the consciousness of the public or how likely it is that the persons summoned for jury duty would or would not be able to put such feelings aside or how it is that the challenge for cause process is ineffective in identifying those prospective jurors who would not be able to do so. Another unknown in this case is the affect that the passage of almost three years since the occurrence of these events may or may not have had on the initial and highly emotional reaction to them. While I do not necessarily doubt the applicants' contention, it seems to me that any misgivings I may have on the subject are not a substitute for a proper evidentiary record.

And Your Honour went on further to find, on paragraph 15:

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> And I am not satisfied that on the record before me that the degree of pre-trial publicity in this case has risen to the level that impairs the applicant's ability to have a fair trial, in light of statutory and common law procedures designed to preserve and protect fair trial rights. I am therefore unable to conclude that the applicant's rights under 11(d) of the *Charter* had been infringed. The application also fails on this alternative basis.

So, with respect Your Honour, respectfully submit there isn't a proper record before you. And in any event, in a case as highly publicized and as topical as J.S-R., the court held that there was still, you could still pick a jury that would not be affected by the publicity.

I am respectfully submitting that this case is nowhere near the level of publicity that that case garnered, and I don't have to go into details of it. I'm sure Your Honour is aware of the case. But notwithstanding that, this is not anywhere near that level. It is also three years old. Interestingly enough. And the only publicity that my friend has put forward is some publicity that

happened in 2007. The article in 2010 from Mr. Pazzano, on, forthcoming trials, and one in 2008. That are filed under exhibit E. And furthermore just to say there is 9,000 hits with that name doesn't really provide the court with that much to rely.

So, in addressing my friend's issue of publicity, which I respectfully submit is not what this court has to necessarily deal with, but notwithstanding that, I'm addressing that. Similarly, the issue of complexity. For my application, submitted that the applicant is aware of the nature of the eyewitness testimony as a result of the evidence adduced at the preliminary inquiry. The applicant had the opportunity to challenge the reliability of the eyewitness testimony, the applicant will have the same opportunity at trial to challenge the strength of the Crown's case. It is submitted there is nothing inherently difficult in any of this evidence and it is not so complex that a properly instructed jury would not be able to evaluate it.

I refer Your Honour now to *Badgerow,* and just so it's clear, *Badgerow* involved a 2008 case, just so the cite is 2008, O.J. No. 109, and that case involved, ah, there was a murder trial and it was an attempt murder and sexual assault, and the assault took place in 1981, at the time of the victim ID'd the accused but his hair was different. Going ahead to 1998, another investigation led to the accused

being charged with new charges as well as this old matter. It goes before the judge alone on the basis of publicity as well as lost evidence as well as a jury does not give reasons and it is always unknown how they arrive at their decision. He questions whether the instructions to the jury will resolve the evidentiary difficulties presented in the case and, in any event, in this case, the evidentiary issues were far greater, and that they involved a deceased witnesses, missing evidence, and the passage of time of 17 years. And even when that evidence was before the court and that com, the complexity of that evidence, ah, the application was denied.

And if I just go to paragraph 59 of Barrow, which is on, sorry, *Badgerow*, Tab 2. That's where at paragraph 59 is where the question really is put. A jury, Mr. Visitine (phon) argues, does not give reasons, sorry, Bytensky, argues, does not give reasons, and is always unknown how they will arrive at their decision. He questions whether or not instructions to the jury will resolve the evidentiary difficulties presented in this case.

We can go now to paragraph 94, and more specifically 97, but in any event 94:

> According to the findings as to a *Charter* violation or abuse of process, again is premature at this point. All that can be

said is that there is a potential for such findings, issues are identified but the evidence or the lack of must be canvassed with the witnesses testifying in court.

And furthermore, on 97, which is the integrity of the jury system, with respect to being able to deal with complex questions.

The jury system has always been an integral part of the criminal justice process. I am not persuaded re-election is necessary or appropriate. Jurors will, I suggest, understand and follow instructions as required by circumstances and abide by their affirmation. The lack of reasons by a jury has never been considered problematic, and I fail to see how such a legitimate concern, I fail to see such is a legitimate concern in this case.

So in addressing, and as indicated in that case, without repeating myself, the evidence that was involved in that case was once again the deceased witnesses' missing evidence and the passage of 17 years. The court rules that that is not too difficult for jury to comprehend,

and I respectfully submit my friend's accusations with respect to tainted evidence, identification witnesses will not, in fact, be something that the jury is not able to handle.

So, I am dealing with those issues. I respectfully submit those are not the issues that are properly before the court as to whether the Crown has acted in a proper manner, and that is the only question that should be corrected before the court. But in any event, I felt necessary to deal with it. Because my friend has basically, uhmm, has put those two issues and tried to make them into something that they are not. But, in any event, hopefully, that addresses those two issues. I will give further comments should Your Honour require on that area.

With the next issue with respect to the right to re-elect. Essentially, Section 471 of the *Code* mandates that a jury is compulsory, except for otherwise provided by law. Section 561 deals with the rules of affecting re-election, specifically when the consent of the Crown is required. And Section 473 deals with Section 469 offences, requiring both the consent of the accused and the Attorney General for a judge alone trial.

While there is a right to trial with a judge and jury under Section 11(f) there is no corresponding right to judge alone. And if I can go to *R v. Lee*, which is tab

number 6, paragraph 23 and 24:

> Authorities do not support the trial judge on the issuing of Crown discretion. *Stinchcombe* supra dealt with the failure of the Crown to disclose relevant documents in a timely manner. Sopinka for the Supreme Court of Canada held at page 11-12 the obligation on the Crown to make disclosure was not absolute in the subject to discretion of the counsel for the Crown. That discretion is however reviewable by a trial judge.

And I am just, court's brief indulgence. Without reading the entire paragraph, if I can just move down to 24.

> The error permeated the approach that counsel for the accused at trial was that her selection of the mode of trial was an option available to the accused and therefore absent some compelling reason of the contrary, they should not be held strictly to the time limit set out in the *Code* for exercising this, that option. I would have thought the Supreme Court of Canada in *R v. Turpin*, 1989, 48 C.C.C. (3d), had made it clear that it is not the

law, while conceding that the accused has the right under Section 11(f) of the *Canadian Charter of Rights and Freedoms* to waive the benefit of his or her constitutional right to a trial by a jury, the court held that this does not create a corresponding right to a trial without a jury unless permitted by the provisions of the *Code*.

And furthermore, in *Ng*, at paragraph 43 to 44, found at Tab 4, once again Supreme Court of Canada in *Turpin* held that a Section 11(f) of the *Charter*.

...their right to the benefit of a trial by a jury, in certain prescribed circumstances. The section was read as permitting an accused to waive the benefit if, in fact, he or she viewed it as in his or her best interests. However, Turpin did not hold there was a corresponding right or benefit to a trial by judge alone. That decision has not been challenged.

Furthermore on the issue of right to re-elect. The refusal by the Attorney General to consent to

re-election does not offend fundamental justice. I am
5 referring to Efferts (phon). Which is found at Tab 5.

THE COURT: Interesting aspect of Turpin, Mr.
Thompson.

MR. THOMPSON: Sorry.

10 THE COURT: I said an interesting aspect of
Turpin, which is, where all of this is borne out of.

MR. THOMPSON: Mm-hmm.

THE COURT: Is if you take Justice Wilson's
observation literally, she says the purpose of Section 11(f)
15 is to give an accused the right to a jury trial and to ensure
that if a jury trial is not a benefit to the accused, the
accused may waive the right to a jury trial.

MR. THOMPSON: Yes.

20 THE COURT: And she then goes on to say that
the mandatory jury provisions of the *Criminal Code* are
inconsistent with 11(f) but it results in effect in the
accused not being able to waive the right to a jury trial, it
25 doesn't accomplish the very thing that Justice Wilson says
Section 11(f) is designed to ensure.

MR. THOMPSON: I take that comment, Your
Honour. If I am going to, I think, though, it says it hasn't
30 been effectively challenged at this point in time. That
argument. Turpin hasn't.

THE COURT: No, because I guess the issue is

yet to go back to the Supreme Court of Canada. It just strikes me as, if all Justice Wilson had said of Turpin was the purpose of Section 11(f) is to give an accused the right to a jury trial, full stop, then you could say, the provision of the mandatory provisions of the *Code* require the jury in certain instances aren't inconsistent with that, it just means the right to a jury trial is maintained. But, instead, Justice Wilson goes on and says, to ensure that if a jury trial is not a benefit to the accused, the accused may waive the right. Run four square into the provisions of the *Code* which essentially say you can't waive that right.

MR. THOMPSON: And I understand Your Honour's comment. My comment would be more along the lines as well, that is not the only consideration that's involved in this. With respect to the -- the issue is, it is at this point this time, it is in the *Code*, and by being in the *Code*, and I have outlined the sections which deal with it, that although Justice Wilson said that at the time, and the object, the object at the end is that there are, a trial is fair, but because that has not been challenged at this point in time, Your Honour, with the greatest of respect, it is still within the Crown's position that they, that they do not have to consent to the re-election. It's already enshrined in the code. Should that section be struck down, then obviously the Crown is in a different position. But the law as it currently

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stands, as the *Code* as it currently stands, puts forward the position that a Section 469 offence has to go by way of judge and jury. In the event, only goes not go, so, in the event that the Crown does not consent to that re-election. And the only basis under which the, respectfully this court can determine whether or not the Crown, if that consent should be that, that the Attorney General's non consent should be judicially reviewed is if my friend can bring forward some indication that there has been some abuse of process or there is an improper purpose involved. Because as I will get into, I think, further on, every time the Crown makes a decision to ask the Crown to justify that decision, is putting it backwards. In other words, if every discretion the Crown has to do, they have to argue why their discretion is proper as opposed to being challenged when there is an improper motive, then the process would never proceed properly.

I understand your comment, Your Honour's concern with respect to Wilson, but I am also suggesting that as the way it stands currently in the *Criminal Code*, as outlined by the Section 473, 471, and there is a requirement for a judge and jury. Until that has been challenged and put, and set aside, the comment that Wilson made, may very well be obiter at this point in time. But nonetheless, on today's application, and I take Your Honour's point, I do, to

respect to that. But as obiter in there, it is not, at this time, successfully challenged, and I have to deal with the *Code* as it is currently stated.

THE COURT: No, but, we can all agree the *Criminal Code* has to be consistent with the Charter.

MR. THOMPSON: I am agreeing with that.

THE COURT: And there is no Section 11(f) of the *Charter* doesn't say the state and the accused have the right to a jury trial. It says the accused has a right to a jury trial. So there is no constitutional right in the state to a jury trial.

MR. THOMPSON: No. But it, my friend hasn't brought a, to strike down that section of the *Code*. He hasn't brought an application to strike down the section under 473. And I am not disputing what Your Honour's comments are, but I am suggesting at this juncture, with what is before the court, the only thing that I can argue is the basis under which my friend can set aside the Attorney General's consent. And I am suggesting it can only happen on the basis whether or not there has been abuse. I am not arguing Your Honour's saying that there may be some inconsistencies with Wilson, with respect to the *Charter*. And I, all I can say it's obiter in this point in time, *Turpin* has not been challenged.

THE COURT: But then, accepting that, you are

then still have to contend with Justice Charron's decision in *McGregor*, where she suggests that the surrounding circumstances can give rise to the impression that the decision is being properly noted.

MR. THOMPSON: I, I, and that's why I am getting back to the issue that the discretion, if every time the Crown made a decision, it was subject to judicial review, then the system would never proceed. It would get bogged down and the courts, and I will get into further, have gone, the abuse the Crown is putting forward has to be seen in the clearest of circumstances. And that if, if the position is that at the end of the day, the Crown has to account for every decision, because there could be a negative inference to be drawn, in other words, if we proceed, if we decide to grant bail to someone on the basis that somebody else pleas or, and on our day to day every day operation that we deal that, we give one witness or one accused a benefit because he's testifying or against another, or he's providing anything for the state, then every decision that we will do will come under some form of judicial review, and I am respectfully submitting that if you allow the courts to say, every decision that somehow that one could equate that decision with some nefarious reason, then, essentially, it is reverse the process. Now the Crown has to account for every decision they make, as opposed to saying, this is the

decision that's made, and the normal course of the process, and unless you can find that we've done even an abuse about it, then I don't have to justify each and every decision you make. And I'm not --

THE COURT: I am not suggesting that, Mr. Thompson. But I think we can agree the caselaw is clear that the Crown's decision to consent or not to consent to a re-election is reviewable, *McGregor* establishes that.

MR. THOMPSON: Well, *McGregor* establishes but there is also other cases that would indicate that unless there is some abuse --

THE COURT: No no, I am just saying, let's start in the first place, it is reviewable. The court can ban the refusal.

MR. THOMPSON: Yeah. They can.

THE COURT: Right. Then the question becomes, is there a basis for finding or is there a basis for the court to interfere with that decision, which can only be undertaken in the very narrow grounds that are articulate. An abuse of process or improper motive. The difficulty you then get into, I suggest, is insofar as the Crown either refuses to articulate their reason for failing to consent to a re-election, or put forward a reasons which may be seen as being I'll try and avoid the use of boilerplate, generic as opposed to fact specific, and there are a constellation of

facts in a particular case such as *McGregor* that makes one immediately wonder why the Crown is being so insistent on a jury trial, that as Justice Charron said in *McGregor*, one can take from those surrounding circumstances a suggestion that there isn't a proper motive or abuse of process. Because why else is the Crown so insistent on having a jury trial. And to say that well, the defence has to point to something beyond that, point to something concrete as giving rise to a basis for finding a proper motive or abuse of process puts the defence in the same situation, I suggest, the Supreme Court of Canada has commented on, for example, third party records and the innocence at stake exception, how do they prove something when they haven't seen the documents that they need to see in order to offer the proof. Well, how does the defence show an improper motive when the Crown won't provide to it the information necessary by which they could show that improper motive.

MR. THOMPSON: Well, with the greatest respect, in this case, number 1, I would respectfully submit under, I think, Crown is not required to, at least under *Ng* provide reasons for the Attorney General, and in this case an extra step was made to provide those reasons. And my friend may find that they're boilerplate, but, frankly, his application for that information from the Attorney General or the decision was boilerplate. All it said was there is a lot

of publicity, and it's difficult because there is identification witnesses. So, I don't know what response the Attorney General could have provided that would somehow assist my friend. It was a 4 or 5 page document. Each one of my friend's concerns was, was addressed.

So, other than citing, I don't know what else they could have responded, with the greatest respect. The fact that they did respond, and I am respectfully submitting they go didn't have to, they did, is at least a show of faith. Furthermore, they wanted statistics, which I did provide my friend with those statistics. In terms of, he asked just, he asked the boilerplate, he asked the question, how many have been consented to in the last, well actually only for the years, we provided him with three years. So, I don't know, I mean just as Your Honour is saying, that, you know, how do we know that the Crown isn't just providing boilerplate or how do they know it's not missing, if, in fact, they haven't provided it, such as the third party records. My argument is, well, how do we know what my friend's position is other than to say, there is a great deal of publicity, and frankly, the documents he's filed with respect to exhibit, or Tab E, there is nothing there, other than web, ah, cites from 2007. And I didn't, I wasn't going into that area, Your Honour, but I mean, if Your Honour wants to, I mean, what my friend basically is saying by making that

argument, effectively, is judge and jury trials as we now know them end. We cannot conduct a judge and jury trial. Because anybody can go on the internet. He is somehow, in both his arguments one and two, effectively saying you can't trust the jury, they are going to cheat. So if they are going to cheat, they have lots more -- but I would argue respectfully, they could have cheated a long time ago. They can go and ask their next door neighbour, they can talk to their wives, they can talk to other jurors about evidence they shouldn't. They can do all of that. All the internet has allowed them to do is address more people at the same time. So, if you are gonna cheat, you can cheat big as opposed to cheating small. So with the greatest respect, that argument fails because otherwise we might as well just pack up shop now and quit without judge and jury, and have everything run judge alone. I don't believe that's the requirement for this argument to be had but effectively that's all he has said is now that we have access to the internet. Which they had access in J.S-R., they had access prior, the internet has been around since 1992. It has been in full swing and full place, pay pal has been since 2001. We do tran -- that has been around forever. If that was the argument to be had, it should have been had ten years ago. But with the greatest respect, both my friends argument on 1 and 2 fall under that.

With respect to his argument on identification evidence, well, if Your Honour wants me to address that, I will as well. But, I don't believe that all they are saying is we don't need a jury. They can't somehow cope with the idea that the identification is something they can't deal with. I didn't run the preliminary inquiry, neither did my colleague run it. But nonetheless, I don't necessarily agree that the evidence was tainted with respect to the process that took place. So, somehow that is now a fact that that evidence is tainted? I respectfully submit no. And that's something that a jury can deal with. They've dealt with that for hundreds, tense of hundreds well, hundreds of years, I guess to that extent, but in any event, I don't believe there is anything new in the identification evidence that hasn't existed before.

And getting back to Your Honour's issue with respect to, you know, is that should there be something more that the court can look at to review the Crown's decision. I am respectfully submitting that what you have been provided doesn't provide any guidance either, under the three things my friend indicated existed. In any event, I am sorry, Your Honour.

THE COURT: Why does the Crown care?

MR. THOMPSON: I, I don't know that that's a legal argument, Your Honour.

THE COURT: Well, I don't know if it is either, but it just, established there is no state constitutional right to a jury trial. You have an accused right to a jury trial, which he or she can waive. You have a request to waive in a given case, with reasons provided, whether you accept they are valid reasons or not. I am always, it's not, as you know, the first time I have had to deal with this issue. But it always leaves me with the sort of residual question as to why the Crown cares. Why doesn't the Crown say, you don't want a jury trial, fine, we won't have a jury trial. Let's go.

MR. THOMPSON: Your Honour, all I can say, I mean, this is not, this is not a personal issue. This is a matter of, it is legislated in the *Criminal Code*, that the public, and I am here as an officer of the public, is entitled to make decision on these type of offences. And I believe they should have a say into the process. And that doesn't, and that, I mean, what Your Honour is asking me to do is to say, I don't care if we have 12 people from the community sitting here and making judgment on others. Well, I do. And the Attorney General does, in any event. So that's the reason why we are fighting for a disposition is because I think my friend has at least an obligation to show some improper motive on the Crown as well as abuse of process, and if Your Honour wants to follow the other

argument there is somehow some publicity here that somehow is going to affect the fairness of this trial, I respectfully submit there is not. My friend hasn't put forward an argument, and if that's the case, then we never can have a jury.

I don't know that's answering Your Honour's question.

THE COURT: Thank you.

MR. THOMPSON: I think, Your Honour, I was on the issue of the AG's consent does not offend the fundamental justice. And I was referring to *Efforts* (phon) on paragraph 3. And *Efforts* (phon) is found on Tab 5. And it's held:

> The trial judge found by the authority of *Ng* prosecutorial discretion to withhold consent to a re-election for trial without...

Or sorry.

> ...without jury was not subject to review by the court. Absent proof of an abuse of process. The trial judge was not persuaded that either Crown's decision not to consent to re-election nor the Crown's failure to explain that decision constituted a level of misconduct

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> sufficient to justify a review or
> overriding by the court or that...

or sorry --

> ...of that Crown decision. Noting that
> the existence of a statutory discretion by
> the Crown, did not itself offend
> fundamental justice.

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And furthermore on *Ng*, paragraph 145, and once again, *Ng* is
Tab 4:

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> For these reasons therefore I agree with
> Whitman J.A. that the Crown is under no
> obligation to give reasons for not
> consenting to a trial by judge alone in
> the absence of any evidence that it
> exercised it's discretion or an oblique or
> improper motive. I also agree that the
> absence of reasons cannot by itself
> support an adverse inference that the
> Crown improperly exercised its discretion.
> Nor can the fact that the Crown often or
> ordinarily consents to trial by judge
> alone lead to an adverse inference that it
> must have an improper motive when it
> declines to consent to a trial by judge

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5 alone in a given case.

I guess that may address the issue, Your Honour, with respect to *McGregor* about the inference that can be drawn. And the past does not mean that, decide not to

10 allow the consent there is an improper purpose.

It's the Crown's position that the proper question is, is that the record establish an improper motive or an abuse of process by the Crown. And not are the actions of the Crown fair. And I am going to direct Your Honour to

15 my friend's Tab 3, sorry, Tab 2, pages 20 to 22 where I think, respectfully, my friend has misapprehended the legal test by calling the fairness of the Crown. That's not the test that's required.

20 MR. SCARFE: What paragraph?

MR. THOMPSON: Pages 20 to 22. Pages, the heading starts at another paragraph so. And basically the heading of that section is, "Are the actions of the Crown

25 unfair". That's respectfully is not the test. And in support of that, it's the defence has an onus to establish an abuse on the balance of probabilities. It refer to *Ng*. Page, at tab, sorry, paragraph 133. Tab 4 again. It says:

30 > Third, while the exercise of prosecutorial discretion is subject to review, the accepted test remains whether the exercise

> of its prosecutorial discretion amounts to or would amount to abuse of process.

Cites a number of cases. I am not going to repeat them but,

> The abuse of process in this context includes not only the conduct impairing of an accused's *Charter* rights, it also includes conduct which contravenes fundamental notions of justice and thereby the integrity of the judicial process.

Moving down to paragraph 134:

> What must be emphasized however, is that the accused, it is the accused who bears the onus to establish abuse of process on the balance of probabilities. For a court to focus on whether a Crown has good reasons for not consenting to a trial by judge alone and then to deconstruct and analyze the proffered reasons would turn the approach on its head. The question would no longer be whether bad reasons could be proven by the defence, but whether good reasons, indeed, good enough reasons could be prove by the Crown. This

> is not the test for judicial review of the exercise of prosecutorial discretion and with sound justification.

And it cites a number of cases. Also, in *Power,* on Tab, *Power,* which is I believe case, tab number 2. *Power* being tab number 3, paragraphs 9 to 12: And it states: It's referring to the *Kiowsky* (phon) case, 1988, N S C R, 657. The court unanimously refer to principles enumerated in R v. *Jewitt* (phon). While she held that the stay of proceedings for abuse of process was not limited to cases where there is evidence of prosecutorial misconduct, Wilson J. for the court, page 659 was careful to point out the remedy will only be read in the clearest of cases. So I am respectfully submitting number 1, that there is no evidence before the court of any form of prosecutorial misconduct, and even if, in, and the test is that my friend has to bring that evidence. And similarly, even if he does bring the evidence, it says only available in the clearest of cases.

So, I have taken my application, Your Honour, and I have sort of changed it around in terms of written submissions. I think the contents of the application are fairly well founded in law that is currently before the court. I appreciate Your Honour's comments with respect to the Crown's reasons or, let me put it properly. I understand

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(Thompson)

Your Honour's comments with respect to why the Crown may or may not want to proceed by way of judge and jury. Unfortunately, I would respectfully submit, the law is very much on the Crown's side on this occasion. And I do that with respect of this court. I understand Your Honour has adjudicated over this issue a number of times and I am familiar with Your Honour's decisions. I am suggesting in this case, as opposed to a remedy of a judge alone that my friend's concerns can be addressed on the publicity issue by way of a properly word challenge for cause, and that would address any concerns that he has, and similarly with respect to the, as he calls it the complexity or the frailties of the eyewitness evidence, that that could be always dealt with in cross-examination. And my friend is quite able to do, and I've seen his transcripts of preliminary inquiries, so he's quite capable of doing so. And to ask that somehow the substituting of a judge alone is the appropriate thing to do in that, when he has the ability to do otherwise, I would suggest is it's just not necessary. So I am respectfully submitting, not to repeat myself, that the caselaw that is there I believe is a fairly sound argument as to why we should proceed by judge and jury. And that my friend has other remedies. The Crown has done everything in its power at this point in time, they've got reasons from the Attorney General. We've agreed with respect to the witnesses that

videotaped by video link, we've agreed to allow that evidence to go in so that took away another challenge that my friend faced when he originally brought the application. We consented to all of these matters to assist my friend, and I would respectfully submit that the judge and jury should not substitute now for additional problems that he may perceive that are there. That the Crown has gone, actually, beyond what is necessary, but has nonetheless appreciated the nature of the argument and has complied to the best of its ability.

Subject to any questions from Your Honour, those are my submissions with respect to that.

THE COURT: Thank you. Reply, if any. Mr. Scarfe.

MR. SCARFE: Thank you, Your Honour, very briefly. I think most people who had taken law school at some point, the first half of the first year, have to take a little course on legal writing, legal reasoning, and it's there that we learn about beware the floodgates argument. And I am just responding to my friend, his submission to you was that, if every time the Crown made a decision it was subject to judicial review, that would be terrible. But the corollary of that answer is we should never be subject to judicial review. His other floodgate argument is that this application is granted then judge and jury trials basically end. Doesn't follow, again, floodgate fear based argument

doesn't follow. There are lots of cases where the accused will want a jury trial, and there are lots of cases where the accused is unable to point to reasons, fact specific reasons that show the benefit of it. It's trite law to say that justice must not only be done, but appear to be done. And my friend says I haven't shown any kind of an abuse. Well, I don't really have access to the upper echelons of 720 Bay. Or a bug. Or hidden video camera that put before you the discussion that must have gone on, but if you look at the letter requesting it, when my friend says is boilerplate, I would respectfully disagree. I think we set out, 4, 5 page letter, a lot of the reasons, and quite a bit of detail, as to why we thought the facts of this particular case warranted a re-election. Then my friend's letter really didn't address any of the facts except to say, there are no facts here that warrant. And it just, it's a lack of discretion. It's, it's as though the state itself has an ego, and they are not going to be pushed around in the fear of having the defence being able to have a choice that isn't specifically mandated by the statute 4703. Wow, if we give that up, it's going to lead to a disaster. Of course, it never does. So, the Crown learned some time ago that if the defence brings an application reviewing their decision and then asks for reasons, you know, why did you make the decision, and they refuse, they are more likely to lose this kind of an application. So now what they

do is they write a perfunctory letter that says here are your reasons. Which are the reasons you've raised defence for asking for this thing. They don't make out anything at all. But they don't go on to say, you know, we accept your concerns about this, but we believe it can be counter active over here. This and this and this. There is nothing in the Crown's letter. With respect to my friend's submission, that his letter isn't boilerplate and mine is, I guess my response is, no, I'm not putting a boilerplate, I am putting a very considered set of facts in front of him. But Your Honour can read both letters, and you can make your own decision with respect to that.

Subject to any other questions you have, those are my submissions on this application.

THE COURT: Thank you. The next application is the lost evidence application, correct?

MR. THOMPSON: That's correct, Your Honour.

THE COURT: Are we, I know it is a rather special event going on tomorrow, involving the police, are we going to be able to proceed with that tomorrow, in light of the officers that have to be called or not?

MR. THOMPSON: Your Honour, I think we could stumble along, but I think in all fairness, and respect, it may be that Officer Giroux is required on the application at some point in time, and it may just being wise not to, at

least start, it may be wise not to start it. I know he is going to the funeral. And plus we just received supplementary materials today. So, I am no the sure we are in a position to proceed any way, the supplementary materials just arrived today.

I am not actually arguing that application, so I'm just taking, I am orchestrating the comments that I have received. I would suggest in any event, Your Honour, there may be an argument to be made, depending on what your decision in respect to this matter that, an abuse, sorry, that a lost evidence application is best heard after all the evidence. But somewhat of a incongruous position to sort of say the part of the application should be heard before the trial, and part of it should be heard afterwards.

THE COURT: Well that may be. Except for the relief that's sought, and the relief sought is to dispense with the jury, and therefore, that can't possibly be argued, well, I mean, it would be very interesting prospect to argue that at the end of the evidence, potentially then say to the jury thanks for coming out, but we don't need you.

MR. THOMPSON: I am totally cognizant of that. The corollary of that argument is if my friend is conceding that argument is best held in terms of lost evidence, the same logic, that is held at the end of the Crown's case, or at least until evidence is heard. Same

5 logic has to apply for the other remedy as well.

THE COURT: Well, it may, the law is fairly clear, I think, that the application for stay is properly reserved until the end of the case or at least the Crown's evidence. I'm not sure given Mr. Star's added alternative
10 remedies that they all necessarily have to come to that.

MR. THOMPSON: Surely the evidentiary basis in order to make that decision has to be based on the same evidence. Whatever relief is requested. In any event.

15 THE COURT: In any event.

MR. THOMPSON: That's an interesting conundrum.

MR. SCARFE: I think I mis-spoke in chambers, Ms. Simpson reminded me yes, the only question is whether to
20 state proceedings, it would I would agree with my friend, it should go to the end. But even if Your Honour rules on this application, trial proceed before a judge sitting alone, uhmm, there is still the question of what appropriate use can
25 be made of the fact that this evidence was lost, whether that leads to adverse inferences whether the Crown ought to be required to call everybody who was involved in that. Just to convey to the trier of fact, Ms. Kish isn't getting a fair
30 shake here. So there are other alternate remedies that need to be considered. Even if we are successful on this application.

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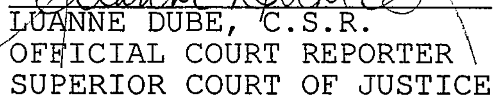
(reply, Scarfe)

THE COURT: All right. Well, I think in the particular circumstances of tomorrow that perhaps we should pick up the second *voir dire* starting on Wednesday. I assume that evidence will be, the witnesses will be available at that point in time and as among other things, allow me to use tomorrow to do my reasons on this application, which I'll have for counsel for Wednesday.

MR. SCARFE: Thank you very much.

--- **COURT RECESSED AT 4:09 p.m.** to Wednesday, January 19, 2011

This is to certify that
the foregoing is a true
and accurate transcript
of my notes to the best
of my skill and ability



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