A Rush to Justice: The Institution of Presumptive Ceilings in *R v Jordan* and Their Potential Implications for Wrongful Convictions

DEVON MEDEIROS & MICHELLE I. BERTRAND*

ABSTRACT

In 2016, the Supreme Court of Canada ("SCC") released its landmark decision in the case of *R v Jordan*. With the objective of addressing widespread delay within the Canadian justice system, the implications of the ruling were such that the Court set out definitive limits on the length of time in which accused persons must be brought to trial before a stay of proceedings is presumed to be entered. Since the decision, many scholars have emphasized the importance of resolving delay within the justice system to ensure that widespread stays of proceedings are not being entered, whereby the justice system may consequently fall into a state of disrepute. However, an equally important consideration that has not yet been explored concerns the risks that a failure to adequately remedy delay may result in police and Crown rushing to resolve cases within these strict time constraints. To explore this gap within the literature, this paper utilizes wrongful conviction concepts and available data to demonstrate that the current state of delay within the justice system has the potential to contribute to a "rush to justice" mentality among police and Crown. The

* Devon Medeiros, BA(Hons.) is a 2023 graduate of the University of Winnipeg, Department of Criminal Justice. Michelle I. Bertrand, M.A., Ph.D (Queen's University) is an associate professor at the University of Winnipeg, Department of Criminal Justice. The authors would like to thank the Manitoba Law Journal editors for their extensive support. We would also like to extend our gratitude to the anonymous reviewers for their helpful feedback.

development of such a mentality is problematic as it has the potential to lead to a wrongful conviction. Considering this elevated risk for wrongful convictions, this paper thus provides a new perspective in underscoring the importance of resolving delays within the justice system in the advent of *Jordan*.

Keywords: Section 11(b); Charter; *R v Jordan*; Presumptive Ceilings; Delay; Wrongful Convictions; Cognitive Biases; Tunnel Vision; Noble-Cause Corruption; Crown; Prosecutors; Police; Decision-making.

I. INTRODUCTION

On the evening of December 23rd, 1981, Barbara Stoppel's strangled and nearly lifeless body was found in the bathroom of a donut shop in Winnipeg, Manitoba.[1] Witnesses outside the store reported seeing Stoppel, who was working alone as a waitress, conversing with a man before he turned around, locked the storefront door, and led her toward the bathroom.[2] Shortly after, witnesses saw the man leave the store, cross a nearby bridge, and drop various items into the river below.[3] A description of the perpetrator was provided to the police, and a search of the riverbank resulted in the recovery of various items – the most significant of which was a nylon rope with fibers from Stoppel's sweater embedded within it.[4]

A visual inspection of the rope suggested that it may have been manufactured by a plant in Washington State – a major consumer of which was a British Columbian utility company.[5] As authorities began to search for a suspect with links to the west coast, they quickly turned their sights onto British Columbia resident Thomas Sophonow, who happened to have arrived in Winnipeg the same evening of the crime.[6] Having borne some resemblance to the composite drawing of the perpetrator, Sophonow agreed to cooperate with the police by being interviewed and was later

---

1 Peter Cory, "The Inquiry Regarding Thomas Sophonow" (2001) at 43-44, online (pdf): *Government of Manitoba* <websites.godaddy.com/blob/6aaa6fc2-99d9-4af2-a3b4-51e9d74ea37a/downloads/Thomas%20Sophonow%20Inquiry.pdf?2bd500cf> [perma.cc/BZF5-9QMY] [Cory].

2 *Ibid.*

3 *Ibid.*

4 *Ibid* at 44.

5 *Ibid.*

6 *Ibid* at 45.

subjected to an interrogation.[7] Although he never confessed to the crime, the police were sure of his guilt.[8] As Stoppel would tragically go on to die from her injuries at a local hospital, Sophonow was charged with her murder.[9]

At this point in the investigation, evidence indicative of Sophonow's guilt appeared to mount quickly. For instance, as he was arrested, Sophonow would unknowingly demonstrate the "twisting motion of locking the door" – which eyewitnesses had reported – to an undercover police officer placed in his cell.[10] In addition, when eyewitnesses were called to view a police lineup (a.k.a. photo-pack), many identified Sophonow as the perpetrator.[11] Finally, while incarcerated, several jailhouse informants came forward alleging that Sohponow had confessed to them that he had committed the crime.[12] Given such evidence, Sophonow went on to be subjected to three trials, the first resulting in a hung jury, while the second and third trials resulted in a successful appeal of his conviction.[13] Rather than sending the matter back for a fourth trial, the Court went on to stay the charges, and Sophonow was released after having spent 45 months in prison.[14] In 2000, nearly 20 years after Stoppel's murder, the Winnipeg Police Service conducted a reinvestigation into the crime.[15] Their conclusion: Sophonow was, in fact, innocent.[16]

It is now known that several investigative and prosecutorial failures were responsible for Sophonow's wrongful conviction.[17] Among them are the facts that the rope had actually been manufactured in Manitoba, the police had likely inadvertently shown Sophonow the motion which the perpetrator used to lock the door during his interrogation, the eyewitness lineups resulting in his identification were highly suggestive and unfairly

---

7 *Ibid* at 45, 50.
8 *Ibid* at 51-54.
9 *Ibid* at 35.
10 *Ibid* at 53.
11 *Ibid* at 58-59.
12 *Ibid* at 102-108.
13 *Ibid* at 35.
14 *Ibid* at 35-36.
15 *Ibid* at 35.
16 *Ibid.*
17 Cory, *supra* note 1; Sarah Harland-Logan, "Thomas Sophonow" (last visited 27 April 2023), online: *Innocence Canada* <www.innocencecanada.com/exonerations/thomas-sophonow/> [perma.cc/7YT2-K355] [Harland-Logan].

conducted, and that it was not disclosed to the defence that the jailhouse informants had unsavory backgrounds or were otherwise incentivized to testify.[18]

While it is difficult to ascertain exactly what was going through the mind of the police and Crown involved in Sophonow's case, it is unlikely to be the result of actors gone "rogue." Instead, the root cause of his wrongful conviction may be properly attributed to human nature's tendency to overly focus on a particular theory, which consequently impedes one's ability to objectively evaluate present evidence – a psychological phenomenon known as tunnel vision.[19] This set of circumstances became especially evident when it came to light that the police had failed to follow up on another potential suspect who should have raised several red flags for investigators or when they discounted Sophnow's alibi after perceiving it as being late and incomplete.[20] Indeed, it is now known that during the time that Sophonow was accused of being at the donut shop and murdering Stoppel, he was, in fact, visiting local Winnipeg hospitals where he was handing out Christmas stockings to sick children.[21]

Among the environmental pressures that exacerbate the potential for the development of tunnel vision is the existence of intense pressure placed upon state actors – like that of the police and Crown – to quickly resolve a crime.[22] Such conditions were undoubtedly present in Sophonow's case, where the subsequent inquiry into his wrongful conviction noted that "[t]he City of Winnipeg was understandably outraged by the murder. The media reflected that sentiment. There was extensive media coverage, not only of the crime, but also of the investigation and all the proceedings that followed it."[23] Given the existence of such circumstances, the travesty of Thomas Sophonow's wrongful conviction serves as a case in point with respect to the risk that the presence of a "rush to justice" mentality among police and Crown may pose for the occurrence of a miscarriage of justice. Perhaps more abstractly, Sophonow's case also demonstrates the careful balance that must be struck between speed and delay in the justice system. Indeed, while section 11(b) of the *Canadian Charter of Rights and Freedoms*

---

18 Cory, *ibid.*

19 Harland-Logan, *supra* note 17.

20 Cory, *supra* note 1 at 79-80, 99.

21 Cory, *supra* note 1 at 97-98.

22 Harland-Logan, *supra* note 17.

23 Cory, *supra* note 1 at 35.

guarantees the right to a speedy trial,[24] wrongful conviction literature has simultaneously raised concerns that the presence of pressures demanding excessive speed to bring accused persons to justice may simultaneously increase the likelihood for the occurrence of a wrongful conviction.[25]

In the summer of 2016, this careful balance between speed and delay came to the forefront following the release of the Supreme Court of Canada's decision in *R v Jordan*.[26] The implications of the decision were such that the SCC set out definitive limits (known as "presumptive ceilings") on the length of time that an accused person must be brought to trial before a judicial stay of proceedings[27] is presumed to be entered.[28] These ceilings were set at 18 months for provincial court cases and 30 months for superior court cases or provincial court cases with a preliminary inquiry.[29] According to the Court, the rationale behind such a dramatic change in the law lies in the alleged "culture of complacency" concerning delay, which has plagued the Canadian justice system in recent decades.[30] In Jordan's case, for instance, despite him being charged with drug-related offences of modest complexity, the delay was so significant that it would take more than four years before he would see the end of his trial.[31] Across the justice system, more broadly, it was reported that "between the fiscal years of 2006/2007 and 2015/2016 the median time between charging and disposition for a superior court case grew from 10.6-months to 14-

---

24 Canadian Charter of Rights and Freedoms, s 11(b), Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11.

25 Bruce A MacFarlane, "Wrongful Convictions: The Effect of Tunnel Vision and Predisposing Circumstances in the Criminal Justice System" (2008) at 7-16, online (pdf): *Ontario Ministry of Attorney General* <www.attorneygeneral.jus.gov.on.ca/inquiries/goudge/policy_research/pdf/Macfarlane_Wrongful-Convictions.pdf> [perma.cc/G9UM-XU6A] [MacFarlane]; FTP Heads of Prosecution Committee, "Innocence at Stake: The Need for Continued Vigilance to Prevent Wrongful Convictions in Canada" (2018) at 10-12, online (pdf): *Public Prosecution Service of Canada* <www.ppsc-sppc.gc.ca/eng/pub/is-ip/is-ip-eng.pdf> [perma.cc/PE72-9UFE].

26 *R v Jordan*, 2016 SCC 27 [*Jordan*].

27 A judicial stay of proceedings refers to the permanent halting of criminal proceedings against an accused.

28 *Jordan*, *supra* note 26.

29 *Ibid* at para 46.

30 *Ibid* at para 40.

31 *Ibid* at para 4.

months."[32] In view of these circumstances, the SCC, therefore, asserted that such ceilings were necessary:

> ...in order to give meaningful direction to the state on its constitutional obligations and to those who play an important role in ensuring that the trial concludes within a reasonable time: court administration, the police, Crown prosecutors, accused persons and their counsel, and judges.[33]

Given this dramatic shift towards the imposition of definitive time limits on criminal trials, it is perhaps unsurprising that *Jordan* has had a significant impact on the practice of criminal law in Canada. For instance, the Standing Senate Committee on Legal and Constitutional Affairs ("SSCLCA") suggested that *Jordan* "... has shaken up the status quo of the criminal justice system unlike any case in recent years."[34] In response, legal scholars and practitioners alike have emphasized the importance of adequate governmental and justice agency response to the demands of the SCC in *Jordan* with respect to remedying delay.[35] Such efforts are often suggested to be critical so as not only to ensure that the rights of accused persons are being respected but also to ensure that the reputation of the criminal justice system does not enter a state of disrepute due to widespread stays of proceedings being entered.[36]

Nevertheless, despite the longstanding concern raised within wrongful conviction literature concerning the development of a "rush to justice" mentality,[37] a perspective which has been largely absent from the discussion surrounding *Jordan* has been any consideration as to the risks that a failure to resolve delay within the justice system may pose for the occurrence of wrongful convictions. In this respect, if actors such as the police and Crown are struggling to meet the SCC's strict timelines in *Jordan* due to the

---

32 Myles Anevich, "Fighting the Culture of Complacency: A Comparative Analysis of Pretrial Delay Remedies in Canada and the United States" (2019) 24:1 Can Crim L Rev 39 at 56 [Anevich].

33 *Jordan, supra* note 26 at para 50.

34 Standing Senate Committee on Legal and Constitutional Affairs, "Delaying Justice is Denying Justice: An Urgent Need to Address Lengthy Court Delays in Canada" (2017) at 15, online (pdf): Senate of Canada <sencanada.ca/content/sen/committee/421/LCJC/reports/Court_Delays_Final_Report_e.pdf> [perma.cc/3QUH-6VU3] [SSCLCA].

35 SSCLCA, *ibid.*

36 *Ibid.*

37 MacFarlane, *supra* note 25 at 7-16; FTP Heads of Prosecution Committee, *supra* note 25 at 10-12.

existence of a continual delay in the justice system, it is reasonable to consider whether the resulting pressure to meet these deadlines has the potential to contribute to the development of "rush to justice" mentality among such actors. Therefore, to address such gap within the literature, in this paper, we answer the following two research questions:

1) Does the institution of presumptive ceilings in *R v Jordan* exacerbate the likelihood for wrongful convictions to occur?
2) To what extent have government and justice agencies responded to the demands of the Supreme Court of Canada in *R v Jordan* as it pertains to reducing delay and what implications may this have for the occurrence of wrongful convictions?

In answering these questions, we argue that in the advent of the institution of presumptive ceilings in *R v Jordan,* the current state of delay within the justice system has the potential to exacerbate the likelihood that wrongful convictions may occur.

To demonstrate this argument, this paper is divided into several distinct sections. First, we explore the case of *R v Jordan* and its subsequent impact on the justice system. Second, we identify the relevant "rush to justice" concepts that have been identified within wrongful conviction literature and consider their relevance to the *Jordan* framework. Third, we explore whether delay within the justice system has been appropriately addressed with respect to minimizing the risk of the development of a "rush to justice" mentality among actors such as the police and Crown. Finally, we conclude by considering several recommendations, which may be implemented to further reduce delay within the justice system and consequently reduce the likelihood of the development of a "rush to justice" mentality among such actors. Our recommendations include the need for technological improvement in courthouses, ensuring that the position vacancies of key criminal justice participants are quickly filled, reducing the number of cases entering the traditional criminal justice system, and the need for better data collection concerning *Jordan* applications to assess the frequency of, and reasons for, delay and to provide support for making evidence-based changes if warranted.

It must be stated from the outset that our position within this paper is not to be critical of the SCC's decision in *Jordan*. Rather, we intend to provide a new perspective on the importance of adequate governmental and justice agency responses to the demands of the SCC in *Jordan* through the exploration of wrongful conviction literature. While there exists no

universal definition as to what a wrongful conviction may be defined as,[38] we nevertheless adopt the FTP Heads of Prosecution Committee's understanding of such occurrence, which asserted that it is "...the conviction of a person who is factually innocent of the crime for which he or she was convicted ... and whose conviction is not remedied through the ordinary court processes within a reasonable time."[39]

II. The Case of *R v Jordan*

A. Summary of *Jordan*

Section 11(b) of the *Canadian Charter of Rights and Freedoms* guarantees the right to a trial within a reasonable time.[40] For over two decades, the relevant case law for assessing section 11(b) *Charter* applications was set out in the 1992 case of *R v Morin*.[41] In *Morin*, the SCC previously held that to assess section11(b) *Charter* applications, judges are to balance four factors, including:

> ... (1) the length of the delay; (2) defence waiver; (3) the reasons for the delay, including the inherent needs of the case, defence delay, Crown delay, institutional delay, and other reasons for delay; and (4) prejudice to the accused's interest in liberty, security of the person, and a fair trial.[42]

The *Morin* framework would go on to define the boundaries of section 11(b) until a narrow majority in *R v Jordan* would overturn it and establish an entirely new framework to assess delay.

In *Jordan*, the accused was one of ten co-accused charged with several offences related to the possession and trafficking of narcotics following a dial-a-dope operation conducted by the Royal Canadian Mounted Police ("RCMP").[43] Mr. Jordan was arrested in December of 2008, where he remained in custody until he was eventually released on bail in February of

---

38 FTP Heads of Prosecution Committee, *ibid*.

39 *Ibid*.

40 *Jordan, supra* note 26 at para 12.

41 *Ibid* at para 13.

42 *Ibid* at para 30.

43 *Ibid* at para 7. As explained by the SCC in the case of *R v Ahmad*, a dial-a-dope operation is where the police pose as a prospective drug buyer by calling the phone of a drug trafficker with the objective of arranging a meeting to purchase illicit drugs. See *R v Ahmad*, 2020 SCC 11.

2009, with restrictive conditions, including house arrest.[44] While his preliminary inquiry was originally scheduled for May of 2009, the Crown and the defence sought continuances until eventually around 44 months had elapsed before the start of his trial.[45] As a result of this lengthy delay, Jordan brought forward an application to enter a stay of proceedings, alleging that his section 11(b) *Charter* right had been violated.[46]

In applying the *Morin* framework, the trial judge ultimately decided to dismiss the application.[47] In his analysis, the trial judge reasoned that while the delay was significant, an institutional delay should be given less weight than a delay caused by the Crown.[48] In this case, he ascribed four months of delay to Mr. Jordan when he had opted to change counsel at the start of the trial, while two months of delay were attributed to the Crown and 32.5 months were found to be the result of an institutional delay.[49] Around this same time, Mr. Jordan was also convicted of drug-related charges in relation to a separate incident, which resulted in him being placed under a conditional sentence order with similarly restrictive conditions as those which he was assigned while on bail.[50] The trial judge, therefore, also reasoned that because Mr. Jordan was subject to similar conditions under the conditional sentence order during a large portion of the delay, the prejudice which he experienced because of the delay was rather limited.[51] Consequently, the trial judge concluded that the delay was not unreasonable, and the trial resumed.[52] The trial would eventually go on to conclude in February of 2013, with Mr. Jordan being convicted of five drug-related offences.[53]

Mr. Jordan later appealed his case to the British Columbia Court of Appeal ("BCCA") and argued that the trial judge erred in his finding that the delay was reasonable.[54] While the BCCA would ultimately agree with the trial judge and dismiss the appeal, Mr. Jordan would continue his

---

44 *Jordan*, *supra* note 26 at para 7.
45 *Ibid* at paras 7-12.
46 *Ibid* at para 12.
47 *Ibid* at para 13.
48 *Ibid* at para 15.
49 *Ibid* at paras 14-15.
50 *Ibid* at para 11.
51 *Ibid* at para 16.
52 *Ibid* at para 17.
53 *Ibid* at para 12.
54 *Ibid* at para 17.

argument up to the SCC, where the majority opinion would come to a very different conclusion by deciding to dramatically change the law with respect to section 11(b) of the *Charter*.[55] The justification for such dramatic shift in the law rested upon their recognition that the *Morin* framework was beset by "doctrinal and practical problems," which were incapable of being resolved through mere refinements.[56] In this respect, the SCC went on to identify several shortcomings of the *Morin* framework over its decades of authority, including the fact that it was too unpredictable, complex, confusing, hard to prove, and subjective.[57] These shortcomings would be demonstrated by the facts that judges had a particularly difficult time assessing the element of prejudice present within the *Morin* framework, the framework provided little to prevent delay or otherwise encourage substantive change within the justice system, it encouraged "micro-counting" to attribute each instance of delay to a particular party, and that judges were ultimately hesitant to find in the accused's favour and order a stay of proceedings in lieu of society's interest in continuing the trial.[58] Together, the SCC suggested these factors culminated into a "culture of complacency" with respect to delay in the justice system.[59]

In place of *Morin's* rather subjective analysis, the SCC opted to replace it with a more determinative framework by setting definitive limits on the length of time that a criminal trial is presumed to take, known as "presumptive ceilings."[60] Such ceilings apply from the date of charge to the "...actual or anticipated end of trial"[61] and were thus set at 18 months for provincial court cases and 30 months for superior court cases or provincial court cases with a preliminary inquiry.[62] In their written decision, the SCC reportedly arrived at such specific ceilings by accounting for the time required to complete modern criminal investigations and prosecutions.[63]

When calculating delay with respect to such ceilings within a particular case, the trial judge is to subtract any delay attributable to the defence.[64] In

---

55 *Jordan, supra* note 26.
56 *Ibid* at para 29.
57 *Ibid* at paras 33-39.
58 *Ibid.*
59 *Ibid* at para 40.
60 *Ibid* at para 5.
61 *Ibid* at para 47.
62 *Ibid* at para 46.
63 *Ibid* at paras 52-53.
64 *Ibid* at para 60.

recognizing an incentive for the defence to contribute to delay, the court noted that frivolous defence actions would count towards defence delay; however, on the other hand, legitimate defence actions such as preparation time and genuine applications or requests would ultimately count toward the total delay calculation.[65] If, after accounting for defence delay, the total remaining delay still exceeds the presumptive ceiling, the burden is then placed upon the Crown to justify that the delay was nevertheless reasonable.[66] The Crown may only justify delay beyond the ceilings if it was the result of "discrete events" that were reasonably unforeseeable – such as illness – or was otherwise the result of the case being particularly complex.[67] With respect to the latter exception, the SCC commented that a murder case by itself does not typically meet the threshold of a complex case.[68] However, it was suggested that a case may be more complex where charges of terrorism or organized crime are present.[69] Ultimately, if the Crown is unable to justify the delay based on either exception, a stay of proceedings must be entered.[70]

The SCC also noted that even if the delay is below the presumptive ceiling prescribed for a particular case, the defence may still argue that the delay was nevertheless unreasonable.[71] In such an event, the defence must show that it took the initiative by taking meaningful steps to expedite the proceedings and that the reasonable time requirements of the case were markedly exceeded.[72] Both qualifications must be demonstrated for a violation of section 11(b) to be found within such context.[73] In any event, the SCC suggested that successful applications below the presumptive ceilings will be rare, save for "clear" cases.[74]

Because judicial change in the law is presumed to operate retroactively, the Court in *Jordan* noted that these newly established presumptive ceilings were to apply immediately, even to cases already within the system – albeit

---

65 *Ibid* at para 63.
66 *Ibid* at para 68.
67 *Ibid* at paras 69-81.
68 *Ibid* at para 78.
69 *Ibid* at para 81.
70 *Ibid* at para 76.
71 *Ibid* at para 82.
72 *Ibid*.
73 *Ibid*.
74 *Ibid* at para 83.

with a few caveats.[75] In this respect, to avoid widespread stays of proceedings being entered, a contextual "transitional period" is to be applied in which the Crown may demonstrate that "… the time which the case has taken is justified based on the parties' reasonable reliance on the law as it previously existed."[76] Because Mr. Jordan's case fell within the transitional period, this slightly modified the framework applied to him.[77] When embarking upon such analysis, the majority opinion accounted for a defence delay of four months and ascribed the Crown a remaining delay of 44 months, which well exceeded the case's prescribed ceiling of 30 months.[78] Despite the additional consideration of such "transitional circumstances," the SCC ultimately found the delay to be unreasonable.[79] Such a finding was aided by the fact that there were a lack of discrete events present and that the case itself was determined to be relatively absent of complexity.[80] As explained by the SCC:

> We recognize that the Crown was operating without notice of this change in the law within a jurisdiction with some systemic delay issues. But a total delay of 44 months (excluding defence delay), of which the vast majority was either Crown or institutional delay, in an ordinary dial-a-dope trafficking prosecution is simply unreasonable regardless of the framework under which the Crown was operating.[81]

In conclusion, the court found that Mr. Jordan's section 11(b) *Charter* right had been infringed, and a stay of proceedings was ordered.[82]

B. Post-*Jordan* Aftermath and its Implications on the Justice System

In the years following the release of the decision, the SCC took up several opportunities to clarify the nuances of the presumptive ceilings. For instance, in *R v KJM*,[83] the SCC held that the presumptive ceilings apply to youth matters. In *R v KGK*,[84] the SCC determined that the presumptive

---

75 *Ibid* at paras 93-95.
76 *Ibid* at para 96.
77 *Ibid* at para 128.
78 *Ibid* at para 124.
79 *Ibid* at para 128.
80 *Ibid* at paras 125-28.
81 *Ibid* at para 128.
82 *Ibid* at para 135.
83 *R v KJM*, 2019 SCC 55.
84 *R v KGK,* 2020 SCC 7.

ceilings timeline does not include the time it takes for a trier of fact to reach their verdict. In other words, the timeline begins from the moment a charge is laid until the end of trial arguments.[85] In *R v JF*,[86] the SCC held that when a new trial is ordered, the presumptive ceilings apply only to the delay that occurred within the accused's new trial. As this new section11(b) jurisprudence continues to take hold in the coming years, it is inevitable that the courts will continue to clarify the framework's specificities.

In 2017, a standing committee established by the Senate of Canada and tasked with the objective of studying delay within the justice system released their comprehensive final report, which included over 50 recommendations about how such delay may be reduced across Canada.[87] The committee traveled to several provinces and heard testimony from over a hundred witnesses involved within the justice system in various capacities with the objective of understanding the differing challenges and perspectives as to the factors contributing to the delay.[88] In response to the findings of the committee, in March of 2018, the federal government introduced Bill C-75, which aimed to modernize the criminal justice system and reduce delay, most notably through changes such as streamlining the bail process, restricting the availability of preliminary inquiries to only specific serious offences, expanding the powers of the judiciary with respect to case management, and streamlining the classification of offences.[89] Further efforts have been taken by individual provinces, such as in Ontario, where the province has hired additional provincial judges and Crown prosecutors,[90] and in British Columbia, which has proposed a digitalization strategy aimed at reducing delay through the implementation of technology in courthouses.[91]

---

85 *Ibid*.

86 *R v JF*, 2022 SCC 17.

87 SSCLCA, *supra* note 34.

88 *Ibid* at 22.

89 "Legislative Background: An Act to amend the Criminal Code, the Youth Criminal Justice Act, and other Acts and to make consequential amendments to other Acts, as enacted (Bill C-75 in the 42nd Parliament)" (last modified 26 August 2022), online: *Department of Justice Canada* <www.justice.gc.ca/eng/rp-pr/csj-sjc/jsp-sjp/c75/p3.html> [perma.cc/PX29-FYGH].

90 Andrew Pilla & Levi Vandersteen, "Re-Charting the Remedial Course for Section 11(b) Violations Post-Jordan" (2019) 56:2 Osgoode Hall LJ 436 at 439 n 12 [Pilla & Vandersteen].

91 "Court Digital Transformation Strategy" (2019), online (pdf): *Government of British Columbia* <www2.gov.bc.ca/assets/gov/law-crime-and-justice/about-bc-justice-

Given *Jordan's* notable changes to the practice of criminal law, it is perhaps unsurprising that the decision has been the subject of considerable controversy amongst legal scholars and practitioners. For instance, in a survey of police investigators within the province of British Columbia, participants unanimously agreed that *Jordan* effectively requires that governments commit additional funding for more police, Crown counsel, courtrooms, and RCMP laboratories to meet the requirements of the decision and maintain the repute of the justice system.[92] Lundrigan has argued that the SCC's decision to set descriptive ceilings with respect to how long a criminal case must be completed within provides little incentive to address delay, whereby the Court should have instead provided prescriptive ceilings that tell the state how long a case should be completed by.[93] Maintaining a similar critical lens, Anevich has suggested that *Jordan*:

> ...Effectively reduces constitutional law to mathematics and rejects the underlying spirit of the law and combined weight of Canadian and American speedy trial jurisprudence. It turns judges and litigants into accountants, and except for determining what an exceptional circumstance is or the limits of the transitional framework, removes all weighing from the calculation.[94]

Other scholars, such as Pilla and Vandersteen, have argued that unlike the *Morin* framework, the *Jordan* framework is devoid of interest balancing and, therefore, requires a revision of the precedent that a stay of proceedings is the only remedy available to the judiciary following the finding of a section 11(b) breach.[95] Similarly, de Sa has argued that the availability of alternative remedies for judges other than a stay of proceedings is necessary to ensure that the administration of justice is not undermined.[96]

As evident from such commentary, a significant focus among academics and practitioners has narrowed in on the potential implications

---

system/justice-reform-initiatives/digital-transformation-strategy-bc-courts.pdf> [perma.cc/R5GN-59C5] [Court Digital Transformation Strategy].

92 Irwin M Cohen et al, "An Examination of the Impact of Court Rulings on Police Investigation Time and Resources" (2021) at 3, online (pdf): *Center for Public Safety and Criminal Justice Research* <cjr.ufv.ca/wp-content/uploads/2021/08/Jordan-Study-Final-Report-in-Centre-Template.pdf> [perma.cc/ES7Y-YFJ3].

93 Keara Lundrigan, "R v Jordan: A Ticking Time Bomb" (2018) 41:4 Man LJ 113 at 122.

94 Anevich, *supra* note 32 at 49.

95 Pilla & Vandersteen, *supra* note 90.

96 Chris de Sa, "Understanding *R. v. Jordan*: A New Era for s. 11(b)" (2018) 66:1-2 Crim LQ 92 at 106-107.

that *Jordan* may have for criminal trials or the justice system more broadly. Despite this, given the imposition of strict time constraints on police and Crown, a key consideration that has been absent from this discussion concerns the need to resolve delays within the justice system as a means of combatting the potential for wrongful convictions due to the development of a "rush to justice" mentality among such actors. In this respect, because the presumptive ceilings begin from the moment that an accused person is charged, the SCC's decision in *Jordan* necessarily implicates the role and responsibilities of both the police and the Crown. Indeed, upon laying a criminal charge, *Jordan* effectively places deadlines on the police's responsibility to conduct investigations and collect evidence. Because of this, police agencies must now ensure that their investigations are complete with adequate time to spare for subsequent Crown preparation. Once an investigation is completed, the Crown themselves must ensure that they have thoroughly evaluated all the evidence present within a particular case and, if needed, are able to bring the matter to trial within these strict time constraints.

Nevertheless, it is important to acknowledge that in most instances, the *Jordan* framework allows the police and Crown a substantial amount of time to resolve cases.[97] Indeed, it has been observed that many cases may be resolved well under the presumptive ceilings set out in *Jordan*.[98] Moreover, even if cases begin to show signs that they may fail to meet these ceilings, the Crown has several tools at its disposal that may be used to expedite such matters.[99] For example, de Sa has recognized that:

> (1) Working with police and organizing disclosure pre-charge builds in lead time; (2) Charge screening, diversion, and triage reduces volume; (3) Reducing the number of charges and reducing the number of accused simplifies the proceedings and shortens time estimates; (4) Case-management/disclosure teams allow the Crown to keep on top of files and set dates expeditiously; (5) Section 540 applications in preliminary hearings can expedite matters substantially; (6) Direct Indictments shorten otherwise protracted proceedings in Provincial Court; (7) Rolling lists for priority matters which place them as a priority week to week when courts are unavailable; and (9) Case management judges can assist with expediting motions.[100]

---

97 *Ibid* at 100.

98 *Ibid*.

99 *Ibid*.

100 *Ibid*.

Furthermore, even where these additional efforts falter and the Crown still fails to meet the presumptive ceilings, they may nevertheless have the ability to rebut the presumption that the delay was unreasonable. However, such arguments may only be successful if the delay falls within the "discrete events" or "complex cases" category. It does not, for instance, allow for the Crown to justify continual delay within the justice system, which may have contributed to that case exceeding the ceilings. In addition, even if the Crown believes that some delay may be the result of discrete events or the case's complexity, there is no guarantee that the Court will see it the same way or otherwise attribute the entirety of the delay which the Crown had sought to justify. This reality is at the heart of our concern that a failure to resolve delay in the justice system may result in actors such as the police and Crown rushing to resolve cases. As previously mentioned, this "rush to justice" mentality is particularly problematic as it has been recognized to have the potential to contribute to the occurrence of a wrongful conviction.[101] In the following section of this paper, we will consider several wrongful conviction concepts that are particularly relevant to such mentality, including cognitive biases, tunnel vision, and noble-cause corruption.

III. "Rush to Justice" Wrongful Conviction Concepts and Their Relevance to *Jordan*

To make sense of the potential for *Jordan*-induced time pressures to increase the likelihood of a miscarriage of justice, we adopt a social science conceptual framework informed by the field of wrongful convictions. That is, should the factors contributing to delay within the justice system continue unabated, police and Crown who are tasked with meeting the presumptive ceilings set out in *Jordan* will effectively face time-related pressures in meeting these deadlines. Within the field of wrongful convictions, such time-related pressures have been understood to have the potential to negatively impact the decision-making processes of the police and Crown.[102] In turn, this can then influence the course of a criminal investigation or prosecution and potentially contribute to the occurrence

---

101 MacFarlane, *supra* note 25 at 7-16; FTP Heads of Prosecution Committee, *supra* note 25 at 10-12.

102 *Ibid.*

of a wrongful conviction.[103] In this respect, we suggest that the concepts of cognitive biases, tunnel vision, and noble-cause corruption are of particular concern when considering the development of such a "rush to justice" mentality. Each of these concepts will be explored in detail throughout this section.

A. Cognitive Biases and Tunnel Vision

To effectively process the copious amounts of information that individuals are confronted with during their day-to-day lives, human beings often unconsciously make use of mental shortcuts known as "cognitive biases."[104] Broadly defined, cognitive biases can be understood as an "…umbrella term that refers to a variety of inadvertent but predictable mental tendencies which can impact perception, memory, reasoning, and behaviour."[105] While cognitive biases may sound unflattering in these terms, these predictable mental tendencies are essential to human cognition.[106] Indeed, as MacFarlane notes:

> On a practical level, cognitive biases may actually be seen as a natural means by which we can efficiently process the flood of information we are subjected to on a daily basis. Without some sort of filtration mechanism, information received may simply become a "blur."[107]

Although cognitive biases may be beneficial for everyday information processing, in the context of a criminal investigation or prosecution where the careful evaluation of all the existing evidence is critical to assessing the guilt or innocence of a suspect, these mental shortcuts can be detrimental to the need for objectivity.[108] This is especially the case as humans tend "… to categorize, interpret, and give attention only [on] a selective basis… ."[109]

When cognitive biases occur during a criminal investigation, it may result in police and/or prosecutors unconsciously engaging in a psychological phenomenon known as tunnel vision.[110] In the criminal

---

103 *Ibid*.

104 MacFarlane, *supra* note 25 at 37.

105 Vanessa Meterko & Glinda Cooper, "Cognitive Biases in Criminal Case Evaluation: A Review of the Research" (2021) 37:1 J Police Crim Psychol 101 at 101 [Meterko & Cooper].

106 MacFarlane, *supra* note 25 at 37; Meterko & Cooper, *supra* note 105 at 101.

107 MacFarlane, *supra* note 25 at 37.

108 *Ibid* at 37-45.

109 *Ibid*.

110 FTP Heads of Prosecution Committee, *supra* note 25 at 7-10.

justice context, tunnel vision may be understood as "...a tendency of participants in the system, such as police or prosecutors, to focus on a particular theory of a case and to dismiss or undervalue evidence which contradicts that theory."[111] Tunnel vision is the result of the formation of several cognitive biases – namely confirmation bias, hindsight bias, and outcome bias.[112] In defining each of these psychological phenomena,

> ... confirmation bias involves seeking out, interpreting, or recalling evidence or information that supports existing beliefs; hindsight bias is a means of projecting new knowledge, or outcomes into the past whereby the early stages of process connect casually to the end; and outcome bias reflects hindsight judgments about whether a decision was a good or bad one, a correct or incorrect one.[113]

Although tunnel vision may be thought to be somewhat synonymous with confirmation bias, the two concepts are notably distinct.[114] In this regard, while tunnel vision narrows an individual's focus on a particular suspect, confirmation bias results in an unconscious filtering of evidence.[115]

Given tunnel vision's roots in the concept of cognitive biases, it is important to note that its development does not necessarily indicate malfeasance.[116] Indeed, "[t]unnel vision is not a judgmental concept. It says nothing about the ethics or character of the person involved. Properly understood, it involves a natural human tendency, and is not the result of maliciousness, much less corruption."[117] Moreover, because the development of tunnel vision is understood to be a natural human tendency, even the most experienced investigators or prosecutors are not immune to its development.[118] In fact, experienced Crown all succumbed to varying degrees of tunnel vision in the prominent Canadian wrongful convictions of David Milgaard, Guy-Paul Morin, Thomas Sophonow, and James Driskell.[119]

---

111 *Ibid* at 7.

112 Kathryn M Campbell, *Miscarriages of Justice in Canada: Causes, Responses, Remedies* (Toronto: University of Toronto Press, 2018) at 52 [Campbell].

113 *Ibid* at 52-53.

114 FTP Heads of Prosecution Committee, *supra* note 25 at 7.

115 *Ibid.*

116 Bruce A MacFarlane, "Wrongful Convictions: Drilling Down to Understand Distorted Decision-Making by Prosecutors" (2016) 63:4 Crim LQ 439 [MacFarlane] at 453.

117 *Ibid.*

118 *Ibid* at 443-50.

119 *Ibid.*

Much like cognitive biases, the development of tunnel vision poses a serious risk for criminal investigations and prosecutions.[120] In this respect, through the influence of confirmation bias, hindsight bias, and outcome bias,[121] tunnel vision may interfere with the objective assessment and collection of evidence.[122] As a result, the formation of tunnel vision has been understood to have the potential to inadvertently result in the distortion of truth or the displacement of the presumption of innocence.[123]

In providing an example of the implications of tunnel vision during the process of a criminal investigation, the work of Jerome Frank – who was an American judge of the U.S. Circuit of Appeals – provides an excellent illustration of the risks that may arise when actors stubbornly cling to their belief in the guilt of a suspect or accused during an investigation:

> A bank has been robbed, its cashier murdered. A bystander reports to the police that he saw Williams Jones commit the murder. Having thus found a suspect, the police sedulously run down all clues that seem to incriminate William Jones. They piece together those clues and jump to the conclusion that he is their man. They overlook other clues that might exculpate Jones or inculpate someone else. They brush aside facts inconsistent with their theory of Jones's guilt. In this they are not dishonest. For here pride and prejudice operate: Pride in their theory is buttressed by prejudice against any other.[124]

B. *Jordan*'s Implications for the Development of Cognitive Biases and Tunnel Vision

Importantly, it has been well-recognized that the likelihood for the development of tunnel vision may be exacerbated by the environment in which police and the Crown operate.[125] In particular, it has been found that police and Crown are more prone to developing tunnel vision when they operate within an environment that demands efficiency over thoroughness.[126] This type of environment is problematic as it has been

---

120 *Ibid* at 453-54.

121 Campbell, *supra* note 112 at 52-53.

122 Dianne L Martin, "Lessons about Justice from the Laboratory of Wrongful Convictions: Tunnel Vision, the Construction of Guilt and Informer Evidence" (2002) 70 UMKC L Rev 847 at 848 [Martin].

123 MacFarlane, *supra* note 116 at 454.

124 Judge Jerome Frank & Barbara Frank, Not Guilty (Garden City: Doubleday and Company Inc, 1957). Doubleday and Company, Inc (Garden City, NY: 1957) at 66, cited in MacFarlane, *supra* note 116 at 452.

125 MacFarlane, *supra* note 25 at 37-56; Meterko & Cooper, *supra* note 105 at 107-08.

126 Meterko & Cooper, *ibid*.

understood to encourage a reduced depth of cognitive processing, which thereby may increase both the adoption and the effects of cognitive biases.[127] Put differently, such an environment is not conducive to the allowance of thorough and objective thought, which has been suggested to be the "true enemy" of tunnel vision.[128]

Should police and Crown struggle to meet the presumptive ceilings in *Jordan* due to the continued existence of delay within the justice system, this problematic environment may be conducive to the development of a 'rush to justice' mentality, which may then exacerbate factors that are known contributors to wrongful convictions.[129] Indeed, continual delay within the justice system will make these timelines unrealistic, and consequently, police and Crown may be unable to thoroughly evaluate all the evidence that is present within a particular case. These circumstances would effectively result in police and Crown rushing to resolve cases – which is problematic for preventing wrongful convictions. It has been suggested that "[m]ost cases of confirmed wrongful convictions are a product of pressure, generated either externally because of a high-profile crime or internally by resource and other institutional forces, to resolve a crime which fuels a bias dubbed 'tunnel vision.'"[130] This reality emphasizes the importance for police and the Crown to be able to thoroughly evaluate all evidence and potential leads within a particular case.

It has also been recognized that the need for careful case evaluation is especially salient given that the general process of a criminal investigation within Canada already creates a heightened risk for the development of tunnel vision.[131] In this respect, following the completion of an investigation by the police, the Crown typically receives a case file that already implicates a particular accused and is absent of evidence that may

---

127 Karl Ask, Pär Anders Granhag & Anna Rebelius, "Investigators Under Influence: How Social Norms Activate Goal-Directed Processing of Criminal Evidence" (2011) 25:4 Appl Cogn Psychol 548.

128 FTP Heads of Prosecution Committee, *supra* note 25 at 11.

129 We acknowledge that tunnel vision may not always necessitate a rush to bring an accused to trial. There may be instances where tunnel vision could potentially extend the length of an investigation or prosecution due to a fixation on a particular individual. However, as *Jordan* effectively creates time limits for a criminal investigation and prosecution, the focus of this paper is primarily concerned with the opposing set of circumstances where such actors are in a rush due to the existence of continual delay.

130 Martin, *supra* note 122 at 848.

131 FTP Heads of Prosecution Committee, *supra* note 25 at 8.

incriminate a different suspect.[132] In reviewing the case file, the separation of offices between the police and the Crown offers an opportunity for the Crown to evaluate such evidence with a "fresh set of eyes" and ensure that the evidence against an accused is sound. However, if the Crown does not have the luxury of evaluating the present evidence within a particular case given the existence of unrealistic time restraints, they too can perpetuate the tunnel vision that began at the investigatory stage.[133]

If, after receiving a case file from investigators, a trial is looking to conclude uncomfortably close to the presumptive ceilings, continual delay within the justice system may result in the Crown being unable to critically analyze all the present evidence. Alternatively, in such situations where the presumptive ceiling is approaching, and there are doubts as to the reliability of the police's investigation, the Crown may be left to make the difficult choice of deciding whether to continue with the trial as planned or risk encroaching upon the presumptive ceilings. This choice may be particularly difficult given that the risks of encroaching upon the ceiling are severe – namely that a stay of proceedings will occur should a section 11(b) breach be found.

It is also in this way that the existence of unrealistic timelines may have the potential to implicate the Crown's discretion with respect to charge screening and the decision of whether to proceed with a charge. For example, Manitoba's charge screening policy requires two criteria to be met, namely that there is a reasonable likelihood of conviction and that it is in the public interest to proceed with the charge.[134] Such policies – both in Manitoba and in other provinces – operate in part upon the recognition of the risk of wrongful convictions and that weak cases should not be prosecuted to avoid putting a potentially innocent accused in jeopardy of conviction.[135] The past wrongful convictions of Randy Druken and Gregory Parsons in Newfoundland and Labrador demonstrate this risk well.[136] In

---

132 *Ibid.*

133 *Ibid.*

134 Manitoba Department of Justice Prosecutions, "Laying, Staying and Proceeding on Charges" (2017), online (pdf): *Government of Manitoba* <www.gov.mb.ca/justice/crown/prosecutions/pubs/laying_and_staying_of_charges.pdf> [perma.cc/72LQ-GF4L].

135 Campbell, *supra* note 112 at 66.

136 *Ibid.*

those cases, it was found that the Crown accepted the police's belief in the guilt despite evident inconsistencies in both instances.[137]

The need for careful case evaluation on the part of the police and Crown is especially salient in cases where jailhouse informants are involved, and thus, special caution toward the present evidence is required. This fact was echoed by Justice Cory in the inquiry into Thomas Sophonow's wrongful conviction, where he noted:

> This case demonstrates that experienced police officers considered very unreliable informants to be credible and trustworthy. Crown counsel obviously thought they were credible witnesses who should be put forward. If experienced police officers and Crown Counsel can be so easily taken in by jailhouse informants, how much more difficult it must be for jurors to resist their blandishments.[138]

Fortunately, while provinces have become more attuned to the risks that jailhouse informants present and have implemented additional safeguards accordingly,[139] it is critical that these safeguards still require time for careful case evaluation when making such assessments.

In the advent of the presumptive ceilings, the existence of continual delay within the justice system may also be problematic in its ability to further heighten the pressures already faced by police and Crown, which have been understood to potentially contribute to the development of tunnel vision. Such pressures include those that arise from "...victims and their families, the public, colleagues, and supervisors..."[140] For police, such pressures have the potential to influence the course of an investigation as they work to identify a suspect.[141] For the Crown, such pressures can contribute to the development of a "conviction psychology," whereby a Crown's mentality may shift from one that is interested in obtaining justice to one that is interested in securing a conviction.[142] Importantly, the Crown is supposed to be arbiters of justice, which necessarily excludes notions of winning or losing.[143] Indeed, the role of the Crown was eloquently explained in the case of *Boucher v The Queen*,[144] where the SCC noted:

---

137 *Ibid.*

138 Cory, *supra* note 1 at 109.

139 Campbell, *supra* note 112 at 118-130.

140 FTP Heads of Prosecution Committee, *supra* note 25 at 10.

141 *Ibid.*

142 *Ibid.*

143 *Ibid.*

144 *Boucher v The Queen*, [1955] SCR 16 at 23-24, 110 CCC 263.

> It cannot be over-emphasized that the purpose of a criminal prosecution is not to obtain a conviction, it is to lay before a jury what the Crown considers to be credible evidence relevant to what is alleged to be a crime. Counsel has a duty to see that all available legal proof of the facts is presented: it should be done firmly and pressed to its legitimate strength, but it must also be done fairly. The role of the prosecutor excludes any notion of winning or losing; his function is a matter of public duty than which in civil life there can be none charged with greater personal responsibility. It is to be efficiently performed with an ingrained sense of the dignity, the seriousness, and the justness of judicial proceedings.

Ultimately, if continual delay within the justice system remains a problem, police and Crown who are tasked with meeting the presumptive ceilings may face heightened pressures to not only obtain a conviction but also to do so within an unrealistic timeline. This heightened pressure may be particularly powerful given that if the police and Crown fail to meet such a timeline, a stay of proceedings will follow. This reality further speaks to the high-stakes nature of continual delay and the need to ensure that police and Crown are not being rushed to resolve cases in the advent of the presumptive ceilings.

Importantly, should continual delay within the justice system remain a problem given the presumptive ceilings, this can result in police and Crown rushing to resolve cases not only through trials but also through plea bargaining. Plea bargaining is a common practice within the justice system whereby the Crown offers the accused a lesser penalty in exchange for a guilty plea.[145] By engaging in such practice, plea bargaining is often considered to benefit all the parties involved where:

> ... the Crown can tidily close its case, the defence is spared a possibly long trial, and the accused is rewarded for saving court time and expense as well as for sparing victims and victims' families from having to relieve painful events.[146]

In comparison to criminal trials, plea bargaining is the far more common way in which criminal matters are resolved.[147] Indeed, it has been reported that around 90 percent of cases are resolved through the means of plea bargaining.[148] In this way, plea bargaining is often seen to be essential to the function of the criminal justice system.[149] In its absence, it has been suggested that the justice system would likely collapse under its weight due

---

145 Campbell, *supra* note 112 at 69.

146 *Ibid* at 69.

147 FTP Heads of Prosecution Committee, *supra* note 25 at 173.

148 *Ibid*.

149 Campbell, *supra* note 112 at 69.

to the sheer volume of cases that would have to be accommodated through criminal trials.[150]

When offering a plea bargain, the Crown must believe that if the matter went to trial, there would be a reasonable likelihood of conviction.[151] However, as we have argued throughout this paper, should the police and Crown be rushing to resolve cases because of the existence of continual delay, this can result in the development of tunnel vision. Once tunnel vision develops, this can then cause such actors to overly focus on a particular theory and to dismiss evidence that may point to an accused's innocence.[152] Consequently, this can interfere with the Crown's assessment of the prospect of conviction, and as a result, they may offer an innocent accused a plea bargain. While plea bargaining is essential to the function of the justice system, it has been well recognized that such practice may induce innocent persons into a guilty plea. This has been understood to occur for a variety of reasons, including that proceeding to trial may be perceived by an accused as too great a risk to take, that accepting a guilty plea would spare them a lengthy criminal trial, or the simple fact that an accused may actually be released sooner if they plead guilty.[153]

The pressure to accept a plea bargain despite one's innocence can also be dependent on one's identity and unique circumstances.[154] Indeed, it has been observed that various sub-populations, including young persons, Indigenous persons, those with cognitive deficits or mental health concerns, and other marginalized groups, may be at a heightened vulnerability to accept a plea bargain despite their innocence.[155] For instance, Amanda Carling observes that Indigenous peoples may be particularly vulnerable to pleading guilty to a crime that they did not commit for a wide variety of reasons, including – but not limited to – the fact that they are more likely to be denied bail, they may experience communication barriers with justice participants, or they may otherwise face difficulties in navigating and understanding a foreign system of justice which operates upon a different worldview.[156] Given these realities, it is

---

150 *Ibid.*

151 FTP Heads of Prosecution Committee, *supra* note 25 at 191-92.

152 *Ibid* at 7.

153 *Ibid* at 175-81.

154 *Ibid* at 172, 227-28.

155 *Ibid* at 172.

156 Amanda Carling, "A Way to Reduce Indigenous Overrepresentation: Prevent False Guilty Plea Wrongful Convictions" (2017) 64:3-4 Crim LQ 41.

perhaps unsurprising that of the 15 recognized wrongful convictions where an innocent accused entered a guilty plea, four (or 27%) of them were of Indigenous identity.[157] Such a number is greatly disproportionate to the 5% of the general Canadian population that Indigenous peoples make up – although it is a little less than the roughly 30% of the prison population that Indigenous peoples make up.[158]

It has also been recognized that there exists a gendered dimension to the pressure for an innocent person to plead guilty.[159] For example, because most women charged with a crime are also mothers, their familial obligations may pressure them to plead guilty to a crime they did not commit for them to avoid a long criminal trial or to be released from custody sooner.[160]

All of this is not to suggest that one would necessarily expect to see a notable increase in the rate at which plea bargaining is used to resolve cases in a post-*Jordan* environment – especially considering that many cases would be resolved well below the presumptive ceiling and, therefore allow the Crown and police plenty of time to comfortably close their case. Nevertheless, in those cases where the police and Crown are struggling to meet the presumptive ceiling, tunnel vision may be at a heightened risk of developing. If such a stubborn belief in guilt does develop, this can result in the offering of a plea bargain to an innocent accused.

C. Noble-cause Corruption

One potential byproduct of tunnel vision is that of noble-cause corruption.[161] Although noble-cause corruption may have a variety of definitions,[162] in general, it typically refers to "… an ends-based police and prosecutorial culture that masks misconduct as legitimate on the basis that the guilty must be brought successfully to justice."[163] In other words, noble-cause corruption may occur when actors such as the police and Crown become blinded as to the inappropriateness of their conduct and instead

---

157 Kent Roach, "Canada's False Guilty Pleas: Lessons from The Canadian Registry of Wrongful Convictions" (2023) 4:1 Wrongful Conviction LRev 16 at 22.

158 *Ibid.*

159 *Ibid* at 20-22; FTP Heads of Prosecution Committee, *supra* note 25 at 227-28.

160 FTP Heads of Prosecution Committee, *supra* note 25 at 227-28.

161 *Ibid* at 18; MacFarlane, *supra* note 25 at 23-24.

162 Campbell, *supra* note at 112 at 51.

163 MacFarlane, *supra* note 25 at 4.

perceive their actions as legitimate in pursuit of the public interest.[164] Such actors may engage in this type of corruption because they find themselves "...emotionally invested in a case and driven by the need to protect the victim or society from the suspect or perpetrator."[165]

It has also been suggested that participants may engage in such corruption for non-moral reasons, including the fact that it may "... simply make one's job easier; it may conceal sloppy or inadequate police work; it may relieve one of social pressure and so on."[166] In practice, noble-cause corruption can take the shape of a variety of deceptive or non-deceptive conduct.[167] Deceptive tactics may include lying about or otherwise fabricating evidence, while non-deceptive conduct may include the use of excessive force, illegal surveillance tactics, racial profiling, and a whole host of other forms of misconduct.[168]

D. *Jordan*'s Implications for the Development of Noble-Cause Corruption

The significance of noble-cause corruption in relation to the institution of presumptive ceilings is closely aligned with the fact that a failure to meet such deadlines can result in a factually guilty person not being held accountable for their crimes and the concomitant impacts on victims and their families as well as public trust in the justice system. Indeed, on the one hand, the imposition of definitive ceilings upon which delay is presumptively unreasonable may be advantageous in its setting of clear expectations for police and the Crown.[169] In this respect, the institution of presumptive ceilings allows state actors to streamline proceedings and quickly remedy any problems that may be contributing to the delay of a particular case.[170] At the same time, however, the SCC has long set out that a violation of section 11(b) can only be remedied with a stay of proceedings.

---

164 *Ibid* at 20.

165 FTP Heads of Prosecution Committee, *supra* note 25 at 11.

166 John Kleinig, "Rethinking Noble Cause Corruption" (2002) 4:4 Intl J Police Sci & Manag 287 at 308, n 44.

167 *Ibid* at 290.

168 *Ibid.*

169 Pilla & Vandersteen, *supra* note 90 at 439.

170 *Ibid.*

The necessity for such a remedy was clearly articulated in *R v Rahey*,[171] where the SCC noted:

> If an accused has the constitutional right to be tried within a reasonable time, he has the right not to be tried beyond that point in time, and no court has jurisdiction to try him or order that he be tried in violation of that right. After the passage of an unreasonable period of time, no trial, not even the fairest possible trial, is permissible. To allow a trial to proceed after such a finding would be to participate in a further violation of the *Charter*.

In other words, a trial that continues after the breach of an accused's section 11(b) *Charter* right has been found would only further worsen the violation.[172]

While such high stakes may act as a motivator for the state to ensure that concrete action is taken, they simultaneously may have the potential to act as a motivator for actors to engage in corruption to ensure that factually guilty persons are held to account. This is especially the case because the occurrence of a stay of proceedings is notoriously criticized by the Canadian public.[173] Indeed, it has been suggested that "[o]ne effect that rarely fails to escape public consciousness when serious charges are stayed for unreasonable delay is that the accused may receive a windfall."[174] A similar position was also recognized by the SSCLCA during their study, where it was noted that:

> Stays are of great concern to Canadians. They can have a harsh impact on victims and affect public confidence in the criminal justice system. When stays are granted in cases involving alleged child abuse or murder, it shocks the conscience of Canadian communities. They represent a failure to properly prosecute crimes and thereby protect society.[175]

Consequently, should the presumptive ceilings be at risk of being encroached upon within a particular case due to the continual existence of a delay in the justice system, actors such as police or Crown may feel pressure to engage in illegal or otherwise unethical conduct as a means of securing a conviction. For example, it is easy to imagine a scenario where a Crown may become aware of the existence of key disclosure halfway through a trial. While the trial may be on track to complete just under the

---

171 *R v Rahey*, [1987] 1 SCR 588 at para 45, 39 DLR (4th) 481.

172 Pilla & Vandersteen, *supra* note 90.

173 *Ibid* at 444-45.

174 *Ibid* at 444.

175 SSCLCA, *supra* note 34 at 1.

presumptive ceiling, the Crown knows that if such evidence is disclosed to the defence, the proceedings will likely be adjourned so that the defence can have adequate time to prepare. Because legitimate defence preparation time would count towards the total calculation of delay, the Crown knows that disclosing such evidence would bring the trial beyond the presumptive ceiling for that case. While, as previously discussed, the Crown may argue that the delay was attributable to the defence or was otherwise the result of discrete events or the fact that the case was particularly complex, there is no guarantee that such an argument will be successful. Though they may still provide proper disclosure, in such a scenario, the Crown may be under significant pressure not to disclose such evidence. Similarly, should the police find themselves in a situation where they become aware of late disclosure of which the Crown is unaware, they too may be under significant pressure not to inform the Crown of its existence in worry that it would result in the case exceeding the presumptive ceilings. Though hypothetical, these are plausible scenarios demonstrating the importance of ensuring delay is properly addressed so that decisions made by justice system actors are not impacted by whether a case is unduly close to the presumptive ceiling. Doing so would ensure that should unexpected events arise – like that of late disclosure – state actors are not placed in such an uncomfortable position.

IV. Are Actors Being "Rushed to Justice" at the Current State of Delay?

Given the potential for the institution of presumptive ceilings to interact with extant delay issues in contributing to the development of a "rush to justice" mentality among police and Crown, it is important to consider whether delay within the justice system has appropriately been reduced to minimize such risk. One way in which this may be evaluated is through the consideration of the number of successful section 11(b) applications since the release of the SCC's decision in *Jordan*. As previously mentioned, the SCC in *Jordan* asserted that the presumptive ceilings were established by accounting for the time required to complete modern criminal investigations and prosecutions.[176] Therefore, should the police and Crown have difficulty in meeting the presumptive ceilings due to

[176] *Jordan*, *supra* note 26 at 52-53.

continual delay within the justice system, one would expect that a significant number of section 11(b) applications would be successful.

Upon evaluating such data, it does indeed appear a significant number of stays are in fact occurring. For instance, one year following the SCC's decision in *Jordan*, it was reported that a total of 204 cases were stayed across Canada because of unreasonable delay.[177] In 2019, it was reported that this number had grown to a total of 789 cases over three years.[178] Obtaining more recent statistics poses a challenge as many provinces and territories – apart from Alberta – do not publicly report the number of cases that have been stayed because of a *Jordan* application.[179] Nevertheless, the statistics collected by the Government of Alberta do not neatly provide the number of stays that occurred within each calendar year. Instead, the province simply reported that between the period of October 25, 2016, and March 31, 2023 (presumably the portion of the fiscal year during which *Jordan* applied), a total of 114 cases were stayed within the province because of *Jordan*.[180]

With respect to other available data, within the province of Manitoba, a more recent article reported that between 2021-2022, a total of 18 cases were stayed or otherwise had their charges preemptively dropped in response to a *Jordan* application.[181] In 2021, Statistics Canada reported that 6.7% of completed adult criminal court cases during the first three quarters of 2020/2021 had exceeded the presumptive ceiling, with 42% of those cases being stayed or withdrawn[182] – although it was unclear whether the

---

177 Laura Kane, "'Failing everyone': 204 cases tossed over delays since Supreme Court's Jordan Decision" (6 July 2017), online: *CBC News* <www.cbc.ca/news/politics/jordan-cases-stayed-1.4192823> [perma.cc/NX36-AWD4].

178 Andrew Russel, "'It's a travesty': Nearly 800 criminal cases thrown out over delays since 2016 Jordan decision" (10 June 2019), online: *Global News* <globalnews.ca/news/5351012/criminal-cases-thrown-out-r-v-jordan-decision/> [perma.cc/AV6U-Q2L8] [Russel].

179 *Ibid.*

180 "Jordan applications" (last visited 27 April 2023), online: *Government of Alberta* <www.alberta.ca/jordan-applications.aspx> [perma.cc/2DLQ-X5G9].

181 "18 court cases tossed in Manitoba over last 2 years due to delays, prosecution services says" (17 March 2023), online: *CBC News* <www.cbc.ca/news/canada/manitoba/annual-provincial-court-report-manitoba-2022-1.6783335> [perma.cc/6UBA-7NFK].

182 Importantly however, this statistic excluded data from Manitoba, Prince Edward Island, and the Newfoundland and Labrador Superior Court as it was unavailable at the time.

charges were stayed or withdrawn directly in response to a section 11(b) application.[183]

While these statistics may suggest a cause for concern with respect to the current state of delay and the risk of developing a "rush to justice" mentality, they are nevertheless of limited utility because they provide little insight into why the *Jordan* applications have been successful. In this respect, it may be the case that many *Jordan* applications have been successful for reasons unrelated to the presence of continual delay within the justice system. For instance, it is possible that many applications have been successful simply because the Crown had made a genuine mistake in failing to keep up with the *Jordan* timelines within a particular case. In such a scenario, a successful *Jordan* application would say little about the presence of continual delay within the justice system. Considering this, a perhaps more valuable way of examining if delay within the justice system has been appropriately resolved may be through the analysis of the written decisions of recent cases where a *Jordan* application had been successful. Doing so would allow for the evaluation of how the presiding judge may have attributed the source of delay within a particular case. Narrowing this analysis in on the most recently decided cases would be particularly helpful in providing insight into the most current state of delay within the justice system.

Although the source of delay within an individual case may be multifaceted, it does indeed appear that delay within the justice system continues to contribute to instances where stays have been ordered pursuant to a *Jordan* application. For instance, in *R v Brereton*,[184] the accused was charged with sexual assault and the careless storage of a firearm. In *Brereton,* the trial judge attributed the delay to several causes, including an 11-week delay from the accused's date of charge to their first appearance in court, a nine-month delay from the trial readiness of the parties to the trial dates which were available, and the frequent use of one-month adjournments.[185]

---

183 "Fewer adult criminal court cases were completed during the first three quarters of 2020/2021" (16 June 2021), online: *Statistics Canada* <www150.statcan.gc.ca/n1/daily-quotidien/210616/dq210616d-eng.htm> [perma.cc/PA6C-NUJW].

184 *R v Brereton*, 2023 ONCJ 137 at para 1 [*Brereton*].

185 *Ibid* at paras 18-22.

In *R v MK*,[186] the accused was charged with two counts of assault, assault with a weapon, and sexual assault, all of which were related to domestic violence. While the source of delay within *MK* may have been attributable to several sources, the trial judge ultimately found that it was primarily the fault of the justice system's limited resources and its inability to expeditiously accommodate a new trial date after the previous trial date had fallen through.[187] As explained in the trial judge's written decision:

> In the end it was the lack of institutional resources that weighs prominently as a cause for delay. The first trial dates in this matter were scheduled in January 2021, almost 11 months after the parties were prepared to proceed to trial in March 2020. When the matter did not proceed as scheduled, it would have been apparent to all of the criminal justice participants that this case was in jeopardy due to excessive delay. The Trial Coordinator was only able to identify one – two-day block of trial dates before the May 30 and 31 dates. It demonstrates limited institutional flexibility to accommodate cases that are at risk.[188]

In *R v Jakovac*,[189] the accused was one of two co-accused charged with assaulting their sister. In *Jakovac,* the defence successfully argued that despite the case being below the 18-month presumptive ceiling, the delay within the case was nevertheless unreasonable.[190] Here, the trial judge similarly found that the unreasonable delay was also largely the fault of the justice system.[191] In particular, the trial judge noted: "… I am satisfied that it is more probable than not that this factually simple and straightforward 2-day case took markedly longer than it should because of institutional delay due to insufficient judicial resources."[192]

Another recurring theme observed within various past cases is that delay may occasionally materialize on the part of the police. For instance, this can be seen in the case of *R v McCann*,[193] where a significant delay occurred in executing the forensic analysis of the accused's seized electronic devices. As the Court recounted:

> The Crown provided evidence on this application that the police cyber crime unit with responsibility for this analysis was significantly over-loaded with work. There

---

186 *R v MK*, 2022 ONCJ 392 at para 6 [*MK*].

187 *Ibid* at para 24.

188 *Ibid.*

189 *R v Jakovac*, 2023 ONCJ 27 at para 1 [*Jakovac*].

190 *Ibid* at paras 25-35.

191 *Ibid* at para 32.

192 *Ibid.*

193 *R v McCann*, 2022 ONCJ 336 [*McCann*].

> were, for most of the time, only two qualified full-time analysts handling all the cyber crime investigative work in the area. A third part-time analyst was available at some points in time. This acknowledged heavy workload and the limited resources available, was put forward as the reason why the forensic analysis of the devices in this case had to be deferred for 11 months following their seizure.[194]

Once analysis on the devices began at the 11-month mark, another three months was required for the forensic report to be finalized and submitted to the Crown.[195] Given this lengthy delay, it is perhaps unsurprising that the case would be scheduled to conclude beyond the prescribed 18-month presumptive ceiling, and consequently, a stay of proceedings was entered.[196]

Importantly, when a delay such as that which occurred in *McCann* arises on the part of the police, it has the potential to implicate the Crown as they are then responsible for expediting (or attempting to expedite) the proceedings to make up for such lost time. As previously discussed, this occurrence is problematic as it places significant time pressure on the Crown, which may contribute to the development of a "rush to justice" mentality among such actors. This pressure is especially well-demonstrated in the case of *R v MacMillan*,[197] which centered around an accused who was charged with multiple firearm-related offences. In this case, problems began to arise when the Crown made several follow-up requests with the police to receive a key piece of evidence which were necessary for its disclosure obligations and the setting of a trial date.[198] As found by the court:

> What is clear from the evidentiary record, including set date transcripts filed in this matter, is that the Crown consistently over the course of these proceedings made concerted efforts to follow-up with the Toronto Police Service. When asked about the delay in providing the complainant's video statement for example, a crucial piece of disclosure, Mr. Giovinazzo stated that he followed up with the Officer-in-Charge at least once [a] month if not more often. A frequent police response to these inquiries was that it had been ordered but was not yet available. The Crown further advised that despite multiple requests, he did not always get a response from the Officer-in-Charge and escalated his concerns to a superior officer at 54 Division.[199]

---

194 *Ibid* at para 62.

195 *Ibid* at para 63.

196 *Ibid* at paras 2, 72.

197 *R v MacMillan*, 2022 ONCJ 594 at para 9.

198 *Ibid* at paras 82-95.

199 *Ibid* at para 87.

When the Crown received the crucial video, it noted that minor redactions were required and subsequently sent the video back to the police to make such edits.[200] Despite the requirement for relatively minimal changes, it would take around a month for the video to be returned to the Crown.[201] At this point, when the Crown found that a second statement from the complainant, in addition to a 9-1-1 call, also required further redactions, the Crown took it upon themselves to redact the materials in an effort to avoid further delay – despite it being against Crown policy.[202] Indeed, as the *Jordan* ceilings began to approach, the Crown involved in the case explained:

> I'm not going to risk sending it back, given the situation I'm in. I redacted it myself, which is, I will note, contrary to Crown policy. But I did anyway, in order to try and alleviate the situation here. I can say explicitly that that's not going to happen again, given – given the Crown's policy, but it was such dire straits that I literally did the redactions myself.[203]

In the end, despite these desperate efforts from the Crown, the Court ultimately found that the net delay still exceeded the prescribed 18-month presumptive ceiling for the case, and a stay of proceedings was ordered.[204]

Ultimately, these decisions indicate that the current state of delay within the justice system continues to be problematic by creating an environment conducive to the development of a "rush to justice" mentality among actors such as police and Crown. However, this is not to suggest that delay is equally problematic in every jurisdiction, as some may have better addressed delay than others. In addition, while these cases demonstrate that delay within the justice system continues to be problematic, they still provide limited insight into the extent of the problem. This is partly because judges are not always explicitly identifying the source of delay within a particular case, given that the source of delay within a particular case is not always easily identifiable from a judge's vantage point.[205] Nevertheless, these cases show that more work needs to be

---

200 *Ibid* at para 88.

201 *Ibid.*

202 *Ibid.*

203 *Ibid* at para 89.

204 *Ibid* at paras 96-98.

205 See e.g., *R v Dhillon*, 2023 ONCJ 101 at para 38. In *Dhillon*, the trial judge was unable to determine if the long delay between the trial readiness of the parties and the available trial dates was the result of court shutdowns related to the COVID-19 pandemic or a lack of judicial resources due judicial position vacancies – or both.

done with respect to addressing delays within the justice system. Considering this, in the next section of the paper, we will explore several potential recommendations that may be implemented to further reduce delay.

V. Recommendations for the Path Forward

As argued throughout this paper, taking meaningful steps to resolve the delay in the advent of the presumptive ceilings is necessary to reduce the risk of the occurrence of wrongful convictions. Since the release of the SCC's decision in *Jordan*, a significant number of recommendations have been put forth by scholars and committees alike, which aim at reducing delay through efficiency improvements. This section of the paper revisits several of these recommendations, including the need to increase the adoption of technology in courthouses, ensure that the job vacancies of key justice participants are quickly filled, and reduce the number of cases entering the criminal justice system. By implementing these recommendations, actors such as the police and Crown may be able to dispose of matters more quickly, reduce ongoing caseloads, and dedicate less time to administrative matters. Within this section, we also conclude by proposing our recommendation, namely that there is a need for fulsome and systematic data collection on *Jordan* applications which, as we suggest, would assist in providing a more complete picture as to where efforts to resolve delay should be targeted. By reducing delay through the implementation of such recommendations, we suggest that police and Crown may then be able to designate more time for careful case evaluation, which in the presence of *Jordan*'s strict timelines is essential to reducing the risk of the development of a "rush to justice" mentality, and thus by extension, ultimately reducing the risk for the occurrence of wrongful convictions.

We do not intend to suggest that the recommendations advanced within this section are the only methods by which delay may be reduced. Indeed, it must be underscored that delay within the justice system is not the sole fault of the issues we have identified here. Instead, we reiterate the claim advanced by the SSCLCA that delay within the justice system is a multifaceted problem with a large variation of causes and effects.[206] Put

---

[206] SSCLCA, *supra* note 34 at 1.

differently, as the committee has suggested, there is no single "quick fix" to solve delay in the justice system.[207] Nevertheless, we suggest that the recommendations advanced within this section may be good places to start when attempting to address the problem of delay in the justice system. While some may purport that delay could be easily remedied by simply injecting more resources into the criminal justice system, the SSCLCA has noted that "…increasing resources alone will not fix the problems. If resources are increased without being accompanied by broader institutional changes, it is likely that the delays will continue."[208]

A. Technological Improvement in Courthouses

A prominent recommendation that has been put forth following *Jordan* narrows in on the need to adopt more technology[209] within courthouses across Canada.[210] Indeed, the justice system – and the court system in particular – has been well-criticized for its failure to keep up with technological change.[211] It has also been suggested that "… the justice systems of Canada and the United States are rooted in the 18th and 19th century but are facing 21st-century problems. The mechanisms used for scheduling, and the system of evidence are archaic."[212] A similar finding was made during the SSCLCA's study after witnesses frequently "…described how within the legal community there is often a reluctance to adopt computer-based systems and a continued reliance on traditional and paper-based practices."[213]

Nevertheless, the suggestion to implement more technology in courthouses is not necessarily new. Indeed, some provinces have previously attempted to modernize their court systems with rather disappointing outcomes.[214] For instance, Ontario spent $10 million on the development

---

207 *Ibid*.

208 *Ibid* at 2.

209 In the context of this recommendation, technology may be understood to refer to the digitization of court processes, proceedings, and documents.

210 *Ibid* at 93-95.

211 Anevich, *supra* note 32 at 76; "Court Digital Transformation Strategy," *supra* note 91 at 5; SSCLCA, *supra* note 34 at 12, 94.

212 Anevich, *supra* note 32 at 76.

213 SSCLCA, *supra* note 34 at 94.

214 Paul Gallant, "How Technology Can Help Create a Better Justice System"(13 February 2018), online: *The Walrus* <thewalrus.ca/how-technology-can-help-create-a-better-justice-system/> [perma.cc/28MR-9DLL].

of an online court management system before it was eventually abandoned.[215] Similarly, Quebec had a comparable experience where $60 million was invested in a similar system over several years with apparently "...little to show for it."[216] While evidently, some provinces may have been unsuccessful in implementing such a recommendation in the past, the reality of the SCC's decision in *Jordan* and its risk for wrongful convictions may nevertheless require that the implementation of technology be a necessary feature of modern courthouses.

In relation to reducing the risk of wrongful convictions, the adoption of technology in courthouses may allow for the streamlining of criminal proceedings and, depending on the degree of such implementation, may result in the ability to reduce the number of court appearances required altogether. Consequently, police and Crown may be able to spend less time in courtrooms or otherwise dealing with matters that could be more efficiently resolved with the assistance of technology. This would allow the police and Crown to spend more time on careful case evaluation, which is critical in combating the development of a "rush to justice" mentality.

A recent digitization strategy put forward by the Government of British Columbia demonstrates how such measures can be effective in helping the police and Crown save valuable time in their everyday work. In this respect, among the province's many proposed technological additions is the adoption of a digital case management system.[217] Such a system would reportedly give justice participants the ability to quickly and remotely access or file documents and disclosure, allow court staff the ability to spend less time on data entry and more time assisting judges and litigants while also remedying the inundation of paper, which is currently plaguing courtrooms and requiring valuable resources to produce.[218]

Another significant proposal put forward by the Government of British Columbia includes increasing the adoption of connectivity in courtrooms and encouraging the use of digital proceedings wherever possible.[219] The province suggests that such implementation may have considerable benefits, including the fact that participants, witnesses, and defendants may be able to attend earlier court dates because of less disruption and conflict

---

215 *Ibid.*

216 *Ibid.*

217 "Court Digital Transformation Strategy", *supra* note 91.

218 *Ibid.*

219 *Ibid.*

in their employment and other obligations.[220] This is especially true for those who live in rural locations or those who may live on a reserve far from courthouses where the proceedings are scheduled to take place.[221]

While there is certainly room for improvement, all of this is not to suggest that Canadian courthouses are entirely absent of technology. Indeed, some technological advancements aimed at increasing efficiency in court proceedings have already been made in the city of Calgary, where lawyers are able to schedule their appearances remotely through their computers.[222] Furthermore, at the time of writing this paper, the province of Ontario has recently opened a state-of-the-art courthouse in the city of Toronto.[223] Among its many features, this newly constructed courthouse "...boasts 73 judicial hearing rooms equipped with modern technology, including video capabilities, to ensure the efficient and effective process of criminal cases."[224]

With respect to such recommendations, it is also helpful to look at the implementations of other countries and jurisdictions outside of Canada. For instance, the SSCLCA pointed to England and Wales, where a computerized system for managing court proceedings has recently been implemented.[225] Such a system allows counsel the ability to make digital submissions of filings to be reviewed by a judge without requiring physical appearances.[226] Ultimately, in view of the presumptive ceilings, embracing technology within courthouses in this manner may be critical for ensuring trial efficiency and reducing the risk of wrongful convictions.

B. Ensuring that the Position Vacancies of key Justice Participants are Quickly Filled

Another recommendation that has been advanced in the advent of *Jordan* and the need to reduce delay narrows in on the importance of ensuring that position vacancies of key justice participants are quickly

---

220 *Ibid* at 9-10.

221 *Ibid* at 10.

222 SSCLCA, *supra* note 34 at 82.

223 Angelica Dino, "New courthouse opens in Toronto to modernize and improve access to justice" (6 March 2023), online: *Law Times* <www.lawtimesnews.com/practice-areas/litigation/new-courthouse-opens-in-toronto-to-modernize-and-improve-access-to-justice/374165> [perma.cc/4VRJ-QRLX].

224 *Ibid*.

225 SSCLCA, *supra* note 34 at 93.

226 *Ibid*.

filled.[227] The implementation of such a recommendation is necessary to ensure that court cases are moving along as quickly as possible. Related to this, a concern raised by SSCLCA focused on the significant number of federal judicial vacancies that existed over the course of their year-long study on delay within Canada.[228] As a result, the SSCLCA advanced the recommendation that "…superior court judges be appointed on the day of a known retirement of a judge and the only exception to this immediate replacement would be an unexpected death or unexpected early retirement of a sitting judge."[229] In this respect, the committee observed as of June 1st, 2017, the federal judiciary had a total of 849 federally appointed judges and 285 supernumerary judges; however, there were between 27 to as high as 62 total vacant positions between February 2016 and June 2017.[230] According to more recent numbers, it appears that such vacancies are not getting much better given that recently, as of April 3rd, 2023, there remained 86 positions to be filled out of a total of 908 federally appointed judges and 272 supernumerary judges.[231] The situation has gotten so dire that in May of 2023, Chief Justice Richard Wagner of the SCC wrote a letter to the federal government expressing his serious concern about the number of judicial vacancies that currently exist.[232] The Chief Justice explained that judicial appointments are taking an inordinate amount of time, consequently leading to delays with respect to the *Jordan* timeline.[233]

Such circumstances are problematic in relation to wrongful convictions and the need to reduce the "rush to justice" pressures that may be caused by delay. With dozens of judicial vacancies present at any given month,

---

227 See e.g., SSCLCA, *supra* note 34 at 86-92.

228 SSCLCA, *ibid* at 86-92.

229 *Ibid* at 5.

230 *Ibid* at 87-88.

231 "Number of Federally Appointed Judges in Canada" (last modified 3 April 2023), online: *Office of the Commissioner for Federal Judicial Affairs Canada* <www.fja.gc.ca/appointments-nominations/judges-juges-eng.aspx> [perma.cc/ZCH6-KBQJ]. It is important to note that at the beginning of 2023, 22 new judicial positions were added due to incoming legislation on the part of the federal government. Nevertheless, even without the addition of such positions, the number of judicial vacancies does not appear to be improving.

232 Daniel Leblanc, "Chief justice warns Trudeau that judicial vacancies are putting criminal trials at risk" (9 May 2023), online: *CBC News* <www.cbc.ca/news/politics/supreme-court-wagner-trudeau-judicial-vacancies-1.6836145> [perma.cc/9EYF-E8P8].

233 *Ibid.*

police and Crown are unable to resolve matters as quickly as they otherwise should[234] and are thus left with larger revolving caseloads. By quickly filling such judicial vacancies, police and Crown would be able to dispose of matters quicker and dedicate more of their time to the most pressing cases. In addition, should this problem be resolved, trials would presumably be able to be scheduled within shorter timeframes, taking up less of the presumptive ceiling timeline and thus allowing more time for careful case evaluation.

Although the SSCLCA's study focused almost exclusively on federal judiciary vacancies, equally important is the need to ensure that position vacancies for other criminal justice actors are also quickly being filled. At the time of writing this paper, a particularly concerning situation has emerged in Alberta concerning a significant number of vacant positions in their provincial Crown office.[235] As suggested by the president of the Alberta Crown Attorney's Association, "The best numbers we have, suggest that we're 47 Crown prosecutors short."[236] As a consequence, in relation to *Jordan*, the president suggested that they "...do not have the resources necessary to prosecute all the files coming through court and as a result, there are about 1,200 serious and violent cases that are at risk of being stayed due to delay."[237] Given this set of circumstances, it is perhaps unsurprising that it is further reported that the "[t]he workload is crushing, morale is low, and most prosecutors report feeling completely burned out."[238] Problematically, according to the Alberta Crown Attorney's Association, this has been an issue for many years and is suggested to be particularly bad in rural areas.[239] Fortunately, this situation appears to be slowly resolving, with a recent announcement that the Alberta Crown Attorneys' Association has reached an agreement with the province to guarantee a certain amount of preparation time per case.[240] Nevertheless, it

---

234 SSCLCA, *supra* note 34 at 86.

235 Emily Mertz, "'It's a crisis': Shortage of Alberta Crown prosecutors means 1,200 serious files at risk of being stayed" (23 November 2021), online: *Global News* <globalnews.ca/news/8395629/alberta-crown-prosecutors-shortage-charges-stayed/> [perma.cc/RM9F-TJZP].

236 *Ibid.*

237 *Ibid.*

238 *Ibid.*

239 *Ibid.*

240 Paula Tran, "Alberta Crown prosecutors reach agreement with government" (27 October 2022), online: *Global News* <globalnews.ca/news/9230732/alberta-crown-

remains unclear as to whether the significant number of prosecutorial vacancies within the province are being filled.

Similar situations with the staffing of Crown attorneys have also been reported in the provinces of Manitoba and New Brunswick.[241] For instance, in the spring of 2023, the Manitoba Association of Crown Attorneys filed a grievance with the province due to their Crown becoming overstrained and experiencing a high burnout rate.[242] This has allegedly been brought on by several factors, including a high crime rate leading to more arrests, increasing complexity, and the strict timelines imposed by *Jordan*.[243] Problematically, this has reportedly led to the Crown having inadequate case preparation time,[244] which, as we have argued, may create conditions conducive to wrongful convictions. Similarly, the New Brunswick Crown Prosecutors Association has said that they "...have been experiencing staffing problems for the last 10 to 15 years and over the last few years the shortage has become a crisis."[245] While they have been attempting to raise this issue with the provincial government, the shortage has reportedly become so bad that they are on the "brink of collapse."[246]

It is unclear whether similarly dire situations in Crown attorney staffing exist in other provinces, but it is clearly not an issue isolated to one jurisdiction. From a wrongful convictions perspective, this is a grave cause for concern with respect to the risk of the development of a "rush to justice" mentality. In this respect, such an environment is conducive to one which prioritizes efficiency over thoroughness and thereby creates a heightened risk for the development of cognitive biases and tunnel vision.[247] Ultimately, the *Jordan* timeline is static, and thus, it does not allow for exceptions based on local resource constraints or considerations such as a

---

prosecutor-collective-agreement/> [perma.cc/BS7D-JYFS].

241 See e.g., Sam Thompson, "Overworked Manitoba Crown attorneys file grievance with province" (26 April 2023), online: *Global News* <globalnews.ca/news/9651978/manitoba-crowns-grievance/> [perma.cc/SQG9-S5WK] [Thompson]; Vanessa Moreau, "Delays prompt judge to stay charges against man accused of sexual assault" (24 February 2023), online: *CBC News* <www.cbc.ca/news/canada/new-brunswick/case-thrown-nb-prosecution-delays-1.6759545> [perma.cc/HV8A-9AU3] [Moreau].

242 Thompson, *supra* note 241.

243 *Ibid.*

244 *Ibid.*

245 Moreau, *supra* note 241.

246 *Ibid.*

247 Meterko & Cooper, *supra* note 105 at 107.

shortage of prosecutors, police, or judges within a particular jurisdiction. Given this inflexibility, it is critical that when governments and their respective criminal justice agencies are attempting to resolve delay, all jurisdictions must be equally prioritized.

C. Reducing the Number of Cases Entering the Traditional Criminal Justice System

Considering the institution of presumptive ceilings and the risks that continual delay may pose for wrongful convictions, another recommendation aimed at reducing the workload of police and Crown concerns the need to reduce the sheer volume of cases that are entering the traditional criminal justice system.[248] This position was similarly shared by the SCC in *Jordan*, where it suggested that among the many obligations for Crown counsel following the establishment of presumptive ceilings is the need for "…enhanced crown discretion for resolving individual cases."[249]

Many participants in the SSCLCA's study also reiterated this need where the committee found that "one of the more pressing causes of delays presented by many witnesses lies in the fact that the criminal law system is attempting to deal with too many cases that it is not suited to handle."[250] Recently retired SCC justice Michael Moldaver has renewed such claims by suggesting that lower-level prosecutions such as minor drug cases, thefts, assaults, and administration of justice offences could be resolved more efficiently through means such as ticketing and diversion while still maintaining principles of fairness.[251] As suggested by the retired justice, "I think we have to come to grips with the fact that the criminal justice system is not a panacea – it's not a cure for the ills of society."[252]

In line with such recommendation, in the advent of *Jordan*, the province of Manitoba has recently taken the initiative by instituting new Crown policies which require the Crown to make quicker decisions with respect to whether a particular case would be better handled through

---

248 SSCLCA, *supra* note 34 at 56.

249 *Jordan*, *supra* note 26 at 138.

250 SSCLCA, *supra* note 34 at 12.

251 Cristin Schmitz, "Cull of 'huge mass' of less-serious criminal cases could unclog Canada's justice system: Moldaver" (19 September 2022), online: *Law360 Canada* <www.law360.ca/articles/39774> [perma.cc/JX8A-5KBE].

252 *Ibid*.

diversion programming.[253] As a result of such changes, the province reports that they are now "… making more effective use of alternative measures including diversion to restorative justice programs than in the past."[254] Indeed, the utilization of diversion programming is not new.[255] In this respect, the SSCLCA observed that section 717 of the *Criminal Code* has long stated that alternative measures outside the use of judicial proceedings may be utilized.[256] However, for diversion to be possible under such provision, several strict conditions must be met – as explicitly set out within the *Code* – including the requirement that such diversion is not "…inconsistent with the protection of society."[257] Provinces and territories around the country can take lessons from Manitoba by ensuring that diversion programming is being appropriately utilized.

There is, however, an additional question concerning whether more can be done with respect to diverting low-level offenders away from the system. This suggestion was brought forth within SSCLCA's study, where it was suggested that the objective should be "…to divert suitable matters away from the courts before they get there, perhaps even before charges have been laid."[258] One example of a somewhat recent initiative in this regard can be found in the implementation of the Immediate Roadside Prohibition ("IRP") program within many western provinces, including that of British Columbia, Alberta, Saskatchewan, and Manitoba.[259] Such a program aims to reduce the influx of impaired driving charges within the court system by diverting low-level impairment cases away from the need to lay criminal charges through immediate sanctions that can be administered on the roadside.[260] While the IRP program has been undoubtedly

---

253 "Criminal Justice System Modernization Strategy" (2019) at 4, online (pdf): *Government of Manitoba* <www.gov.mb.ca/justice/cjsm/pubs/criminaljusticereform.pdf> [perma.cc/7QQ2-RRV8].

254 *Ibid* at 5.

255 SSCLCA, *supra* note 34 at 142-44.

256 *Ibid* at 143.

257 *Ibid.*

258 *Ibid* at 144.

259 Robert Solomon, Lauren MacLeod & Eric Dumschat, "The increasing role of provincial administrative sanctions in Canadian impaired driving enforcement" (2020) 21:5 Traffic In Prev 298 at 299.

260 SSCLCA, *supra* note 34 at 58-59.

controversial since its inception,[261] it nevertheless provides one creative example of how other provinces may divert cases from the courts entirely.

With respect to wrongful convictions, reducing the number of cases within the traditional criminal justice system by making greater use of diversion programming may allow police and Crown the ability to dedicate more time and resources to investigating and prosecuting more serious cases. By being able to dedicate additional time to these more serious matters, the police and Crown may consequently feel less pressure from *Jordan*'s strict timelines and be able to spend more time conducting careful case evaluation. At the same time, diverting cases from the traditional criminal justice system will also reduce the number of cases moving through the courts, thereby reducing backlog and presumably allowing courts to schedule matters faster and in shorter timeframes. In turn, Crown may be able to resolve matters more quickly. This is especially important when mid-trial applications may be brought forward, which may require additional trial dates and thus further delay the anticipated end date of the trial. Ultimately, it must be acknowledged that the criminal justice system has a finite number of resources available for its operation. While diverting offenders away from the criminal justice system may be considered a controversial issue among Canadians, these are nevertheless the difficult conversations that the public must engage in following the release of the SCC's decision in *Jordan.*

D. The Need for Better Data Collection Concerning *Jordan* Applications

A recommendation that has perhaps received less attention following *Jordan* surrounds the need for better data collection concerning *Jordan* applications. As previously discussed, as it currently stands, there exists no requirement for provinces and territories to publicly report the number of successful *Jordan* applications which have occurred or what the causes of delay within such cases may be attributed to.[262] Consequently, obtaining an accurate picture of the current state of delay within the justice system remains a challenge. The collection of such data is critical to assessing the most pressing causes of delay within the justice system, whether the causes differ between jurisdictions, and where efforts should be focused with

---

261 *Ibid* at 58-60.

262 Russel, *supra* note 178.

respect to tackling the issue of delay. When it comes to avoiding wrongful convictions, understanding the nature of delay in the justice system will allow governments and justice agencies to quickly identify and respond to the contributors to delay within individual jurisdictions. Indeed, as found by the SSCLCA, jurisdictions often face unique contributors to delay, which may differ from others.[263] Ultimately, addressing delay in this manner may most effectively help reduce the potential contributors to the development of a "rush to justice" mentality among police and Crown.

We note that if, per one of our previous recommendations, technological improvements were adopted within the courts, the means to easily report and record this and other types of valuable data electronically could be built into any system and compiled centrally, whether at the provincial or federal level.

With respect to the collection of data on the cause of delay within a particular case, it is important to qualify this recommendation by acknowledging that, in some cases, it may be difficult for actors such as judges to identify the source of delay within a particular case so that it may later be recorded. However, at the same time, judges may also find themselves with unique expertise of the jurisdiction in which they operate and may consequently be able to identify sources of delay that may not be apparent to those without such insight. Nevertheless, even if limiting the collection of such data to only those cases where the cause of delay is clear, such data would still provide valuable insight into the current state of delay within the justice system and its consequential risks for the occurrence of wrongful convictions.

It is also important to note that the existence of more fulsome data collection may be very helpful when making future assessments as to whether the presumptive ceilings should be changed. Indeed, as the majority in *Jordan* stated:

> There is little reason to be satisfied with a presumptive ceiling on trial delay set at 18 months for cases going to trial in the provincial court, and 30 months for cases going to trial in the superior court. This is a long time to wait for justice. But the ceiling reflects the realities we currently face. We may have to revisit these numbers and the considerations that inform them in the future.

Having access to comprehensive data regarding the number of, and reasons for, *Jordan*-related stays would also provide decision-makers with a more complete and nuanced picture of the current state of delay, especially

---

263 SSCLCA, *supra* note 34.

as the investigative and prosecutorial landscape continues to change in the future. Comprehensive data on these issues would also enable decision-makers to enact evidence-based changes to presumptive ceilings if needed. For example, Parliament could increase the presumptive ceilings through legislation.

VI. Conclusion

In conclusion, considering the imposition of presumptive ceilings in *R v Jordan*, the current state of delay within the justice system has the potential to exacerbate the likelihood that a wrongful conviction may occur. In this respect, continual delay within the justice system may create an elevated risk for the development of cognitive biases, tunnel vision, and noble-cause corruption – all of which have been understood to increase the likelihood that a wrongful conviction may occur.[264] While governments and justice agencies have taken some steps to resolve delay and consequently reduce "rush to justice" pressures among justice participants, evidence nevertheless suggests that police and Crown may continue to experience pressures to meet the presumptive ceilings. Accordingly, further efforts need to be taken to better address delay within the justice system, given the SCC's decision in *Jordan*.

This argument has been demonstrated throughout this paper in four distinct sections. First, we explored the case of *R v Jordan* and relevant commentary on its potential impacts on the criminal justice system. Second, we identified the relevant "rush to justice" concepts within wrongful conviction literature and considered their relevance to the *Jordan* framework. Third, we explored whether the current state of delay within the justice system risks the development of a "rush to justice" mentality among actors such as the police and Crown. Finally, we concluded by considering several recommendations that may be adopted to further reduce delay and, by extension, reduce the risk of the development of a "rush to justice" mentality among such actors. Such recommendations include the need for technological improvement in courthouses, ensuring that the position vacancies of key justice participants are quickly filled, reducing the number of cases entering the traditional criminal justice

---

264 FTP Heads of Prosecution Committee, *supra* note 25.

system, and the need for better data collection concerning *Jordan* applications.

It must be reiterated that the objective of this paper is not to be critical of the SCC's decision in *Jordan*. Rather, considering the decision, we have sought to demonstrate the importance of adequate government and justice agency response to the decision to reduce the potential for wrongful convictions. Indeed, to date, nearly all the discussion surrounding the decision has focused primarily on the need to address delay as a means of preventing the occurrence of stays being entered and thereby maintaining the repute of the justice system. Such concern is of particular importance considering recent cases such as *R v Hanan*,[265] where the SCC set aside the accused's conviction for a variety of serious offences – including manslaughter – and entered a stay of proceedings after the case had exceeded the 30-month presumptive ceiling. However, as this paper makes evident, an equally important perspective that has been largely absent from the discussion surrounding *Jordan* concerns the increased potential for wrongful convictions within an environment that can exacerbate a "rush to justice" mentality among actors such as police and Crown if the delay is not appropriately addressed.

In their report on wrongful convictions within Canada, the FTP Heads of the Prosecution Committee expressed the concern that "…wrongful convictions may receive less priority and attention as other issues – notably trial delay following the Supreme Court of Canada's landmark ruling in *Jordan* – come to the fore."[266] Quite the contrary, in the wake of *Jordan* and its potential to create a "rush to justice" mentality among justice participants, we are of the position that wrongful convictions should be at the forefront of discussion surrounding the need to reduce delay. Given the lack of discussion concerning this position to date, perhaps there is some truth to the Committee's concern that the issue of wrongful convictions has become overlooked in recent years.

Ultimately, it is imperative to prevent wrongful convictions before they occur in the first place. Once a wrongful conviction has occurred, the current process that individuals must undertake to remedy it has been criticized as being inaccessible, time-consuming, costly, and inadequate.[267] Once a wrongfully convicted individual has exhausted their appeals and

---

265 *R v Hanan*, 2016 SCC 27 [*Hanan*].

266 FTP Heads of Prosecution Committee, *supra* note 25 at 5.

267 Campbell, *supra* note 112 at 191, 198-204.

subsequently applies for a ministerial review of their conviction, this review process alone can take anywhere from two to six years to complete.[268] Particularly problematic is the fact that this process has been identified as a barrier for members of marginalized communities.[269] Indeed, as the then-Justice Minister David Lametti explained, many of those who are requesting a ministerial review of their case are overwhelmingly white men and are therefore not representative of the prison population.[270]

At the time of writing this paper, the federal government has recently proposed legislation that aims to revise this ministerial review process by establishing a new and independent commission to review wrongful convictions.[271] The new bill aims to address some of these criticisms by making the review process faster and more accessible.[272] Nevertheless, while these changes appear promising should they come to fruition, it is perhaps too early to determine if this new process would truly address these problems in practice. In addition, much like the process that it aims to replace, no system will be able to identify or remedy all wrongful convictions. This reality further underscores the importance of preventing wrongful convictions before they occur in the first place.

While the focus of this paper has primarily centered on *Jordan* and its potential impacts on the decision-making responsibilities of police and Crown prosecutors, further research is needed to explore the implications that justice system delay and the risk of developing a "rush to justice" mentality may have on other justice participants such as forensic analysts. Ultimately, this concern of developing a "rush to justice" mentality is by no means remote. Indeed, wrongful conviction literature has long identified that an environment that prioritizes efficiency over thoroughness is problematic for the development of cognitive biases, tunnel vision, and, consequently, noble-cause corruption.[273] Each of these concepts has been

---

268 "Liberals introduce 'Milgaard's Law' to create review process for wrongful convictions" (16 February 2023), online: *CTV News* <www.ctvnews.ca/politics/liberals-introduce-milgaard-s-law-to-create-review-process-for-wrongful-convictions-1.6276740> [perma.cc/C3BX-K4BU].

269 *Ibid.*

270 *Ibid.*

271 *Ibid.*

272 *Ibid.*

273 Campbell, *supra* note 112; MacFarlane, "Distorted Decision-Making", *supra* note 117; MacFarlane, "The Effect of Tunnel Vision", *supra* note 25.

understood to contribute to miscarriages of justice,[274] and therefore Canadian justice participants must continue to be vigilant regarding the continually pressing risk of wrongful convictions.

[274] See e.g. FTP Heads of Prosecution Committee, *supra* note 25; MacFarlane, "The Effect of Tunnel Vision", *supra* note 25; Meterko & Cooper, *supra* note 106.