P R O O F V E R S I O N O N L Y

LEGISLATIVE COUNCIL LEGAL AND SOCIAL ISSUES COMMITTEE

Inquiry into a legislated spent convictions scheme

Shepparton—Monday, 15 July 2019

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Necessary corrections to be notified to executive officer of committee

WITNESS

Ms Karen Gurney, manager and principal solicitor, Goulbourn Valley Community Legal Centre.

The CHAIR: I declare that the Standing Committee on Legal and Social Issues public hearing is open, and hopefully everyone at this table has got their phones on silent. I would like to begin this hearing by respectfully acknowledging the Aboriginal peoples, the traditional custodians of this land which we are meeting on here today, and pay my respects to their ancestors, elders and family. I particularly will welcome any elders or community members who may come today to impart their knowledge of this issue to the committee or who are observing from the gallery.

The committee is conducting today's hearings in relation to our inquiry into a legislated spent convictions scheme, so all evidence taken at this hearing is protected by parliamentary privilege as provided by the Constitution Act, so everything that you say here is protected by law and cannot be used against you in any court of law or any other forum. However, if you were to say that outside, we cannot offer the same protection. The evidence is being recorded, and you will be provided with a proof version of that in a couple of weeks. Ultimately we will make it public and post it on our website. Thank you very much for your submission and for making the time today. If you would like to make some opening remarks, then we could ask a few questions.

Ms GURNEY: Thank you very much indeed for your welcome, and welcome to the very, very beautiful Goulburn Valley. Before I start I would just like to also pay my respects to the traditional owners of the land that we are sitting on, the eight clans of the Yorta Yorta nation, and to their elders, past, present and emerging, so thank you very much indeed. My name is Karen Gurney. They call me Kaz. I am the manager and principal solicitor at Goulburn Valley Community Legal Centre, based here in Shepparton. I was just explaining before that we provide duty lawyer services to five courts across the region, covering six LGAs, so we encompass quite a big area.

Much of our work relates to family violence, because we provide duty lawyer services at each of those courts. We now have a specialist family violence court in Shepparton, which is an enormous obligation for our free legal services, VI and ourselves. We appear three to four days a week at that specialist family violence court, because that court not only deals with family violence now but is also dealing with associated matters. They may be criminal matters relating to assaults or breaches that have occurred during the course of family violence, but they also include family law matters and child protection matters, so it is a big obligation for us. But we are a generalist service. We provide a whole range of legal advice as representation, casework or support for disadvantaged members of our community.

You may know that Shepparton has a significant cohort of people who would be described as disadvantaged or underprivileged, not necessarily but often including members of the Aboriginal community here, and that Shepparton is the home of the largest discrete community of Aboriginal people in Victoria. The work that we do in providing support is couched in a therapeutic practice. We actually introduced the concept of therapeutic justice to the court here five years ago with a therapeutic justice project, and that project involved a partnership with Primary Care Connect, who provided a case manager with the funding that we were provided with by the Legal Services Board, and we had a specialist lawyer, and between them they dealt with people who had very complex legal issues but very complex social and health issues as well. Substance abuse is a significant problem in this community. Mental health issues often associated with substance abuse are compounding factors. Poverty, lack of opportunity and systemic disadvantage all are factors involved in the issues that face the people that we provide services to.

The CHAIR: Great. Thank you.

Ms GURNEY: You are welcome.

The CHAIR: In offering your submission you made a number of recommendations, which I appreciate. One of the ones which I would like to maybe get a little bit more information about was limiting the release of information about an applicant's antecedents to Working with Children only when it is relevant to the safety of children or vulnerable persons. I think it is about not introducing irrelevant convictions to that test. Are you

aware if that is operational in any other jurisdictions, where the working with children check does provide that consideration?

Ms GURNEY: No, I am not, but in discussions I have had with senior management at Working with Children they have felt that they need to know everything about the person's background, and I am afraid I disagree with them—that sort of knowledge is not necessary, and people with very old convictions should not be shamed by having to raise them again.

The CHAIR: Yes.

Ms GURNEY: But the issue goes beyond that, because the sorts of people that we work with often have very poor literacy skills. Some are just illiterate full stop. They have had other issues in their lives. Many have suffered what would generally be thought of as acquired brain injuries, for example. Acquired brain injuries in the normal sense occur from head trauma, which may be the result of having been involved in fights or so on at some stage or a motor vehicle accident. But acquired brain injury-like issues also occur as a result of fetal alcohol syndrome, for example, which is a real problem, emerging problem, here in our community at the moment.

Ms LOVELL: Huge.

Ms GURNEY: But they also occur as a consequence of the consumption of some of the more horrible substances that people are using, and methamphetamine just seems to be a particular worry in that regard. So we see people with various underlying issues that would include cognitive issues.

The CHAIR: Yes.

Ms GURNEY: They might present as though they have an intellectual disability, for example, or impaired function. So their ability to be able to respond—

The CHAIR: And make that appeal application, yes.

Ms GURNEY: Yes, and many of them are not aware that they can get help for these sorts of things. We feel that we are only seeing a very small number of those that have actually been impacted. But I have had a number of discussions with Working with Children. They themselves are actually pretty helpful, but when somebody who does not understand what is being said to them in a letter receives one of these letters requiring them to show cause and explain, going back 30 years, things that they might not even remember about, then they are at a huge disadvantage, and the tendency is to say 'Can't handle it' and just give up.

Dr KIEU: Karen, may I also follow on from Fiona's question about your recommendation c. At the moment when someone has applied for a working with children check and they have a blanket thing, permit, so to speak, now you are suggesting that the information should only be released if it is relevant. Would that be a problem sometimes with some practical issues? Because for each job the authority would have to consider what is relevant or not before they release that information.

Ms GURNEY: Applications for criminal record checks generally come about as a result of a person seeking employment. So the employer will be the one that receives the information and pays for the cost of the application to Victoria and federal police for the report to be provided, in which case they will have knowledge of what area of work that employer is working in. There are various ways in which offences might lose relevance over time. For example, I had a client who was looking to gain employment working as a cleaner after hours at one of our local schools, and I think I mentioned earlier in the submission that that person was presented with a long list of the various offending that he had engaged in decades earlier when he was a young man. A number of the offences were summary offences, for example. Summary offences should not be relevant to any employment opportunity, really, once a suitable length of time has expired to demonstrate that their pattern of offending has ceased.

But there are other offences too. One of the offences that my client had been convicted of was of recklessly causing injury, which is a serious indictable offence, but when you read the circumstances in which it occurred and the consequent summary offences that were charged concurrently, where he was abusive of police officers

that intended to arrest him, it was a fight between two men that knew each other, and he had lashed out and hit the other fellow. I might add that the other fellow had also struck him on a number of occasions; it was not a one-sided affair at all. So when you go into the detail, the detail tells you the whole story.

We see this time and again. We see it in the media. I have read this morning, 'When are magistrates going to learn that a community corrections order is not enough? They should be putting these people in jail.' It is not until you have read all of the information about the particular type of offending that you know what the circumstances of the offending are and the circumstances of the offender as well as the victim, and all of those things need to be taken into account in establishing a suitable penalty. Because we come from a therapeutic background and we work assiduously with the various agencies providing supports to the community here in Shepparton, we routinely make referrals to them. So if we detect that somebody has clearly got a little bit of a cognitive issue, we might refer them for a neuropsych report, and time and again when we do this we find that the client in fact has got an ABI or a similar type of cognitive deficit that has not been put previously to a court to give some sort of understanding and mitigation of the offending that has occurred but more importantly to get the supports that are needed to deal with that deficiency in their physical and psychological wellbeing so that it does not continue to cause a problem in the future.

I hope I have answered your question. I have rambled on a little bit there, but I am quite passionate about the way in which we go about working with our clients, yes.

Dr KIEU: We see that. Thank you.

Ms LOVELL: Kaz, I am interested in your recommendation d, where you say:

> Ending the current discretionary practice of Victoria Police whereby findings of guilt without conviction, good behaviour bonds, recent charges or even outstanding matters under investigation that have not yet gone to court may also be released.

Can you give us an example—obviously those of us sitting here are not people who are dealing with these types of things every day—of what sorts of incidents or crimes this would relate to?

Ms GURNEY: Okay. They generally relate to summary offences, but they can also relate to indictable offences. Stealing a Mars Bar from the local milk bar is an indictable offence.

Ms LOVELL: Oh, is it—shoplifting?

Ms GURNEY: It potentially carries 14 years jail and a massive fine. It is theft. But we have people who commit small-scale theft for reasons of survival. If the kids at home are going hungry and dad has drunk the pension money, mum is going to do whatever she has to do in order to be able to provide food for her children, for example. So you might call them petty thefts. Many, many years ago in court we talked about petty theft and so on. It is not now. It is shop theft, and it is an offence under section 71 of the Crimes Act. So that is probably a good example.

There is common-law assault, unlawful assault, and you all understand that a person does not even have to lay their hand on another person in order to commit an assault. The threat, the fear of the threat, is sufficient to constitute an assault. The police, God bless them, tend to file charges for just about everything they can think of. So if a person has, for example, struck another person, they may charge them with unlawful assault, a common-law offence. They will charge them with assault intending to cause injury. If there has been a bit of a bruise or a mark or whatever, they will charge them with assault causing injury. If the cut bleeds, it will be serious injury, and they will file all of those charges. But when the matter is heard, it may well be pleaded down to an unlawful assault. But all of those other matters have been charged. All of those other matters can be brought forward—working with children, for example—but they can also be brought forward at subsequent matters that are being heard in court where there has been a finding of guilt but without conviction, such as a good behaviour bond, for example. That is the most common circumstance where there can be a finding of guilt but the matter is recorded without conviction. So if a person is asked, 'Have you been convicted of an offence?', they can honestly say no, but most people now are a little wiser to it and will ask, 'Have you ever been charged with an offence?'. So once again it becomes difficult. And it is a bit discriminatory being able to bring up matters which actually the person has not been convicted of.

The CHAIR: Yes.

Ms GURNEY: Yes, it just causes them a great deal of angst when they are applying for things like working with children checks.

Ms LOVELL: Kaz, in your submission you talked about the Aboriginal children who were charged with being in need of care and the impact that that had on their lives. We have expunged historical convictions for other crimes. Do you believe that these should be expunged as well?

Ms GURNEY: I think that is in the process of happening right now.

Ms LOVELL: Is it? Okay, I did not realise that.

Ms GURNEY: Yes. I know a number of my friends in the Aboriginal community who have suffered that same issue, and of course Uncle Jack Charles is one of them. Jack is an old friend who had the most shocking childhood—removed from his family. I do not know. Have you taken evidence from Jack?

The CHAIR: We have met Jack, yes.

Ms GURNEY: Well, you know Jack's story.

The CHAIR: Yes, we do.

Ms GURNEY: The abuse that he suffered in Box Hill Boys and so on. I happened to be at the State Theatre one night when he was doing his play on *Bastardy*, the movie that he did, and he was on stage doing it. Towards the very end he came on stage wearing a magnificent white sports coat, and it was 'Ring, ring, ring, ring', and he answered the mobile phone, 'Jack Charles on theatre'. Always looking at the contrary. And then there was a 'Ring, ring', and he pulled the other phone out of the other pocket, and his quote—he said: 'Jesus, Bluey, the jacks are after ya'. 'Oh, that's no good. You'd better get down to the NJC and see that tall sheila'. And then he gave a long pause, and he said, 'Yes, I know, but!'. and I was there with the people from NJC, including David Fanning, our wonderful magistrate there, and his family. The other 2000 people in the audience could not work out why 40 people were laughing hysterically. Yes, so that is Jack, who is just one of many. Uncle Larry Walsh is another one, and I hope Uncle Larry has also provided evidence.

Ms LOVELL: What about other crimes that are no longer a crime? Should we be recommending that anything that would no longer be considered an offence should be expunged?

Ms GURNEY: No, there is nothing that comes to mind in that respect. What I would like to see is a scheme that takes away irrelevant matters and things that will become irrelevant, either because they have got no particular application to the moment or because so much time has gone by—the effluxion of time just says that they are no longer relevant.

Ms VAGHELA: Hi, Karen.

Ms GURNEY: Hello.

Ms VAGHELA: Out of your submission, the first one talks about the duration, where it says 'the sentence was equal to or less than 30 months'.

Ms GURNEY: Yes.

Ms VAGHELA: The first one. I just wanted to know on what basis you said it should be 30 months.

Ms GURNEY: I have looked at provisions across Australia, including the commonwealth, in regard to spent convictions. Twenty-four months is the maximum penalty that a Magistrates Court will apply, two years incarceration, so this is taking it slightly into the realms of the County Court, for example. It is not going a long way, because the County Court can sentence a person to very, very long periods of imprisonment, but it is just picking up some of those when perhaps at the time the matter was too serious to be dealt with in the Magistrates Court. You understand that often that is down to the discretion of the prosecutor as to whether or not they will

accept a plea in the Magistrates Court, because many indictable offences are actually triable summarily, but often police will say, 'No, the severity of the matter is such that it should go on indictment and go upstairs to the County Court'. So it is just broadening the catch a little bit, yes.

Ms VAGHELA: Yes. I was just comparing with the other states. So you are saying it is more or less in line with the commonwealth one, where it is 30 months sentence or less. But I was looking at the other states, and for some of them it is six months or less. So there is a difference from six months to 30 months. So I just wanted to know a little bit more as to whether there was any particular reason, or are you just basing it on the existing commonwealth one?

Ms GURNEY: The issue, particularly for our Aboriginal clients, is where the prevalence of offending in young life is very high, but as they become older they become established as good citizens and so on. Most of my working with children clients, for example, would have offending that has seen them spend more than six months in jail. I have to say also that if we go back historically, especially 20, 30 years or more, the courts were perhaps particularly heavy on Aboriginal people offending for whatever justification there may have been at the time, so penalties that were handed out back then are not the levels of penalty that would be applied now. They have already suffered that period of incarceration in many instances where today they might get a community correction order instead. So it is a way of taking that into account, and we are talking about something that is a decade old, for adults, for example, yes.

Ms MAXWELL: Kaz, it is lovely to hear that you have a therapeutic approach in your work. I think there are many lessons to be learned across all services in regard to providing those therapeutic opportunities. I guess I have got a couple of questions. For a spent conviction, what offences would you deem not suitable?

Ms GURNEY: Certainly sexual offences. Sexual offences most definitely need to remain part of the record. Sometimes it is not the actual offence, it is the severity of the offence. I gave the instance of a person intentionally causing injury. It might be a small split over the eye, but it might also be a massive stab wound caused by a weapon, for example. So we need to be able to take those things into account, and that is why most jurisdictions look at the length of the sentence rather than the particular offence, except for those specific ones like sexual offences, murder and a few of the others that are particularly heinous, yes.

Ms MAXWELL: So the legislation would need to have very specific guidelines in regard to what offences would not be allowed to be spent convictions.

Ms GURNEY: I am comfortable with that, yes.

Ms MAXWELL: Okay. And my second question is: if somebody has a spent conviction and later on they offend again—

Ms GURNEY: The clock has to start running again.

Ms MAXWELL: Yes. But how many spent convictions would you consider someone to be able to gain for their offending?

Ms GURNEY: I personally would not put a cap on it. There are certainly many people that I have worked with where they may have faced the hamburger, the one with the lot, from the police on a couple of occasions, and they might have a dozen convictions. The other tendency with people in those circumstances is they just want to get it over and done with. Most of my clients coming out of court will say, 'What happened?'. They are so full of adrenaline at the time that they really do not comprehend what is going on. The magistrate says, 'Do you understand?'. 'Yes'. And they get outside, and the first question is: 'What happened?'. So I think we just need to be very careful about imposing caps, about putting a limit on the number of spent convictions. If they are able to be spent and it is more than the 10-year period, then it seems to me that that person should be able to go on and live their life without that hanging over their head and impacting them sometimes really, really severely, yes.

The CHAIR: Karen, just following on from that, looking at the limits on the waiting periods, as they are called, for spent convictions, in your submission you have put 10 years.

Ms GURNEY: Ten years for an adult, yes.

The CHAIR: I suppose, looking at the increasing numbers—we have over 700 000 applications for police checks now per annum in Victoria—some like Woor-Dungin and some of the other submissions have suggested that the nature of the offence, the person and their rehabilitation could be taken into account and that there should be wiggle room in that. Do you think we should just make it a hard and fast rule of 10 years for adults and five years for children and leave it at that?

Ms GURNEY: Police have got a discretion at the present time. Some police exercise it broadly, others very, very narrowly or not at all. I think probably we need to set a time frame. Wherever there is wiggle room, it is open to abuse. Yes, I think we probably need to set a specific time frame.

The CHAIR: Yes, and do you think 10 years is that period for a person that you feel has shown rehabilitation?

Ms GURNEY: I think that is a reasonable period of time, yes. We have all sorts of issues, and children are a particular concern here in Shepparton at the moment. We have a cohort of young people who are running pretty wild. I am actually talking with government and philanthropic organisations and so on about potential opportunities to put programs in place that might help to diminish the rate and severity of offending that is occurring at the moment, and some of it is extremely serious.

The CHAIR: Yes.

Ms GURNEY: We have teenage children that have been charged with murder, for example. You may have seen on the news the result of a hearing just last week. That is not the first time that a teenager has been charged and convicted of murder or of a homicide here.

We have the problem also where at this stage children are deemed to be legally competent at 10 years of age. There is a concerted effort across jurisdictions here in Australia and overseas to recognise the lack of development of children intellectually, the development of the brain, and to look for an age of criminality of about 14, which I certainly support. Irrespective of that, I think if offences have been engaged in during childhood, a period of five years for children is very appropriate—certainly significantly less than the period that is required for adult offending, where one would expect that the person was emotionally and mentally mature.

The CHAIR: Yes. Thank you for that, Karen. Just to clarify: your submission would contend that convictions that are not recorded or good behaviour bonds would be automatically spent as part of the review and as part of the changes?

Ms GURNEY: Yes. I note that in Western Australia an offender can be granted a spent conviction immediately by the court.

The CHAIR: Yes, yes.

Ms GURNEY: I was a little nonplussed when I read it, but that is the circumstance in Western Australia.

The CHAIR: Would you think that the term—I think in the UK they try and call it the 'rehabilitation period' rather than the 'waiting period'—would start at the point of conviction or the point of release?

Ms GURNEY: It should be from the time of conviction, yes, or a finding of guilt, yes.

The CHAIR: Yes.

Ms MAXWELL: Kaz, just a quick question. Obviously an offender would go before a magistrate to have that spent conviction implemented. Do you think that if there were victims involved in that crime, the original crime, they should have any input in whether that offender has a spent conviction?

Ms GURNEY: I do not believe that a person should have to go back before a court to get their conviction spent. I think the impact on the courts would be just horrific. The increase in workload would be stupendous. I

think the impact on victims should be dealt with at the time that a decision is made as to penalty. I think the voice of victims is really, really important, and we have various legislation that deals particularly with the need to provide voice for victims. What we have not had is the same level of voice about the underlying issues and how they might be addressed. One of the things that I find really interesting is the way the courts have moved to place a real emphasis on community correction orders, for example, and I am a great supporter of that, because I see that as a way in which courts are able to mandate the attendance of programs.

They get the reports back—hopefully they get the reports back—from corrections, although I note that on some occasions corrections have been so overwhelmed that they have not actually got to see the client during the period of the community correction order, and that has been happening in family violence matters, which I find pretty alarming. But I think it is at that early stage that the voice of victims needs to be heard and recognised. If there are other ways in which victims can gain a sense of closure after being the victims of offending, then I support it, and of course—I have got to think of the term now—the reconciliation meetings that can occur between the offender and the victims which are being facilitated through some of the programs at the moment. I am sorry; my memory is just—

The CHAIR: Restorative justice.

Ms GARRETT: Restorative justice.

Ms GURNEY: Restorative justice. Thank you. I am old—75 years old! Yes, restorative justice. I have seen restorative justice work well. The Centre for Innovative Justice at RMIT are strong proponents of restorative justice. But I have also seen it where it has not worked so well. I think at the moment it depends on the persuasion of the particular court and the magistrate, but also the other players involved—the agencies that are present there at court. Good restorative justice is excellent; half-hearted restorative justice probably just leaves victims feeling even more confused, yes. I can tell you quite honestly that I have been the victim of significant offences by other parties as well, so I understand what it is to be a victim as well as being a person who defends perpetrators.

Ms GARRETT: Thank you for your contribution. This is a question made with a very long premise of understanding how complex the criminal justice system is and the causes of crime and social inequality et cetera, et cetera, but one of the elements of the criminal justice system is it acts as a deterrent to people committing crime. How do you think that the possibility that this system—do you think that there is a chance that it would lead perhaps younger offenders to feel they have got a bit more of a free pass?

Ms GURNEY: None whatsoever. The people that I deal with are not thinking about the future; they are just thinking about the moment. Much of the offending is totally on the spur, and they are certainly not thinking about a future five or 10 years ahead of them. Most of them unfortunately do not see themselves as having a future. So no, I do not see that as a factor against deterrence whatsoever. I also do not think it is something that should be brought up at the time of the hearing for the offence either. It should be something that happens down the track.

Ms GARRETT: That is a really important point, I think.

Dr KIEU: That could work both ways, because it could act as a deterrent for the person not to offend again so that they can have their past criminal history expunged.

I have a question for you, Karen. Would you allow for some part of offences during the waiting period not to be taken into account and interrupt the waiting period?

Ms GURNEY: Look, I am really not sure what would be the better way to go there. There are some jurisdictions that say, 'Well, summary offences shouldn't set the clock running again'. I tend to think that if people are offending and are receiving any form of penalty other than a non-conviction, then perhaps the clock needs to start again. Non-convictions can be a good behaviour bond where they might make a donation to the local CFA, for example. They can require them to write a letter of apology to a victim. They can be required to pay a fine, so you can have a non-conviction fine. Our magistrates are very keen on the idea of contributions to local organisations. It keeps the money within the community instead of going off to the coffers of Treasury, which is a terrific thing because they do some really great work in the community.

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The CHAIR: Yes.

Ms GURNEY: I think that probably takes it far enough.

The CHAIR: Just finally—I am aware of the time—would you be able to give us any examples of any clients that you have had that would have benefited from a spent convictions scheme? I certainly recognise the example that you have used there.

Ms GURNEY: I have given a couple of examples, yes.

The CHAIR: Would there be, I suppose, a succinct little example that you could leave us with of a client that, had that spent convictions scheme been available to them, would have had a significant change to the way their life had travelled?

Ms GURNEY: I think probably the evidence that Uncle Larry gave would be a particularly poignant example of the impact that that had over a long period of time, where the fact that he had a conviction in his very, very early childhood kept on just coming up. Well, there was a conviction back in 1952 or whenever it was, so there was a long history of offending. Magistrates are often extremely busy. They just get a record of antecedents. They may not perhaps spend the time to think about—how old was the client and how long ago was that?

The CHAIR: Or realise he would have been three at the time. Yes.

Ms GURNEY: So Uncle Larry's example is a really good one.

The CHAIR: Right.

Ms GURNEY: But there is one thing further, and I did not bring it up because it is outside the consideration of spent convictions altogether, but a matter is discrimination on the grounds of irrelevant criminal records.

The CHAIR: Yes.

Ms GURNEY: We are in the interesting situation where under the commonwealth Fair Work Act discrimination on the basis of an employment application because of a criminal record is not an offence—it is not prescribed—although it would seem that becoming aware of that offence sometime down the track during the person's employment leading to a dismissal could in fact be grounds for an unfair dismissal claim.

The CHAIR: Could be used, yes.

Ms GURNEY: Some jurisdictions have already got a general attribute of irrelevant criminal record, and I would strongly argue that Victoria's legislation should have a similar scheme.

The CHAIR: Yes. You are not alone, Karen.

Ms GURNEY: Thank you. Obviously there need to be exceptions to that provision. There will be areas of employment where a criminal record is very relevant indeed and honesty offences become a problem, so yes, I will leave it there with you.

The CHAIR: Thank you. We very much appreciate the evidence that you have provided for us today and your submission, but also a special thankyou for providing some local knowledge to the committee. I know that you have been particularly helpful with the secretariat in enabling us to get in contact with people in this area, so we very much appreciate it. Thank you very much for everything today.

Ms GURNEY: Thank you very much, and can I just say thank you very much indeed for taking the time and the trouble to come up here and to hear evidence of things that are occurring. I am sure Ms Lovell, for example, will be particularly pleased that you are here and hearing these things.

Ms LOVELL: Absolutely.

Ms GURNEY: But I know that there are many in the community, even though you may not hear from them, who are very anxious about the outcomes of your deliberations. So thank you very much again. I hope you enjoy the rest of the day.

The CHAIR: Thank you.

Witness withdrew.