SCC File**: 40097**

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO)

BETWEEN:

DIA 'EDDIN HANAN

Appellant

- and -

HER MAJESTY THE QUEEN

Respondent

FACTUM OF THE APPELLANT, DIA 'EDDIN HANAN

(Pursuant to Rule 42 of the Rules of the *Supreme Court of Canada*)

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PART I: OVERVIEW AND THE STATEMENT OF THE FACTS

A. Overview

1. This case is about the denial of a timely and fair trial. It affords this Court an opportunity to address the persistence of the culture of complacency criticized in *R. v. Jordan,*[1] and the perils of jury instructions that undermine the presumption of innocence.

2. The trial judge committed two critical errors below: he incorrectly dismissed the Appellant's section 11(b) *Charter* application, and he misdirected the jury on the burden of proof. Justice Tulloch and Justice van Rensburg of the Court of Appeal for Ontario concluded that the trial judge committed neither error and dismissed the Appellant's appeal from conviction. Justice Nordheimer, dissenting, held that the trial judge committed both errors and that the appeal should have been allowed. The Appellant appeals as of right on the basis of Justice Nordheimer's dissent and asks this Court to allow his appeal, set aside his convictions and enter a stay of proceedings or, alternatively, order a new trial.

The Section 11(b) Error

3. The Appellant's trial took far longer than it should have. On December 24, 2015, the Appellant was charged with murder, attempted murder and (later) various firearm offences after he shot two men who came to his home demanding money. A six-week jury trial was scheduled to commence in November 2018 and conclude within the effective *Jordan* ceiling. The trial was adjourned at the last minute because of complications in the Crown's case and the Crown's subsequent refusal to consent to the Appellant's re-election to a judge-alone trial. The trial ultimately concluded 12 months later, on November 28, 2019. The jury found the Appellant not guilty of murder and attempted murder but guilty of manslaughter, discharge firearm with intent to wound and possess firearm without a license.

4. The total delay was 47 months. The trial judge deducted approximately 12 months as defence-caused delay, leaving a remaining delay of 35 months. The trial judge applied the transitional exceptional circumstance and held that there was no section 11(b) violation

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1 *R. v. Jordan*, 2016 SCC 27 ["*Jordan*"].

because the total delay would have been reasonable under the old *Morin*[2] framework.[3] A majority of the Court of Appeal upheld the trial judge's section 11(b) analysis and conclusion.[4] Justice Nordheimer dissented and held that the transitional exception could not justify the excess delay, because the vast majority of that delay accrued after the release of *Jordan.*

5. The Court of Appeal majority erred in upholding the trial judge's application of the transitional exception. As this Court explained in *R. v. Cody*,[5] the *Morin* factors have no place in the transitional analysis of post-*Jordan* delay, because the parties could not have reasonably relied on *Morin* during that time. For post-*Jordan* delay, "the focus should instead be on the extent to which the parties and the courts had sufficient time to adapt to the new law."[6] The trial judge cited this passage from *Cody* but failed to apply it. He assessed both pre-*Jordan* and post-*Jordan* delay under the *Morin* framework, distorting the transitional exception from a contextual application of *Jordan* into a get-out-of-*Jordan*-free card. The Court of Appeal majority compounded the error by holding that the trial judge was "required" to take this approach.[7] Both the trial judge and the Court of Appeal majority failed to follow *Cody* and incorrectly concluded that section 11(b) was not infringed.

6. Correctly applied, the transitional exception could not justify the excess delay. The record confirmed that the parties stopped operating under the previous state of the law immediately after *Jordan*'s release.[8] They had ample time thereafter to adapt to *Jordan*'s

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2 *R. v. Morin*, [1992] 1 S.C.R. 771.

3 Ruling on Application Pursuant to ss. 11(b) & 24(1) of the *Charter* ["Ruling on Section. 11(b) Application"], Appellant's Record ["AR"], Tab 1.

4 Reasons for Judgment of the Ontario Court of Appeal, dated March 21, 2022 ["Reasons of the Court of Appeal"], AR Tab 4; Order of the Ontario Court of Appeal, dated March 21, 2022, AR, Tab 6.

5 *R. v. Cody*, 2017 SCC 31 ["*Cody*"].

6 *Cody*, *supra*, para. 71, emphasis added.

7 Reasons of the Court of Appeal, AR Tab 4, para. 69.

8 Ruling on Section. 11(b) Application, AR Tab 1, para. 9.

requirements, as demonstrated by their ability to schedule the trial within the *Jordan* ceiling.[9] The Crown's refusal to consent to re-election on the eve of trial, knowing that its decision would delay the trial by another year *and* that it could avoid that delay by consenting,[10] reflected a disregard for section 11(b) of the *Charter* and a continuation of the 'culture of complacency' criticized in *Jordan*. The delay was unreasonable and the proceedings should have been stayed.

The Jury Misdirection

7. The trial judge also erred by improperly instructing the jury on the presumption of innocence and burden of proof in accordance with *R. v. W.(D.)*.[11] He repeatedly told the jury its decision on the ultimate issues would depend on which version of events it accepted – the Appellant's or that of the surviving witness. In doing so the trial judge framed the case as a credibility contest, placing a burden on the Appellant to prove his innocence.

8. The majority of the Court of Appeal excused the errors in the charge by citing defence counsel's failure to object and identifying other legally correct passages. This itself was an error: a failure to object cannot cure an error that undermines the presumption of innocence, and the other passages referenced by the majority appeared near the beginning of the charge such that they could not have remedied the later erroneous passages relating the law to the evidence. The jury charge compromised trial fairness and produced an unsafe verdict, necessitating a new trial.

B. Summary of the Facts

(i) Overview

9. On December 23, 2015, Alekesji Guzhavin and Gregory Henriquez attended the Appellant's home in Windsor, unannounced. The Appellant had met Guzhavin on two occasions in the summer of 2015 but did not know Henriquez. Guzhavin asked the

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9 Ruling on Section. 11(b) Application, AR Tab 1, paras. 81-82.

10 Ruling on Section. 11(b) Application, AR Tab 1, paras. 181, 186, 190.

11 *R. v. W.(D.)* , [1991] 1 S.C.R. 742.

Appellant for money. The Appellant asked for some time to get the money together.[12] Guzhavin and Henriquez returned to the Appellant's home ten minutes later and met the Appellant in his backyard. The Appellant gave Guzhavin $300 cash. An altercation ensued during which the Appellant shot Guzhavin and Henriquez. Guzhavin died and Henriquez was left paralyzed from the waist down.[13]

10. The Crown's theory at trial was that the Appellant lured Guzhavin and Henriquez into a trap in order to avoid paying Guzhavin. The Appellant asked the men to leave and return to his home so he could buy time to arm himself. When Guzhavin and Henriquez returned, the Appellant invited them into his backyard where there would be no eyewitnesses, handed Guzhavin the money, and shot both men intending to kill them.[14]

11. The Appellant testified that he shot Guzhavin and Henriquez in self-defence. After accepting the $300, Guzhavin drew a gun on the Appellant and demanded more money. Henriquez threatened the Appellant and his family. The Appellant, fearing for his and his family's safety, snatched Guzhavin's gun and fired multiple shots in the ensuing struggle. He did not intend to kill anyone.[15]

(ii) Guzhavin and the Appellant

12. Guzhavin had thirteen criminal convictions dated between 2004 and 2015: two for violent offences (assault and robbery), four for firearm-related offences, six for property offences

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12 Testimony of Dia Hanan, *Proceedings at Trial*, Vol. V, 374/7; AR Vol. V, Tab. 13, page 48 Testimony of Gregory Henriquez, *Proceedings at Trial*, Vol. II, 257/4-259/5. AR, Vol. IV, Tab. 10, page 31-33

13 Testimony of Dia Hanan, *Proceedings at Trial*, Vol. V, 384/10-394/30; AR, Vol. V, Tab. 13, page 58-68; Testimony of Gregory Henriquez, *Proceedings at Trial*, Vol. II, 257/4-259/5. AR, Vol. IV, Tab. 10, page 31-33

14 Closing Submissions of the Crown, *Proceedings at Trial*, Vol. VI, 266/7-267/26. AR, Vol V, Tab 14, page 117-118

15 Testimony of Dia Hanan, *Proceedings at Trial*, Vol. V, 386/10-392/30. AR Vol. V, Tab. 13, page 60-66

and one for criminal harassment. In September 2015 Guzhavin was charged with attempted murder and other offences in relation to a drive-by shooting in Windsor. He was released on bail in November 2015, one month before the shooting at the Appellant's home.[16]

13. The Appellant testified that he first met Guzhavin at the home of a mutual acquaintance in the summer of 2015. On a subsequent occasion the acquaintance and Guzhavin attended the Appellant's home together. The Appellant lent the acquaintance money, prompting Guzhavin to ask the Appellant, "What about me, Dia?" The Appellant replied that he and Guzhavin were not friends and that he would not lend Guzhavin money.[17]

14. In September 2015, Guzhavin was arrested for attempted murder. The Appellant learned that Guzhavin was angry following his arrest and would be "taxing everybody in the city". Guzhavin spoke to the Appellant over the phone while in custody and asked for money. The Appellant refused to provide it. The Appellant testified that he overheard Guzhavin say "He's fucking dead".[18]

15. On November 19, 2015, Guzhavin was released on bail on his attempted murder charge. Guzhavin needed money and after his release he tried to get some. Namir Zec, an acquaintance of the Appellant, testified that Guzhavin threatened to burn down Zec's house if Zec did not give Guzhavin money. Zec had told the Appellant that he gave Guzhavin $300 to avoid this.[19] Upon learning this the Appellant tried to meet Guzhavin to defuse any

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16 Recognizance of Bail and Criminal Record of Alekesji Guzhavin, *Proceedings at Trial,* Exhibits 29 and 33. AR, page 146 and 151

17 Testimony of Dia Hanan, *Proceedings at Trial*, Vol. V, 343/20-348/24. AR, Vol. V, Tab. 13, page 17-22

18 Testimony of Dia Hanan, *Proceedings at Trial*, Vol. V, 348/27-353/19. AR, Vol. V, Tab. 13, page 22-27

19 Testimony of Namir Zec, *Proceedings at Trial,* Vol. V, 326/12-332/15. AR, Vol. V, Tab. 13, page 6-12

tension between them but the meeting did not occur.[20] The Appellant next saw Guzhavin on the day of the shooting.

(iii) Henriquez

16. Henriquez is a citizen of the United States. He testified that he travelled to Canada in March 2015 to attend a family gathering and to learn how to tattoo. In April 2015 he was charged with drug offences in Toronto. He was charged with additional drug offences in Windsor in August 2015 and held in custody. Henriquez testified that he met Guzhavin in custody and they became friends. They continued their friendship and met a few times after they were both released.[21]

17. Henriquez and the Appellant encountered each other for the first time on the day of the shooting.

(iv) The Shooting on December 23, 2015

(a) Guzhavin and Henriquez's First Attendance at the Appellant's Home

18. According to Henriquez, in the evening on December 23, 2015 Guzhavin contacted Henriquez and told him he was walking to the Appellant's house to borrow money. Henriquez offered Guzhavin a ride which Guzhavin accepted.[22] Henriquez and Guzhavin drove together to the Appellant's house and parked on the street. The Appellant arrived ten minutes later and parked in his driveway. Guzhavin exited the vehicle and approached the

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20 Testimony of Dia Hanan, *Proceedings at Trial*, Vol. V, 354/15-356/4; 358/21-359/16. AR, Vol. V, Tab. 13, page 28-30; 32-33.

21 Testimony of Gregory Henriquez, *Proceedings at Trial*, Vol. II, 315/6, 326/26; AR. Vol. IV, Tab 10, page 43 and 54; Volume III, 27/12, 37/20, 39/26, 41/7, 70/7. AR, Vol. IV, Tab 11, page 60, 64, 66, 68, 71.

22 Testimony of Gregory Henriquez, *Proceedings at Trial*, Volume III, 40/29, 88/16, 89/26-29, 90/10. AR, Vol. IV, Tab 11, page 67, 74, 75, 76.

Appellant. Guzhavin asked the Appellant for money and, according to Henriquez, the Appellant "seemed like he was okay with it" and there was no hostility between anyone.[23]

19. The Appellant disagreed with Henriquez's account. The Appellant testified that after parking and exiting his car, he saw Guzhavin and Henriquez, whom he did not recognize. The Appellant asked Guzhavin why he had come to his home. Guzhavin replied, "I'll shoot you, bro" and put his hand in his pocket. Guzhavin accused the Appellant of disrespecting him when the Appellant refused to give him money when he was in custody. The Appellant explained that he had his own family to provide for and that he would not provide for Guzhavin or pay Guzhavin "a tax".[24]

20. The Appellant testified that he took out his knife. Guzhavin responded by drawing a handgun, pointing it at the Appellant and demanding money. The Appellant put his knife away and agreed to give money to Guzhavin while reiterating that Guzhavin was not welcome at his home. Guzhavin responded that he "ain't no fucking bitch either" and that he would "shoot any motherfucker in broad daylight".[25]

21. The Appellant and Guzhavin exchanged cell phone numbers and Guzhavin agreed to leave with Henriquez while the Appellant gathered the money. The Appellant told Guzhavin to park in the same spot on the street when they returned and that he would meet them there. Guzhavin and Henriquez left.[26] The Appellant did not call police. He explained that he

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23 Testimony of Gregory Henriquez, *Proceedings at Trial*, Volume II, 257/7-259/23; AR, Vol. IV, Tab. 10, page 31-33, Volume III, 103/5-26, 104/11-29, 107/13-25, 108/13. AR, Vol. IV, Tab. 11, page 79, 80, 83, 84.

24 Testimony of Dia Hanan, *Proceedings at Trial*, Vol. V, 362/20-368/5. AR, Vol. V, Tab. 13, page 36-42.

25 Testimony of Dia Hanan, *Proceedings at Trial*, Vol. V, 369/9-373/1. AR, Vol. V, Tab. 13, page 43-47.

26 Testimony of Gregory Henriquez, *Proceedings at Trial*, Volume III, 103/5-26, 104/11-29, 107/13-25, 108/13. AR, Vol. IV, Tab. 11, page 79, 80, 83, 84.

thought $300 would appease Guzhavin, and he was not confident that police could provide meaningful protection from Guzhavin even if they arrested him.[27]

22. The Appellant went inside his home and gathered the money. The Appellant called Guzhavin and told him to meet where Guzhavin and Henriquez had parked earlier. Guzhavin said "okay".[28]

(b) Guzhavin and Henriquez Return to the Appellant's Home

23. The Appellant exited his home from the back porch, walked toward the front and, to his surprise, saw Guzhavin's vehicle pull into the driveway.[29] According to Henriquez they pulled into the Appellant's driveway because the Appellant had told Guzhavin to come to the back.[30] After parking their vehicle on the Appellant's driveway Guzhavin and Henriquez walked toward the Appellant's backyard. From this point the accounts of Henriquez and the Appellant diverge significantly.

(c) The Shooting According to Henriquez

24. Henriquez testified that he was "on his phone" and "just kinda minding [his] own business" as he and Guzhavin approached the Appellant in the backyard. Henriquez did not observe money exchange hands, but assumed the Appellant had given Guzhavin money "because [Guzhavin] seemed a little bit more relieved, and he was thanking him and stuff." Henriquez put his phone in his pocket, looked up and saw the Appellant pointing a handgun

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27 Testimony of Dia Hanan, *Proceedings at Trial*, Vol. V, 382/18-25. AR, Vol. V, Tab. 13, page 56.

28 Testimony of Dia Hanan, *Proceedings at Trial*, Vol. V, 378/26-379/23, 383/12. AR, Vol. V, Tab. 13, page 52-53.

29 Testimony of Dia Hanan, *Proceedings at Trial*, Vol. V, 386/26. AR, Vol. V, Tab. 13, page 60.

30 Testimony of Gregory Henriquez, *Proceedings at Trial*, Volume II, 260/12-22; AR, Vol. IV , Tab.10, page 34. Volume III, 110/13-111/24. AR, Vol. IV, Tab. 11, page 86-87.

at Guzhavin, although he did not see the Appellant draw the gun. Guzhavin's hands were raised mid-chest palms facing out. Henriquez was "stunned" and did not know what was going on. According to Henriquez the Appellant shot Guzhavin a few times. Henriquez turned to run but was shot and fell face-down on the ground. Though he "couldn't really see", he testified that the Appellant "walked close to" him, then "walked back over" to Guzhavin and "shot him some more". Henriquez claimed that after being shot he heard the Appellant yell "Die, motherfucker, die".[31]

25. Henriquez claimed that neither he nor Guzhavin had a handgun with them that day. However, on cross-examination he admitted that he did not know if Guzhavin had a handgun.[32]

(d) The Appellant's Account of the Shooting

26. According to the Appellant, when Guzhavin and Henriquez entered his backyard he gave Guzhavin $300. Guzhavin took the money but balked, said "Three hundred bucks? I can't even buy coffee with that" and demanded the Appellant go inside his home to get more money. The Appellant testified that Henriquez, who was not on his phone, threatened to go inside and watch the Appellant's family while the Appellant gathered the money.[33]

27. At first the Appellant thought the men might be joking, but then he saw Guzhavin pointing a handgun at him. In fear for his life and the safety of his family, the Appellant pretended that someone was walking up his driveway and asked Guzhavin who it was. When

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31 Testimony of Gregory Henriquez, *Proceedings at Trial*, Volume II, 260/14-266/23; AR, Vol. IV , Tab.10, page 34-40. Volume III, 112/5-113/8; 118/25-122/24. AR, Vol. IV, Tab. 11, page 88-89, 94-98.

32 Testimony of Gregory Henriquez, *Proceedings at Trial*, Volume III, 129/30. AR, Vol. IV, Tab. 11, page 105.

33 Testimony of Dia Hanan, *Proceedings at Trial*, Vol. V, 386/10-387/14. AR, Vol. V, Tab. 13, page 60-61.

Guzhavin turned his torso to look back, the Appellant snatched the gun from Guzhavin's hand.[34]

28. A struggle for the handgun ensued. Guzhavin turned back around and grabbed the Appellant's shoulder. Henriquez grabbed the Appellant's arm. The Appellant resisted and yelled out that the men were trying to kill him. As this unfolded, a motion-sensor light that had been activated in the Appellant's backyard suddenly turned off, rendering the backyard completely dark.[35] The Appellant heard a number of shots go off and initially believed Guzhavin and Henriquez were firing at him. The Appellant then realized he had the gun in his hand and fired several times in the dark. A remote audio recording captured the sound of nine gunshots: five in quick succession, followed by two more after a slight pause, followed by another two after another slight pause.[36] Once the shots stopped, the Appellant began running and screaming for help, at which point the light turned back on and the Appellant realized he had shot both men.[37]

29. The Appellant put the handgun on the ground and called 911. The operator told him to conduct CPR on the two men, to which he replied "they tried to kill me. I am not touching them." The Appellant ran to the sidewalk in front of his home and waited for police to arrive. Attending officers described him as "emotional", "upset", "distraught" and "hysterical", and observed him crying and pacing back and forth on the sidewalk. He

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34 Testimony of Dia Hanan, *Proceedings at Trial*, Vol. V, 388/4-390/11. AR, Vol. V, Tab. 13, page 62-64.

35 The Appellant explained that the motion-sensor light turned off during the struggle for the gun and only turned on again after the shooting when he ran for help and was detected by the sensor: Testimony of Dia Hanan, *Proceedings at Trial*, Vol. V, 417/2-18. AR, Vol. V, Tab. 13, page 91.

36 Testimony of Murray Valley, *Proceedings at Trial*, Vol. II, 135/25-140/12; AR, Vol. IV, Tab 10, page 23-28. DVD – Surveillance of 211 Crawford Avenue Apartment, Murray Valley, *Proceedings at Trial,* Exhibit 24. AR, Vol. VI .

37 Testimony of Dia Hanan, *Proceedings at Trial*, Vol. V, 388/17-395/3, 416/26-417/18. AR, Vol. V, Tab. 13, page 62-63, 90-91.

directed the officers to the backyard. After securing the scene, police arrested the Appellant.[38]

(v) The Handgun

30. The handgun the Appellant shot was a 40 caliber semi-automatic Glock pistol. The grip had a mixture of DNA from three individuals but the poor quality of the sample precluded identification. A forensic expert testified that a struggle over the gun between three individuals could explain the poor quality of the sample.[39]

31. Police traced the pistol to an American owner named John Woods. Woods purchased the gun on November 19, 2013 and later sold it at an unlicensed trade centre in Michigan. Woods told police he did not know whom he sold the gun to, and confirmed that he did not know the Appellant. Police did not ask Woods whether he knew Guzhavin or Henriquez.[40]

C. Chronology of the Proceedings

(i) Background

32. On December 24, 2015, the Appellant was charged with first degree murder and attempted murder. On March 10, 2016, police added six firearms charges to the Information. The

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38 Testimony of Dia Hanan, *Proceedings at Trial*, Vol. V, 392/20-393/24; AR, Vol. V, Tab. 13, page 66-67; Testimony of Phong Le, *Proceedings at Trial*, Vol. I, 185/19-22; AR, Vol. IV, Tab. 9, page 5; Testimony of Randall Spratt, *Proceedings at Trial*, Vol. I, 227/6. AR, Vol. IV, Tab. 9, page 8.

39 Testimony of Dia Hanan, *Proceedings at Trial*, Vol. V, 392/29; AR, Vol. V, Tab. 13, page 66; Testimony of Randall Spratt, *Proceedings at Trial*, Vol. I, 236/12; AR, Vol. IV, Tab. 9, page 17. Testimony of Toni Brinck, *Proceedings at Trial*, Vol. IV, 278/24-285/20; AR, Vol. IV, Tab 12, page 119-126. Testimony of Sobia Malik, *Proceedings at Trial*, Vol. IV, 218/22-219/24, 236/19. AR, Vol. IV, Tab. 12, page 112-113, 116.

40 Testimony of Toni Brinck, *Proceedings at Trial*, Vol. IV, 278/24; AR, Vol. IV, Tab. 12, page 119. Agreed Statement of Fact RE Firearm Seized by Officer Mollicone, *Proceedings at Trial,* Exhibit 32. AR, Vol. V, Tab. 17, page 150.

matter was adjourned from time to time to permit defence counsel to review additional disclosure, and due to the Appellant's decision to change counsel.

33. On July 8, 2016, this Court released its decision in *R. v. Jordan*.

34. Between November 9, 2016 and January 16, 2017, the matter was judicially pre-tried and the Appellant was released on bail. On March 29, 2017, a 15-day preliminary inquiry was scheduled to commence in October 2017.

35. In December 2017, following the preliminary inquiry, the Appellant was discharged on first degree murder but committed to stand trial on second degree murder, attempted murder, and various firearm-related charges.

36. On January 5, 2018, the parties agreed in assignment court that the effective *Jordan* ceiling was February 2019, after deducting approximately eight months for defence delay.[41] A six-week trial by judge and jury was scheduled to commence on November 5, 2018 and conclude under the ceiling.

37. The following table sets out the relevant chronology of the prosecution from the date of the charges to the originally scheduled trial date:

Date	**Information**	**Total Delay (Months)**
December 24, 2015	Charges laid	0
December 31, 2015	Defence requests disclosure	0
January 7, 2016	Crown provides 158 items of initial disclosure	0.5
January 21, 2016	Defence indicates willingness to set JPT on next date	1
January 28, 2016	Matter adjourned for defence to obtain and review new disclosure	1
March 10, 2016	Six additional charges laid	2.5
March 26, 2016	Crown provides 367 items of further disclosure (including some duplicates) including witness statements, police will-says and photographs	3
April 11, 2016	Crown provides 26 items of further disclosure	3.5
April 27, 2016	Crown provides further disclosure including phone records and Guzhavin's criminal record	4
May 19, 2016	Crown provides 52 items of further disclosure including Henriquez's statement to police	5
June 9, 2016	Appellant indicates intention to change counsel	5.5
July 8, 2016	Supreme Court of Canada releases *R. v. Jordan*	6.5
August 16, 2016	New counsel noted as counsel of record; matter adjourned for new counsel to review disclosure	8

41 Ruling on Section. 11(b) Application, AR Tab 1, paras. 81-82.

October 19, 2016	JPT set for November 9, 2016	10
November 9, 2016	JPT held and adjourned for continuation	10.5
December 2, 2016	Crown provides 13 items of further disclosure including Guzhavin's autopsy report	11.5
December 15, 2016	Appellant has a bail hearing	12
December 20, 2016	Appellant released on bail; JPT continuation set for January 16, 2017	12
January 16, 2017	Matter adjourned to March 1, 2017 to set preliminary inquiry date	13
March 1, 2017	Defence requests adjournment to set preliminary inquiry date	14.5
March 10, 2017	Crown provides further disclosure including a CFS report on projectiles	14.5
March 29, 2017	Preliminary inquiry set for 15 days beginning October 31, 2017	15
October 31, 2017	Preliminary inquiry begins	22
December 4, 2017	Preliminary inquiry ends	23.5
December 12, 2017	Preliminary inquiry judge releases reasons	23.5
February 1, 2018	Continuing JPT held	25.5
February 16, 2018	6-week jury trial set to commence November 5, 2018; parties agree that the effective *Jordan* ceiling is February 2019	26
November 5, 2018	Original start date of trial	34[42]

38. On November 2, 2018, three days before trial, the Crown notified the trial judge and the Appellant that Henriquez would not testify at trial and that the Crown intended to bring an application to adduce Henriquez's preliminary inquiry evidence for the truth of its contents. On that day the Crown also advised that it intended to rely on new cellphone evidence that had not been disclosed to the Appellant.[43]

39. On November 5, 2018, the Appellant proposed to re-elect to a judge-alone trial in order to preserve the trial dates. A re-election would have provided the parties sufficient time to litigate the Crown's last minute hearsay application and the admissibility of the late cellphone disclosure and complete the trial. The trial judge supported the Appellant's

42 Although the total delay up to the originally scheduled trial date was 34 months, the remaining delay after agreed upon deductions was in the range of 26-27 months.

43 Ruling on Section 11(b) Application, AR Tab 1, paras. 11, 122-123.

proposal.[44] The Crown did not and refused to consent to the re-election, knowing that the earliest available date for a rescheduled jury trial was October 28, 2019.[45] The trial was adjourned to that date and concluded on November 28, 2019.[46]

(ii) The Trial Judge's Section 11(b) Ruling and Charge to the Jury

(a) Section 11(b) Ruling

40. After the November 2018 trial was adjourned, the Appellant applied for a stay of proceedings pursuant to sections 11(b) and 24(1) of the *Charter*. The trial judge dismissed the application.

41. The trial judge calculated 47 months and 12 days of total delay, based on the then-anticipated end of trial.[47] From this he deducted three periods of defence delay:

> *(i)* January 21, 2016 to October 19, 2016: **8 months and 29 days** deducted for defence failure to schedule a JPT and for defence change of counsel.
>
> *(ii)* December 15, 2016 to December 20, 2016: **5 days** deducted for defence failure to set a continuing JPT.
>
> *(iii)* March 1, 2017 to March 29, 2017: **28 days** deducted for defence failure to set a preliminary inquiry.

42. The trial judge deducted these periods to reach a net delay of 37 months and 10 days. He next analyzed whether exceptional circumstances warranted further deductions. He found the Crown's late-breaking disclosure of cell phone evidence did not qualify as an

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44 Ruling on Section 11(b) Application, AR Tab 1, paras. 11, 123.

45 Ruling on Section 11(b) Application, AR Tab 1, paras. 11, 127-130.

46 Ruling on Section 11(b) Application, AR Tab 1, paras. 11, 131. After the trial was adjourned, the trial judge advised the parties that he could preside over a six-week jury trial beginning on June 3, 2019. The Crown was available on this date but defence counsel was not due to a previously scheduled trial for another client. As a result, the trial was rescheduled to the previously agreed upon date of October 28, 2019.

47 Ruling on Section 11(b) Application, AR Tab 1, para. 64. The actual total delay was 47 months and 4 days.

exceptional circumstance because it was within the Crown's control to address earlier.[48] The trial judge found that although Henriquez's refusal to participate in the trial was reasonably unavoidable, the Crown acted unreasonably by refusing to consent to a judge-alone trial and preserve the trial dates.[49] The trial judge thus declined to deduct any of the delay caused by the adjournment, save for the 1 month and 15 day period commencing June 3, 2019 when the Court and the Crown were prepared to proceed to trial but defence counsel was not.[50]

43. Subtracting 1 month and 15 days from the net delay, the trial judge calculated 35 months and 7 days of remaining delay.[51] He found that while the case was not sufficiently complex to justify the excess delay, the delay was justified under the transitional exceptional circumstance. He reached this conclusion by applying the *Morin* framework to the total delay, determining that the delay fell within the *Morin* guidelines, and concluding that the parties reasonably relied on other *Morin* factors such that section 11(b) was not infringed.[52]

(b) Charge to the Jury

44. Two eyewitnesses to the shooting testified at trial. The Crown's witness, Henriquez, testified that the Appellant produced a gun and suddenly began shooting, striking Guzhavin first, then Henriquez, then returning to Guzhavin and shooting him again. The Appellant denied doing this. He testified that after Guzhavin pointed a gun at him demanding money, he snatched the gun out of Guzhavin's hand and began shooting in self-defence.

45. The trial judge told the jury how to apply the burden of proof to this evidence. He explained that the burden of proof always remains on the Crown and that the jury should not approach

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48 Ruling on Section 11(b) Application, AR Tab 1, paras. 138-149.

49 Ruling on Section 11(b) Application, AR Tab 1, paras. 179-190.

50 Ruling on Section 11(b) Application, AR Tab 1, paras. 191-194.

51 Ruling on Section 11(b) Application, AR Tab 1, para. 195. The trial judge appears to have made a counting error in this calculation. The correct remaining delay was 35 months and 25 days.

52 Ruling on Section 11(b) Application, AR Tab 1, paras. 201-203, 216-278.

the case as a contest between the credibility of Henriquez and the Appellant.[53] Yet when instructing the jury on the issues of self-defence and intent, the trial judge instructed:

> The resolution of these issues, I suggest to you, is driven in large part by which version you accept. The two versions you have heard cannot both be true. Of course, you must resolve this decision according to the law as given to you. In making your assessment, you may find it helpful to examine the physical and independent evidence you do accept to see whether each version is consistent or inconsistent with that evidence.[54]

46. The trial judge repeated this instruction at two other points in his charge, when relating the reasonableness element of self-defence to the murder and attempted murder counts. In relation to the murder count, he told the jury that the "reasonableness of the shooting of Mr. Guzhavin by Mr. Hanan is largely dependent on which of the two conflicting versions you accept." In relation to the attempted murder count, the trial judge said: "Was it reasonable to shoot Mr. Henriquez? The answer again is largely dependent upon which version is accepted."[55]

(iii) The Court of Appeal's Decision

47. The Appellant's appeal from conviction and sentence was heard on September 7, 2021. In reasons released on March 21, 2022, a majority of the Court of Appeal for Ontario dismissed the appeal.

(a) Ontario Court of Appeal, Tulloch and van Rensburg JJ.A.

48. Justice van Rensburg, writing for the majority of the Court of Appeal, upheld the trial judge's delay calculation and his application of the transitional exceptional circumstance to justify the delay. According to Justice van Rensburg, the trial judge correctly conducted an exhaustive assessment of the total delay under the *Morin* framework and reasonably

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53 Charge to the Jury, AR Tab 2, 12/3-17. The trial judge repeated this point later in his charge: Charge to the Jury, AR Tab 2, 96/13-24.

54 Charge to the Jury, AR Tab 2, 71/13-30, emphasis added.

55 Charge to the Jury, AR Tab 2, 110/23-111/3.

concluded that the parties lacked sufficient time to adapt to *Jordan*.[56] In addition, Justice van Rensburg rejected the Appellant's submission that the trial judge framed the case as a credibility contest and relieved the Crown of its burden to prove guilt beyond a reasonable doubt in his jury charge. Emphasizing the failure of defence counsel to object to the charge, Justice van Rensburg held that the charge as a whole properly related the burden of proof to the evidence and that the jury would not have been misled by it.[57]

(b) Ontario Court of Appeal, Nordheimer J.A.

49. Justice Nordheimer dissented on both issues. He held that section 11(b) was infringed because the remaining delay exceeded the *Jordan* ceiling and could not be justified under the transitional exceptional circumstance, as the parties had more than enough time following the release of *Jordan* to adapt to its demands.[58] Justice Nordheimer also held that the trial judge misdirected the jury on the burden of proof, by failing to explain that the Appellant had to be acquitted if the jury was unable to decide which version of events to believe or if they disagreed on that point.[59] In the result, Justice Nordheimer would have allowed the appeal and entered a stay of proceedings or, alternatively, ordered a new trial.

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56 Reasons of the Court of Appeal, AR Tab 4, para. 80.

57 Reasons of the Court of Appeal, AR Tab 4, paras. 96-113.

58 Reasons of the Court of Appeal, AR Tab 4, para. 148, per Nordheimer J.A. in dissent.

59 Reasons of the Court of Appeal, AR Tab 4, para. 158, per Nordheimer J.A. in dissent.

PART II: STATEMENT OF ISSUES

50. The Appellant raises the following two issues on this appeal:

> 1. Did the trial judge err by concluding that the transitional exceptional circumstance justified the presumptively unreasonable delay in the Appellant's trial?
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> 2. Did the trial judge misdirect the jury with respect to the presumption of innocence and burden of proof?

PART III: STATEMENT OF ARGUMENT

1. THE SECTION 11(B) ERROR

A. Governing Principles

51. In *R. v. Jordan,* this Court reformulated the section 11(b) framework. It set a presumptive ceiling of 30 months of delay for cases proceeding to trial in the Superior Court.[60]

52. The first step in the analysis of whether delay is unreasonable under the new framework is to calculate the total delay from the charge to the end of trial, subtracting any defence delay to arrive at the "net delay". If the net delay exceeds the ceiling, the delay is unreasonable and the proceedings must be stayed unless the Crown can establish exceptional circumstances. Exceptional circumstances are circumstances outside the Crown's control in the sense that (i) they are reasonably unforeseen or reasonably unavoidable and (ii) the Crown cannot reasonably remedy the delay emanating from those circumstances once they arise.[61]

53. Exceptional circumstances generally fall under two categories – discrete events and particularly complex cases. Delay attributable to discrete events is deducted from the net delay to arrive at the "remaining delay". If the remaining delay exceeds 30 months the

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60 *Jordan, supra,* para. 46..

61 *Jordan, supra,* paras. 46-48; *R. v. Coulter*, 2016 ONCA 704, para. 34-41.

Court will stay the proceedings unless the Crown can demonstrate that the case was particularly complex.[62]

54. For cases in which the charges were laid prior to the release of *Jordan* and the remaining delay exceeds 30 months, a transitional exceptional circumstance may apply to justify the delay. The transitional exceptional circumstance is applicable if the Crown can show that the parties reasonably relied on the law as it existed pre-*Jordan* and lacked sufficient time to adapt to the new framework after *Jordan's* release.[63]

B. Standard of Review

55. The standard of review on appeal from a section 11(b) decision is well established. While deference is owed to a trial judge's underlying findings of fact absent palpable and overriding error, a correctness standard applies to characterizations of periods of delay (as, for example, defence delay or exceptional circumstances) and to the ultimate decision concerning whether there has been unreasonable delay.[64]

C. The Trial Judge Erred in Concluding that the Delay was Justified

56. The Appellant accepts the trial judge's delay calculation and his finding on case complexity but submits that he erred in concluding that the transitional exceptional circumstance justified the delay in the case, and that the Court of Appeal erred in upholding his conclusion.

57. The trial judge calculated 35 months and 7 days of remaining delay, after assessing deductions for defence delay and exceptional circumstances. He found that case complexity could not justify the excess delay and that the delay was presumptively unreasonable. The trial judge then applied the transitional exceptional circumstance and

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62 *Jordan, supra,* paras. 69-80.

63 *Jordan, supra,* para. 96; *Cody, supra,* para. 71.

64 *R. v. Pauls*, 2020 ONCA 220, para. 40, appeal to SCC dismissed, 2021 SCC 2; *R. v. Jurkus*, 2018 ONCA 489, paras. 25-26.

concluded that the delay was justified based on the parties' reasonable reliance on the previous state of the law. This was an error.

(i) The Development of the Transitional Exceptional Circumstance

58. *Jordan* fundamentally altered the section 11(b) framework. It also applied immediately to all cases currently in the system.[65] The transitional exceptional circumstance was devised to ensure that *Jordan*'s immediate application did not trigger a wave of stayed charges as had occurred in the aftermath of *R. v. Askov*[66] and thereby undermine the administration of justice.[67] The transitional exception would achieve this end by ensuring that the parties' delay-causing behavior was judged fairly and not by a standard of which they had no notice.[68]

59. In any case where charges were laid prior to the release of *Jordan,* the transitional exception was to be the final step in the section 11(b) analysis if the remaining delay exceeded the presumptive ceiling and could not be justified by case complexity.[69] The transitional exception would apply in this circumstance only if the Crown could establish that the time the case had taken was justified based on the parties' reasonable reliance on the law as it previously existed.[70]

60. In *Jordan* and its companion case *Williamson*, this Court identified six factors to consider when applying the transitional exceptional circumstance. The factors, derived from the previous *Morin* framework, are:

(1) case complexity;

(2) the period of delay in excess of the *Morin* guidelines;

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65 *Jordan, supra,* para. 96 .

66 *R. v. Askov,* [1990] 2 S.C.R. 1199.

67 *Jordan, supra,* paras. 92, 94, 98.

68 *Jordan, supra,* para. 96; *Cody, supra*, paras. 68-69.

69 *Cody, supra,* para. 67.

70 *Jordan, supra*, para. 96.

(3) the Crown's response to any institutional delay;

(4) the defence efforts to move the case along;

(5) prejudice to the accused; and

(6) the seriousness of the offence.[71]

61. Consideration of these factors requires a "contextual assessment", one that is "sensitive to the manner in which the previous framework was applied, and the fact that the parties' behaviour cannot be judged strictly, against a standard of which they had no notice."[72]

62. Notably, because the delay at issue in *Jordan* and *Williamson* accrued entirely before the release of *Jordan*, this Court was not required to answer the question of whether delay that accrued after *Jordan's* release should be assessed differently. This Court nevertheless provided the outline of an answer in *Jordan*, anticipating that the question would arise in future cases: "Of course, if the parties have had time following the release of this decision to correct their behaviour, and the system has had some time to adapt, the trial judge should take this into account."[73]

63. The *Jordan* Court did not expand on this answer. For a period of time it remained unclear how exactly trial judges should account for 'adaptation time' when applying the transitional exception to post-*Jordan* delay. This Court provided clarity one year later in *Cody*. The Court in *Cody* drew a bright-line distinction between pre-*Jordan* and post-*Jordan* portions of delay and directed trial judges to assess each portion differently. For pre-*Jordan* delay, "the focus should be on reliance on factors that were relevant under the *Morin* framework, including the seriousness of the offence and prejudice."[74] For post-*Jordan* delay, "the focus should instead be on the extent to which the parties and the courts had sufficient time to adapt."[75]

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71 *Jordan, supra, para.* 96; *R. v. Williamson*, 2016 SCC 28, paras. 26-30 ["*Williamson*"]; *R. v. Gopie*, 2017 ONCA 728, para. 178; *R. v. Zahor,* 2022 ONCA 449, para. 116.

72 *Jordan, supra,* para. 96.

73 *Jordan, supra,* para. 96.

74 *Cody, supra,* para. 71.

75 *Cody, supra,* para. 71, emphasis added.

64. This Court's use of the word "instead" in the final sentence of paragraph 71 of *Cody* is telling. The Court is saying that a trial judge should *not* focus on the seriousness of the offence, prejudice to the accused or other factors that were relevant under the *Morin* framework when assessing post-*Jordan* delay under the transitional exception. Focusing on these factors is inappropriate because it amounts to judging the parties' behaviour by an expired legal standard which no longer applies. *Instead*, a trial judge should focus on something different for post-*Jordan* delay, namely 'adaptation time': "the extent to which the parties and the courts had sufficient time to adapt" to *Jordan*'s requirements and avoid unreasonable delay. This approach ensures that *Jordan* is applied immediately yet flexibly to cases already in the system, so as to effect change while accounting for the reality that change takes time.[76]

65. *Cody*'s directive to distinctly evaluate pre-*Jordan* and post-*Jordan* delay honours the purpose of the transitional exception. It ensures that the parties' delay-causing behaviour is judged fairly, according to the legal standard which they understood applied to them at the time. The directive also makes sense in principle. For example, in a case where the entire delay precedes *Jordan*, the transitional exception ought to hinge on the reasonableness of the parties' reliance on *Morin*, because the possibility of adapting to *Jordan* simply would not have arisen. On the other hand, in a case where all but one day of delay postdates *Jordan*, the transitional exception should turn entirely on adaptation time, because the parties would have known from the virtual outset that *Morin* did not apply. Between these two extremes, the transitional exception requires judges to determine, on the basis of a contextual and distinct assessment of pre-*Jordan* and post-*Jordan* delay, whether delay that is otherwise unreasonable can be justified.

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76 *Jordan, supra,* para. 97.

(ii) The Trial Judge's Errors

66. Just under one month of the 35 months of remaining delay in this case accrued pre-*Jordan*.[77] *Cody* required the trial judge to assess the one month of pre-*Jordan* delay against the factors relevant under the *Morin* framework, and to assess the other 34 months against the ability of the parties and the courts to adapt to *Jordan*, to determine if the 35 months of delay could be justified.[78]

67. The trial judge did not do this. He applied the *Morin* framework to the total delay of 47 months and concluded that the delay was justified based on the parties' reasonable reliance on the prior law. This was an error in two respects. First, the trial judge conducted a transitional analysis of the total delay of 47 months rather than the remaining delay of 35 months.[79] Second, the trial judge collapsed the pre- and post-*Jordan* delay together and assessed it entirely under the *Morin* framework. The trial judge departed from binding precedent by taking this approach and effectively suspended the application of the *Jordan* framework to this case.[80] His decision is incorrect and not entitled to deference on appeal.

68. This Court's decision in *R. v. K.J.M.*[81] nods toward the correct disposition of the Appellant's section 11(b) application. In *K.J.M.,* this Court was asked to enter a below-ceiling stay in a youth matter. Justice Moldaver, writing for the majority, declined to do so because the case did not take markedly longer than it should have, given that 80% of the

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77 This was the period between December 24, 2015 (the date charges were laid) and January 21, 2016 (the date trial counsel indicated her willingness to set a JPT). The trial judge deducted the delay between January 21, 2016 and July 8, 2016 (the date of *Jordan*'s release) as defence delay.

78 *Cody, supra,* paras. 72.

79 *Cody, supra,* paras. 72, 74. In *Cody,* the total delay was 60.5 months and the remaining delay (which the Court called 'net delay') was 36.5 months. In applying the transitional exceptional circumstance, the Court stated at para. 72: "The Crown must therefore show that the **36.5 months of net delay** was justified in light of its reliance on the previous state of the law under *Morin*" (emphasis added).

80 *R. v. Kirkpatrick*, 2022 SCC 33, para. 178 ["*Kirkpatrick*"].

81 *R. v. K.J.M.,* 2019 SCC 55 ["*K.J.M.*"].

delay accrued prior to *Jordan*.[82] Echoing *Cody*, Justice Moldaver explained that a trial judge applying the under-the-ceiling test for unreasonable delay in a transitional case "must take into account how much of the delay pre-dated *Jordan*, as well as how that delay would have been treated under the *pre-Jordan* jurisprudence. These considerations shape what can reasonably be expected in terms of timeliness in a transitional case."[83] Justice Moldaver went on to add: "Had 80 percent of the trial taken place after *Jordan*, rather than before it, I would have been inclined to grant a stay."[84]

69. Over **97%** of the remaining delay in the Appellant's case accrued after *Jordan.* Had the trial judge followed *Cody* and considered *K.J.M.*, he would have found that the delay could not be justified under the transitional exception because the parties and the courts in Windsor clearly had sufficient time to adapt to *Jordan*.[85] This follows from the fact that the Appellant's trial was initially scheduled to conclude, by all accounts, **two months under the *Jordan* ceiling**.[86] Put differently, the courts, the Crown and the Appellant demonstrated their ability to meet the demands of *Jordan* by securing a trial on the merits in a reasonable time.

70. When circumstances incident to the Crown's case threatened to delay the trial, the Appellant offered to re-elect to a judge-alone trial to preserve the scheduled dates. This was in keeping with *Jordan*'s admonition that "all participants in the justice system must work in concert to achieve speedier trials."[87] The Crown ignored that admonition and

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82 *K.J.M.*, *supra*, para. 112.

83 *K.J.M.*, *supra,* para. 111.

84 *K.J.M.*, *supra*, para. 119.

85 In fairness, *K.J.M.* was released after the trial judge's section 11(b) ruling.

86 Ruling on Section 11(b) Application, AR Tab 1, para. 120: "After being in the OCJ for almost two full years, at the first Superior Court appearance on January 5, 2018, the parties agreed with 8 months of defence delay which 'extended' the *Jordan* ceiling to February 24, 2019. The court relied on this agreement in setting the November 5, 2018 commencement date for a six week jury trial with a challenge for cause. **The date set clearly was within the *Jordan* framework**" (emphasis added).

87 *Jordan, supra,* para. 116.

refused to consent to re-election. It made this decision more than two years into the *Jordan* era, fixed with the knowledge that the existing delay was already close to the *Jordan* ceiling and that its refusal to consent would delay the trial *by another year*.[88]

71. While it was open to the Crown to exercise its discretion this way, this Court warned in *Jordan* that "Crown counsel must be alive to the fact that any delay resulting from their prosecutorial discretion must conform to the accused's section 11(b) right".[89] The Crown was not alive to this fact in this case. The Crown exercised its discretion unreasonably, in contravention of the Appellant's section 11(b) right, abrogating not only his interest but the broader interests of victims, witnesses and the public in a reasonably efficient trial on the freshest possible evidence.[90]

72. In *R. v. Gordon*,[91] the Court of Appeal for Ontario held that delay resulting from a Crown's refusal to consent to re-election may have been reasonable under the *Morin* framework, but would likely be unreasonable under *Jordan.* The refusal to consent in *Gordon* had occurred prior to *Jordan*, in a context where the delay up to that point was well within the *Morin* guidelines. In applying the transitional exceptional circumstance to justify the delay, Doherty J.A. cautioned: "The Crown's decision to keep the jury and consequently delay the trial, while probably unreasonable in the context of the "hard cap" approach in *Jordan*, was reasonable in the context of the *Morin* analysis as applied to the chronology of this case."[92]

73. The Appellant's case is the flipside of *Gordon*. Here the Crown refused consent while operating under the *Jordan* framework, knowing its decision would delay the trial by another year. As Justice Doherty indicated, the transitional exception was not designed to bandage the unconstitutional fallout from this kind of exercise of Crown discretion in the

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88 Ruling on Section 11(b) Application, AR Tab 1, paras. 120, 127-130, 181.

89 *Jordan, supra,* para. 79, emphasis added; *R. v. Thanabalasingham*, 2020 SCC 18, para. 5.

90 *Jordan, supra,* paras. 19-28; *Williamson, supra,* paras. 36-38.

91 *R. v. Gordon*, 2017 ONCA 436 [*"Gordon*"].

92 *Gordon, supra*, para. 27, emphasis added.

Jordan era.[93] The Crown's decision to proceed as it did in the Appellant's case was both unreasonable and indicative of a lingering culture of complacency toward delay that should not be condoned by this Court.

(iii) The Court of Appeal's Errors

74. The majority of the Court of Appeal committed two errors in upholding the trial judge's section 11(b) decision. Its first error was to endorse the trial judge's use of the *Morin* factors to assess the total delay of 47 months. Conducting "an exhaustive assessment of the entire delay under the *Morin* framework" was, according to the majority, "required as part of the transitional exceptional circumstance analysis."[94] This is incorrect. *Cody* directed precisely the opposite: a trial judge is required to consider adaptation time – *not* the *Morin* framework – when assessing post-*Jordan* delay in a transitional case, because the parties could not have reasonably relied on *Morin* for that portion of delay.

75. By affirming the trial judge's error against binding authority, the majority's decision, like that of the trial judge, falls afoul of vertical *stare decisis*.[95] Further, as an appellate decision that is binding on trial courts, the majority's decision injects confusion and uncertainty into an area of law that this Court unequivocally settled in *Cody*, which threatens to further erode *Cody*'s authority. Intervention by this Court is necessary to fix the problem.

76. The majority of the Court of Appeal also erred by attributing a finding to the trial judge that he did not make. According to the majority, the trial judge "found that the parties had not had sufficient time to adapt to the new framework."[96] Yet that finding does not appear in the trial judge's reasons. The trial judge's only comment on the issue of adaptation appears in the penultimate paragraph of his transitional analysis:

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93 *R. v. Picard,* 2017 ONCA 692, para. 130: "Under *Jordan*, where accumulated delay is significant, whatever the cause, the Crown, defence and the court are to work toward reaching and completing the trial in as short a time as reasonably possible".

94 Reasons of the Court of Appeal for Ontario, AR Tab 4, para. 69, emphasis added.

95 *Kirkpatrick, supra*, para. 178.

96 Reasons of the Court of Appeal for Ontario, AR Tab 4, paras. 69, 73, 80.

> There is no question here that Crown counsel was aware of the *Jordan* decision within weeks of its release. Crown counsel referred to *Jordan* by name in the OCJ when pressing for quicker dates. But awareness of the presumptive ceiling and the need for speed are the easiest lessons of *Jordan*. *Jordan* introduced a totally new framework with new concepts and new definitions: defence delay, discrete exceptional circumstances, particularly complex cases, and transitional exceptional circumstances. The precise meaning of these new concepts continues to be refined in court cases more than two years after the release of *Jordan*. It is the full understanding of the lessons of *Jordan* that Crown counsel and the courts lagged in their adjustment in this case. This is most notable in the OCJ where the case stalled, quite unnecessarily in most instances, without understanding. No longer can the courts in the OCJ unquestioningly go along with defence requests for delay before setting a JPT. The JPT is intended to advance cases, including as the forum to identify and resolve disclosure issues. The JPT should not evolve into a mechanism to retard cases. And, perhaps unfortunately, no longer can the Crown and the courts accommodate the defence in extending preliminary hearings for defence discovery without holding the defence responsible for that extra time. These too are lessons of *Jordan* to which we must adapt.[97]

77. In this passage, the trial judge criticized the Crown and the courts for "lagging" in their adjustment to *Jordan*. He identified several instances of lag, including in the OCJ during the intake phase, the JPT, and the preliminary inquiry. Critically, the trial judge did not find that the Crown or courts lacked the time to adjust to *Jordan*, only that they failed to adjust to *Jordan* in practice. The transitional exception was not designed to shore up such failures. As Justice Nordheimer put it in his dissenting reasons, "If Crown counsel and the courts 'lagged in their adjustment' to the requirements of *Jordan*, that simply reflects a continuation of the 'culture of complacency' that was criticized in *Jordan*. It does not provide an excuse for the delay."[98]

78. Alternatively, if the trial judge found that the parties lacked sufficient time to adapt to *Jordan,* his finding would reflect palpable and overriding error and would not be entitled to deference on appeal.[99] The record confirms that the parties were aware of *Jordan* upon its release and, more importantly, aware of the applicable *Jordan* ceiling when scheduling

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97 Ruling on Section 11(b) Application, AR Tab 1, para. 277, emphasis added.

98 Reasons of the Court of Appeal, AR Tab 4, para. 142, per Nordheimer J.A. in dissent.

99 *R. v. Jurkus*, 2018 ONCA 489, para. 25.

trial dates.[100] They scheduled a trial within the ceiling.[101] The trial would have concluded as scheduled but for the Crown's refusal to consent to re-election.[102] These facts compel a finding that the parties had sufficient time to adapt to *Jordan*, because they prove that compliance with the new framework was achievable in the concrete reality of this case. The transitional exception cannot justify unreasonable delay in such circumstances. To the extent the trial judge found otherwise, he erred, as did the majority of the Court of Appeal in upholding that finding.

(iv) Conclusion on Section 11(b)

79. A contextual assessment of all the circumstances makes clear that the transitional exceptional circumstance could not justify the remaining delay in this case. The Crown had sufficient time to adapt to *Jordan* but exercised its discretion unreasonably when it refused to consent to re-election, causing the delay to exceed the *Jordan* ceiling. The delay was unreasonable and infringed section 11(b) of the *Charter*. A stay should be entered.

2. THE MISDIRECTED JURY

A. Overview

80. The fundamental issue at trial was whether the Appellant shot Guzhavin and Henriquez in self-defence. To resolve this issue fairly, the jury had to properly apply the burden of proof to Henriquez and the Appellant's conflicting evidence on the circumstances surrounding the shooting.

81. The trial judge misdirected the jury with regard to this evidence. He told the jury its decision on the ultimate issues would depend on which version of events it accepted. In doing so the trial judge framed the case as a credibility contest, shifting the burden of proof to the Appellant and undermining the presumption of innocence. The error renders the verdict unsafe and necessitates a new trial.

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100 Ruling on Section 11(b) Application, AR Tab 1, paras. 9, 11.

101 Ruling on Section 11(b) Application, AR Tab 1, paras. 81-82, 181.

102 Ruling on Section 11(b) Application, AR Tab 1, paras. 186, 190.

B. Governing Principles

82. A jury should not be left with the impression that they may decide a case based on whether they accept the accused's evidence or the Crown's evidence. As this Court explained in *R. v. W.(D.)*, the verdict must be determined by whether, based on the whole of the evidence, the jury is left with a reasonable doubt about the accused's guilt.[103] Where a trial judge misdirects a jury on this point, a new trial is required unless the charge, when read as a whole, makes clear that the jury could not have been under any misapprehension as to the correct burden of proof to apply.[104]

C. The Trial Judge Misdirected the Jury on the Burden of Proof

83. Two eyewitnesses to the shooting – Crown witness Henriquez and the Appellant – testified at trial. They provided conflicting accounts of what occurred. Henriquez testified that he looked up from his phone to see the Appellant pointing a gun at Guzhavin, shooting Guzhavin, then shooting Henriquez before returning to Guzhavin and shooting him again. The Appellant denied doing this. He testified that Guzhavin pointed a gun at him and demanded money. Fearing for his life, the Appellant distracted Guzhavin, snatched the gun out of his hand, and began shooting in self-defence.

(i) The Trial Judge's Errors

84. With regard to the conflicting eyewitness testimony, the trial judge instructed the jury correctly in the early, "boilerplate" portion of his charge. He told the jury the burden of proof always remains on the Crown. He explained that when assessing conflicting versions of events, the jury must "not approach it asking which version do you prefer" and must not approach the case as a "contest between dueling versions".[105] Unfortunately, much later in

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103 *R. v. W.(D.),* [1991] 1 S.C.R. 742, paras. 27-28 ["*W.(D.)*"]; *R. v. C.L.Y.*, 2008 SCC 2, para. 8.

104 *W.(D.), supra,* para. 29; *R. v. Darnley*, 2020 ONCA 179, para. 38.

105 Charge to the Jury, AR Tab 2, 12/3-17. The trial judge repeated this point later in his charge: Charge to the Jury, AR Tab 2, 96/13-24.

the charge when introducing the issues of self-defence and intent, the trial judge said the opposite:

> I suggest to you that the major issue for you to decide is whether Dia Hanan was acting in lawful self defence when he shot Alekesji Guzhavin and Gregory Henriquez. Intention also is an issue...
>
> The resolution of these issues, I suggest to you, is driven in large part by which version you accept. The two versions you have heard cannot both be true. Of course, you must resolve this decision according to the law as given to you. In making your assessment, you may find it helpful to examine the physical and independent evidence you do accept to see whether each version is consistent or inconsistent with that evidence.[106]

85. This part of the charge is ridden with problems. The first is the trial judge's observation that the two versions of events "cannot both be true". While logically correct, the Court of Appeal for Ontario in *R. v. T.A.* described this statement as "the antithesis of a *W.(D.)* analysis, which requires the trier of fact to consider whether, even if she does not accept the defence evidence, she is still left with a reasonable doubt by it."[107] The second problem is the trial judge's suggestion that the jury's task was to "accept" one of the two versions they heard. This was not the jury's task – the jury was not supposed to pick between different versions of events, because doing so would reduce the criminal trial to a credibility contest.[108] The jury's task was strictly to determine whether the Crown had met its burden of proving the elements of each offence beyond a reasonable doubt.[109] The third problem is that the trial judge did not explain to the jury that if it could not decide which version of events to believe, or if it rejected both versions, it would necessarily be left with

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106 Charge to the Jury, AR Tab 2, 71/13-30, emphasis added.

107 *R. v. T.A.*, 2020 ONCA 783, para. 27 ["*T.A.*"]; Reasons of the Court of Appeal, AR Tab 4, para. 165, per Nordheimer J.A. in dissent.

108 *W.(D.), supra*, para. 26.

109 *T.A., supra,* para. 28.

a reasonable doubt requiring an acquittal.[110] Depriving the jury of this understanding increased the risk that they would approach the case as a credibility contest.

86. This was not an isolated misdirection. The trial judge compounded the error at two critical points in his charge, when relating the reasonableness element of self-defence to the murder and attempted murder counts. He told the jury:

> The reasonableness of the shooting of Mr. Guzhavin by Mr. Hanan is largely dependent on which of the two conflicting versions you accept. According to Mr. Hanan, Mr. Guzhavin, with the assistance of Mr. Henriquez, was extorting money from him at gunpoint and threatening to involve Mr. Hanan's family. According to Mr. Henriquez, although he did not know Mr. Hanan at all and did not know Mr. Guzhavin well, nothing was violent or threatening at the scene until he saw Mr. Hanan with a gun shooting Mr. Guzhavin.
>
> You may conclude that shooting Mr. Guzhavin under Mr. Hanan's version is reasonable but shooting Mr. Guzhavin under Mr. Henriquez's version is unreasonable. Again you may find that the resolution of this issue hinges on which version is accepted.[111]
>
> […]
>
> Was it reasonable to shoot Mr. Henriquez? The answer again is largely dependent upon which version is accepted. If you accept the version of Mr. Hanan that Mr. Henriquez was shot during or immediately after the struggle over the gun, then you approach your assessment from that point of view to determine whether the shooting of Mr. Henriquez was reasonable under all the circumstances. If, on the other hand, you accept the evidence of Mr. Henriquez that he was shot in the back while trying to run away, then you may consider the reasonableness of such conduct.[112]

87. The trial judge again framed the case as an either/or contest between dueling versions. His instruction shepherded the jury toward accepting either the Appellant's version or Henriquez's version, excluding a "third alternative" where neither version was accepted.[113] This wrongly suggested that the jury could only acquit if the Appellant's story was

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110 *R. v. Austin* (2006), 214 C.C.C. (3d) 38 (Ont. C.A.), para. 20 ["*Austin*"]; Reasons of the Court of Appeal, AR Tab 4, para. 158, per Nordheimer J.A. in dissent.

111 Charge to the Jury, AR Tab 2, 89/31-90/16, emphasis added.

112 Charge to the Jury, AR Tab 2, 110/23-111/3, emphasis added.

113 *R. v. S. (W.D.)*, [1994] 3 S.C.R. 521, paras. 25, 27-28 ["*S.(W.D.)*"].

accepted. It thereby undermined the presumption of innocence and unfairly shifted the burden to the Appellant to prove his innocence.[114] The instruction gave rise to the very dangers that *W.(D.)* sought to avoid.[115]

88. In *R. v. Austin,* the Ontario Court of Appeal ordered a new trial in a sexual assault case where the jury was improperly instructed about what to do if they could not accept either of two versions of an event. The complainant and the accused in *Austin* had testified to opposing accounts of their sexual encounter. During deliberations, the jury asked a question about how reasonable doubt related to the assessment of witness credibility. The trial judge gave an answer that invited the jury to decide the case based on whom they believed. Justice Doherty explained why the trial judge's answer was wrong:

> Recognition of the possibility that a jury may not be able to come to a definitive conclusion with respect to the credibility of competing versions of the relevant events is integral to a proper application of the reasonable doubt standard. This potential middle ground is especially important in cases like this one where the accused testifies and presents a version of events that is diametrically opposed to that given by the Crown witnesses. The jury must understand that if it cannot decide whose story to believe, it must acquit.[116]

89. The trial judge in the Appellant's case deprived the jury of this understanding, rendering the verdict unsafe and the trial unfair. The risk of an unsafe verdict was heightened after the jury requested and received hard copies of the entire jury charge, revealing that they were grappling with a problem and required assistance.[117] If the jury had any reason to review the above parts of the charge, the error would have been reinforced. It is impossible to conclude in these circumstances that the jury properly understood and applied the burden of proof.[118]

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114 *R. v. A.P.*, 2013 ONCA 344, para. 41; *R. v. J.W.*, 2014 ONCA 322, paras. 27-29.

115 *R. v. Smith,* 2020 ONCA 782, para. 36.

116 *Austin, supra*, para. 20, emphasis added.

117 *Proceedings at Trial,* Vol. VII, 175/19-26, 182/17-26; *W.(D.), supra,* para. 26; *S.(W.D.)*, *supra,* paras. 13-20. AR Vol. V, page

118 *W.(D.), supra,* para. 29.

(ii) The Court of Appeal's Errors

90. The Court of Appeal majority provided four reasons for dismissing the Appellant's appeal on this ground:

1. the impugned parts of the charge were preceded and followed by appropriate instructions about how the jury should assess the two versions of events;

2. the trial judge did not direct the jury to accept the entire version of events given by Henriquez or the Appellant, but instead reminded them that they could accept some, all, or none of the evidence of either;

3. unlike in *R. v. Austin,* the trial judge did not lead the jury to believe that its task was to determine which of the two versions was true;

4. the Appellant's trial counsel did not object to the charge.[119]

91. Nowhere in its reasons did the majority expressly endorse the impugned passages as correct. This is telling, as it signals the majority's recognition that the passages were at the very least problematic if not erroneous. The majority instead attempted to downplay the significance of the errors, by drawing attention to other legally correct passages in the charge and speculating that the jury would have correctly understood the burden of proof because of them. In doing so the majority avoided the fact that those other passages appeared very early in the charge, nearly **57 pages** before the first erroneous passage, and were repeated only once thereafter.[120] This rendered the majority's speculation about the jury's understanding unreasonable, as Nordheimer J.A. explained in his dissent:

> […] it is risky to assume that what a jury is told early on in the instructions will necessarily resonate with them respecting matters that arise later in the instructions. The fact that basic concepts are contained in what I respectfully characterize as the boilerplate portion of the instructions will not have the same impact as when the trial judge turns to the elements of the offence and any defences that arise on the evidence.
>
> In that regard, the problematic portions of the instructions are included at the very point that the jury is being instructed on self-defence, which was the key defence in this case. It is at the very point when the jury is focused

119 Reasons of the Court of Appeal for Ontario, AR Tab 4, paras. 97-112.

120 Charge to the Jury, AR Tab 2, 12/3-17, 96/13-24.

> on what they are being told are the key issues that they have to decide regarding the question of guilt that the erroneous instructions are given. Suggesting that the jury will, at that point, harken back to something they were told much earlier, as somehow limiting (if not contradicting) what the judge is then saying, is neither realistic nor of much comfort.[121]

92. The space between the correct and incorrect passages in the charge made it unlikely that the jury averted to the former, ignored the latter and thereby properly applied the burden of proof to the ultimate issues in the case. It is in any event too risky to assume they did. As this Court said in *W.(D.)*, errors relating to the burden of proof are fundamental errors that necessitate a new trial unless "the charge, when read as a whole, makes it clear that the jury could not have been under any misapprehension as to the correct burden and standard of proof to apply".[122] The majority erred in concluding that this high bar was met in this case.

93. The majority further erred by misunderstanding *R. v. Austin*'s relevance to the issues in this case. The majority held that *Austin* was distinguishable because the trial judge in that case had directed the jury to determine which of two versions of an event it believed to be true, whereas in this case the trial judge made no such express direction. Yet the real import of *Austin* lay elsewhere, in Doherty J.A.'s holding that, when a jury is confronted with "diametrically opposed" versions of an event, the trial judge must instruct the jury "that if it cannot decide whose story to believe, it must acquit."[123] The trial judge failed to do so in this case, and therefore failed to ensure the jury properly applied the burden of proof. *Austin* supports the conclusion that a new trial is required.

94. Finally, the majority improperly relied on defence counsel's failure to object to reduce the significance of the error. This was improper because the error related to the burden of proof and presumption of innocence, two bedrock criminal law principles that are integral to trial fairness. The trial judge was required to properly explain these principles to the jury

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121 Reasons of the Court of Appeal for Ontario, AR Tab 4, paras. 163-164, per Nordheimer J.A. in dissent, emphasis added.

122 *W.(D.), supra,* para. 29; *R. v. Mann*, 2021 ONCA 103, paras. 18-19.

123 *Austin, supra,* para. 20.

notwithstanding counsel's failure to object.[124] Moreover, defence counsel's failure to object did not reflect a tactical choice in this case, as the Appellant "had nothing to gain by the misdirection, and everything to lose".[125] The failure to object was therefore "immaterial".[126]

(iii) Conclusion on the Misdirection

95. The trial judge failed to equip the jury with a proper understanding of the burden of proof. His errors compromised the presumption of innocence, trial fairness and the integrity of the verdict. A new trial is required.

PART IV: SUBMISSIONS ON COSTS

96. The Appellant does not seek costs and makes no submissions as to costs.

PART V: ORDER REQUESTED

97. The Appellant respectfully requests that this Court allow the appeal, set aside the Appellant's convictions and:

(a) enter a stay of proceedings pursuant to section 24(1) of the *Charter* on the basis that his section 11(b) *Charter* right was infringed;

(b) in the alternative, order a new trial.

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124 *R. v. Jacquard*, [1997] 1 S.C.R. 314, para. 37; *R. v. Poulin*, 2017 ONCA 175, para. 50.

125 *R. v. D.M.*, 2022 ONCA 429, para. 65; *R. v. Darnley*, 2020 ONCA 179, para. 38.

126 *R. v. McFarlane*, 2020 ONCA 548, para. 91.

PART VI: SUBMISSIONS ON CASE SENSITIVITY

98. There is no sealing or confidentiality order, publication ban, classification of information in the file that is confidential under legislation or restriction on public access to information in the file that could have an impact on the Court's reasons in the appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 31st day of August, 2022.

Saman Wickramasinghe
URSEL PHILLIPS FELLOWS HOPKINSON LLP

Parmbir Gill
URSEL PHILLIPS FELLOWS HOPKINSON LLP

Counsel for the Appellant

PART VII: TABLE OF AUTHORITIES

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R. v. Thanabalasingham, 2020 SCC 18	5
R. v. W.(D.), [1991] 1 S.C.R. 742	27-29
R. v. Williamson, 2016 SCC 28	26-30; 36-38
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