Court of Appeal No. 44096
Vancouver Registry

IN THE COURT OF APPEAL FOR BRITISH COLUMBIA

ON APPEAL FROM: a conviction entered by way of a guilty plea in the Supreme Court of British Columbia sitting in Prince Rupert before Justice Davies on November 1, 1983

Between:

REGINA

Respondent

And:

PHILLIP JAMES TALLIO

Appellant

Appellant's Revised Factum

Note: Publication and sealing orders have been made in relation to material referenced in this factum

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Overview – (Revised)

This appeal concerns an application to withdraw a plea to 2nd degree murder in 1983.

Traditionally, the law relating to applications to withdraw guilty pleas focussed on whether the plea was voluntary, unequivocal and informed (*Adgey – SCC 1975* and *Wong – SCC 2018*), and if those criteria were met, then the plea is deemed valid. Subsequent to A*dgey,* the analysis has evolved to address guilty pleas where miscariages of justice are alleged. In those cases, the guilty plea itself may meet the test for a valid guilty plea, but courts have found nonetheless that the guilty pleas should be struck, in the interests of justice. The basis for this approach was addressed in the cases of *Kumar – ONCA 2011*, *Taillefer and Duguay – SCC 2003*, and *Hanemayer – ONCA 2008*.

> [19] Even though the appellant's plea appears to meet all the traditional tests for a valid guilty plea, as pointed out by Doherty J.A. in *T. (R.)* at p. 519*,* this court retains a discretion, to be exercised in the interests of justice, to receive fresh evidence to explain the circumstances that led to the plea and that demonstrate a miscarriage of justice occurred.
>
> Justice Rosenberg in *Hanemaayer*

With respect to the issues advanced in this appeal, the appellant submits that both the miscarriage analysis (*Kumar/Taillefer/Hanemaayer*) and the traditional analysis (*Adgey*/*Wong*) apply. The *Kumar/Taillefer* miscarriage analysis applies to all of the grounds of appeal, but for the uninformed plea ground, to which the *Adgey/Wong* analysis applies.

There were only two 'pieces' of evidence that could have reasonably been relied upon to convict the appellant at trial. One of those pieces was found inadmissible at trial – the appellant's statement allegedly made to Officer Mydlak. The other piece was the anticipated evidence of Dr. Pos, relating to statements that he said the appellant made to him while remanded for a fitness assessment at the Forensic Psychiatric Institute (FPI).

The appellant advances two purely legal arguments: 1. That the provincial court judge lacked jurisdiction to remand the appellant to FPI in 1983 at the time, and thus any evidence derived from his compelled placement could not be used against him, and; 2. That the anticipated evidence of what Dr. Pos said the appellant stated, arising from the appellant's compelled placement at FPI, was inadmissible in any event.

The appellant argues that his trial counsel was ineffective because he failed to properly assess the admissibility of the Pos evidence. Thus, the appellant is attacking ineffectiveness of counsel on the basis that his plea was uninformed. This discrete argument engages an analysis of the appellant's cognitive state.

The appellant also submits that fresh evidence of a DNA exclusion meets the *Palmer* criteria (as modified for withdrawl of plea cases), and that it could reasonably affected the outcome – the decision to plead guilty.

The appellant also presents fresh evidence pointing to the fact that the investigation was inadequate, and that he had limited opportunity to commit the crime: a) persons who witnessed the appellant walking up and running down the street during a critical time window – and who were never interviewed by police; b) there were other persons who may have committed the crime and who may have covered up their involvement.

The issues are as follows:

Relating to the issue of Factual Innocence

a) There is DNA evidence that excludes the appellant from being the perpetrator.

b) There is evidence that the initial investigation was glaringly inadequate and that others perpetrated the crime and covered it up.

Relating to Miscarriage

c) The 30-day remand for a fitness assessment was unlawful.

d) Anticipated evidence that Dr. Pos wrote about in a letter, concerning statements that he attributed to the appellant, would have been inadmissible at trial.

e) The appellant's trial lawyer was ineffective becuase he did not properly evaluate the anticipated evidence from Dr. Pos.

PART I: FACTS

The Appellant's Background

1) Phillip Tallio was born on December 10, 1965, in Bella Bella, British Columbia. He spent his early years residing between Bella Bella, where his mother Delores Tallio grew up as a member of the Heiltsuk Nation, and Bella Coola, where his father Robert Tallio grew up as a member of the Nuxalk Nation.[1]

2) The Indigenous Heiltsuk and Nuxalk Nations' populations were decimated by smallpox and measles epidemics in the mid to late 19th century,[2] to only 200[3] and 300[4] people respectively. Bella Bella and Bella Coola remain tiny, isolated communities on the Central Coast of B.C. Bella Bella is accessible only by boat and floatplane.[5] Williams Lake, the closet city to Bella Coola, is 453 kilometres away.[6] These facts are germane to the DNA issues in this appeal.

3) Phillip was first sexually assaulted by his Uncle Cyril Tallio Sr. when he was about four years old. Phillip's family and Cyril all lived at his paternal grandparents' house during this period. The sexual abuse continued throughout the years that Phillip lived on the Nuxalk Nation reserve.[7] Cyril sexually assaulted Phillip multiple times a week.[8] Cyril was often intoxicated.[9] Cyril also sexually assaulted Phillip's older brother,

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[1] First Aff. Phillip Tallio, paras. 5-8. (Tab 42a)
[2] Aff. Dr. Bruce Granville Miller, paras. 5-6 (Rev. Aff. Tab 11); Joshua Ostroff, "How a smallpox epidemic forged modern British Columbia," Macleans.ca, (Aug. 1, 2017), https://www.macleans.ca/news/canada/how-a-smallpox-epidemic-forged-modern-british-columbia/
[3] Huyat.ca ("Timeline") http://www.hauyat.ca/timeline.html (2019).
[4] "About Us" https://nuxalknation.ca/about/. The Aboriginal on-reserve population as of 2016 is 780 individuals, Statistics Canada. 2018. *Nuxalk Nation [First Nation/Indian band or Tribal Council area], British Columbia* (table). *Aboriginal Population Profile*. http://www12.statcan.gc.ca/census-recensement/2016/dp-pd/abpopprof/index.cfm?Lang=E
[5] Qqs Projects Society, "How to Get to Bella Bella" (2019) <https://www.qqsprojects.org/contact-us/directions/>
[6] Distance Canada (2019) <http://www.distancecanada.com/bella-coola_britishcolumbia_and_williams-lake_britishcolumbia/>
[7] First Aff. Phillip Tallio, paras. 11-13, 18, 50 (Tab 42a).
[8] First Aff. Phillip Tallio, para. 12 (Tab 42a).
[9] Aff. Gordon Tallio, para. 9 (Rev. Aff. Tab 15).

Gordon. In the late 1990s, Cyril was convicted of sexually assaulting two women when they were children. He was incarcerated.[10]

4) In 1972, when he was seven years old, Phillip's parents separated and his mother Delores took him and his brothers, Gordon and Thomas Tallio, to live with her and her parents on the Heiltsuk reserve in Bella Bella. Delores struggled with addiction and emotionally and physically abused Phillip [11]. On one occasion she threw Phillip down a flight of stairs causing him to hit his head on a wall.[12] On December 31, 1974, Delores died from an overdose of alcohol and drugs. Phillip was present. He was nine years old.[13]

5) Phillip and his brothers were sent back to Bella Coola to live with their paternal grandparents in the same house in which Cyril resided.[14] Their father Robert was a fisherman and was often away for work.[15] The sexual abuse by Cyril recommenced. Phillip did not tell anyone about it until the late 1990s.[16] He kept quiet as was ingrained in him by his family and his culture.

6) The appellant submits, as fresh evidence, the affidavit of UBC Anthropololgy Professor Dr. Bruce Granville Miller. Dr. Miller is presented as an expert in the ethnography and ethnohistory of the Coast Salish peoples of Washington State and British Columbia, and particularly in respect of the cultural characteristics, dynamics and practices of the Nuxalk Nation of the Central Coast of BC generally, and in the context of the Nuxalk people's involvement and interaction with non-indigenous peoples, and systemic issues arising therefrom.

7) Dr. Miller states that the Nuxalk culture, like other Coast Salish cultures, is highly secretive. Senior members of families, or "corporate groups" control the flow of information, from spiritual and genealogical information to psychological and physical

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[10] Aff. Lorna George, paras. 5, 11-12 (Rev. Aff. Tab 6).
[11] First Aff. Phillip Tallio, paras. 14-16 (Tab 42a).
[12] Fourth Aff. Phillip Tallio, para 2 (Tab 42d).
[13] First Aff. Phillip Tallio, para. 17 (Tab 42a).
[14] First Aff. Phillip Tallio paras. 11, 18 (Tab 42a); Aff. Gordon Tallio, paras. 7-9 (Rev. Aff. Tab 15).
[15] Aff. Darlene Tallio para. 6 (Tab 37).
[16] First Aff. Phillip Tallio, paras. 13, 19, 148-152 (Tab 42a).

information, even of information regarding fishing and hunting, et cetera.[17] Youngest members of families are taught restraint early on. Family information is held so closely that it may not be disclosed to outsiders, "even in cases when death or disability might result if information is not provided."[18] Dr. Miller explains that junior members in particular do not like to speak for the family.[19]

8) Dr. Miller explains (para 27) that there was a "disinclination of families to report violent crime against children committed by one of their members" and that family solidarity was more significant than protecting children. The repercussions for violating these cultural norms were significant. During Phillip's youth, when Nuxalk individuals dared to disclose sexual abuse they suffered or knew of, they were often admonished or ignored; the abuser protected.[20]

9) Mr. Tallio did not speak of the sexual, physical and emotional abuse he suffered growing up. "Silence is almost the same as respect," Phillip's Aunt Darlene Tallio explains. And Phillip was in particular "not a very verbal child."[21] Phillip had trouble at school, getting into fights with white children and being rambunctious. In 1976, he was placed into foster care through the Ministry of Human Resources.

10) During the next seven years, Mr. Tallio was shuffled from foster home to foster home, away from Bella Coola. His Aunt Darlene states that the Ministry never informed the family as to Phillip's location or well-being during those years. His relatives only received updates when Phillip himself was able to telephone or write them. The Tallio family and the Nuxalk community felt significant intimidation from the Ministry during that time, as well as the effects of prevalent racial tension between the Nuxalk and white community in Bella Coola. There was (and technically still is) an order in place prohibiting Nuxalk people from going to the "white side" of Bella Coola after 21:00.[22]

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[17] Aff. Dr. Bruce Granville Miller, paras. 15-17, 19-28 (Rev. Aff. Tab 11).
[18] Aff. Dr. Bruce Granville Miller, para. 17 (Rev. Aff. Tab 11).
[19] Aff. Dr. Bruce Granville Miller, para. 20 (Rev. Aff. Tab 11).
[20] See Aff. Anna Edgar (Rev. Aff. Tab 4); Aff. Lorna George, para. 10-11 (Rev. Aff. Tab 6); Aff. June Mack, paras. 12-13 (Rev. Aff. Tab 8); Aff. Darlene Tallio, para. 20 (Tab 37).
[21] Aff. Darlene Tallio, para. 7 (Tab 37).
[22] Aff. Darlene Tallio, para. 8 (Tab 37).

Ward of the State

11) Phillip suffered multiple head injuries during his time in foster care.[23] He was beaten with hockey sticks and with a lead pipe. In January, 1979, he was moved to a new foster home in Williams Lake. His father died in March 1979, making Phillip an orphan at the age of 13.[24]

12) Phillip ran away from his foster home. He stole cars, rolled a pickup truck (an incident which landed him in the hospital), and committed break and enters with other youths. He said he was trying to get himself kicked out of the overwhelmingly white communities he was placed in, in hopes that he would sent back to Bella Coola.

13) One of Phillip's social workers at the time, Colleen Burns (then Colleen Noel), administered his Ministry file for at least three years, recalls visiting him in jail cells for youth court stints in Nanaimo. To Ms. Burns, he seemed "glazed-over" and she thought he did not have a high intellectual capacity. "Phillip appeared to have some kind of cognitive difficulties and he struck me as having difficulty following conversations," (para. 7 of Affidavit). "He was slow to respond to my questions and his language was very simple. He was very quiet and soft-spoken. He did not show any aggression with me. He took a long time to answer, saying, "ummm…uh.." often. Speaking to him was like pulling teeth."[25]

14) During a suicide attempt in October 1980, Phillip shot a gun through a bathroom door and unintentionally wounded his foster grandmother in the buttocks. He was institutionalized at Willingdon Youth Detention Centre for nine months on probation. After two additional suicide attempts (one of which involved jumping off a 50-foot wharf), he was sentenced for his previous break and enters and was sent back to Willingdon, where he met youth probation officer Marie Spetch.[26]

15) Mrs. Spetch, 95, has remained in contact with Phillip since their Willingdon days, acting as his adopted mother. To her, Phillip was a very sensitive child who did not act

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[23] Fourth Aff. Phillip Tallio, paras. 2-5, 7-8, 10 (Tab 42d).
[24] First Aff. Phillip Tallio, para. 27 (Tab 42a).
[25] Aff. Colleen Burns, para. 7 (Rev. Aff. Tab 3).
[26] First Aff. Phillip Tallio, para. 45 (Tab 42a).

aggressively toward anyone in Willingdon. Phillip always seemed "somewhat slow, mentally" and she often had to explain things to him repeatedly. [27]

16) As Phillip's time in Willingdon was about to come to an end, the Ministry planned for him to remain in the Lower Mainland. However, when his Uncle Cyril and Aunt Nina offered to act as foster parents for him, the Ministry agreed that the appellant would live with them on the Nuxalk reserve. Phillip moved in with Cyril and Nina and their children, aged six, eight and 10, on February 4, 1983.[28]

Return to Bella Coola

17) On Phillip's return to Bella Coola, his social worker, Paul Wilson, recalls that he was very popular. He always had other teenagers, including his girlfriend Theresa Hood around him. "At that particular time in his life, his focus seemed to be basketball, gaining the attention of teenaged girls, looking nice and most of all, being popular."[29]

18) In his social work entry dated February 24, 1983, Mr. Wilson wrote, "Phillip has found a girlfriend and was very typical for his age showing a growing ego and a desire to impress her." In another February 1983 entry he wrote that "Phillip's attitude was markedly changed." His March 1983 entries record that the reserve was supportive of Phillip's presence; that Phillip "still has the same girlfriend and seems to have a very positive outlook"; and that he "met with Phillip who seemed very bright and cheerful…Phillip expressed a desire to leave his past behind and begin a new life."[30]

19) Phillip continued to struggle with cognitive limitations. Mr. Wilson noted "school was not [Phillip's] forte",[31] and that Mr. Tallio was never a "talker". The teenager would usually bring someone else such as his girlfriend or a relative with him to meetings with Mr. Wilson so that they could speak for him. Phillip did not "grasp concepts that many typical teenagers did" and he did not understand complex instructions.[32] At the appellant's preliminary hearing, Mr. Wilson testified that even the process of purchasing

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[27] Aff. Marie Spetch, paras. 3, 18 (Tab 34).
[28] First Aff. Phillip Tallio, paras. 46-48 (Tab 42a).
[29] Second Aff. Paul Wilson, para.11 (Rev. Aff. Tab 20).
[30] Second Aff. Paul Wilson, Exhbit "D" (Rev. Aff. Tab 20).
[31] Second Aff. Paul Wilson, para. 11 (Rev. Aff. Tab 20).
[32] Second Aff. Paul Wilson, para. 13 (Rev. Aff. Tab 20).

running shoes was too complicated for Phillip to follow. Instructions needed to be broken down for Phillip very clearly.[33]

20) On April 22, 1983, Phillip's girlfriend, Theresa Hood, told him she was pregnant with his child.[34] Phillip was ecstatic.[35] His plan was to marry Ms. Hood, get a job and work to support his new family.[36]

April 22, 1983 – Before the Murder

21) On April 22, 1983 after school, Phillip went roller-skating with Theresa. They each went to their own homes to eat dinner. Afterwards, Phillip attended a fire drill, as he was a volunteer firefighter.[37]

22) At approximately 2030 hours Phillip and Ms. Hood went to the movie, "E.T." which was playing at Moose Hall. The playing of this movie was an event in the small community. They were with a few friends including Gwen Edgar who recalls they were laughing and joking around.[38] Another community member, Anna Edgar, saw the couple in line to buy tickets. "They looked happy. They were holding hands and hugging."[39]

23) After the movie, Phillip and Ms. Hood went to Cyril and Nina Tallio's house, where they babysat Cyril and Nina's children as well as the children of Nina's sister, Celestine Vickers (an 18-month-old girl and a three-year-old boy).[40] Ms. Vickers and her children were staying at Cyril and Nina's house while she completed a practicum for her university studies.[41]

24) At approximately 2230 hours Ms. Vickers, Nina and Cyril were at the Cedar Inn, a bar located a few blocks away from Nina and Cyril's residence.[42] Nina and Cyril

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[33] Second Aff. Paul Wilson, see especially paras. 12-13, 24, 27 (Rev. Aff. Tab 20).
[34] Aff. Gwen Edgar, para. 6 (Rev. Aff. Tab 5); Aff. Gordon Tallio, para. 14 (Rev. Aff. Tab 15); First Aff. Phillip Tallio, para. 65 (Tab 42a); Aff. Celestine Vickers, para. 16 (Tab 45).
[35] Aff. Gwen Edgar, para. 6 (Rev. Aff. Tab 5).
[36] First Aff. Phillip Tallio, para. 65 (Tab 42a); Aff. Celestine Vickers, para. 8 (Tab 45).
[37] First Aff. Phillip Tallio, para. 52 (Tab 42a).
[38] Aff. Gwen Edgar, para. 9 (Rev. Aff. Tab 5).
[39] Aff. Anna Edgar, para. 6 (Rev. Aff. Tab 4).
[40] First Aff. Phillip Tallio, para. 55 (Tab 42a).
[41] Aff. Celestine Vickers, paras. 3-4 (Tab 45).
[42] Aff. Celestine Vickers, para. 10 (Tab 45).

consumed alcohol.[43] Ms. Vickers was sober.[44]

25) At approximately 2300, Lotta Bolton and Blair Mack (the victim's parents) joined Cyril, Nina and Ms. Vickers. Ms. Bolton (age 20)[45] and Mr. Mack, (age 21)[46] lived at Mr. Mack's parents, Sam and Gert Mack's, residence.[47]

April 23, 1983—Before the Murder

26) Between 0100 and 0130, Nina, Cyril and Ms. Vickers went to Nina and Cyril's residence.[48] The house, depicted in Exhibit "B" attached to Robert Tallio's affidavit, was located at the bottom of Tswan-Koos Street, which intersected with Cliff Street. Cliff Street runs parallel to Mackenzie Street and Ong-Ten-Kai Street. A map of the Nuxalk reserve, depicting the layout of the "downtown" reserve as it was in 1983, is attached to Robert Tallio's affidavit as Exhibit "A".[49]

27) Phillip and Ms. Hood were still at Nina and Cyril's house baby-sitting the children. When the adults arrived home between 0100 and 0130, Phillip walked Ms. Hood to her house. They had sex in Ms. Hood's room and Phillip returned to Cyril and Nina's house immediately after.[50]

28) There were a number of other drinking parties that night on the reserve, and guests moved from one house to another.[51] Drinking parties occurred frequently on the reserve in the 1980s,[52] but this was a particularly unusual night for Bella Coola because in addition to a movie screening at the community hall, a band was playing at the Cedar Inn.[53]

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[43] PH Celestine Vickers, AB, pp. 181 (L. 7-47), 182 (L. 1-8), PH Nina Tallio, AB, pp. 165 (L. 3-7), 166 (L. 14-22), PH Cyril Tallio, AB, pp. 150 (L. 28-30, 49-43), 161 (L. 9-13).
[44]Aff. Celestine Vickers, para. 11 (Tab 45).
[45] Joint Witness Statement of Blair Mack and Lotta Bolton (Aff. Pembroke, Tab 28).
[46] April 23, 1983 8 a.m-8:42 a.m. Statement of Blair Mack (Aff. Pembroke, Tab 20).
[47] PH Blair Mack, AB, p. 114 (L. 46-47), p. 115 (L. 1-2).
[48] Aff. Celestine Vickers, para. 12 (Tab 45).
[49] Aff. Robert Tallio, Exhibits A and B, paras. 9-10 (Tab 43).
[50] Aff. Theresa Hood, paras. 6-7 (Rev. Aff. Tab 7); First Aff. Phillip Tallio, paras. 55, 61 (Tab 42a).
[51] See for instance, Aff. Anna Edgar, paras. 4, 7-14 (Rev. Aff. Tab 4).
[52] Aff. Roseanne Andy, para. 6 (Rev. Aff. Tab 2).
[53] Aff. Anna Edgar, para. 4 (Rev. Aff. Tab 4).

29) Over the course of the night, a number of other guests arrived at Nina and Cyril's house party, including Lotta Bolton and Blair Mack[54] who had left their daughter, Delavina Mack, in Mr. Mack's parents' care just before 2000 the evening of April 22, 1983. His parents, Sam and Gert Mack, babysat Delavina from that point until the early morning of April 23, 1983.[55]

30) Sam and Gert Mack's residence was located at 17 Ong-Ten-Kai street, at the corner of Tswan-Koos street.[56] It was one of the "party houses" on the reserve.[57] Sam is now deceased but Gert still resides in this house.[58] A map (Exhibit "A") and a series of photos attached to Godfrey and Louisa Tallio's son Robert Tallio's affidavit depicts the layout of these houses.[59] Cyril and Nina's house is labelled "1" on Exhibit "A"; Godfrey and Louisa's is "2" and the Mack's house is labelled "3".

31) Two houses – Godfrey and Louisa Tallio's and Martha Edgar's stood in between Cyril and Nina Tallio's residence and Sam and Gert Mack's house on the same side of Tswan-Koos street.[60]

32) The white house depicted in Exhibit "B" attached to Robert Tallio's affidavit belonged to Cyril and Nina in 1983. A photo of the Mack's pastel green house as taken through the window of the remnants of Godfrey and Louisa's house (which suffered a fire several years ago) is attached to Robert Tallio's affidavit as Exhibit "D". The hedge on the side of Godfrey and Louisa's house was not present in 1983; it was grown by their son Robert Tallio about 20 years ago.[61] There were (and still are) two houses per block, each with large yards.

33) The Mack's residence was less than a two-and-a-half-minute walk away from Cyril and Nina's house.[62] To run at less than full speed from the Mack's house to Cyril

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[54] First Aff. Phillip Tallio, para. 62 (Tab 42a); Aff. Celestine Vickers, para. 14 (Tab 45).
[55] PH Gert Mack, AB, p. 95 (L. 1-9).
[56] PH Galenzoski, AB, p. 45 (L. 39-44).
[57] Aff. June Mack, para. 10. (Rev. Aff. Tab 8).
[58] Aff. Robert Tallio, para. 14 (Tab 43).
[59] See also Second Aff. Paul Wilson Exhibits "B" and "C" (Rev. Aff. Tab 20).
[60] Aff. Robert Tallio, Exhibit "A" (Tab 43).
[61] Aff. Robert Tallio, para. 12 (Tab 43).
[62] Aff. Thomas Tallio, para. 14 (Tab 44).

and Nina's house takes one minute and 9.3 seconds.[63]

34) During the early morning hours, Ms. Vickers heard Lotta Bolton ask Nina Tallio if she would go with her to check on Delavina. Nina said that she was very tired, so they did not go check on Delavina.[64]

35) Phillip Tallio visited with Ms. Vickers in the kitchen during the party. Neither Ms. Vickers nor Phillip was intoxicated. Phillip told Ms. Vickers the news of Ms. Hood's pregnancy and expressed enthusiasm about the work program at school, which he hoped would help him obtain a job.[65]

36) While Ms. Vickers and Phillip were talking, Lotta Bolton asked her cousin[66] Phillip to go check on Delavina at Sam and Gert Mack's house.[67] In his statement to police taken from 0800 to 0842 on April 23, 1983, Blair Mack also recalls that he and Lotta Bolton asked Phillip to go check on their daughter.[68] Ms. Bolton later denied that she had asked Phillip to go check on Delavina at the preliminary hearing.

37) Lotta Bolton had told Phillip she was afraid that Sam and Gert Mack were drinking alcohol while they babysat Delavina.[69] She wanted Gwen Edgar to babysit her daughter instead of her in-laws that night.[70] She told others that when she and Blair Mack had gone to check on their daughter before going to Nina and Cyril's house, Delavina wasn't there. Ms. Vickers heard Ms. Bolton say that "someone else had come to pick her up to look after her somewhere else."[71] Ms. Bolton said she was worried about her daughter because Delavina wasn't at Sam and Gert Mack's house as she was supposed to be. Ms. Bolton engaged in multiple conversations regarding Delavina's

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[63] Aff. Thomas Tallio, para. 15 (Tab 44).
[64] Aff. Celestine Vickers, para. 15 (Tab 45).
[65] First Aff. Phillip Tallio, para. 65 (Tab 42a); Aff. Celestine Vickers, para. 8, 16 (Tab 45).
[66] First Aff. Phillip Tallio, para. 56 (Tab 42a).
[67] First Aff. Phillip Tallio, para. 66 (Tab 42a); Aff. Celestine Vickers, para. 17 (Tab 45).
[68] April 23, 1983 8 a.m.-8:42 a.m. Statement of Blair Mack p. 2 (Aff. Pembroke, Tab 20).
[69] First Aff. Phillip Tallio, para. 66 (Tab 42a).
[70] Aff. Gwen Edgar, para. 9 (Rev. Aff. Tab 5).
[71] PH Celestine Vickers, AB p. 183, (L. 9-15).

whereabouts during the party at Cyril and Nina's house.[72]

38) Phillip did not go to check on Delavina immediately after Ms. Bolton asked him to as he wanted to continue chatting with Ms. Vickers.[73]

39) At his party, Cyril Tallio was drunk. Gwen Edgar states: "[Cyril] was being obnoxious, saying things to me and other young girls like, "Oh, let's go to the room."[74] In the preliminary hearing, Cyril testified that he realized he was drinking too much: "I couldn't stomach anymore."[75] He was too intoxicated to make it to his bedroom, saying he would have had to crawl to get there.[76]

40) That evening, Blair Mack also consumed a large amount of alcohol: at least five or six glasses of wine, and seven to nine beer, as well as "Vodka Sevens."[77] Lotta Bolton had at least three glasses of wine, and numerous beer during the same 6.5 hour period.[78] She agreed that she was feeling "fairly high."[79] Blair and Lotta passed out on a couch in the living room. Cyril kicked the rest of the party guests out at about 0330.[80]

41) Gert Mack testified that she had bathed Delavina and placed her on the sofa in the living room after 2130. While there was a bedroom made up for the victim ("Bedroom 1"), Ms. Bolton testified that she did not let Delavina sleep in it. She slept with Ms. Bolton and Mr. Mack.[81] Gert and Sam drank an entire 26-ounce bottle of rye that evening.[82]

42) Between approximately 2300 and 0400 three members of the Bella Coola

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[72] PH Celestine Vickers, AB pp. 188 (L. 46-47), 189 (L. 1-47), 190 (L. 1-47), 191 (L. 1-31).
[73] First Aff. Phillip Tallio, para. 67. (Tab 42a)
[74] Aff. of Gwen Edgar, para. 10. (Rev. Aff. Tab 5)
[75] PH Cyril Tallio, AB, p. 150 (L. 40-43).
[76] PH Cyril Tallio, AB, p. 151 (L. 10-11).
[77] PH Blair Mack, AB, p. 116 (L. 34-41).
[78] PH Lotta Bolton, AB, pp. 131 (L. 2-5), 132 (L. 6-14, 30-41).
[79] PH Lotta Bolton, AB, p. 132 (L. 40-41).
[80] Aff. Celestine Vickers, paras. 19-20 (Tab 45).
[81] PH Gert Mack, AB pp. 94 (L. 26-32), 96 (L. 4-7, 35-47), 97; PH Lotta Bolton, AB pp. 129 (ln. 40-44), 130 (L. 13-26).
[82] April 23, 1983 Gert Mack Statement to Police (Aff. Pembroke, Tab 21).

community came to visit Gert and Sam. These guests—Randy Edgar,[83] Marlene King[84] and Peter Tallio[85]—all left by about 0340.[86]

43) Gert Mack stated that Delavina was asleep at approximately 0455 at the foot of the sofa. She wore a two-piece grey pajama set and was covered with a quilt.[87]

44) The lock to the front door was broken, and Gert was worried that someone could walk into the house.[88]

45) Over at Cyril and Nina's house, Phillip, Nina and Ms. Vickers chatted in the kitchen. Nina went to bed at about 0400.[89] Phillip remained in the kitchen with Ms. Vickers, drinking tea. At close to 0430 Phillip tried to waken Cyril Tallio, who had passed out drunk on one of the two couches in the living room, because Phillip wanted to go to sleep. He had been sleeping on the couch while Ms. Vickers was in town, as she was using his bed. Phillip was unable to wake Cyril up. He told Ms. Vickers that he would snuggle up at the other end of the couch. Ms. Vickers went to sleep at 0430.[90]

46) At the Mack's house, Gert fell asleep on the sofa at about 05:05. Sam had passed out earlier.[91]

47) Back at Cyril and Nina's house, Phillip tried to sleep on the couch but there was not enough space. He went to the kitchen where he cleaned things up from the party.[92]

48) The kitchen and the living room at Cyril and Nina's house were laid out in a closed floor plan. The kitchen was walled off from the living room and there was a door between the two rooms. Phillip could not see into the living room while he was in the kitchen cleaning up.[93]

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[83] PH Gert Mack, AB, p. 97 (L. 34-35).
[84] PH Gert Mack, AB, p. 98 (L. 25-26).
[85] PH Gert Mack, AB, p. 98 (L. 30-31).
[86] PH Gert Mack, AB, p. 97 (L. 23-43).
[87] PH Gert Mack, AB, pp. 95 (L. 41-45), 100 (L. 25-46).
[88] PH Gert Mack, AB, pp. 100 (L. 47); 101 (L. 1-6).
[89] First Aff. Phillip Tallio, para. 70 (Tab 42a).
[90] Aff. Celestine Vickers, paras. 23-24 (Tab 45).
[91] PH Gert Mack, AB, p. 101 (L. 7-17, 34-42).
[92] Fourth Aff. Phillip Tallio, para. 95 (Tab 42d).
[93] Fourth Aff. Phillip Tallio, para. 96 (Tab 42d).

Cyril and Wilfred in the Street

49) During the early morning hours of April 23, 1983, Anna Edgar and her husband Alan Edgar were driving around the reserve to see what was going on at the parties.[94]

50) When they turned right on Tswan-Koos street, they saw Cyril Tallio walking down the road by what was then Godfrey and Louisa Tallio's house. Godfrey and Louisa's residence was situated on the corner of Tswan-Koos and Mackenzie streets, in between Cyril and Nina Tallio's and Sam and Gert Mack's houses. "There was a streetlight at the corner of Godfrey's house, so the light was bright—it was definitely Cyril." "We waved to him, but Cyril did not seem to notice us."[95]

51) Alan and Anna Edgar continued driving and wound up at another residence. Between 0500 to 0530, about 45 minutes after they had seen Cyril on the street—they passed by Tswan-Koos Street. The sun rose in Bella Coola at 0513 that morning.[96] Alan and Anna saw Wilfred Tallio outside of Sam and Gert Mack's house. "He was getting into his truck".[97] Anna was never interviewed by the RCMP in 1983. Anna was eventually interviewed by the RCMP in 2011.[98]

Wilfred Tallio's Box of Bloody Clothes

52) Wilfred Tallio (now deceased) was Gert Mack's father and therefore Delavina's great-grandfather. Though Wilfred's branch of the Tallio family and Phillip Tallio's branch of the Tallio family were assumed to be related, DNA testing proved that the two families were not related and that there had been a "break" in the family tree.[99] These facts are important in terms of understanding the concept of possible contributors of DNA at the crime scene.

53) Wilfred and Daisy Tallio (both now deceased) lived on the Nuxalk reserve. When Wilfred returned home on April 23, 1983, his clothes were bloodied. He said that he had

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[94] Aff. Anna Edgar, para. 5 (Rev. Aff. Tab 4).
[95] Aff. Anna Edgar, para. 13 (Rev. Aff. Tab 4).
[96] National Research Council Canada, Sunrise/sunset calculator (Advanced Options and Sun Angles), April 23, 1983: https://app.hia-iha.nrc-cnrc.gc.ca/cgi-bin/sun-soleil.pl
[97] Aff. Anna Edgar, paras. 14-15 (Rev. Aff. Tab 4).
[98] Aff. Anna Edgar, para. 18 (Rev. Aff. Tab 4).
[99] Second Aff. Dr. Rick Staub, para. 24 (Attached to Third Aff. Dr. Staub, Tab 35b).

been drinking at Sam and Gert Mack's house.[100]

54) Daisy told this information to her homemaker, Larry Moody. Mr. Moody arrived to work at Daisy and Wilfred's house at about 1000 on April 23, 1983.[101] Daisy was there but Wilfred was not home.[102]

55) Daisy told Larry Moody there was a box under Wilfred's bed that was starting to smell. She wanted Mr. Moody to burn it.[103] According to Daisy, the box contained bloody clothes that Wilfred had been wearing when he came home late from drinking at the Mack's house.[104]

56) Daisy told Larry Moody that the box had to do with what happened "down at Sam's place." She said that she thought that Wilfred was involved; that Wilfred was "no good."[105]

57) Mr. Moody felt it was not his place to ask questions. He just wanted to do his job and leave. He made a fire in the backyard and burnt the box. He then went inside the house and continued cleaning, including cleaning blood from the sink of Wilfred and Daisy's bathroom.[106]

58) Mr. Moody did not find out that the victim—had been killed "down at Sam's place" until later that day while he was in the restaurant at the Co-op grocery store. Everyone in town was talking about the murder that had occurred that morning; the same day Mr. Moody burnt the box.[107]

59) A few days later, he passed Wilfred on the street. Wilfred asked if he had looked

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[100] Aff. Larry Moody, paras. 9-11 (Rev. Aff. Tab 12). This evidence is recounted by Mr. Moody, as told to him by Daisy Tallio. The appellant relies on this evidence in the context of investigative hearsay.
[101] Aff. Larry Moody, paras. 6, 16 (Rev. Aff. Tab 12). Though Mr. Moody does not recall the exact date himself, he confirms that he burnt the box on the same day that Delavina Mack died, which was April 23, 1983.
[102] Aff. Larry Moody, para. 6 (Rev. Aff. Tab 12).
[103] Aff. Larry Moody, para. 7 (Rev. Aff. Tab 12).
[104] Aff. Larry Moody, paras. 10-11 (Rev. Aff. Tab 12).
[105] Aff. Larry Moody, para. 12 (Rev. Aff. Tab 12).
[106] Aff. Larry Moody, paras. 12-14 (Rev. Aff. Tab 12).
[107] Aff. Larry Moody, para. 16 (Rev. Aff. Tab 12).

in the box. Mr. Moody said no, that he only did what Daisy had asked him to do. “Wilfred did not say much.”[108]

60) Mr. Moody recalls that later on, Daisy asked him if the box had all burned up and if he saw anything. He told her that it had all burned and it was gone. Daisy suggested that it be “forgotten” and Mr. Moody replied “yeah.” She thanked him for burning it.[109]

61) The RCMP did not interview Larry Moody until 2012. He did not approach the police himself. At the time of the victim’s death, he was under the impression that Phillip Tallio—a teenager whom he did not know—had confessed to the crime. He had thought that was the end of it.[110]

Wilfred Tallio in the Nuxalk Community

62) Sexual abuse at the time of Delavina Mack’s death was widespread in Bella Coola.[111] Wilfred Tallio, who died in 1997, was one of several men alleged to sexually assault children, including; his granddaughter between the age of three to nine years,[112] his great-granddaughter[113]; and a young neighbourhood girl suffered abuse from age 11-14.[114]

Phillip Walks Up to the Mack’s House

63) Back at Cyril and Nina’s house, Phillip had finished cleaning up in the kitchen. Having nowhere to sleep, he decided to go check on Delavina as his cousin Ms. Bolton had asked him to. At approximately 0545, Phillip walked straight from Cyril and Nina Tallio’s house to the Mack’s house.[115]

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[108] Aff. Larry Moody, para. 17 (Rev. Aff. Tab 12).
[109] Aff. Larry Moody, para. 18 (Rev. Aff. Tab 12).
[110] Aff. Larry Moody, para. 19 (Rev. Aff. Tab 12).
[111] Aff. Roseanne Andy, paras. 18-19 (Rev. Aff. Tab 2); Aff. Sylvia Brown, paras. 2, 5 (Tab 8); Aff. Gwen Edgar, paras. 15 (Rev. Aff. Tab 5); Aff. Anna Edgar, para. 20 (Rev. Aff. Tab 4); Aff. Lorna George, paras. 5, 13 (Rev. Aff. Tab 6); Aff. June Mack, para. 12 (Rev. Aff. Tab 8); Aff. Gordon Tallio, para. 9, 20 (Rev. Aff. Tab 15); Aff. Person X, paras. 6-9 (Tab 33); Aff. Person Y, paras. 13-18 (Rev. Aff. Tab 9); Aff. Bill Tallio, para. 17. (Tab 36)
[112] Aff. Person Y, para. 14 (Rev. Aff. Tab 9).
[113] Aff. June Mack, paras. 9, 12-13. (Rev. Aff. Tab 8)
[114] Aff. Person X, para. 8 (Tab 33).
[115] First Aff. Phillip Tallio, para. 73 (Tab 42a).

64) It was light out by this time. Godfrey and Louisa Tallio (both now deceased) were up early because they had been waiting for their daughters to arrive home from a party. One daughter, Maureen, then 20 years old, had already arrived home.[116] The family drank coffee at their kitchen table at about 5:45 a.m. It was daylight.[117]

65) The windows in Louisa and Godfrey's house faced towards Sam and Gert Mack's backyard and to the side with a direct view of Silas King's house. The view of the street was clear. There was no blockage by any shrubbery.[118]

66) Maureen, Godfrey and Louisa could see outside through the windows while sitting at their kitchen table.[119] They all saw Phillip walk up to the Mack's house[120] at about 0545 that morning.[121] Maureen described Phillip's demeanour as, "calm and not in a rush."

67) Directly across from Godfrey and Louisa's house—on the other side of Tswan-Koos and Mackenzie streets—was Silas King's residence.

68) Angela King was married to Bradley King, son of Silas King. The couple lived at Silas's house in 1983 and she was awake with her young children early the morning of April 23, 1983. It was light outside. She was standing in the dining room where she could see outside through the sliding glass patio door.[122] The view from the sliding glass door covers both Tswan-Koos and Ong-Ten-Kai streets.

69) Ms. King did not know Phillip Tallio well but she knew that he was Theresa

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[116] Aff. Maureen Tallio, paras. 7-9 (Tab 41). The appellant relies on this evidence in the context of investigative hearsay.
[117] Aff. Louisa Tallio, paras. 4-5 (Rev. Aff. Tab 16); Aff. Godfrey Tallio, paras. 5-6. (Rev. Aff. Tab 14).
[118] Aff. Robert Tallio, para. 16 (Tab 43).
[119] Aff. Louisa Tallio, para. 5 (Rev. Aff. Tab 16); Aff. Godfrey Tallio, para. 6 (Rev. Aff. Tab 14); Aff. Maureen Tallio, para. 10 (Tab 41).
[120] Aff. Louisa Tallio, para. 6 (Rev. Aff. Tab 16); Aff. Godfrey Tallio, para. 7 (Rev. Aff. Tab 14); Aff. Maureen Tallio, para. 11 (Tab 41).
[121] Aff. Godfrey Tallio, paras. 5-7 (Rev. Aff. Tab 14).
[122] Aff. Angela King, paras. 4-8. (Tab 18); Photos of Silas King's house and the view from its patio are depicted in Robert Tallio's affidavit, paras. 16-20, Exhibits "A", "F", "G", "H", "I" (Tab 43).

Hood's boyfriend and a member of the Nuxalk community.[123] Through the sliding glass patio door, she saw Phillip walking up the street towards the Mack's house.[124]

Discovery of the Deceased

70) Phillip Tallio arrived at the Mack's house. The front door was wide open. He knocked on the door anyhow and called out if anyone was home. There was no answer. He heard snoring.[125]

71) Phillip walked into the Mack's house and called out again but no one answered. He went upstairs. At the top of the stairs there was a short hallway to the right. To the left was a living room, dining room and kitchen.[126]

72) Phillip saw Gert and Sam Mack sleeping in the living room. He tried waking them but they did not wake up. He tried shaking them by the shoulders, but they merely grunted and rolled over. A strong stench of alcohol permeated the space.[127]

73) Delavina was not there with Sam and Gert. Phillip went to see if they had put her to sleep in one of the bedrooms. He found Delavina in the last room on the right ("Bedroom 1"). The door to that bedroom was open.[128]

74) Delavina was lying on the bed face-up. Her pyjama pants were pulled down to her knees. She was naked from her waist to her knees. Phillip saw a large blood stain on the bed between her legs. He could not hear her breathing. He put his ear to her chest and could not hear a heartbeat.

75) Phillip ran to the living room and tried waking Sam again, shaking him. Sam said told Phillip to "fuck off." He tried waking Gert up again to no avail.[129]

Phillip Runs Back Down the Street

76) Phillip ran out of the Mack's house and back down Tswan-Koos Street to Cyril

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[123] Aff. Angela King, para. 4 (Tab 18).
[124] Aff. Angela King, para. 9 (Tab 18).
[125] First Aff. Phillip Tallio, para. 75 (Tab 42a).
[126] First Aff. Phillip Tallio, para. 76 (Tab 42a).
[127] First Aff. Phillip Tallio, paras. 77-78 (Tab 42a).
[128] First Aff. Phillip Tallio, para. 79 (Tab 42a).
[129] First Aff. Phillip Tallio, para. 81 (Tab 42a).

and Nina's house.[130] Godfrey, Louisa and Maureen Tallio, and Angela King all witnessed Phillip running back down the street from the Mack's house.

77) Godfrey and Lousia recall seeing Phillip run back down the street less than 10 minutes after they saw him walk up the street.[131] They did not see anything out of the ordinary about Phillip's appearance.[132]

78) Maureen saw Phillip run back down the street to Cyril's house about five minutes after she saw him walk up to the Mack's house. He looked "really concerned and scared" as he ran back to Cyril's. "Other than the expression on Phillip's face, I did not see anything different about his appearance."[133]

79) Angela King saw Phillip run back down the street to Cyril and Nina's house just a few minutes after she saw him walking up the street towards Sam and Gert's house. His appearance did not appear to have changed in those few minutes except that "he looked panicked as he ran back down the street."[134]

80) The police never interviewed Angela King, Louisa Tallio nor Godfrey Tallio in 1983. Maureen Tallio approached the police the next day and told them she had seen Phillip Tallio walking up the street to the Mack's and running back down five minutes later. But the officers "did not listen to her."[135]

81) Phillip ran back to his uncle Cyril and aunt Nina's house and tried to wake Delavina's father, Blair Mack, without success. He woke Nina up instead.[136] Nina testified that Phillip was crying when he woke her up.[137] He told her her that he had gone to check on Delavina as Lotta Bolton had asked and that he had found Delavina dead. He said that the victim's pajama bottoms were halfway down, and that it looked

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[130] First Aff. Phillip Tallio, para. 82 (Tab 42a).
[131] Aff. Godfrey Tallio, para. 8 (Rev. Aff. Tab 14).
[132] Aff. Godfrey Tallio, para. 9 (Rev. Aff. Tab 14).
[133] Aff. Maureen Tallio, paras. 12-13 (Tab 41).
[134] Aff. Angela King, para. 10 (Tab 18).
[135] Aff of Maureen Tallio, para. 17 (Tab 41).
[136] First Aff. Phillip Tallio, para. 82 (Tab 42a).
[137] PH Nina Tallio, AB p. 177 (L. 31-34).

like she had been raped.[138]

82) Nina woke her sister Ms. Vickers and told her what Phillip had relayed.[139] There is no mention of her husband Cyril's whereabouts at this point.

83) Nina and Ms. Vickers each testified that on April 23, 1983 that Phillip was wearing the same clothes he had on before.[140] There was no evidence of the presence of blood or anything out of the ordinary about Phillip's clothing that morning.

84) After she woke Ms. Vickers, Nina woke up Mr. Mack and told him that he had better go and check on his baby, as she thought there was something the matter with her.[141]

85) Blair Mack ran to his parents' house. He found the victim in Bedroom 1. She was not breathing. Her pajamas were below her knees and she was not wearing a diaper. Mr. Mack carried the victim to the living room, where Gert and Sam were still sleeping.[142]

86) When Gert woke up and saw Delavina in the living room, there was blood in between her legs.[143]

Burning at the Creek

I. Roseanne Andy and Phyllis King-Svisdahl

87) In 1983, Roseanne Andy, her husband Billy Andy and their family lived at the corner of Ong-Ten-Kai and Tswan-Koos streets, diagonally across from the Mack's house.[144] The Andy's house is shown in Exhibit "K" attached to the affidavit of Robert Tallio. Exhibit "K" was taken from the Mack's backyard. The Andy's residence is the white house next to what would become the firehall (the structure with the blue roof).[145]

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[138] PH Nina Tallio, AB pp. 168 (L. 23-41).
[139] Aff. Celestine Vickers, para. 25 (Tab 45); PH Nina Tallio, AB p. 169 (L. 1-5).
[140] PH Nina Tallio, AB p. 181 (L. 36-38); PH Celestine Vickers, AB p. 187 (L. 8-12); See also Aff. Celestine Vickers, para. 35. (Tab 45)
[141] PH Nina Tallio, AB p. 169, (L. 10-17).
[142] PH Blair Mack, AB p. 120 (L. 14-34).
[143] PH Gert Mack, AB p. 102 (L. 9-18).
[144] Aff. Roseanne Andy, para. 5. (Rev. Aff. Tab 2).
[145] Aff. Robert Tallio, paras. 13, 22 (Tab 43).

88) Exhibit “L” attached to Robert Tallio’s affidavit depicts the view from the front of the Andy’s house—the Mack’s house is the pastel green house directly across from the firehall.[146]

89) Exhibit “M” attached to Robert Tallio’s house depicts the firehall next to the Andy’s house. There is a smokehouse in between the firehall and the Andy’s house. Behind the smokehouse is a river/creek.[147]

90) During the morning of April 23, 1983, Roseanne Andy (now deceased) heard her sister Phyllis King-Svisdahl calling her name. Ms. King-Svisdahl, who passed away in 2010 (prior to the swearing of Mrs. Andy’s affidavit) lived in a trailer in the Andy’s backyard. Ms. King-Svisdahl threw rocks and pebbles at Mrs. Andy’s window, saying “Let me in!” Her sister sounded troubled, so Ms. Andy let her in.[148] Speaking Nuxalk, Ms. King-Svisdahl said that it sounded like there was a lot of commotion at Sam and Gert’s house.[149]

91) Through the living room window, the sisters watched a number of people running back and forth from the Mack’s house to Gert’s brother Bill Tallio’s house.[150]

92) Mrs. Andy then looked through her bedroom window and saw people running behind her house towards the creek, labelled “creek” on the map attached as Exhibit “A” to her affidavit. She saw people carrying items with them to the creek. She was unable to identify them except for Blair Mack, who was wearing the bright yellow T-shirt that she had seen him wearing the night before.[151]

93) Mrs. Andy witnessed flames and smoke by the creek.[152] This took place at daybreak[153] before the police arrived.[154]

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[146] Aff. Robert Tallio, paras. 14, 23 (Tab 43).
[147] Aff. Robert Tallio, para. 24 (Tab 43).
[148] Aff. Roseanne Andy, para. 9 (Rev. Aff. Tab 2).
[149] Aff. Roseanne Andy, para. 10 (Rev. Aff. Tab 2).
[150] Aff. Roseanne Andy, para. 11 (Rev. Aff. Tab 2).
[151] Aff. Roseanne Andy, para. 12 (Rev. Aff. Tab 2).
[152] Aff, Roseanne Andy, para. 13 (Rev. Aff. Tab 2).
[153] Aff. Roseanne Andy, para. 6 (Rev. Aff. Tab 2).
[154] Aff. Roseanne Andy, para. 12 (Rev. Aff. Tab 2).

94) Mrs. Andy explains that when a Nuxalk individual dies, it is customary to burn items belonging to a deceased person so that they may travel with the person's spirit to the next world. However, the burning is done in one's own backyard, normally on the fourth day after the deceased person's death.

95) Mrs. Andy found out about Delavina's death about one or two hours after she saw people running to the creek.[155] She and Ms. King-Svisdahl went to the RCMP detachment to make a statement about what they saw—"about the items and the fire and said that there was something really fishy going on at the Mack's house." But the RCMP officers were dismissive.[156] They never came to talk to Mrs. Andy.[157]

II. Jennifer Andy

96) In April 1983, Mrs. Andy's daughter Jennifer was living with her partner Bert Mack and their two daughters at his grandmother Dora Mack's residence. There were two houses in between Sam and Gert Mack's house and Dora's house on Ong-Ten-Kai street.[158]

97) Before Jennifer moved to Dora's house, she and her family had lived at Sam and Gert's house for a couple of months. Sam and Gert are Jennifer's uncle and aunt. When her family left Sam and Gert's house, Jennifer accidentally left some things there, including her daughter Cheryl's favourite toy, which was a red stuffed clown doll.[159]

98) On April 23, 1983, Dora woke Jennifer and Bert up at about 08:00 and told them about Delavina's death. Jennifer dressed her daughters and took them to her mother Roseanne Andy's house.[160] When Jennifer arrived, her mother and aunt Ms. King-Svisdahl, were speaking. Jennifer understood from that conversation that Ms. King-Svisdahl heard Gert screaming that morning; and that she saw people running from the Mack's house, including Blair Mack who was carrying things from his parents' house

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[155] Aff. Roseanne Andy, para. 14 (Rev. Aff. Tab 2).
[156] Aff. Roseanne Andy, para. 15 (Rev. Aff. Tab 2).
[157] Aff. Roseanne Andy, para. 16 (Rev. Aff. Tab 2).
[158] Aff. Jennifer Andy, para. 4 (Rev. Aff. Tab 1).
[159] Aff. Jennifer Andy, para. 5 (Rev. Aff. Tab 1).
[160] Aff. Jennifer Andy, para. 6 (Rev. Aff. Tab 1).

and burning them in a fire in an area behind the Andy's house.[161]

99) Later that day, Jennifer walked to the burn site where Ms. King-Svisdahl had seen the fire. She saw a burnt area where it appeared a fire had been. There was still smoke—the area was still smouldering and the black burnt area was in a circle. Jennifer saw bedsheets on the ground, including a partially burnt sheet which was cream-coloured with a brown or tan pattern.[162] She also saw her daughter Cheryl's favourite stuffed clown doll toy which she had left at the Mack's house.[163]

100) Regarding buring, Jennifer Andy states that when a Nuxalk individual dies, it is a tradition to burn some of their personal belongings to send along to Heaven with them. However, any burning takes place before 4 p.m. on the fourth day after the person's death".[164] Jennifer was never interviewed by the RCMP in 1983.[165]

III. Colleen Gabriel

101) Colleen Gabriel had moved to Bella Coola in 1982. She did not know Phillip Tallio personally.[166] On April 23, 1983, Ms. Gabriel was staying at Joe Mack's house on Ong-Ten-Kai street, which was two houses south of the Mack's house.[167] Joe Mack's house is depicted in Exhibit "K" attached to Robert Tallio's affidavit. It is the red house with the white trailer in the yard.[168]

102) Ms. Gabriel woke up early on April 23, 1983. It was light outside. From inside Joe's house, she looked out a window facing Ong-Ten-Kai street and saw Gert Mack running from the creek behind the fire hall towards the Mack's house, carrying a small mattress spring. The mattress spring was dark in colour and appeared to Ms. Gabriel to

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[161] Aff. Jennifer Andy, para. 7 (Rev. Aff. Tab 1). The evidence of what Ms. King-Svisdahl told Jennifer Andy is not offered for proof of the truth that burning happened, but for narrative and context to Jennifer's actions and state of mind in visiting the burn area, as well as to issues concerning a negligent investigation.
[162] Aff. Jennifer Andy, para. 8 (Rev. Aff. Tab 1).
[163] Aff. Jennifer Andy, para. 9 (Rev. Aff. Tab 1).
[164] Aff. Jennifer Andy, para. 10 (Rev. Aff. Tab 1).
[165] Aff. Jennifer Andy, para. 12 (Rev. Aff. Tab 1).
[166] Aff. Colleen Gabriel, para. 5 (Tab 13).
[167] Aff. Colleen Gabriel, para. 6 (Tab 13).
[168] Aff. Robert Tallio, para. 22 (Tab 43).

be burnt.[169] RCMP officers never interviewed Ms. Gabriel in 1983.[170]

The RCMP is Alerted

103) After carrying Delavina into the living room at his parent's house, Blair Mack ran next door to get help from Gert's brother Bill Tallio. Bill went to check on the victim himself while his wife Penny telephoned the police. At the preliminary hearing, Mr. Mack testified that he ran back to Cyril and Nina's house to get Ms. Bolton. He told her that the victim was raped and was dead.[171] Phillip was present when Mr. Mack informed Ms. Bolton about the victim. Phillip appeared to be in shock.[172]

104) Mr. Mack and Ms. Bolton went to the Mack's house. They asked Nina and Cyril to come with them. Nina, Cyril and Phillip Tallio followed them up the street.[173]

105) At the Mack's house, Gert wrapped the victim in a quilt and Bill took them to the hospital, which was a couple minutes' drive away.[174]

106) Constable James Hulan arrived at the Mack's house at about 0615 after receiving a telephone call approximately five minutes earlier from Penny Tallio. Phillip Tallio spoke to him at the Mack's house, explaining that he had found the victim on the bed.[175] Cst. Hulan noted that Phillip was very calm and that he did not appear to have been drinking.[176]

107) In 2011, Nina told the RCMP that while at the Mack's house that morning, she heard Cyril threaten Phillip that he "better tell them what he did."[177]

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[169] Aff. Colleen Gabriel, para. 7 (Tab 13).
[170] Aff. Colleen Gabriel, para. 10 (Tab 13).
[171] Aff. Celestine Vickers, para. 29 (Tab 45); PH Marion Bolton, AB p. 133 AB (L. 23-27); Blair Mack, AB p. 121 (L. 3-4).
[172] Aff. Celestine Vickers, para. 31 (Tab 45).
[173] Aff. Celestine Vickers, para. 32 (Tab 45); PH Nina Tallio, AB p. 169 (L. 44-47), p. 170 (L. 1-10).
[174] PH Gert Mack, AB, p. 102 (L. 1-47), p. 103 (L. 1-11).
[175] Aff. Bruce Hulan, para. 46 (Respondent's Fresh Evidence Affidavits, Vol. 2 Tab 7).
[176] PH James Bruce Hulan, AB p. 8 (L. 38-47; p. 9 (L. 1-10).
[177] Memorandum from RCMP Cpl. Bill Robinson to Crown Counsel Mary Ainslie dated Aug. 25, 2011 ("Aug. 25, 2011 RCMP Memo"), p. 9, Second Aff. Kimberly Wong, Exhibit "A". (Tab 47)

108) After 15 minutes had passed, Nina and Phillip returned to Nina and Cyril's residence. Ms. Vickers had stayed there to babysit the children. Phillip was quiet. He sat down in an armchair and eventually fell asleep.[178]

109) At the Mack's house, Cst. Hulan entered Bedroom 1. He photographed the room, seized numerous articles such as sheets, blankets and socks with red staining on them, and placed the articles into a plastic bag which was given to him by Sam Mack. He placed the plastic bag in the trunk of his police car and moved it into the exhibit locker at the Bella Coola RCMP detachment.[179] He spent only a few minutes at the Mack's house and then drove to the hospital, arriving there at approximately 06:25.[180] Cst. Allen O'Halloran arrived at the hospital at about 06:45 and was briefed by Cst. Hulan.[181]

110) At the hospital, Delavina's body was placed in the emergency treatment room and remained there until Cst. Hulan and a staff doctor, Dr. Raymond McIlwain, transported it to the morgue. The body was not examined at the hospital.[182]

Detention of Blair Mack

111) Constables Hulan, O'Halloran, Ernie Defer and Special Constable Ted Walkus (an Indigenous liaison) were Bella Coola's only RCMP officers. S/Cst. Walkus arrived at the morgue at about 0945.[183]

112) Cst. O'Halloran arranged contact to the Terrace Telecoms Centre, the Prince Rupert RCMP Sub/Division and Anaheim Lake RCMP detachment to request assistance.[184]

113) At 0651, Cst. O'Halloran went to Sam and Gert Mack's house. He detained Blair Mack and placed him in the police car. At 0706 he advised Mr. Mack that he was under arrest for murder. At the preliminary hearing, Cst. O'Halloran testified that he took Mr.

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[178] First Aff. Phillip Tallio, para. 87 (Tab 42a); Aff. Celestine Vickers, paras. 33-34 (Tab 45); PH Nina Tallio, AB p. 170 (L. 29-44), p.160, (L. 15-17).
[179] PH James Bruce Hulan, AB p. 12 (L. 1-47), p. 13 (L. 1-47), p. 14 (L. 1-3).
[180] PH James Bruce Hulan, AB p. 17 (L. 9-12).
[181] PH Allen O'Halloran, AB p. 237 (L. 41-47), p. 238 (L. 1-6).
[182] Aff. Bruce Hulan, paras. 52, 54, 56 (Respondent's Fresh Evidence Affidavits, Vol. 2 Tab 7); Aff. Dr. Raymond McIlwain, para. 7 (Tab 23).
[183] PH Ted Walkus, AB p. 208 (L. 15-22).
[184] PH Allen O'Halloran, AB p. 238 (L. 19-29).

Mack with him for further investigation, as Cst. Hulan advised him that Mr. Mack was the victim's father and that he may have been involved.[185]

114) Cst. O'Halloran arrived at the RCMP detachment with Mr. Mack at 0713. In his April 23, 1983 police statement taken at 0842 Blair Mack confirmed that he and Ms. Bolton asked Phillip Tallio to go check on their daughter during the party.[186] Mr. Mack told Cst. O'Halloran that he did not think that Phillip killed his daughter.[187]

Detention of Phillip Tallio

115) After interviewing Mr. Mack, Cst. O'Halloran and Cst. Hulan went to Cyril and Nina's residence. They arrived just before 0900, to bring Phillip Tallio, who was asleep, in for questioning.[188]

116) The Constables drove Phillip to the detachment. There was no indication that Phillip had been drinking.[189]

117) The police did not alert Phillip's social worker and legal guardian Paul Wilson, that they had detained him,[190] nor did they alert his family.[191]

Initial Scene Investigation

118) Cst. O'Halloran left the Mack's residence that morning shortly after 0700. During the next several hours the crime scene was unsecured.[192]

119) Cst. Hulan attended at the Bella Coola Hospital, the morgue, the Bella Coola RCMP detachment, Cyril's residence, and then he flew with Delavina's body to B.C.

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[185] PH Allen O'Halloran, AB pp. 226, (L. 41-47); 227, (L. 1-35); 228 (L. 1-11, 30-47), 229 (L. 1-3).
[186] April 23, 1983 8 a.m.-8:42 a.m. Statement of Blair Mack p. 2 (Aff. Pembroke, Tab 20).
[187] April 23, 1983 8 a.m.-8:42 a.m. Statement of Blair Mack p. 2 (Aff. Pembroke, Tab 20).
[188] PH Allen O'Halloran, AB p. 242 (L. 5-44).
[189] PH Allen O'Halloran, AB, p. 243 (L. 15-47), p. 244 (L. 1-24); PH James Bruce Hulan, AB p. 20 (L. 6-27).
[190] Second Aff. Paul Wilson, para. 14 (Rev. Aff. Tab 20).
[191] Aff. Darlene Tallio, paras. 12-13 (Tab 37).
[192] Review of full PH transcripts of James Bruce Hulan, Allen O'Halloran and Ted Walkus, beginning AB pp. 9, 237, 208 respectively.

Children's Hospital in Vancouver, B.C. at around 1000, where he would spend the majority of the day.[193]

120) After attending the morgue, S/Cst. Walkus attended the Mack's residence, arriving at 1010. [194]

Chaos at the Mack's House During the Time it was Unsecured: Cyril Burning

121) After Cst. O'Halloran's departure from the crime scene and before Special Cst. Walkus's arrival at 1010, numerous members of the Bella Coola community visited the Mack's house. Neighbour and relative June Mack saw about 30 people on the steps, in the hallway, and in the living room within a span of just 20 minutes.[195]

122) When Special Cst. Walkus arrived at 1010, he found 17 people at the Mack's house in addition to Sam and Gert. He asked them to leave,[196] but he did not clear the individuals from the house until 1100.[197]

123) One of the people at the Mack's house that morning was Cyril Tallio. In 2011, RCMP investigating officers travelled to Bella Coola to interview potential witnesses. Reports regarding Cyril were made to the RCMP, including a claim that the victim's parents had also asked Cyril to check on her at the Mack's house; that after checking on the victim, he returned home, showered, and demanded that Nina get him new clothes.[198]

124) In 2011, RCMP officers were also informed that after the victim was found and before the police arrived, Cyril attended the Mack's residence and removed garbage. He had not been asked by the Mack family to do so. Sam Mack witnessed Cyril picking

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[193] Cst. Hulan flew to Vancouver at 10:21 a.m. and only arrived back in Bella Coola after 7 p.m. that day. See, Aff. Bruce Hulan, paras. 70-81 (Respondent's Fresh Evidence Affidavits, Vol. 2 Tab 7).
[194] PH Walkus, AB p. 208 (L. 11-30).
[195] Aff. June Mack, para. 11 (Rev. Aff. Tab 8).
[196] PH Walkus, AB p. 208 (L. 27-47), p. 209 (L. 1-12).
[197] PH Walkus, AB p. 202 (L. 25-28).
[198] Aug. 25, 2011 RCMP Memo, p. 7-8, attached to Second Aff. of Kimberley Wong, Exhibit A (Tab 47).

up garbage and putting into a bag.[199] Gert Mack noticed Cyril hanging around a garbage bag, which was gone when Cyril' left the Mack's house.[200] Community member Lillian Siwallace also witnessed Cyril picking up garbage bags and taking things off the floor.[201]

125) Bill Tallio, who lived next door to the Mack's house, noticed that while the scene was unsecured, plumes of smoke arose from the burn barrel, located by the smokehouse just across from the Mack's house. Bill confirms that the Nuxalk custom of burning an individual's personal belongings after they die occurs after the four days of passing. "It is sacrilegious to burn the items right after the person dies or immediately after they are buried."[202]

126) Bill witnessed numerous Nuxalk community members walking all over the Mack's house. No police officers were present. He also saw Cyril carrying around garbage bags and taking a plastic bag out of the plastic garbage bin when he heard Gert Mack screaming at Cyril to "Stop!".[203]

127) On April 23, 1983, Bill told one of the police officers that he saw Cyril taking garbage bags out of the bins and trying to take them out of the Mack's house. He suggested that it was something he thought the police should check into. However, the police did not interview Bill in 1983.[204]

128) Person Y saw Cyril leaving the Mack's house carrying a green garbage bag.[205]

129) Person Y witnessed Cyril walk behind the smokehouse just across from the Mack's house, carrying a garbage bag. The smokehouse is marked with the number 3

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[199] Aug. 25, 2011 RCMP Memo, p. 5-6, attached to Second Aff. of Kimberley Wong, Exhibit A (Tab 47).
[200] Aug. 25, 2011 RCMP Memo, p. 6, attached to Second Aff. of Kimberley Wong, Exhibit A (Tab 47).
[201] Aug. 25, 2011 RCMP Memo, p. 8, attached to Second Aff. of Kimberley Wong, Exhibit A (Tab 47).
[202] Aff. Bill Tallio, para. 15 (Tab 36).
[203] Aff. Bill Tallio, para. 13 (Tab 36).
[204] Aff. Bill Tallio, para. 15 (Tab 36).
[205] Aff. Person Y, para. 10 (Rev. Aff. Tab 9).

on Exhibit "A" of Person Y's affidavit.[206] She then saw plumes of smoke coming up from the back area of the smokehouse where there are normally none, unless something is burning.[207]

130) When the RCMP interviewed Cyril in 2011, he claimed at first that he did not go to the Mack's house on April 22 or April 23, 1983 at all.[208]

Audio-recorded First Interrogation of Phillip Tallio – 0915 to 1006

131) Phillip was held in a jail cell at the RCMP detachment. He was interrogated three times over a 10-hour period. Phillip's Aunt Darlene retained a lawyer for her nephew,[209] but he was not permitted to speak to counsel, despite the fact that lawyers Wayne Haimila and Leslie Pinder called for him repeatedly.[210] Nor was he permitted to see Mr. Wilson[211] or his family members who came to the RCMP detachment.[212]

132) Cst. O'Halloran interrogated Phillip from 0915 until 1006. Phillip maintained his innocence throughout the audiorecorded interview.[213]

Physical Examination of Phillip Tallio

133) Dr. McIlwain conducted a 20-minute physical examination of Phillip at 1045 on April 23, 1983. He noted that Phillip had a very limited understanding of consent to the examination or his legal rights. "I felt that Phillip was definitely naïve, and that he did not seem very aware of the significance of what was going on. I questioned Phillip's understanding at the time but did not put too much thought into it then. I felt badly during the examination, thinking that Phillip did not have a clue what was going on. I thought

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[206] Aff. Person Y, para. 11 (Rev. Aff. Tab 9).
[207] Aff. Person Y, para. 11 (Rev. Aff. Tab 9).
[208] Aug. 25, 2011 RCMP Memo, p. 10, attached to Second Aff. of Kimberley Wong, Exhibit A (Tab 47).
[209] Aff. Darlene Tallio, para. 14 (Tab 37).
[210] PH Cst. Allen O'Halloran, AB p. 267 (L. 1-47), 268 (L. 1-10), pp. 278- 279 (L. 1-47); Aff. Leslie Pinder, paras. 9-10 (Tab 29).
[211] Second Aff. Paul Wilson, para. 17 (Rev. Aff. Tab 20).
[212] Aff. Darlene Tallio, paras. 13-16 (Tab 37); Aff. Godfrey Tallio, para.15 (Rev. Aff. Tab 14); Aff. Louisa Tallio, para. 14 (Rev. Aff. Tab 16).
[213] Exculpatory Statement of Phillip Tallio Taken by Cst. O'Halloran concluded at 10:06 a.m. (Aff. Pembroke, Tab 25); Exculpatory Statement of Phillip Tallio Taken by Cst. O'Halloran at 19:03 p.m. (Aff. Pembroke, Tab 26).

that he should have had legal advice. He was certainly on his own."[214]

134) Phillip was calm, cooperative and pleasant. He told Dr. McIlwain about finding Delavina at the Mack's house.[215]

135) Dr. McIlwain did not observe any signs of intoxication and there was no odor of alcohol on Phillip's breath. There was no blood visible anywhere on his body.[216]

136) There was moist secretion under Phillip's foreskin which Dr. McIlwain states would be consistent with his reporting that he had sexual intercourse the night before. There was no seminal fluid in his pubic area.[217] Phillip provided two pubic hair samples, which were placed into vials and given to Cst. O'Halloran.[218]

Further Actions by the RCMP

137) After Dr. McIlwain conducted his physical examination of Phillip, Cst. O'Halloran met with social worker Mr. Wilson in Cst. O'Halloran's living quarters at the detachment around 1130 to 1200.[219] The officer refused to let Phillip's legal guardian see him.[220] Nor did Cst. O'Halloran permit Phillip's family to see him, telling his Aunt Darlene that no one would be allowed to see him until the police got a confession out of him.[221]

138) Cst. O'Halloran's emotional state stands out for Mr. Wilson, who knew the officer from their bible study group.[222] At the preliminary hearing, Cst. O'Halloran testified that, "during the entire investigation, Your Honour, I was very upset[223]…this investigation, it had a rather personal—it hit very closely to home."[224]

139) RCMP Corporal Gerry Galenzoski ("Cpl. Galenzoski"), Corporal Wayne Watson ("Cpl. Watson"), and Corporal Garry Mydlak were stationed in Prince Rupert and flew to

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[214] Aff. Dr. Raymond McIlwain, paras 9 & 10 (Tab 23)
[215] Aff. Dr. Raymond McIlwain, paras. 12, 14. (Tab 23)
[216] Aff. Dr. Raymond McIlwain, para. 13 (Tab 23).
[217] Aff. Dr. Raymond McIlwain, para. 13 (Tab 23).
[218] Aff. Dr. Raymond McIlwain, para. 14 (Tab 23).
[219] PH Paul Wilson, AB p. 406.
[220] Second Aff. Paul Wilson, para. 17 (Rev. Aff. Tab 20).
[221] Aff. Darlene Tallio, para. 14 (Tab 37).
[222] Second Aff. Paul Wilson, para. 17 (Rev. Aff. Tab 20).
[223] PH O'Halloran, AB p. 275 (L. 22-23).
[224] PH O'Halloran, AB p. 281 (L. 5-10).

Bella Coola to assist. Cst. O'Halloran picked them up at the airport at 1213 on April 23, 1983 and briefed them on the case.[225]

140) Cpl. Mydlak, Cpl. Watson and Cpl. Galenzoski attended the Mack's residence just before 1400. S/Cst. Walkus was still there with the Macks. Cpl. Galenzoski photographed each room in the Mack's house, sketched the interior of the scene, took measurements, and examined Bedroom 1 for footprints and fingerprints.[226]

141) Cpl. Watson took the exhibits he and Cst. O'Halloran had seized to the RCMP crime detection laboratory in Vancouver on April 29, 1983 and gave them to hair and fibre analyst Ron Schiefke. Mr. Schiefke turned most exhibits over to serologist John Elsoff on May 10, 1983. Nothing from their resulting analyses inculpated Mr. Tallio.[227] The RCMP did not do an ABO blood grouping and enzyme detailing from semen, which could have potentially excluded Phillip as the perpetrator. [228]

142) Cpl. Mydlak took a written statement from Gert Mack. He left the Mack's house at 1552 and went to the Bella Coola RCMP detachment[229] where he briefly interviewed Lotta Bolton. He did not take a statement from her on that day. Nor did he take a statement from Blair Mack that day. Mr. Mack was released from custody at 1701.[230]

143) Cst. Hulan telephoned the detachment with preliminary results from the victim's autopsy, conveying to Cpl. Mydlak at 1712, that she was asphyxiated by "something

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[225] PH O'Halloran, AB p. 254, (L. 34-37).
[226] PH Wayne Watson, AB p. 65 (L. 1-4); PH Gerry Galenzoski, pp. 42 (L. 19-38), 43 (L. 7-10).
[227] Deirdre Pothecary, trial Crown, states at para. 5 of her first affidavit (Tab 30) that the only inculpatory evidence implicating Phillip at trial was the anticipated testimony of Dr. Pos. A review of the preliminary hearing transcripts (i.e. of Mr. Schiefke and Mr. Elsof) and the entirety of the *Tallio* documentation supports her statement.
[228] PH John Elsoff, AB p. 229 (L. 40-44). Mr. Elsoff was only asked to *examine* the exhibits for the presence of semen, as evident from his own testimony as well as Cst. Hulan's Request for Examination of Exhibits, and Mr. Elsoff's own report. However, as Mr. Elsoff testified, in 1983 (and well before) blood grouping from semen was available. There was a large quantity of semen on exhibits such as the sock (Exhibit B), the blanket (Exhibit P) and the victim's pyjamas (Exhibit I). Yet testing which could determine the perpetrator's blood grouping and blood enzymes from semen and could potentially exclude suspect(s) based on a comparison of their blood was not done.
[229] Cpl. Mydlak, 1624 entry April 23, 1983, 1552 hrs. (Aff. Pembroke, Tab 23).
[230] Cpl. Mydlak 1624 entry April 23, 1983 at 1701 hrs (Aff. Pembroke, Tab 23).

soft over mouth, probably a pillow" and sexually assaulted.[231]

144) Cpl. Watson and Cpl. Galenzoski left the crime scene at 1745 and returned to the Bella Coola detachment. S/Cst. Walkus remained at the Mack's house.

145) At the detachment, Cst. O'Halloran, Cpl. Watson, Cpl. Mydlak and Cpl. Galenzoski held a meeting at 1753. When lawyer Leslie Pinder called for Phillip at 18:40, the officers refused to let her speak to him, just as they had refused to let him speak to lawyer Wayne Hamila, who had called at 1500.[232]

146) Cst. O'Halloran's emotional state appears to have been concerning to his RCMP colleagues. At around 1845, Cpl. Mydlak instructed Cst. O'Halloran to essentially "stand down" before conducting his second interrogation of Phillip.[233]

Arrest and Audio-recorded Second Interrogation of Phillip Tallio—1903 to 1942

147) At 1903 Cst. O'Halloran formally arrested Phillip for the first-degree murder of Delavina Mack.[234] There was no basis for the arrest.

148) After arresting Phillip Cst. O'Halloran interviewed him for the second time.[235] The second interrogation was audio-recorded and, as in the first audio-recorded interrogation, Phillip maintained his innocence throughout.[236]

149) During the second interrogation, lawyer Ms. Pinder called again. Cpl. Mydlak refused to let her speak to Phillip.[237]

150) Cpl. Mydlak recalls that Cst. O'Halloran was frustrated after the second interrogation failed to garner results.[238]

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[231] PH Hulan, p. 26 L. 40-42; Cpl. Mydlak 1624 entry April 23, 1983 at 1712 hrs (Aff. Pembroke, Tab 23).
[232] PH Allen O'Halloran, AB p. 256 & 268.
[233] Sept. 12, 2017 Statement of Garry Mydlak (Aff. Pembroke, Tab 31).
[234] Exculpatory Statement of Phillip Tallio Taken by Cst. O'Halloran at 7:03 p.m. (Aff. Pembroke, Tab 26).
[235] Exculpatory Statement of Phillip Tallio Taken by Cst. O'Halloran at 7:03 p.m. (Aff. Pembroke, Tab 26).
[236] Exculpatory Statement of Phillip Tallio Taken by Cst. O'Halloran at 7:03 p.m. (Aff. Pembroke, Tab 26).
[237] Aff. Leslie Pinder, paras. 9-10 (Tab 29).
[238] Sept. 12, 2017 Statement of Garry Mydlak (Aff. Pembroke, Tab 31).

151) Cpl. Mydlak would not permit Phillip to be released.[239] In 2011, he wrote to the RCMP:

> I intervened to prevent his release. I do recall some unknown member expressing the opinion that he (TALLIO) did not commit the crimes. I did not concur with this view…

Unrecorded Third Interrogation of Phillip Tallio—1937 p.m. to 2015 p.m.

152) At 1937 Cpl. Mydlak commenced his own interrogation of Phillip. He did not show his interrogation plan to Cst. O'Halloran, before or after.[240] At the top of the fifth page of Cpl. Mydlak's "planned interrogation notes"[241], which he did not prepare until May 10, 1983—almost three weeks after the interrogation and only when Crown counsel Deirdre Pothecary requested it,[242] Cpl. Mydlak wrote:

> *"USE OF "PLEASE" TELL ME THE TRUTH WORKED! AFTER 38 MIN."*

153) Cpl. Mydlak made this notation three weeks after the fact, that the use of the word "please" spurred Phillip to confess. He also stated that the tape recorder malfunctioned while he used it. This same recorder had functioned properly during the two exculpatory interrogations conducted by Cst. O'Halloran. Thus, the entire third interrogation was neither audio-recorded nor contemporaneously recorded by hand, including the alleged confession.[243]

154) PMr. Tallio maintains that at no time did he confess to Cpl. Mydlak.[244]

155) Three weeks after the *Tallio* "investigation" concluded, Cpl. Mydlak also wrote out what he called his "expanded notes" and a handwritten statement he claimed to have obtained from Phillip, which was then typed up to appear to read as if it was a

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[239] "Correspondence to Major Crimes Regarding Tallio Murder 1983 Prepared 10:51 HRS PDST Thursday 2011.04.07 (At no charge for my services)" (Aff. Pembroke, Tab 30).
[240] PH Allen O'Halloran, AB p. 270 (L. 25-30).
[241] Cpl. Garry Mydlak's "Planned Interrogation Notes" (Aff. Pembroke, Tab 22).
[242] Cpl. Garry Mydlak's letter to Deirdre Pothecary dated May 10, 1983 (Aff. Pembroke, Tab 29); AB, Garry Mydlak, p. 377 (L. 38-47), p. 378 (L. 1-6), p. 379 (L 1-33).
[243] PH Garry Mydlak, AB p. 325 (L. 30-47), p. 326 (L. 1-15).
[244] First Aff. Phillip Tallio, paras. 100, 102, 120. (Tab 42a)

verbatim transcript of the interrogation.[245] Cpl. Mydlak did not advise Cst. O'Halloran that the tape recorder had allegedly broken until sometime in May 1983.[246] There is no record that Cpl. Mydlak told anyone about the alleged malfunction until well after the "investigation" was over.

156) Then-Crown counsel Deirdre Pothecary's experiences with Cpl. Mydlak during *Tallio* and afterward caused her concern. Cpl. Mydlak refused to answer defence counsel Phillip Rankin's questions during a meeting, finally swiveling his chair and sitting with his back to now-Judge Pothecary and Mr. Rankin for the balance of their meeting.[247]

157) At trial Justice Davies found Phillip's alleged confession to Cpl. Mydlak to be involuntary and inadmissible.[248]

April 23, 1983—After the Mydlak Interrogation

158) The RCMP allowed Phillip, for the first time, to speak to counsel Ms. Pinder at 2130. Ms. Pinder was very concerned that Phillip did not understand what she was telling him. "He had very little affect in his tone. He was laconic. His responses were at times monosyllabic, and at times he did not respond at all. He made a comment about his girlfriend, which was unrelated."[249] Ms. Pinder wondered if Phillip had a mental deficiency.[250]

159) The RCMP also finally allowed Phillip to see his relatives Darlene Tallio and Alice Tallio who arrived at 2230 or 2330 after being turned away earlier.[251]

160) Cpl. Galenzoski and Cpl. Watson released security on the Mack's house back to

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[245] "Inculpatory warned handwritten and typed version statement of TALLIO taken by Cst. Mydlak on 83-04-24 @2016 hrs @ BELLA COOLA Detachment", (Aff. Pembroke, Tab 27). See also, PH Garry Mydlak, AB p. 377 (L. 38-47), p. 378 (L. 1-6), p. 379 (L. 1-33).
[246] PH Allen O'Halloran, AB p.280 (L. 31-36).
[247] First Aff. Deirdre Pothecary, paras. 7-8 (Tab 30).
[248] AB, p. 469.
[249] Aff. Leslie Pinder, para. 13 (Tab 29).
[250] Aff. Leslie Pinder, para. 14 (Tab 29).
[251] Aff. Darlene Tallio, para. 15 (Tab 37).

Sam and Gert at 2225.[252] At 2330 Cpl. Watson went off-shift.[253] This ended RCMP activity on April 23, 1983.

April 24, 1983

161) On April 24, 1983 Cpl. Watson, Cpl. Galenzoski, Cst. Hulan and Cst. O'Halloran processed exhibits. Cst. Hulan swore the Information charging Phillip with first degree murder.[254]

162) At 1044 Cpl. Mydlak took a statement from Nina Tallio. He took a "joint" statement from Ms. Bolton and Mr. Mack at 1141.

163) At 1215 the Prince Rupert Sub/Division officers departed Bella Coola and flew home. The investigation was over.

164) The only police statements taken on the date of the murder were from Phillip Tallio, Blair Mack, and Gert Mack. The next day the RCMP took a joint statement from Blair Mack and Lotta Bolton and Nina Tallio. Statements from Theresa Hood and Celestine Vickers were not obtained until months later. These were apparently the *only* statements obtained by the RCMP during the entirety of its investigation in 1983.

Transfer to and Appearances in Vancouver

165) On April 24, 1983, after Cst. Hulan swore the information charging Phillip with first degree murder, contrary to s. 218(1) of the *Criminal Code*. He then escorted Phillip by plane to Vancouver.[255]

166) A note typed by Paul Wilson in a May 5, 1983 letter to Gillian Chetty, indicates that on "25 April 1983" he was "informed that Phillip was being sent to Vancouver to appear for a show cause hearing and that recommendations would be made for a

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[252] Cpl. Watson, 1624 entries at 22:25 hrs, 22:27 hrs (Aff. Pembroke, Tab 24).
[253] Cpl. Watson, 1624 entry at 23:30 hrs, April 23, 1983 (Aff. Pembroke, Tab 24).
[254] Cpl. Watson 1624 entries, 6:55 hrs, 8:20 hrs April 24, 1983 (Aff. Pembroke, Tab 24); Information sworn by Cst. Hulan, AB p. 7; PH Hulan, AB p. 30, p. 6-11.
[255] ADM 503 – "Initiation Date 24 Apr 83: returnable date 25 Apr 83." (Aff. Pembroke, Tab 1).

psychiatric assessment."[256]

167) On April 25, 1983 at 0900 Phillip appeared, without a lawyer, in Courtroom 101 at 222 Main Street in Vancouver.[257] He was remanded to April 26 at 0900 in the same courtroom, the reason being "SAJ."[258]

168) At 1725 on April 25, 1983 Phillip was booked into the cells at 312 Main Street. A Booking Sheet note indicates he was in "Good health" but "Suicidal!", noting the scars on his wrists[259] which were a result of his suicide attempt a year beforehand.[260]

Dr. Murphy's First Assessment for Fitness and Judge Diebolt's Order

169) On April 25, 1983, between 1850 and 2030, forensic psychiatrist Dr. Emlene Murphy interviewed Phillip in a jail cell.[261] This was the first of *seven* assessments of his fitness to stand trial she would conduct on April 25, April 26, April 29, May 6, May 10, May 13, and May 17, 1983.[262]

170) On April 25, 1983 Dr. Murphy wrote two reports in relation to her first interview, a typed Jail Report and a handwritten Memorandum to Crown counsel Herb Weitzel. She noted that Phillip had been advised by "his defence lawyer" not to speak about the offence alleged against him.[263] Her Jail Report refers to twelve "Fitness Questions" that

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[256] Second Aff. Paul Wilson, entry dated "25 April 1983" in Wilson's May 5, 1983 letter to Gillian Chetty (p.18) (Rev. Aff. Tab 20).
[257] ADM 504 Adjournment Minute Sheet dated 25 Apr 83, courtroom 101 (Aff. Pembroke, Tab 2); ADM 503 – "Case History Card "Initiation Date 24 Apr 83," returnable date "25 Apr 83." (Aff. Pembroke, Tab 1).
[258] ADM 504 Adjournment Minute Sheet dated 25 Apr 83, Courtroom 101 (Aff. Pembroke, Tab 2).
[259] VPD Booking Sheet A (Aff. Pembroke, Tab 5); and Warrant Remanding a Prisoner, April 25, 1983 (Aff. Pembroke, Tab 6).
[260] First Aff. Phillip Tallio, para. 42 (Tab 42a); Fourth Aff. Phillip Tallio, para. 9. (Tab 42d)
[261] Dr. Murphy's April 25, 1983 Jail Report (Aff. Pembroke, Tab 7).
[262] Dr. Murphy's April 25, 1983 Jail Report (Aff. Pembroke, Tab 7); Dr. Murphy's April 25, 1983 Memorandum to Herb Weitzel (Aff. Pembroke, Tab 8); Dr. Murphy's May 17, 1983 Report to the Presiding Judge of the BC Provincial Court, p.2 (Aff. Pembroke, Tab 11); April 26 and 29, 1983 Assessment Notes at FPI (Aff. Pembroke, Tab 19); May 3, 1983 Psychological Evaluation at Riverview Hospital (Aff. Pembroke, Tab 16); May 6, 1983 Assessment Notes at FPI (Aff. Pembroke, Tab 19); and May 10, 1983 Psychiatric Interview, Ward Notes at FPI (Aff. Pembroke, Tab 17).
[263] Dr. Murphy's April 25, 1983 Jail Report, p. 3 (Aff. Pembroke, Tab 7).

she had put to Phillip and records his answers.[264]

171) Dr. Murphy had available to her a 1980 psychiatric assessment and a 1980 social work assessment of Phillip. She knew that Mr. Tallio had been seen by at least four other psychiatrists in the past and had sustained multiple head injuries.[265]

172) Dr. Murphy advised Mr. Weitzel that Phillp was not certifiable under *The Mental Health Act* but that he "may be mentally ill".[266] She noted that this mental illness possibility "could be ruled out if [the appellant] is remanded for a 30-day period at the Forensic Institute to":

a) review his old psychiatric evaluations
b) do psychological testing and assess his intelligence level
c) review the hospital records re: his head trauma
d) do a sexual history if this is appropriate.

173) Before Phillip appeared before Judge Diebolt on April 25, 1983, either the Crown alone, or an unidentified individual or court authority, had *already* decided that a 30-day psychiatric remand would be ordered.[267]

174) On April 26, 1983 at 0900, Phillip appeared in courtroom 101 at 222 Main Street.[268] The Ministry, who acted as Phillip's guardian, appointed Phillip Rankin as his counsel. One witness was called. The Adjournment Minute Sheet does not indicate who the witness was. The Crown counsel in attendance was Judith Bowers.[269]

175) Despite the fact that Dr. Murphy's April 25, 1983 interview of Phillip *already*

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[264] On May 6, 1983 Dr. Murphy noted that she had interviewed the appellant that day (May 6) "to obtain personal history and to review issue of fitness" and that the appellant had answered "all the questions accurately *as before*": FPI Assessment Notes, May 6/83. Emphasis added (Aff. Pembroke, Tab 19).
[265] Dr. Murphy's Memorandum to Herb Weitzel (Aff. Pembroke, Tab 8).
[266] Dr. Murphy's Memorandum to Herb Weitzel, p. 2 (Aff. Pembroke, Tab 8).
[267] Second Aff. Paul Wilson, entry dated "25 April 1983" in Wilson's May 5, 1983 letter to Gillian Chetty (p.18) (Rev. Aff Tab 20).
[268] ADM 504 Adjournment Minute Sheet dated 26 Apr 83, Courtroom 101 (Aff. Pembroke, Tab 3).
[269] ADM 504 Adjournment Minute Sheet dated 26 Apr 83, Courtroom 101 (Aff. Pembroke, Tab 3).

demonstrated that Phillip was fit to stand trial,[270] Judge Diebolt ordered the Executive Director of the Forensic Psychiatric Institute ("FPI") to receive Phillip into custody for observation and safe-keeping until May 24, 1983, on the basis that Judge Diebolt had reason to believe, supported by the evidence of Dr. Murphy, that Phillip "may be mentally ill".[271]

176) Judge Diebolt wrote a handwritten endorsement on the April 24, 1983 information sworn by Cst. Hulan as follows:

> Pursuant to section 465(1)(c) CCC the accused is remanded in custody for observation in the Forensic Psychiatric Institute at Port Coquitlam, BC, for period not to exceed thirty days, until May 24, 1983.

177) Judge Diebolt stamped this endorsement as a "Judge of the Provincial Court of British Columbia authorized to exercise the Jurisdiction conferred upon a Magistrate by Part XVI of the Criminal Code." [272]

178) The Adjournment Minute Sheet for the proceeding indicates that Mr. Tallio did *not* give consent to the 30-day remand.[273]

179) On April 26, 1983, an agent the Crown signed a Forensic Psychiatric Services Referral Form. Section F of the Forensic Psychiatric Services Referral Form, entitled "Request for Psychiatric Opinion On," indicates that a Request had been made for a Psychiatric Opinion on "Fitness to stand trial" but not on the "Existence of mental illness (including certifiability)" or "Mental state at time of offence." The next court date was scheduled for "May 24, 1983". Phillip appeared in court earlier, on May 19, 1983, without defence counsel being listed on the Adjournment Minute Sheet.[274]

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[270] First Aff. Dr. Roy O'Shaughnessy, Exhibit "A", p. 2-3 (Tab 28a).
[271] Remand By Order dated April 26, 1983 (Aff. Pembroke, Tab 10).
[272] Endorsed Information, stamped "April 26, 1983" (Aff. Pembroke, Tab 9).
[273] See ADM 504 Adjournment Minute Sheet dated 26 Apr 83, Courtroom 101 (Aff. Pembroke, Tab 3).
[274] Phillip would also appear in court on May 27 and June 3, 1983, with Mr. Rankin and Mr. McMurray listed as defence counsel. See, Affidavit of Mark Levitz sworn on May 19, 1983 (Aff. Pembroke, Tab 12); Warrant Remanding a Prisoner dated May 20, 1983 (Aff. Pembroke, Tab 13); ADM 504 Adjournment Minute Sheet for May 20, 1983 (Aff. Pembroke, Tab 4); FPI Assessment Notes, May 29, 1983 (Aff. Pembroke, Tab 19)

Transport to the FPI

180) Mr. Tallio was sent to the FPI on April 26, 1983. Dr. Murphy's notes from that date indicate that Phillip was "admitted for remand x 30 days *for fitness*".[275] A Nursing Assessment written by W.W. Nichol at the FPI indicates that the appellant "was remanded to May 24, 1983, for psychiatric assessment to ascertain *only* his fitness to stand trial".[276] The psychiatric report prepared for the court by Dr. Murphy on May 17, 1983 indicates that when the appellant was remanded into the FPI on April 26, 1983, a "psychiatric opinion was requested on the issue of fitness to stand trial".[277] Further, Dr. Murphy indicated that "during this current admission" (while at the FPI) "the examination focused primarily on the issue of fitness to stand trial".[278]

181) On April 30, G. E. Nelson received the Forensic Psychiatric Services Referral Form and "request for psychiatric opinion on 'Fitness to stand trial'.[279]

182) On May 3, Dr. William Koch interviewed Phillip. He reported that they talked about some of Phillip's behaviour "[l]eading up to the alleged offence" but that the appellant "refused to discuss any other aspects of the environment or his social interactions leading up to the alleged offence".[280]

183) On May 6, Dr. Murphy indicated that she had interviewed Phillip to obtain his personal history and "to review issue of fitness." She noted that he had answered all the fitness question "accurately as before".[281] On May 10, she conducted another interview of Phillip,[282]then another on May 13, then a final interview on May 17, 1983,[283] all concerning his fitness to stand trial.

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[275] April 26, 1983 FPI Assessment Notes (Aff. Pembroke, Tab 19).
[276] FPI Nursing Assessment, "Patient History," p.1 (Aff. Pembroke, Tab 18).
[277] Dr. Murphy's May 17, 1983 Report the Presiding Judge of the BC Provincial Court, p.1 (Aff. Pembroke, Tab 11).
[278] Dr. Murphy's May 17, 1983 Report the Presiding Judge of the BC Provincial Court, p.2 (Aff. Pembroke, Tab 11).
[279] FPI Assessment Notes dated April 30, 1983 (Aff. Pembroke, Tab 19).
[280] May 3, 1983 Psychological Evaluation by Dr. William Koch (Aff. Pembroke, Tab 16).
[281] May 6, 1983 FPI Assessment Notes (Aff. Pembroke, Tab 19).
[282] May 10, 1983 FPI Assessment Notes (Aff. Pembroke, Tab 19).
[283] Dr. Murphy's May 17, 1983 Report the Presiding Judge of the BC Provincial Court (Aff. Pembroke, Tab 11).

Dr. Robert Pos

184) Dr. Murphy asked Dr. Robert Pos to see Phillip for a second opinion[284] *after* she had found him fit to stand trial. She did not state the reason for requesting this second opinion, nor does she recall it today. Today, Dr. Murphy attests that this was generally not something that she would do.[285]

185) Dr. Pos moved to B.C. in 1982 and joined the Forensic Psychiatric Services Commission.[286] In 1983, despite the fact that he had no forensic training, Dr. Pos became Psychiatrist-in-Chief at the FPI. According to forensic psychiatrist Dr. Roy O'Shaughnessy, who knew Dr. Pos in his capacity as a forensic psychiatrist,[287]the state of forensic psychiatry in B.C. was "underdeveloped and quite chaotic" at the time.

186) Dr. O'Shaughnessy describes Dr. Pos's methods of assessing and providing opinions on patients as "objectively dangerous and unreliable."[288] For instance, Dr. Pos told Dr. O'Shaughnessy and others that he could determine whether someone was a psychopath by the way their carotid veins pulsed,[289] or the way that Dr. Pos's own hair stood up on the back of his neck when he was around them.[290] Dr. O'Shaughnessy notes that at times, Dr. Pos offered opinions about individuals without conducting an interview at all—a concern expressed by others as well.[291]

187) Dr. O'Shaughnessy was alarmed about Dr. Pos's conduct.[292] He was part of a group of members of the legal and psychiatric professions who made complaints against Dr. Pos to the B.C. College of Physicians and Surgeons following Dr. Pos's

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[284] May 10, 1983 FPI Assessment Notes (Aff. Pembroke, Tab 19).
[285] Dr. Murphy's Response Document (Respondent's Fresh Evidence Affidavits, Third Affidavit of Janet Dickie, Vol. 1, Tab 3, p. 5 ex. "L").
[286] Third Aff. Dr. O'Shaughnessy, para. 7 (Rev. Aff. Tab 13).
[287] Third Aff. Dr. O'Shaughnessy, para. 7 (Rev. Aff. Tab 13).
[288] Third Aff. Dr. O'Shaughnessy, para. 10 (Rev. Aff. Tab 13).
[289] Third Aff. Dr. O'Shaughnessy, para. 15 (Rev. Aff. Tab 13); Aff. James Watson Millar, para. 6 (Rev. Aff. Tab 10).
[290] Third Aff. Dr. O'Shaughnessy, para. 16 (Rev. Aff. Tab 13).
[291] Third Aff. Dr. O'Shaughnessy, para. 11 (Rev. Aff. Tab 13); Aff. James Watson Millar (Rev. Aff. Tab 10).
[292] Third Aff. Dr. O'Shaughnessy, para. 11 (Rev. Aff. Tab 13).

testimony in *R. v. Noyes*, 1986 CanLII 921 BCSC.[293]

188) Lawyer James Watson Millar recalls that, during a 1982 sentencing hearing for Mr. Millar's client, teenager Darcy Sidoruk, Dr. Pos testified that he interviewed Mr. Sidoruk for the purpose of a fitness assessment. "Dr. Pos alleged that during the brief interview Mr. Sidoruk made a short, unrecorded verbal statement which the Crown sought to tender in evidence," states Mr. Millar.[294] However, Mr. Sidoruk told Mr. Miller that Dr. Pos had never interviewed him—that he had never seen Dr. Pos before Dr. Pos appeared as a witness. "…Mr. Sidoruk's claim that Dr. Pos had never interviewed him was troubling to me at the time because Mr. Sidoruk seemed to be honest with me on all other matters." Mr. Sidoruk had made a full confession well before Dr. Pos's involvement.[295] Mr. Millar discussed and wrote a memo regarding these issues with Mr. Rankin before Mr. Tallio's trial.

The Anticipated Evidence of Dr. Pos

189) On May 17, 1983 Dr. Murphy wrote a psychiatric report for the presiding judge of the provincial court of BC, concluding that Phillip was "fit to stand trial". She wrote that "there was no evidence of psychotic thinking" and implied that the appellant did not suffer from a mental illness.[296]

190) Dr. Murphy maintains it was not typical of her to include another psychiatrist's second opinion in her report to the court.[297] However, she appended a letter Dr. Pos wrote to her, also dated May 17, to her report to the judge. [298]

191) In his letter, Dr. Pos claimed that on May 16, 1983, he interviewed Phillip "in excess of one hour" at the R3West nursing unit of the FPI "without anybody being present."[299] Significantly, the alleged interview was not audio-recorded, nor witnessed,

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[293] Third Aff. Dr. O'Shaughnessy, paras. 17-18 (Rev. Aff. Tab 13).
[294] Aff. James Watson Millar, para. 9 (Rev. Aff. Tab 10).
[295] Aff. James Watson Millar, para. 12 (Rev. Aff. Tab 10).
[296] Dr. Murphy's May 17, 1983 Report to the Presiding Judge of the BC Provincial Court, p.3 (Aff. Pembroke, Tab 11).
[297] Dr. Murphy's Response Document (Respondent's Fresh Evidence Affidavits, Third Affidavit of Janet Dickie, Vol. 1, Tab 3, p. 7 ex. "L").
[298] Pos letter, May 17, 1983, p.1 (Aff. Pembroke, Tab 11).
[299] Pos letter, May 17, 1983, p.1 (Aff. Pembroke, Tab 11).

and handwritten notes are nowhere to be found in the FPI file, which was disclosed by the FPI in full.

192) Phillip attests that he met with Dr. Murphy several times but that he never met with or was interviewed by Dr. Pos.[300]

193) In his letter to Dr. Murphy, Dr. Pos conveys that amongst the materials he reviewed with regards to the Tallio assessment included the RCMP's report to Crown counsel and the alleged, unrecorded confession to Cpl. Mydlak that would later be found involuntary and inadmissible.[301] Then, in his letter to Dr. Murphy, Dr. Pos inserted statements which he claims Phillip made to him on May 16. Dr. Pos noted Phillip's "general unwillingness to discuss the alleged crime and related matters" and that, prior to his interview with Phillip, the appellant "had just met with his defence counsel".[302]

194) Dr. Pos wrote that he had asked Phillip: "What are you thinking about right now?" which allegedly elicited replies—replies which were interpreted by trial counsel to be inculpatory.[303]

195) Dr. Pos also purportedly asked Phillip if he could help him understand why he "did this?" In reply, Phillip allegedly shook his head negatively and mentioned twice that his ancestors had told him to listen to his lawyer. Phillip did not offer up information about the charge against him except, purportedly, in response to Dr. Pos' questions.[304]

196) The appellant submits expert psychiatric evidence for the purpose of establishing the ethical and practice standards relating to fitness assessments generally, and specifically relating to Dr. Pos, and in the context of the appellant's cognitive state in 1983.

197) Four leading forensic psychiatrists have each assessed Dr. Pos's letter regarding

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[300] First Aff. Phillip Tallio, para. 105 (Tab 42a).
[301] Pos letter, May 17, 1983, p. 1. Dr. Pos writes: "…report to Crown; written statement, signed by the accused regarding the alleged crime" (Aff. Pembroke, Tab 11).
[302] Pos letter, May 17, 1983, p. 2 (Aff. Pembroke, Tab 11).
[303] First Aff. Deirdre Pothecary Aff at para. 11 (Tab 30); Aff. Phillip Rankin at para. 26. (Tab 31)
[304] Pos letter, May 17, 1983, p. 2-3 (Aff. Pembroke, Tab 11).

his alleged interview of Phillip. These forensic psychiatrists are Dr. O'Shaughnessy,[305] Dr. John Bradford, O.C.,[306] Dr. Graham Glancy,[307] and Dr. Stanley Semrau.[308] These psychiatrists made a number of findings setting out serious concerns regarding the veracity and inappropriateness of Dr. Pos's alleged interview of Phillip. They characterized Dr. Pos's letter as "highly atypical and unconventional, in some areas to an extreme and rather disturbing extent"[309] with inconsistencies "that are difficult to reconcile."[310] The forensic psychiatrists' analyses found that Dr. Pos's alleged fitness consultation was inappropriate and unethical, constituting "very disturbing" professional behaviour on the part of Dr. Pos by both today's standards and forensic psychiatry standards of 1983. The analyses found that the statements allegedly made by Phillip to Dr. Pos should *not* have been construed as inculpatory, as they were, and would be highly questionable in terms of their reliability.

The Preliminary Inquiry

198) After Phillip was discharged from the FPI, he was sent to Oakalla prison where he was held in custody before the preliminary inquiry and trial. His former youth correctional officer, Marie Spetch, visited him at Oakalla often. Mrs. Spetch recalls that Phillip "did not seem to fully understand the legal proceedings that were occurring in his case".[311]

199) On July 7 and 8, 1983, and August 8 and 9, 1983, a preliminary hearing was held before Judge Cunliffe Barnett at the Cedar Inn in Bella Coola, following which he was committed to stand trial.[312] Eighteen witnesses were called at the preliminary inquiry, 17 by the Crown and one by the defence. Part of the preliminary inquiry was approached as a *voir dire* directed at the admissibility of a statement Phillip allegedly made to Cpl.

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[305] First Aff. Dr. Roy O'Shaughnessy, Exhibit "A" (April 10, 2012 report) (Tab 28a).
[306] Aff. Dr. John Bradford, O.C., Exhibit "B" (March 24, 2015 report) (Tab 7).
[307] Aff. Dr. Graham Glancy, Exhibit "B" (January 21, 2015 report) (Tab 15).
[308] Aff. Dr. Stanley Semrau, Exhibit "A" (November 29, 2014) (Tab 32).
[309] Aff. Dr. Stanley Semrau, Exhibit "A", p. 10 (Tab 32).
[310] First Aff. Dr. Roy O'Shaughnessy, Exhibit "A", p. 6 (Tab 28a).
[311] Aff. Marie Spetch, para. 14 (Tab 34).
[312] First Aff. Deirdre Pothecary, para. 4 (Tab 30).

Mydlak. [313] This alleged statement was later ruled involuntary at the trial.

200) Phillip's former social worker, Colleen Burns, attended much of the preliminary hearing. She sat with Ms. Hood, who was pregnant with Phillip's daughter, Honey. "Phillip appeared to be more interested in communicating with Theresa the entire time than he was in the actual proceedings". "Phillip kept turning around, looking back at Theresa; waving at her, winking at her, smiling and making small gestures to her. It was as if Phillip did not know what he was doing there. He had a glazed-over look on his face, like he had had in Nanaimo. He seemed to be more distraught knowing that Theresa was there and in trying to talk to her than in anything happening around him." To Ms. Burns, Phillip did not seem to have a clue about what was going on.[314]

201) Judge Barnett expresses the same sentiment in his affidavit. During a flight in which the court party flew to Vancouver, Judge Barnett observed: "Phillip Tallio sat in the rear of the plane and was apparently happily engrossed reading the many childrens' comic books that Mr. Rankin had brought for him." According to Judge Barnett, Phillip was silent during the trip as he was during the entire preliminary hearing. "It seemed to me that Phillip Tallio was overwhelmed and did not comprehend the gravity of his situation" states Judge Barnett.[315]

The Trial

i. Dr. Koopman's Findings: "I put my voice in my pocket"

202) Before his trial, Phillip was transferred to the Pretrial Services Centre in Vancouver. He recalls meeting with forensic psychologist Dr. Peggy Koopman, who interviewed him three times over October 5, 11 and 13, 1983. Phillip maintained his innocence throughout her interviews with him.[316]

203) On October 17, 1983, Phillip's jury trial began in Prince Rupert before Justice William H. Davies. Defence counsel were Phil Rankin and Ellen Bond. Deirdre Pothecary continued as Crown Counsel.

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[313] AB, p. 429-436.
[314] Aff. Colleen Burns, para. 11 (Rev. Aff. Tab 3).
[315] Aff. Judge Cunliffe Barnett, para. 8 (Tab 4).
[316] Aff. Dr. Peggy Koopman, para. 18 (Tab 20).

204) Trial Crown Deirdre Pothecary, who had made her opening remarks on Oct. 26, 1983, attests that Dr. Pos was "[a]nother intended witness for the Crown".[317] In her first affidavit, now-Judge Pothecary states that she "anticipated" Dr. Pos would testify regarding certain statements purportedly made to him by Phillip.

205) Dr. Koopman interviewed Phillip in Prince Rupert during his trial three more times, on October 18, 19 and 20, 1983. Phillip maintained his innocence throughout these lengthy sessions as well.[318] Dr. Koopman includes her notes from these interviews in her affidavit.[319] They include messages to Phillip's trial counsel that Phillip was "completely confused"[320]; that the concepts in court were "too complicated, too abstract for him"[321] and that he could "only process short sequences of information."[322] Phillip conveyed to Dr. Koopman that his legal issues were "…the lawyer's problem, they'll take care of it." Phillip's expressed concerns were "immediate and physical, 'Lousy food, TV dinners, haven't had a crap in two days, any milk,' etc. This he can relate to."

206) Phillip conveyed to Dr. Koopman that when interrogated, he "put my voice in my pocket"[323] and did not inquire when he still did not understand concepts such as right to counsel at the time of trial.[324] Nor did he follow up when authority figures failed to respond to his questions. For instance, Dr. Koopman asked him why he just waited and did not ask for anything or to see anyone when he wanted to see his relatives in jail. Phillip responded, "Cause that's how it was before in Williams Lake when there was that trouble."[325] Dr. Koopman observed:

> *He has a rather blind faith that someone will come and rescue him. The greater the trouble the more likely he seems to think that it will be that help and care will be forthcoming. It is almost that as he sat in Bella Coola he was waiting for the*

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[317] First Aff. Deirdre Pothecary, para. 10 (Tab 30a).
[318] Aff. Dr. Peggy Koopman, para. 18 (Tab 20).
[319] Aff. Dr. Peggy Koopman, paras. 11-21 (Tab 20).
[320] Aff. Dr. Peggy Koopman, para. 13 (Tab 20).
[321] Aff. Dr. Peggy Koopman, para. 14 (Tab 20).
[322] Aff. Dr. Peggy Koopman, para. 20 (Tab 20).
[323] Aff. Dr. Peggy Koopman, para. 16 (Tab 20).
[324] Aff. Dr. Peggy Koopman, paras. 12, 15 (Tab 20).
[325] Aff. Dr. Peggy Koopman, para. 11 (Tab 20).

Mommy who will come and make it all better, or at least make it all go away[326]*.*

207) Dr. Koopman states that during her first interview with Phillip, Mr. Rankin was present for a brief period of time. According to Dr. Koopman, Phillip asked Mr. Rankin several questions and Mr. Rankin tried to explain the situation logically and simply, but she thought that Phillip still did not understand the answers. In her report to Ms. Bond, Dr. Koopman wrote:

> *This was the first of many times I was to stop and restructure the question and the answer in a form that was of an appropriate cognitive and linguistic level for Phillip's understanding. Once this foundation was formed, Phillip and I were then able to communicate very directly and he acted much more secure.*
>
> *Understanding what I said and understanding what it meant to him meant that he did not have to be fearful or suspicious of unexpected outcomes. This suspiciousness stemming from uncertainty seems to be what results in him shutting out questions and refusing to respond when he feels pressed to speak.*
>
> *Phillip emphasized many times that he often does not understand what people really want to know when they ask questions. He tries to answer their questions in a very general way hoping to capture at least some of what they want to know, but feels uncertain as to whether it is successful or not. He is unable to evaluate their reactions to his verbal statements.*
>
> *As a result he often finds it easier not to speak, or to speak very little. He is also inclined to be so preoccupied with understanding the question, that the exactness of consequences of his response to it are lost, and he tries to satisfy the listener by giving a response that will be accepted and thus stop the questioning.*[327]

ii. The Voir Dire

208) A *voir dire* took place between October 18 to 26, 1983,[328] to address the admissibility of the exculpatory, audio recorded statements to Cst. O'Halloran and the unrecorded confession to Cpl. Mydlak. Dr. Koopman provided expert evidence during the *voir dire* as to Phillip's cognitive limitations, as did Mr. Wilson.[329] Cst. Hulan, Cst. O'Halloran, Ms. Pinder, Cpl. Watson, Cpl. Mydlak, jail guards Wallis Stiles and Ian

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[326] Aff. Dr. Peggy Koopman, para. 14 (Tab 20).
[327] Aff. Dr. Peggy Koopman, para. 17 (Tab 20).
[328] ROP Oct. 18-26, 1983, AB pp. 444-455.
[329] Second Aff. Paul Wilson, para. 24 (Rev. Aff. Tab 20).

Trepanier, and Darlene Tallio also testified.

iii. October 28 thru November 1, 1983 – Plea Negotiations and the Plea

209) Justice Davies gave his *voir dire* decision on October 28, 1983,[330] ruling that Phillip's exculpatory morning statement to Cst. O'Halloran was voluntary and admissible but that his exculpatory evening statement to Cst. O'Halloran and his alleged confession to Cpl. Mydlak were involuntary and inadmissible.[331]

210) Justice Davies accepted that Phillip "apparently has a functioning level of a child ten to twelve years of age."[332]Justice Davies held: "His actions, or lack of action, his responses to the questions of the police officers, his weak-at times inaudible, answers to the questions would seem to confirm Dr. Koopman's opinion."[333]

211) The court reporter, Jeffrey Cairns, echoes Justice Davies' description of Phillip's immaturity. He recalls that Phillip was upset about missing Halloween due to the trial. He witnessed some sheriffs who took pity on Phillip and gave him Halloween candy.[334]

212) At the end of the court day on Friday, October 28, 1983 the trial was recessed to the following Monday morning, October 31.[335]

Recollections Regarding the Plea

213) Mr. Rankin states that he gave "anxious consideration" to the evidence before proposing to the appellant that weekend that he *should* consider a guilty plea.[336] Mr. Rankin deposed that he explained to the appellant that the *voir dire* ruling was "a very important ruling" but "the Pos statement was still a problem".[337]

214) In her first affidavit, now-Judge Pothecary states that she "anticipated" Dr. Pos would testify regarding certain statements purportedly made to him by Phillip.

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[330] ROP Oct. 28, 1983, AB, p. 459.
[331] *R. v. Tallio*, [1983] B.C.J. No. 258, paras. 18 and 19; Aff. Phillip Rankin, para. 29 (Tab 31).
[332] *R. v. Tallio*, [1983] B.C.J. No. 258, para. 14.
[333] *R. v. Tallio*, [1983] B.C.J. No. 258, para. 14.
[334] Aff. Jeffrey Cairns, para. 12 (Tab 5).
[335] ROP Oct. 28, 1983, AB, p. 459.
[336] Aff. Phillip Rankin, para. 35 (Tab 31).
[337] Aff. Phillip Rankin, para. 32 (Tab 31).

215) As far as the Crown was concerned, Justice Davies' ruling severely weakened its case against the appellant. As mentioned above, Ms. Pothecary intended to call Dr. Pos to testify, to recall what the Crown considered to be "inculpatory statements" Phillip had allegedly made to Dr. Pos at the FPI on May 16, 1983 ("the Pos statement").[338] If the Pos statement had been the subject of a voluntariness *voir dire* and been ruled inadmissible as a result, the Crown believed that Phillip "would have likely been acquitted."[339] If, on the other hand, the Pos statement was ruled admissible, the Crown believed that Phillip would have been convicted of first degree murder.[340]

216) Mr. Rankin states that he believed that the Crown's case "remained very strong and that a conviction was likely, especially if the Pos statement was tendered by the Crown".[341]

217) Mr. Rankin states that he suggested to the appellant the possibility of asking the Crown to accept a plea to second degree murder. He states that he explained to Phillip "what this would mean" (i.e. assuming the Crown agreed with the proposal) and that he "took verbal instructions" from the appellant, allowing himself (Mr. Rankin) to explore with Ms. Pothecary the potential disposition of the case by way of a plea to second degree murder and 10-year parole eligibility.[342]

218) Phillip states that Mr. Rankin did *not* explain what a "guilty plea" meant[343] and that he did not tell him that he thought the Crown might accept a plea to second degree murder.[344] He asserts that he did not give Mr. Rankin instructions to plead guilty so that he would be in prison for less time than if he was convicted of first-degree murder.[345]

219) The affidavits of Phillip and Mr. Rankin materially differ concerning these discussions and the events preceding the entry of the guilty plea on November 1, 1983.

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[338] First Aff. Deirdre Pothecary, para. 11 (Tab 30).
[339] First Aff. Deirdre Pothecary, para. 13 (Tab 30).
[340] First Aff. Deirdre Pothecary, para. 13 (Tab 30).
[341] Aff. Phillip Rankin, para. 35 (Tab 31).
[342] Aff. Phillip Rankin, paras. 32-33 (Tab 31).
[343] Fourth Aff. Phillip Tallio, paras. 21-23, 28, 38 (Tab 42d).
[344] Fourth Aff. Phillip Tallio, para. 37 (Tab 42d).
[345] Fourth Aff. Phillip Tallio, para. 42 (Tab 42d).

220) Mr. Rankin states that he turned his mind to the evidentiary implications of the Pos statement. He was reluctant to challenge its admissibility because, "based on the law then in force," he believed he would have likely lost his challenge and, in turn, his bargaining position.[346]

221) Mr. Rankin does not indicate what law he had in mind but he says it was "always his intention to challenge the admissibility of the Pos statement" and he "made it clear to the Crown that he would be challenging the admissibility of the Pos statement."[347] He goes on to say that Ms. Pothecary was uncertain of the admissibility of the Pos statement, and her uncertainty gave him a "bargaining chip"—the "main bargaining chip"—to induce her "to enter into plea negotiations."[348]

222) Ms. Pothecary recalls that on Monday, October 31, 1983 Mr. Rankin asked her to consider accepting a plea to second degree murder with minimum parole eligibility at ten years.[349] Mr. Rankin had written to the Crown that "the defence"offered her the plea on Tuesday, November 1, which she accepted "on November 2nd".[350]

223) Mr. Rankin states that he met again with the appellant to explain to him "what was happening."[351] Mr. Rankin states that, not until he had confirmed with the appellant that he (Phillip) was "still willing and prepared to enter a guilty plea," and not until Mr. Rankin had obtained written instructions, did he agree to plea bargain with the Crown.[352]

224) Due to the "significant risk" that Phillip would have been acquitted if the Dr. Pos statements were found to be inadmissible and partly due to Phillip's youth, the Crown accepted the plea bargain.[353] Later on November 1, 1983, Mr. Rankin entered a plea of

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[346] Aff. Phillip Rankin, para. 70 (Tab 31).
[347] Aff. Phillip Rankin, paras. 42 and 65 (Tab 31).
[348] Aff. Phillip Rankin, paras. 42 and 65 (Tab 31).
[349] Letter from Deirdre Pothecary to Phillip Rankin dated November 7, 1983, attached to First Aff. Deirdre Pothecary as Exhibit "F" (Tab 30).
[350] Letter from Phillip Rankin to Deirdre Pothecary dated November 7, 1983, attached to First Aff. Deirdre Pothecary as Exhibit "E" (Tab 30).
[351] Aff. Phillip Rankin, para. 43 (Tab 31).
[352] Aff. Phillip Rankin, para. 43 (Tab 31).
[353] First Aff. Deirdre Pothecary, para. 15 (Tab 30).

guilty to second degree murder on behalf of Mr. Tallio[354] Mr. Tallio did not say anything in court, "I did not know that I could say anything."[355]

225) Dr. Koopman attests that in her discussions with Phillip, "he thought that the sooner he went to prison, the more likely it would be that he could go home for Christmas." Christmas passed, and then New Years. On January 26, 1984, Mr. Tallio was sentenced to life in prison with parole eligibility at ten years.

Mr. Tallio's Understanding of What Transpired

226) Though Phillip recalls that Mr. Rankin "scared" him, the 17-year-old *trusted* Mr. Rankin because he was "the lawyer."[356] Phillip himself did "not understand much of what was going on" but he believed that Mr. Rankin would "take care of things, and this whole mess would be over if I just did what he said."[357] Dr. Koopman's observations while assessing Phillip that he had a "rather blind faith that someone will come and rescue him"; to "make it all better, or at least make it all go away"[358] supports Phillip's submission and his submissiveness—Mr. Rankin was that someone whom Phillip depended on to rescue him.

227) According to Phillip, on the day the guilty plea was entered, Mr. Rankin came to his cell before court began. He told Phillip that "there was going to be something coming up in court that afternoon, and we were going to go along with it." The then-17-year-old does not recall his lawyer asking him what he wanted to do. Rather, Mr. Rankin *told* the Phillip "what we were going to do."[359] Leslie Pinder, the lawyer whom the RCMP refused to allow Phillip to speak to until after 2100 on April 23, 1983, recounts a similar experience with Mr. Rankin. When she met with Mr. Rankin in Prince Rupert before testifying in the voir dire, Ms. Pinder was "taken aback by his behaviour. Mr. Rankin did not *ask* me what happened. Rather, he *told* me what happened. He said, "*This* is what

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354 First Aff. Phillip Tallio, para. 114 (Tab 42a); Aff. Phil Rankin, para. 45 (Tab 31).
355 First Aff. Phillip Tallio, para. 114 (Tab 42a).
356 First Aff. Phillip Tallio, para. 104 (Tab 42a); Fourth Aff. Phillip Tallio, para. 20 (Tab 42d).
357 First Aff. Phillip Tallio, para. 108 (Tab 42a).
358 Aff. Dr. Peggy Koopman, para. 14 (Tab 20).
359 First Aff. Phillip Tallio, para. 111 (Tab 42a).

happened, isn't it. *This* is what went on."[360]

228) According to Phillip, after court commenced, Mr. Rankin told the judge that Phillip was pleading guilty. Phillip did not know what it meant to "plead guilty", but he did not think anything of it. As supported by the evidence of Dr. Koopman, to the 17-year-old with the mental capacity of a 10 to 12-year-old child, court was "the lawyer's problem, they'll take care of it".[361] To Phillip, on November 1, 1983, his lawyer Mr. Rankin was just doing his legal thing as usual, using "legal jargon"[362] and "legalese terms and sentences" which Phillip ignored.[363] To Phillip, November 1, 1983 was just another boring day stuck in court where lawyers used language he did not understand.

229) Phillip states that he did not say anything in court and that he did not know he was allowed to say anything. [364]

230) Phillip was unaware that "pleading guilty" meant that he was admitting to raping and killing his cousin Delavina Mack.[365] Phillip states that he was also unaware that his fight against the murder charge was over. He did not know that the trial was actually over until months later, just before the sentencing hearing which occurred on January 26, 1984. Only when the guards told Phillip that he was going to be sent to protective custody did the he realize the trial was actually over. "[A]nd that is why I told the guards to tell Mr. Rankin that he was fired. I was so angry that he had not let me tell the judge and the jury my side of the story that I refused to see him" recalls Phillip.[366] His statement is supported by the objective contemporaneous evidence of Mr. Rankin's own note to Ms. Pothecary dated January 25, 1984.[367] Mr. Rankin wrote:

> To DEIRDRE Re TALLIO
>
> TALLIO is refusing to come out of his cell to talk to me. The guards said he wants to fire me. I asked him to come and see me he refused and told the guards to

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[360] Aff. Leslie Hall Pinder, para. 18 (Tab 29).
[361] Aff. Dr. Peggy Koopman, para. 14 (Tab 20).
[362] First Aff. Phillip Tallio, para. 112 (Tab 42a).
[363] Fourth Aff. Phillip Tallio, para. 48 (Tab 42d).
[364] First Aff. Phillip Tallio, para. 114 (Tab 42a).
[365] First Aff. Phillip Tallio, para. 112 (Tab 42a).
[366] Fourth Aff, Phillip Tallio, para. 52 (Tab 42d); See also First Aff., Phillip Tallio, paras. 115-116 (Tab 42a).
[367] This note is attached to Judge Pothecary's First Affidavit as Exhibit "H" (Tab 30).

> "Fire me." I will be there tomorrow call me at home if you want further information.

231) Phillip maintains that he had told his lawyer that he did not kill Delavina after his meetings with Dr. Koopman (which took place in October,1983). The fact that Phillip continued to maintain his innocence to Mr. Rankin at the time of the trial is supported by the evidence of social worker Paul Wilson, who testified during the voir dire at the preliminary inquiry about the appellant's mental and social disposition. In his affidavit, Mr. Wilson states that he spent quite a lot of time with Mr. Rankin and Ms. Bond in Prince Rupert. They stayed at the same hotel and shared meals together.[368] Mr. Wilson states: "Mr. Rankin told me that in his conversations with Phillip, Phillip was sticking to his position that he was innocent. I recall this with strong certainty; that Phil Rankin told me Phillip said he was innocent."[369] Phillip's continued assertion of innocence during his trial is not consistent with a sudden desire to plead guilty nine days into trial. It *is* consistent with his submission that he never wished to admit to the elements of the offence via a guilty plea.

232) During his sentencing hearing, Phillip did not know that he was allowed to say anything in court. No one asked him any questions.[370] After the sentencing hearing was over, Mr. Rankin told his 17-year-old client: "At least you will still be young when you get out."[371]

233) Phillip remained in prison until January 2020, when this Court granted his bail aplication. Following from the plea deal Mr. Rankin made with the Crown, Phillip could have been released on full parole in 1993. However, because Phillip refuses to admit guilt to an offence he maintains he did not commit, the Parole Board of Canada has continuously denied him parole.[372]

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[368] Second Aff. Paul Wilson, para. 26 (Rev. Aff. Tab 20).
[369] Second Aff. Paul Wilson, para. 28 (Rev. Aff. Tab 20).
[370] First Aff. Phillip Tallio, para. 117 (Tab 42a).
[371] First Aff. Phillip Tallio, para. 118 (Tab 42a).
[372] First Aff. Phillip Tallio, paras. 124-125; 127, 129-131, 134-147; 154-157; 162-168; 172 (Tab 42a); Fourth Aff. Phillip Tallio, para. 53 (Tab 42d). See also, Rachel Barsky & Adam Blanchard, *Preventing Parole: The Effect of Innocence Claims on Parole Eligibility*, 2018 CanLIIDocs 312.

PART II: ISSUES (Revised)

I. DNA: There is fresh evidence relating to DNA analysis that excludes the appellant from being the perpetrator.

II. Jurisdiction: The Court had no jurisdiction to order the appellant into a 30-day psychiatric remand so legal proceedings involving the appellant at the time were a nullity, and evidence derived from the order was inadmissible.

III. Dr. Pos: The anticipated evidence of Dr. Pos was inadmissible;

    a. Once the appellant was found to be fit, the anticipated evidence from Dr. Pos became inadmissible as a matter of law and/or policy.

    b. In the circumstances, Dr. Pos was a person in authority.

IV. The Plea and Ineffective Assistance: There was a miscarriage of justice concerning the appellant's plea;

    a. The plea was uninformed due to ineffective assistance of counsel.

        i. Objective test: The appellant's trial counsel was ineffective because he did not properly evaluate the anticipated evidence of Dr. Pos.

        ii. Subjective test: Had the appellant been advised of the inadmissibility of the Pos evidence he would not have entered into plea negotiations.

V. Inadequate Investigation: There was a miscarriage of justice because the investigation into the murder of Delavina Mack was inadequate and fresh evidence points to a reasonable probability that others perpetrated the crime and covered it up.

PART III: ARGUMENT

Miscarriage of Justice – Conceptually

234) This Court is delegated to review convictions and allow the appeal on "on any ground there was a miscarriage of justice". Sections 686(1)(a)(i) and (ii) permit a court to find that a "verdict" or "judgment of the trial court" may be set aside. In this case there was no verdict or judgment. As a guilty plea was entered nine days into trial, there was no "verdict" on "the evidence" and no "judgment" on "a question of law". The appellant does not allege the trial judge erred in accepting his plea and entering a conviction.

235) Parliament recognized that other circumstances would arise to produce a miscarriage of justice and did not limit review of those circumstances to where there was a "verdict" or "judgment" supporting the conviction. Instead Parliament provided the authority to allow appeals against all convictions, "on any ground there was a miscarriage of justice", because allowing convictions to stand in the face of a miscarriage of justice was contrary to the interests of justice (*R. v. Truscott*, 2007 ONCA 575).

236) The grounds of appeal are predicated on a number of complex legal areas. With respect to issues concerning DNA, the appellant's cognitive capacity, and assessing the investigation, there is fresh evidence which must be assessed by the Court. With respect to issues concerning the evidence of Dr. Pos and actions of the appellant's trial counsel, the law regarding ineffective assistance of counsel must be evaluated and applied. With respect assessing jurisdiction and admissibility, the Court will need to examine the law and procedure as it applied more than 36 years ago, just after the birth of the *Charter*.

237) Overarching all of these issues is the concept of withdrawal of a guilty plea. Before delving into each issue, the appellant will canvas the law, generally, with respect to withdrawal of plea and fresh evidence.

Withdrawal of Guilty Plea – Generally

The traditional approach to applying to withdraw a plea

238) To be valid, a plea of guilty must be voluntary, unequivocal and informed: *R. v.*

Girn, 2019 ONCA 202, at para. 50; R. v. *Wong*, 2018 SCC 25 at para. 3; *R. v. Quick*, 2016 ONCA 95, 129 O.R. (3d) 334, at para. 4.

239) In *Adgey v. R.*, [1975] 2 S.C.R. 246, the majority of the Court rejected the proposition that the bases upon which guilty pleas could be properly withdrawn are restricted (p.431):

> This Court in *Regina v. Bamsey*, [1960] S.C.R. 294 at 298, 32 C.R. 218, 30 W.W.R. 552, 125 C.C.C. 329, held that an accused may change his plea if he can satisfy the appeal court "that there are valid grounds for his being permitted to do so." It would be unwise to attempt to define all that which might be embraced within the phrase "valid grounds"….

240) Justice Doherty confirmed in *T.(R.)*, at para. 10, that no "finite list" of all valid grounds can be provided. This court has held that the "basis upon which a change of plea may be allowed, or denied, will depend upon the situation which prevails in each case."[373]

241) Valid grounds for withdrawing a plea are <u>not</u> limited to invalidity of the plea itself. This was recognized by the SCC in *R. v. Taillefer; R. v. Duguay*, 2003 SCC 70 at paras.85-86*:*

> The appellant Duguay's case presents an additional difficulty. It requires that this Court identify the test that applies when an accused seeks to withdraw his or her guilty plea on the ground of the discovery of fresh evidence that was not disclosed by the prosecution. <u>In *Adgey, supra*, this Court held that an accused may change his plea if he is able to persuade the appellate court "that there are valid grounds for his being permitted to do so" (p. 431). This Court, however, did not think it appropriate to exhaustively define the grounds that could justify withdrawing a guilty plea</u>. Nonetheless, in *R. v. T. (R.)* <u>(1992), 10 O.R. (3d) 514</u> (Ont. C.A.), Doherty J.A. of the Ontario Court of Appeal reiterated the requirements that must be met in order for a guilty plea to be valid, as follows, pointing out that the plea must be voluntary and unequivocal, and based on sufficient information concerning the nature of the charges against the accused and the consequences for the accused of a guilty plea (at p. 519):
>
> > To constitute a valid guilty plea, the plea must be voluntary and unequivocal. The plea must also be informed, that is the accused must be aware of the nature of the allegations made against him, the effect of his

[373] *R. v. Meers*, 1991 CarswellBC 1173 64 C.C.C. (3d) 221 (BCCA) at para. 17.

> plea, and the consequence of his plea.
> (See also *L. (T.P.)*, *supra*, at p. 371.)
>
> However, even if the requirements for validity are met, a guilty plea may be withdrawn in the event that the accused's constitutional rights were infringed. Those rights cannot be ignored in assessing the accused's legal situation. [emphasis added]

242) In *R. v. Kumar*, 2011 ONCA 120, the Ontario Court of Appeal also recognized that an application to withdraw a guilty plea may be allowed even where the plea itself was valid:

> As this court explained in *R. v. Hanemaayer* (2008), 234 C.C.C. (3d) 3 (Ont. C.A.) and *R. v. T. (R.)* (1992), 10 O.R. (3d) 514 (Ont. C.A.), even though an appellant's plea of guilty appears to meet all the traditional tests for a valid guilty plea, the court retains a discretion, to be exercised in the interests of justice, to receive fresh evidence to explain the circumstances that led to the guilty plea and that demonstrate a miscarriage of justice occurred. [emphasis added]

243) In *Kumar,* there was both an explanation of the circumstances of the guilty plea ("process evidence") and fresh evidence related to the elements of the offence ("substantive fresh evidence"). The sub-ground under s.686(1)(a)(iii) was referred to as an "unreasonable conviction", as opposed to an unreasonable "verdict" for the purpose of s.686(1)(a)(i), as there was no verdict following a trial. This court may also set aside a guilty plea where the interests of justice so require.[374]

244) This Court may also set aside a guilty plea to prevent a miscarriage of justice: *Meers* at para. 14; *R. v. T. (G.)*, 2003 BCCA 1 at para. 17; and *R. v. Sullivan*, 2004 BCSC 683 (SC) at para. 38 (miscarriage within the terms of s.686(1)(a)(iii)).

245) In *R. v. Miller*, 2019 BCCA 78, Justice Fitch summarized the law regarding validity of guilty pleas following the Supreme Court's findings in *Wong.* Justice Fitch held at para. 3:

> In *R. v. Wong*, 2018 SCC 25 (S.C.C.), the Supreme Court of Canada confirmed that

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[374] *R. v. Jawbone*, [1998] M.J. No. 235 (NBCA) at para. 6; *R. v. Fraser*, 1971 CarswellBC 249, 5 C.C.C. (2d) 439 (CA) at paras. 17 and 20; *R. v.Meers*, 1991 CarswellBC 1173 (BCCA) at para. 15; *R. v. Malone*, 1997 CarswellBC 572 (BCSC) at para. 11 ("unjust to uphold the plea"); *R. v. Read* (1994), 47 B.C.A.C. 28; *R. v. Joseph*, 2000 BCSC 1891 at para. 49.

> for a guilty plea to be valid, it must be voluntary, unequivocal and informed. To be informed, the accused must be aware of the nature of the allegations, the effect of the plea, and the consequences of the plea, including the "legally relevant collateral consequences" that flow from the conviction and impact serious interests of the accused. In addition, accused persons who seek to withdraw their guilty plea on the basis that they were unaware of legally relevant consequences when the plea was entered must establish a reasonable possibility that they would have proceeded differently had they been informed of those consequences.

246) In *Wong*, the Supreme Court declined to delve further into the meaning of "legally relevant collateral consequences" though it endorsed a "broad approach" in evaluating the relevance of collateral consequences in determining whether a guilty plea was sufficiently informed.[375] However in *Miller*, this Court followed its own finding in *R. v. Wong*, 2016 BCCA 416 that the "collateral consequences of a guilty plea" "is broad enough to encompass a wide variety of actual and potential penalties, disentitlements and disabilities ranging 'from the proximate to the remote, the serious to the trivial and the foreseeable to the unforeseeable.'"[376]

247) The Supreme Court also did not delve into detailed definitions of equivocality or voluntariness. In *R. v. Hobbs*, 2018 BCCA 250, this Court held at paragraph 12: "a guilty plea involves an unequivocal acknowledgment of the legal elements of the offence" and that "A guilty plea is presumed to be a voluntary admission of the elements of the offence made with a proper appreciation of its significance and consequences." At paragraph 15 of *Hobbs*, this Court also held that in addition to being a formal admission of guilt, a valid guilty plea "constitutes waiver of an accused's right to require the Crown to prove its case beyond a reasonable doubt and the related procedural safeguards".

Application to Appeal

248) With respect to the issues advanced in this appeal, the appellant submits that both the miscarriage analysis (*Kumar/Taillefer*) and the traditional analysis (*Adgey/Wong*) apply. The *Kumar/Taillefer* miscarriage analyses applies to all of the grounds of appeal, but for the uninformed plea ground, to which the *Adgey*/*Wong*

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[375] *R. v. Wong*, 2018 SCC 25, paras. 9, 74.
[376] *Miller*, para. 42.

analysis applies.

Fresh Evidence – Generally

249) This appeal presents a wide array of fresh evidence across a number of categories: 1) Evidence that amplifies what transpired in 1983 relating to the incident; 2) Evidence concerning what occurred during the investigation in 1983; 3) Evidence that expands on what transpired during the legal proceedings in 1983 and 1984; 4) Evidence relating to DNA; 5) Evidence relating to Phillip's cognitive capacity and relative ability to understand matters.

250) As noted above, and as outlined in the reasons granting the extension of time in this case, the development of the issues in this case occurred over an extensive period of time. As such, there is clearly a much wider amount of fresh evidence than might normally be presented in a typical fresh evidence appeal, especially given the paucity of formal records that were destroyed or are missing (unavailable). That said, the volume of fresh evidence material presented is necessary in this case to provide a full picture to the Court to enable a transparent understanding of what transpired in 1983 and afterward in a broad sense, as well as to explain the passage of time and provide a general narrative.

251) Much of the fresh evidence in this case was gathered through the UBC Innocence Project, a clinic at the Allard School of Law from 2009 to 2016. The notice of appeal was filed on November 30, 2016. As such, this means that there are differing levels of detail and references to facts in the materials presented, and some affidavits contain hearsay. The appellant requests this Court's forbearance in terms of assessing the evidence contained in the various affidavits. Much like one cannot expect a perfect trial, as is often said by this Court, one can also not expect a perfect record in an appeal occurring 37 years after the trial. In the case management phase of this appeal, it became apparent that the Crown had some issues with hearsay contained in various affidavits. In the circumstances, the appellant agreed to reference specific portions of affidavits that the appellant submits are admissible.

252) That said, it is submitted that this is an appropriate case where the rules of evidence should be attenuated. Further, there is an important cultural component and

context in assessing the issues and evidence in this case. The Nuxalk Nation is a remote Indigenous band that had (and it appears, still has) significant communication and trust issues with the non-Indigenous community. This context cannot be ignored in terms of assessing the evidence. Thus, the appellant suggests that the concept of strict admissibility of evidence should be "approached and adapted in light of the evidentiary difficulties inherent in adjudicating aboriginal claims."[377] As well, the fairly recent evolvement of the understanding of the impact of intergenerational issues concerning Indigenous persons and the legal system are also germane. Accordingly, the appellant has presented the affidavit and research of Dr. Bruce Granville Miller to provide a cultural and historical context for the Court's consideration.

253) The rules (*Palmer* test) surrounding the admission of fresh evidence have been canvassed numerous times by this Court. The most recent case canvassing fresh evidence in detail from this Court (as of July 15, 2019) was *R. v. Ball*, 2019 BCCA 32:

> [100] Subsection 683(1) of the *Criminal Code* authorizes this Court to receive fresh evidence where it is in the interests of justice to do so. Pursuant to the test articulated in *R. v. Palmer (1979), [1980] 1 S.C.R. 759 (S.C.C)*, in addition to the requirement that fresh evidence comply with general rules of evidence, the relevant criteria considered on an application to adduce fresh evidence on appeal are as follows (at 775):
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> > (1) The evidence should generally not be admitted if, by due diligence, it could have been adduced at trial provided that this general principle will not be applied as strictly in a criminal case as in civil cases: [citation omitted];
> >
> > (2) The evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue in the trial;
> >
> > (3) The evidence must be credible in the sense that it is reasonably capable of belief; and
> >
> > (4) It must be such that if believed it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result.

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[377] *Delgamuukw v. British Columbia*, [1997] 3 SCR 1010, 1997 CanLII 302 (SCC) at para 105.

[102] Where a miscarriage of justice is alleged, the applicable procedure is as described in *R. v. Stolar*, [1988] 1 S.C.R. 480. The fresh evidence application should be heard and, unless the fresh evidence is obviously inadmissible, the court should reserve judgment on the application. If the court ultimately determines that the fresh evidence could reasonably have affected the result, it should admit the fresh evidence and allow the appeal. On the other hand, if the court determines that the fresh evidence could not reasonably have affected the result, it should dismiss both the fresh evidence application and the miscarriage of justice ground of appeal.

[103] However, where ineffective assistance of counsel is a ground of appeal, the *Palmer* test and the *Stolar* procedure are modified. In such cases, the appellate court is asked to admit fresh evidence for the purpose of considering an issue that was not considered below: *R. v. Aulakh*, 2012 BCCA 340 at para. 59. In these circumstances, the fresh evidence relates to the integrity of the trial process itself, not to a substantive factual or legal issue decided at the trial level. Accordingly, as Justice Smith explained in *Aulakh*, the due diligence criterion is relaxed and the court may admit the fresh evidence in the interests of justice for the limited purpose of assessing the professional incompetence allegations:

> [64] Thus, fresh evidence directed to a new issue on appeal relating to the integrity of the trial process (rather than a substantive issue adjudicated at trial) will be admissible for the limited purpose of assessing the allegation of ineffective representation of counsel if it: (i) complies with the rules of evidence; (ii) is relevant to the new issue; and (iii) is credible. If the fresh evidence also relates to a substantive factual or legal issue adjudicated at trial, the *Palmer* due diligence criteria may be relevant. It goes without saying that the fourth *Palmer* criterion, the expectation that the fresh evidence would affect the result, is addressed by the parallel prejudice component of the test for ineffective assistance of counsel.

[104] The modified *Palmer* test and *Stolar* procedure apply on a case-sensitive basis whenever fresh evidence is directed to matters that go to the integrity of the trial process or to a request for an original remedy: *Hamzehali* at para. 35.
…

This court may exercise its discretion in the interests of justice to receive fresh evidence to explain the circumstances leading up to a guilty plea that may demonstrate a miscarriage of justice has occurred, even when the appellant's guilty plea appears to have met all the traditional tests for a valid guilty plea—i.e. that it was unequivocal, voluntary and informed: *Cherrington, supra* at para. 29. As a corollary to the authority to admit fresh evidence, this court may set aside a guilty plea in the interests of justice: *Cherrington, supra* at para. 29; *R. v. Hanemaayer*, 2008 ONCA 580 at paras. 19-20.

I. DNA

254) All physical exhibits and/or materials related to Phillip's trial were lost and/or destroyed, except for 45 histology samples taken at the victim's autopsy ("the *Tallio* samples") and stored at the B.C. Children's Hospital, which were located and seized by the RCMP during the summer of 2011. These samples were not exhibits at trial, and, as *Tallio* was tried prior to the advent of DNA profiling, no physical materials from the case were ever tested for DNA before 2011.

255) The testing of the histology samples was conducted by an independent laboratory in Dallas, Texas, Orchid Cellmark (now Bode Cellmark Forensics, "Cellmark"). The testing was conducted outside of Canada as Canada lags behind the U.S. and particularly Europe in Y-STR DNA testing and the RCMP laboratory did not have the ability to conduct the testing.

256) The first seven histology samples sent to Cellmark for DNA testing were female tissue samples—skin from the victim's inner thighs; three sections of vaginal tissue, and one section of vaginal-rectal tissue. The samples were Formalin Fixed Paraffin Embedded (FFPE) samples. At autopsy, organs may be removed and small pieces of the organs—the tissue samples—are taken. The tissue samples are placed in formalin for fixation, overnight or longer. In this case the samples taken at the victim's autopsy sat in formalin for four days.[378]The samples were then removed from the formalin, trimmed down and put into small plastic cassettes. The cassettes were then put in formalin until they were removed to be put on the processing machine to embed the cassette with paraffin wax. The tissue samples were then sliced on a microtome, which is an instrument used to slice the paraffin wax into very thin sections.[379]

257) Typically, the DNA extraction protocol for paraffin tissue blocks involves first cutting into the paraffin wax and cutting around a portion of all of the tissue so that one has a tissue sample plus as thin a layer of wax as possible. Then the waxy layer is dissolved with a chemical called xylene, and the resultant "washing" is discarded. DNA

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[378] Tissue samples may be placed in formalin between 24 hours and several weeks, depending on the lab's schedule.
[379] Second Aff. Dr. Rick Staub at para. 7 (Attached to his Fourth Aff., Tab 35b).

is then to be extracted from the remaining solid tissue sample. However, in Phillip's case, Cellmark modified the extraction protocol to keep the washing as well as the tissue sample, and to subject both the washing and the tissue sample to the DNA extraction process. If enough male DNA was found to be present, the sample would then undergo DNA analysis. The modification was made so that any male cellular material which may have adhered to the victim's tissue sample prior to the tissue block preparation, but which may have been washed off the tissue during the DNA extraction process, could be detected and obtained.[380]

258) From August 18, 2011 to May 31, 2012, Cellmark completed DNA testing of five FFPE tissue samples. When Cellmark performed the modified FFPE DNA extraction protocol on the five FFPE tissue samples, male DNA was identified on one of them, F-47523/129 VII ("the vaginal sample"). Cellmark determined that Y-STR DNA testing was the appropriate method to test the male DNA. Cellmark used biotechnology company Thermo Fisher Scientific's Applied Biosystem's commercial Y-filer kit on the male DNA found in the first washing of the vaginal sample, and a *partial* Y-STR profile was identified. The maximum number of loci able to be produced by Y-filer is 17. However, the male DNA located on the vaginal sample was present at a very low level, and thus produced a partial Y-STR profile of 8 loci.[381]

259) On his application for the release of the uterus sample for further DNA testing (*R. v. Tallio*, 2018 BCCA 83), Phillip submitted that all potential sources of contamination were ruled out with regards to the vaginal sample, as the Y-STR profiles of any potential sources of contamination were tested and did not match the partial Y-STR profile obtained from the first washing of the vaginal sample.

260) A complete Y-STR profile separately provided by Phillip was compared to the partial Y-STR profile found on the vaginal sample. He was excluded as a possible contributor.[382] *Only one differentiating locus is necessary for exclusion*, and Phillip's Y-STR profile differentiated from the partial Y-STR profile found on the vaginal sample at

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[380] Aff. Jennifer Clay at paras. 6-7 (Tab 6) and the First Aff. Dr. Rick Staub at para. 12 (Attached to his Third Aff., Tab 35a).
[381] Second Aff. Dr. Rick Staub at paras. 9, 11 (Attached to his Fourth Aff., Tab 35b).
[382] First Aff. Dr. Rick Staub, para. 14 (Attached to his Third Aff., Tab 35a).

two loci. Thus, Phillip could not have contributed the male DNA found on the vaginal sample.[383]

261) After Phillip was excluded as the contributor of the male DNA found on the vaginal sample, the RCMP sent the 38 remaining histology samples from the victim's autopsy to Cellmark for Y-STR testing. The testing of the 38 additional samples took longer than one year for Cellmark to complete.[384] Cellmark employed the same protocol with these samples as with the initial five histology samples. Male DNA was located on the exteriors of the surface swabbings of the left motor (brain) FFPE tissue (F-47523-129-F/FR11-0113-22.03.01), the left basal ganglia (brain) FFPE tissue (F-47523-129-C/FR11-0113-22.04.1), and the left upper lobe lung FFPE tissue (F-47523-129-L/FR11-0113-22.20.1). Partial Y-STR profiles of seven loci, five loci, and seven loci were identified from these three histology samples, respectively.

262) During Phillip's application for release of the uterus sample, the Crown alleged, and continues to allege, that all of the *Tallio* DNA constitutes contaminant DNA. Phillip submitted that only the surface swabbings of the left motor, left basal ganglia, and left upper lobe lung samples are contaminant DNA, and that the pertinent samples—the vaginal and uterus samples—are not contaminant, as determined by forensic DNA experts Dr. Greg Hampikian and Dr. Rick Staub in their respective analyses of the *Tallio* DNA.[385]

263) The left motor, left basal ganglia, and left upper lobe lung samples appear to have been contaminated by an administrative assistant for the Department of Pathology at the B.C. Children's Hospital in 2011, Tony Borodovsky. Mr. Borodovsky could not be excluded as the contributor of the partial Y-STR profiles located on the surface swabbings of the left motor, left basal ganglia, and left upper lobe lung samples. Mr. Borodovsky handled the samples prior to turning them over to the RCMP in June,

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[383] Second Aff. Dr. Rick Staub, para. 11 (Attached to his Fourth Aff.,Tab 35b); First Aff. Dr. Greg Hampikian, para. 39 (Tab 16a).
[384] Crown letter July 15, 2013, appending RCMP/Cellmark report.
[385] See full affidavits of Dr. Rick Staub (Affs. 1(3), 2(4), 6) (Tab 35a, 35b, 35f); Dr. Greg Hampikian (Affs. 1, 4) (Tab 16a,16d).

2011.[386] Mr. Borodovsky was not wearing gloves while he handled the samples.

264) The uterus sample (F-47523-129-11/FR11-0113-21.12.2) was also tested for DNA by Cellmark. In 2013, a seven loci partial Y-STR profile was obtained from within the uterus tissue itself, not from the outer tissue block surface (as occurred with the left basal ganglia, left motor and left upper lobe lung samples). The partial Y-STR profile derives from a single individual.[387]

265) To put things simply, if the DNA samples were compared to an apple, it is as if Mr. Borodovsky handled the outside of the apple with bare hands, not surprisingly leaving his DNA on its outer skin (the surface swabbings of the left motor, left basal ganglia, and left upper lobe lung surface samples). However, the vaginal sample and the uterus sample can be likened to the inside flesh of the apple, and, Phillip submitted, were not contaminated by Mr. Borodovsky or anyone else.[388]

266) Dr. Staub states that three terms are integral to understand: “excluded,” “included,” and “cannot be excluded.” When an individual is “excluded,” it means that they are eliminated as the source of a biological sample. Their DNA is not present in the DNA obtained from an evidence sample. When individuals are included, it means that all of their DNA is also present in all of the DNA obtained from an evidence sample. In colloquial terms, their DNA “matches” the sample’s DNA. When individuals “cannot be excluded” it means that their DNA may be a possible source of the DNA found in the sample. However, results can be inconclusive in situations where there is a mixed DNA sample (containing DNA from several individuals), possible contamination, or an incomplete DNA profile, for example. There may not be enough DNA in a sample to produce a full profile, thus prohibiting a conclusive comparison to the individual’s DNA profile.[389]

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[386] Second Aff. Dr. Rick Staub, para. 18 (Attached to his Fourth Aff., Tab 35b); First Aff. Dr. Greg Hampikian, para. 16 (Tab 16a); Fourth Aff. Dr. Greg Hampikian, para. 19 (Tab 16d).
[387] Second Aff. Dr. Rick Staub, para. 23 (Attached to his Fourth Aff., Tab 35b).
[388] Dr. Hampikian utilizes other useful food analogies at paras. 12, 28, and 36 of his Fourth Aff. (Tab 16d).
[389] Second Aff. Dr. Rick Staub at para. 12. (Attached to his Fourth Aff., Tab 35b)

267) Phillip's paternal uncle, convicted child sex abuser and alternate suspect Cyril Tallio Sr., was one of the other individuals whose DNA was tested by Cellmark. Both men are members of the Indigenous Nuxalk Nation. Phillip, his uncle Cyril, and all other male individuals who are patrilineally related to them- "cannot be excluded" as possible contributors of the partial Y-STR profile found in the uterus sample using the second round of Y-STR testing employed by Cellmark in 2013.[390] However, this does not mean that a Tallio man is necessarily the donor of the male DNA; only that they would all fall under the "cannot be excluded" category utilizing the commercial kit available to Cellmark during the testing at that time.

268) Phillip and Cyril Tallio Sr.'s complete Y-STR profiles were each tested by Cellmark and by Canadian laboratory Maxxam Analytics (which by that time could conduct some Y-STR DNA testing), and they were found to have the same Y-STR profile as one another, confirming their direct patrilineal relationship.[391]

269) No statistical significance can be assigned to the partial seven-locus Y-STR profile found in the uterus sample and the Y-STR profiles of Phillip and Cyril Tallio, as no DNA database for Nuxalk males or even Indigenous males in Canada exists. No data exist to answer the question as to whether the partial Y-STR profile found in the uterus sample is rare (or common) in the Nuxalk Nation.[392]- The Nuxalk Nation is a very small First Nation and many Nuxalk individuals are related.[393]- In his affidavit, Dr. Staub states that no conclusions can be drawn with regard to the fact that two separate partial Y-STR profiles were located in the vaginal and uterus samples taken at the victim's autopsy, other than the partial Y-STR profiles are derived from two different males. Dr. Staub states that it is impossible to know whether there were two perpetrators involved in the crime, or whether male DNA had been deposited through another incident in the days prior to the victim's death.[394] The partial Y-STR profile located on the uterus

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[390] First Aff. Dr. Greg Hampikian, paras. 41-42 (Tab 16a); Second Aff. Dr. Rick Staub, para. 30 (Attached to his Fourth Aff., Tab 35b).
[391] Second Aff. Dr. Rick Staub at para 23 (Attached to his Fourth Aff., Tab 35b).
[392] Second Aff. Dr. Rick Staub, paras. 26, 31 (Attached to his Fourth Aff., Tab 35b); First Aff. Dr. Greg Hampikian, para. 43 (Tab 16a).
[393] Aff. Dr. Bruce Granville Miller at paras 4, 5, 6, 7, and 14 (Rev. Aff. Tab 11).
[394] Second Aff. Dr. Rick Staub, at paras. 27-28 (Attached to his Fourth Aff., Tab 35b).

sample cannot be individualized to Phillip.[395]

270) At present, Phillip Tallio "cannot be excluded" from the partial Y-STR profile found in the uterus sample. Seven of the loci in his Y-STR profile were the same as the seven loci found in the uterus sample.[396] Twenty-seven loci or more are available to comprise a full Y-STR profile using commercial kits available today.[397] This means that only seven loci were identified in the uterus sample, with the other 20-plus loci unknown. Essentially, there is a great deal of "missing information."

271) During his application for release of the uterus sample, Phillip submitted that if additional loci in the uterus sample were able to be tested, more information would become available, and his Y-STR profile could potentially be excluded as the donor of the male DNA located in the uterus sample. For instance, hypothetically, had 11 loci been identified in the uterus sample, with only seven of those loci included in Phillip's own Y-STR profile, the DNA results would have "excluded" Phillip rather than found that he "could not be excluded." Such a situation occurred in the case of Chen Long-Qi in Taiwan.

272) Chen Long Qi was convicted of rape on the basis of DNA which concluded that he "cannot be excluded" from the semen stain on the victim's underwear. Mr. Chen was included at all Y-chromosome loci in a DNA mixture using a commercial kit which tested 17 loci. However, using a newer, more complete testing kit which tested 23 loci, Mr. Chen was excluded at two loci and was exonerated.[398]

273) Phillip hoped that current Y-STR technology using more powerful Rapidly Mutating Y-STRs, which was not available to Cellmark in its DNA testing in 2013, would

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[395] Second Aff. Dr. Rick Staub, at para 30 (Attached to his Fourth Aff., Tab 35b).
[396] Second Aff. Dr. Rick Staub, para. 30 (Attached to his Fourth Aff., Tab 35b).
[397] A.L. Westen, "Analysis of 36 Y-STR marker units including a concordance study among 2085 Dutch Males" *Forensic Science International: Genetics 14* (2015) 174-181. See also, Cesare Rapone et al., "Forensic genetic value of a 27 Y-STR loci multiplex (Yfiler Plus kit) in an Italian population sample" *Forensic Science International: Genetics 21* (2016) e1-e5.
[398] First Aff. Dr. Greg Hampikian, para. 44 (Tab 16a), Second Aff. Dr. Greg Hampikian (Tab 16b), see Exhibit "A": G. Hampikian et al., "Case report: Coincidental inclusion in. 17-locus Y-STR mixture, wrongful conviction and exoneration." *Forensic Science International: Genetics* 31 (2017) 1-4.

have the potential to provide additional information which could lead to Phillip's exclusion, versus the result of "cannot be excluded" regarding the uterus sample. Besides the problem of the missing data, Phillip Tallio also faces the issue that his Y-STR profile was found to be the same as Cyril Tallio Sr.'s. The commercial kits used by Cellmark would identify all males patrilineally-related to Phillip and Cyril as having the same Y-STR profile as them, whereas RM Y-STRs have a median mutation rate 6.5-fold higher than that estimated for the commercial kit Yfiler STRs, which was the commercial kit used by Cellmark in the *Tallio* DNA testing. The 13 RM Y-STRs were able to distinguish the Y-STR profiles in 70 per cent of father-son pairs tested in a major study, while Yfiler could not differentiate any.[399]

274) The Crown refused to release the uterus sample for further DNA testing for 2.5 years. On March 12, 2018, the BCCA granted Phillip's application.[400] After the BCCA ordered the Crown and RCMP to release the uterus sample for DNA testing, RM Y-STR testing was conducted by the Netherlands Forensic Institute in the Hague during the spring and summer of 2018. The RM Y-STRs—though able to differentiate between male relatives in the majority of cases—were not able to differentiate between the Y-STR profiles of Phillip and his uncle Cyril Tallio Sr.'s. Unbeknownst to the appellant until late fall, 2018, the RCMP had stored the uterus sample incorrectly from December 5, 2015 until July 21, 2017. The uterus sample was supposed to be stored in a freezer,[401] but until July 21, 2017, it was merely refrigerated. There were also several days during the 1.5-year period during which the uterus sample was kept at room temperature, not even refrigerated. The RCMP and Crown[402] knew that the uterus sample had been

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[399] Relevant literature is noted in the Dr. Greg Hampikian's First Aff., para. 45. (Tab 16a)
[400] *R. v. Tallio*, 2018 BCCA 83.
[401] Second Aff. Katherine Kirkpatrick (Rev. Aff. Tab 18), Email from Joan Gulliksen (Bode Cellmark Forensics) to Cpl. Katalinic dated July 27, 2017 advising that the tubes should be kept frozen (R_2911); On July 21, 2017 Sgt. Robinson instructed Shelley Woods to move the sample to the freezer (R_3129). See also, RCMP documents R_3094, R_3092, R_3100, R_3217, R_3095, R_3098, R_3073.
[402] Second Aff. Katherine Kirkpatrick (Rev. Aff. Tab 18), For instance, Cpl. Katalinic took the uterus sample (including the DNA extract) out of the fridge and transported it to a ceremony on March 15, 2018. She left it overnight in an unknown location at room temperature, then returned it to E Division the morning of March 16, 2018, to an exhibit

improperly stored and most likely compromised as of July, 2017[403]—almost one year prior to the hearing to release the sample for testing—but did not advise the appellant.

275) Thus, Phillip is left with the result that he is excluded as the donor of the male DNA found in the first washing of the vaginal sample. With the DNA testing that has been completed thus far, he "cannot be excluded" as the donor of the male DNA found in the uterus sample; nor can his Uncle Cyril, nor at least 25,000 other males in the U.S. alone.[404]

276) One of the Nuxalk males whose exclusion status is unknown is child sex abuser Wilfred Tallio, who repeatedly raped Person X and his grand-daughter Person Y when they were children, and who sexually abused his own great-granddaughter Olivia Mack when she was a child. Wilfred is another alternate suspect in the murder of his great-granddaughter Delavina Mack. In 2013, the RCMP (via Cellmark) tested the DNA of Ivan Tallio and Bill Tallio, who were raised as Wilfred's sons. Ivan and Bill were excluded as the contributors of the male DNA found in the uterus sample. However, a break in the Tallio family tree exists—the DNA testing revealed that Ivan and Bill are *not* patrilineally related to Phillip and Cyril Tallio. Furthermore, Wilfred's own DNA has never been tested.[405] As Dr. Staub conveys, "determining patrilineal relatives can only be done with certainty when the DNA samples of the individuals themselves are tested"—the DNA samples of alleged patrilineally-related males cannot be relied upon to exclude the other individual. This is because maternal infidelity could have produced the "relied-

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locker at room temperature. See, documents R_3006, R_3070, R_3071, R_3009, R_3073.

[403] Second Aff. Katherine Kirkpatrick (Rev. Aff. Tab 18), Email from Cathie Osler-Britt/Karen Chan to Shelley Woods in RCMP Exhibits dated July 4, 2017 (R_3095) stating: "Analysts store samples in the fridge temporarily while they are working on them and once the cases are done the samples are stored in the freezer. Do note that freeze and thaw can *degrade the DNA* so getting samples in and out of the freezer repeatedly is not ideal. *Long term storage in the fridge could potentially lead to condensation issues*" [Emphasis added]; Email from Audra in Exhibits to Cpl. Katalinic dated July 5, 2017 (R_3098) stating: "Just an FYI, after two weeks the items [samples] will automatically be placed in the freezer *to stop any deterioration*" [Emphasis added]- the extracts should have been placed in the freezer to stop deterioration 1.5 year prior to Audra's communication but were not. R_3095 and R_3098.

[404] Second Aff. Dr. Greg Hampikian, paras. 41- 42 (Tab 16b).

[405] Second Aff. Dr. Rick Staub, para. 24 (Attached to his Fourth Aff., Tab 35b).

upon" offspring, or there could be infidelity in a previous generation.[406] Polyandry is practiced in the Nuxalk society and one's biological father is sometimes not their social father.[407]

Battle of the Experts—Alleged Contamination

277) The Crown continues to allege that all of the *Tallio* DNA samples are contaminated and relies on the affidavit of Dr. Frederick Bieber, filed in January 2019. Dr. Hampikian and Dr. Staub each analyzed Dr. Bieber's affidavit and both experts discount Dr. Bieber's assertions. They each found that the vast majority of Dr. Bieber's affidavit speaks in generalities as to how contamination can occur in a pathology tissue preparation laboratory, making broad statements, speculations and misrepresentations without providing logical explanations or case-specific evidence, instead of assessing the *Tallio* case data specifically.[408] As Dr. Hampikian states, "Existence in the general sense is not evidence in the present case."[409]

278) For instance, Dr. Bieber states that (in lab processes) gloves and masks are sometimes used and sometimes not. This is accurate as a general practice, depending on the lab process and at what stage a process is at, but, as Dr. Staub and Dr. Hampikian ask, how does this apply to *Tallio* specifically? The answer is that Dr. Bieber's general observation does not apply in this case.

279) In *Tallio*, pathologist Dr. Glenn Taylor, who conducted the victim's autopsy, states that while conducting an autopsy he wears gloves, usually two pairs, and that everyone involved is gloved and wears protective clothing and masks. The lab technologist from the victim's autopsy, Richard Mah, confirms that he always (including in 1983) wore gloves while working with formalin because it is toxic.[410] Moreover, the Y-STR DNA profiles of each of the males involved in the victim's autopsy were tested and

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[406] Second Aff. Dr. Rick Staub, para. 32 (Attached to his Fourth Aff., Tab 35b).
[407] Aff. Dr. Bruce Granville Miller, paras. 9, 11 (Rev. Aff. Tab 11).
[408]Sixth Aff. Dr. Rick Staub, paras. 7-8, 21 (Tab 35d); Fourth Aff. Dr. Greg Hampikian, paras. 10, 13-14, 17-18, 22-23, 25, 28, 31-33, 35-36, 39, 42, 44. (Tab 16d). At para. 9 of his Sixth Aff., Dr. Staub notes that the same is true with regards the affidavits of Ms. Crossman and Mr. Mah.
[409] Fourth Aff. Dr. Greg Hampikian, para. 31 (Tab 16d).
[410] Fourth Aff. Dr. Greg Hampikian, para. 13 (Tab 16d).

the men were *all excluded* as the contributors of the male DNA located in the histology samples.[411] All employees who worked on the *Tallio* case at Orchid Cellmark—the lab that conducted the Y-STR testing decades later—were women.[412] Women could not have contributed the DNA found in the samples as women do not have Y-chromosomes and therefore cannot generate Y-STR DNA profiles.[413] The DNA located in the samples were partial Y-STR DNA profiles.[414] Accordingly, the individuals working in the laboratory during the victim's autopsy and at Cellmark did not contaminate the samples.

280) Dr. Bieber also focusses on "floaters" and inadvertent transfer via the microtome's blades, arguing that rogue DNA (i.e. from another case the lab was working on) could have made its way onto the *Tallio* samples. Dr. Bieber's concern here is also unfounded. "Of course DNA contamination can occur during sectioning as a general phenomenon (i.e. if proper protocols are not followed in a lab) but there is no evidence that this occurred in *Tallio*," states Dr. Hampikian.[415] Floaters are actually a rare occurrence,[416] and Dr. Hampikian and Dr. Staub each note that if there had been inadvertent transfer via microtome blades or solution or floating tissue slices in *Tallio*, then male DNA should have been seen in the multiple earlier labelled histology samples rather than 129 III (uterus) and 129 VII (vaginal).[417] Dr. Bieber speculates that the samples could have been labelled out of order. However, this would be very odd. Dr. Hampikian and Dr. Staub confirm that it appears that the cutting and labelling of the paraffin blocks in *Tallio* appears to have been done chronologically[418] and that it is only logical that the samples would be cut in chronological order. The practice typically utilized by laboratories is for tissue samples to be processed in alphabetical and

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[411] First Aff. Dr. Greg Hampikian, para. 21 (Tab 16a); Fourth Aff. Dr. Greg Hampikian, para. 13 (Tab 16d).
[412] First Aff. Jennifer Clay, para. 21 (Tab 6).
[413] Fourth Aff. Dr. Greg Hampikian, para. 17 (Tab 16d).
[414] Fourth Aff. Dr. Greg Hampikian, para. 13 (Tab 16d).
[415] Fourth Aff. Dr. Greg Hampikian, paras. 32-32 (Tab 16d).
[416] Sixth Aff. Dr. Rick Staub, para. 10 (Tab 35d).
[417] First Aff. Dr. Rick Staub, para. 19 (Attached to his Third Aff., Tab 35a); Fourth Aff. Dr. Greg Hampikian, paras. 17-18, 32 (Tab 16d).
[418] Fourth Aff. Dr. Greg Hampikian, para. 17 (Tab 16d).

numerical order.[419]

281) Further, B.C. Children's Hospital pathologist Dr. Taylor's own protocol for autopsy specimens (which the samples from Delavina Mack's autopsy would have been classified as) was to handle specimens from a single case—not to trim specimens from multiple patients as he would with surgical biopsy specimens. Dr. Taylor states that cross-contamination was "mainly a concern for surgical biopsy specimens, rather than for autopsy specimens" for this reason. As Dr. Staub notes, "This information places the B.C. Children's Hospital's handling of autopsies in 1983 into a separate class from biopsies, in that autopsies are not as predisposed to contamination events."[420] Even in surgical biopsies, Dr. Taylor states that care was taken to minimize the possibility of contamination of tissue samples during the processing to make glass microscope slides including changing the scalpel blades between every case, using fresh paper sheets on the cutting surface and keeping the area clean to minimize the potential for tissue from one patient's slide getting into another patient's tissue slide. "Contamination was an uncommon occurrence even for biopsy specimens; less so for autopsy specimens such as the *Tallio* case" concludes Dr. Staub.[421]

282) Hypothetically, if the *Tallio* samples *had* been processed out of order, contaminant DNA (i.e. from a laboratory worker) would still not have been detected. This is because even if contaminant cellular material or DNA had been deposited in the formalin fixation solution (in which the *Tallio* samples were bathed in during processing), the formalin's liquid nature would dilute the contaminant cell or DNA too highly to be detected.[422] As well, the fact that all tissue samples were enclosed in cassettes would make it very difficult to contaminate the samples.[423]

283) Dr. Bieber also states that "[t]here is no evidence or record that spermatozoa were detected at autopsy or at any point during the subsequent testing by Dr. Taylor or

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[419] Fourth Aff. Dr. Greg Hampikian, paras. 18, 42 (Tab 16d); Sixth Aff. Dr. Rick Staub, para. 11 (Tab 35d).
[420] Sixth Aff. Dr. Rick Staub, para. 12 (Tab 35d).
[421] Sixth Aff. Dr. Rick Staub, para. 13 (Tab 35d).
[422] Sixth Aff. Dr. Rick Staub, para. 14 (Tab 35d).
[423] First Aff. Dr. Rick Staub, para. 16 (Attached to his Third Aff., Tab 35a).

by the RCMP." He expresses concern that the microscopic examination did not show sperm in the vagina or vaginal laceration.[424] In reality, Dr. Taylor did not conduct an examination to detect sperm.[425] As well, Dr. Taylor testified that he could easily miss sperm in a microscopic examination—he may not be able to see them even if they were present.[426] Just because sperm was not detected does not mean that it was not present, and just because sperm was not detected does not mean the male DNA was contaminant. Further, as Dr. Hampikian notes, sperm cells are not the only source of male DNA in sexual abuse incidents. "Sexual assaults without sperm are common. Perpetrators may not ejaculate; they may be vasectomized or have a low sperm count and may not use their penis to penetrate victims. For instance, they may penetrate victims digitally leaving epithelial cells."[427]

284) Dr. Bieber's various comments regarding the technique utilized by Cellmark to remove DNA in layers from the *Tallio* samples are offered without supporting evidence. For instance, Dr. Bieber makes a number of statements at paragraphs 57-58 of his affidavit without explaining "why" he comes to those conclusions, such as his statement that the procedures used by Cellmark were "a prescription for DNA cross-contamination."[428] On what basis does Dr. Bieber come to this conclusion? He appears not to understand Cellmark's technique. For instance, Dr. Bieber states that a "rinse inside the victim's vagina" was performed, when no such wash was performed.[429] Dr. Hampikian, who is independent from Cellmark, analyzed Cellmark's technique and deems it "excellent and careful work". He explains that in order to remove DNA in layers from the tissue samples, Cellmark started with swabbing and successfully showed they could detect and remove surface DNA from outside the paraffin block. Then they used a dissolving wash to look at internal paraffin, and finally they examined the underlying

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[424] Aff. Dr. Frederick Bieber, para. 55 (Respondent's Fresh Evidence Affidavits, Vol. 1, Tab 1).
[425] Sixth Aff. Dr. Rick Staub, para. 16 (Tab 35d).
[426] Sixth Aff. Dr. Rick Staub, para. 16 (Tab 35d). See also, Fourth Aff. Dr. Greg Hampikian, para. 20—sperm cells may not be seen due to the substantial injuries and condition of the victim's body (Tab 16d).
[427] Fourth Aff. Dr. Greg Hampikian, paras. 20, 34 (Tab 16d).
[428] Aff. Dr. Frederick Bieber, para. 58.
[429] Fourth Aff. Dr. Greg Hampikian, paras. 24, 28 (Tab 16d).

tissue. "The success of this strategy is demonstrated by the fact that no DNA profile appeared in more than one of these successfully exposed treatment layers. DNA on the outside was found on the outside; DNA in the middle 'wash' was found only there, and the DNA in the tissue was restricted to that layer" observes Dr. Hampikian.[430]

285) Perhaps the confusion for Dr. Bieber derives from his repeated and incorrect conflation of the male DNA found on the outside of the brain and lung samples with the vaginal and uterus samples. The appellant agrees that the male DNA found on the surface of the brain and lung samples are the result of contamination, most likely by B.C. Children's Hospital administrative assistant Tony Borodovsky who handled them without gloves, as set out above. However, Dr. Bieber continuously asserts that because the brain and lung samples are contaminated, the vaginal and uterus samples are also contaminated.[431] This is simply not the case.

286) The partial Y-STR profiles found on the brain and lung samples derived from the exterior surface of these paraffin wax blocks—as Dr. Hampikian explains, the DNA found on the outside does not trickle into the block itself: "A simple example is that we may expect to find the DNA of supermarket workers on the outside of our cheese package, but not on the slices of cheese within." [432]Dr. Hampikian states that Dr. Bieber's error in referring to the *outside* of the paraffin block DNA (the lung and brain samples) and the *inside* of the paraffin block DNA (the vaginal and uterus samples), all as contaminant DNA is "very misleading"[433] and "absurd."[434] Dr. Hampikian states that if Dr. Bieber's logic was applied, "we could conclude that someone has stuck their fingers in the sealed peanut butter jar simply because there is a fingerprint on the outside of the peanut butter jar.[435] This does not make any sense. The DNA found in the vaginal and uterus samples is DNA which is safely protected *inside* the paraffin blocks,[436] like the peanut butter inside the sealed jar is safely protected from exterior handling of the jar

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[430] Fourth Aff. Dr. Greg Hampikian, paras. 22, 24, see also, para. 39 (Tab 16d).
[431] Fourth Aff. Dr. Greg Hampikian, para 23 (Tab 16d).
[432] Fourth Aff. Dr. Greg Hampikian, para. 12 (Tab 16d).
[433] Fourth Aff. Dr. Greg Hampikian, para. 12 (Tab 16d).
[434] Fourth Aff. Dr. Greg Hampikian, para. 36 (Tab 16d).
[435] Fourth Aff. Dr. Greg Hampikian, para. 36 (Tab 16d).
[436] Fourth Aff. Dr. Greg Hampikian, para. 19 (Tab 16d).

itself. Dr. Staub agrees—Dr. Bieber's claim comparing the contaminated exterior surfaces of the brain and lung samples in attempt to prove the vaginal and uterus samples are contaminated "is not comparing apples to apples."[437]

287) The DNA found on the exterior surface of the lung and brain samples is "easily explained by handling of these blocks without gloves"[438] (as Mr. Borodovsky failed to wear when he handed the samples over to the RCMP). This DNA is not pertinent to *Tallio* as it is obviously contaminant and it is clear how it was deposited onto the samples.[439]

288) The relevant samples in the *Tallio* case are the vaginal and uterus samples. With regards to the vaginal sample, Dr. Bieber claims that the male DNA extracted (with the xylene solvent/wash) from the paraffin around the vaginal tissue came from some unexplained remote source. He does not offer case specific evidence to support this notion. As Dr. Hampikian states, the simple explanation is that the male DNA originated from the vaginal tissue it encases.[440]Dr. Bieber opines that he would not expect male DNA left on vaginal tissue during an assault to be present in the xylene wash, but he offers no evidence for this notion either.[441] Dr. Hampikian questions: "Where should we look for evidence if not in the preserved medium around these tissues?" and explains the mechanism as to how male cells most likely dislodged from the victim's vaginal tissue when the molten paraffin was added to the thin section of vaginal tissue. "The dislodged male cells would be found in the xylene solution of dissolved paraffin, referred to as vaginal wash" Dr. Hampikian concludes.[442]

289) Dr. Bieber argues that the uterus sample is contaminated as well, musing that DNA contamination "at an earlier time" "likely" explains the partial Y-STR DNA profile found in it and in the vaginal sample. However, he again provides no evidence for his

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[437] Sixth Aff. Dr. Rick Staub, para. 23 (Tab 35d).
[438] Fourth Aff. Dr. Greg Hampikian, paras. 16, 37 (Tab 16d).
[439] Fourth Aff. Dr. Greg Hampikian, para. 33 (Tab 16d).
[440] Fourth Aff. Dr. Greg Hampikian, para. 38 (Tab 16d).
[441] Fourth Aff. Dr. Greg Hampikian, para. 39 (Tab 16d); Sixth Aff. Dr. Rick Staub, para. 7 (Tab 35d).
[442] Fourth Aff. Dr. Greg Hampikian, para. 39 (Tab 16d); Sixth Aff. Dr. Rick Staub, para. 18 (Tab 35d).

assertion or what “earlier time” he is referring to.[443]

290) There are additional concerns regarding statements made by Dr. Bieber in his affidavit. For instance, at paragraph 62, he misrepresents then-Cellmark employee Jennifer Clay’s conclusion regarding possible contamination. In reality, Ms. Clay’s affidavit goes through the potential contamination scenarios and discounts each of them.[444] As Dr. Hampikian states: “Dr. Bieber ignores [Clay’s] careful explanation and instead emphasizes her comment, ‘…we cannot fully eliminate the possibility of contamination from the surface wax…’”[445] Dr. Hampikian notes that Ms. Clay’s general disclaimer is “the hallmark of forensic science”[446] but that her fulsome statement “eliminates sources of contamination to the highest degree scientifically possible.”[447]

291) At paragraph 62 of his affidavit Dr. Bieber also claims that “stutter” indicates a possible second contributor to the vaginal sample—that a DNA mixture “cannot be excluded with confidence.” Dr. Bieber “seems to be fixated on finding any possible way to discount what is clearly important evidence in this case” states Dr. Hampikian. Dr. Hampikian explains that the stutter claim is highly speculative and not the simplest reading of the DNA results. “Stutter is a well-known artefact that is expected in a low-level DNA result like this; it does not establish more than one male contributor.”[448] Dr. Bieber returns to his claim that a mixture exists at paragraph 66 of his affidavit, however he does not indicate what evidence there is to support a mixture. It appears that he is referring to the lung and brain samples, however these samples are not probative—they are clearly contaminant. It is the vaginal and uterus samples that are relevant, and the partial DNA profiles found on/in those samples do not derive from a mixture.[449]

292) At paragraph 92 of his affidavit, Dr. Bieber states that because most of the

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[443] Fourth Aff. Dr. Greg Hampikian, para. 35 (Tab 16d); Sixth Aff. Dr. Rick Staub, para. 20. (Tab 35d)
[444] Fourth Aff. Dr. Greg Hampikian, para. 25 (Tab 16d).
[445] Fourth Aff. Dr. Greg Hampikian, para. 25 (Tab 16d).
[446] Fourth Aff. Dr. Greg Hampikian, para. 25 (Tab 16d).
[447] Fourth Aff. Dr. Greg Hampikian, para. 25 (Tab 16d).
[448] Fourth Aff. Dr. Greg Hampikian, para. 26 (Tab 16d).
[449] Fourth Aff. Dr. Greg Hampikian, para. 29 (Tab 16d); Second Aff. Dr. Rick Staub, para. 23 (Attached to his Fourth Aff., Tab 35b).

histology samples did not have male DNA on them and others only had partial Y-STR DNA profiles, that this is "consistent with contamination" and that "the DNA results provide no reliable basis to form any reasonable scientific conclusions about the source of the partial Y-STR results." As Dr. Staub explains, the fact that most of the samples did not elicit male DNA, this does not mean that contamination occurred. "Nor does the partiality of a DNA profile equate to contamination." The alternative explanation, which Dr. Bieber fails to consider, is that many samples simply have no male DNA associated with them. For instance, a male can deposit DNA in a female's uterus without leaving DNA on her leg. The samples that do have male DNA associated with them are samples which would be expected to have male DNA associate with them, based on a sexual assault occurring (due to the locations of the male DNA—vaginal and uterus). "The fact that a male did not deposit DNA on one area does not negate DNA deposited on another area" states Dr. Staub. "Furthermore, the fact that the male DNA profiles are partial and only small molecular weight fragments were produced is exactly what one would expect from formalin-crosslinked FFPE samples."

293) It appears that Dr. Beiber may not have understood the purpose of the *Tallio* testing. At paragraph 56 of his affidavit he lists what he views as uses of DNA testing of FFPE tissue blocks but fails to include the purpose of the testing in the case at bar. The testing of the FFPE samples in *Tallio* was not to identify an individual but rather to determine if Phillip could be excluded as the donor of the male DNA located in the samples. It is not possible to identify the donor via DNA testing of the *Tallio* samples due to the partial nature of the Y-STR profiles on the samples, and the statistical limitations of Y-STR analysis, explains Dr. Hampikian. "In the samples from this case, individuals can only be excluded as the contributor(s) of the DNA, not identified, as loci are missing from the Y-STR DNA profiles."[450] Exclusionary results are still significant and have been used to exonerate many wrongfully convicted individuals.[451]

294) Dr. Bieber never considers the fact that the DNA results from the *Tallio* case could be due to the presence of male tissue that was actually in the crime scene

[450] Fourth Aff. Dr. Greg Hampikian, para. 21 (Tab 16d).
[451] Fourth Aff. Dr. Greg Hampikian, para. 29; See Exhibit "A" attached to Dr. Hampikian's Fourth Aff. (Tab 16d).

specimen from the putative assailant(s). “If that is not possible, why was this difficult testing even carried out?” asks Dr. Staub.[452] Instead of assessing the results fairly, Dr. Bieber states that he cannot agree that because Phillip is excluded as a possible contributor to the first xylene wash of the FFPE vagina, that he is excluded as the perpetrator in the sexual assault of the victim.[453] Dr. Hampikian notes that Dr. Bieber’s statement “goes beyond the scope of scientific evaluation and seems to advocate for a particular legal conclusion…such pronouncements are beyond the scope of science and should be left to the triers of fact.”[454]

295) What *is* appropriate for scientists to determine in the *Tallio* case is that two partial Y-STR DNA profiles were located in the probative samples—the vaginal and uterus samples. These samples constitute “good evidence.”[455] Dr. Hampikian and Dr. Staub agree that unlike the lung and brain samples, the partial Y-STR profiles located on the vaginal and uterus samples are “*extremely unlikely”* to be the result of contaminant DNA.[456]

II. Jurisdiction

The court had no jurisdiction to order Phillip into a 30-day psychiatric remand so legal proceedings involving the appellant in 1983 were a nullity, and evidence derived from the order was inadmissible.

296) Phillip Tallio appeared before Judge Diebolt on April 26, 1983, having been charged with murder. At that time Judge Diebolt’s powers and functions were “entirely statutory” and had to be conferred “expressly or by necessary implication.”[457]

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[452] Sixth Aff. Dr. Rick Staub, para. 17 (Tab 35d).
[453] Aff. Dr. Frederick Bieber, para. 91 (Respondent’s Fresh Evidence Affidavits, Vol. Tab 1).
[454] Fourth Aff. Dr. Greg Hampikian, para. 43 (Tab 16d).
[455] Fourth Aff. Dr. Greg Hampikian, para. 41 (Tab 16d).
[456] Sixth Aff. Dr. Rick Staub, para. 7 (Tab 35d); First Aff. Dr. Rick Staub, para. 19 (Attached to his Third Aff., Tab 35a), Second Aff. Dr. Rick Staub, para. 20 (Attached to his Fourth Aff., Tab 35b); First Aff. Dr. Greg Hampikian, para. 27 (Tab 16a); Fourth Aff. Dr. Greg Hampikian, para. 41 (Tab 16d).
[457] *Doyle, Re*, [1977] 1 SCR 597, at paras. 8 and 10.

297) Two Parts of the *Criminal Code* in particular—Part XIV ("Judicial Interim Release") and Part XV ("Procedure on Preliminary Inquiry")—governed the scope of Judge Diebolt's powers. However, Judge Diebolt acted pursuant to Part XVI when he ordered Mr. Tallio into the Forensic Psychiatric Institute for psychiatric examination. He endorsed Constable Hulan's warrant as follows, "Pursuant to section 465(1) CCC the accused is remanded in custody for observation in the Forensic Psychiatric at Port Coquitlam, BC for a period not to exceed thirty days, until May 24, 1983" and he stamped this warrant as a "Judge of the Provincial Court of British Columbia authorized to exercise the Jurisdiction conferred upon a Magistrate by Part XVI of the Criminal Code."

298) Part XVI governed *trials* in cases of electable indictable offences ("Indictable Offences—Trial Without Jury"). A magistrate defined in Part XVI—specifically, by s. 482(a)—was "a person appointed under the law of a province, by whatever title he may be designated, who is specially authorized by the terms of his appointment to exercise the jurisdiction conferred upon a magistrate by this Part, but does not include two or more justices of the peace sitting together." He or she was a magistrate upon whom special jurisdiction to preside over the judge-alone *trial* of an electable indictable offence was conferred.[458] In short, a magistrate acting lawfully under Part XVI could either preside over an indictable judge-alone trial or conduct a preliminary inquiry *proper*. Judge Diebolt was not presiding over any such proceeding.

299) When an accused person with a right of election did not elect trial by a provincial court judge, subsection 484(3) in Part XVI obliged a magistrate to "hold a preliminary inquiry in accordance with Part XV." Of course, the accused person first had to *elect* trial at a provincial superior court.[459] A person charged with murder could not elect his or her mode of trial, so s. 484(3) did not obviously or necessarily apply to him.

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[458] See Edmond Cloutier, *The Report of the Royal Commission on the Revision of Criminal Code* (1952-53), (Ottawa, 1954: The Queens Printer) at p.8.
[459] In *R. v. Plummer*, 1983 CarswellBC 672 (CA) at para. 9, MacFarlane, J.A. wrote, "I think the holding of a preliminary inquiry is a necessary and inevitable consequence of the accused not having elected trial by magistrate. That consequence follows by reason of the mandatory terms of s. 484(3)."

300) A magistrate within the meaning of Part XVI was not a "justice" contemplated by s.465 of the *Criminal Code* ("Powers of a Justice")—a justice, that is, who had jurisdiction to order an accused person into custody for a maximum 30-day forensic remand. In *Doyle* Ritchie, J. explained that Part XV contemplated two distinct stages of a preliminary inquiry. The first stage was dictated by s.463 and was purely legalistic or formalistic.

301) Section 463 obliged a justice before whom a person charged with an indictable offence appeared, to "inquire into that charge and any other charge against that person." The black-letter of this section gave no indication of the scope of the inquiry into the charge before the court or "any other charge" the accused person faced, but in 1983 the scope of inquiry was limited by the common law and various statutory conditions.

302) As Ritchie, J. observed, the *first* inquiry under Part XV had to be "into the charge itself (s. 463) to determine whether or not it is one over which a magistrate has absolute jurisdiction and ensure that it is not one of those offences mentioned in s. 427".[460]

303) This 'first' inquiry pursuant to s.463 contemplated other legalistic inquiries. An accused person could not be expected to plead to an illegal indictment,[461] so it was a "condition precedent" to the jurisdiction of a justice under s.463 that the information be valid on its face.[462] A provincial court judge did not necessarily have jurisdiction under s.463 to call *any* evidence until a person facing an electable indictable offence had elected.[463] The charge had to disclose an offence known to law.[464] The presiding

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[460] *Doyle, Re*, at para. 20. Murder was listed in s. 427 of the *Criminal Code* (being the equivalent of a s.469 offence today).
[461] See *Brodie v. The King* (1936) S.C.R. 188, 65 C.C.C. 289 at 299.
[462] See *R. v. H. (W.F.)*, 1987 CarswellAlta 461 (Prov. Ct.), at paras. 11 and 18.
[463] *R. v. Zaluski*, 1983 CarswellSask 40 (QB) at para. 26.
[464] See *R. v. Grawelicz*, 1980 CarswellOnt 661, [1980] 2 S.C.R. 493 at para. 60; *Quebec (Procureur General) v. Lessard*, 1980 CarswellQue 33 (CA), *aff'd* 1982 CarswellQue 1303, [1982] 1 S.C.R. 573; and *H.(W.F.)*, at para. 39. *Quebec (Procureur General) v. Lessard*, *supra*, was addressed to the issue of whether a provincial court judge could discharge an accused person prior to receiving evidence at a preliminary inquiry if, upon inquiring into the charge pursuant to s.463, the judge concluded that the offence was not known to Canadian law.

justice was also required to satisfy himself or herself that he had jurisdiction to grant bail.[465]

304) Section 463 also obliged presiding justices to determine what level of court had jurisdiction in relation to the charge. If that 'preliminary' inquiry revealed that the indictable offence before the court was an absolute jurisdiction indictable offence, then s.464(1) obliged the presiding judge to remand the accused person to appear before a provincial court judge (i.e. "a magistrate having absolute jurisdiction over that offence"). There would be no preliminary inquiry, properly speaking, for that person.[466]

305) If the s.463 'preliminary' inquiry revealed that the indictable offence before the court was electable, then s.464(2) required the presiding judge to read the information to the accused person and in turn put him to his election.[467] In *Doyle*, Ritchie J. observed that once the charges were read to the accused person (and presumably, once the accused person elected):

> The *succeeding sections* of Pt. XV of the Code [were] designed to provide for a situation where "the justice" before whom the accused is brought is not "a magistrate" as defined by s. 482 [am. 1972, c. 13, s. 39; 1972, c. 17, s. 2] of the Code and they provide for the steps which are to be taken by way of preliminary inquiry to determine whether there are grounds for committing the accused for trial.[468]

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[465] *Doyle* at para. 15; *H.(W.F.),* at para. 40.
[466] Unless the magistrate presiding over the trial decided that the matter should be prosecuted by indictment, in which case he or she could transform trial proceedings into a preliminary inquiry: s.485(1).
[467] In *Doyle* the Supreme Court of Canada held that a provincial court judge had lost jurisdiction by the time he granted the Crown's request for a contested, lengthy adjournment because no judge had yet read the electable charge to Mr. Doyle or put him to his election. In 1976 the *Criminal Code* was amended to include s.440.1(1), which provided that "the validity of any proceeding before a court, judge, magistrate or justice is not affected by any failure to comply with the provisions of this Act relating to adjournments or remands". This amendment was meant to preserve jurisdiction in the face of procedural irregularities pertaining to adjournments and remands. The jurisdictional complaint in the case at bar is *not* that Judge Diebolt committed a procedural irregularity, but rather that he *never* had jurisdiction under s.465 to order Mr. Tallio into a 30-day psychiatric remand. Subsection s.440.1(1) was and is irrelevant.
[468] *Doyle, Re*, at para. 16. Emphasis added.

306) In other words, a Part XVI "magistrate" was exclusively a provincial court judge authorized to preside over a trial or a "preliminary procedure" pertaining to that trial *when the accused person had elected trial by a magistrate*.[469] Judge Diebolt was no such magistrate. He mistakenly believed that he had "the Jurisdiction conferred upon a Magistrate by Part XVI of the Criminal Code" to make a s.465 order against Mr. Tallio. At best, *Doyle* implied that he could have granted a maximum 8-day adjournment pursuant to s.465(1)(***b***).[470] *Doyle* was not addressed to a murder charge and did not address s.465(1)(***c***) because *Mr. Doyle's mental condition was never an issue*.

307) Before *Doyle* was delivered, the Supreme Court of Canada made clear in *R. v. Vaillancourt*[471] that a provincial court judge had no power to order a person into a 30-day psychiatric remand under s.465(c) until a preliminary inquiry *proper* was underway. Mr. Vaillancourt had complained about the legality of psychiatric examinations to which he had been subjected in jail shortly after his arrest for murder, inferentially of the type conducted by Dr. Emlene Murphy in the case at bar.

308) In *Vaillancourt*, the appellant's lawyer had referred the court to "s. 465(*c*), s. 543 and s. 608.2 of the *Criminal Code*".[472] These three *Criminal Code* sections empowered judges to make 30-day observational psychiatric remands on the belief that the accused person or convicted person may be mentally ill or was mentally ill, as the case might have been. Justice Spence observed that "all" of them were "concerned with a later period when the accused was at preliminary inquiry, at trial, or before the Court of Appeal, and," he observed, "I am of the opinion that they are quite inapplicable to the circumstances in the present appeal".[473]

309) Justice Spence thereby made clear that custodial forensic psychiatric remands under s. 465(1)(c) could not be made until a preliminary inquiry *proper* was underway.

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[469] *Doyle, Re*, at para. 20.
[470] *Doyle, Re*, at para. 20.
[471] 1975 CarswellOnt 296, [1976] 1 S.C.R. 13 (SCC) ("*Vaillancourt* (SCC)")
[472] *Vaillancourt* (SCC), *supra* at para.18. By "s. 465(c)," Justice Spence surely meant s. 465(1)(c), because there was no s. 465(c) at the time.
[473] *Vaillancourt* (SCC), at para.18.

His understanding of s.465(1)(c) was not obiter[474] and Ritchie, J. did not comment upon it in *Doyle*. *Vaillancourt* and *Doyle* addressed different powers under s.465 and Ritchie, J. emphasized in *Doyle* that the offences before the magistrates in his case were not ones "over which a magistrate has absolute jurisdiction under s. 483" or "an offence that is mentioned under s. 427".[475] *Vaillancourt* addressed s.465(1)(***c***) and *Doyle* addressed s. 465(1)(***b***).

310) The logic of *Vaillancourt* (SCC) is compelling and reflective of coherent Parliamentary intent. A provincial court judge presiding over a person charged with murder did *not* have the power to make a 30-day observational remand order until a preliminary inquiry *proper* was underway. Precisely because of *Vaillancourt* (SCC), provincial court judges in Vancouver believed that they did not have jurisdiction to make a s.465(1)(c) order in electable cases, unless the accused person had elected trial by provincial court judge alone, or unless they had absolute jurisdiction to try the offence themselves. Judge Diebolt was not a Part XV “justice” authorized to make such an order under s.465 when he did.

311) In 1976 Parliament amended s.465 of the *Criminal Code* in the *Criminal Law Amendment Act*, s.58. Paragraph 465(1)(b) (which was the adjournment power in issue in *Doyle*) authorized a “justice acting under this Part” to adjourn the inquiry “from time to time” to accommodate eventualities such as “the absence of a witness, the inability of a witness who is ill to attend at the place where the justice usually sits, or for any other sufficient reason,” and it restricted these adjournments to eight days maximum unless the Crown and the accused person consented to a lengthier adjournment, or unless the accused person was remanded for observation *as an outpatient*, pursuant to s.465(1)(c)(***i***).

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[474] Justice Spence wrote that he had “very little to add” to the reasoning of *R. v. Vaillancourt*, 1974 CarswellOnt 52, 31 C.R.N.S. 81 (“*Vaillaincourt* (CA)”), except for “one matter” upon which he felt “it only proper to express concern”: *Vaillancourt* (SCC), *supra* at para. 5. This was the matter summarized above. By purposely qualifying his acceptance of the Ontario Court of Appeal decision, Justice Spence’s reasoning was an integral part of the analysis, not obiter.

[475] *Doyle, Re*, at para. 17.

312) By contrast, new subparagraphs 465(1)(c)(***ii***) and (***iii***) permitted a provincial court judge to remand an accused person "to such custody as the justice directs for observation for a period not exceeding thirty days," by written order, where there was reason to believe that the accused "may be mentally ill." These subparagraphs were substantively the same as the *pre-1976* version of s.465(1)(c)(i), which was at issue in *Vaillancourt* (SCC), but in 1976 they were formally severed from s.465(1)(b).

313) The 1976 amendment indicated Parliament's clear intent to separate a judge's authority to order an accused person into an extraordinary 30-day observational remand at a secure psychiatric hospital from the authority to adjourn the inquiry "from time to time" on an outpatient basis. The "extraordinary" 30-day custodial remand power was addressed to the substantive issue of mental capacity and was potentially determinative of the outcome of the proceedings.[476] *R. v. Fitzgerald*[477] illustrates that the practice was to have the 30-day observational remand requested or ordered at the preliminary inquiry proper. *Fitzgerald* reads:

> At the opening of the preliminary hearing on February 10, 1981, counsel for Fitzgerald applied, pursuant to the provisions of s. 465(1)(c), for an order remanding the accused to the Clarke Institute of Psychiatry for observation.[478]

314) In *R. v. Chabot*,[479] the Supreme Court of Canada addressed the scope of a provincial court judge's power to commit an accused person to stand trial. Justice Dickson implicitly considered the interpretation of s. 463 provided in *Doyle* as follows:

> I do not think that, in this case, anything turns upon whether s. 463 purports to deal with a preliminary inquiry or merely with an initial mandatory inquiry by the justice after the accused has been arrested, directed at determining whether the charge is one over which the justice had absolute jurisdiction. On either view, I agree with the Court of Appeal that such an inquiry must be limited to 'charges' in informations outstanding against the accused at the time of the inquiry.[480]

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[476] See, *R. v. Sommer* (1958), 27 C.R. 243, 1958 CarswellQue 1 (Que. Sup. Ct.) at para. 10; and *R. v. Sweeney* (1975), 28 C.C.C. (2d) 70 (Ont. Prov. Ct.) at para. 12.
[477] 1982 CarswellOnt 1313 (Ont CA)
[478] *Fitzgerald*, *supra* at para. 26.
[479] [1980] 2 SCR 985, 1980 CarswellOnt 60.
[480] *Chabot, supra* at p.1007 or para. 66.

315) Justice Dickson confirmed that *Doyle* did not overturn or modify *Vaillancourt* (SCC) and confirmed that the mandatory inquiry under s.463 was not a part of a preliminary inquiry proper. This was consistent with Justice Spence's understanding in *Vaillancourt* (SCC) that powers of remand under s.465(1)(c) were restricted to a preliminary inquiry proper. Critically, only *Vaillancourt* (SCC), not *Doyle*, governs the remand issue in the case at bar, because *Vaillancourt* (SCC) addressed a murder charge and a 30-day observational remand, not fraud charges and an 8-day remand.

316) Judge Diebolt could not properly exercise preliminary inquiry powers under this Part that would effectively undermine his Part XIV obligation to order Mr. Tallio in custody until he or she was "dealt with according to law" *at the superior court* and to commit him into custody according to Form 8. Judge Diebolt could only fulfill his Part XIV and Part XV obligations lawfully if the scope of his 'preliminary' inquiry under Part XV was restricted.

317) Section 457(8) in Part XIV obliged a "justice" to whom a person charged with an offence mentioned in s. 457.7 was taken, to "order that the accused be detained in custody until he is dealt with according to law" and to issue "a warrant in Form 8 for the committal of the accused." Murder was identified in s.457.7(2)(d.1). Judge Diebolt was statutorily obliged to make this order and to issue the warrant in Form 8.[481] It is not clear from the available record that he used this form, which required Peace Officers to deliver the accused person to prison and for the keeper to receive the accused in custody until he is delivered by "due course of law." The legality of an accused person's continued detention is therefore an open question at the initial stage of the proceedings.

318) In 1983 s.457.7 of the *Criminal Code* provided that only a superior court justice could decide whether a person charged with "an offence punishable by death…or non-capital murder" should be ordered into custody or be released pending his or her trial. In 1978 this Court had observed that the "thrust" of s.457 "appears to be that judicial

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[481] In 1982 Harradance, J.A. observed that "where the accused is brought before the justice and is charged with an offence mentioned in s. 457.7, the justice is not without jurisdiction to deal with the accused. The justice is precluded from releasing the accused and *must make an order as set out in s. 457(8)*": *Alberta (Attorney General) v. Kennedy*, 1982 CarswellAlta 222 (CA) at para. 13. Emphasis added.

interim release will be dealt with at the earliest possible opportunity."[482] This practice is consistent with an accused persons' constitutional entitlement to *habeas corpus* under s.10(c) of the *Charter* and to reasonable bail under s. 11(e) of the *Charter*.[483]

319) A provincial court judge was not simply *de facto* authorized to exercise powers provided to a justice in s. 465 of the *Criminal Code*. In order to have jurisdiction to make a 30-day psychiatric remand order, Judge Diebolt had to be a justice "acting under" Part XV. He had to be presiding over a preliminary inquiry proper.

320) Judge Cunliffe Barnett presided over the preliminary inquiry of the appellant in July 1983. He was authorized to exercise the powers conferred on justices in s. 465 of the *Criminal Code* because he was conducting a preliminary inquiry proper and was therefore a justice acting under Part XV. In the context of that preliminary inquiry, he could have ordered Mr. Tallio into a 30-day remand if there were a reasonable basis for believing that Mr. Tallio might ("may") be mentally ill. Each power granted to him by s. 465 was only intelligible within this context, such as the power under s. 465(1)(h) to receive opening or closing submissions, or reply evidence, from Crown counsel.

321) *Vaillancourt* (SCC) proved to be consistent with *R. v. Swain*,[484] wherein Chief Justice Lamer observed, "remands for psychiatric observation can be ordered at the time of a preliminary hearing (s. 465)." In response to *Swain*, Parliament conferred authority for the first time upon a court to order a psychiatric assessment *at any stage* of the proceedings.[485]

322) In sum, the weight of the common law was that on April 25, 1983 Judge Diebolt did not have authority under Part XV of the *Criminal Code*, particularly under s.

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[482] *R. v. Adams*, 1978 CarswellBC 543 (CA) at para. 15.
[483] See *R. v. Neubauer*, 1987 CarswellSask 867 (Sask QB), a murder case in which a superior court justice presided over Mr. Neubauer's application for interim release, pursuant to s.457.7. Psychiatric evidence was tendered in support of the risk-assessment and the presiding justice detained Mr. Neubauer for reasons of perceived dangerousness. Inferentially, in a murder case only a superior court justice had jurisdiction to concerns about the accused person's mental healths. See also *R. v. Degerness*, 1980 CarswellBC 667 (BCSC), in which a preliminary inquiry took place *after* a detention order was made pursuant to s.457.7.
[484] [1991] 1 S.C.R. 933, 1991 CarswellOnt 93, at para. 159.
[485] See s. 672.12(1) of the current *Criminal Code*.

465(1)(c)(***ii***), to order the appellant into a 30-day psychiatric remand. He was not lawfully acting as a "justice" acting under that Part or as a "magistrate" under Part XVI when he ordered Mr. Tallio into a 30-day psychiatric remand. Provincial court judges did not acquire this power until a preliminary inquiry proper had commenced. As the power was neither expressly conferred or conferred by necessary implication until a preliminary inquiry proper had commenced, Judge Diebolt lacked the jurisdiction to exercise it when he did.

323) As a result of the lack of jurisdiction, any evidence derived from Mr. Tallio's compelled placement at FPI was a nullity and inadmissible on its face. Mr. Tallio was subjected to questioning by Drs. Murphy and Pos at the FPI only because he was unlawfully ordered into custody there by Judge Diebolt. For this reason, the principles of fundamental justice do not countenance the possibility that statements Mr. Tallio might have made to Drs. Murphy and Dr. Pos could be used against him at his trial. If an involuntary confession elicited by a peace officer cannot be used against an accused person as a matter of fundamental justice, neither should an admission obtained from a suspect placed unlawfully in detention *by a judge*.

III. The Anticipated Evidence from Dr. Pos was Inadmissible:

Once the appellant was found to be fit, the anticipated evidence from Dr. Pos became inadmissible as a matter of law or policy

324) Inferentially, Mr. Tallio had been declared fit to stand trial on May 27, 1983 at the latest – he was actually found fit by Dr. Murphy in late April.[486] Nothing in the record below suggests that after May 27, 1983 the court, the trial Crown or Mr. Rankin had any concern that the appellant might be mentally ill. If, on May 27 or beforehand there had been a hearing at which Dr. Murphy or even Dr. Pos had testified as expert witnesses, any statements the appellant had allegedly made to these psychiatric experts, including the Pos statement, would have been admissible for a limited purpose, going to the

[486] Second Aff. Paul Wilson, Exhibit "D" typewritten note to file dated May 27, 1983, p. 1(Rev. Aff. Tab 20). The appellant was discharged from the FPI on May 20, 1983 (FPI Assessment Notes dated "23-05-20"), appeared in provincial court that same morning, and was remanded to May 27, 1983.

weight the expert opinions about the state of the appellant's mental health, but not for the truth of the statements' contents.[487]

325) As of May 27, 1983, however, when it was clear that no abnormality was found in terms of Mr. Tallio's mental makeup, neither Dr. Murphy nor Dr. Pos had any relevant opinion evidence to give the court in the proceedings against Mr. Tallio.

326) It is disconcerting, therefore, that the Crown prosecutor intended to call Dr. Pos at trial not to give an expert opinion about Mr. Tallio's mental health, but to reveal to the court an incriminating statement that Mr. Tallio had purportedly made to him on May 16, 1983 during the judicially-ordered custodial forensic exam. The Crown prosecutor intended to tender this statement for the truth of its contents. The appellant is unaware of any attempt to use a protected statement in the history of Canadian criminal law or procedure and, with the exception of the case at bar, it has not been attempted since—for sound reasons.

327) As of 1978 in Toronto, the Crown Attorney had assured the Metropolitan Toronto Forensic Service (METFORS) psychiatrists that it would not call psychiatrists to provide fact information based on what they had been told by accused persons.[488] Out of hundreds of brief assessments recorded by that time, no psychiatrist had ever been asked to provide a psychiatric confession for the Crown. At the time of the appellant's trial, every reported, authoritative case that had examined the admissibility or evidentiary use of statements made by accused persons to forensic psychiatrists addressed expert *opinions* called by the defence or the Crown *at trial* on the live issue of insanity or automatism.[489] No Crown had ever considered treating the psychiatrists in law as civilians (or persons in authority) who could simply reveal self-incriminating admissions made to them by their patients in a forensic exam, for their truth.

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[487] *R. v. Abbey,* [1982] 2 S.C.R. 24 at paras. 48-52.
[488] B.T. Butler, R.E. Turner, "The Ethics of Pre-Arraignment Psychiatric Examination: One Canadian Viewpoint" (1978) 6:4 Journal of the American Academy of Psychiatry and the Law Online 398.
[489] See *Vaillaincourt* (SCC)*, supra, Sweeney* (CA)*, supra*, *Abbey*, *supra*, *Potvin*, *supra*, *Regina v. Schonberger* (1960), 126 C.C.C. (3d) 113 (Sask CA), and *Fisher v. R.*, [1961] S.C.R. 535, 1961 CarswellOnt 14, and *R. v. Conkie*, 1978 CarswellAlta 233 (Alt. Sup. Ct., App. Div.).

328) *Abbey* put decisively to rest, once and for all, any doubts that might have remained in the common law as to the evidentiary use that might be put to statements accused persons made to forensic psychiatrists. More precisely, *Abbey* confirmed that such statements could *never* be used for the truth of their contents. *Abbey* maintained this principle as a de facto principle of fundamental justice, a matter of fairness, and as a matter of maintaining the reputation of Canada's criminal justice system.

329) *Abbey* confirmed that *all* statements made by accused persons to forensic psychiatrists in psychiatric examinations are deserving of special protection from the justice system, especially when those statements are elicited in a court-ordered institutional psychiatric examination. Indeed, because of the distinctive social context in which a judge orders an accused person into detention on a reasonable suspicion that the person suffers from cognitive deficiencies, the categorical protection that *Abbey* affords those persons has a deeper ethical-legal foundation than the confessions rule itself.

330) The confessions rule is designed to protect persons who speak to obvious 'persons in authority' simply because the latter have the power to influence the behaviour of the latter, including their decision to speak or not to speak.[490] The justice system insists that an accused person has spoken *voluntarily* to an obvious person in authority (usually a peace officer) before any statement that he or she makes is admissible for its truth. However, unlike the psychiatric detainee, the typical police detainee is not presumed, known or suspected by a member of the judiciary or Crown prosecutor to have a mental disorder or other meaningful cognitive limitation. A police officer investigating an alleged crime, not a presiding judge concerned solely about a person's mental health, detains the accused person with the intent and power to interrogate him or her about the substantive offence.

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[490] *R. v. Piche,* [1971] S.C.R. 23, 1970 CarswellMan 62 (SCC), established that a *voir dire* was needed when the Crown sought to tender any statements made by an accused person to a person-in-authority, whether it was exculpatory or inculpatory. Voluntariness, not the exculpatory or inculpatory contents of the statement, were determinative. *Piche* involved an exculpatory statement made by Ms. Piche to a police officer.

331) Enlightened jurists and judges easily recognize that the forensic psychiatric detainee who is placed in an institution by a judge is far more vulnerable to the authority of the psychiatrist, who has the judicial mandate to observe and to examine that detainee, than a custodial detainee in a jail is to a peace officer who wishes to interrogate him or her in relation to the substantive offence. A typical detainee is not asked by the police or expected to help anyone, except as a psychological ruse for obtaining a confession. By contrast, a psychiatric detainee is expected *to assist the court* (and therefore the public) honestly in determining the legal implications of his or her suspected cognitive deficiencies.

332) Until *Abbey* was decided, the common law saw many side-issues arise in the forensic psychiatric context, such as whether statements made by forensic detainees to psychiatrists were privileged, whether psychiatrists were perceived by detainees as persons-in-authority, and whether the forensic detainee had been advised by a lawyer not to speak to a forensic psychiatrist. (Consider how illogical it is to assume that a person suspected of being mentally ill who is placed in a locked psychiatric institution will understand or follow advice not to speak to a forensic psychiatrist).

333) The fundamental principle articulated in *Abbey* had been staring Crown prosecutors and judges in the face for years. *Abbey* said enough is enough, and decisively confirmed that statements made by forensic detainees on suspicion that they have mental limitations must *never* be used for the truth of their contents, but only to assist the fact-finder in determining the strength of an expert psychiatric opinion. The one arguable exception remains in the restricted post-conviction context of dangerous offender proceedings,[491] because here the issue is forward-looking dangerousness, not culpability.

334) The ethical and legal underpinning of *Abbey* can be traced at least to *Perras v. The Queen*.[492] The substantive trial issue in the latter case was whether Mr. Perras had acted involuntarily due to extreme intoxication or was merely feigning amnesia. The

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[491] See, e.g., *Wilband v. The Queen*, [1967] S.C.R. 14.
[492] *Perras v. R*, 1973 CarswellSask 75, [1974] S.C.R. 659, *aff'g* 1972 CarswellSask 65 (Sask. CA).

Crown prosecutor had sought to call rebuttal forensic psychiatric opinion evidence from Dr. Demay on this live issue. Significantly, the Crown prosecutor had *no intention* of tendering evidence of anything Mr. Perras might have said to Dr. Demay and had even conceded that he was a person in authority.[493] At the Saskatchewan Court of Appeal, Woods, J., for the majority wrote,

> *The law is clear* that, had the evidence been led as to what, *if anything*, the accused told Dr. Demay in the course of his examination, it could not have been received as a confession. Clear instruction to the jury would be necessary as to the very limited purpose for which such evidence could be used. In any event, the Crown did not intend to lead it and if such evidence existed it would only have been brought out in cross- examination. It could not have constituted or have been used as a confession, so could not be the proper subject of a *voir dire*.[494]

335) Note that this *law* (not just a policy or practice) was "clear" *even before* 1972 and that it pertained to statements made by accused persons to a Crown psychiatrist *potentially led by the Crown*.

336) In *Perras* (SCC), the Supreme Court of Canada affirmed Woods, J.A.'s decision. Judson, J. (for the majority of the SCC) wrote,

> The Court of Appeal held that there was error in the ruling of the trial Judge that a voir dire was necessary because Crown counsel did not intend to lead any evidence of a statement and, therefore, there was nothing on which to hold a voir dire. I agree with the Court of Appeal. The Crown's submission throughout has been that Dr. Demay was simply being called as an expert entitled to give evidence on a psychiatric question, and that he was not a witness as to facts.
>
> The nature and extent of Dr. Demay's examinations within the limits stated by Crown counsel had to be elicited to enable the jury to assess the foundation for any opinion that he might give. The fact that the doctor had examined Perras a short time after the event would, in itself, be a part of the foundation.[495]

337) Judson, J. added that he had determined the appeal on the basis of the Crown's concession that Dr. Demay was a person-in-authority, and he cited the post-conviction, dangerous offender case of *Wilband, supra* as "strong authority against any such

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[493] The Crown prosecutor did not intend "to lead Dr. Demay to report any statements made by the accused": *Perras* (SCC) at para. 3.
[494] *Perras* (CA) at para. 18. Emphasis added.
[495] *Perras* (SCC) at paras. 5 and 6.

proposition."[496] However, as submitted above, the post-conviction, dangerous offender context is qualitatively distinguishable from the pre-conviction context addressed by Woods, J.A. and accepted by Judson, J. Indeed, just because Judson, J. suggested that a psychiatrist who conducts a post-conviction dangerous offender psychiatric exam might be a person-in-authority, that suggestion had no bearing on the fundamental rule articulated by Woods, J.A., which Judson, J. accepted ("I agree with the Court of Appeal," *supra*), being that any statements made by a detainee to forensic psychiatric examiner pre-conviction could not be used by the Crown as a confession. In the case at bar, Ms. Pothecary states in her second affidavit that she considered Dr. Pos to be a person in authority.[497]

338) Significantly, Spence, J. observed in dissent in *Perras* (SCC) that Mr. Perras was entitled to explore the factual basis of the Crown's expert opinion, in which case cross-examination "would lead inevitably into a detailed examination of what the appellant had told Dr. Demay".[498] Spence, J. addressed the argument that the trial judge was obliged to instruct the jury that Mr. Perras' statements to the Crown expert [Dr. Demay] "could not have been accepted as evidence of the truth or falsity of their contents but only as the material upon which Dr. Demay could base his opinion".[499] This was precisely *the law* articulated by Woods, J.A. in *Perras* (CA) and accepted by Judson, J. for the majority. Spence, J. implicitly accepted it by observing that it was "most attractive as a legal theory".[500] His concern was not with the principle or "theory," as he put it, but with the practice. He expressed concern that, even with the limiting instruction, the jury "would be quite incapable of refusing to accept that evidence as applicable to the truth of such facts, rather than limiting the effect of the evidence to merely establishing the basis for Dr. Demay's opinion".[501]

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[496] *Perras* (SCC) at para. 7. Justice Judson cited *Wilband v. The Queen*, [1967] S.C.R. 14.
[497] Tab 30B, para. 37.
[498] *Perras* at para. 27.
[499] *Perras* at para. 32.
[500] *Perras* at para. 32.
[501] Of course, his reasoning about jury capabilities flies in the face of subsequent judicial recognition that jurors are presumed to be capable of following limiting instructions—see, e.g., *R. v. Corbett* (1988), 41 C.C.C. (3d) 385—but this fact is beside the point.

339) In effect, in *Perras* (SCC) Spence, J. confirmed the law articulated by Woods, J.A. and simply raised a concern about the efficacy of the limiting instruction when the factual foundation for a psychiatric opinion was revealed to the fact-finder. Allan Manson similarly observed,

> The admissibility of opinion evidence permits testimony about the basis for the opinion, including reference to incriminating admissions. Although such admissions must be subjected to a limiting instruction which cautions the jury to their restricted purpose distinct from evidence going to the truthfulness of the admission, the prejudice which arises merely from allowing the jury to hear the admission cannot be eradicated.[502]

340) In 1973 the Ontario Court of Appeal followed and applied *Perras* (SCC) directly in relation to forensic psychiatric opinion evidence *that the Crown prosecutor wished to lead* on the issue of insanity.[503] As in Mr. Perras's case, the Crown in Mr. Vaillaincourt's case had no intention of leading evidence of what Mr. Vaillancourt might have said to the Crown psychiatrist for the truth of its contents. Gale, C.J.O. (for the court) found that, because the Crown prosecutor in that case was not leading statements made to the Crown psychiatrist for their truth, "the issue as to whether the psychiatrist is a person in authority is irrelevant and no voir dire is necessary."[504]

341) Gale, C.J.O. added,

> It is implicit in the judgment of the majority in [*Perras* (SCC)] that other considerations may apply if the Crown through its psychiatrists were tendering admissions by the accused as to facts which would be relied upon by the Crown to prove the guilt or innocence of the accused.[505]

Gale, C.J.O. was directly referring to the logic of *Perras (SCC)*, to the effect that a voluntariness *voir dire* was not necessary because the Crown in that case had no intention of leading statements Mr. Perras made to the Crown's forensic psychiatrist *for their truth*.[506] The "other" consideration that Gale, C.J.O. attributes to *Perras* (SCC) by

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[502] A Manson, "Observations from an Ethical Perspective on Fitness, Insanity and Confidentiality," (1982) 27 *McGill Law Review* 196 at 224 (citations omitted).
[503] See *R. v. Vaillaincourt*, 1974 CarswellOnt 52 ("*Vaillaincourt* (CA)").
[504] *Vaillancourt* (CA), p.5.
[505] *Vailancourt* (CA), p.5.
[506] See *Perras* (SCC) at para. 5.

implication is that a voluntariness could be necessary if the Crown intended to tender statements made by an accused person to a forensic psychiatrist for their truth. Respectfully, *Perras* (SCC) intended no such implication because it clearly accepted that a psychiatrist could not recall statements made to a Crown psychiatrist *for their truth, ever* (as *Abbey* subsequently confirmed, see below).

342) In *Vaillancourt* (CA) Gale, C.J.O. followed *Perras* (SCC) and concluded that the trial judge in Mr. Vaillancourt's case was not obliged to hold a voluntariness *voir dire* because the Crown wished to tender statements that Mr. Vaillancourt made to a Crown psychiatrist *only for the limited purpose* of supporting "their opinion as to the mental capacity of the accused in relation to the offence charged" and because any other material admissions were already a matter of record.[507]

343) The Supreme Court of Canada agreed categorically with Gale, C.J.O., but felt the need to address the legality of procedures involved in eliciting psychiatric statements at the earliest stages of an accused person's detention,[508] as was discussed in this factum under the Lack of Jurisdiction ground.

344) In 1977 the Supreme Court of Canada yet again decided to remind Crown prosecutors and judges that Crown prosecutors could *never* use statements provided by accused persons to forensic psychiatrists for the truth of their contents. In *R. v. Phillion*, Ritchie, J. (for the majority) wrote,

> Statements made to psychiatrists and psychologists are sometimes admitted in criminal cases and when this is so it is because they have qualified as experts in diagnosing the behavioural symptoms of individuals and have formed an opinion which the trial judge deems to be relevant to the case, *but the statements on which such opinion are based are not admissible in proof of their truth but rather as indicating the basis upon which the medical opinion was formed in accordance with recognized professional procedures*.[509]

345) In *Phillion* (SCC) Ritchie, J. explicitly distinguished the potential use of statements made by an accused person to a polygraph operator—"Entirely different considerations, however, apply to the evidence of Mr. Reid, who was neither a

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[507] *Vaillancourt* (CA), p. 5.
[508] *Vaillancourt* (SCC), para. 5.
[509] 1977 CarswellOnt 12, [1978] 1 S.C.R. 18 at para. 12. Emphasis added.

psychiatrist nor a psychologist"[510] (and who was not even a qualified expert)—from those made to forensic psychiatrists. He observed that, if Mr. Phillion had made an admission directly to a polygraph operator, the operator could have recalled the admission for the Crown, presumably as a fact witness.[511] By expressly distinguishing statements made to a polygraph operator (who could never give expert opinion evidence) from statements made to forensic psychiatrists and psychologists, Ritchie, J. clearly confirmed that the Crown could not call forensic psychiatrists as fact witnesses to reveal admissions made to them for their truth.

346) *R. v. Stewart*[512] confirmed that statements made by accused persons to forensic psychiatrists were protected statements in the sense that they could not be used for the truth of their contents. Mr. Stewart had been examined by a Dr. Cantor who then drew a professional opinion as to Mr. Stewart's fitness to stand trial. The court observed, "there was some general discussion *which resulted in Dr. Cantor concluding that the appellant was fit to stand trial*. Dr. Cantor *then* advised the appellant that he had seen the body of the deceased *and then the appellant blurted out the information in issue*".[513] The singular fact that Mr. Stewart had made his contested statement to Dr. Canter *after the relevant fitness assessment information was obtained and the expert opinion formed* made the statement admissible. The court in *Stewart* expressly distinguished between statements made by persons to psychiatrists in dangerous offender proceedings – statements [that] were in part the basis for the doctor's opinion – and a statement "*not related to the doctor's opinion" because the doctor "had arrived at his conclusion as to the appellant's fitness to stand trial before the statement was made*".[514]

347) Therefore, because Mr. Stewart had made his incriminating statements to Dr. Cantor after or outside of his fitness assessment and after Dr. Cantor had formed his expert opinion, the court in *Stewart* followed Gale, C.J.O.'s understanding of *Perras (SCC)* in *Vaillancourt (CA)*, to the effect that "other considerations may apply if the

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[510] *Phillion* (SCC), para. 13.
[511] *Phillion* (SCC), para. 15.
[512] (1980), 54 C.C.C. (2d) 93 (Alta. C.A.).
[513] *Stewart*, para. 6. Emphasis added.
[514] *Stewart*, para. 22. Emphasis added.

Crown through its psychiatrists were tendering admissions by the accused as to facts which would be relied upon by the Crown to prove the guilt or innocence of the accused."[515]

348) The court's reference in *Stewart* to the "other considerations" mentioned in *Perras* and *Vaillancourt* was therefore intended to say that a *voir dire* was needed if a Crown attempts to tender an admission made by an accused person to a psychiatrist *during* a forensic psychiatric exam (as opposed to later, after the exam was completed and opinion was formed), for the truth of its content; or it was meant to confirm the prevailing protected statement principle, that a statement made to psychiatric professionals in the context of psychiatric assessment could only be used for limited purposes of supporting an expert opinion (in which case no *voir dire* would be needed). No Canadian court has ever suggested or implied that when a Crown prosecutor seeks to introduce admissions made by the accused to the psychiatrist during a psychiatric examine *in furtherance of proof of guilt of the accused*, "considerations" other than the protected statement principle might permit the Crown to tender those admissions for their truth.

349) In 1982 the Supreme Court of Canada yet again confirmed that statements made by accused persons forensic psychiatrists could never be tendered for the truth of their contents. Mr. Abbey had been interviewed by a defence forensic psychiatrist (Dr. Vallance) and a Crown forensic psychiatrist (Dr. Eaves, for rebuttal purposes), for the purpose of obtaining expert opinions about Mr. Abbey's mental state at the time of the alleged offence. The use to which the evidence of *both* psychiatrists became an issue on appeal. The Crown complained about the trial judge's approach to the defence expert, but the court in *Abbey* resolved the complaint by addressing the use to which forensic psychiatric evidence may be put *generally*. Dickson, J. (for the court) wrote, "it was error for the judge to accept as having been proved the facts upon which the doctors had relied in forming their opinions."[516]

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[515] *Stewart*, para. 22.
[516] *Abbey*, para. 52.

350) In *Abbey* Dickson, J. quoted with approval the passage from *Phillion* (*supra* para. 344), wherein Ritchie, J. made clear that statements made to psychiatrists and psychologists were not admissible for their truth, but only to show the basis on which a medical was formed.[517] Then Dickson, J. turned his mind directly to the "real" danger that a limiting instruction in relation to psychiatric statements might not be effective and that a jury might indeed use statements made by an accused person to a forensic psychiatrist for their truth.[518] He affirmed that the statement Mr Abbey made to Dr. Vallance was "admissible in the context of his [the expert's] opinion," but "to the extent that it is second-hand his testimony is not proof of the facts stated."[519]

351) Dickson, J. referred to the accused person's statements to a forensic psychiatrist as "second-hand testimony" because, in the eyes of the Supreme Court of Canada, a statement made by an accused person within a forensic psychiatric exam cannot be used as an admission or confession, just as Woods, J.A. had observed in *Perras* (CA). Dickson, J. even quoted with approval Woods, J.A. in *Perras* (CA) as observing:

> The evidence of a physician stating what a patient told him about his symptoms is not evidence as to the existence of the symptoms. To accept it as such would be to infringe the rule against hearsay.[520]

352) Dickson, J. found that "the trial judge erred in law in treating as *factual* the hearsay evidence upon which the opinions of the psychiatrist were based."[521] He made clear that the trial judge had erred by permitting Dr. Vallance to give evidence *in effect as a fact witness*. It would therefore be an affront to the principles of fundamental justice to argue that Dr. Vallance (or Dr. Eaves, who was called by the Crown) could have simply testified as a fact witness, not as an expert witness, and provided the very same fact evidence that Dickson, J. criticized the trial judge for accepting in the context of an expert opinion. Justice Watt observed in *R. v. Baltovich*,

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[517] *Abbey*, para. 48.
[518] *Abbey*, para. 49.
[519] *Abbey*, para. 49. See also para. 50.
[520] See *Abbey*, para. 52.
[521] *Abbey*, para. 51. Emphasis added.

> To permit a hearsay exception to cleanse the exclusionary effect of another admissibility rule would be at once to make the hearsay rule first among equals and to allow a party to do indirectly what an admissibility rule would not suffer the party to do directly. Failure to satisfy the rigours of one admissibility rule warrants exclusion under that rule to which satisfaction of the requirements of another admissibility rule affords no relief.[522]

353) By plain logic and sound principle, if the Crown could not call evidence of statement made to a forensic psychiatrist for its truth when it asks a psychiatrist to give expert opinion evidence, it was certainly barred from calling the psychiatrist as a fact witness to elicit precisely the same evidence for its truth.The clear, import of *Abbey*, *Perras*, and *Phillion* was that statements obtained during forensic psychiatric assessments for the purpose of supplying information for an expert opinion, *including self-incriminatory statements*, which were squarely at issue in *Perras*, are never admissible for their truth. This "elementary principle" was and remains fundamentally sound and robust because it recognizes the distinctive, purposive, and public interest context in which such statements are obtained.[523]

354) By 1983, then, the Supreme Court of Canada had *repeatedly* affirmed that a class exemption against forensic psychiatric statements being used for their truth existed and that this hearsay exception did not depend upon issues of privilege, voluntariness or persons in authority. It was precisely because the common law had so adamantly maintained that statements made in the distinctive forensic psychiatric required unique protection against potential misuses that no Crown prosecutor had ever before tried to introduce an inculpatory statement made by an accused person to a forensic psychiatrist *independently* of litigation directly involving that psychiatric opinion.

355) But-for the appellant's detention at the FPI, pursuant to Judge Diebolt's s.465 psychiatric order, the Pos statement would have never been elicited, because the appellant would have never encountered Pos in the FPI on May 16, 1983. Only by virtue of a judicial order and Mr. Tallio's secured detention at the FPI did the trial Crown

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[522] 2007 CarswellOnt 10481 (CA) at para. 105. See *ibid* at paras. 85-87.
[523] Dickson, J. accepted this expression from *R. v. Turne*r, [1975] Q.B. 834, in *Abbey*, para. 49. Again, this principle is currently reflected in the *Criminal Code*'s concept of a "protected statement": see s.672.21(1) of the *Criminal Code*.

acquire a statement that the common law insisted was ensured against misuse. The Crown at trial appears to have sought to call Dr Pos as an expert witness, and the Crown on appeal states that Dr. Pos could have been called as a fact witness. Neither avenue was, or is, legally available. This would have been, and is, an affront to the principles of fundamental justice and undermines the very integrity and repute of Canada's criminal justice system.

In the Circumstances, Dr. Pos Was a Person in Authority

356) *R. v. Fowler* [1982] NJ No. 14, 4 CCC (Nfld. CA) is a decision that is remarkably similar on the facts to *Tallio*. The appellant, Mrs. Fowler, had a low IQ and was remanded to a psychiatric facility for 30 days for fitness to stand trial. She had been convicted of second-degree murder based on statements she allegedly made to doctors at the hospital which the medical doctor thought to be relevant and admissible in the proceedings against her. The trial judge had permitted members of the hospital staff to read into evidence made to them by Mrs. Fowler. The defence submitted that this was in error. The Newfoundland Court of Appeal considered whether the doctors, nurses and nursing assistants were persons in authority in the circumstances of the case.

357) The Court in *Fowler* cited Justice Bain's definition of "person in authority" in *R. v. Todd* (1901) 4 C.C.C. 514 at p. 526 that a person in authority "means, generally speaking, anyone who has authority or control over the accused or over the prosecution against him". The Court found that the courts have used the subjective test in determining who is a person in authority, the test being: "Did the accused, truly believe, at the time he made the declaration, that the person he dealt with had some degree of power over him?" Further, even if an objective test were applied, the Court held that the hospital staff were "people engaged in the detention and examination of the accused, who had some authority over the proceedings, and thus persons in authority." The Court found that the coercive nature of a 30-day, s. 465 remand, automatically made the forensic professionals persons-in-authority over the detainee, and directly informed the voluntariness of any statements that the detainee might make to such professionals.

358) As in *Fowler*, Phillip was not a voluntary patient at the FPI. He did not consent to

go there. He was held there because of an order of the provincial court and the hospital staff had authority over him. As forensic psychiatrist Dr. Stanley Semrau states at page 9 of his report assessing Dr. Pos's letter,[524]"there would have been a marked interpersonal power imbalance involved in any interaction between Phillip and Dr. Pos, in almost all possible respects." Dr. Pos was "part of the apparatus and power structure of an institution which was in practical terms incarcerating Phillip."[525]

359) Voluntariness, not reliability, is the critical admissibility issue in relation to statements made by accused persons to persons-in-authority.[526] In its analysis as to the statements' voluntariness, the Court in *Fowler* held that "the Crown has not been able to bring before the Court evidence of all the circumstances surrounding the taking of the statements - indeed, none of the circumstances"[527] and therefore failed to discharge the burden of proof that the statements were voluntary. Thus, Chief Justice Mifflin held, the statements should not have been admitted into evidence.

360) In *Fowler*, the doctor stated that he gave the appellant a warning but she did not seem to understand it.[528] In *Tallio*, Dr. Pos failed to even administer a warning to Phillip.[529] Further, there are no notes authored by Dr. Pos in the FPI file, and Dr. Pos himself states that no one else was present when he (supposedly) met with Phillip. Dr. Pos did not describe the circumstances surrounding the taking of the Pos statements. The four forensic psychiatrists who each analyzed Dr. Pos's letter convey that Dr. Pos unethically and inappropriately tried to elicit admissions from the teenaged Phillip.[530] If

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[524] Attached as Exhibit "A" to the First Aff. Dr. Stanley Semrau (Tab 32).
[525] First Aff. Dr Stanley Semrau, Exhibit "A", p. 9 (Tab 32).
[526] *R. v. Piche*, [1971] S.C.R. 23, and *Rothman v. The Queen*, [1981] 1 S.C.R. 640 at para. 35.
[527] *Fowler, supra*, p. 6.
[528] *Fowler, supra,* p. 6.
[529] See, Aff. Dr. Stanley Semrau, Exhibit "A", p. 8-9, in which Dr. Semrau states that at the FPI at that time, it would have been typical that the informed consent process would have been documented in the report (Tab 32). See also, Aff. Graham Glancy, Exhibit "B", p. 6. (Tab 15); Aff. Dr. John Bradford, Exhibit "B" p. 4, 6 (Tab 7).
[530] First Aff. Dr. Roy O'Shaughnessy, Exhibit "A" page 6-7 (Tab 28a); Aff. Dr. Stanley Semrau, Exhibit "A", p. 11-12 (Tab 32); Aff. Graham Glancy, Exhibit "B", p. 4, 6 (Tab 15); Aff. Dr. John Bradford, Exhibit "B" p. 4, 6 (Tab 7). Assuming Dr. Pos was found to be a person in authority, if the Pos statement was made as purported, it would constitute an involuntary statement due to Dr. Pos's coercion of Phillip (see for instance,

Ms. Pothecary was unable to bring before the Court evidence of all the circumstances of the taking of the statements—and it is submitted that she would have been unable to do so, particularly with the circumstances being extremely suspect—it flows that the Crown would have failed to discharge the burden of proof that the statements to Dr. Pos were voluntary.

IV. There was a Miscarriage of Justice Concerning the Appellant's Plea

The plea was uniformed due to ineffective assistance of counsel

The Appellant's Cognitive State

361) The appellant attests that he did not instruct Mr. Rankin to enter a guilty a plea, that he did not understand what the term "guilty plea" meant, and that he never would have pled guilty sexually assaulting and killing Delavina Mack. However, he does not submit in this appeal that trial counsel should have been aware of the extent of his cognitive limitations and understanding in this regard. There is clearly a difference in what trial counsel states occurred at the guilty plea stage and what Phillip states what he thought had transpired. The appellant's position at this appeal is that his cognitive limitations, as understood by today's analytical understandings and perspectives, provides an explanation for the differences in view. The salient matter concerning trial counsel's conduct is with respect to the admissibility or use of critical evidence. This is not to say that the courts, lawyers and related personnel at the time were not aware that Phillip had cognitive limitations, but rather that the extent and impact of those limitations was not appreciated.

362) The puropose for presenting Mr. Tallio's cognitive state on this appeal is to provide a backdrop from which this court can assess the context of the relationship that Mr. Tallio had with his trial counsel, as well as the context concerning his understanding of what was happening to him in the course of pre-trial proceedings in court and at FPI. The appellant submits that his plea was uninformed. That analysis cannot simply be

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R. v. Rothman, [1981] S.C.J.N. 55 (SCC) at p. 19). Even if Dr. Pos's conduct had been viewed as appropriate, the test is subjective (see, *R. v. Griffin*, [1981] O.J. No. 3273, 59 C.C.C. (2d) 503, para. 28, citing *Rothman*).

made in a vacuum of determining whether Mr. Rankin provided adequate advice concerning the use of Dr. Pos's evidence, but must also be considered in the context of the appellant's cognition in the circumstances. This is not to say that, whenever an appellant wishes to withdraw a plea on the basis that it was uninformed, that cognition comes into play. Rather, the appellant submits that the courts must approach the matter on a case-by-case basis, and that cognition in the context of assessing whether a plea was informed may have some bearing in limited cases, such as the one at bar.

Evidence Relating to Cognition

363) There were numerous concerns as to Phillip's communicative and cognitive abilities in 1983 and throughout his youth in general. The observations of individuals who knew Phillip in 1983 offer "objective, contemporaneous evidence" (as sought by the Supreme Court in *Wong* to support the subjective inquiry) bolster the credibility of Phillip's assertions that he truly did not understand what was occurring during his trial. To review, his youth probation officer Marie Spetch and social workers Colleen Burns and Paul Wilson recount the teenaged Phillip as being "glazed-over"; that talking to him was like "pulling teeth"; that he seemed to have cognitive difficulties, was "mentally challenged" or "mentally slow" and did not appear to understand complex instructions. He compensated by bringing others to meetings and having them speak for him. He went along with the flow, never questioning the workers' authority.

364) Dr. McIlwain, the physician who assessed Phillip on April 23, 1983, attests that Phillip "did not have a clue what was going on." Lawyer Ms. Pinder, who attempted to give Phillip legal advice that day, was concerned that he had a mental deficiency. Youth correctional officer Marie Spetch, who visited Phillip often at Oakalla prior to his trial, observed that Phillip "did not seem to fully understand the legal proceedings that were occurring in his case."

365) Judge Barnett recalls that Phillip appeared to be overwhelmed and did not understand the gravity of his situation. He did care about missing Halloween, to the point that sheriffs took pity on him and brought him candy, as witnessed by court reporter Jeffrey Cairns.

366) In her 1983 report to Ms. Bond, Dr. Koopman wrote that Phillip did not

understand what Mr. Rankin or others told him and tried to compensate by answering them “in a very general way” to stop the questioning, or by not speaking, or speaking very little. Dr. Koopman testified at the *voir dire* that Phillip did not function as a 17-year-old but rather at the level of a 10 to 12-year-old child. Her opinion was accepted by Justice Davies.

The Asante Report

367) In December 2015 Phillip was assessed by a multidisciplinary team at the Asante Centre, a specialized facility for fetal alcohol spectrum disorder, autism spectrum disorder and other complex disabilities. Following the results of the assessment,[531] the Asante Centre advised that Phillip should be viewed as an individual with a disability.[532] He has been diagnosed as having significant discrepancies in his cognitive ability. He struggles with a low processing speed, and with significant deficits in his verbal comprehension, verbal memory, and verbal reasoning, among other areas.[533]

368) As found by the Asante Centre, Phillip’s ability to understand and express himself in concrete ways is not as developed as other adults, even when information is kept short and concrete. He has difficulty processing “even a couple of sentences when they are presented verbally.”[534] The Asante Centre found that Phillip’s verbal ability would have been worse prior to his incarceration and that he “fakes understanding even when he hasn’t understood what he hears.”[535] Phillip assumes his listener will fill in the appropriate missing information for him, which “has implications for questioning in a legal context” advised the Asante Centre. “He will be more likely to be led by questioning than other adults.”[536]

369) Amongst the adverse experiences that the Asante Centre concluded likely contributed to Phillip’s brain deficits are the head injuries he has suffered throughout his

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[531] Asante Centre Diagnostic Assessment Report (“Asante Centre Report”) attached as Exhibit “A” to the First Affidavit of Phillip Tallio.
[532] Asante Centre Report, page 21.
[533] *Ibid* at pages 19-20.
[534] *Ibid* at page 22.
[535] *Ibid* at page 22.
[536] *Ibid* at page 23.

life.[537] Phillip estimates that he has suffered between 20 to 30 concussions,[538] with many occurring prior to his 1983 trial. Between the ages of five to 17, his head was injured when he: (a) hit his head when his mother threw him down a flight of stairs,[539](b) when he crashed down the side of a mountain in a vehicle,[540] (c) when he was punched in the head by his bus driver,[541] (d) when he was kneed, kicked and punched in the head by bullies,[542] (e) when he hit his head when running away from a gang,[543]and (f) when he was punched in the head by his cousin's boyfriend, to name a few incidents.[544]

370) The Asante Centre determined that Phillip's deficits are connected to the severe neglect and trauma that he suffered in his youth.[545] His cultural, familial and socioeconomic background contributed to the outcome of his trial. The impact of these factors was also not understood in 1983 at the level it is today.

The Plea was Uninformed

Trial counsel was ineffective because he did not properly evaluate the evidence of Dr. Pos.

371) This Court may also set aside a guilty plea on the basis that it was uninformed due to the incompetence of Mr. Rankin and because a miscarriage resulted from his incompetent representation of Phillip.[546] An appellant who seeks to have his or her plea reversed on this basis must establish the facts underpinning the claim of incompetence attributed to trial counsel (what the ONCA in *R. v. Cherrington*, 2018 ONCA 653 calls the "performance" component), and a miscarriage of justice resulting from the alleged incompetence of trial counsel[547] (what the Court in *Cherrington* calls the "prejudice" component).

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[537] Fourth Aff. Phillip Tallio, para. 21 (Tab 42d).
[538] Fourth Aff. Phillip Tallio, para. 17 (Tab 42d).
[539] Fourth Aff. Phillip Tallio, para. 2 (Tab 42d).
[540] Fourth Aff. Phillip Tallio, para. 4 (Tab 42d).
[541] Fourth Aff. Phillip Tallio, para. 5 (Tab 42d).
[542] Fourth Aff. Phillip Tallio, para. 7 (Tab 42d).
[543] Fourth Aff. Phillip Tallio, para. 8 (Tab 42d).
[544] Fourth Aff. Phillip Tallio, para. 10 (Tab 42d).
[545] Fourth Aff. Phillip Tallio, para. 21 (Tab 42d).
[546] *R. v. Cherrington*, 2018 ONCA 653 at para. 25.
[547] *Ibid.*

372) This Court may exercise its discretion in the interests of justice to receive fresh evidence to explain the circumstances leading up to a guilty plea that may demonstrate a miscarriage of justice has occurred, even when the appellant's guilty plea appears to have met all the traditional tests for a valid guilty plea—i.e. that it was unequivocal, voluntary and informed.[548] As a corollary to the authority to admit fresh evidence, this Court may set aside a guilty plea in the interests of justice.[549]

The Performance Analysis: Facts underpinning ineffective assistance of counsel

373) Apropos of the *voir dire* ruling, the Crown intended to call Dr. Robert Pos to testify, presumably to recall the Pos statement (or what the Crown considered to be "inculpatory statements" Phillip had allegedly made to Dr. Pos at the FPI on May 16, 1983.[550] Phillip maintains that he did not meet with Dr. Pos. He recalls meeting with Dr. Murphy at the FPI and later with Dr. Koopman, but he does not recall being interviewed by Dr. Pos and conveyed this to Mr. Rankin.[551] Nonetheless, if the Pos statement had been ruled inadmissible following a voluntariness *voir dire*, Ms. Pothecary believed that Phillip "would have likely been acquitted."[552] If, however, the Pos statement was ruled admissible, Ms. Pothecary believed that Phillip would have been convicted of first degree murder.[553]

374) Ms. Pothecary confirmed that the Crown possessed no other inculpatory evidence besides the Pos statement.[554] A thorough review of the documentation in the possession of the Crown and authorities[555] shows no other potentially inculpatory evidence. Mr. Rankin believed that the Crown's case "remained very strong and that a conviction was likely, especially if the Pos statement was tendered by the Crown". [556]

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[548] *Cherrington*, *supra* at para. 29.
[549] *Cherrington, supra* at para. 29; *R. v. Hanemaayer,* 2008 ONCA 580 at paras. 19-20.
[550] First Aff. Deirdre Pothecary para. 11 (Tab 30a).
[551] Fourth Aff. Phillip Tallio, para. 35 (Tab 42d)
[552] First Aff. Deirdre Pothecary para. 13 (Tab 30a).
[553] First Aff. Deirdre Pothecary para. 13 (Tab 30a).
[554] First Aff. Deirdre Pothecary para. 12 (Tab 30a).
[555] For instance, the preliminary hearing transcripts, police statements, hair, fibre and serology reports; autopsy report, et cetera, do not contain inculpatory evidence (save for the unrecorded confession allegedly obtained by Cpl. Mydlak).
[556] Aff. Phillip Rankin, para. 35 (Tab 31).

Mr. Rankin's stated advice to Phillip was broadly analogous to that in issue in *R. v. B.(I.B.),* (at para. 42), wherein the court recalled that the defence lawyer "maintained throughout to I.B.B. that the Crown had a very strong case and that should the witnesses attend, he was very likely going to be convicted and was at risk of a penitentiary sentence if he ran a trial."

375) Mr. Rankin's belief is inconsistent and difficult to reconcile—with the alleged, unrecorded confession to Cpl. Mydlak excluded, what was left of the Crown's case besides the alleged, unrecorded statement to Dr. Pos? There is nothing in the preliminary hearing transcripts, police statements, RCMP hair, fibre and serology reports, et cetera, indicating Phillip's guilt.

376) Mr. Rankin states that he gave "anxious consideration" to the evidence before proposing to the appellant that he *should* consider a guilty plea.[557] He states that he explained to Phillip that the *voir dire* ruling was "a very important ruling" but "the Pos statement was still a problem".[558]

377) Mr. Rankin states that he turned his mind, either during this time (i.e. between October 28 and October 30) or sometime beforehand to the evidentiary implications of the Pos statement. He was reluctant to challenge its admissibility because, "based on the law then in force," he would have likely lost his challenge and, in turn, his bargaining position.[559]

378) This Court may reasonably and properly infer that, whatever Mr. Rankin's understanding of the relevant law was at the time, it *directly* informed his decision to approach both Phillip, to inquire whether he was willing to consider a plea bargain, and later the trial Crown, to inquire whether she was willing to consider accepting a plea to second degree murder. This Court can also reasonably and properly infer that the appellant relied entirely upon Mr. Rankin's understanding of the relevant law as forming the substantive legal basis upon which decisions about his trial were made. It is apparent that Phillip did not question Mr. Rankin's decisionmaking.

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[557] Aff. Phillip Rankin, para. 35 (Tab 31).
[558] Aff. Phillip Rankin, para. 32 (Tab 31).
[559] Aff. Phillip Rankin, para. 70 (Tab 31).

379) Mr. Rankin states that it was "always his intention to challenge the admissibility of the Pos statement" and he "made it clear to the Crown that he would be challenging the admissibility of the Pos statement."[560] He further states that Ms. Pothecary was uncertain of the admissibility of the statement, and her uncertainty gave him the "main bargaining chip" to induce her "to enter into plea negotiations."[561]

380) At some point during that weekend Mr. Rankin states that he suggested to the appellant the possibility of asking the Crown to accept a plea to second degree murder. He states that he explained to Phillip "what this would mean" (i.e. assuming the Crown agreed with the proposal) and "took verbal instructions" from Phillip, allowing him to explore with the Crown the potential disposition of the case by way of a plea to second degree murder and 10-year parole eligibility.[562]

381) Mr. Rankin's "primary thought" was that he could challenge the admissibility of the Pos statement as having been made involuntarily, in which case he would have had to establish that Dr. Pos "was a person in authority."[563] To do this, he believed that he would "likely have to call Phillip to testify on a voluntariness *voir dire*," but he did not consider this option "realistic" because of his "many interactions with Phillip, his personal background and criminal record, and the evidence of our Dr. Koopman."[564] Mr. Rankin's observations of Phillip and his proffering of Dr. Koopman's evidence thus underscores the fact that Mr. Rankin recognized Phillip's cognitive difficulties (though not to the level his limitations are understood today).

Unreasonable Judgment as Distinct from Incompetent Knowledge

382) It is not this Court's role to second-guess Mr. Rankin in terms of the *judgment*-calls that Mr. Rankin made in relation to plea negotiations—his weighing of potential outcomes and his *strategizing*.[565] The law presumes that he acted competently in these

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[560] Aff. Phillip Rankin, paras. 42 and 65 (Tab 31).
[561] Aff. Phillip Rankin, paras. 42 and 65 (Tab 31).
[562] Aff. Phillip Rankin, paras. 32-33 (Tab 31).
[563] Aff. Phillip Rankin, para. 67 (Tab 31).
[564] Aff. Phillip Rankin, para. 67 (Tab 31).
[565] *R. v. Cherrington*, 2018 ONCA 653 at para. 26; *R. v. T. (G.)*, 2003 BCCA 1 at para. 23; *R. v. B.(G.D.)*, 2000 SCC 22, at para. 26.

respects. *R. v. G.(D.M.)*, 2011 ONCA 343 at para. 107. As Justice Major held in the Supreme Court of Canada case *R. v. B.(G.D.)*, 2000 SCC 22 at para. 27:

> The onus is on the appellant to establish the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment.

383) In *R. v. G.(D.M.),* 2011 ONCA 343 at paras. 108-109, Justice Watt, applied the same logic to *decisions* made by trial counsel. Thus, a review of a lawyer's judgment-calls or decisions is supposed to proceed from a strong presumption of competence, as tested against a standard of reasonableness, and accords no place to hindsight.[566]

384) However, the reasonable competent standard is too low of a measure of competency when the complaint is that a lawyer gave legal advice to a client based on either a materially incorrect understanding of clear law or a failure to consider that law. Such is the complaint here, which is not the typical incompetency complaint addressed to the professional *judgment* of a lawyer—to whether the lawyer made reasonable *tactical* decisions on behalf of his or her client, such as not to enter a surreptitiously recorded statement into evidence, as was the issue in *B.(G.D.)*. It is not that type of *performance* complaint. Within the broad spectrum of potential forms of incompetency, it falls closer to the complaint in *G.(D.M.),* wherein Justice Watt, found at paras. 117-118 that a miscarriage of justice had resulted from the defence counsel's "lack of preparation."

385) A lack of preparation, which includes or should include an incomplete understanding of substantive law, procedure and rules of evidence, *is within a trial lawyer's control*. It is therefore a qualitatively different complaint than that addressed to matters *beyond a lawyer's control*, such as the outcomes of discretionary rulings. A competent lawyer is not expected to be able to predict the outcome of a discretionary ruling with any certainty or reliability, so a lawyer's reasonable strategies in relation to such rulings is presumptively competent. The very point of legal counsel is that the client can rely upon his or her counsel *at least to know the substantive law* that applies to evidentiary applications. In this respect the lawyer must have *much more than* a

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[566] *G.(D.M.), supra*, at para. 107.

reasonable understanding of relevant law.

386) Informed members of the public can acquire a reasonable understanding of relevant law. They can become reasonably competent in this singular respect, but a certified lawyer who is retained to act for a client should have a nearly perfect, if not complete, understanding of relevant law, to the extent that such law is clear.[567] Such an understanding is certainly part of trial preparation, but it is a more fundamental or critical part of such preparation than the kinds of problems identified in *G.(D.M.),* such as failing to review and transcribe video witness statements. To argue otherwise would be to undermine the very logic of the fiduciary nature of the solicitor-client relationship.

387) Incorrect legal advice "may be a factor to consider" in relation to an application to reverse a plea.[568] This principle makes perfect sense because the entire point of the fiduciary relationship that a lawyer has to a client is that the client is dependent upon his or her lawyer's knowledge of relevant law.

388) Both Mr. Rankin and the trial Crown's strategies and affidavits demonstrate that Mr. Rankin and the trial Crown failed to consider that *R. v. Abbey*, [1982] 2 S.C.R. 24, governed the Pos statement. *Abbey* was not directly addressed to the voluntariness of a statement made to a person-in-authority. Rather, it was addressed to the evidentiary use that a statement made by an accused person to a forensic psychiatrist could be put.

The Prejudice Resulting from Mr. Rankin's Incompetence

The Objective Approach

389) The court explained in *Cherrington,* at para. 27, that when an appellant seeks to have a plea reversed on the basis that it was uninformed as a result of ineffective representation, the prejudice component engages "a determination of whether a miscarriage of justice has occurred, either because of some procedural unfairness in the proceedings, compromise of the reliability of the result or both." In *R. v. Joanisse* (1995), 102 C.C.C. (3d) 35 (Ont. C.A.) at 57, Justice Doherty further explained,

> Where counsel fails to provide effective representation, the fairness of the trial,

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[567] Such a submission is consistent with the common law's expectation that trial lawyers apprise their clients of legally-significant corollary consequences of pleading guilty.
[568] See for instance, *R. v. Peterenko*, [2009] O.J. No. 5094 (Ont Sup Ct J); *R. v. Gililov*, 2014 ONCJ 94 (Ont Ct. J) at para. 16.

> measured both by reference to the reliability of the verdict and the adjudicative fairness of the process used to arrive at the verdict, suffers. In some cases the result will be a miscarriage of justice.

This passage clearly reflects an *objective* approach to miscarriages of justice engendered by incompetent representation. It was quoted with approval in *R. v. B.(G.D.)*, 2000 SCC 22, at para. 25.

390) The facts underpinning the claim of ineffective assistance of counsel have been established. *Abbey* protected the appellant in two meaningful ways: it prohibited the use of the Pos statement for its truth in the context of expert testimony, and it provided a clear legal restriction on the inclusionary rule of evidence, being the rule that all relevant evidence is admissible. It prohibited the Crown from attempting to use the Pos statement when Pos' expert opinion was irrelevant.

391) Mr. Rankin states that he invited the appellant and the Crown to consider a plea to second degree murder because he believed that the admission of the Pos statement would have likely resulted in a conviction for first degree murder. However, Mr. Rankin should have considered or should have known that the Pos statement was not admissible for its truth, and therefore could not have supplied the Crown with evidence against the appellant. Because Mr. Rankin incompetently advised Phillip (if he advised the appellant at all on this respect)[569] in this material respect, and because the appellant trusted Mr. Rankin's decisions on his case without understanding what was occurring, the appellant was unduly prejudiced.

392) The Pos statement was not a problem for Phillip because it was not admissible for its truth. A conviction did not become likely *even if* the Crown was able to get the Pos statement tendered into evidence, and even then, there was the separate issue of backdoor admissibility that hindered the Crown's use of the Pos statement.

393) The prejudice that Phillip suffered was a compromise of the reliability of the result. It was broadly similar to the prejudice caused by the defence counsel's incompetency that Justice Watt addressed in *G.(D.M.)*. In that case, on the first day of a trial that had been

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[569] Again, Phillip states that Mr. Rankin did not explain what a guilty plea meant. See, Fourth Aff. Phillip Tallio, paras. 21-23, 28, 38 (Tab 42d).

set for two days, G.(D.M.) unexpectedly pleaded guilty—an "ill-informed *volte face*", as Justice Watt put it at para. 118. Justice Watt then explained at para. 19,

> What occurred here also raises questions about the reliability of the conclusion of guilt that rests upon allegations untested in the crucible of cross-examination because of inadequate trial preparation by the appellant's former counsel.

394) Again, this is the broad complaint made here, but with emphasis on Mr. Rankin's ignorance of material rules of evidence, which is a qualitatively distinct form of incompetence from inadequate readiness in terms of familiarity with Crown disclosure. If, however, upon review here, the standard of competency must remain that of reasonableness, then Mr. Rankin's ignorance about the use and admissibility of the Pos statement meets the unreasonably incompetent standard.

395) According to the appellant, Mr. Rankin told him that if he did not plead guilty (a term which Phillip submits he did not understand in 1983[570]), the jury would find him guilty and he would be sentenced to life in prison.[571] However, given the state of the Crown's case following the *voir dire* result on October 28, 1983, the jury would not likely have found Phillip guilty of first or second degree murder if the guilty plea had not been entered, because the Pos statement could not have strengthened the Crown's case, and by now-Judge Pothecary's own deposition, without the Pos statement, Phillip would have likely been acquitted.

396) Mr. Rankin's incompetence compromised the result and casts reasonable doubt upon "the conclusion of guilt" indicated by the guilty plea, to use Justice Watt's expression in *G.(D.M.)* at para. 19. The record does not suggest that the appellant approached Mr. Rankin or the Crown with a wish to plead guilty. Today the appellant understands what it means to plead guilty. He did not understand what it meant in 1983. He did not wish to admit guilt in the offence and he never intended to plead guilty. As reviewed, the evidence of witnesses at the time (i.e. Phillip's social workers, the defence psychologist, other counsel) supports Phillip's subjective account. The totality of the record suggests that, but for Mr. Rankin's incompetence, the guilty plea would have not been entered.

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[570] First Aff. Phillip Tallio, para. 112 (Tab 42a); Fourth Aff. Phillip Tallio, paras. 21-22 (Tab 42d).
[571] First Aff. Phillip Tallio, para. 113 (Tab 42a).

The Appellant Would Not Have Entered into Plea Negotiations

The Subjective Approach

397) *Wong* at para. 35 confirmed that the prejudice suffered by a person who seeks to reverse a guilty plea due to inadequate information provided by counsel must be subjectively assessed by asking whether that person would have taken a "meaningfully different course of action in pleading"—that is, if that person had been properly informed.

398) This test was established in an appeal addressed specifically to the issue of whether a guilty plea can be withdrawn "on the basis that the accused was unaware of a collateral consequence stemming from that plea".[572] This is not the complaint here: that the appellant was not informed of collateral legal consequences stemming from the plea.

399) *Wong* was determined on a formalistic basis that "Mr. Wong did not state in his affidavit that he would have proceeded differently".[573]

400) The *Wong* test was either intended to be confined to the kind of uninformed plea issue that arose in *Wong* (e.g. uninformed about collateral legal consequences), or it should be so confined. It does not apply here and cannot be reconciled with the objective approach to miscarriages resulting from uninformed but legally represented pleas as discussed above.[574]

401) It is clear from the appellant's affidavits that he would not have pleaded guilty if he had known that the Pos statement could not be used against him for its truth, assuming, of course, that the appellant could have properly comprehended all the other rules that bore upon his case.

V. Inadequate Investigation and Alternate Suspects

402) The investigation into the murder of Delavina Mack was essentially completed in a period of 24 hours. Officers Mydlak, Galenzoski and Watson arrived at the airport from Prince Rupert and were picked up at 1213 on April 23rd. They departed the next day at 1215, having processed exhibits and allegedly obtained the purported confession

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[572] *Wong* at para. 1.
[573] *Wong* at para. 30.
[574] *G.(D.M.), B.(G.D.)*, and *Cherrington*.

from the appellant.

403) There were a number of glaring inadequacies with the investigation:

a) Cst. Hulan arrived at the Mack's house at 0615 and departed at 0625. The next time that an officer arrived at the scene was at 1100, when Cst. O'Halloran and Special Cst. Walkus arrived to secure the crime scene, which had been left unattended for almost five hours. They found 19 persons in the house.

b) Investigators appear to have simply disregarded an initial statement from Blair Mack stating that he and Lotta Bolton had asked Phillip Tallio to check on Delavina.

c) Dr. McIlwain was not directed to take swabs of Phillip's genital area.

d) The investigating officers confined their suspect list much too early, thus disregarding the possibility that other persons could have been involved, and that Sam Mack was an obvious suspect from the very beginning.

e) A search warrant should have been obtained as soon as possible to search the Mack house. This was not done.

f) No effort was made to conduct any neighbourhood inquiries to locate witnesses that may have observed the suspect or anyone else coming or going from the crime scene.

    i) Another critical aspect of this investigation that was never addressed was the very basic fundamental aspect of almost any investigation, asking: 'Did anyone see anything?' Neighbourhood inquiries must be completed. Officers canvass the area and speak with everyone who may have had an opportunity to see anything related to the investigation. In this case the investigators knew that there were a number of houses that had a view of the area in question around the Mack residence.

g) No written statement was taken from Lotta Bolton when she was interviewed at 1614 by Cpl. Mydlak.

h) When Blair Mack was released from custody at 1701, he stated that he had not seen the appellant at Cyril and Nina's house the evening before, contradicting his statement from earlier in the day to Cst. O'Halloran, yet nothing was investigated nor done about this discrepancy.

i) From various interviews conducted, it was apparent that the whereabouts of Cyril Tallio were unaccounted for. The issue of his "opportunity" to commit the crime was never considered.

j) Cpl. Mydlak did not indicate that he had reviewed prior statements of the

appellant or Blair Mack prior to conducting his interrogation of Phillip.

k) Cpl. Mydlak obtained a questionable confession from Mr. Tallio which was not recorded due to a "malfunction" of the tape recorder. Once he discovered the interrogation was not recorded, Cpl. Mydlak did not sit down immediately and make detailed notes; he only prepared some notes of the unrecorded conversation weeks later on May 10, 1983.

l) Cpl. Mydlak indicated at the preliminary inquiry that he did not know who Paul Wilson was (the appellant's social worker).

m) There was no follow up with respect to identifying four of five unidentified footprints found at the crime scene, on the bedroom floor.

n) Even a cursory investigation should have dealved into the circumstances surrounding the obtaining of the admission from Phillip Tallio. He was only 17 years of age, a ward of the Ministry of Social Services, had been kept in custody and isolated from any support for almost 11 hours. He had not spoken with legal counsel even though lawyers had been making repeated calls to the detachment requesting contact with Phillip. Follow up investigation to support this admission from the suspect was absolutely essential. It appears from a review of all the available material that, once this statement was obtained from Phillip Tallio, virtually no further follow up investigation was undertaken other than processing crime lab exhibits.

404) We also now know that critical persons were <u>never interviewed</u>, either during the critical early stages of the investigation, or until the Innocence Project took the case in December 2009. These persons included persons who were at the crime scene at critical times, who lived on the same street and saw Phillip walking up to and running back from the Mack house, who witnessed activity after the crime had been discovered, and persons who had been assaulted by alternative suspects Wilfred Tallio or Cyril Tallio.

i) <u>Bill Tallio</u>: Gert Mack's brother who lived next door to the Mack's house and who came over right after the body was discovered. Bill inspected the body of his great-niece Delavina Mack and drove her body to the hospital.

ii) <u>Persons who were at Cyril's house during his April 22—April 23, 1983 party:</u>

(1) <u>Gwen Edgar</u>: Saw Cyril intoxicated and making lewd comments to young girls to go to "the room" with him.

(2) <u>Richard Edgar</u>: Heard the victim's parents also ask Cyril to check on her and that when Cyril returned home from the Mack's house, Cyril showered

and demanded that Nina get him new clothes.

iii) Persons who saw Phillip on the street walking to and from the Mack's house:

(1) Angela King: Saw Phillip run back down the street from the Mack's house to Cyril and Nina's house just a few minutes after she saw him walking up the street towards the Mack's house. States that Phillip's appearance did not appear to have changed in those few minutes except that "he looked panicked as he ran back down the street."

(2) Louisa Tallio: Saw Phillip run back down the street less than 10 minutes after she saw him walk down the street.

(3) Godfrey Tallio: Saw Phillip run back down the street less than 10 minutes after he saw Phillip walk up the street.

(4) Maureen Tallio: Saw Phillip run back down the street to Cyril's house about five minutes after she saw him walk up to the Mack's house. Describes Phillip as looking "really concerned and scared" as he ran back to Cyril's. "Other than the expression on Phillip's face, I did not see anything different about his appearance."

iv) Persons who saw suspicious activity after the crime.

(1) Roseanne Andy: Saw people, including Blair Mack, running towards the creek carrying items with them. She and her sister saw flames and smoke by the creek.

(2) Colleen Gabriel: Saw Gert Mack running from the creek behind the fire hall during the morning of April 23, 1983, with a small burnt mattress.

(3) Jennifer Andy: Heard her aunt Phyllis talking about stuff being burnt across from Jennifer's uncle Sam and aunt Gert Mack's house. Jennifer went to the burn site where she saw that a bed sheet had been burnt, as well as her daughter's favourite toy, which she had left at the Mack's house while house-sitting.

(4) Person Y: Saw Cyril leaving the Mack's house carrying a green garbage bag. Saw Cyril walk behind the smokehouse across from the Mack's house carrying the garbage bag and then saw plumes of smoke arising from the smokehouse.

(5) Bill Tallio: Saw plumes of smoke arising from the smokehouse across from his sister Gert's house that morning and witnessed Cyril trying to take garbage bags from the Mack's house, unasked.

(6) Nina Tallio: Was at the Mack's house that morning and heard Cyril threaten Phillip that [Phillip] "better tell them what he did".

(7) Larry Moody: Wilfred's wife Daisy asked Mr. Moody (their homemaker) to burn Wilfred's box of bloody clothes on April 23, 1983, which she stated Wilfred was wearing when he came late that night of the murder. She said

that it had to with with what happened at “Sam’s place”; that she thought that Wilfred was involved and that he was “no good.” Mr. Moody saw blood around Wilfred and Daisy Tallio’s sink while cleaning their washroom on April 23, 1983.

v) Persons who saw activity near the Mack’s house before the crime.

(1) Anna Edgar: Anna and her husband Alan saw the victim’s great-grandfather, Wilfred Tallio, getting into his truck outside his daughter Gert Mack’s house just before the crime. Anna and Alan witnessed Cyril Tallio walking on the street near the house in the early morning hours.

405) With respect to alternate suspects, the evidence indicates that both Cyril Tallio and Wilfred Tallio had opportunity and a history of assaultive behaviour.

a) Persons known to have been sexually assaulted as children by Cyril Tallio.

(1) Lorna George: Cyril was convicted of sexually assaulting Ms. George and was incarcerated.

(2) Gwen Edgar: Cyril was convicted of sexually assaulting Ms. Edgar and was incarcerated.

(3) Gordon Tallio: Was raped by his uncle Cyril for years from a very young age.

(4) Phillip Tallio: Was raped by his uncle Cyril for years starting from the age of four.

ii) Persons known to have been sexually assaulted as children by Wilfred Tallio.

(1) Person Y: Was raped by her grandfather Wilfred Tallio for 5-6 years, starting from the age of three.

(2) Person “X”: Was raped by Wilfred Tallio for several years when she was a child.

(3) Olivia Mack: Was sexually abused by her great-grandfather Wilfred Tallio as a child. She was ostracized by relatives for exposing Wilfred.

406) Information that could have led to potential defences for Phillip is now unavailable with the passage of time.

407) In *R. v. Spackman*, 2012 ONCA 905, the court commented on how the issue of alleged inadequate investigation and alternate suspect should be approached. *Spackman* was a Crown appeal against the acquittal of the accused, who had raised the issue of a third suspect and inadequate investigation at his trial. The trial judge refused to permit the Crown to call evidence to attempt to rebut the accused’s allegations.

408) The court stated:

> [120] It is fundamental that if A is charged with the murder of X, then A is entitled, by way of defence, to adduce evidence to prove that B, not A, murdered X: *R. v. McMillan* (1975), 1975 CanLII 43 (ON CA), 7 O.R. (2d) 750 (C.A.), at p. 757, affirmed, 1977 CanLII 19 (SCC), [1977] 2 S.C.R. 824; *R. v. Grandinetti*, 2005 SCC 5 (CanLII), [2005] 1 S.C.R. 27, at para. 46. The evidence on which an accused relies to demonstrate the involvement of a third party in the commission of the office with which the accused is charged must be relevant to and admissible on the material issue of identity: *McMillan*, at p. 757; *Grandinetti*, at para. 46.
>
> [121] It is essential that there be a sufficient connection between the third party and the crime, otherwise any evidence about the third party would be immaterial. An accused must show that there is some basis upon which a reasonable jury, properly instructed, could acquit based on the claim of third party authorship: *Grandinetti*, at paras. 47-48; *R. v. Fontaine*, 2004 SCC 27 (CanLII), [2004] 1 S.C.R. 702, at para. 70. Absent a sufficient connection, the "defence" of third party authorship lacks an air of reality and cannot be considered by the trier of fact: *Grandinetti*, at para. 48.

409) As stated in *Spackman*, referencing *R. v. Fontaine*, 2004 SCC 27 and *R. v. Grandinetti*, 2005 SCC 5, the test is that "[a]n accused must show that there is some basis upon which a reasonable jury, properly instructed, could acquit based on the claim of third party authorship." In *Grandinetti*, the court stated:

> 46 Evidence of the potential involvement of a third party in the commission of an offence is admissible. In *R. v. McMillan* (1975), 1975 CanLII 43 (ON CA), 7 O.R. (2d) 750 (C.A.), aff'd 1977 CanLII 19 (SCC), [1977] 2 S.C.R. 824, Martin J.A. stated the simple underlying premise to be:
>
> > [I]t [is] self-evident that if A is charged with the murder of X, then A is entitled, by way of defence, to adduce evidence to prove that B, not A, murdered X. [p. 757]
>
> However, as he explained, the evidence must be relevant and probative:
>
> > Evidence directed to prove that the crime was committed by a third person, rather than the accused, must, of course, meet the test of relevancy and must have sufficient probative value to justify its reception. Consequently, the Courts have shown a disinclination to admit such evidence unless the third person is sufficiently connected by other circumstances with the crime charged to give the proffered evidence some probative value. [p. 757]

> 47 The requirement that there be a sufficient connection between the third party and the crime is essential. Without this link, the third party evidence is neither relevant nor probative. The evidence may be inferential, but the inferences must be reasonable, based on the evidence, and not amount to speculation.

410) As stated in *Spackman* and other cases, the issue of inadequate investigation and alternate suspects are often inextricably linked. In this case the appellant submits that there is more "than a sufficient connection" between the possible third parties and the crime in this case. Wilfred Tallio and Cyril Tallio were both known child sex abusers in the community. Both were intoxicated during the night and early morning in question. Cyril Tallio was seen by Anna and Alan Edgar walking near the Mack's house. Additionally, Mr. and Mrs. Edgar saw Wilfred Tallio getting into his truck, parked outside of the Mack's house around 0500-0530. On April 23, 1983, Larry Moody was asked by Wilfred's wife to burn a box of bloody clothes worn by her husband, who had come home late in these bloody clothes after drinking at the Mack's house, where Delavina Mack was sleeping. These facts were never investigated.

411) Tunnel vision has been defined as "the single minded and overly narrow focus on an investigation or prosecutorial theory so as to unreasonably colour the evaluation of information received and one's conduct in response to the information." It has been a leading cause of wrongful convictions in Canada, including the wrongful convictions of Donald Marshall, Guy-Paul Morin, David Milgaard, Thomas Sophonow, and James Driskell.[575] The investigators' approach to this case in 1983 can be characterised as overcome by tunnel vision and unfairly deprived Phillip of potential avenues of defence.

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[575] Public Prosecution Service of Canada, *Innocence at Stake: The Need for Continued Vigilance to Prevent Wrongful Convictions in Canada*, (2018) (*Chapter 2—Understanding Tunnel Vision*) online: <https://www.ppsc-sppc.gc.ca/eng/pub/is-ip/ch2.html>.

PART IV: NATURE OF ORDER SOUGHT

412) Phillip Tallio requests that his conviction be set aside and an acquittal be entered on the basis that there was a miscarriage of justice and that his conviction cannot be supported by the evidence, pursuant to s. 686(1)(a) and (2)(a) of the *Code*. Alternatively, in the circumstances of the passage of time, the appellant requests that the Court set aside the guilty plea and enter a stay of proceedings.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 10th day of February, 2020

Thomas Arbogast

Rachel Barsky
Counsel for the Appellant

Table of Cases

Statutes, Reports, and Secondary Sources