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file number: 7 Tdo 778/2012-44

[stamp of the mail room of the Municipal Court in Prague]

Delivery: 16 November 2012

RESOLUTION

The Supreme Court of the Czech Republic held a non-public hearing on 7 November 2012 to resolve the matter of these defendants: **Gilbert Ferguson McCrae**, born on 27 September 1958 in Montclair, New Jersey, U.S.A., national of the United States of America and of the United Kingdom of Great Britain and Northern Ireland, residing in the Czech Republic at: Sokolská 29, Praha 2, and **Sylvie Salterová**, born on 22 October 1947 in Opava, resident at Praha 2, Sokolská 29, who both filed a requests for extraordinary judicial review of the resolution of the High Court in Prague dated 8 February 2012, file number 6 To 6/2012, in the criminal matter resolved by the Municipal Court in Prague under file number 49 T 5/2011, and hereby resolves as follows:

upon § 265i sub. 1 sub. e) of the Code of Criminal Prosecution these requests of these defendants for extraordinary judicial review are hereby **denied**.

RATIONALE

I.

1. In its judgment dated 8 November 2011, file number 49 T 5/2011, namely in part A, the Municipal Court in Prague found the defendant Gilbert Ferguson McCrae, as per Article I.: guilty of murder under § 140 sub. 2 of the Penal Code, as per Article II.: guilty of illegal possession of firearms under § 279 sub. 1 of the Penal Code, as per Article III.: guilty of illegal possession of firearms under § 279 sub. 1 of the Penal Code, and was punished as per § 140 sub. 2 of the Penal Code while applying § 43 sub. 1 of the Penal Code to a summary punishment of sixteen year of deprivation of liberty. As per § 56 sub. 2 sub. d) of the Penal Code it was resolved the defendant will be placed in a prison facility with maximum security. As per § 70 sub. 1 sub. a), sub. 2 and 3 of the Penal Code a confiscation of an item or other property or valuables was ordered. In the same judgment, in part B, the Municipal Court in Prague acquitted Sylvie Salterová as per § 226 sub. c) of the Code of Criminal Prosecution of criminal charges described in parts I. and II. In part C, certain items of the defendant (ones described in the rationale) were ordered to be confiscated as per § 101 sub. 1 sub. e) of the Penal Code while applying § 230 sub. 1 of the Code of Criminal Prosecution.

2. Both defendants filed an appeal against said judgment (**in their favor**). So did the state prosecutor, to the detriment of the defendant against the verdict on punishment and to the detriment of the defendant against the verdict on acquittal. The High Court in Prague issued a resolution on 8 February 2012, file number 6 To 6/2012, whereby all the appeals were denied on grounds of § 256 of the Code of Criminal Prosecution.

3. Both defendants filed a due and timely request for extraordinary judicial review regarding this said resolution of the appeals court.

4. Defendant Gilbert Ferguson McCrae based his request on grounds set forth in § 256b sub. 1 sub. c) and g) of the Code of Criminal Prosecution, while in the content of the request **he failed to describe which objections he meant to tie to which grounds for extraordinary review**. In the introduction of the rather large request he stresses that the High Court in Prague, before all, dealt with the criminal

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defense objections regarding trustworthiness of witness Turčaninov in a wrong way, which resulted in the factual state of affairs not being proven beyond all doubt. He states that the first testimony of this witness about the person that had the conflict with the victim is quite different from facts described in the rationale of both the court decisions, differs from the later testimony of this witness, differs from the testimony of Ms Rezková and Mr Všetečka. The High Court then stated that there was an altercation in Bar Ještěrka between the victim and some person, but who that person was, according to the opinion of the defendant, was never proven. The defendant believes it doubtful to base a factual finding in recognition where the defendant was pointed out by one sole witness.

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The rationale of the courts as to the refusal to hear more witnesses that were in Bar Ještěrka on the night in question is, according to the defendant, quite insufficient. Denying those motions resulted in violation of principle of material truth. The factual finding that the defendant was in Bar Ještěrka on the night in question and that he also was the person that the victim verbally offended is not supported by presented evidence, so the defendant claims. The defendant and his wife claimed that the defendant was not in the bar on that night and this fact was not refuted by witnesses Všetečka or Rezková, the other persons present in the bar that night were never heard by the courts, and it was Turčaninov alone who stated that it had been this defendant that the victim verbally offended in the bar that night and Turčaninov's description of the defendant differs a lot from his real looks.

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The defendant further points to allegedly omitted evidence, namely a revision of a forensic report, one that had the capacity to refute the conclusions of the forensic report from ballistics, the one whose actual value is, according to the defendant, doubtful. The criminal defense objected about the level of correctness of the forensic expertise since the very beginning, doubted some of the conclusions therein, namely the objective impossibility to state the individual match of gun and bullet. As the court did not order a revision of this forensic report, we have an omitted piece of evidence here, one that led to an unlawful conviction of this defendant. Further, the criminal defense claims that alternative investigation lines were overlooked, namely a witness that was never summoned to give testimony who would have stated on record that the victim had told him that shortly before the murder someone had taken a couple shots at him. Despite the motion of the criminal defense the police officers were not heard and thus it was impossible to factually confirm the circumstances and reasons for the CSI at the crime scene, interrogation of the defendant without a defense lawyer and without a translator present with him.

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The defendant still believes that some of the evidence was gathered by a procedurally inadmissible way. Regarding the house search, he points to obvious discrepancy where the High Court states that the public prosecutor filed a motion for a search warrant on 4 March 2011 and the District Court for Prague, Tenth District, issued this warrant on 4 February 2011. According to the defendant, even if this were but a typo, such a flaw should not occur in a matter which the defense lawyers deem so essential. The defendant stresses that that his wife wanted to allow access and entry to the police of her own free will and thus it was not necessary to utilize such an extreme measure like house search. But, the court did order the house search and thus the unwarranted violation of a constitution-guaranteed right / freedom of privacy at home arose, and that results, as the defendant claims, in gathering evidence in violation of fundamental principles of criminal process.

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The defendant also believes that the argumentation of the court depending in witness Turčaninov's recognizing the defendant in the court room "in natura" is out of place, for the witness surely could not have mistaken the defendant for, let us say, the judge or the defense attorney (both wearing different-colored gowns), or for the court bailiffs (wearing uniforms). The nature of recognition depends in the recognizing person not being able to see the perpetrator between the moment of the crime and the moment of the recognition and picking the perpetrator from a group of several people with similar looks.

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The defendant claims that courts, in rationale of their rulings, completely omitted the relevance of evidence in his favor. It is true that they were supposed to proceed in accordance with the principle of material truth, but the defendant believes that the courts assigned too much importance to evidence that, in fact, was no evidence at all or that had quite insufficient evidentiary value. As an example the defendant quotes the failure to find his DNA on a cigarette butt found near a tram stop at I.P.Pavlova, which, according to the defendant, proves that he was not there. Hence, the defendant does not accept the conclusions of the court on the (non-)value of this evidence. Also, the defendant stresses that it is impossible to accept as evidence the A/V recording from the CCTV, that as he claims only shows that it was two people that entered the tram, one of them was the victim, while the court failed to resolve the question whether or not the person entering the tram at I.P.Pavlova is the same person that travelled with the victim all the way to the terminal station.

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Further, the defendant stresses that the comparison of the bullet and the gun failed to prove beyond doubt that the projectile was in fact discharged from Heckler & Koch model P2000, S/N 116-033133, 9mm Luger. Hence, it was not proven beyond doubt which gun it was that killed the victim, and the courts failed to deal with this issue sufficiently. The defendant believes it is impossible to simply accept the conclusions of the courts of both instances in that the staff of the Crime Investigation Institute found identical individual markings on the bullet casings found at the crime scene and on the casings discharged from the gun in question. At court the forensic experts did not react to questions about the discrepancy between the impossibility to identify individual match in traces on the casing discharged from the alleged killing gun and individual traces on the casing found at the crime scene. Forensic experts could not rule out, and the court did not resolve this despite objections from the criminal defense, whether or not a gun from the same production line, which was stolen from the defendant some time before the crime, or any other gun close to this one in its production parameters, could or could not show similar markings deemed by the forensic experts the markings of individual match. The defendant goes on and in a lot of detail describes the method of production and assembly of firearms. According to the defendant, the court should have allowed the defense lawyer to request a report from a testing laboratory of the arms factory Heckler & Koch, which factory, being an unbiased expert, could have brought forth objective results. Furthermore, the courts underestimated the knowledge and expertise of this defendant, who is an expert in firearms, because if he had been the real perpetrator of this crime, could have reliably destroyed identification of the gun in question, which he did not. When the courts failed to take these facts into consideration, the defendant claims it shows the will of the courts to convict him regardless of whether he was the murderer or not. He also objects against the Crime Investigation Institute forensic experts' having used ammunition in their tests (ones based on which they stated individual match of the guns) that did not correspond with the ammunition used in the murder and thus the casings cannot show the same markings.

12.

Another objection of the defendant aims at the violation of the defendant's right to criminal defense, where in the first eight hours he allegedly did not have a defense attorney, and then in the first stage of the process he did not have an interpreter. The defendant claims that the principle of contradiction and equal arms was violated when many requests of the defense attorney were denied, e.g. as to the recording from the first interrogation of the defendant at the police station. The defendant was found guilty of murder, but he claims the evidence against him was not capable of supporting that finding. Furthermore, the Municipal Court had only indirect evidence. At the end of his request for extraordinary judicial review the defendant objects that the High Court breached its obligation to duly present its grounds for the ruling as it quite formally refused the request for judicial review stating that the High Court was in full agreement with the factual findings and conclusions of the court of first instance.

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13. The defendant moves that the Supreme Court of the Czech Republic overturns the rulings of the court of first instance and the appellate court in the verdicts challenged in the request and returns the matter to the Municipal Court in Prague for a new trial.

14. The other defendant, Sylvie Salterová, also filed a request for extraordinary judicial review of the ruling of the High Court in Prague. She based her request on grounds stated in § 265b sub. 1 sub. j) and g) of the Code of Criminal Prosecution. She believes a protective measure was ordered without the terms stated in the law for that being met, and she also claims that the ruling is based on a wrong legal consideration of the facts and/or other wrong material consideration.

15. The defendant disagrees with the conclusion of the court of first instance depending in her, being a holder of a carry permit, failed to comply with her duty to safekeep the guns, for the other defendant had access to a treasure vault in which these were kept and as a result of that a violent crime was committed. This defendant considers the protective measures ordered towards her to be inadequate and believes that they cannot meet the purpose the law connects thereto, for in her opinion the court wrongly analyzed what in fact is danger to safety. This defendant, first of all, believes that her husband did not commit the crime that he was indicted for. By failing to safekeep the guns she owned she did in no way endanger anyone's safety. Furthermore, it was not proven that the other firearms that the husband did not take out were not safely under lock and key. Hence, the defendant claims that it is unacceptable to use an extensive interpretation to come to the conclusion that if the husband took out one gun, he could have as well taken out the others found in the apartment. Hence, she considers wrong the confiscation of all of the guns, namely the Winchester and automatic Remington, for it was never proven that those guns were not safely under lock and key and thus might endanger safety of property, health or society. Furthermore, the defendant states reasons for keeping the guns in the treasure vault to which her husband had access by stating that they both loved shooting, the husband used to be the original owner of those guns, she trusted her husband and did not want to apply a measure of preventing him from accessing the guns which would endanger the trust of their marital life. She also stresses that the courts failed to deal with her objections against the inadequacy of the protective measures to be applied against her. She objected claiming she had done nothing wrong and still the guns were confiscated, guns that represent quite an asset for her. The defendant is persuaded that in her case it was possible to apply the principle of adequacy as per § 101 sub. 4 sub. d) of the Code of Criminal Prosecution, i.e. she could merely have been ordered to refrain from handling firearms.

16. At the end the defendant stresses that during the criminal process the authorities dealt with her and her husband in obvious discordance with the Constitution of the Czech Republic and the Bill of Rights, namely there was a breach of right to fair trial, namely the right to criminal defense. By denying the motions to hear testimonies of police officers conducting the actions and of impartial witnesses a whole chain of rights violations of this defendant was never investigated, beginning with the inadequately violent method of arrest, continuing with repeatedly refusing to allow the defendant access to her defense attorney, pressing her to give statement, and ending with an illegal method of conducting a search of the premises.

17. Hence, the defendant moves that the Supreme Court of the Czech Republic overturns the verdict named C.

18. A public prosecutor from the Attorney General's Office gave a statement regarding the request for extraordinary judicial review filed by Gilbert Ferguson McCrae. She states that the grounds for filing this request as per § 265b sub. 1 sub. c) of the Code of Criminal Prosecution depends in a case where a defendant does not have a defense lawyer in a process while the law states that he/she must have one. Thus, that would be a breach of provisions on the obligatory defense lawyer. However, the public prosecutor claims that not every such situation is a breach of provisions on the obligatory

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defense lawyer. In order to meet the terms for these grounds for request for extraordinary judicial review it is necessary that the criminal prosecution (at the time the defendant truly has no defense attorney) take any procedural steps aiming at issuing a material verdict challenged by the request. The grounds for obligatory defense lawyer for this defendant was found in this case as per § 36 sub. 3 of the Code of Criminal Prosecution, for this process was a process on a crime for which the law states a punishment of more than five years of imprisonment. In such cases the defendant must have a defense lawyer already in the pre-trial stage. The obligatory defense lawyer principle is in effect as of the moment of the initiation of criminal prosecution. That results from the used term "a defendant" in the sentence "a defendant shall have" used in § 36 of the Code of Criminal Prosecution, because as of that moment the criminal prosecution is being conducted against a specific person. The criminal file shows that on 8 March 2011 criminal prosecution against this defendant was initiated for the crimes described therein. On that same day, i.e. on 8 March 2011, the District Court for Prague, tenth District, namely the judge Dr. Petr Zelenka, telephonically declared a resolution on appointment of a defense attorney as per § 36 sub. 3 of the Code of Criminal Prosecution, ex offo, namely defense lawyer Mr Václav zelenka, law office at this address: Praha 3, Žižkov, Husinecká 3. It is thus clear that the defendant's right to have a defense lawyer was never breached.

19.

Regarding the grounds for filing a request for extraordinary judicial review as per § 265b sub. 1 sub. g) of the Code of Criminal Prosecution, the public prosecutor states that this provision is used to correct exclusively legal flaws. Questioning factual findings cannot find grounds in law-defined scope of admissible grounds for filing a request for extraordinary judicial review as per § 265b of the Code of Criminal Prosecution. Regarding the defendant's objections as to the search of premises, she states that the purpose of search of premises as per § 82 of the Code of Criminal Prosecution is "to secure a thing or a person important for criminal prosecution". A requisite for any search of premises is a reasonable suspicion that an apartment or any other premises used for living or premises thereto pertaining contains such a thing or person. As per § 83 sub.1 of the Code of Criminal Prosecution a search of premises is only admissible upon a written warrant of a judge containing grounds for that. Service of process thereof is necessary during the search of premises, the warrant must notify users of said premises that they must suffer the search of premises, that authorities have the right to subdue resistance or break obstacles and that a user of such a thing must submit any such found thing important for criminal prosecution or they might be removed or taken by force. If a warrant for a search of premises contains these said elements, the public prosecutor is sure the defendant's objection cannot be deemed material. Pointing to a discrepancy in dating in rationale of the appellate court means pointing out a clear typo.

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The other objections of this defendant, the public prosecutor says, aim at factual findings. The defendant basically has it against both the courts that they ended up with wrong factual findings which was caused by wrong evaluation of presented evidence and failure to present evidence proposed by the defendant. The defendant presents his own, a much more favorable version of what happened and how it happened, quite different from the version found by the courts. Such objections do not fall under the scope of the declared grounds for filing a request for extraordinary judicial review. The public prosecutor claims that no extreme discrepancy between the factual findings of the Municipal Court in Prague (which findings were accepted by the appellate court) and the presented evidence.

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Hence, the public prosecutor moves that the Supreme Court of the Czech Republic follows § 265i sub. 1 sub. e) of the Code of Criminal Prosecution and refuses to allow the extraordinary judicial review as the request for extraordinary judicial review is obviously groundless.

22.

Regarding the request for extraordinary judicial review filed by Sylvie Salterová the public prosecutor states the following: as per § 265b sub. 1 sub. j) of the Code of Criminal Prosecution,

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grounds for extraordinary judicial review depend in failure to meet terms stated by the law for imposing protective measures that are described in § 98 and § 101 of the Penal Code. The grounds for extraordinary judicial review for procedure under § 101 of the Penal Code might be seen in a situation where imposition of a protective measure was not required for safety of people or property or society or where there was no danger that the confiscated item(s) would be used for committing a crime. Upon presented evidence the court of first instance came to the conclusion that letting this defendant keep any firearm represents an unbearable risk for our society, namely for safety of people, and thus it is reasonable to apply the procedure laid out in § 101 sub. 1 sub. c) of the Code of Criminal Prosecution and so to interfere with her property rights, and to impose the protective measure of confiscation of an item or other property as to all and any firearms she possesses, although she herself did not commit any crime. It is clear that the original owner of those firearms was McCrae and that Salterová became the owner thereof only formally so that McCrae would not lose those firearms. Moreover, she allowed access to those firearms to a man who lost his carry permit by keeping those firearms outside the treasure vault or by allowing him free access to the key to the treasure vault whenever they truly were locked in there. In the case at hand it was proven that the defendant, without his wife's knowledge, took out of the apartment (at least) the gun Heckler & Koch and consequently used it to commit murder. The method of safekeeping of those firearms that Salterová employed allowed McCrae unlimited access to these firearms, and that in connection with his personality represents an unbearable risk for the safety of this society, which risk is quite clear from the fact that McCrae used his unlimited access to take out the gun Heckler & Koch and commit murder with it. Hence, Salterová breached an obligation imposed by Act 119/2002, the Firearms and Ammunition Act, as amended, depending in the duty to safekeep firearms so that they could not be abused by an unauthorized person. Hence, the court came to a finding that it is quite well within the interests of this society to confiscate not only the gun with which the crime was committed, but along with it also the other guns in possession of Salterová, as per the verdict of the court of first instance, so that the court prevents any similar abuse in the future.

23. Hence, the public prosecutor moves that the Supreme Court of the Czech Republic follows § 265i sub. 1 sub. e) of the Code of Criminal Prosecution and refuses to allow the extraordinary judicial review as the request for extraordinary judicial review is obviously groundless.

II.

24. Regarding the request for extraordinary judicial review filed by Gilbert Ferguson McCrae, the Supreme Court finds that he filed the request exclusively with respect to the crime described under Roman numeral I. If the verdict on guilt of the court of first instance, whereby he is found guilty of murder as per § 140 sub. 2 of the Penal Code. He committed this crime as follows: *On 4 February 2011 after 11 PM came to Bar Ještěrka at Londýnská 315/71, Praha 2, and took a seat nearby the drunk victim, Mr. Rudolf Slavík, born on 20 April 1976. The victim repeatedly grossly insulted the Defendant between 11.30 PM and 0.00 AM and threatened him. The Defendant did not react to that in any verbal way, but kept watching the victim, whereas the actions of the victim obviously angered him. Thereon the Defendant decided to take vengeance on the victim for his insults by killing him using a firearm, and thus, shortly after midnight, i.e. on 5 February 2011, left the said bar, waited for the victim, and when the victim left the bar around fifteen past midnight the Defendant followed the victim to a tram stop at I.P.Pavlova. There the Defendant watched the victim from distance and at forty-four past midnight entered the first car of Tram 22. After the Tram 22 finished its course at the terminal station Nádraží Hostivař at about 1.10 AM the Defendant approached the (most probably sleeping) sitting victim, put an automat Heckler & Koch gun model P2000, 9mm series, Luger, S/N 1166-033133, behind the right ear of the victim and from this immediate proximity discharged one shot by which the Defendant shot through the head of the victim. That issued in damage to the brain of the victim inconsistent with life and as a result the victim died on spot.*

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25. In his request to allow extraordinary judicial review the defendant applies grounds for that as per § 265b sub. 1 sub. c, g) of the Code of Criminal Prosecution.

→ The grounds as per § 265b sub. 1 sub. c) of the Code of Criminal Prosecution are present where the defendant did not have a defense lawyer in the criminal process even though according to the letter of the law he/she should have had one. These grounds for filing a request for extraordinary judicial review shall not aim at any violation of right to criminal defense except one that in its consequences truly is relevant in the light of the material verdict. If the defendant, for example, did not have a criminal defense lawyer for a certain part of the criminal process, although (s)he should have had one, then these grounds for filing a request to allow extraordinary judicial review are present only if the criminal prosecution authorities truly took procedural steps aiming at issuing a material verdict challenged by the request to allow extraordinary judicial review during that period (see our ruling number 48/2003 published in the Collection of Criminal Law Rulings of the Supreme Court).

26.

However, the defendant objects that he had no defense lawyer during the first eight hours. It is clear that this defendant bases his objection on his not having a criminal defense lawyer present with him during the first eight hours after being apprehended, i.e. before criminal prosecution was initiated.

→ The Supreme Court hereby finds this objection of this defendant to be clearly immaterial. The grounds as per § 265b sub. 1 sub. c) of the Code of Criminal Prosecution are present where the defendant did not have a defense lawyer in the criminal process even though according to the letter of the law he/she should have had one. This concerns before all the provision of obligatory defense lawyer (§ 36 of the Code of Criminal Prosecution), which describes cases in which a defendant must have a defense attorney. Obligatory defense lawyer begins in the pre-trial at the very moment of the initiation of criminal prosecution. The defendant's objection in that he had no defense lawyer the first eight hours describes the period before the initiation of criminal prosecution, namely the period when he was in position of a suspect, not a defendant. During that period the legal effects of obligatory criminal defense are not present, as that applies as of the moment of the initiation of criminal prosecution, if and only if other terms are also met. At the time in question it was in no way clear whether or not criminal prosecution shall be initiated against a defendant, against this specific defendant, and so he was in position of a suspect and only after the criminal prosecution authorities had taken some time-sensitive steps, the criminal prosecution against him was initiated. Even though the pre-trial includes the stage before the initiation of criminal prosecution, as of the moment of the drafting of the record on the initiation of actions commencing criminal prosecution or taking time-sensitive actions that cannot be delayed, which immediately precedes that, the obligatory defense lawyer principle begins with the initiation of criminal prosecution, which is clear from the term "defendant" that the law uses in the first part of § 36 of the Code of Criminal Prosecution, because as of that moment a process is being conducted against a specific person. And so, during the time that the defendant objects he had no defense lawyer, the terms for him to obligatorily have one were not met, and thus the law does not require he had one.

27.

Given the above and given the contents of the criminal file it is clear that criminal prosecution against this defendant was initiated on 8 March 2011 (page number 1 of the criminal file). As there were grounds for obligatory appointment of a defense attorney (§ 36 sub. 3 of the Code of Criminal Prosecution), i.e. the criminal prosecution was initiated for a committed crime the punishment for which is stated in the law in scope exceeding 5 years of imprisonment (upper limit), on the very same day, i.e. 8 March 2011, in the evening, a judge of the District Court for Prague, Tenth District, appointed a defense attorney for this defendant, namely Mr. Václav Zelenka (see page number 58, official record on promulgation of a resolution on appointment of a defense attorney, page number 62, court writ dated 8 March 2011, writ file number 1 Nt 1042/2011, whereby the defense lawyer Mr. Václav Zelenka is being appointed for this defendant). Next steps of criminal prosecution were always carried out in presence of a defense lawyer of the defendant. Hence, the Supreme Court

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hereby finds that there was no violation of the defendant's right to criminal defense and that the defendant's objection is clearly immaterial.

29.



Above the scope of this request for extraordinary judicial review the Supreme Court states that the Supreme Court disagrees with the defendant's objection as it does not fit any of the allowed grounds for filing a request for extraordinary judicial review provided in § 265b of the Code of Criminal Prosecution, namely depending in the fact that he had no interpreter in the first stages of the process, because the criminal file shows (page 33 et seq.) that already during the interrogation of a suspect, immediately after the apprehending of the suspect, an interpreter was present there, and he then signed the official record on interrogation of a suspect.

30.

The grounds as per § 265b sub. 1 sub. g) of the Code of Criminal Prosecution are present where the ruling depends in a wrong analysis of the actions or another wrong material consideration or adjudication.

31.

The letter of the law in this provision shows that in connection with the found count(s) the request for extraordinary judicial review may challenge exclusively material flaws. Because it is not allowed to question correctness of factual findings while referring to the grounds for filing a request for extraordinary judicial review stated in § 265b of the Code of Criminal Prosecution, the Supreme Court is bound by the factual findings of the court of first instance and the appellate court and the factual findings described by these courts must be a base for the Supreme Court in order to analyze the count(s) as to material law. Hence, the Supreme Court must accept the found facts as they were found during the criminal process and before all as they were laid out in the verdict of the judgement, while the Supreme Court must find out whether or not the legal analysis of the count(s) is in accordance with the expression of the method of acting in the relevant crime definition with respect to the found facts.



32.

Hence, it is possible to move within the limits of the allowed grounds for filing a request for extraordinary judicial review under § 265b sub. 1 sub. g) of the Code of Criminal Prosecution if one objects that the count(s) as found by the court(s) was/were wrongly charged especially if the charges were criminal charges for a felony that as it turned out was no felony after all, or that it was quite a different felony, not the one of which the defendant was found guilty. Beside the flaws seen in the legal definitions in the criminal charges it is also allowed to claim "other wrong material analysis or adjudication". That means resolution of an issue that does not directly depend in legal definition of the counts of the felonies or crimes but rather in legal analysis of another factual circumstance important for materiality.

33.

Using the grounds for filing a request for extraordinary judicial review under § 265b sub. 1 sub. g) of the Code of Criminal Prosecution does not make it possible for objecting against or requesting reviewing of correctness and completeness of factual findings as per § 2 sub. 5 of the Code of Criminal Prosecution or requesting checkup of level of completeness of presented evidence and correctness of evaluation of presented evidence as per § 2 sub. 6 of the Code of Criminal Prosecution, because this court activity depends in applying procedural provisions of the law, not material provisions of the law. The Supreme Court, when resolving requests for extraordinary judicial review, never or only exceptionally rarely analyses evidence, and in the rare cases when it does so, it does so in order to be able to rule on the very accepting or rejecting the request itself (see § 265r sub. 7 of the Code of Criminal Prosecution) and thus, solely based on the criminal file and without an option to repeat the presentation of evidence in order to comply with the principle of oral process and principle of immediate response, the Supreme Court is not allowed to question the existing factual findings and check correctness of evaluation of evidence presented before the lower courts. In other words, a request for extraordinary judicial review can only be filed based on material-law objections, not based on factual objections.



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At the same time we must stress that the contents of the raised objections supporting existence of any specific grounds for filing a request for extraordinary judicial review must correspond with the definition stated in the law for those grounds as per §265b of the Code of Criminal Prosecution, so a mere formal reference to a provision of the law that contains some of the allowed grounds for filing a request for extraordinary judicial review is not enough.

35.

First, the Supreme Court finds that the defendant has raised the same objections in his request for extraordinary judicial review that were part of his criminal defense, those same objections were raised in his appeal and the court of first instance and the appellate court repeatedly dealt with those objections and very diligently and convincingly resolved them in the rationale of their rulings.

36.

In his request for extraordinary judicial review the defendant first objects that he never committed the crime in question. He takes arms against trustworthiness of witness Turčaninov, whose testimony, the defendant claims, are discordant with respect to descriptions of his person. The defendant objects that it was never proven who the person in Bar Ještěrka was, one with whom the victim had an altercation. He goes on and questions the evidentiary value of recognition upon which the defendant was identified by one sole witness. He believes that the appellate court based its decision on unconvincing evidence that do not make it possible to reach a conclusion on his guilt. He also objects that not all proposed witnesses were heard, a review forensic expertise in ballistics was not procured and he also believes the evidence is clearly incomplete. He believes the evidence in his favor was evaluated wrongly while high importance was assigned to evidence that as he claims is of insufficient value.

37.

The defendant's objections express disagreement with factual findings gathered in this matter by lower courts and with presented and accepted evidence, and also with the evaluation thereof by both lower courts. By that the defendant questions results of presenting evidence and finds in it grounds for filing this request while applying § 265b sub. 1 sub. g) of the Code of Criminal Prosecution, namely wrong procedure of lower courts. Hence, the defendant deduces conditions for alternate legal analysis of the crime in question not from the arguments explaining grounds for a different legal description of the criminal charges as per the verdict on guilt in the judgement of the court of first instance, but merely from other factual conclusions (ones that are more favorable for him) than those that the lower courts took in account.

38.

The Supreme Court must make a note here: it is clear that § 265b sub. 1 sub. g) of the Code of Criminal Prosecution states that grounds for filing a request for extraordinary judicial review cannot be a mere objection of incorrect (incomplete, different) factual findings or wrong evidence, for such grounds are not included there. A request for extraordinary judicial review cannot be considered to be just another appeal. This is an extraordinary legal remedy and its purpose is to correct some expressly stated procedural and material flaws, ones that fall under the scope of the grounds that are exhaustively enumerated. Hence, it is impossible to file a request for extraordinary judicial review for the same grounds and in the same scope as it was done in filing an appeal. By filing a request for extraordinary judicial review one cannot successfully request a review of factual findings made by the court of first instance and the appellate court, nor successfully request a review of correctness and legality of the evidentiary procedure conducted by those courts. The core of evidentiary process lies at the court of first instance. Its factual findings may be reviewed and amended only by an appellate court, which is allowed to present and hear more evidence exactly for these purposes (§ 259 sub. 3, § 263 sub. 6 and 7 of the Code of Criminal Prosecution). The Supreme Court is not any general third instance that might review any ruling of an appellate court as to all claimed flaws. The Supreme Court cannot review the correctness of factual findings or presented and heard evidence, not even in connection with an objection claiming incorrect legal analysis of the crime or another incorrect material-law adjudication, if only because the Supreme Court is not allowed to re-evaluate

presented and heard evidence. Unlike the court of first instance and the appellate court the Supreme Court lacks the option to apply the principle of oral response and principle of immediate response and to present or hear evidence in the proceeding on ruling on a request for extraordinary judicial review, for that much is quite clear from the very limited scope of evidentiary proceedings allowed to the Supreme Court as per § 265r sub. 7 of the Code of Criminal Prosecution. Without a repeated presentation of evidence or hearing evidence (evidence the defendant questions) the Supreme Court cannot evaluate the already presented evidence any differently from the lower courts.

39. The Supreme Court follows a principle not to interfere with factual findings of the lower courts. The Supreme Court can do that only exceptionally, as long as the Supreme Court needs to lay grounds for an extreme discrepancy between factual findings of lower courts and presented evidence. In such cases the interference of the Supreme Court as to factual findings is absolutely necessary in order to secure a Constitution-guaranteed right of a defendant to a fair trial. An extreme discrepancy between the factual findings of lower courts and presented evidence is present wherever factual findings of lower courts lack internal logical connection with evidence, wherever factual findings of lower courts in no way arise from evidence despite applying all and any logically acceptable ways of evaluation, wherever factual findings of lower courts are contrary to the contents of presented evidence from which these factual findings were made, etc.

40. Between the factual findings of the Municipal Court in Prague (with which the High Court in Prague agrees, see resolution on appeal) and the presented evidence show no extreme discord. The procedures of both the lower courts clearly show that they presented and heard all available evidence necessary to prove guilt of this defendant, evaluated the evidence each piece a time and also in their connections and then they came to factual conclusions that are not in discord with principles of formal logics, while the legal analysis of the criminal charges fully corresponds with the factual findings, as described in the verdict of the court of first instance, and they explain their conclusions in their rulings in a satisfactory and convincing way. Under these circumstances the grounds for filing a request for extraordinary judicial review under § 265b sub. 1 sub. g) of the Code of Criminal Prosecution are not met, even if a reference is made to a Constitution-guaranteed right to a fair trial, based on which, exceptionally, breaking the ban on principle of no review of factual findings of lower courts is possible.

41. In this matter at hand, regarding the criminal charges as per the verdict of the court of first instance, the defendant objects wrong evaluation of factual findings made by lower courts while stating that he did not commit the criminal action in question and that the courts evaluated the presented evidence one-sidedly to his detriment. He himself offers a different story behind the facts. In this respect, however, both the lower courts explained in the rationale of their rulings quite convincingly and in a lot of detail what evidence made them come to their conclusions and what evidence supported that. They explained why they believed testimonies of witness Turčaninov and why they deem this witness trustworthy (page 8 of the judgement of the court of first instance). The contents of the criminal file, the testimonies of this witness (page 147 et seq., page 866 et seq. of the criminal file) show that he never departed from his testimony, he described the defendant in a lot of detail during his interrogation on 9 March 2011 and then he safely and without doubt recognized the defendant during a photo recognition that occurred on that same day. During the trial on 14 September 2011 he confirmed that the defendant is the person who was in Bar Ještěrka and whom he had previously recognized from the photos during the photo recognition. Regarding the description of the defendant, the Supreme Court hereby stresses that the person described by witness Turčaninov matches the type described by the testimony of Všetěčka (see the criminal file, page number 154) and and of Krotíl (see the criminal file, page number 144). Testimonies of those witnesses mentioned above regarding the description of the defendant are also supported by a CCTV recording made by a camery placed at Náměstí I. P. Pavlova (see the criminal file, page number 557). Both the lower courts explained in a comprehensive way why they refused to believe the testimonies of the defendant and quite carefully

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described the reasons for denying the motion of the defense lawyer to enrich the presented evidence by hearing more witnesses.

42.

Regarding the objections referring to the allegedly omitted evidence: we must stress that both the lower courts duly explained why they denied the motion of the defense lawyer to order a review of the forensic report in ballistics. The defendant believes that the conclusions of the forensic report in ballistics have doubtful evidentiary value and he believes that it was not proven beyond doubt which gun it was that shot the victim. The Supreme Court does not agree with these objections. The official record on preliminary ballistics examination, the expert testimonies from crime scene sciences, ballistics, chemistry of 10 May 2011, file pages 220-229; 10 May 2011, file pages 230-247; addendum of forensic report for crime scene sciences, ballistics and chemistry dated 10 October 2011, file pages 975-978, testimony of forensic expert Colonel Lieutenant D. Ryšavý M.Sc. during the trial on 15 September 2011, file pages 893 et seq., testimony of forensic expert B. Plank M.Sc. during the trial on 8 November 2011, file page 1055, all these clearly show that during the trial the court found all relevant facts necessary for both the lower courts to come to a conclusion in this matter, as those are described in their rulings, and just as well all the objections raised by the defense attorney were repeatedly answered (and those objections are the same ones that the defendant uses in his request for extraordinary judicial review). The preliminary ballistics testing secured a match of the casing found at the crime scene and the casing obtained during test-firing the secured firearm. This result was then confirmed by all the above mentioned reports and by testimonies of these forensic experts. The courts then, based on presented evidence, came to the right conclusion i.e. that the casing found at the crime scene was for sure discharged from a secured firearm Heckler & Koch model P2000, S/N 116-033133, 9mm Luger (hereinafter referred to as the HK), which is the one secured from the apartment of this defendant. In this case the casing was matched by individual identification between the gun and the casing and it was ruled out that the casing might have come from any other gun. The forensic reports show that the casing could not have come from any other gun, as the defendant attempted to object repeatedly. It was also duly answered that the individual markings on the casing are not affected by the forensic experts using different ammunition from that which was used to murder the victim. Regarding the bullet found at the crime scene lodged in the window frame of the tram, this bullet was quite deformed and it was impossible to run an individual match with the firearm. But, it was stated nonetheless that this bullet might have belonged to that casing. By class, the bullet was identified as a bullet discharged from HK secured in the apartment of this defendant. Then, based on these findings, the courts came to the conclusion that the gun secured in the apartment of the defendant was the gun that was used to shoot the victim. The Supreme Court again points to the very detailed and diligent rationale of the court of first instance, and makes hereby a reference thereto for further details. Regarding the motion for further evidence by ordering a forensic report in crime scene sciences – ballistics that was to be worked out by the very experts from Heckler & Koch Arms Factory, the lower courts quite clearly explained in their rationales why they deemed this report not only redundant but also unrealistic, namely in a situation where the forensic team of the Crime Scene Investigation Institute of the City of Prague drafted forensic reports for them and presented their testimonies, which provided a reasonable base for the ruling.

43.

The defendant further objects in his request for extraordinary judicial review that the ordering of the search of the home of the defendant was in contradiction to the principle of adequacy, for the defendant's wife wanted to freely allow the police team to enter the premises, and thus it was surely not adequate to take such an extreme measure as a search warrant. The defendant believes this is evidence that was obtained in discordance with the fundamental principles of criminal process.

44.

If we put aside the fact that this objection falls under factual objections and that the Supreme Court principally cannot deal with those given the legal definition of allowed grounds for filing a request for extraordinary judicial review as per § 265b sub. 1 sub. g) of the Code of Criminal Prosecution, it is clear that this objection of this defendant regarding the alleged illegality of the evidence gathered

during the search of his home was duly dealt with by both the lower courts and that the courts duly resolved this matter. As per the statement of the public prosecutor of the Attorney General's Office, the purpose of search of premises as per § 82 of the Code of Criminal Prosecution is to secure a thing or a person important for criminal prosecution. A requisite for any search of premises is a reasonable suspicion that an apartment or any other premises used for living or premises thereto pertaining contains such a thing or person. As per § 83 sub.1 of the Code of Criminal Prosecution a search of premises is only admissible upon a written warrant of a judge containing grounds for that. Service of process thereof is necessary during the search of premises, the warrant must notify users of said premises that they must suffer the search of premises, that authorities have the right to subdue resistance or break obstacles and that a user of such a thing must submit any such found thing important for criminal prosecution or they might be removed or taken by force. The contents of the criminal file show that on 4 March 2011 a public prosecutor filed a request with the District Court for Prague, Tenth District, that the court issue a search warrant (see page 327 of the criminal file). On 4 March 2011 the District Court for Prague, Tenth District, issued said search warrant (court file number 1 Nt 508/2011, see criminal file page number 329-331), and that warrant had all the formalities including a proper notification of rights and remedies. The Supreme Court will no longer deal with what is clearly a typo in the rationale of the resolution of the appellate court. According to the official record on conducting a search of premises (criminal file, page number 334), the search was conducted on 8 March 2011 in accordance with the law and in presence of a user of that apartment, namely the defendant's wife. She was duly served the search warrant, she was notified of her rights, she expressly stated she requests no defense lawyer present in there, she also signed the record on conducting the search. The search was conducted in presence of an impartial third party (P. Marták). There is no doubt that the search was conducted in a lawful way and in a constitutionally conform way. The Supreme Court stresses that during preparing and conducting a search of premises the criminal prosecution authorities must comply with all provisions of laws that affect this activity and surely cannot rely on good will of persons obliged to suffer the search.

45. The Supreme Court finds that the above said objections of the defendant are, in their sum, of insufficient capacity to represent reasonable support for a relevant conclusion depending in finding a flaw in the process of lower courts (or extreme discrepancy) while organizing, presenting and hearing evidence and during the subsequent evaluation of that evidence. The factual findings have logical and material support in that evidence, and thus there is no way we can come to the conclusion that on contrary they are in extreme discordance with that evidence. Hence, it is necessary to conclude that the factual findings in their contents and scope made it possible for the lower courts to reliably come to legal conclusions, these legal conclusions are reasonable and satisfactory and do not represent any excessive diversion from primary interpretation principles, including the objected non-compliance with fair trial rights, though that is guaranteed by Article 36 sub. 1 and 2 of the Bill of Rights. Definition of the felony as per the criminal charges pressed against the defendant, i.e. murder under § 140 sub. 2 of the Penal Code, is correct.

46. Wherever in his request for extraordinary judicial review the defendant attacks the rationale of the lower court rulings and the arguments they used, the Supreme Court hereby stresses that as per § 265a sub. 4 of the Code of Criminal Prosecution the process before the Supreme Court on ruling on a request for extraordinary judicial review does not allow objections against grounds for judgements.

47. It is true that the defendant formally applies the grounds for filing a request for extraordinary judicial review as per 265b sub. 1 sub. g) of the Code of Criminal Prosecution, but did so via his objections that in their contents do not meet these grounds and they cannot fall under other reasons as per § 265i sub. 1 sub. b) of the Code of Criminal Prosecution.

48. In this procedure the Supreme Court did not find the flaw claimed by the defendant meeting terms of grounds for filing a request for extraordinary judicial review as per 265b sub. 1 sub. c) of the Code of

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Criminal Prosecution and thus the defendant's objections in this respect were clearly groundless. The Supreme Court hence hereby refuses to accept the request for extraordinary judicial review filed by one Gilbert Ferguson McCrae as per § 265i sub. 1 sub. b) of the Code of Criminal Prosecution, on grounds of the filing being clearly groundless.

III.

49. The Supreme Court hereby finds that Sylvie Salterová applies grounds for filing request for extraordinary judicial review as per 265b sub. 1 sub. g) and j) of the Code of Criminal Prosecution, but she did not give details of which specific objections are connected to which specific grounds for filing request for extraordinary judicial review. The contents of the request for extraordinary judicial review clearly shows that she aims most of her objections against the verdict C, which is the verdict that imposes a protective measure against this defendant and in accordance with § 101 sub. 1 sub. c) of the Penal Code in connection with § 230 sub. 1 of the Penal Code the following items are confiscated: autoloading gun Heckler & Koch model P2000, 9mm series, Luger, S/N 1166-033133, including correspondent ammunition magazine, repeating rifle Winchester 94AE, S/N 5265195, 30-30 Winchester, autoloading trap shotgun Remington model 11-87 Premier, S/N PC040203, 12-gauge, 76mm chamber, autoloading gun Colt Delta Elite, model Gold Cup National Match, S/N DG03108, 10mm Auto, including correspondent ammunition magazine.

50. The Supreme Court finds that the defendant raised these very same objections during her criminal defense at court of first instance and they were also part of her appeal. Both lower courts dealt with those objections in a lot of detail and did resolve them duly.

51. Confiscation or imposition of an item or another valuable or property as per § 101 of the Penal Code is one of a set of protective measures (§ 98 sub. 1 of the Penal Code). Grounds for filing a request for extraordinary judicial review as per 265b sub. 1 sub. j) of the Code of Criminal Prosecution depends in failure to meet law-imposed terms for imposing protective measures. Confiscation of items represents consequences of a committing of a felony or of an action criminally punishable, and guarantees safety to this society by taking away from perpetrators and also other persons items that are generally dangerous (firearms, ammunition, explosives, poisons...) or other items serving during committing of felonies or utilizing profits from illegal activities, the aim of which is removing means serving to support or aid or abet criminal activity. Confiscation of any item or another valuable or property is a protective measure of this nature: upon a verdict of a court the ownership rights of a perpetrator or another person is transferred to the Republic with regards to item(s) or other valuable(s) or property as long as these are in certain relation, even if indirect, to the committed felony. In accordance with § 101 sub. 1 sub. c) of the Penal Code, if the punishment of confiscation of an item or another valuable or property was not imposed as per § 70 sub. 1, the court may rule that such an item or another valuable or property is impounded as long as such represents a danger to safety of people or property or this society, or if there is a danger that it may yet serve to committing of a crime, whereas the only relevance depends in the relation of such an item or another valuable or property (whose confiscation or impounding is being ruled upon) to the crime in question. The term "represents a danger to safety of people or property or this society" means the interests of individuals and this society in protection of these values, as it is necessary to protect them by confiscating items that are dangerous for people or property or this society.

52. The defendant believes that in her case there was a wrong analysis of what in fact is the danger to the society. She believes that her failure to safekeep the guns did not result in any endangering of safety. But, the Supreme Court disagrees with the objections of this defendant and deems them clearly groundless.

53. The contents of the criminal file and the rationales of the verdicts of both lower courts it is clear that the defendant is a holder of a carry permit and is to know her duties ordered by the law, namely Act

119/2002, the Firearms and Ammunition Act, as amended. Her careless and irresponsible approach namely to her obligation to safekeep the firearms so that they cannot be abused by an unauthorized person made it possible for G.F. McCrae, an unauthorized person, to freely access these firearms in her possession. It is doubtless that as to those firearms in possession of Salterová G.F. McCrae was an unauthorized person and it is absolutely irrelevant whether or not he was the husband of the owner. The factual findings of the courts clearly show how significant the failure of Salterová to comply with her duties was, as McCrae abused this unlimited and unchecked free access to those firearms and abused the gun HK to commit murder. The Supreme Court states that the court of first instance came to a correct conclusion that allowing any firearms in possession of this defendant represents danger to safety of people or property or this society, namely danger to safety of people, and an unbearable risk, and so it is necessary to interfere with her ownership and apply the procedure under § 101 sub. 1 sub. c) of the Penal Code and thus to confiscate all her firearms as described in verdict C of the court of first instance upon imposing a protective measure of confiscation or impounding of an item or another valuable or property, although she did not commit any crime. The irresponsible behaviour of Salterová's in connection with the nature and seriousness of the committed crime and in connection with the personality of G.F. McCrae, his status and possibility of his correction, there is no doubt that her possession of those firearms represented danger to safety of people, property and society. The Supreme Court fully accepts the conclusion of the court of first instance and of the appellate court, as described in the rationales of their rulings, to which the Supreme Court now makes a reference, and the Supreme Court deems the objections of this defendant to be immaterial.

54.



Regarding the grounds for filing a request for extraordinary judicial review under § 265b sub. 1 sub. g) of the Code of Criminal Prosecution, these grounds are present, as described above, if the ruling depends in a wrong legal analysis of the prosecuted actions or any other wrong material analysis or adjudication. The Supreme Court repeats that in connection with these grounds for filing a request for extraordinary judicial review, as far as the found actions are concerned the request for extraordinary judicial review may only object material flaws. It is impossible to object incorrect factual findings, it is impossible to object or request review of or re-evaluation of correctness and completeness of facts as per § 2 sub. 5 of the Code of Criminal Prosecution or check completeness of presented evidence and correctness of evaluation of evidence as per § 2 sub. 6 of the Code of Criminal Prosecution because those court activities belong under application of procedural provisions of the law, not material provisions.

55.



However, the contents of the request for extraordinary judicial review shows that these grounds for the filing could not be and was not met with the objections of this defendant regarding the violation of her right to fair trial, or objections that authorities dealt with her and her husband in contradiction with the Constitution and the Bill of Rights and rights thereby guaranteed. The defendant objects that failure to hear the police officers and impartial witnesses resulted in a whole chain of violations of her rights beginning with the violent manner of arrest, continuing with barring her from seeing a defense lawyer, and ending with illegal conduct of house search. The rationales of the judgements of the lower courts show that they resolved these objections when dealing with the criminal defense of this defendant (and so did they with respect to objections of G.F. McCrae) during the trial and during the appeal, where these objections of these defendants were again brought up, and that the courts dealt with these objections and resolved them duly and diligently. These courts described valid reasons for denying motions for further evidence to be presented, namely interrogations of the police officers, other impartial witnesses etc., for the courts deemed that redundant (see page 23 et seq. of the judgement of the court of first instance, page 5 of the ruling of the appellate court). Regarding the objection as to the alleged illegal manner of conducting a search of the premises, the Supreme Court now makes a reference to the above provided court interpretation regarding the very same objection of G.F. McCrae, while we repeat ourselves stating that no flaws in the procedures of criminal prosecution authorities were found in the criminal matter of both these defendants, and that the

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criminal file at hand does not contain any complaints of either defendant against the approach of the police during any individual action.

The Supreme Court finds that the defendant formally applied the grounds for filing a request for extraordinary judicial review as per § 265b sub. 1 sub. g) of the Code of Criminal Prosecution, but she did so via objections that cannot meet these grounds because of their contents and these objections cannot fall under any other grounds specified under § 265b of the Code of Criminal Prosecution. The objections applied under the grounds for filing a request for extraordinary judicial review as per § 265b sub. 1 sub. j) of the Code of Criminal Prosecution are clearly groundless.

The Supreme Court of the Czech Republic hence followed § 265r sub. 1 sub. a) of the Code of Criminal Prosecution and passed this resolution at a non-public court hearing.

Remedies: there is no remedy allowed against this resolution.

Brno, 7. November 2012

Chairman of the tribunal:
Dr. Michal Mikláš

True copy by court clerk:
Marcela Oslzlová
[illegible signature]

[great seal of the Supreme Court]

Tlumočnická doložka

Jako tlumočnický jazyka anglického jmenovaný rozhodnutím Krajského soudu v Praze ze dne: 11. prosince 2008, č.j.: Spr4101/2008 stvrzuji, že překlad souhlasí doslovně s textem připojené listiny.

V překladu jsem provedl tyto opravy: žádné

Tlumočnický úkon je zapsán v tlumočnickém deníku pod č.: 178/2012

Odměna účtována částkou: samostatně. Náhrada hotových výloh účtována podle dokladů č.: samostatně.

V Praze, dne: 30.12.2012

Podpis a razítko:

Sworn Translation

As an interpreter of English language appointed and sworn by the Regional Court in Prague on 11 December 2008, court file No. Spr4101/2008, I hereby certify that this true translation is in full conformity with the text of the attached document.

I have made the following corrections in the translation: none

Translation recorded in the record of translations, file No. 178/2012

Fee billed: separately

Out of pocket expenses billed: separately

Prague, on: 30 December 2012

Signature, great seal of my office:

