

STATE OF NEW YORK  
COMMISSION ON JUDICIAL CONDUCT

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In the Matter of the Proceeding  
Pursuant to Section 44, subdivision 4,  
of the Judiciary Law in Relation to

**MICHAEL A. GARY,**

**AGREED  
STATEMENT OF FACTS**

a Judge of the New York City Criminal Court  
and an Acting Justice of the Supreme Court,  
2nd Judicial District, Kings County.

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Subject to the approval of the Commission on Judicial Conduct

("Commission"):

**IT IS HEREBY STIPULATED AND AGREED** by and between Robert H. Tembeckjian, Administrator and Counsel to the Commission, and Honorable Michael A. Gary ("Respondent"), who is represented in this proceeding by Harvey L. Greenberg, of Greenberg & Wilner, LLP, that further proceedings are waived and that the Commission shall make its determination upon the following facts, which shall constitute the entire record in lieu of a hearing.

1. Respondent was admitted to the practice of law in New York in 1975. He has been a Judge of the New York City Criminal Court since 1987 and an Acting Justice of the Supreme Court, 2<sup>nd</sup> Judicial District, Kings County, since 1994. Respondent's current term expires on December 31, 2020.

2. Respondent was served with a Formal Written Complaint dated February 29, 2016, a copy of which is appended as Exhibit 1. He filed an Answer dated March 22, 2016, a copy of which is appended as Exhibit 2.

**As to Charge I**

3. On March 13 and 14, 2014, while presiding over the trial in *People v Kevin Bartholomew*, Respondent, without basis in law, threatened to: (1) hold an assistant district attorney in contempt of court if the defendant was arrested for threatening a witness in the case; (2) declare a mistrial with prejudice if the defendant was arrested; and (3) impose financial sanctions upon the District Attorney's Office if a mistrial was declared because of the arrest. Respondent also yelled and acted in a discourteous manner toward the assistant district attorney.

**As to the Specifications to Charge I**

4. In March 2014, Respondent presided over a jury trial in *People v Kevin Bartholomew*, in which the defendant was charged with raping his daughter.

5. On Wednesday March 12, 2014, Assistant District Attorney ("ADA") Lisa Nugent called Joleane Joseph, the defendant's former girlfriend and mother of his minor son, to testify. Ms. Joseph testified on direct examination and was cross-examined through the afternoon session. She returned the next day and was cross-examined for the morning session on March 13<sup>th</sup>.

6. Ms. Joseph completed her testimony before court was recessed for lunch. Toward the end of the luncheon recess, and before trial resumed, there was an off-the-record conference during which ADA Nugent informed Respondent that the defendant, who was free on bail, had allegedly approached Ms. Joseph as she was leaving the courthouse during the lunch break and said to her, "You're dead." ADA Nugent also

informed Respondent that Ms. Joseph had been taken to the 84<sup>th</sup> Precinct stationhouse to make a complaint against the defendant.

7. During the conference, Respondent spoke to ADA Nugent in a raised voice and threatened to hold her in contempt if the defendant was arrested for threatening Ms. Joseph.

8. On the record, ADA Nugent summarized the threat the defendant had allegedly made against Ms. Joseph. Respondent directed that the defendant was not to be arrested for making a threat while the rape trial was ongoing. Addressing ADA Nugent, Respondent continued, "Because if he is, then I will hold you in contempt for violating my direct order." A copy of the transcript of the proceedings on March 13, 2014 is appended as Exhibit 3.<sup>1</sup>

9. Respondent also said that if the defendant was arrested, defense counsel "will make a motion for a mistrial . . . [a]nd it is very, very likely that I will grant that mistrial motion with prejudice." Respondent asked ADA Nugent, "Do you understand what with prejudice means?" *Id.*

10. Respondent then told ADA Nugent to notify her supervisors to "coordinate with the police personnel from the 84<sup>th</sup> Precinct . . . such that nothing happens to this man until this case is over." *Id.*

11. After calling her supervisor, ADA Nugent advised Respondent, "We have no control over . . . the police department." Respondent replied, "Don't give me any BS

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<sup>1</sup> The relevant discussion is on pages 425 through 429 of Exhibit 3.

about you have no control over the police department . . . . You can certainly tell a detective or police officer investigating that on the orders of the DA's Office, no arrest is to be made until it is authorized by your office." *Id.*

12. ADA Nugent requested the defendant's remand on the rape charge in light of his threat to the witness. Respondent denied the request, and the trial resumed.

13. The next day, Friday March 14, 2014, during a morning recess of the trial, Respondent raised the issue of the defendant's arrest again, stating:

Let's make something crystal clear, People. Today is Friday. We are going to finish the People's case now with this last witness. The defense case is supposed to start on Monday. If you were to have . . . Mr. Bartholomew arrested any time between now and Monday . . . Mr. Bartholomew . . . would not be in a position to prepare his defense.

\* \* \*

If there is a mistrial, if this case has to be delayed because you have unnecessarily and unjustifiably prevented the defendant from seeing his attorney and preparing his defense and this matter has to be adjourned, I will consider, one, financial sanctions against your office. And number two, I will certainly consider a mistrial with prejudice.<sup>2</sup>

A copy of the transcript of the proceedings on March 14, 2014 is appended as Exhibit 4.<sup>3</sup>

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<sup>2</sup> While the Administrator takes no position on whether the defendant should or should not have been remanded, Respondent avers and the trial transcript corroborates that he had the following concerns. Had the defendant been remanded on Thursday March 13, the Department of Corrections would have had to insure his presence in court for the resumption of trial on Friday March 14. However, such remand would have meant his continued incarceration over the weekend, likely at Riker's Island, which would likely have impeded his ability to meet with counsel to prepare for the commencement of his defense on Monday March 17. Any custodial movement of the defendant associated with his arrest and processing on the new charge may have further impeded his ability to meet with counsel for trial preparation purposes. In addition, at the time of these discussions on March 13 and 14, Respondent considered that, the defendant had not formally been charged with threatening his girlfriend and had been coming to court as required while out on bail throughout the course of this case.

<sup>3</sup> The relevant discussion is on pages 545 through 556 and pages 601 through 623 of Exhibit 4.

14. ADA Nugent's supervisor, ADA Coleen Balbert, then approached the bench and told Respondent that the District Attorney's Office would not advise the Police Department to refrain from arresting the defendant. Respondent directed ADA Balbert to have the detective or a supervising officer in the courtroom at 2:15 that afternoon.

15. After the lunch recess, ADAs Nugent and Balbert returned to the courtroom accompanied by Lieutenant ("Lt.") Joseph LaBella and Detective William Bush. ADA Balbert stated that, according to Police Department policy, the defendant should have been arrested in connection with threatening the witness.

16. Respondent acknowledged on the record that he had no authority to order the Police Department to refrain from arresting the defendant. However, he beseeched the officers not to arrest the defendant until after the trial concluded. Respondent explained his concern that an arrest might require a mistrial and cause the victim to have to testify again about being raped by her father.

17. Lt. LaBella did not want to interfere with the felony rape trial and agreed with defense counsel that the defendant would not be arrested before the conclusion of the trial, but would surrender to the police after the verdict.

18. On March 18, 2014, the defendant was found guilty and was remanded pending sentence.

19. Although the police intended and were prepared to arrest the defendant promptly for threatening Ms. Joseph's life, they delayed doing so because of Respondent's statements. Respondent sentenced the defendant to 15 years in prison and 20 years of post-release supervision. After sentence was imposed, the police arrested and

charged the defendant with menacing, a B misdemeanor, having a maximum possible sentence of 90 days in jail. However, the Kings County DA's Office chose not to prosecute the defendant on the menacing charge and it was dismissed for failure to prosecute. Notably, the prosecution had never requested an Order of Protection on behalf of Joleane Joseph in the three years this case had been pending trial, nor did they at the time they represented she had been allegedly threatened by the defendant Mr. Bartholomew.

20. By reason of the foregoing, Respondent should be disciplined for cause, pursuant to Article 6, Section 22, subdivision (a), of the Constitution and Section 44, subdivision 1, of the Judiciary Law, in that Respondent failed to uphold the integrity and independence of the judiciary by failing to maintain high standards of conduct so that the integrity and independence of the judiciary would be preserved, in violation of Section 100.1 of the Rules; failed to avoid impropriety and the appearance of impropriety in that he failed to respect and comply with the law and to act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary, in violation of Section 100.2(A) of the Rules; and failed to perform the duties of judicial office impartially and diligently, in that he failed to be patient, dignified and courteous to those with whom the judge deals in an official capacity, in violation of Section 100.3(B)(3) of the Rules.

#### **Additional Factors**

21. Respondent acknowledges that it was wrong and without basis in law to threaten to (A) hold the prosecutor in contempt if the defendant was arrested, (B) declare

a mistrial with prejudice if the defendant was arrested and (C) impose financial sanctions upon the District Attorney's Office if a mistrial was declared because of the defendant's arrest.

22. Consistent with his statements on the record in the *Bartholomew* case (Exhibit 4), Respondent testified under oath during the Commission's investigation that he was motivated by his concerns (A) to conclude the case and avoid a mistrial and (B) to spare the young victim from having to testify again at a retrial. In doing so, he conceded in his testimony that he spoke in a rash fashion to the prosecutor. Furthermore, Respondent believed a mistrial would result if the trial was delayed by the defendant's arrest on the menacing charge because, as evidenced in the trial record (Exhibit 4 at page 500 and pages 572 through 574) and Respondent's Answer (Exhibit 2, Third Affirmative Defense), two jurors reported to the Court Officer that they would not be able to return after Monday, March 17<sup>th</sup> (and only one alternate juror remained).

23. As the *Bartholomew* trial transcript (Exhibit 4) demonstrates, Respondent acknowledged contemporaneously and on his own that he could not directly order the police not to arrest the defendant. When the two police officers involved in this matter came into Respondent's court, Respondent expressed his preference that the police not arrest the defendant until after the trial was concluded, and he explained why he was making this unusual request. However, Respondent did not order them to postpone the arrest.

24. Lt. LaBella, the supervising police officer in this matter, testified under oath during the Commission's investigation that, in postponing the arrest as requested by

Respondent, the police acted in a manner they considered appropriate under the circumstances, *i.e.* agreeing to delay the arrest and to facilitate the defendant's surrender through an agreement with defense counsel, which is not unusual. Lt. LaBella also testified that while Respondent's request to postpone the arrest was unusual and caused the police some concern, Respondent did not control their actions.

25. Respondent never held ADA Nugent or anyone else in contempt in connection with the *Bartholomew* case.

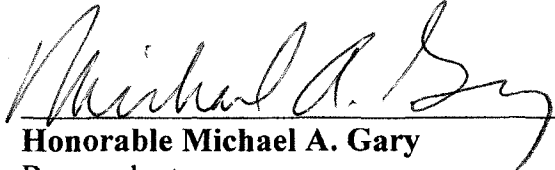
**IT IS FURTHER STIPULATED AND AGREED** that Respondent withdraws from his Answer any denials or defenses inconsistent with this Agreed Statement of Facts.

**IT IS FURTHER STIPULATED AND AGREED** that the parties to this Agreed Statement of Facts respectfully recommend to the Commission that the appropriate sanction is public Admonition based upon the judicial misconduct set forth above.

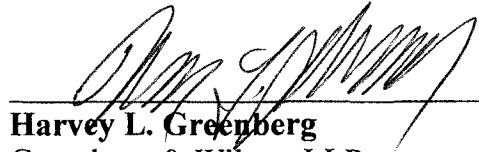
**IT IS FURTHER STIPULATED AND AGREED** that if the Commission accepts this Agreed Statement of Facts, the parties waive oral argument and waive further submissions to the Commission as to the issues of misconduct and sanction, and that the Commission shall thereupon impose a public Admonition without further submission of the parties, based solely upon this Agreed Statement. If the Commission rejects this Agreed Statement of Facts, the matter shall proceed to a hearing and the statements made herein shall not be used by the Commission, the Respondent or the Administrator and Counsel to the Commission.



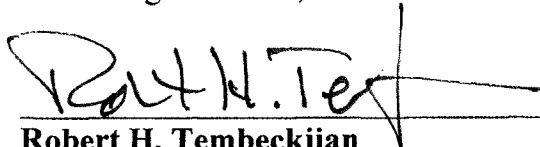
Dated: July 27, 2016

  
**Honorable Michael A. Gary**  
Respondent

Dated: July 26, 2016

  
**Harvey L. Greenberg**  
Greenberg & Wilner, LLP

Dated: July 27, 2016

  
**Robert H. Tembeckjian**  
Administrator & Counsel to the Commission  
(Mark Levine, Erica K. Sparkler, Of Counsel)

# EXHIBIT

1

STATE OF NEW YORK  
COMMISSION ON JUDICIAL CONDUCT

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In the Matter of the Proceeding  
Pursuant to Section 44, subdivision 4,  
of the Judiciary Law in Relation to

**FORMAL  
WRITTEN COMPLAINT**

**MICHAEL A. GARY,**

a Judge of the New York City Criminal Court  
and an Acting Justice of the Supreme Court,  
2<sup>nd</sup> Judicial District, Kings County.

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1. Article 6, Section 22, of the Constitution of the State of New York establishes a Commission on Judicial Conduct ("Commission"), and Section 44, subdivision 4, of the Judiciary Law empowers the Commission to direct that a Formal Written Complaint be drawn and served upon a judge.

2. The Commission has directed that a Formal Written Complaint be drawn and served upon Michael A. Gary ("Respondent"), a Judge of the New York City Criminal Court and an Acting Justice of the Supreme Court, 2<sup>nd</sup> Judicial District, Kings County.

3. The factual allegations set forth in Charge I state acts of judicial misconduct by Respondent in violation of the Rules of the Chief Administrator of the Courts Governing Judicial Conduct ("Rules").

4. Respondent was admitted to the practice of law in New York in 1975. He has been a Judge of the New York City Criminal Court since 1987 and an Acting Justice of the Supreme Court, 2<sup>nd</sup> Judicial District, Kings County, since 1994. Respondent's current term expires on December 31, 2020.

### **CHARGE I**

5. On or about March 13 and 14, 2014, while presiding over the trial in *People v Kevin Bartholomew*, Respondent, without basis in law, threatened to: (1) hold an assistant district attorney in contempt of court if the defendant was arrested for threatening a witness in the case; (2) declare a mistrial with prejudice if the defendant was arrested; and (3) impose financial sanctions upon the District Attorney's Office if a mistrial was declared because of the arrest. Respondent also yelled and acted in a discourteous manner toward the assistant district attorney.

#### **Specifications to Charge I**

6. In or about March 2014, Respondent presided over a jury trial in *People v Kevin Bartholomew*, in which the defendant was charged with raping his daughter.

7. On or about March 13, 2014, Assistant District Attorney Lisa Nugent called Joleane Joseph, the defendant's former girlfriend, to testify.

8. Ms. Joseph completed her testimony before court was recessed for lunch. Toward the end of the luncheon recess, and before trial resumed, there was an off-the-record conference during which Ms. Nugent informed Respondent that the defendant, who was free on bail, had approached Ms. Joseph as she was leaving the courthouse during the lunch break and said to her, "You're dead." Ms. Nugent also informed Respondent that Ms. Joseph had been taken to the 84<sup>th</sup> Precinct stationhouse to make a complaint against the defendant.

9. During the conference, Respondent became angry and, speaking to Ms. Nugent in a raised voice, threatened to hold her in contempt if the defendant was arrested for threatening Ms. Joseph.

10. On the record, Ms. Nugent summarized the threat that the defendant made against Ms. Joseph. Respondent directed that the defendant was not to be arrested for making a threat while the rape trial was ongoing. Addressing Ms. Nugent, Respondent continued, "Because if he is, then I will hold you in contempt for violating my direct order."

11. Respondent also said that if the defendant was arrested, defense counsel "will make a motion for a mistrial ... [a]nd it is very, very likely that I will grant that mistrial motion with prejudice." Respondent asked Ms. Nugent, "Do you understand what with prejudice means?"

12. Respondent then directed Ms. Nugent to notify her supervisors to "coordinate with the police personnel from the 84<sup>th</sup> Precinct ... such that nothing happens to this man until this case is over."

13. After calling her supervisor, Ms. Nugent advised Respondent, "We have no control over ... the police department." Respondent replied, "Don't give me any BS about you have no control over the police department.... You can certainly tell a detective or police officer investigating that on the orders of the DA's Office, no arrest is to be made until it is authorized by your office."

14. Ms. Nugent requested the defendant's remand on the rape charge in light of his threat to the witness. Respondent immediately denied the request, and the trial resumed.

15. The next day, March 14, 2014, during a morning recess of the trial, Respondent raised the issue of the defendant's arrest again, stating:

Let's make something crystal clear, People. Today is Friday. We are going to finish the People's case now with this last witness. The defense case is supposed to start on Monday. If you were to have ... Mr. Bartholomew arrested any time between now and Monday ... Mr. Bartholomew ... would not be in a position to prepare his defense.

\* \* \*

If there is a mistrial, if this case has to be delayed because you have unnecessarily and unjustifiably prevented the defendant from seeing his attorney and preparing his defense and this matter has to be adjourned, I will consider, one, financial sanctions against your office. And number two, I will certainly consider a mistrial with prejudice.

16. Ms. Nugent's supervisor, Coleen Balbert, then approached the bench and told Respondent that the District Attorney's Office would not advise the Police Department to refrain from arresting the defendant. Respondent directed Ms. Balbert to have the detective or a supervising officer in the courtroom at 2:15 that afternoon.

17. After the lunch recess, Ms. Nugent and Ms. Balbert returned to the courtroom accompanied by Lieutenant Joseph LaBella and Detective William Bush. Ms. Balbert stated that, according to Police Department policy, the defendant was supposed to have been arrested in connection with threatening the witness.

18. Respondent conceded that he had no authority to order the Police Department to refrain from arresting the defendant but beseeched them not to do so until

after the trial. Lieutenant LaBella said, "I never dealt with something in 21 years of law enforcement to bring me to this position to be in your courtroom." Respondent said he would take "responsibility" for the decision to leave the defendant at liberty. Lieutenant LaBella agreed not to arrest the defendant before the conclusion of the trial, and defense counsel agreed to facilitate the defendant's surrender after the verdict.

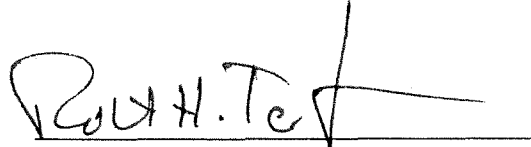
19. On or about March 18, 2014, the defendant was found guilty and was remanded pending sentence.

20. Although the police intended and were prepared to arrest the defendant promptly for threatening Ms. Joseph's life, they delayed doing so because of Respondent's actions and did not arrest the defendant until after he was sentenced in the rape case.

21. By reason of the foregoing, Respondent should be disciplined for cause, pursuant to Article 6, Section 22, subdivision (a), of the Constitution and Section 44, subdivision 1, of the Judiciary Law, in that Respondent failed to uphold the integrity and independence of the judiciary by failing to maintain high standards of conduct so that the integrity and independence of the judiciary would be preserved, in violation of Section 100.1 of the Rules; failed to avoid impropriety and the appearance of impropriety, in that he failed to respect and comply with the law and failed to act in a manner that promotes public confidence in the integrity and impartiality of the judiciary, in violation of Section 100.2(A) of the Rules; and failed to perform the duties of judicial office impartially and diligently, in that he failed to be patient, dignified and courteous to those with whom the judge deals in an official capacity, in violation of Section 100.3(B)(3) of the Rules.

**WHEREFORE**, by reason of the foregoing, the Commission should take whatever further action it deems appropriate in accordance with its powers under the Constitution and the Judiciary Law of the State of New York.

Dated: February 29, 2016  
New York, New York

A handwritten signature in black ink, appearing to read "R. H. Tembeckjian", written over a horizontal line.

**ROBERT H. TEMBECKJIAN**  
Administrator and Counsel  
State Commission on Judicial Conduct  
61 Broadway, Suite 1200  
New York, New York 10006  
(646) 386-4800



STATE OF NEW YORK  
COMMISSION ON JUDICIAL CONDUCT

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In the Matter of the Proceeding  
Pursuant to Section 44, subdivision 4,  
of the Judiciary Law in Relation to

**VERIFICATION**

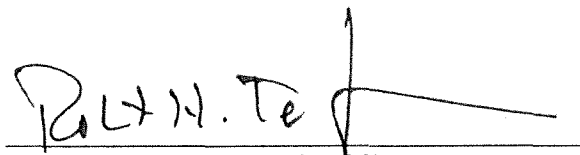
**MICHAEL A. GARY,**

a Judge of the New York City Criminal Court  
and an Acting Justice of the Supreme Court,  
2<sup>nd</sup> Judicial District, Kings County.  
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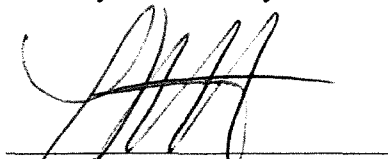
STATE OF NEW YORK                    )  
  : ss.:  
COUNTY OF NEW YORK                )

ROBERT H. TEMBECKJIAN, being duly sworn, deposes and says:

1.     I am the Administrator of the State Commission on Judicial Conduct.
2.     I have read the foregoing Formal Written Complaint and, upon information  
and belief, all matters stated therein are true.
3.     The basis for said information and belief is the files and records of the State  
Commission on Judicial Conduct.

  
Robert H. Tembeckjian

Sworn to before me this  
29<sup>th</sup> day of February 2016

  
\_\_\_\_\_  
Notary Public

LAURA ARCHILLA SOTO  
NOTARY PUBLIC-STATE OF NEW YORK  
No. 01AR6236502  
Qualified in Bronx County  
My Commission Expires February 28, 2019

# EXHIBIT

2

**STATE OF STATE OF NEW YORK  
COMMISSION ON JUDICIAL CONDUCT**

In the Matter of the Proceeding  
Pursuant to Section 44, subdivision 4,  
Of the Judiciary Law in Relation to

**MICHAEL A. GARY**

A Justice of the New York City Criminal Court and  
an Acting Justice of the Supreme Court, 2<sup>nd</sup> Judicial  
District, Kings County

**ANSWER TO FORMAL  
WRITTEN COMPLAINT**

The Respondent, Michael A. Gary, by and through his attorney, HARVEY L.  
GREENBERG, answering the complaint herein, alleges as follows:

1. Admit
2. Admit
3. Respondent denies the allegation contained in Paragraph 3.
4. Respondent admits the allegations contained in Paragraph 4.
5. Respondent admits the allegations contained in Paragraph 5, *except that Respondent denies that he yelled and acted in a discourteous manner toward the assistant district attorney; Respondent further denies that he "would" impose financial sanctions upon the District Attorney's Office if a mistrial was declared because of the arrest.*
6. Respondent admits the allegations contained in Paragraph 6.
7. Respondent admits the allegations contained in Paragraph 7.
8. Respondent admits the allegations contained in Paragraph 8.
9. Respondent admits the allegations contained in Paragraph 9, except that *Respondent denies that he became angry and spoke in a raised voice.*
10. Respondent admits the allegations contained in Paragraph 10.

11. Respondent admits the allegations contained in Paragraph 11 are a redacted portion of the trial transcript. As such, they are an incomplete recitation of Respondent's statements.
12. Respondent admits the allegations contained in Paragraph 12 are a redacted portion of the trial transcript. As such, they are an incomplete recitation of Respondent's statements.
13. Respondent admits the allegations contained in Paragraph 13 are a redacted portion of the trial transcript. As such, they are an incomplete recitation of Respondent's statements.
14. Respondent admits the allegations contained in Paragraph 14.
15. Respondent admits the allegations contained in Paragraph 15 are a redacted portion of the trial transcript. As such, they are an incomplete recitation of Respondent's statements.
16. Respondent admits the allegations contained in Paragraph 16.
17. Respondent admits the allegations contained in Paragraph 17.
18. Respondent admits the allegations contained in Paragraph 18.
19. Respondent admits the allegations contained in Paragraph 19.
20. Respondent admits the allegations contained in Paragraph 20. *Except that the police could have arrested the defendant as soon as he was found guilty.*
21. Respondent denies the allegations contained in Paragraph 21.

#### **FIRST AFFIRMATIVE DEFENSE**

Respondent's actions were necessary in the interest of justice to avoid a mistrial. There was an overriding interest to avoid a mistrial in this matter to avoid the need of the

teenage victim having to testify a second time regarding being raped by her father when she was a child.

#### **SECOND AFFIRMATIVE DEFENSE**

To arrest the defendant at this time on a Friday afternoon would interfere with his attorney's ability to prepare him to testify which was scheduled for the following Monday. The arrest and arraignment of the defendant would have taken 24-48 hours during which time his attorney would not be able to prepare as he would be waiting for the defendant to be arraigned.

#### **THIRD AFFIRMATIVE DEFENSE**

Although the trial had started with three alternate jurors, two jurors had already been dismissed and two others had indicated that they would not return after Monday, March 17, So a delay would have resulted in losing the requisite amount of jurors and a mistrial would have had to be declared.

#### **FOURTH AFFIRMATIVE DEFENSE**

The publicity caused by the arrest would also have likely caused a mistrial. A member of the press was already present to publicize the defendant's new arrest. This was not standard publicity resulting from the trial itself. Instead, this was an allegation outside of the actual case that would not be admissible in the prosecution's direct case. If the jurors were made aware of the arrest, defendant would have been prejudiced. Knowledge of the arrest would have bolstered the testimony of the threatened witness and conversely been

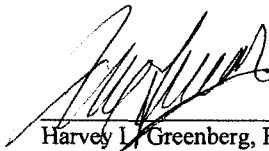
used to reinforce defendant's propensity to commit the crime charged. This would have caused the Court to declare a mistrial, thereby requiring the infant complainant to testify as to her rape again.

**FIFTH AFFIRMATIVE DEFENSE**

The Respondent's actions were necessary and within the Court's discretion to preserve the integrity of the trial before him. The arrest of the defendant and the attendant publicity attaching thereto would have clearly caused a mistrial, thereby requiring the complaining child witness to testify about her rape again

WHEREFORE, Respondent demands that the complaint herein be dismissed.

Dated: Brooklyn, New York  
March 22, 2016

  
\_\_\_\_\_  
Harvey L. Greenberg, Esq.  
*Attorney for the Respondent*  
232 Madison Avenue  
Suite 909  
New York, New York 10016  
212-953-2300

**STATE OF STATE OF NEW YORK  
COMMISSION ON JUDICIAL CONDUCT**

In the Matter of the Proceeding  
Pursuant to Section 44, subdivision 4,  
Of the Judiciary Law in Relation to

**MICHAEL A. GARY**

A Justice of the New York City Criminal Court and  
an Acting Justice of the Supreme Court, 2<sup>nd</sup> Judicial  
District, Kings County

**VERIFICATION**

STATE OF NEW YORK                    )  
  : SS.:  
COUNTY OF KINGS                    )

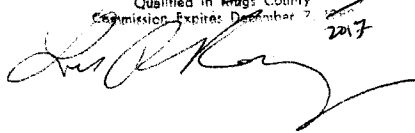
MICHAEL A GARY, being duly sworn deposes and says:

1. That I am the Respondent in the within matter.
2. That I have read the Answer to the formal written complaint herein, and upon information and belief, all matters stated therein are true.

Sworn to before me this  
24<sup>th</sup> day of March, 2016

  
Michael A. Gary

LISA R. ROSENZWEIG  
Notary Public, State of New York  
No. 24-4916557  
Qualified in Kings County  
Commission Expires December 7, 2017



# EXHIBIT

3



SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS : CRIMINAL TERM : PART 12

-----x  
THE PEOPLE OF THE STATE OF NEW YORK

Plaintiff,

-against-

KEVIN BARTHOLOMEW,

Defendant.

-----x  
Indict. No. 544/11

TRIAL

320 Jay Street  
Brooklyn, New York

March 13, 2014

B E F O R E :

HONORABLE MICHAEL GARY,  
Justice, and a jury.

(Appearances same as previously noted.)

VANESSA DEL VALLE  
Official Court Reporter

\* \* \* \*

Pages 300-424 Redacted

\* \* \* \* \*

THE CLERK: Case on trial of Kevin

Bartholomew continues. All parties are present. The defendant is present with his attorney.

MS. NUGENT: Judge, okay. I would like to make a record. It's come to my attention that after -- right before -- withdrawn.

As Joleane Joseph was leaving this court building this defendant approached her and told her, you're dead. Um, and then came back in the building.

Currently Miss Joseph has been speaking to detective investigators and she's making a complaint. She has been brought to the 84th Precinct to file that complaint.

I understand -- do you want to say something, Your Honor, about not having him arrested?

THE COURT: I'll tell you what I told you before off the record.

MS. NUGENT: Tell me.

THE COURT: Are you finished?

MS. NUGENT: Yes. Yes.

THE COURT: As I said to you off the record, of course Miss Joseph is free to pursue whatever avenue she needs to. You are free to investigate as much as you wish. But I tell you now that this man is not to

1 be arrested while this case is going forward.

2 Is that clear?

3 MS. NUGENT: Yes.

4 THE COURT: Is that crystal clear?

5 MS. NUGENT: Yes.

6 THE COURT: Because if he is, then I will

7 hold you in contempt for violating my direct order.

8 MS. NUGENT: Okay. Can I --

9 THE COURT: Number one.

10 MS. NUGENT: Okay.

11 THE COURT: Number two, counsel will make a  
12 motion for a mistrial, as he already indicated he was  
13 wishing to do at our bench conference. And it is very,  
14 very likely that I will grant that mistrial motion with  
15 prejudice.

16 Do you understand what with prejudice means?

17 MS. NUGENT: Of course, Judge. Of course.

18 THE COURT: Very good.

19 So, I am telling you now, I am advising you  
20 in the strongest possible terms --

21 MS. NUGENT: Yes.

22 THE COURT: -- you tell anybody you have to,  
23 go up to the D.A. if you have to so that they can  
24 coordinate, your supervisors can coordinate with the  
25 police personnel from the 84th Precinct, or wherever it

1 is that this complaint is being filed, such that  
2 nothing happens to this man until this case is over.  
3 That is, until the jury has resolved it.

4 Is that clear?

5 MS. NUGENT: Yes.

6 May I make a call outside to my supervisor?  
7 Just to get this in motion, your order. Can I do that?

8 THE COURT: Make the call.

9 MS. NUGENT: Um, I will be right back. Thank  
10 you.

11 MR. RANKIN: Can I go to the bathroom, Judge?

12 THE COURT: Yeah. Now you can.

13 MR. RANKIN: Thanks.

14 (Whereupon, there was a break in the  
15 proceedings and then resumed shortly thereafter.)

16 THE COURT: Line them up.

17 MS. NUGENT: Your Honor, can I just say  
18 something, if I may, of what I have done?

19 THE COURT: Can you wait a second?

20 MS. NUGENT: Yes.

21 THE COURT: All right. Recall the case.

22 THE CLERK: Case on trial recalled. Case on  
23 trial of Kevin Bartholomew continues. All the parties  
24 are present. The defendant is present with his  
25 attorney.

1 MS. NUGENT: Your Honor, I just put in a call  
2 to my supervisor to advise him of what you've ordered  
3 me. I will make further efforts to see, once I get  
4 back, but I have no control over the police department.  
5 We have no control over their, the police department.  
6 I will do my best --

7 THE COURT: Miss Nugent, the law says you are  
8 the People, all right. In all respects you are the  
9 People. Don't give me any BS about you have no control  
10 over the police department. You are talking about  
11 something that your office initiated with the police  
12 department. So, in the same way you can initiate, you  
13 can advise.

14 MS. NUGENT: Which --

15 THE COURT: And you can tell -- let me  
16 finish.

17 MS. NUGENT: Yes. Okay.

18 THE COURT: You can certainly tell a  
19 detective or police officer investigating that on the  
20 orders of the D.A.'s Office no arrest is to be made  
21 until it is authorized by your office.

22 MS. NUGENT: Okay.

23 THE COURT: That it would interfere with a  
24 pending prosecution.

25 MS. NUGENT: Yes. And we are putting in

1 calls to the detective. Mr. Santiago just talked to  
2 the chief of the detective investigators and advised  
3 him -- after speaking with us. So that is taken care  
4 of.

5 THE COURT: You do whatever you have to do.

6 MS. NUGENT: Your Honor, on the record I  
7 would request remand. This defendant threatened the  
8 life of a witness who had testified --

9 MR. RANKIN: Hold on, Judge.

10 THE COURT: Mr. Rankin.

11 MS. NUGENT: This is the information that I  
12 have.

13 MR. RANKIN: Judge. Judge. Judge. Please.

14 MS. NUGENT: Why am I being interrupted?

15 MR. RANKIN: Are they standing --

16 THE COURT: Mr. Rankin, don't worry about it.

17 MR. RANKIN: Are they standing there?

18 THE COURT: They probably are.

19 MR. RANKIN: 'Cause then can hear this.

20 THE COURT: No, they can't.

21 MS. NUGENT: The People would --

22 THE COURT: Your request is denied.

23 MS. NUGENT: Okay.

24 THE COURT: Both sides ready for the jury?

25 MR. RANKIN: No.

Pages 430-490 Redacted



1 [REDACTED]

2

3 \* \* \* \* \*

4 (Whereupon, the proceedings were adjourned to

5 March 14, 2014.)

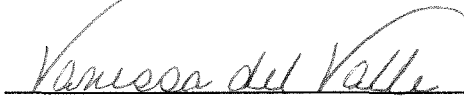
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8 It is hereby certified that the foregoing is a true

9 and accurate transcript of the proceedings.

10

11 

12 **VANESSA DEL VALLE**

13 Senior Court Reporter

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# EXHIBIT

4

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS : CRIMINAL TERM : PART 12

-----x  
THE PEOPLE OF THE STATE OF NEW YORK

Plaintiff,

-against-

KEVIN BARTHOLOMEW,

Defendant.

-----x  
Indict. No. 544/11

TRIAL

320 Jay Street  
Brooklyn, New York

March 14, 2014

B E F O R E :

HONORABLE MICHAEL GARY,  
Justice, and a jury.

(Appearances same as previously noted.)

VANESSA DEL VALLE  
Official Court Reporter

\* \* \* \*

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1 MS. NUGENT: No.

2 THE COURT: All right. Miss Devine will be  
3 excused.

4 MR. RANKIN: This is alternate juror number  
5 two?

6 THE COURT: That's correct.

7 MR. RANKIN: Make a note.

8 THE COURT: Also want to advise you that two  
9 of the jurors expressed to the officer in charge of the  
10 jury their concerns about next week. And dealing with  
11 their employers about how long this case was going to  
12 take.

13 I told the officer not to respond to those  
14 concerns at this time. And simply to advise the jurors  
15 that I will be addressing it after we finish today's  
16 proceedings.

17 Now, let me put on the record at this point  
18 in time, People, you have indicated that, at least at  
19 this point, you haven't asked any questions of  
20 Detective Laurel regarding the statements, the  
21 admissions that he said he made -- that the defendant  
22 made to him after his arrest. You said you weren't  
23 going to use those on direct. That is fine.

24 But my understanding of the law is you  
25 certainly can't ask it on cross examination of

Pages 501-544 Redacted

1 THE COURT: Exhibit A is, in evidence, is the  
2 medical evidence.

3 MR. RANKIN: And I have nothing else.

4 THE CLERK: What was B?

5 MR. RANKIN: B was for I.D.

6 MS. NUGENT: I think you called it A.

7 THE COURT: B is the felony complaint for  
8 I.D.

9 MR. RANKIN: For I.D., yeah.

10 THE COURT: All right. We bring in the jury.

11 I indicated to the People, not indicated, I  
12 directed the People in no uncertain terms that  
13 Mr. Bartholomew should not be arrested such that you  
14 disrupt these proceedings. I said to you yesterday in  
15 no uncertain terms that since you initiated the  
16 prosecution, you are part of the People.

17 While you make the representation that you  
18 don't control the police, you well know, number one,  
19 that from my experience, from every ADA's experience,  
20 from every defense attorney's experience, it must have  
21 been 10,000 times at least where I've sat in  
22 arraignments in Criminal Court and learned that a  
23 defendant was arrested for assault, for felonies, under  
24 circumstances in which the D.A., when asked says, uh,  
25 yes, Judge. The defendant did surrender.

1           Indeed what turns out is that the detective  
2           called the defendant up, said can you be at my office  
3           in my precinct at about 4 o'clock, uh, let's say on  
4           Thursday? I need to talk to you about something. And  
5           then the defendant gets arrested.

6           So, that is one procedure by which  
7           Mr. Bartholomew, of course, can be prosecuted. If the  
8           People feel they have evidence that merits his arrest.  
9           That's one procedure.

10          A second procedure, of course, is a complaint  
11          and warrant. A third procedure that I will suggest to  
12          you is, that you notify, if you haven't done so  
13          already, whoever's handling the prosecution, and to say  
14          to that detective, whoever's assigned to it, I assume a  
15          detective is assigned to it now since it wasn't a  
16          summary arrest.

17                 Is that correct, Miss Nugent?

18                 MS. NUGENT: Yes.

19                 THE COURT: You have the name of that  
20          detective?

21                 MS. NUGENT: I can get it. Yes, I should  
22          have the name.

23                 THE COURT: You should have the name right  
24          now. Yes. So you can say to that detective, that  
25          that -- this is the 84th Precinct, correct?



1 MS. NUGENT: Correct.

2 THE COURT: Right. So it's a few blocks from  
3 here, correct?

4 MS. NUGENT: Correct.

5 THE COURT: So you can say to that detective,  
6 not to do anything in regards to Mr. Bartholomew until  
7 he's notified by the Court.

8 Mr. Rankin, as counsel for the defendant, you  
9 don't have any problem with the idea that  
10 Mr. Bartholomew would wait in the courtroom until the  
11 proceedings were finished, if necessary, for a police  
12 officer to come here.

13 Is that correct?

14 MR. RANKIN: Well I mean I expect I am going  
15 to be his attorney if someone contacts me about an  
16 arrest. They can contact me now. I can arrange a  
17 surrender and a date for that surrender.

18 THE COURT: I understand. I suggested that  
19 to the People already.

20 MR. RANKIN: Yes.

21 THE COURT: Let's make something crystal  
22 clear, People. Today is Friday. We are going to  
23 finish the People's case now with this last witness.  
24 The defense case is supposed to start on Monday.

25 If you were to have, and I say you, I mean

1 you and the police, if you were to have Mr. Bartholomew  
2 arrested any time between now and Monday, Mr. Rankin  
3 would have to go to court to represent him.

4 Mr. Bartholomew, of course, would not be in a position  
5 to prepare his defense.

6 And if Mr. Rankin came in on Monday to say to  
7 me he needed an adjournment because he, of course, has  
8 been tied up waiting in Criminal Court for his client  
9 to be arraigned, and the fact that Mr. Bartholomew has  
10 been in custody and he hasn't been able to speak to  
11 him, then of course I must give Mr. Rankin that  
12 adjournment.

13 Would you agree, Miss Nugent?

14 (Whereupon, there was a pause in the  
15 proceedings.)

16 MS. NUGENT: I don't take any position on  
17 that, Judge.

18 THE COURT: You don't take any position?

19 MS. NUGENT: No.

20 THE COURT: If Mr. Bartholomew is in custody  
21 is he able to communication with his client -- with his  
22 attorney?

23 MS. NUGENT: No.

24 THE COURT: No.

25 And if he is not able to communicate with his

1 attorney, then he certainly can't work on his defense  
2 over the weekend, can he?

3 MS. NUGENT: No.

4 THE COURT: So, if on Monday that  
5 circumstance arises because of your actions and I have  
6 to adjourn this case... so help me, there is only one  
7 explanation for that. And that is, that you haven't  
8 done that which constitutes the normal, everyday  
9 procedure of the police department and the D.A.'s  
10 Office.

11 I will take judicial notice, as it were, that  
12 clearly on many, many cases the D.A.'s Office arranges  
13 for a surrender date for defendants. In this case,  
14 this man's been coming to court on this case for three  
15 plus years. We are on trial now. We lost one juror  
16 today, we stand to lose two more jurors by next Monday.

17 If there is a mistrial, if this case has to  
18 be delayed because you have unnecessarily and  
19 unjustifiably prevented the defendant from seeing his  
20 attorney and preparing for his defense and this matter  
21 has to be adjourned, I will consider, one, financial  
22 sanctions against your office. And number two, I will  
23 certainly consider a mistrial with prejudice.

24 Is that clear?

25 MS. NUGENT: Yes, Judge.

1 THE COURT: Good.

2 MS. NUGENT: Can I just say something?

3 THE COURT: Go ahead.

4 MS. NUGENT: That the People are under an  
5 obligation to protect witnesses. I think we are  
6 missing the point. That the defendant -- it's known to  
7 us as she was leaving the building he said you're dead  
8 to a testifying witness --

9 THE COURT: Is that when she testified?

10 MS. NUGENT: After she testified.

11 THE COURT: We are not talking about  
12 intimidating a witness or preventing a witness from  
13 giving their testimony. Let's get the parameters here.

14 MS. NUGENT: Right.

15 As we are required to do, we spoke to our  
16 witness. A complaint was filed because we take these  
17 threats very seriously.

18 THE COURT: Absolutely. As well you should.

19 MS. NUGENT: Of course.

20 THE COURT: So when we're now looking at the  
21 balancing of interests, Miss Nugent.

22 MS. NUGENT: Right.

23 THE COURT: There is a case on trial. The  
24 defendant is on trial. We have a jury.

25 MS. NUGENT: I understand that, Judge.

1 THE COURT: And you have a witness who I  
2 assume is no longer in the jurisdiction even.

3 MS. NUGENT: No, she is still here.

4 THE COURT: Oh, good. That's good.

5 But you haven't even asked for a temporary  
6 order of protection for her. She didn't have a  
7 temporary order of protection in this case.

8 MS. NUGENT: What does that have to do with  
9 this case? She testified.

10 THE COURT: That's right. We are assessing  
11 the threat. So I will take as a given that  
12 Mr. Bartholomew made a threat.

13 And as I say, in all the 10,000 plus cases  
14 where the police department investigates where there's  
15 been an allegation not only just of a threat, but  
16 literally of assault, okay, where the police department  
17 as a routine matter detectives call up the defendant  
18 and arrange for the defendant to surrender, that's a  
19 procedure that they employ.

20 By contrast if you are going to get, and  
21 you've initiated it, if you are going to get a  
22 detective to come and arrest Mr. Bartholomew over this  
23 weekend or after we finish today, I can take only one  
24 conclusion from that. And that is, you are intent upon  
25 disrupting this trial. That's clearly what's going to

1           happen.

2                   I am putting you on notice now. Don't even  
3           speak to me oh, Judge, we'll get him here first thing  
4           Monday morning. That's meaningless.

5                   If he has been incarcerated for the weekend,  
6           if Mr. Rankin has been in court waiting on the weekend  
7           to stand up to represent him on rape, they cannot  
8           prepare their defense. I have to give them more time.  
9           I have to tell this jury something. They may well tell  
10          me they can't sit any longer in this case. So you are  
11          on notice.

12                   Any questions?

13                   MS. NUGENT: Your Honor, may my supervisor  
14          come up, ADA Coleen Balbert?

15                   THE COURT: Go ahead.

16                   MS. NUGENT: Thank you.

17                   MS. BALBERT: Thank you, Your Honor.

18                   Just so that the Court's aware, I understand  
19          the Court's position on this matter. As Miss Nugent  
20          had stated, the defendant has recreated this situation.  
21          If I could just be heard.

22                   THE COURT: Miss Balbert, there is a  
23          presumption of innocence that applies at this point  
24          this time.

25                   MS. BALBERT: Agreed.

1 THE COURT: Even before somebody is arrested.

2 MS. BALBERT: Agreed.

3 He also sent a text message to her when he  
4 flew to Atlanta over the weekend, the first he had done  
5 according --

6 THE COURT: I will accept for purposes of  
7 this argument, please, that you can prove a case beyond  
8 a reasonable doubt against Mr. Bartholomew for  
9 something. I don't know what it is, but for something.

10 Now, proceed from there.

11 MS. BALBERT: Okay.

12 THE COURT: Let's act upon the issue of the  
13 D.A.'s discretion, the police department's discretion,  
14 and the threat that exists at this very moment.

15 MS. BALBERT: Well as Mr. Rankin just  
16 eloquently cross examined the detective about the must  
17 arrest policy in DV cases, then the Court is aware of  
18 that same policy, that is, a must arrest policy in  
19 domestic violence cases. Which this would fall under  
20 that category.

21 THE COURT: Yes.

22 And I just told you I have heard 10,000 cases  
23 in arraignments in Criminal Court at 120 Schermerhorn  
24 Street in my career, in my experience of DV cases where  
25 when we get to the issue of how did the defendant come

1 to be arrested on this DV case, the assistant has  
2 represented to me, Judge, from my papers it seems the  
3 defendant was contacted by the detective and he  
4 surrendered at the precinct.

5 Correct? You are familiar with that?

6 MS. BALBERT: Agreed.

7 THE COURT: Right.

8 So in the must arrest situation I guess the  
9 police department doesn't necessarily interpret it as  
10 must arrest this very minute. It's interpreted as must  
11 arrest when I am working.

12 MS. BALBERT: Judge, I can't speak on behalf  
13 of the NYPD.

14 THE COURT: No, you can't speak on behalf of  
15 them, but you sure as hell can interact with them. And  
16 you sure as hell can speak with them in regards to  
17 areas of mutual interests.

18 MS. BALBERT: I am not --

19 THE COURT: What I am trying to impress upon  
20 you is this better be an area of mutual interest,  
21 because you are the ones who control whether or not  
22 Mr. Bartholomew is in court at the appropriate time and  
23 whether he's in a position to testify.

24 MS. BALBERT: Well --

25 THE COURT: You have initiated the



1 prosecution. You can -- you are in the position to  
2 advise the police as to why they should delay on making  
3 this particular arrest.

4 MS. BALBERT: And --

5 THE COURT: If you don't do so as I say, you  
6 are going to face the consequences.

7 MS. BALBERT: And, Judge, if she is killed by  
8 him because we have the police do that, then who will  
9 then face those consequences? I am not in a  
10 position --

11 THE COURT: If she's right.

12 MS. BALBERT: That's right. Because he  
13 threatened her life. We had to put her up in a hotel,  
14 a safe place, so he would have no way of contacting her  
15 last night.

16 Here is the situation. You are putting us in  
17 telling us to tell the NYPD don't make an arrest in a  
18 case where the defendant has threatened our witness. I  
19 am not going to direct the NYPD to not arrest in a  
20 situation like this. Because if he does wind up  
21 killing her over the weekend, who is going to be held  
22 accountable for that?

23 THE COURT: You just said you put her in a  
24 safe place.

25 MS. BALBERT: The NYPD did not listen to me.

1 THE COURT: You put her in a safe place.

2 MS. BALBERT: That's correct. That doesn't  
3 mean he can't fly over the weekend and do something to  
4 her.

5 I am not going to suggest to the NYPD how to  
6 conduct their domestic violence arrest in a must arrest  
7 policy situation.

8 I can tell you this. That because the Court  
9 ordered us not to have him arrested yesterday, the P.D.  
10 said they would only postpone it for as long as they  
11 can, because that you would hold Miss Nugent in  
12 contempt of Court if, in fact, he was arrested. So  
13 because of that, they said we will only hold off so  
14 long. But they're making the decision --

15 THE COURT: Have the detective or supervising  
16 officer, have them in my courtroom, please, let's say  
17 2:15 today. They're at the 84th Precinct a few blocks  
18 away.

19 MS. BALBERT: We will do that.

20 THE COURT: Thank you. I will definitely  
21 take responsibility.

22 MS. BALBERT: Okay.

23 THE COURT: Are we ready for the next  
24 witness?

25 MR. RANKIN: Yes, Judge.

Pages 557-571 Redacted

1 witness.

2 MS. NUGENT: Your Honor, the People rest at  
3 this time.

4 THE COURT: Come up, counsel.

5 (Whereupon, there was a discussion held at  
6 the bench off the record.)

7 THE COURT: All right, ladies and gentlemen,  
8 as you heard, the People rested their case. There's  
9 some legal issues I have to discuss with counsel, it  
10 doesn't require you. So I will try to maintain any  
11 promise I am not going to keep you waiting around the  
12 room waiting for something to happen, 'cause I don't  
13 know how long this is going to take. Bottom line, you  
14 are finished for the day.

15 Now I know a couple of jurors asked the jury  
16 officer about next week whether, what they should tell  
17 their employers. So, let me just give you the schedule  
18 as best I can figure it out at this point.

19 I want you back in the jury room promptly at  
20 10 o'clock for Monday morning, all right. And don't  
21 worry about time frames or getting things done. That's  
22 not an issue. You are invested in this, we are all  
23 invested in this case. We are moving along.

24 Quite frankly, as far as I am concerned,  
25 fortunately for me even in terms of my vacation, we are

1 going to visit relatives, my wife and I, outside the  
2 state and we are driving, so I can leave whenever I  
3 need to leave, so that's not an issue. Your focus is  
4 on this case.

5 So addressing the issue directly, like, what  
6 do you tell your employer about next week? Well like I  
7 said to you when you were being selected, I don't have  
8 a crystal ball. I can't tell you exactly when the case  
9 is going to finish because that's going to be up to  
10 you, guys, when you deliberate. We don't set any time  
11 limits on this, of course.

12 So the best I can tell you is to tell your  
13 employers that you are going to get the case early in  
14 the week, that's for sure. But you can't tell them  
15 exactly how long it's going to take to finish, not  
16 exactly. But you are definitely going to get the case  
17 early next week. That's as much as you can tell them  
18 at this point in time.

19 If they have any questions they want  
20 answered, by all means have them call me. The officer  
21 will give you my chambers number if you don't have it  
22 already. I will be glad to speak to any employer about  
23 that.

24 And you know, just so they're aware and you  
25 can tell them that they certainly shouldn't give you

1 any hassles about that because it's a crime, all right.  
2 And I'm sure they don't want to hear from me on this  
3 regard.

4 So, your main focus is on what we are  
5 supposed to have better weather this weekend. Keep an  
6 open, don't discuss it. Enjoy the better weather.

7 Everybody, as you have been, promptly at  
8 10 o'clock in the jury room on Monday. Have a good  
9 weekend.

10 Take the jurors out.

11 (Whereupon, the jury left the courtroom.)

12 THE COURT: All right, counsel.

13 MR. RANKIN: Judge, can we take a five, ten  
14 minute break? I am waiting on my secretary to bring  
15 some charges. I left some of them at my office.

16 THE COURT: Mine trumps yours. We are going  
17 to do mine first.

18 MR. RANKIN: Okay.

19 THE COURT: What we are going to do off the  
20 record, we are going to do a pre-charge conference, at  
21 least preliminarily.

22 Before we get to that, the People rested. Do  
23 you need to make any motions?

24 MR. RANKIN: Yes. I have the elements of all  
25 the charged crimes in this case coming over to me. I

Pages 575-600 Redacted

1 (Whereupon, there was a pause in the  
2 proceedings.)

3 THE COURT: All right. Is there a specific  
4 representative from the police department here this  
5 afternoon in response to my request?

6 LT. LABELLA: Lieutenant Joseph Labella, C.O.  
7 84 detective squad.

8 THE COURT: Thank you for coming.

9 Could you please come up with counsel?

10 MS. BALBERT: I would like to make a record  
11 before the detective approaches, if I may.

12 THE COURT: Go ahead.

13 MS. BALBERT: Your Honor, as the Court's  
14 aware that this defendant was, there was supposed to be  
15 an arrest in this case in a way that would not impede  
16 with this trial. We would have ensured the defendant's  
17 appearance here on Monday, if, in fact, he were held in  
18 over the weekend, which I have, I can't say whether he  
19 would or wouldn't.

20 THE COURT: That wasn't the issue. The issue  
21 wasn't he was just here on Monday. The issue, he was  
22 in a position to prepare with his counsel his defense  
23 over the weekend since we are on the defense case now.

24 That's the issue.

25 MS. BALBERT: Right. This Court has been



1 pending for almost three years.

2 THE COURT: Over three years this case has  
3 been pending.

4 MS. BALBERT: Correct. Right.

5 As the Court's aware, there are many  
6 defendants incarcerated have to prepare a defense while  
7 incarcerated during the course of their trial.

8 THE COURT: But the unusual circumstance  
9 here, of course, if you arrest him now, his counsel has  
10 to go to that arraignment. Remember that. Because  
11 only his counsel has the personal knowledge of all  
12 that's transpired in this case over the past three  
13 years, including the fact that he's made appearances  
14 for three years in this case.

15 MS. BALBERT: Your Honor, since it would have  
16 been a misdemeanor and the Court's aware often times  
17 bail is not even set. The defendant in this case was  
18 able to make \$200,000 bail. A paltry amount of bail by  
19 the misdemeanor would surely be made by the defendant.

20 THE COURT: Let me get this straight.

21 You want to arrest the defendant for a  
22 misdemeanor. Is that correct?

23 MS. BALBERT: I don't know what the charges  
24 would be. It's the NYPD that is --

25 THE COURT: Fine. I will hear from them.

1           Go ahead, finish.

2           MS. BALBERT: They would ask that I make a  
3 statement for the NYPD. NYPD legal.

4           The NYPD and the People believe that the  
5 Court lacks the authority to order the People or the  
6 NYPD to not arrest the defendant. And --

7           THE COURT: That's absolutely true. Yes. Go  
8 on. I don't argue with that.

9           MS. BALBERT: I don't know what the Court's  
10 authority is for that matter.

11          THE COURT: Pardon me?

12          MS. BALBERT: We are asking for the Court's  
13 authority as to how the Courts can order the NYPD or  
14 the People to not have the defendant arrested for the,  
15 threatening the life a witness.

16          THE COURT: I can't order the NYPD, that's  
17 for sure, but I can certainly order the attorneys in  
18 front of me who are trying this case in terms of what  
19 they do.

20          MS. BALBERT: Well --

21          THE COURT: Let's separate it out.

22          It is absolutely clear I have no control over  
23 the New York City Police Department. At most, I will  
24 address them and besiege them. You, of course, work  
25 with them and they will listen to, just like they will

1 listen to me.

2 As I indicated to you in our morning session,  
3 you can ask them to defer prosecution for a few days,  
4 you can advise -- you can invite them that you will do  
5 a complaint and warrant in this case. There's many  
6 different ways you can proceed.

7 As I've said before, there are thousands of  
8 times where the D.A.'s Office and the police department  
9 agree to have defendants surrender. So, there's many  
10 different ways to do. We deal with it in terms of the  
11 D.A.'s discretionary powers to prosecute.

12 MS. BALBERT: It's a matter --

13 THE COURT: You are correct, I have no power  
14 over the police department.

15 MS. BALBERT: And we have no power over the  
16 police department to say not to arrest the defendant,  
17 as the Court is also aware of that.

18 And as the Court is aware, and as I mentioned  
19 earlier that in a domestic violence situation that it  
20 is a must arrest policy for the NYPD. Therefore, even  
21 creating more of a situation where the People can't  
22 control what the NYPD's going to do.

23 But despite, despite the Court's order,  
24 Inspector Cary from -- sorry. Inspector Cary Sweeten,  
25 the C.O of the NYPD legal, is ordering no arrest until

1 conclusion of trial. But the NYPD believes that there  
2 is probable cause to make the arrest. And absent the  
3 Court's order, they would arrest, and are asking the  
4 Court not to issue the order.

5 I am also asking the Court on behalf of the  
6 People, because the defendant is aware of an imminent  
7 arrest, that the Court remands the defendant. And if  
8 the Court is not inclined to do that, order the  
9 defendant not to leave the jurisdiction, because he is  
10 aware that arrests will be made.

11 And if the Court's not inclined to do that,  
12 then issue Parker warnings again so the defendant  
13 doesn't leave the jurisdiction during the course of  
14 this trial.

15 THE COURT: Well let me just back up on the  
16 Parker warnings. If you consulted with Miss Nugent she  
17 would advise you I gave the defendant Parker warnings a  
18 while ago.

19 MS. BALBERT: She did.

20 THE COURT: He knows full well he is on  
21 trial. That's not a problem. I am very gratified you  
22 said you would refrain from doing so from arresting him  
23 until the conclusion of this trial. Now --

24 MS. BALBERT: I did not say that, Judge. The  
25 NYPD.

1 THE COURT: NYPD said that. I am very --

2 MS. BALBERT: Asked you not do that, but they  
3 will do it if you order them to do it.

4 THE COURT: I can't order them, I can besiege  
5 them.

6 MS. BALBERT: They are here. You ordered  
7 them to be here.

8 THE COURT: You finished with your statement?

9 MS. BALBERT: I am good. Thank you.

10 THE COURT: You finished?

11 Can you please step up? And please just give  
12 your appearances, as it were, and your command.

13 LT. LABELLA: Lieutenant Joseph Labella.  
14 84th Precinct commanding officer. L-A-B-E-L-L-A.

15 DET. BUSH: Detective William Bush. 84th  
16 Precinct.

17 THE COURT: Okay. Gentlemen, thank you for  
18 coming this afternoon. Inspector -- detective, is this  
19 your case now?

20 DET. BUSH: Yes, sir.

21 THE COURT: All right. Fine.

22 So let me explain why I am making this  
23 extraordinary request of you, please. All right. I  
24 would not do so under any normal circumstances.  
25 However, what I have to explain to you is as follows.

1 And I'll go back a little bit on my background.

2 I was an ADA in the Brooklyn District  
3 Attorney's Office for over 13 years. I was everything  
4 from a line assistant to, in the homicide, I was a  
5 founding member of the sex crimes bureau. I was a  
6 deputy bureau chief of what was then the Supreme Court  
7 bureau which was in charge of all prosecutions over in  
8 the specialized bureaus.

9 I was then the chief of the economic crimes  
10 and arson bureau before I left the office to become a  
11 Criminal Court Judge. I have been a Criminal Court  
12 Judge for well over 20 years. I have tried every case  
13 that I can think of under the sun.

14 Now in front of me today, so this gentleman,  
15 Mr. Bartholomew, who is on trial, he has waited for  
16 this trial for three years, I am not exaggerating,  
17 three years. He has been to court when he's supposed  
18 to be in court. When he can be in court, he is in  
19 court. I haven't had a problem with him coming to  
20 court.

21 The situation that you are, I am sure,  
22 investigating at this time is as follows. And I need  
23 some clarification from the People.

24 I know the representation was made to me that  
25 the witness, Joleane Joseph, was allegedly threatened

1 by the defendant after she finished testifying.

2 Is that correct?

3 MS. BALBERT: That is correct.

4 MS. NUGENT: That is correct, Judge.

5 THE COURT: All right. But I believe you  
6 also referred to some prior communication.

7 MS. NUGENT: Yes. Miss Joseph informed me  
8 that the defendant, prior to her flight here to New  
9 York, sent her a text saying lose the flight.

10 This is after he had realized that we were  
11 about to go to trial.

12 I will also note Miss Joseph has lived in  
13 Atlanta with his son for over a year and a half. And  
14 on the eve of trial is the first time that he had ever  
15 been in Atlanta before.

16 THE COURT: To see his son? Their son?

17 MS. NUGENT: But also to visit with the  
18 complaining witness and an outcry witness in this case.

19 THE COURT: All right. So, you are telling  
20 me that she got this text from the defendant to lose  
21 the flight and that was before the trial started?

22 MS. NUGENT: That was before the trial  
23 started. But we were not aware of this until  
24 yesterday.

25 THE COURT: You were not aware of it until

1 yesterday?

2 MS. NUGENT: That's correct.

3 THE COURT: And why is that?

4 MS. NUGENT: She did not tell me. She did  
5 not inform --

6 THE COURT: You have a witness who is,  
7 supposedly was threatened by the defendant, she was on  
8 the witness stand for two days, she was in this  
9 courtroom. She never told you that she had been  
10 threatened?

11 MS. NUGENT: Never. And I was in contact  
12 with her the entire weekend prior to her arrival here.

13 (Whereupon, there was a pause in the  
14 proceedings.)

15 MS. NUGENT: Yeah. As soon as yesterday, as  
16 soon as she was outside the courtroom she told me. She  
17 had never told me before.

18 THE COURT: You mean after she finished  
19 testifying?

20 MS. NUGENT: Yes.

21 THE COURT: All right. So please, gentlemen,  
22 understand the context. You just heard it, okay. The  
23 witness was allegedly threatened, never told the D.A.'s  
24 Office. Testified in front of me. Was in front of me.  
25 Was three feet away from me for over two days and never



1 mentioned that the defendant had done anything to her.

2 MS. BALBERT: He hadn't at that point, Your  
3 Honor.

4 THE COURT: Pardon me?

5 MS. BALBERT: He hadn't at this point, other  
6 than sending her that text message.

7 THE COURT: You don't think the  
8 threatening --

9 MS. NUGENT: Lose the flight. Compare that  
10 with, you're dead, right after you testify.

11 THE COURT: Miss Nugent, excuse me.

12 MS. NUGENT: Yes.

13 THE COURT: But I will take a common sense  
14 viewpoint of lose the flight, okay. Don't come.  
15 That's what that means. Don't participate.

16 She participated. She came to court. She  
17 testified for two days. So let me take up the threat  
18 of this, okay.

19 So there was no temporary order of protection  
20 in effect for Miss Joseph in the three years that this  
21 case has been pending. Am I correct? There's never  
22 been an order of protection for her.

23 MS. NUGENT: You are correct.

24 THE COURT: Okay. Literally after  
25 Miss Joseph underwent two days of grueling cross

1 examination by defense counsel and finished  
2 her testimony, you are saying that now, allegedly, the  
3 defendant threatened her.

4 Is that correct?

5 MS. NUGENT: That is correct.

6 THE COURT: Okay.

7 Now, gentlemen, you should know that in terms  
8 of the testimony of Miss Joseph, she testified that on  
9 the day of the alleged crime in this case, she  
10 testified that she called 911, that she reported that  
11 she was a victim of domestic violence at the hands of  
12 the defendant, this very defendant. Mr. Kevin  
13 Bartholomew.

14 She testified that police officers, like  
15 yourselves, came to her house to investigate. That  
16 Mr. Bartholomew was still there. That she spoke to the  
17 police officers. That Mr. Bartholomew spoke to the  
18 police officers.

19 And as you well know, even on January 1, 2011  
20 there was, in effect, New York City Police Department  
21 policy of must arrest in a domestic violence situation.

22 Correct?

23 LT. LABELLA: Correct.

24 DET. BUSH: Yes.

25 THE COURT: Okay. You should also know that

1 Miss Joseph testified, she said, that the police  
2 officers did not arrest Mr. Bartholomew.

3 LT. LABELLA: Your Honor.

4 THE COURT: Now --

5 LT. LABELLA: If I may --

6 THE COURT: After the defendant was arrested  
7 in this case -- just bear with me.

8 LT. LABELLA: Sure.

9 THE COURT: After the defendant was arrested  
10 on this case, and was in custody, she testified on  
11 cross examination that she took money out of their  
12 joint bank account without his knowledge. And  
13 literally took appliances and furniture from the home  
14 that they shared.

15 She testified that she took that property,  
16 that she did not own it, and she acknowledged that the  
17 defendant had told her that he had filed a complaint  
18 with the police in regards to what, at least the  
19 defendant alleged was a theft of his property.

20 LT. LABELLA: Your Honor.

21 THE COURT: Go ahead.

22 LT. LABELLA: If I may, our concern was the  
23 threat that was made yesterday. This is the first time  
24 we become aware of this whole incident when it was  
25 brought to our attention by my detective's attention

1 yesterday. Everything else that happened prior to this  
2 I had no knowledge. My detective has no knowledge.

3 Our main concern was the threat that was made  
4 yesterday. So, when that was brought to our attention  
5 yesterday, that's when we started the ball rolling.  
6 And we are being guided by our legal bureau, Inspector  
7 Sweeten.

8 THE COURT: I understand.

9 LT. LABELLA: At your behest we took this  
10 meeting with you to straighten out this matter. I  
11 never dealt with something in 21 years of law  
12 enforcement to bring me to this position to be in your  
13 courtroom.

14 THE COURT: I have not dealt with such a  
15 situation either.

16 And I am, like I say, most concerned with the  
17 fact that, and I'm sure you can appreciate this as I  
18 balance the interest here, I have had a teenage girl on  
19 the witness stand testifying that when she was 14 years  
20 of age she was raped by her father, the defendant. I  
21 can't think of anything more horrendous than that. And  
22 she testified, and she finished her testimony.

23 And I don't want anything, anything in the  
24 world to jeopardize the conclusion of this case. I  
25 don't want anything in the world to in any way

1           jeopardize the chance that she would, God forbid, have  
2           to go through this again.

3                     So you can, I am sure, understand my concern  
4           that I want to do everything possible to prevent that.

5                     Now I know everybody's faced with the same  
6           CYA situation. And in this CYA situation I've set  
7           forth as best I can the circumstances as I see them,  
8           and really where I think the equities lie in terms of  
9           what's the best way to proceed in the interest of  
10          justice.

11                    Now, if the People are going to ask for  
12          orders of protection for Miss Joseph now, I will  
13          certainly grant it.

14                    Mr. Bartholomew, as a condition of your  
15          continued liberty on bail you may not, I repeat, may  
16          not leave the jurisdiction of New York City.

17                    Is that clear?

18                    THE DEFENDANT: Yes, Judge.

19                    THE COURT: All right. I am doing all in my  
20          power, and it will be up to the jury, of course. As I  
21          said, we are starting with the defense case on Monday.

22                    I've told the attorneys already they should  
23          be prepared to sum up Monday. And I anticipate this  
24          case going to the jury first thing Tuesday. So I  
25          certainly anticipate that this case will end sometime

1 next week.

2 You are welcome to have an officer here while  
3 the case is ongoing. I truly am grateful for the  
4 police department's giving me the courtesy, that's all  
5 it is, the courtesy of, as far as I'm concerned,  
6 withholding their action on this case for the period of  
7 time such that it would impact on this trial.

8 And I take responsibility for that. That's  
9 my request. Only my request. It's not the People's  
10 request, obviously. They're not going along with this.  
11 But in this CYA situation you can put my name down.

12 Is that all right?

13 LT. LABELLA: Yes, Your Honor.

14 The police department is no way looking to  
15 negatively impact this case. We are just trying to  
16 handle the case that was basically assigned to us  
17 yesterday.

18 THE COURT: Well I think I might have given  
19 you some leads to follow up on in terms of your  
20 investigation. But be that as it may, I think I've  
21 stated as clearly as I can what the circumstances are  
22 at this point.

23 I would note that if it, I am sure,  
24 detective, you run this already, you will see  
25 Mr. Bartholomew has no prior convictions. He doesn't

1 even have an arrest for domestic violence or for  
2 violence. He's on trial with this case where he's pled  
3 not guilty, so the law says you can't hold this against  
4 him. So, in essence, he has no criminal record, I  
5 don't believe.

6 Mr. Rankin, is that --

7 MR. RANKIN: As far as my knowledge, correct.

8 MS. BALBERT: No. Actually he has two open  
9 cases for DWI during the pendency of this case, so he  
10 does have an open --

11 MS. NUGENT: There were two arrests following  
12 the arrest in this case.

13 MR. RANKIN: I think the question was, does  
14 he have a criminal record.

15 THE COURT: Does he have any convictions?

16 MR. RANKIN: He has no convictions. Right.

17 THE COURT: No convictions.

18 MR. RANKIN: Yes. I think the stress of all  
19 this caused him --

20 THE COURT: Oh, please.

21 MS. NUGENT: Nah.

22 THE COURT: All right. All right. Please.  
23 DWI arrest, the last time I looked, is not a violent  
24 crime.

25 MS. BALBERT: No. But rape one is for raping

1 his daughter. That is, as your Court, as Your Honor  
2 stated, was the reprehensible crime.

3 THE COURT: He still has the presumption of  
4 innocence. Let's not us lose track of that.

5 MS. BALBERT: Agreed.

6 THE COURT: Just positing that one step  
7 further. If he is acquitted in that case, that may  
8 comes in play in terms of your prosecution of this  
9 matter with Miss Joseph.

10 Be that as it may, the whole point, I do  
11 appreciate everybody's cooperating with my request to  
12 hold off on any action until this case is finished.

13 Do I have that understanding? Is that  
14 correct?

15 DET. BUSH: Yes, sir.

16 LT. LABELLA: Is it possible to get any  
17 assurances that we would be able to make with the  
18 defense that we could --

19 THE COURT: Well you have Mr. Rankin right  
20 here, his attorney.

21 MR. RANKIN: If they're asking  
22 me surrender --

23 THE COURT: Hold on.

24 Inspector, I know you know, as well as I do,  
25 as I said previously on the record, I've sat in the



1 Criminal Court arraigning defendants and I've heard  
2 10,000 plus times about how a defendant was surrendered  
3 by his attorney. Right? We are well aware of that  
4 procedure.

5 LT. LABELLA: Absolutely.

6 THE COURT: So, Mr. Rankin will give your  
7 detective his card.

8 MR. RANKIN: I just did. And he gave me his  
9 as well, Your Honor.

10 THE COURT: All right. I would note that  
11 from the very get-go when the defendant was arrested,  
12 he was interviewed by CJA, he was found to be  
13 recommended for ROR with verified community ties. He  
14 is apparently a business man. As I said, he's appeared  
15 in this court on violent felony charges for three  
16 years.

17 MR. RANKIN: If I can just make one other  
18 request, Your Honor.

19 I am also a former district attorney here in  
20 Brooklyn. I surrender people all the time. Probably  
21 surrendered more than 250 clients. I have never had a  
22 situation where I made an agreement with an officer to  
23 surrender someone. They likewise make the agreement  
24 they will not pick my client up on the open 61 or not  
25 drop an I-card behind my back and the surrender not

1 take place.

2 Actually one or two times where my clients  
3 ended up not hiring me I called the detectives, said  
4 hey, I made an arrangement with you to surrender. The  
5 clients didn't hire me. Therefore, you know, I want to  
6 let the detective know.

7 My client, I am retained already by  
8 Mr. Bartholomew. He's retaining me for this new  
9 matter. I will speak with the detectives as soon as we  
10 finish here. I will make an arrangement to surrender  
11 my client the minute this case is completed.

12 What I would ask is that whenever the verdict  
13 comes in, that if it, obviously if it's a positive  
14 verdict I will be able to surrender him physically by  
15 bringing him down. If it's a negative verdict, I may  
16 not be able to do that.

17 LT. LABELLA: Understood.

18 MR. RANKIN: So, therefore, I don't want that  
19 to be held against me. I would ask, most of the times  
20 verdict's around noon or at the end of the day, I could  
21 bring him over as soon as the court day ends. If that  
22 could be done I would appreciate that. Or whenever the  
23 verdict comes I will bring him over immediately for  
24 surrender.

25 THE COURT: I always say I am not the

1 Massachusetts Supreme Court. I don't give advisory  
2 opinions. I deal with situations as they arise.

3 MR. RANKIN: Sure.

4 THE COURT: I will reserve on this one. We  
5 will see what the situation was.

6 MR. RANKIN: I was really putting on my  
7 conversation I am directing towards the police, if we  
8 could do that.

9 Also ask one other thing, Your Honor. That  
10 you not -- I mean obviously it's an open courtroom, but  
11 I am hoping there will be a situation where the police  
12 will not be sitting in the courtroom for the balance or  
13 pendency of this case. Because these jurors, we  
14 haven't had many people here during this case. The,  
15 maybe that would change come Monday.

16 THE COURT: Mr. Rankin, let me remind you,  
17 other than your request for this sealed proceeding --

18 MR. RANKIN: Yes.

19 THE COURT: -- which is sealed only because  
20 it has nothing to do with the trial, per se, otherwise  
21 this is a public courtroom.

22 MR. RANKIN: Yes.

23 THE COURT: I can't prevent anybody from  
24 coming in and out of this courtroom.

25 MR. RANKIN: I completely understand. They

1 honor your request they couldn't. They didn't want to  
2 impact this courtroom. I fully expect there will be  
3 potentially some press on this, even though we sealed  
4 this courtroom. And God, I don't want to impact this  
5 case further by having court -- I mean NYPD sitting in  
6 the back row, 'cause these jurors, as you well know,  
7 look into the audience.

8 And not say that police officers all look the  
9 same, but it's, you know, people see they look like  
10 police officers, it could impact this case.

11 THE COURT: Well, Mr. Rankin, as I said to  
12 you, this is a public courtroom. Every police officer  
13 is a member of the public, as far as I'm concerned.  
14 They are welcome to be here. They have a right to be  
15 here. I am not telling anyone not to be in this  
16 courtroom, other than for this specific circumstance of  
17 this sealed proceeding.

18 That application is denied.

19 Are the People requesting a TOP for  
20 Miss Joseph?

21 MS. BALBERT: We are, Your Honor.

22 THE COURT: That will be granted.

23 Now understand something, Mr. Bartholomew,  
24 even though you and she have a child together, and even  
25 though it is clear from her testimony that you flew

1 down to Georgia two weeks, I guess before she  
2 testified, and you discussed with her a college fund  
3 for your son, even though you did all that, I am  
4 issuing a temporary order of protection now that will  
5 provide that for the duration of this trial you may not  
6 have any contact with her.

7 Is that clear?

8 THE DEFENDANT: Yes.

9 MR. RANKIN: My client understands, Your  
10 Honor.

11 THE COURT: Is that clear, sir?

12 THE DEFENDANT: Yes.

13 THE COURT: No contact. Even though you  
14 share a child together. I am not even allowing you to  
15 go to Family Court or Supreme Court or whatever to get  
16 any order modifying that. No contact with her. Just  
17 for the duration of this trial, which is going to be a  
18 short period of time.

19 Is that clear?

20 THE DEFENDANT: Yes.

21 THE COURT: All right. Unless there is  
22 anything else anyone wishes to add to the record, I  
23 just thank everyone for being here.

24 Case remains on 10 o'clock Monday morning.  
25 Thank you.

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DET. BUSH: Thank you.

THE COURT: The record here is sealed.

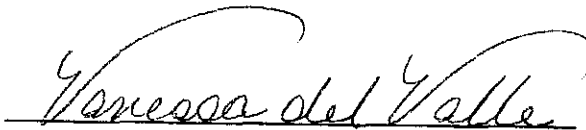
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\* \* \* \* \*

(Whereupon, the proceedings of People V. Kevin Bartholomew, held on March 14, 2014 in front of Hon. Michael Gary at 320 Jay Street, Brooklyn, New York were adjourned to March 17, 2014.)

\* \* \* \* \*

It is hereby certified that the foregoing is a true and accurate transcript of the proceedings.



**VANESSA DEL VALLE**

Senior Court Reporter